

ARTICLE

CURRENT TRENDS IN MARIJUANA REGULATION

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I. INTRODUCTION

There have been unprecedented changes in Texas marijuana regulation. Governor Greg Abbott enacted legislation allowing epilepsy patients to use a cannabis plant derivative.¹ In Houston, Harris County District Attorney Devon Anderson implemented a

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1. *Governor Abbott Signs Bill Authorizing Seizure-Reducing Treatment for Intractable Epilepsy Patients*, OFFICE OF THE GOVERNOR GREG ABBOTT (June 1, 2015), <http://gov.texas.gov/news/signature/20979> [hereinafter *Governor Abbott*].

leniency program for first-time offenders in possession of small amounts of marijuana.² The government officials responsible for these changes insist that these measures will not lead to further liberalization of marijuana regulation in their jurisdictions.³ Though, these legislative and executive decisions are on trend with the political atmosphere.

2016 marks the first presidential campaign where mainstream candidates have endorsed the liberalization of the federal marijuana regulations.⁴ During his term, President Obama increasingly supported non-enforcement of federal regulations in states that had enacted legislation to decriminalize or legalize marijuana.⁵ Under current federal regulations “Marihuana” is listed as a schedule I substance, with no known medical uses.⁶ This is due to the lack of credible research on the substance.⁷ Critics blame strict government regulation for the lack of research on marijuana.⁸

While changes are happening in marijuana regulation nation-wide, Texas lags behind many states that have enacted comprehensive measures to decriminalize and legalize marijuana for medical and recreational use.⁹ Three main justifications are given for these enactments: 1) decriminalization will help to lower incarceration rates and save money that can be used to deal with more serious crimes; 2) there are legitimate medical uses for marijuana, and patients have the right to treatment; and

2. Tim Wetzel, *Harris County D.A. Expands Program for First-Time Pot Offense*, KHOU (Nov. 6, 2015, 6:01 AM), <http://www.khou.com/story/news/crime/2015/11/05/1st-chance-marijuana-program-to-roll-out-through-harris-county/75225124/>.

3. See *id.*; see also Eva Hershaw, *Abbott Legalizes Cannabis Oil for Epilepsy Patients*, TEX. TRIB. (June 1, 2015), <http://www.texastribune.org/2015/06/01/abbott-signs-law-legalizing-cannabis-oil-epilepsy-/>.

4. See *infra* Part III.A (describing the current presidential candidates’ positions on marijuana).

5. JAMES M. COLE, OFFICE OF THE DEPUTY ATTORNEY GEN., GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter 2013 MEMO]; see *Gonzales v. Raich*, 545 U.S. 1, 42–43, 57 (2005) (O’Connor, J., dissenting) (calling California’s attempt to legalize medicinal marijuana an “experiment”).

6. 21 U.S.C. §§ 812(c), 829, 841, 844 (2012).

7. *Drug Facts: Is Marijuana Medicine?*, NIH, <http://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (last updated July 2015) (“So far, researchers have not conducted enough large-scale clinical trials that show that the benefits of the marijuana plant (as opposed to its cannabinoid ingredients) outweigh its risks in patients it is meant to treat.”). However, the FDA approved two medications that contain cannabinoids, which are the chemical compounds found in the cannabis plant. *Id.*

8. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV 1421, 1433–34 (2009) (emphasizing how few marijuana research studies the federal government approves).

9. Hershaw, *supra* note 3.

3) legalization for recreational purposes will bring revenue from the black market into government coffers.¹⁰

This Article gives a general background on marijuana regulation in the United States. Then, it discusses current marijuana legislation and enforcement policies on the federal and state level. It follows with a discussion of recent changes in the political atmosphere and local changes in the law and policies relating to marijuana. In conclusion, future possible changes in the law are discussed.

II. BACKGROUND

The cannabis plant is native to Central Asia and was cultivated as many as ten thousand years ago.¹¹ The cannabis plant produces buds that are harvested and processed for consumption.¹² In the United States, cannabis is commonly referred to colloquially and officially as marijuana or marihuana.¹³

Marijuana use peaked in the United States between 1840 and 1890, but began to decline in the 1890s due to the introduction of more standardized and easily administered treatments for the same problems that marijuana was used to treat.¹⁴ In the 1930s the U.S. government began pushing for the federal regulation of marijuana by publicly touting its negative effects.¹⁵

Before 1970, the primary purpose of drug laws in the United States was raising revenue.¹⁶ The Marihuana Tax Act of 1937¹⁷ did not criminalize marijuana possession or distribution, but instead imposed “onerous administrative requirements” and “prohibitively expensive taxes” on the substance.¹⁸ The Act was

10. See Wetzel, *supra* note 2; Governor Abbott, *supra* note 1; Ariel Nelson, *How Big Is the Marijuana Market?*, CNBC (Apr. 20, 2010, 12:04 AM), <http://www.cnb.com/id/36179677>.

11. LESTER GRINSPOON & JAMES B. BAKALAR, *MARIHUANA: THE FORBIDDEN MEDICINE 3* (rev. and expanded ed. 1997).

12. *Id.*; *Medical Use*, NORML, <http://norml.org/Marijuana/medical> (last visited Feb. 13, 2016) (“Modern research suggests that cannabis is a valuable aid in the treatment of a wide range of clinical applications.”).

13. *Medical Use*, *supra* note 12.

14. GRINSPOON & BAKALAR, *supra* note 11, at 7.

15. *Id.* at 7–8; REEFER MADNESS (G&H Productions 1936), <https://www.youtube.com/watch?v=NJmfQAHGNrs> (depicting high school students going “mad” because of marijuana use).

16. *Gonzales v. Raich*, 545 U.S. 1, 10–11 (2005).

17. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970), <http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm>.

18. *Raich*, 545 U.S. at 11.

meant to curb recreational use of the plant as an intoxicant.¹⁹ Then in 1951, the Boggs Act created the first criminal penalty for marijuana, imposing jail time for those who repeatedly failed to comply with the Marihuana Tax Act.²⁰

However, real change in federal marijuana policy did not come until Nixon's "war on drugs" in the late 1960s and the passage of the Comprehensive Drug Abuse Prevention and Control Act in the early 1970s.²¹ The Act's stated purpose was "to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse."²² The Controlled Substances Act (CSA) was enacted as part of the Comprehensive Abuse Prevention and Control Act and fulfilled the United States' obligations under the United Nation's Single Convention on Narcotic Drugs and Convention on Psychotropic Substances.²³ Additionally, the CSA "consolidate[d] various drug laws on the books into a comprehensive statute," and "provide[d] meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels."²⁴

III. CURRENT LEGISLATION

A. *Constitutional Issues*

The realities of enforcement and the principles of federalism make the issue of state legalization, seemingly resolved under

19. GRINSPOON & BAKALAR, *supra* note 11, at 7.

20. Boggs Act, ch. 666, 65 Stat. 767 (repealed 1970); *see also* EARL BLUMENAUER & JARED POLIS, THE PATH FORWARD: RETHINKING FEDERAL MARIJUANA POLICY 5, http://polis.house.gov/uploadedfiles/the_path_forward.pdf (last visited Feb. 28, 2016) (discussing first offense penalties under the Boggs Act).

21. *Raich*, 545 U.S. at 10 ("Shortly after taking office in 1969, President Nixon declared a national 'war on drugs.'").

22. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1236(, <https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg1236.pdf>.

23. *See* 21 U.S.C. §§ 801-904 (2012) (CSA, current version); Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961, March 30, 1961, art. 28, 26 U.S.T. 1439, 520 U.N.T.S. 204, http://www.unodc.org/pdf/convention_1961_en.pdf. The United Nations' Single Convention on Narcotic Drugs in 1961, and Convention on Psychotropic Substances in 1971 compelled the passage of the CSA. Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 83-84 (2012); *see* Convention on Psychotropic Substances, 1971, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, http://www.unodc.org/pdf/convention_1971_en.pdf (requiring international regulation of psychotropic substances including MDMA and marijuana).

24. *Raich*, 545 U.S. at 2. The Commission on Narcotic Drugs in conjunction with the Narcotics Control Board monitors international compliance with the Single Convention.

the Supremacy Clause, a complicated one.²⁵ Under the Supremacy Clause, federal marijuana laws trump state marijuana laws.²⁶

The Supremacy Clause gives the Judicial Branch the power to resolve conflicts between states and the federal government.²⁷ Before *Gonzalez v. Raich*, there was a question of whether Congress had the power to regulate marijuana production and trade that occurred solely intrastate and never crossed state lines.²⁸ However, in *Raich*, the Supreme Court upheld the CSA as valid under the Commerce Clause. The Court explained that marijuana—even when home-grown in small amounts for state-legalized medical use—is within Congress’s power to regulate interstate commerce.²⁹ This decision was a surprising result after the Commerce Clause decisions in *United States v. Lopez* and *United States v. Morrison*.³⁰ A landmark case, *Raich* set “the outermost bounds of Congress’s Commerce Clause authority.”³¹ The Supreme Court has since held that there is no common-law exception to the CSA for reasons of medical necessity.³² It is unlikely that *Raich* will be overturned,³³ but Commerce Clause interpretation has widely vacillated.³⁴ Justice Sandra Day O’Connor, in her well-known dissent in *Raich*, chastised the majority of the Court for suppressing the principles of federalism³⁵ and emphasized “the role of States as

25. Mikos, *supra* note 8, at 1433–34; see also *Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Marijuana Hearing*], <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg93426/html/CHRG-113shrg93426.htm>.

26. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); Mikos, *supra* note 8, at 1440.

27. U.S. CONST. art. VI, cl. 2.

28. Mikos, *supra* note 8, at 1436–37.

29. U.S. CONST. art. I, § 8, cl. 3; *Raich*, 545 U.S. at 22.

30. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that it was beyond Congress’s Commerce Clause power to create a federal civil remedy for the victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional as beyond the powers of Congress under the Commerce Clause). The Court in *Raich* flatly rejected the defendant’s defense invoking *Lopez* and *Morrison*. *Raich*, 545 U.S. at 3; Mikos, *supra* note 8, at 1437.

31. Mikos, *supra* note 8, at 1437.

32. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 486, 498–99 (2001) (holding the CSA precludes any common law medical necessity exception).

33. *Raich*, 545 U.S. at 2–3.

34. *Id.*

35. *Raich*, 545 U.S. at 42–57 (O’Connor, J., dissenting) (“We enforce the ‘outer limits’ of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.” (citing *Lopez*, 514 U.S. at 557)).

laboratories.”³⁶ As she aptly advocated, the debate over the legalization and regulation of marijuana often comes down to states’ rights versus the powers of the federal government.³⁷

B. Federal Regulation

Currently under the CSA, the possession and distribution of “Marihuana” is illegal within the United States.³⁸ The CSA divides substances with potential for abuse into five schedules, and labels “Marihauna” as a schedule I substance.³⁹ Schedule I substances are defined as having no accepted use for treatment and a high potential for abuse.⁴⁰ The government strictly controls all schedule I substances.⁴¹

To add to the conundrum of federal marijuana regulation, section 280E of the Internal Revenue Code disallows ordinary and necessary business deductions for business dealing in schedule I substances.⁴² Anti-money laundering laws prohibit banks from working with money from criminal enterprises.⁴³ The Lantham Act prevents businesses from registering trademarks used in illegal commerce.⁴⁴ Finally, the Americans with Disabilities Act (ADA) allows for employment discrimination based on marijuana use.⁴⁵

36. *Id.* at 42 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977)).

37. *See Mikos, supra* note 8, at 1439–42.

38. 21 U.S.C. §§ 841, 844 (2012).

39. 21 U.S.C. § 829.

40. Controlled Substances Act, Pub. L. No. 91-513, tit. II § 202(b)–(c), 84 Stat. 1242, 1247–49 (1970).

41. 21 U.S.C. § 801; Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAW. 429, 437 (2013).

42. I.R.C. § 280E (2012).

43. 18 U.S.C. § 1956; *see* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 339–40 (2003) (describing §§ 1956 and 1957 as the core federal money laundering statutes).

44. 15 U.S.C. § 1051(a). The United States Patent and Trademark Office has denied marijuana trademarks as “immoral, deceptive, or scandalous matter.” Justin Scheck, *Patent Office Raises High Hopes, Then Snuffs Them Out*, WALL ST. J. (July 19, 2010), <http://online.wsj.com/news/articles/SB10001424052748704682604575368783687129488?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704682604575368783687129488.html>.

45. 42 U.S.C. §§ 12111(6), 12112(a), 12114(a). A person who uses marijuana is not considered a qualified person under the Americans with Disabilities Act (ADA). § 12114(a).

C. Federal Non-Enforcement Policy

The Office of the Deputy Attorney General has issued three memoranda discussing enforcement of the CSA against people acting in compliance with the laws of their state.⁴⁶ Deputy Attorney General David Ogden issued the first memo in October of 2009.⁴⁷ In relevant part, the memo states that pursuit of the DOJ's priorities "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁴⁸ Although this seemed promising for states with legalized medical marijuana, the memo went on to reiterate that "[o]f course, no State can authorize violations of federal law"⁴⁹

In June 2011, Deputy Attorney General James Cole issued another memo.⁵⁰ The 2011 memo reinforced the idea that large-scale producers of marijuana could still be the target of federal enforcement efforts, even if producing marijuana for state-legalized medical use.⁵¹ After the second memo, federal authorities raided state medical marijuana business around the country.⁵²

In 2013, the government backtracked from its previous commitment to enforcement in a third memo.⁵³ After listing the current federal enforcement priorities toward marijuana, the memo stated that "[o]utside of these enforcement priorities, the

46. 2013 MEMO, *supra* note 5; JAMES M. COLE, OFFICE OF THE DEPUTY ATTORNEY GEN., GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE (2011) [hereinafter 2011 MEMO], <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; DAVID W. OGDEN, OFFICE OF THE DEPUTY ATTORNEY GEN., INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDIAL USE OF MARIJUANA (2009) [hereinafter 2009 MEMO], <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

47. 2009 MEMO, *supra* note 46.

48. *Id.* The memo lists factors that "indicate illegal drug trafficking" as: "unlawful possession or . . . use of firearms; violence; sales to minors; financial and marketing activities inconsistent with . . . state law . . . ; amounts of marijuana inconsistent with . . . state or local law; illegal possession or sale of other controlled substances; or ties to criminal enterprises." *Id.*

49. *Id.*

50. 2011 MEMO, *supra* note 46.

51. *Id.* ("The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana . . . are in violation of the Controlled Substances Act, regardless of state law.")

52. *Roche*, *supra* note 41 at 437 (noting raids and shut-downs in Montana, California, Michigan, and Colorado).

53. 2013 MEMO, *supra* note 5 ("[I]n exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above.")

federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”⁵⁴

Cole addressed congressional concerns about the third memo at a Senate Judiciary Committee hearing on September 10, 2013.⁵⁵ He explained that it was important to have a robust regulatory scheme in place following state legalization of marijuana.⁵⁶ Cole reasoned that if the federal government moved in and dismantled state marijuana regulatory systems, it would cause a greater problem than if states were allowed to regulate the newly legalized substance as planned.⁵⁷

D. State Regulation

Most states still criminalize possession and distribution of marijuana.⁵⁸ However, there has been a trend toward liberalization in state marijuana laws.⁵⁹ This includes removing jail time as a penalty for marijuana crimes (decriminalization) or at least allowing first time offenders to get off with probation (conditional release).⁶⁰

California was the first state to legalize marijuana for medical use in 1996 with Proposition 215.⁶¹ Twenty-three states and the District of Columbia have now legalized medical marijuana and four states and the District of Columbia have legalized recreational

54. *Id.* (listing the priorities as: preventing marijuana distribution to minors, revenue from going to criminal enterprises, diversion to other states, activity as a pretext for illegal activity, related violence and the use of firearms, drugged driving, negative public health consequences, growing on public lands, and possession or use on federal property).

55. *Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary*, *supra* note 25 (statement of Deputy Attorney General James M. Cole) (affirming his stance that states with legalized marijuana would be left alone by the DOJ as long as the industry was sufficiently regulated).

56. *Id.*

57. *See Marijuana Hearing*, *supra* note 25; John Ingold, *Federal Government Seeks Banking Solution for Marijuana Businesses*, DENV. POST (Sept. 10, 2013), http://www.denverpost.com/breakingnews/ci_24064460/federal-government-seeks-banking-solution-Marijuana-businesses.

58. *State Info: United States*, NORML, <http://norml.org/states> (last visited Feb. 28, 2016).

59. Blumenuer & Polis, *supra* note 20, at 5 (“Following the recommendations of the bipartisan Shafer Commission in the early 1970s, 16 states—beginning in Oregon—decriminalized the personal use of marijuana, treating first-time possession of a small amount more like a traffic offense than a crime.”).

60. *State Info: United States*, *supra* note 58; *The Price of Pot*, CNN (Sept. 3, 2014), <http://www.cnn.com/interactive/2014/09/us/marijuana-laws/>.

61. 1996 Cal. Legis. Serv. prop. 215 (West) (codified at CAL. HEALTH & SAFETY CODE §§ 11362.5–11570. (2009)). This Act is commonly known as the Compassionate Use Act. Mikos, *supra* note 8, at 1427–28.

marijuana.⁶² A large, growing, and aging segment of the population supports the liberalization of marijuana laws.⁶³

Colorado was the first state to introduce a system of sanctioned recreational marijuana production and distribution.⁶⁴ In November 2012, Colorado voters passed Amendment 64 to the Colorado Constitution.⁶⁵ Regulating marijuana in a “manner similar to alcohol,” Amendment 64 allows for the possession and private use of marijuana by persons over twenty-one.⁶⁶ After the passage of the Amendment, citizens were allowed to possess and use up to an ounce of recreational marijuana in private. It became legal to grow marijuana for recreational use in Colorado on January 1, 2014.⁶⁷

Colorado requires businesses to have a license to legally grow marijuana for manufacture and sale.⁶⁸ In the first wave of licensing, only retail stores that were already licensed to sell medical marijuana were granted licenses to sell recreational marijuana.⁶⁹ Local governments are allowed to review the state license application before permission to operate is granted.⁷⁰ Municipalities may also require licenses and may provide for local regulation of the substance.⁷¹ Both state and local governments can impose taxes.⁷²

62. *Marijuana Resource Center: State Laws Related to Marijuana*, OFFICE OF NAT'L DRUG POL'Y, <https://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana> (last visited Feb. 28, 2016).

63. Blumenauer & Polis, *supra* note 20, at 7 (“[N]early half of the American public believes that marijuana should be legalized. This figure has steadily risen over the last 30 years, and 2011 marked the first time when a majority of Americans believed marijuana should be legalized.”).

64. Justin Rocket Silverman, *Colorado Tourism Quickly Embraces the Legalization of Recreational Marijuana*, N.Y. DAILY NEWS (Jan. 12, 2014), <http://www.nydailynews.com/life-style/colorado-tourism-embraces-article-1.1571166>.

65. *Amendment 64 – Legalize Marijuana Election Results*, DENV. POST, <http://data.denverpost.com/election/results/amendment/2012/64-legalize-marijuana/> (last visited Feb. 28, 2016).

66. *Amendment 64*, COLO. GEN. ASSEMBLY, [http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112InitRefr.nsf/dac421ef79ad243487256def0067c1de/cfa3bae60c8b4949872579c7006fa7ee/\\$FILE/Amendment%2064%20merged.pdf](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112InitRefr.nsf/dac421ef79ad243487256def0067c1de/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20merged.pdf). (last visited Feb. 28, 2016); *see also* COLO. CONST. art. XVIII, § 16(1).

67. John Ingold, *A Colorado Marijuana Guide: 64 Answers to Commonly Asked Questions*, DENV. POST (Dec. 31, 2013), http://www.denverpost.com/Marijuana/ci_24823785/colorado-Marijuana-guide-64-answers-commonly-asked-questions (“Marijuana actually was legal in Colorado prior to 2014. Since the voter-approved Amendment 64 . . . went into effect on Dec. 10, 2012, it has been legal for anyone 21 and over to use marijuana or possess up to an ounce of marijuana for any purpose . . .”).

68. *Id.*

69. *Id.*

70. COLO. REV. STAT. ANN. § 12-43.4-301 (West 2014).

71. § 12-43.4-104.

72. § 12-43.4-501.

As a testament to the demand for legal marijuana, the state reported over a million dollars in recreational marijuana sales revenue on the first day of sales and over five million dollars of recreational marijuana sales revenue in the first week.⁷³ In 2014 reported sales were \$699 million and reached nearly a billion dollars in 2015.⁷⁴ The high value of the recreational marijuana market may influence more states to consider legalization.

IV. CHANGES POLITICALLY AND LOCALLY

A. *Presidential Candidates*

The 2016 election marks the first time presidential candidates have expressed support for the liberalization of federal marijuana laws. Bernie Sanders has openly supported ending federal marijuana regulation and letting the states regulate it as they choose.⁷⁵ Hillary Clinton has supported the use of medical marijuana but urged that more research needed to be done.⁷⁶ Both Clinton and Sanders recognize the issues with over-incarceration and agree that low-level, non-violent drug offenders should not be in jail.⁷⁷ Donald Trump said that marijuana is a state issue and that people who are very sick should be able to use marijuana medicinally.⁷⁸ Ted Cruz has supported a state-run, federalist approach to marijuana legislation and referenced Justice Brandeis's description of the states as laboratories of democracy.⁷⁹ Jeb Bush admitted to using

73. *Pot Sales Exceed \$1 Million on First Day*, 9NEWS (Jan. 3, 2014), <http://www.9news.com/news/article/371498/339/Pot-sales-exceed-1-million-on-first-day>; Matt Ferner, *Colorado Recreational Marijuana Sales Exceed \$5 Million In First Week*, HUFFINGTON POST (Jan. 23, 2014), http://www.huffingtonpost.com/2014/01/08/marijuana-sales-colorado_n_4552371.html.

74. Tom Huddleston, Jr., *Colorado's Legal Marijuana Industry Is Worth \$ 1 Billion*, FORTUNE (Feb. 11, 2016), <http://fortune.com/2016/02/11/marijuana-billion-dollars-colorado>.

75. David A. Graham, *Bernie Sanders's Not-So-Radical Marijuana Idea*, ATLANTIC (Oct. 30, 2015), <http://www.theatlantic.com/politics/archive/2015/10/bernie-sanders-federal-marijuana-legalization/413197/>.

76. *Hillary Clinton Discusses Marijuana Legalization*, CNN (Oct. 13, 2015), <http://www.cnn.com/videos/politics/2015/10/13/hillary-clinton-democratic-debate-marijuana-legalization-sot.cnn>.

77. *Id.*; *Issues: Racial Justice*, BERNIE 2016, <https://berniesanders.com/issues/racial-justice/> (last visited Feb. 28, 2016).

78. Jenna Johnson, *Trump Softens Position on Marijuana Legalization*, WASH. POST (Oct. 29, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/10/29/trump-wants-marijuana-legalization-decided-at-the-state-level/>.

79. Jacob Sullum, *Ted Cruz's Cannabis Conversion Reflects the Political Prudence of Marijuana Federalism*, FORBES (Mar. 5, 2015), <http://www.forbes.com/sites/jacobsullum/2015/03/05/by-supporting-marijuana-federalism-republican-candidates-can-be-principled-and-popular/#45e76d17373e>; see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system

marijuana in the past but maintained that it is a gateway drug.⁸⁰ Although, Bush said of the legalization in Colorado, “that should be a state decision.”⁸¹ Few candidates are calling for enforcement of the federal laws.⁸² Texas politicians have followed the national trend toward liberalization of marijuana regulation, while denying that their official acts would lead to further change.

B. *Texas Compassionate Use Act*

On June 1, 2015, Governor Greg Abbott signed the Texas Compassionate Use Act (Senate Bill 339), which allows patients with intractable epilepsy to be prescribed cannabidiol (CBD oil).⁸³ CBD oil is a non-intoxicating derivative of the marijuana plant that treats seizures.⁸⁴ There are around 149,000 patients in Texas with intractable epilepsy, which can cause each patient to suffer hundreds of seizures per week.⁸⁵ The bill allows for use of CBD oil if two specialists recommend the treatment.⁸⁶ The Texas Department of Public Safety (DPS) is charged with strictly regulating the distribution of CBD oil.⁸⁷

Under the law, the DPS must create a secure registry of patients with intractable epilepsy and physicians who treat the disease.⁸⁸ The bill requires the DPS to license at least three dispensaries by September 1, 2017.⁸⁹ Licensed dispensaries will be allowed to grow, manufacture, and distribute the low-THC cannabis derivative to prescribed patients.⁹⁰

that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

80. *Jeb Bush Discusses Hot Topics with Joe Mathieu*, WBZ NEWS RADIO, <https://embed.radio.com/clip/59874127/#>. (last visited Feb. 28, 2016).

81. *Bush: ‘40 Years Ago I Said I Smoked Marijuana’*, CNN (Sept. 16, 2015), <http://www.cnn.com/videos/politics/2015/09/16/gop-debate-cnn-debate-8p-15.cnn>.

82. *See id.* (noting that Chris Christie has called for enforcement of federal marijuana legislation); Conor Friedersdorf, *Ben Carson: Intensify the War on Drugs*, ATLANTIC (Oct. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/10/ben-carson-intensify-the-war-on-drugs-and-keep-marijuana-illegal/411868/> (quoting Ben Carson as saying he would “intensify” the war on drugs); Christopher Ingraham, *Republican Voters to Feds: Butt Out of Marijuana Reform*, WASH. POST (Aug. 25, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/25/republican-voters-to-feds-butt-out-of-marijuana-reform/> (noting Marco Rubio’s stance that federal laws on marijuana should be enforced).

83. S.B. 339, 84th Leg., R.S. (Tex. 2015); *Governor Abbott*, *supra* note 1.

84. *CURE Promotes Research on CBD-Rich Marijuana*, CURE EPILEPSY, <http://www.cureepilepsy.org/research/cbd-and-epilepsy.asp> (last visited Feb. 28, 2016).

85. *Governor Abbott*, *supra* note 1.

86. *Id.*

87. S.B. 339, 84th Leg., R.S. (Tex. 2015).

88. *Compassionate Use Program*, TEXAS DEP’T PUB. SAFETY, <https://www.txdps.state.tx.us/rsd/CUP/index.htm> (last visited Feb. 28, 2016).

89. *Id.*

90. *Id.*

Governor Abbott remains adamant that this narrowly tailored legislation does not foreshadow further steps to legalize medicinal or recreational marijuana.⁹¹ At the signing of the bill he stated, “I remain convinced that Texas should not legalize marijuana, nor should Texas open the door for conventional marijuana to be used for medicinal purposes. As governor, I will not allow it; SB 339 does not open the door to marijuana in Texas.”⁹²

C. *Harris County First Chance Program*

Harris County changed the arrest policy for first-time offenders who are found in possession of two ounces or less of marijuana. The First Chance Intervention Program began as a pilot program in October 2014.⁹³ The District Attorney’s Office introduced the program, and it is operated in conjunction with the Harris County Sheriff’s Office and the Houston Police Department.⁹⁴ The program offers first-time offenders who are in possession of two ounces or less of marijuana a chance to avoid being charged.⁹⁵ There are two tracks for offenders to avoid a charge. They may either do eight hours of community service and not violate any laws for sixty days or take an eight-hour class and not violate any laws for ninety days.⁹⁶ The program only applies to offenders who have never had any previous convictions or deferred adjudications for any offense (class B misdemeanor or greater).⁹⁷

Because of the pilot program’s success, the program is now mandatory county-wide.⁹⁸ District Attorney Devon Anderson stated that during the pilot program over 93% of participants were successful in avoiding further trouble with the law.⁹⁹ She maintains the program “frees up law enforcement, jail, prosecution, and court resources that would otherwise be

91. Associated Press, *Abbott Signs Bill to Legalize Medical Cannabis for Epilepsy*, KHOU (June 1, 2015, 4:32 PM), <http://www.khou.com/story/news/local/texas/2015/06/01/abbott-signs-bill-to-legalize-medical-marijuana-for-epilepsy/28322209/>.

92. Hershaw, *supra* note 3.

93. Press Release, Devon Anderson, Dist. Attorney, DA Anderson Announces New Program for Class B Marijuana Possession Arrests (Oct. 1, 2014), <http://harriscountyyda.com/NewsData.ashx?id=234&aid=530>.

94. *Id.*

95. *Id.*

96. *1st Chance Intervention Program*, OFFICE DIST. ATT’Y, <http://app.dao.hctx.net/OurOffice/FirstChanceIntervention.aspx> (last visited Feb. 28, 2016).

97. *Id.*

98. Wetzels, *supra* note 2.

99. *Id.*

expended in the arrest and prosecution of the offender.”¹⁰⁰ However, Anderson insists that this is not a step toward legalization and is in fact not even decriminalization because the offense is still seen as a crime.¹⁰¹

V. CONCLUSION

Texas officials insist implemented changes in marijuana regulation are not indicative of liberalization. When viewed in light of the trend towards liberalization nation-wide, however, further changes seem likely. Decriminalization and legalization can be justified on multiple grounds. Politicians and officials are increasingly commenting on the problems of over-incarceration. Additionally, at least some medical uses are gaining widespread acceptance. Finally, the financial advantages in legal marijuana systems are undeniable. Texas may be slow to change, but the momentum is in favor of liberalization of marijuana regulation.

100. *1st Chance Intervention Program*, *supra* note 96.

101. Wetzel, *supra* note 2.