

Ingham County Bar Association

BRIEFS



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Cannabis Law Update:

Second [Amendment] Edition

By Alexander S. Rusek and John Fraser



Alexander S. Rusek
arusek@fosterswift.com

More than half of Americans now have access to legal recreational cannabis in their state. As of the date of this article, 23 states have legalized cannabis for adult recreational use and 40 states have legalized cannabis for medical use.¹ Cannabis occupies an incredibly tenuous position in our nation’s federal system, as states continue to serve as “laboratories of democracy” on this issue—despite cannabis’s persisting illegality under federal law. The state-federal conflicts surrounding the topic of cannabis create an ever-increasing number of issues for practitioners to navigate. In particular, significant confusion surrounds the interplay of constitutional principles, federal laws, and state laws when it comes to cannabis use and the purchase and possession of firearms. On May 30, 2023, the St. Paul Field Division of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) attempted to clarify any ambiguity in these overlapping and intertwined laws by issuing a statement² setting forth that “Regardless of the recent changes in Minnesota law

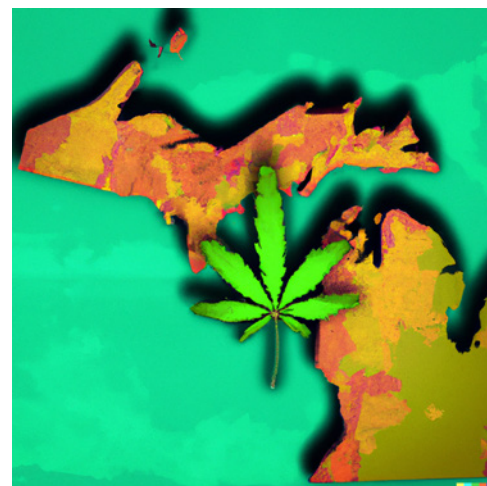


John Fraser
jwfraser@dykema.com

related to the legalization of marijuana, an individual who is a current user of marijuana is still federally defined as an ‘unlawful user’ of a controlled substance and therefore is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.”³ This position is not a new one for the ATF.⁴ It is also important to note that this prohibition is not limited to only persons who actively use cannabis before or during their use of firearms (which should never be done). This article will explore the historical underpinnings of Michigan’s cannabis laws, the Second Amendment, and the future of both.

America’s Historical Love of Guns and Cannabis

America has a long history with and affliction for firearms of all kinds. As noted by the Supreme Court of the United States in *Heller*, “By the time of the founding, the right to have arms had become fundamental for English subjects.”⁵ Enshrined in the Bill of Rights, “[t]he Second Amendment provides: ‘A well regulated Militia,



being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶

The *Heller* Court held that “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not, see, e.g., *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).”⁷ The Court further stated that “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions

and qualifications on the commercial sale of arms.”⁸

That fundamental right is still exercised today by a large portion of Americans. According to a June 2021 Pew Research Center survey, four-in-ten adults in the United States reported living in a household with a firearm, with 30% reporting that they personally own a firearm.⁹ A 2019 Gallup poll found that firearm owners were most likely to cite personal safety or protection as the primary reason they owned a firearm.¹⁰ In 2023 so far, there have been more than 200 mass murders committed with firearms in America (wherein a mass shooting is defined as an event where four or more people are injured or killed).¹¹ Not surprisingly, about half of Americans report seeing gun violence as a very big problem in the country.¹²

Cannabis, too, has deep roots in America’s early history. The cannabis plant is one of humanity’s earliest domesticated plants with recorded uses in China, Ancient Greece, and Ancient Rome—dating back over 12,000 years.¹³ The cannabis plant has been used for millennia for textiles and for its medicinal and recreational properties. Given humanity’s long and historic use of the cannabis plant—it is perhaps unsurprising that cannabis played a critical role in the founding of our country. Indeed, in 1619 colonial Jamestown, colonists were required by law to grow cannabis because of how fundamentally important cannabis was to the success of the colony as a source of textiles, medicine, and likely for recreational purposes as well.¹⁴ Some colonies also offered “bounties”—financial incentives for colonists to

cultivate cannabis. Some famous colonial cannabis farmers include George Washington, Thomas Jefferson, and James Madison—among many other founding fathers.¹⁵ Interestingly, if you make a visit to Mount Vernon today, you will find fields filled with cannabis plants, a historically accurate testament to George Washington’s home.¹⁶

The Evolution of the Legality of Cannabis

It is important to highlight how recent the trend of cannabis prohibition actually is. Cannabis was legal in the United States from (and before) the founding of the country until 1937, when the Marihuana Tax Stamp Act was enacted.¹⁷ Prior to the passage of the Marihuana Tax Act of 1937, cannabis extract was commonly found at drug stores and general stores across the country.¹⁸ The Marihuana Tax Act has its own sordid history, as it was principally advanced at the direction of Harry Anslinger, who was the director of the Federal Bureau of Narcotics. Mr. Anslinger’s principal motivation in advancing the Marihuana Tax Act was not public health or good policy; instead, it was based in racial animus directed towards people who are Black and Latino with Anslinger arguing that cannabis was to blame for “satanic” jazz music among other horrible charges.¹⁹

The Marihuana Tax Act would eventually be declared unconstitutional by the United States Supreme Court in *Leary v. United States*;²⁰ however, cannabis would face prohibition again a year later with the enactment of the Controlled Substances Act of 1970 (“CSA”).²¹ While there is much more

to the story to be told, the end result following the enactment of the CSA was the classification of cannabis as a Schedule I drug, which is the schedule reserved for drugs with a high potential for abuse and no currently accepted medical use in treatment in the United States.²² Despite the fact that a majority of states have flatly rejected this classification by passing laws permitting medical use of cannabis and 23 more have adopted laws to permit recreational use of cannabis by adults age 21 and up, cannabis remains a Schedule I drug to this day under federal law.²³

Stateside, in the 1950s, Michigan legislators (and others across the nation) passed numerous laws imposing severe criminal penalties for the possession of cannabis.²⁴ It would not be until 1996 that a state would legalize medical cannabis use (California).²⁵

In 2008, Michigan voters voted to amend Michigan’s Constitution through Proposal 1, which permitted medical cannabis patients to possess up to two and a half ounces of cannabis. In 2016, Michigan enacted laws creating and regulating medical cannabis dispensaries in the state, including the taxation of medical cannabis. In 2018, Michigan voters once again took to the polls and approved the Michigan Regulation and Taxation of Marihuana Act. Under these new laws, adults over 21 years old in Michigan can possess and consume cannabis recreationally under state law.

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