

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

By MARTIN D. CARCIERI*

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.¹

[A] national conversation has quietly begun about the irrationality of our drug laws.²

There is no debate, merely theater. Discussing drug policy is like discussing gun control or abortion: facts are irrelevant.³

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

[T]he debate is no longer about *whether* marijuana should be legalized, but rather *how* precisely the regulations ought to look if marijuana is legalized.⁵

Introduction

IN THE LAND OF EARTHQUAKES, PROPOSITION 19 shook the political landscape far and wide. This citizens' initiative, titled "Regu-

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1. Often attributed to Abraham Lincoln, Speech to the Illinois House of Representatives (Dec. 18, 1840).

2. Joe Klein, *Why Legalizing Marijuana Makes Sense*, TIME (Apr. 2, 2009), <http://www.time.com/time/magazine/article/0,9171,1889166,00.html>.

3. Stephen J. Dubner, *On the Legalization—or Not—of Marijuana*, FREAKONOMICS (Oct. 30, 2007, 2:58 PM), <http://www.freakonomics.com/2007/10/30/on-the-legalization-or-not-ofmarijuana/> (quoting Richard Lawrence Miller).

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

5. Kenneth Falcon, *A Lesson in Legalization: Successes and Failures of California's Proposition 19*, 9 GEO. J.L. & PUB. POL'Y 463, 475 (2011).

late, Control and Tax Cannabis Act of 2010” (“RCTCA”),⁶ appeared on the 2010 California ballot and would have replaced the state’s regime of marijuana⁷ prohibition with one of regulation and taxation.⁸ While the RCTCA was defeated by a 53.5% to 46.5% margin,⁹ its effects have been substantial. Beyond pushing the issue to the center of a national and international debate¹⁰ and accelerating the growth of the cannabis industry,¹¹ 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 to reduce cannabis possession from a misdemeanor to an infraction one month before the election.¹² Two weeks

6. See CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE 4, 92–94 (2010), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf> [hereinafter CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE].

7. I shall use this term synonymously with cannabis. As RCTCA § 11304(d)(1) 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.” *Id.* at 94.

8. 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, or smoking it while minors are present.
- Maintains current prohibitions against driving while impaired.

Summary of Legislative Analyst’s Estimate of Net State and Local Government Fiscal Impact:

- Savings of potentially several tens of millions of dollars annually to the state and local governments on the costs of incarcerating and supervising certain marijuana offenders.

CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, *supra* note 6, at 12.

9. *Votes For and Against November 2, 2010 Statewide Ballot Measures*, CAL. SECRETARY ST. (2010), <http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf> (last visited Jan. 2, 2012); see also John Hoeffel & Maria L. La Ganga, *Youth Vote Falters; Prop 19 Falls Short*, L.A. TIMES, Nov. 3, 2010, at A17.

10. “Proposition 19 . . . is the most talked-about ballot initiative in the country.” John Hoeffel, *Proposition 19: High-Profile Issue, Low-Profile Campaign*, L.A. TIMES (Oct. 18, 2010), <http://articles.latimes.com/print/2010/oct/18/local/la-me-pot-campaign-20101018>; see also Editorial, *Post-Prop 19*, L.A. TIMES, Nov. 5, 2010, at A18 [hereinafter *Post-Prop 19*].

11. See, e.g., Chip Johnson, *Oakland on a Roll with Marijuana Measures*, S.F. CHRON., Oct. 15, 2010, at C1 (discussing how “businesses in Oakland prepared to respond to the anticipated market boom” from the RCTCA’s passage); CANNABIS COMMERCE, <http://www.cannabis-commerce.com> (last visited Jan. 4, 2012).

12. See CAL. HEALTH & SAFETY CODE § 11357 (West 2007 & Supp. 2011); Jesse McKinley, *California Reduces Its Penalty for Marijuana*, N.Y. TIMES, Oct. 2, 2010, at A9. It has also lent legitimacy to the legislative reform efforts of Assemblyman Tom Ammiano, including

later, the Obama administration backtracked on its 2009 claim¹³ that it would not interfere with cannabis-related activities that were 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.¹⁴ This shift in federal policy has alienated many,¹⁵ yet it seems unlikely, standing alone, that it will cost President Obama the 2012 election. Even if a strong Republican nominee emerges, it is hard to imagine him criticizing President Obama for being too hard on state cannabis laws.¹⁶

In any case, the RCTCA's high visibility and controversial nature made it the focus of much editorial and opinion commentary by leading California newspapers in the months before the 2010 election. While none of this commentary disputed the failure of the U.S. War on Drugs, much of it was critical of the RCTCA, and urged citizens to vote against the initiative.¹⁷ This media criticism merits a reply for

support from some Republicans. See Marisa Lagos & Wyatt Buchanan, *Ammiano Finds Unlikely Ally*, S.F. CHRON., June 4, 2011, at C1.

13. See David Johnston & Neil A. Lewis, *Ending Raids of Dispensers of Marijuana for Patients*, N.Y. TIMES, Mar. 19, 2009, at A20.

14. See Editorial, *The Feds Weigh in on Prop. 19*, S.F. CHRON., Oct. 27, 2010, at A15; Adam Nagourney, *U.S. Will Enforce Marijuana Laws, State Vote Aside*, N.Y. TIMES, Oct. 16, 2010, at A1; *The Feds Say No Way*, L.A. TIMES, Oct. 20, 2010, at A20. 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.*, S.F. CHRON., Oct. 8, 2011, at A1.

15. See, e.g., John Hoeffel, *Suit Seeks End to Pot Raids, Threats*, L.A. TIMES Oct. 29, 2011, at AA3.

16. 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 ("CSA"), allowing states to go their own way within federal guidelines. See Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 305, 308 (2011).

17. See, e.g., Editorial, *Experimenting with Pot: The Broader Desire to Legalize Marijuana Is No Reason to Vote for a Badly Flawed Prop. 19*, L.A. TIMES, Oct. 30, 2010, at A26; Editorial, *If California Goes to Pot, Rest of U.S. Gets Dragged In*, USA TODAY, Oct. 20, 2010, at 8A; Gil Kerlikowske, John Walters, Barry McCaffrey, Lee Brown, Bob Martinez & William Bennett, Op-Ed, *California Should Just Say No*, L.A. TIMES, Aug. 25, 2010, at A17 [hereinafter Drug Czars] (written by former or sitting directors of the Office of National Drug Control Policy ("ONDCP")); Editorial, *No on Prop. 19*, S.F. CHRON., Sept. 16, 2010, at A15; George Skelton, *A Dopey Measure on Pot*, L.A. TIMES, Oct. 11, 2010, at A2; Editorial, *Vote No on Prop. 19: A Debate on Legalizing Marijuana May Be Needed, But This Initiative Has Too Many Flaws*, L.A. TIMES, Sept. 24, 2010, at A18; *Post-Prop 19*, *supra* note 10; Bonnie Dumanis et al., Op-Ed, *Prop 19: The Promise Is Not the Reality*, SAN DIEGO UNION-TRIB. (Oct. 3, 2010), <http://www.signonsandiego.com/news/2010/oct/03/prop-19-promise-not-reality/>.

three reasons: (1) it includes some valid concerns;¹⁸ (2) it contains a great deal of sophistry;¹⁹ and (3) it is a debate that 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.²⁰

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

18. 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.

19. In attacking Proposition 19, that is, the op/ed critics did what those who defend cannabis prohibition have long done—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 that merit a reply. As Kenneth Falcon writes of the No on 19 Campaign, its arguments “are at times meritorious but at others, completely unfounded.” Falcon, *supra* note 5, at 473.

20. Beyond California, refined versions of Proposition 19 are in process in Colorado and Washington. See, e.g., Jesse McKinley, *Backers of Legal Marijuana Find Silver Lining in Defeat of California Measure*, N.Y. TIMES, Nov. 14, 2010, at A24; Gene Johnson, *Former Seattle U.S. Attorney Pushes Pot Legalization*, SEATTLE TIMES (June 21, 2011), http://seattletimes.nwsourc.com/html/localnews/2015387076_apwalegalizingmarijuana1stldwritethru.html; Eric Risberg, *Pot Backers Get Approval for Calif. Ballot Petitions*, USA TODAY (July 26, 2011), http://www.usatoday.com/news/nation/2011-07-26-marijuana-legalization-california-ballot_n.htm. While the initiatives have qualified for the ballot in Washington and Colorado, the attempts in California are floundering since several groups are pushing different versions. Joe Mozingo, *Pot Backers' Ballot Effort in Disarray; Marijuana Legalization Activists Vowed to Craft Initiative for 2012. Now, Four Camps Vie for Funding*, L.A. TIMES, Mar. 10, 2012, at A1.

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 I of the Controlled Substances Act, 21 U.S.C. §§ 801–904 (2006), yielding primary control of cannabis policy to the states under their police power within loose federal guidelines. Ending Federal Marijuana Prohibition Act, H.R. 2306, 112th Cong. (1st Sess. 2011); see Federal Ban on Pot Targeted by Bill Introduced by Ron Paul, Barney Frank, Huffington Post (June 23, 2011), http://www.huffingtonpost.com/2011/06/23/federal-ban-on-pot-bill_n_883652.html. Although “the Bill has no chance of passing the Republican-controlled House,” and indeed will even not be taken up by the House Judiciary Committee, it keeps the issue in the public eye. *Id.* I shall return to the Frank/Paul bill, *infra* Part III.A.

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.²¹

While I shall try to avoid vague words like “legalization” (rather than “regulation”) and “drugs” (instead of “cannabis”), I shall try to meet the *Los Angeles 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.²² As a legal counselor, he is engaged in the circumscribed, essentially *empirical*, work of advising clients how best to maximize the chances of achieving their goals in light of existing law. My target audience, by contrast, consists of 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.²³ While this will include a reply to structural concerns over intergovernmental relations, the core of my reply is substantive as follows.²⁴

As harmful as alcohol and tobacco are, Americans have concluded for reasons well and widely understood²⁵ that the best public policy approach for both of these substances is that of *education* and

21. *Post-Prop. 19, supra* note 10.

22. *See* Falcon, *supra* note 5, at 475.

23. While I agree with the bulk of Falcon's analysis, I shall depart from it places. In his discussion of the Drug Free Workplace Act, for example, he understandably takes federal cannabis prohibition as given—a fact of life. Falcon, *supra* note 5, at 475–77. I share no such assumption, taking the view that such prohibition is flatly unconstitutional under a fair application of leading Fourteenth 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 law enforcement in maintaining federal cannabis prohibition so that their livelihoods—their economic interests—are not disrupted. *Id.* at 487. I shall argue against this as well, from a Rawlsian perspective.

24. 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.

25. Not only did the United States repeal alcohol prohibition as a political, 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, e.g.,* DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 373 (2010).

time, place, and manner *regulation*.²⁶ With regard to cannabis, by contrast, federal and most state law still employs criminal *prohibition* for any possession or use, even by adults, and even in the home.²⁷ I shall argue that this stark inconsistency grossly violates the core principle of constitutional democracy—equal, basic liberties—particularly as articulated in leading Fourteenth Amendment case law.²⁸ 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 and editorial critics’ attacks on the RCTCA.

In the passage cited above, the *Los Angeles 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 of equal liberty. Under the social contract, 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.²⁹

I. Substance: The Equal Liberty Principle

A commitment to liberty and equality lies at the core of a constitutional democracy. As Aristotle wrote: “The underlying idea of the democratic type of constitution is liberty. . . . The democratic concep-

26. See, e.g., U.S. CONST. amend. XXI (ending alcohol prohibition by repealing U.S. CONST. amend. XVIII and turning regulatory authority over intoxicating beverages to states); *Laws Regulating the Sale and Distribution of Tobacco to Minors*, TOBACCOWATCHDOG.ORG, <http://www.tobaccowatchdog.org/laws.htm> (last visited Jan. 2, 2012) (setting forth at length the various federal and state laws restricting actions related to tobacco).

27. See, e.g., 21 U.S.C. §§ 801–904 (2006) (consisting of the operative provisions of the federal Controlled Substances Act prohibiting any possession or use of cannabis for anyone); CAL. HEALTH & SAFETY CODE §§ 11357–11361 (West 2007 & Supp. 2011) (consisting of California provisions prohibiting and punishing possession or sale of cannabis).

28. This inconsistency is precisely the point of analytical departure in Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL’Y 691 (2010).

29. The *Los Angeles 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 Fourteenth Amendment case law, this is constitutionally unsupportable. See Carcieri, *supra* note 16. As Husak notes, the burden must always be on those defending the status quo “when that status quo involves criminalization.” Husak, *supra* note 4, at 191–92.

tion of justice is the enjoyment of arithmetical equality”³⁰ 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 into civil society under the social contract.³¹ 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 of liberties for others.”³² 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.³³ The U.S. Constitution protects equal basic liberties in the first instance through structural features, like separation of powers, checks and balances, and federalism.³⁴ In addition, the Bill of Rights and later amendments have enabled further development of the equal liberty principle as a matter of jurisprudential doctrine.³⁵

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.³⁶ John Stuart Mill’s harm principle thus forms the core of much U.S. constitutional doctrine.³⁷ Second, while

30. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 258 (Ernest Barker trans., Oxford Univ. Press 1958) (c. 350 B.C.E.) (footnote omitted). As Finley observes, democracy is ordered liberty, a “balancing act between freedom and safety.” M. I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 112 (1973).

31. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4–65 (J. W. Gough ed., Blackwell Basil & Mott, Ltd. 3d ed. 1966) (1690).

32. JOHN RAWLS, *A THEORY OF JUSTICE* 53 (1971).

33. *Id.* at 10–15.

34. See, e.g., *THE FEDERALIST* No. 51, at 281–82 (James Madison) (J.R. Pole ed., 2005).

35. See Carcieri, *supra* note 16, at 309–28 (discussing the Supreme Court’s equal protection and due process case law). U.S. CONST. amends. XIX, XXI, XXIV, and XXVI provide further examples.

36. As Chief Justice Marshall wrote, “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. (1 Cranch) 137, 176 (1803); see also *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

37. As Mill wrote:

[T]he 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.

JOHN STUART MILL, *ON LIBERTY* 21–22 (John W. Parker & Son 2d ed. 1859). Thus, beyond rules like those of tort law requiring proof of substantial harm for recovery for negligence,

liberty must be ordered, liberty is the rule in a democracy, not the exception.³⁸ Third, each person's liberty must be protected equally, or at least roughly equally. Civil liberty thus is necessarily fused with equality.³⁹ 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 is allowed for reasons well and widely understood. To the extent that a political regime fails to protect basic liberties like bodily autonomy in a substantially equal fashion it is illegitimate and unstable, losing its character as a constitutional democracy.

A. Equality: Equal Protection

The Supreme Court has developed this third premise of equally protected liberty into constitutional doctrine. The central command of the equal protection clause, the Court has held, is that government may not treat differently those who are similarly situated.⁴⁰ Rawls calls this "justice as regularity,"⁴¹ and, as the Court wrote in the seminal case of *Skinner v. Oklahoma*: "When the law lays an unequal 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 oppressive treatment."⁴²

More recently, the Court has observed, "Our 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

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*, 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 4, at 189, 195–204.

38. As Justice Douglas famously asserted in the First Amendment context, "free speech is the rule, not the exception." *Dennis v. United States*, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting).

39. As Professor Tribe has observed in the Fourteenth 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 H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (emphasis added).

40. 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.

41. *See* RAWLS, *supra* note 32, at 207–09.

42. 316 U.S. 535, 541 (1942); *see also* *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

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basis for the difference in treatment.”⁴³ This principle, Judge Posner has observed, is a basic element of the economic theory of law: “[T]o count as law, a command . . . must treat equally those who are similarly situated in all respects relevant to the command.”⁴⁴ Under the equal liberty principle as embodied in the Fourteenth Amendment, the law may not treat differently individuals who are similarly situated 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.⁴⁵ RCTCA critics raised an important issue with their claim that since alcohol and tobacco already cause serious problems we should not aggravate those problems by ending cannabis prohibition. As the district attorney, sheriff, and a local police chief in San Diego wrote, “It’s not smart to legalize another mind-altering substance, putting more drivers under the influence on our roads.”⁴⁶ *USA Today* expressed “concerns about what legalizing another intoxicant besides alcohol could do to public safety and health,”⁴⁷ and as columnist George Skelton added, “Legalizing ‘recreational’ dope would create yet another problem for the state.”⁴⁸

Such claims are not new.⁴⁹ They rely on one indisputable premise, among others: democracy is ordered liberty, and liberty may,

43. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citing *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923)); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336 (1989)); *see also Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986); *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, supra* note 4, at 195, 203–04.

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44. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 393 (1972).

45. 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 Fourteenth 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, supra* note 16, at 311–16, 324–26.

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46. Dumanis et al., *supra* note 17.

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47. *If California Goes to Pot, Rest of U.S. Gets Dragged In, supra* note 17.

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48. Skelton, *supra* note 17. 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 5, at 469.

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49. As the Office of National Drug Control Policy has written, for example, “[a]lcohol 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?” OFFICE OF NAT’L DRUG CONTROL POLICY, *WHAT AMERICANS NEED TO KNOW ABOUT MARIJUANA: IMPORTANT FACTS ABOUT OUR NATION’S MOST MISUNDERSTOOD ILLEGAL DRUG*

indeed must, be restricted in some ways, even if that means occasionally using the blunt instrument of the criminal law. 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*. This step in reasoning is seriously mistaken. Our bedrock constitutional principle is not liberty. It is *equal* liberty.

From this perspective of equal liberty, then, we notice immediately that regulation and prohibition are fundamentally distinct legal regimes. The contrast between them is one of kind, not just degree. The cannabis user on the one hand and the alcohol drinker or tobacco smoker on the other are thus 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* a threat to those interests, not more so.⁵⁰ If consump-

8, available at http://www.cadca.org/files/policy_priorities/ONDCPMarijuanaFacts.pdf (last visited Jan. 3, 2012). As Sabet adds:

[U]sing [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 A. Sabet, *The (Often Unheard) Case for Marijuana Leniency*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION, *supra* note 4, at 328, 341. Referring to “drugs” generally, the DEA asks: “[H]ow much misery can already be attributed to alcoholism and smoking? [Instead] misery and addiction . . . would accompany the outright legalization of drugs.” U.S. DRUG ENFORCEMENT ADMIN., SPEAKING OUT AGAINST DRUG LEGALIZATION 14, 45 (2010), available at http://www.justice.gov/dea/demand/speak_out_101210.pdf.

50. As one prominent study concluded, “an objective consideration of marijuana shows that it is responsible for less damage to the individual and to society than are alcohol and cigarettes” Edward P. O’Brien et al., *Twentieth Annual Report of the Research Advisory Panel*, SCHAFFER LIBRARY DRUG POL’Y (1989), available at <http://www.druglibrary.org/schaffer/Library/studies/caresadv/default.htm>. According to an article in *The Lancet*, a leading British medical journal, “The smoking of cannabis, even long term, is not harmful to health.” Editorial, *Deglamorising Cannabis*, 346 LANCET 1241 (1995). *The Lancet* later noted, “[I]t would be reasonable to judge cannabis as less of a threat to health than alcohol or tobacco.” Editorial, *Dangerous Habits*, 352 LANCET 1565 (1998). 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. INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 98 (Janet E. Joy, Stanley J. Watson, Jr. & John A. Benson, Jr. eds., 1999) [hereinafter IOM]. As Grinspoon and Bakalar summarize:

After 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.

tion of all three substances were treated the same—either all regulated or all prohibited—then 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.⁵¹ The problem is thus not simply that cannabis users are similarly situated to alcohol drinkers and tobacco smokers and treated differently. The law's imbalance—its disproportionality—is even greater: far from posing *as much* risk to genuine state interests as those who drink and smoke, especially in public, adult cannabis users pose *less* risk, 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 for cannabis, not less. Yet under U.S. 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 is a vital point, 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 United States could punish alcohol use based on gender, or tobacco use based on race with the following hypothetical statement on the DEA and ONDCP web pages: “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?”

On the other hand, even the heaviest marijuana 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* 250 (rev. ed. 1997).

By contrast, alcohol-related deaths total more than 100,000 per year, and tobacco causes more than 400,000 deaths per year. See Ali H. Mokdad, James S. Marks, Donna F. Stroup & Julie L. Gerberding, *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1240 (2004). Thus, “[t]hough cannabis use is not without harm, especially for adolescents, as a source of danger it is surely trumped by alcohol, tobacco, reckless driving, criminality, and unsafe sexual behavior” ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICIES, TIMES, AND PLACES* 345 (2001).

In light of all this, the *Los Angeles Times* seemed to hurt its credibility when it asked, the day after the RCTCA's defeat, “[i]s marijuana more harmful than alcohol or not?” *Post-Prop 19*, *supra* note 10.

51. See *State Laws*, NORML, <http://norml.org/laws> (last visited Jan. 3, 2012); *State Marijuana Laws*, FINDLAW, <http://law.findlaw.com/state-laws/marijuana> (last visited Jan. 3, 2012).

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.⁵² Equal liberty and the rule of law de-

52. 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. For example, as the drug czars write, “legalized marijuana can’t solve California’s budget crisis” Drug Czars, *supra* note 17. Taxing alcohol and tobacco do not solve this problem either, and yet the critics do not call for their prohibition on that account.

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As another example, the *Los Angeles 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.” *Post-Prop 19*, *supra* note 10. 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 Twenty-First 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. OKRENT, *supra* note 25, at 373.

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As a third example, Dumanis et al. write that “[d]rug cartels will not be driven out of business by this initiative.” Dumanis et al., *supra* note 17; *see also* Sylvia Longmire, Op-Ed, *Legalization Won’t Kill the Cartels*, N.Y. TIMES, June 19, 2011, at WK10. 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.

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Finally, critics impugn the motives of RCTCA supporters, particularly Richard Lee (sponsor of the RCTCA and president of Oaksterdam University). *See, e.g.*, Skelton, *supra* note 17. 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 the critics with “vested interests in maintaining prohibition”? GRIN-SPON & BAKALAR, *supra* note 50, at 266. The critics of the RCTCA, 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.” Neal Peirce, *Economists Make Case for Decentralizing the War on Drugs*, DULUTH NEWS-TRIB., Sept. 29, 2003. As Falcon adds, in reference to the No on Proposition 19 Campaign, “[t]he No Campaign’s donor list included those who benefit most from the prohibition of marijuana, most notably the alcohol industry and law enforcement community.” Falcon, *supra* note 5, at 469.

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While this is an important point, Falcon later writes 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

mand that legal classifications be principled. At the very least, they cannot be plainly arbitrary and irrational, especially where the criminal law's coercive power is used.⁵³

In sum, the critics' claim that cannabis prohibition must be maintained even while alcohol and tobacco are merely regulated for reasons that are well understood,⁵⁴ glosses over and fails to speak to the violation of equal basic liberties embodied in this contradiction.⁵⁵

B. 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. For example, Skelton cites police and prison officials for the claim that "relatively little, in fact, is spent nabbing or prosecuting marijuana users."⁵⁶ The drug czars assure us that "[l]aw enforcement officers do not currently focus much effort on arresting adults whose only crime is possessing small amounts of marijuana."⁵⁷ As Dumanis et al. argue:

At 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 prosecu-

revisions of the RCTCA in upcoming elections, 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.

53. As one further illustration, the Court has held that in regulating abortion, "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Planned Parenthood of Se. Penn. 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.

54. *See supra* note 25.

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55. 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." Klein, *supra* note 2.

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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, supra* note 32, at 392–96. 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.

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56. Skelton, *supra* note 17.

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57. Drug Czars, *supra* note 17.

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tors, we're not spending a large amount of time or money on these cases because offenders typically just pay the fine.⁵⁸

To be sure, this claim seems especially persuasive now that adult cannabis possession is merely an infraction in California—a particularly “minor” offense. Yet, so long as more dangerous substances are merely regulated, there is no apparent justification for cannabis prohibition regardless of the criminal punishment imposed. Thus, regulation 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, police and prosecutors know that adults who merely possess and use cannabis pose no harm to society that would justify the time and resources that could otherwise be used on prosecuting dangerous criminals, like drunk 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. However, as Husak notes, “Laws that still exist can be enforced occasionally and selectively.”⁵⁹ Indeed, the racially disparate impact of the drug war confirms the discriminatory way in which the war on cannabis is fought.⁶⁰ This violates due pro-

58. Dumanis et al., *supra* note 17.

59. Douglas Husak, *For Drug Legalization*, in DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS* 12–13 (2005) [hereinafter Husak II]. As an example of the inconsistency in enforcement of the war on cannabis, a writer 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, *Burning Issue in Pot Country*, S.F. CHRON., May 31, 2008, at A1.

60. As a retired police chief has written, “[T]he 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.” William F. Buckley Jr., Kurt Schmoke, Joseph D. McNamara & Robert W. Sweet, *The War on Drugs is Lost*, in *BUSTED: STONE COWBOYS, NARCO-LORDS AND WASHINGTON’S WAR ON DRUGS* 209 (Mike Gray ed., 2002). As Cole adds, “[t]he racial profiling studies also 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 U. 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 and West Indian; intemperate users of alcohol were often Irish, Italian, or German; and

cess,⁶¹ and more broadly, the equal liberty principle. The remedy for any harm from cannabis use is *not* police discretion to apply a law that no one thinks should be vigorously enforced—it is to treat cannabis no more harshly than more dangerous substances.

II. Other Policy Concerns in the Equal Liberty Perspective

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, I will now take up the critics' other plausible concerns. These divide roughly into two categories: (1) harms to self/user such as addiction and increased use; and (2) harms to others, including 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.

A. Harms to Self: Addiction and Increased Use

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.⁶² This is especially so since whatever the harms of cannabis, the harms of alcohol and tobacco use are far greater.⁶³ Yet some critics of the RCTCA grounded their concerns in the addiction justification, and so we begin there.

Some addictions are beneficial. 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.’”⁶⁴ Even assuming this to be true,

later we shall see that users of marihuana were often Mexican and users of peyote were often American Indian.

RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 30 (1974); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

61. The Court has held that “arbitrary and discriminatory enforcement” of the law violates due process. *City of Chi. 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 of police in deciding whether or not to arrest and charge them with crimes.

62. As Husak writes, “there *is* no general (criminal) offense of causing physical and/ or psychological harm to oneself.” Husak, *supra* note 4, at 201.

63. *See supra* note 50.

64. Skelton, *supra* note 17.

however, decades of studies⁶⁵ conclude cannabis is less addictive than alcohol or nicotine, which are merely regulated. Again, the equal liberty principle rejects the harsher punishment of the less harmful substance.

But let us assume, *arguendo*, all three substances are equally addictive. The Supreme Court has held that addiction cannot constitutionally be a crime.⁶⁶ Even if it could, equal liberty requires all addictions to be punished in proportion to their severity. But tobacco and alcohol are merely regulated while cannabis is prohibited. From the equal liberty perspective, then, any addictive potential of cannabis use cannot justify this inconsistency in the law.

65. Claims of cannabis' addictiveness are nothing new. They go back to the "reefer madness" days of the 1930s. 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. . . . From 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 marihuana for a period of years showed no mental or physical deterioration[,] which may be attributed to the drug.

George B. Wallace et al., *The Marihuana Problem in the City of New York*, in *THE MARIHUANA PAPERS* 355, 404–05, 408 (David Solomon ed., 1966).

More recently, a Stanford medical professor wrote that: "Physical 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 Cannabis*, 38 *PHARMACOLOGICAL REVIEWS* 1, 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." IOM, *supra* note 50, 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 *POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION*, *supra* note 4, 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 BOYUM & PETER REUTER, *AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY I* (Marvin H. Kosters ed., 2005), available at http://www.aei.org/files/2005/02/25/20050218_book812text.pdf.

66. Specifically, the Court held that enforcement of such a law constitutes cruel and unusual punishment. *See Robinson v. California*, 370 U.S. 660, 666–67 (1962). Following suit, California appellate courts have also held that addiction is not a crime. *See Blinder v. Div. of Narcotics Enforcement*, 101 Cal. Rptr. 635, 644 (Ct. App. 1972).

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Critics might reply that cannabis use would increase if prohibition were ended. As the drug czars wrote, for example, “[w]e can say with near certainty . . . that marijuana use would increase if it were legal.”⁶⁷ But this “near certainty” is undercut by several sources.⁶⁸ Regardless, the relevant issue is not use, but abuse. Critics seem to assume cannabis use is abuse by definition. By this logic, any alcohol or nicotine use is abuse and must also be prohibited. Yet, just as millions of adults can enjoy alcohol in moderation, the studies cited leave no reason to doubt adults 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.

B. 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 canna-

67. Drug Czars, *supra* note 17.

68. The IOM, studying the Netherlands’ experience following decriminalization, found that “there is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use.” IOM, *supra* note 50, at 104. According to a U.S. sponsored study in 2001, “existing research seems to indicate that 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.” NAT’L RESEARCH COUNCIL, INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS: WHAT WE DON’T KNOW KEEPS HURTING US 193 (Charles F. Manski, John V. Pepper & Carol V. Petrie eds., 2001). 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 5,600 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 69–70 (2003) (emphasis added).

Furthermore, after the UK decriminalized cannabis in 2004, the British Crime Survey confirmed that its use declined. RACHEL MURPHY & STEPHEN ROE, DRUG MISUSE DECLARED: FINDINGS FROM THE 2006/07 BRITISH CRIME SURVEY 1 (2007), available at <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs07/hosb1807.pdf>. As MacCoun and Reuter write:

Dutch national rates [of cannabis usage] now are somewhat lower than those in the United States [T]he 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 in the United States.

MACCOUN & REUTER, *supra* note 50, at 256, 261, 263.

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bis; or (3) providing cannabis to minors.⁶⁹ Yet 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, critics can plausibly assert that the good (preventing serious harm to others) is substantial and that the right (to bodily autonomy) is trivial. Nonetheless, these three concerns do not justify voting against revisions of the RCTCA in 2012 and beyond.

1. Effects on Children

I begin with concerns over minors. On this subject, Falcon responds to the "No on 19" Campaign's concern over the prospect of school bus operators driving under the influence.⁷⁰ The op-ed critics, however, express broader concerns over minors. The *Los Angeles Times*, we saw, asked "What would be the effect of legalization [o]n children?"⁷¹ Skelton quoted a doctor's claim that "[d]rugs cause tremendous hardships to children and families,"⁷² 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.⁷³

On its face, of course, concern for children is legitimate, even compelling.⁷⁴ Special rules protecting minors are justifiably found throughout our law.⁷⁵ The RCTCA was thus clear, as the critics concede, that providing cannabis to minors would have remained a crime.⁷⁶ Yet even assuming this law would have increased some children's access to cannabis, a revised RCTCA remains justified.

69. See RCTCA § 2(C)(2); CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, *supra* note 6, at 92–93.

70. Falcon, *supra* note 5, at 481; see text and cited materials *infra* Part II.B.2.

71. *Post-Prop 19*, *supra* note 10.

72. Skelton, *supra* note 17.

73. *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

74. As Husak notes, "[t]his rationale has a tremendous appeal." Husak II, *supra* note 59, at 53.

75. Beyond the central relevance of the interests of minor children in divorce settlements, for example, contracts are voidable at the option of parties who are minors and the liability of minors for negligence is partly a function of their age.

76. Indeed, Falcon writes that "[t]he RCTCA went above and beyond to protect California's children." Falcon, *supra* note 5, at 471.

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To begin with government's goals, the Court has held that government may not simply restrict what it pleases in order to make the world safe for children, particularly when it burdens basic liberties. 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 14th Amendment⁷⁷

Beyond this, if Congress truly believed that it must protect minors from ingesting substances in proportion with the risk of the actual harm they pose, it would criminalize the ingestion of all dangerous substances. Since it does not, its means are underinclusive given its purported goal, and 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.⁷⁸ Yet if we were really concerned about this message, it seems we would instead end cannabis prohibition.⁷⁹ This sends the message that as a society we will finally end the hypocrisy of claiming to protect children while treating the most destructive drugs with the most leniency.⁸⁰

Even assuming that minimizing minors' access to cannabis is a legitimate state interest, the problem remains that minors already have easy access to cannabis on the black market. Further, the black

77. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

78. *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

79. 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, Editorial, *The Problem Is Pot Prohibition*, *WASH. POST*, May 4, 2002, at A19.

80. As a psychologist writes:

Our 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, at C1.

market in marijuana is created and sustained by prohibition. 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%).”⁸¹ As Judge Gray observes:

[O]ur 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.⁸²

If anything, then, as with alcohol, cannabis regulation would diminish minors’ 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 follow *USA Today* in assuming that children of parents who would use cannabis “more frequently and openly”⁸³ if prohibition ended would have easier 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.

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.

81. LLOYD D. JOHNSTON, PATRICK M. O’MALLEY, JERALD G. BACHMAN & JOHN E. SCHULENBERG, NAT’L INST. ON DRUG ABUSE, *MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2004: VOLUME I SECONDARY SCHOOL STUDENTS 397* (2005) (emphasis omitted).

82. JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 50–51* (2001); see also Anita Hamilton et al., *This Bud’s for the U.S.*, *TIME*, Aug. 23, 2004, at 36–37. More 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.*” NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., 2008 NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE at iii (2008), available at <http://www.casa.columbia.org/articlefiles/380-2008%20Teen%20Survey%20Report.pdf> (emphasis added).

83. *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

2. 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.”⁸⁴ 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.”⁸⁵ As Dumanis et al. opine, “San Diego County’s 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.”⁸⁶

Falcon speaks to these concerns. He concedes that “marijuana use and car accidents do sometimes coincide,”⁸⁷ and that the RCTCA failed to provide an objective test of cannabis intoxication.⁸⁸ Yet he notes that courts and legislatures have developed reasonably objective standards for such intoxication.⁸⁹ He proposes a “hybrid” model of enforcement,⁹⁰ and he suggests an exemption from the RCTCA for employers of school bus drivers⁹¹ and perhaps commercial bus and transportation companies.⁹² I add just two points.

First, studies have shown that people drive more cautiously under the influence of cannabis than of alcohol. For example, a University

84. *No on Prop. 19, supra* note 17.

85. *Drug Czars, supra* note 17.

86. Dumanis et al., *supra* note 17. 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. Also misleading, *USA Today* adds that:

You wouldn’t want someone [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.

If California Goes to Pot, Rest of U.S. Gets Dragged In, supra note 17. 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.

87. Falcon, *supra* note 5, at 480.

88. *See id.* at 477.

89. *See id.*

90. *See id.* at 488–89. 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.

91. *See id.* at 481.

92. *See id.* at 481, 488.

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of Maryland study of 2405 drivers hospitalized in auto accidents from 1997 to 2001 concluded that drivers who test positive for marijuana in urine are no more likely to cause accidents than drug-free drivers.⁹³ Other studies have made similar conclusions, partly due to the higher caution exercised by cannabis-using drivers.⁹⁴ Accordingly, since we tolerate the greater risks of drunk driving for reasons well understood, concerns over highway safety do not justify voting against revisions of the RCTCA in 2012 and beyond.

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 that others not subject them to this risk. But a categorical prohibition of alcohol is not needed to achieve 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.⁹⁵

93. See CARL SODERSTROM ET AL., ASS'N FOR THE ADVANCEMENT OF AUTO. MED., CRASH CULPABILITY RELATIVE TO AGE AND SEX FOR INJURED DRIVERS USING ALCOHOL, MARIJUANA OR COCAINE 335–36 (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 forty-one to sixty were statistically less likely to be at fault for accidents than drug free drivers.

94. See Steven R. Lowenstein & Jane Koziol-McLain, *Drugs and Traffic Crash Responsibility: A Study of Injured Motorists in Colorado*, 50 J. TRAUMA 313, 315–18 (2001); K.L.L. Movig et al., *Psychoactive Substance Use and the Risk of Motor Vehicle Accidents*, 36 ACCIDENT ANALYSIS & PREVENTION 631, 633–35 (2004); Anthony Liguori, *Marijuana and Driving: Trends, Design Issues, and Future Recommendations*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION, *supra* note 4, at 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 50, at 237.

95. Douglas N. Husak, *Liberal Neutrality, Autonomy, and Drug Prohibitions*, 29 PHIL. & PUB. AFF. 43, 55 (2000) [hereinafter Husak III]. See generally Rodney Skager, *Revisoning Youth Policy on Marijuana and Other Drug Use: Alternatives to Zero Tolerance*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION, *supra* note 4, at 300–02.

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

[W]ould 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.⁹⁶

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.⁹⁷ As with highway safety, further, the bodily autonomy of adults in the home does not dispose 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.⁹⁸ 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. The equal liberty principle requires that we treat the less

96. *Vote No on Prop. 19: A Debate on Legalizing Marijuana May Be Needed, But This Initiative Has Too Many Flaws*, *supra* note 17; *see also No on Prop. 19*, *supra* note 17. The day after Proposition 19 was defeated, the *Los Angeles Times* referred to its “ludicrous workplace protections for marijuana-smoking employees.” *Post-Prop 19*, *supra* note 10.

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97. To be sure, many report that cannabis enhances the quality of their work. *See GRINSPOON & BAKALAR*, *supra* note 50, at 277–82. Yet it can also be counterproductive and even dangerous. As Falcon observes:

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If 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 5, 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.

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98. Accordingly, once again, the RCTCA was clear that it was not intended to affect the workplace. RCTCA § 2(C)(2); CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, *supra* note 6, at 92–93.

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harmful substance no more harshly than we do the more harmful substance.

Cannabis, we have seen, is less harmful than tobacco or alcohol.⁹⁹ 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 that critics' comments regarding highway safety and the workplace provide no basis to reject revisions of the RCTCA in 2012 and beyond.

III. Structure: Intergovernmental Concerns

Yet the critics still seem to have some powerful arrows in their quivers. We thus turn to their structural critiques: the level of government at which jurisdiction over cannabis law is and should be lodged.

A. Federal v. State Power: Supremacy and Preemption

A common critique of the RCTCA was that it would conflict with federal law, which is supreme. As the *Los Angeles Times* wrote, for example, under the RCTCA, "marijuana, though legal under California law, would remain a prohibited Schedule I drug under federal law, setting up an inevitable conflict."¹⁰⁰ The constitutional principle referenced here is familiar: under the Supremacy Clause federal law preempts contrary state law.¹⁰¹ I reply, however, 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. *United States v. Oakland*

99. See *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

100. *Experimenting with Pot*, *supra* note 17; see also Skelton, *supra* note 17; *Vote No on Prop. 19: A Debate on Legalizing Marijuana May Be Needed, But This Initiative Has Too Many Flaws*, *supra* note 17.

101. U.S. CONST. art. VI.

*Cannabis Buyers' Cooperative*¹⁰² was a statutory ruling, and *Gonzales v. Raich*¹⁰³ held only that the CSA is generally a permissible exercise of Congress' commerce power and that the DEA may thus enforce it. This question is distinct from whether federal cannabis prohibition violates the equal liberty principle as articulated in the Court's Fourteenth Amendment case law. As Husak observes:

[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. . . . [Also improbable 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 contemporary liberal states have rarely sought to punish them. *No case law exists about issues that have never been addressed.*¹⁰⁴

Beyond this, we saw that the Frank/Paul bill was recently introduced in the House.¹⁰⁵ 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. One such avenue is 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, Mikos observes, all agree that the latter is unenforceable.¹⁰⁶ 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.¹⁰⁷ This is consistent with the well-established

102. 532 U.S. 483, 486 (2001) (holding that the CSA includes no medical necessity exception).

103. 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 generally* Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131 (2007).

104. Husak III, *supra* note 95, at 59 (emphasis added); *see also* Dan Riffle, *Prop 19 and Constitutional Law for Dummies (and DEA Administrators)*, MPP BLOG, (Oct. 13, 2010), <http://blog.mpp.org/tax-and-regulate/prop-19-and-constitutional-law-for-dummies-and-dea-administrators/10132010/>.

105. *See supra* note 20.

106. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

107. *Id.* 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.

principle that states may, if they wish, protect individual rights under their constitutions at a higher level than does the U.S. Constitution.¹⁰⁸ 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 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 Fourteenth 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.¹⁰⁹ The critics' premise that we ignore this distinction is 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,¹¹⁰ voting is not just legal, it is a fundamental constitutional right.¹¹¹

In this light, *USA Today's* claim that “legalization is a decision that should be made by the entire country, not just one state,”¹¹² misunderstands the role of our federalism. As Justice Brandeis famously wrote, “[I]t is one of the happy incidents of the federal system that a

108. 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 Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also* *California v. Greenwood*, 486 U.S. 35, 43 (1988); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Daffin v. State ex rel. Okla. Dep't of Mines*, 251 P.3d 741, 747 n.20 (Okla. 2011); *United States v. Garner*, 945 F. Supp. 990, 997 (N.D. Tex. 1996) (referring to “the historic principle that the United States Constitution provides a floor to a citizen's civil rights while the state constitutions provide a ceiling”).

109. ROBERT L. HAYMAN, JR., NANCY LEVIT & RICHARD DELGADO, *JURISPRUDENCE CLASSICAL AND CONTEMPORARY* 74–80 (2002).

110. *See* RAWLS, *supra* note 32, at 308–41, 363–77. 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.

111. *See* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

112. *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

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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.”¹¹³ This is especially so with a classic police power concern like cannabis regulation. Boychik writes, “[T]hough 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?”¹¹⁴ 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,”¹¹⁵ but “when legalization comes, it will not start at the federal level. . . . State action is the only way to legalize marijuana.”¹¹⁶

For these reasons, preemption concerns about a revised RCTCA are unpersuasive. Even assuming the CSA would preempt such a revision, there are good reasons, rooted in the equal liberty principle, to oppose federal law by voting in state elections.

B. State v. Local Power

1. “Regulatory Chaos”

Critics raised additional structural concerns. Some of them asserted the RCTCA was poorly drafted and would thus have created “regulatory chaos.” This was because “[i]t would empower the state’s hundreds of city and county governments to set their own regulations for growing, selling, using and taxing marijuana.”¹¹⁷ As the *San Fran-*

113. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also K.K. DuVivier, *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 laborator[ies]”). 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.” *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17. 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.

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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. Drug Czars, *supra* note 17. 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.

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114. Ben Boychuk, Editorial, *Take the Initiative: For Conservatives, the Real Question Is, Is This Any Way to Run a State?*, L.A. TIMES, Oct. 31, 2010, at A41.

115. Falcon, *supra* note 5, at 483.

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116. *Id.* at 492.

117. *If California Goes to Pot, Rest of U.S. Gets Dragged In*, *supra* note 17.

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cisco Chronicle added, “Proposition 19 allows the 58 counties and hundreds of cities to come up with their own taxation and regulatory schemes.”¹¹⁸ The *Los Angeles Times* proclaimed, “[T]he 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.”¹¹⁹

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.¹²⁰ Falcon casts the “regulatory chaos” issue as whether the state should encourage large or small-scale cannabis production.¹²¹ He argues for the latter—for keeping the industry “Mom ‘n’ Pop” with state law “regulating to encourage small-scale production.”¹²² 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.

2. Doubts Regarding Tax Revenue

Critics are left with one last claim justifying cannabis prohibition in the face of alcohol and tobacco regulation. As the *San Francisco Chronicle* writes, the RCTCA “does nothing to help cure the state’s budget deficit.”¹²³ 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

118. *No on Prop. 19*, *supra* note 17.

119. *Vote No on Prop. 19: A Debate on Legalizing Marijuana May Be Needed, But This Initiative Has Too Many Flaws*, *supra* note 17; *see also Experimenting with Pot*, *supra* note 17; *No on Prop. 19*, *supra* note 17 (noting that the “nightmare” created by Proposition 215 has led to dispensary moratoria).

120. *See* RCTCA §§ 11301, 11303; CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, *supra* note 6, at 93–94. Falcon’s observation that “[t]here is a strong argument to be made for the value in varied laws” is thus relevant here as well. Falcon, *supra* note 5, at 483.

121. Falcon, *supra* note 5, at 486.

122. *Id.*

123. *No on Prop. 19*, *supra* note 17.

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possession a crime. Furthermore, this claim seems misleading. While any tax revenues under the RCTCA would have gone to local rather than state coffers, they would to that extent have made localities less dependent on state support. In this sense, the RCTCA would have done something to ease the state budget deficit.

The drug czars ask: “Why would people volunteer to pay high taxes on marijuana 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.”¹²⁴ “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 cannabis, many would buy from dispensaries, as they do now for medicinal use. Consumers rationally prefer choosing from a variety of products where 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 tax revenue is directed to a “sympathetic public cause, such as education or health care.”¹²⁵

Finally, the *Los Angeles Times* writes that the tax revenue would depend on untried bureaucracies and enforcement agencies.¹²⁶ There are three replies. First, such administrative adjustments are a natural consequence of legislative reform. When the United States ended alcohol prohibition or created the Department of Homeland Security, new bureaucracies and law enforcement divisions had to be, and were, established.¹²⁷ This is what one would expect in ending a century of cannabis prohibition.

Second, 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 condi-

124. Drug Czars, *supra* note 17.

125. Falcon, *supra* note 5, at 490.

126. See, e.g., *Vote No on Prop. 19: A Debate on Legalizing Marijuana May Be Needed, But This Initiative Has Too Many Flaws*, *supra* note 17; *Experimenting with Pot*, *supra* note 17; *Post-Prop 19*, *supra* note 10.

127. As one scholar has written, “States responded with comprehensive regulatory schemes affecting all aspects of the liquor industry.” Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 353 (1999). As another observes, repeal of prohibition ushered in “a series of state-by-state codes, regulations, and enforcement procedures.” OKRENT, *supra* note 25.

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tions of a quasi-black market in which cannabis suppliers and vendors are forced to operate.¹²⁸ In this light, and to this extent, any doubts regarding the tax revenue that would flow from ending cannabis prohibition cannot be assessed against the merits of a revised RCTCA.

Finally, 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. Doubts regarding tax revenue thus do not justify voting against revisions of the RCTCA. Rather, voting to send the strongest possible message of opposition to federal prohibition is well justified.

Conclusion

The criticism of the RCTCA we have reviewed has raised legitimate concerns. As Falcon notes, such critiques are a step forward in the debate over cannabis law reform.¹²⁹ 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 Fourteenth Amendment case law.

This is not lost on President Obama. If reelected, he should call on Congress to end federal cannabis prohibition, letting states go their own way within loose federal guidelines.¹³⁰ As noted, however, in an apparent bid for conservative support in his run for reelection, President Obama has recently authorized crackdowns on medical cannabis dispensaries.¹³¹ After all, observe Grinspoon and Bakalar, “[C]ulturally conservative people are fearful of marihuana.”¹³² In this connection, Skager has referenced “the legacy of Harry Anslinger . . . implanted in the conservative psyche.”¹³³ As a Harvard economist recently noted, however, “vigorous opposition to the drug war should be a no-brainer for conservatives.”¹³⁴ Indeed, the heroic dissents by Jus-

128. Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 244 (2010).

129. See Falcon, *supra* note 5, at 475.

130. See Carcieri, *supra* note 16, at 308.

131. Egelko, *supra* note 14, at A1.

132. GRINSPOON & BAKALAR, *supra* note 50, at 267.

133. Skager, *supra* note 95, at 307.

134. Jeffrey A. Miron, Editorial, *Common Cause: Conservatism and Opposition to the Drug War Should Go Hand in Hand*, L.A. TIMES, Sept. 29, 2010, at A23.

tices O'Connor, Rehnquist, and Thomas in *Raich* prove that principled conservatives need not fear liberal social policy.

In this light, the Frank/Paul bill¹³⁵ 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.¹³⁶ Even if President 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, citizens are well justified in voting for revisions of the RCTCA in 2012 and beyond, especially if they incorporate the changes advised by Falcon.

135. *H.R.* 2306, 112th Cong. (1st Sess. 2011).

136. 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, Op-Ed, *Drug Bust*, N.Y. TIMES, June 11, 2011, at A21; Jimmy Carter, Op-Ed, *Call off the Global Drug War*, N.Y. TIMES, June 17, 2011, at A35.

