Opinion: Legal and political analysis of Regulate Marijuana Like Wine

By Steve Kubby

Medical marijuana is under assault like never before. Multiple federal agencies including the IRS, DEA, and DOJ all have their own proprietary programs to end California's experiment with the medicalization of cannabis.

Furthermore, an increasing number of voters are fed up with what they perceive as abuses of the MCDs and the easy access to cannabis for young people who otherwise appear healthy. For many in California, "medical marijuana has become a joke."

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In addition to the federal assault, two recent decisions in state appellate courts have ruled that local jurisdictions can ban dispensaries. In Riverside v. Inland Patients, the court ruled that nothing in state law prevents cities or counties from banning dispensaries. In a similar case in Long Beach, the court went even further and ruled that only the federal government can regulate marijuana and any attempt by a local jurisdiction is illegal and a violation of the Controlled Substance Act.

California laws "do not provide individuals with inalienable

rights to establish, operate or use" dispensaries, nor do they say that dispensaries "shall be permitted within every city and county," wrote Justice Carol Codrington for a unanimous court in City of Riverside v. Inland Empire Patients Health and Wellness Center. California law expressly allows localities to regulate dispensaries and restrict their locations, Codrington wrote, adding that a total ban is "simply a means of regulation or restriction."

In the days since the ruling was announced, a number of localities have already either moved to enact bans or halted plans to regulate dispensaries.

Fortunately, our campaign team saw this coming a year ago when Michele Leonhart was confirmed as Obama's choice to head the DEA. During her confirmation hearing in the Senate, she was asked if she intended to uphold Obama's promise to respect state laws on medical marijuana and she didn't hesitate to say no, it's illegal under federal law and that she intended to enforce the law. We knew then that current laws would not protect dispensaries, growers or patients and we needed to create new laws, as well as a new legal strategy to overcome the many hurdles that we now face.

To understand the revolutionary and widespread benefits of the Regulate Marijuana Like Wine Act, we must begin by asking, "Why didn't Prop. 215 protect patients from arrest? After all, we specifically said that 215 Exempts patients and caregivers."

The biggest problem is that we assumed "exempts" meant "protects from arrest," but we didn't say that. Instead, by saying "exempts" we laid the groundwork for prosecutors to define the "affirmative defense" as our "exemption". So it is clear that any future initiative needs to specifically and clearly spell it out. This is exactly what we do in RMLW2012:

(b)(6) This Act enjoins the search, arrest, prosecution,

property seizure, asset forfeiture, eradication costs, and/or any criminal or civil penalty, or sanction, for activity authorized herein.

(Note: “enjoins” is a legal term that means legally prohibited from doing something)

The next major problem with 215 is that it failed to remove bad laws from the books. California’s medical marijuana laws are not in conflict with the CSA or federal drug laws, as they merely decriminalizes possession and cultivation of marijuana statewide, for certain individuals, in a defined medical class. Nothing in the CSA or federal law requires California to pass any state laws outlawing marijuana use, possession, sales or cultivation. However, by stopping at decrim, instead of repeal, we left the door wide open for police and prosecutors to find ways to charge bona fide patients, who were compliant with 215, with criminal activity nevertheless. RMLW fixes this problem by repealing all those terrible marijuana laws:

(b) This act does all of the following:

(1) Repeals California Health and Safety Code sections 11357, 11358, 11359, 11360, 11361, 11485, Vehicle Code section 23222(b). Marijuana is removed from Health and Safety Code sections 11364 through 11375, 11366, 11366.5, 11469 through 11495, 11532(b)(7), 11590, 11703, and 11999. Adults 21 years of age and older, and approved business entities shall no longer be prohibited from association, use, possession, trade, processing, packaging, gifting, vending, sales, distribution, storage, transportation, production, or cultivation of marijuana. This act establishes rights not defenses.

Notice that in the last sentence, we state that RMLW is establishing actual civil rights, not just affirmative defenses.

The final major problem with 215 is it didn’t prohibit the

Feds from simply buying the cooperation of local police and prosecutors. For example, last month the Feds gave California $72 million to arrest and prosecute marijuana growers and sellers. That money goes directly to police and prosecutors who understand they are being paid to make marijuana arrests and to obtain convictions. RMLW puts an end to this bribery under color of law and specifically forbids any cooperation by state officers with federal agents:

(e) State, local, elected, appointed, hired employees, officers, and officials shall not directly or indirectly cooperate with or assist federal, state, local officers or officials, volunteers, or employees who eradicate marijuana, act for seizure or forfeiture, or to defeat any liberally construed purpose of this Act, nor may any state or local agency contract to eradicate marijuana that is being grown, manufactured or stored under the provisions of this act.

Another important feature of RMLW is that no longer will kids get a criminal record or be locked up with career criminals for minor marijuana crimes, since we remove all criminal penalties and replace it with a stiff civil fine of $2,500 instead.

Of course, we expect the feds to challenge RMLW in the courts once it passes. We welcome such legal challenges. According to William McPike, “The law is all about challenge. A good initiative should challenge the law and even be prepared to lose a few clauses in court battles. Because of the Severance Clause we would still have enough rights and protections under our new initiative, to block the feds from enforcing their laws. For example, our non-cooperation clause, just by itself, is a powerful tool for ending Federal raids and prosecutions.”

Mr. McPike also points out the the attorney general must defend these cases, as specifically required by RMLW, so we won’t have any big litigation costs and we can still submit our own amicus briefs to ensure we make good arguments in

court.

We believe that once this voter initiative passes, we will have the upper hand in court. Firstly, we believe the recent unanimous U.S. Supreme Court decision in Bond v. US can be used to argue the Tenth Amendment provides states with sovereign powers:

“Some of these liberties are of a political character. The federal structure allows local policies “more sensitive to the diverse needs of a heterogeneous society,” permits “innovation and experimentation,” enables greater citizen “involvement in democratic processes,” and makes government “more responsive by putting the States in competition for a mobile citizenry.” Gregory v. Ashcroft, 501 U. S. 452, 458 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the states. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. See ibid. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”

Secondly, we note that NORML is currently mounting a legal challenge to the Federal raids, by relying upon the same Ninth and Tenth Amendment arguments that we do. Finally, like the NORML attorneys, we are eager to set the record straight regarding Gonzalez v. Raich to show that the Commerce Clause can only be applied where there is a contract between an

individual and the Federal government in which they are paid by the government not to grow more than an agreed upon amount of a crop.

But wait. How will voters respond to such a radical and far-reaching measure as RMLW2012? According to our latest poll and analysis, voters absolutely love this new initiative. Here's the report from Angelo Paparella, CEO of PCI Consultants:

PCI Consultants Inc. has collected over 47 million signatures, qualifying 250 plus measures across the country, and we have provided analysis for measures over the past 20 years.

This past week we put the new Regulate Marijuana Like Wine petition in play with five of our primary coordinators statewide. They in turn distributed it out to approximately 150-165 or so circulators throughout California. At the time of this report (Nov. 13) we've amassed 10,421 signatures in six days. Approximately 7,000 of these signatures have been validated to date and we are running at 75.3 percent valid rate thus far.

We did a simple categorization of responses by having petition circulators ask the public to grade the petition on an A, B, C basis whereby A was the best grade – meaning the petition was of great importance as a topic that deserved a statewide vote – on down to C as the lowest. Note that in the past the only petitions to get an "A" rating have been the slam-dunk issues at the ballot, such as increasing the minimum wage or support local governments or medical marijuana when it first came out.

About 75 percent of the circulators said the public rated the petition as an "A". About 20 percent rated the petition a B – either the Marijuana petition was duly deserving, but other matters like resolving California's pension system were probably more urgent. The other 5 percent fell into the indifference C category, "I signed to help you make your rent, buddy." Those 5 percent are typical of any petition drive,

people signing just “because” with no affinity for the issue.

One interesting response that we did not anticipate and we heard numerous times, especially from the better educated (and therefore the most likely voters), is the “medical dispensaries are such a mess, let’s just legalize it and be done.” Other responses were quick and to the point, “yeah, it’s time” or “let’s collect taxes on marijuana sales”.

My reading of the notes from the five statewide coordinators is that a marijuana petition would probably be a stopper (an issue the public goes out if its way to sign) – a lead issue amongst a majority of circulators. That is typically a really good sign for success at the ballot.

Also, we have this report from our statewide volunteer field coordinator, M. Barnes:

“In our experience, drawing someone to the table is as easy as asking, ‘Will you help us legalize marijuana this year?’ The simple question stops people in the tracks and the signature is usually as easy as asking what county they are registered to vote in. Several paid petitioners have asked to use our petition as a leader for the death penalty one they were circulating. It was a much easier draw for them. Public opinion in this state seems to expect legalization as a given, they seem tired of the complications. Most signers do not have questions until after they sign. When they want details it seems like what they really want is talking points.”

That’s right, paid petitioners are asking to carry our petition for free, just because RMLW is such a powerful magnet for drawing voters to come and sign our petition, so that these petitioners can then get signatures on their paid petitions.

The latest Gallup Poll, which shows support for legalization has soared in just two years from 46 percent to 50 percent, with 55 percent support documented for the West. Just look at

the graph and you can see that we have clearly reached a tipping point:

The November 2012 presidential election affords proponents of a ballot initiative to change state law concerning the regulation of marijuana a strong opportunity for success. The most significant consideration is that the California electorate for the next presidential election will be considerably younger. Our analysis indicates that 21 percent of all voters will be under the age of 35, compared to just 16 percent in the November 2010 election. Also, in November 2010, 27 percent of voters were ages 65 and older but in November 2012 seniors are expected to comprise 20 percent of the electorate. As the table below shows, the composition of the electorate will be more advantageous for our initiative, as a greater share of the electorate will be under the age of 40.

Age Group	**Prop. 19 Yes Vote (Field Poll-10/31/10)**	**Percent of Nov. 2010 Electorate**	**Percent of Nov. 2012 Electorate**	**Difference**
18-39	54%	21%	30%	+9%
40-49	39%	17%	20%	+3%
50-64	47%	35%	30%	-5%
65+	29%	27%	20%	-7%

Steve Kubby is CEO of Strategic Campaigns LLC and serves as chief officer and campaign chairman for a new California voter initiative to Regulate Marijuana Like Wine.
