

INDUSTRIAL HEMP:
HOW THE CLASSIFICATION OF INDUSTRIAL HEMP AS
MARIJUANA UNDER THE CONTROLLED SUBSTANCES ACT
HAS CAUSED THE DREAM OF GROWING INDUSTRIAL
HEMP IN NORTH DAKOTA TO GO UP IN SMOKE

I. INTRODUCTION

In 1999, the North Dakota Legislative Assembly passed a bill which legalized the ability of any person in the state of North Dakota to “plant, grow, harvest, possess, process, sell, and buy industrial hemp. . . .”¹ The bill was codified in North Dakota Century Code section 4-41-01 and allowed the production of industrial hemp as long as it possessed “no more than three-tenths of one percent tetrahydrocannabinol [THC].”² The bill’s passage made North Dakota the first state to allow the production of industrial hemp.³

But North Dakota farmers have been unsuccessful in their attempts to grow industrial hemp in compliance with the North Dakota Century Code.⁴ Each branch of the United States government has refused to allow the production of industrial hemp, due to the classification of industrial hemp as marijuana under the federal Controlled Substances Act (CSA).⁵ This classification has prevented North Dakota farmers from growing industrial hemp, as the cultivation of hemp remains illegal under federal law.⁶

1. H.B. 1428, 56th Legis. Assem. (N.D. 1999).

2. N. D. CENT. CODE § 4-41-01 (2008).

3. JEAN M. RAWSON, CONG. RESEARCH SERV., HEMP AS AN AGRICULTURAL COMMODITY (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL32725.pdf>.

4. See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (holding that Drug Enforcement Agency (DEA) regulations prevent North Dakota farmers from growing industrial hemp). Oral argument before the Eighth Circuit Court of Appeals took place on November 12, 2008. See *David Monson v. Drug Enforcement*, No. 07-3837, available at http://www.ca8.uscourts.gov/cgi-bin/new/getDocs.pl?case_num=07-3837. As of the publication of this article, no decision by the Eighth Circuit has been made. *Id.*

5. See *id.* (holding that the federal courts will not classify industrial hemp separately from marijuana); see also Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1009ih.txt.pdf (introducing legislation designed to separate industrial hemp from marijuana); Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, DEA, to Roger Johnson, Commissioner, North Dakota Department of Agriculture (Mar. 27, 2007), available at http://votehemp.com/PDF/DEA_Letter_to_NDDA_03272007.pdf. [hereinafter DEA Letter] (explaining that the DEA does not distinguish industrial hemp from marijuana).

6. See generally *Monson*, 522 F. Supp. 2d at 1191-93 (discussing how the CSA’s classification of industrial hemp as marijuana prevents the petitioners from growing industrial hemp in North Dakota).

The purpose of this note is to provide an overview of the CSA's classification of industrial hemp and its impact on North Dakota farmers. This note illustrates these ideas by providing a brief background on the historical, scientific, and economic implications of industrial hemp.⁷ This note also examines the progression of industrial hemp law, including the Marihuana Tax Act and history and role of the CSA, which will enable a better understanding of the current state of industrial hemp law locally and nationally.⁸ The development of these topics requires a closer look at broader legal and public policy issues such as federalism, the proper role of Congress's authority to regulate industrial hemp through the Commerce Clause, judicial interpretation of the Marihuana Tax Act, and enforcement of industrial hemp laws.⁹ Before discussing specific legal arguments, a brief background of industrial hemp is provided.¹⁰

II. BACKGROUND OF INDUSTRIAL HEMP

Section A provides a brief historical background of industrial hemp from its inception and introduction in North America to the end of legal cultivation of industrial hemp in the United States. The next section focuses on the scientific background of industrial hemp. Finally, section C discusses the economic implications of the global and North Dakota markets in order to establish the economic feasibility of growing industrial hemp.

A. HISTORICAL BACKGROUND OF INDUSTRIAL HEMP

Hemp was one of the first plants cultivated by man.¹¹ From its beginning, hemp has been used throughout the world for its fiber, seed, and its psychoactive effect.¹² Industrial hemp was introduced to America sometime around 1545 and was cultivated as early as 1611 in the Jamestown colony.¹³

7. See discussion *infra* Part II.A-C.

8. See discussion *infra* Part III.B; see also Part V.A-B.

9. See discussion *infra* Part VII.A-D.

10. See discussion *infra* Part II.A-C.

11. DAVID G. KRAENZAL ET AL., INST. FOR NATURAL RES. & ECON. DEV., N.D. STATE UNIV., AGRIC. ECON. REPORT NO. 402, INDUSTRIAL HEMP AS AN ALTERNATIVE CROP IN NORTH DAKOTA, A WHITE PAPER STUDY OF THE MARKETS, PROFITABILITY, PROCESSING, AGRONOMICS, AND HISTORY 15 (1998), available at <http://votehemp.com/PDF/aer402.pdf>.

12. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 1-2 (1974). Although all uses of the hemp plant began thousands of years ago, usage of the plant differed from one civilization to the next. *Id.* at 1. The hemp plant has been used for three main purposes: the fiber is used for making rope, twine, and cloth; the seeds are used for drying oil and bird food; and the resin is used as a psychoactive agent, used for medicinal and religious purposes, as well as an intoxicant. *Id.*

13. *Id.* at 2-3.

People widely accepted hemp in the early American republic.¹⁴ Hemp was used by prominent leaders, such as Benjamin Franklin for printing, and by George Washington and Thomas Jefferson for planting.¹⁵ The American hemp industry continued to grow throughout the beginning of the new republic, reaching its peak in the mid-1800s.¹⁶ By 1890 the labor intensive hemp industry had been effectively replaced by the development of new technology in the cotton industry.¹⁷ This resulted in a dramatic decrease in domestic production of industrial hemp.¹⁸ However, the cultivation of the hemp plant since the colonial era resulted in growing it along roads and in the fields of almost every state.¹⁹ Through the end of the nineteenth century, the hemp plant and industrial hemp were familiar and acceptable fixtures in America, as the use of the hemp plant for drug use was not yet introduced to America.²⁰

Apart from its commercial uses, hemp also became a popular medical treatment in the mid-nineteenth century.²¹ During this time, evidence suggests that the primary use of the drug was for legitimate medical purposes.²² It was not until the early twentieth century that the use of the hemp plant as a psychoactive drug became prevalent in America.²³ The introduction of the hemp plant as a drug originated from Mexico rather than from Europe, which transported hemp for fiber, oil, and medicinal uses to America.²⁴ The fact that the negative drug use of the hemp plant originated in Mexico rather than Europe has substantially impacted the approach of policy-makers.²⁵

14. KRAENZAL ET AL., *supra* note 11, at 16.

15. *Id.*

16. RAWSON, *supra* note 3, at 1. Productive uses of hemp grown in the United States from the colonial period to the mid-eighteenth century included “both fine and coarse fabrics, twine, and paper.” *Id.*

17. *See* BONNIE & WHITEBREAD, *supra* note 12, at 3 (indicating that the cost-effective cotton industry primarily replaced the demand for industrial hemp).

18. *Id.*

19. *Id.*

20. *See id.* (explaining that smoking hemp as an intoxicant had not yet emerged “on any significant scale in preindustrial America”).

21. *Id.* at 4.

22. *See id.* (“by the middle of the nineteenth century the use of the hemp plant for fiber, seed, and medicine was well established. . . in the United States”).

23. *Id.* at 32.

24. *Id.*

25. *See id.* at 5, 39 (suggesting that the prejudice and negative connotations of Americans toward Mexican immigrants in the early twentieth century also contributed to the gradual prohibition of marijuana since the use of hemp as a drug was linked with its “Mexican origins, and sometimes to the criminal conduct which inevitably followed when Mexicans used the ‘killer weed’”).

By the 1930s, the use of marijuana as a psychoactive drug seemingly overshadowed the productive, legitimate uses of the plant.²⁶ As the industrial hemp industry waned, federal legislation prohibiting marijuana for illegitimate purposes increased.²⁷ During World War II, however, in response to a shortage of hemp for ropes used on ships, the federal government began to encourage the production of industrial hemp.²⁸ Through the United States Department of Agriculture (USDA) the United States government launched “Hemp for Victory,” which promoted the domestic production of industrial hemp.²⁹ The United States government described the effort as “patriotic” as it distributed 400,000 pounds of hemp seeds with the goal of planting 50,000 acres of industrial hemp.³⁰

The production of industrial hemp in America dramatically decreased after its resurgence in World War II.³¹ Increased competition from synthetic fibers, along with the Marihuana Tax Act, made the American hemp industry impractical, which resulted in fewer acres of planted hemp.³² Production of industrial hemp in America virtually ended by 1958.³³

Another reason for the decline of the American hemp industry was due to the increased anti-drug sentiments, which resulted in states passing more laws restricting the cultivation of the hemp plant.³⁴ The public perception linked the industrial uses of hemp with the intoxicating uses of marijuana, ultimately contributing to the subsequent classification of the entire hemp plant, regardless of its purpose, as a Schedule I controlled substance under the CSA.³⁵ However, a closer evaluation of the scientific background of the hemp plant illustrates that industrial hemp and marijuana are not only distinguished by their uses, but also by their scientific makeup.³⁶

26. *Id.* at 21. By the 1930s, American public opinion towards hemp (marijuana specifically) shifted as the image of drug users as accidental victims took on a more negative meaning such as “dope fiend” or “street” user. *Id.*

27. *Id.* at 15-16.

28. Transcript of 1942 United States Department of Agriculture Film, *Hemp for Victory*, available at http://www.globalhemp.com/Archives/Government_Research/USDA/hemp_forvictory.shtml. [hereinafter *Hemp for Victory*].

29. KRAENZAL ET AL., *supra* note 11, at 17.

30. *See id.* (indicating that the resurgence in hemp was an insurance measure due to supplies being cut off from the Philippines); *see also Hemp for Victory*, *supra* note 28, ¶ 4 (describing the American production of industrial hemp as a “patriotic” cause).

31. RAWSON, *supra* note 3, at 2.

32. *Id.*

33. *Id.*

34. *See id.* (explaining that thirty-three states passed laws, between 1914 and 1933, limiting the cultivation of the hemp plant).

35. *See* discussion *infra* Part IV.A-B.

36. *See* discussion *infra* Part II.B.

B. SCIENTIFIC BACKGROUND OF INDUSTRIAL HEMP

Industrial hemp is classified under the genus *Cannabis*.³⁷ Marijuana and industrial hemp derive from different portions of the plant popularly known as the hemp plant.³⁸ The plant is designated as *Cannabis sativa* in the Linnaean system of botanical classification (*Cannabis sativa L.*)³⁹ Generally, the flower or leaves of the hemp plant are the portions of the plant that produce the drug marijuana, whereas the stalk produces the industrial products.⁴⁰

Legislative history suggests that Congress accepted the name *Cannabis sativa L.* for the hemp plant, believing it to be the common description within the scientific community.⁴¹ This categorization combined all marijuana-producing *Cannabis* plants.⁴² Therefore, any hemp plant capable of producing any amount of THC was classified as *Cannabis sativa L.* under the CSA.⁴³

Both industrial hemp and marijuana contain THC, which is responsible for the psychoactive effect linked to illicit drug use.⁴⁴ But industrial hemp contains much lower levels of THC.⁴⁵ While the THC levels of marijuana range between 4 and 20%, industrial hemp's THC levels are .3% or less.⁴⁶ The large disparity in THC levels between marijuana and industrial hemp has led many in the scientific community to contend that marijuana and industrial hemp should be differentiated by their biochemical, rather than physical, composition.⁴⁷

37. DAVID P. WEST, HEMP AND MARIJUANA: MYTHS & REALITIES 5 (N. Am. Indus. Hemp Council White Paper Series No. 1, 1998), available at <http://www.gametec.com/hemp/naihc.hemp.mj.pdf>.

38. N.H. Hemp Council, Inc. v. Marshall, 203 F.3d 1, 3 (1st Cir. 2000). In *New Hampshire Hemp Council*, a New Hampshire farmer sought a declaration that Congress's definition of marijuana did not include industrial hemp products. *Id.* at 3-4. The First Circuit Court of Appeals held that although the issue of whether the CSA includes all *Cannabis sativa* plants is not clear, a literal reading of the CSA demonstrates that Congress intended to combine industrial hemp within the definition of marijuana. *Id.* at 8.

39. *Id.* at 3.

40. *Id.*

41. *United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006) (quoting *United States v. Gavic*, 520 F.2d 1346, 1352 (8th Cir. 1975)).

42. *Id.*

43. *See id.* at 1073 (noting that the language of the CSA encompasses any material containing any quantity of THC).

44. WEST, *supra* note 37, at 8.

45. KRAENZAL ET AL., *supra* note 11, at 5.

46. *See id.* (discussing the THC levels of industrial hemp and marijuana); *see also* *Hemp Indus. Ass'n v. DEA (Hemp I)*, 333 F.3d 1082, 1085 (9th Cir. 2003) (quoting Petitioner's Reply on Emergency Motion for State, Exh. 2 Crew Dec. at 2) (explaining that analytical testing has determined that a "THC Free" status, in "terms of a true zero" is impossible).

47. WEST, *supra* note 37, at 7-8.

Another chemical shared by both industrial hemp and marijuana is Cannabidiol (CBD).⁴⁸ CBD is unique because it is not intoxicating and it also moderates the euphoric effect of THC.⁴⁹ Marijuana, which has disproportionately higher levels of THC than industrial hemp, also contains lower levels of CBD.⁵⁰ The higher THC and lower CBD concentration gives marijuana its psychoactive effect.⁵¹ Conversely, industrial hemp's low THC levels and comparatively high CBD levels produce none of the intoxicating effects of marijuana.⁵²

Although industrial hemp and marijuana share the same psychoactive drug, THC, it would be absurd to consider industrial hemp a drug.⁵³ Accordingly, to obtain a psychoactive effect from smoking industrial hemp with even one percent THC, which contains three times more THC than regular industrial hemp, would require the user to smoke approximately twelve hemp cigarettes within minutes.⁵⁴ The amount of smoke and inhalation required to create a euphoric high would be difficult for a person to accomplish, much less enjoy.⁵⁵

The USDA describes industrial hemp and marijuana as indistinguishable in appearance.⁵⁶ However, when industrial hemp is grown for fiber, it is easily distinguishable from hemp that is grown for illicit purposes.⁵⁷ Visually, industrial hemp plants are noticeably taller and spaced closer together than marijuana plants.⁵⁸ While marijuana is grown to augment the THC content, industrial hemp is grown to maximize its production

48. Karl W. Hillig & Paul G. Mahlberg, *A Chemotaxonomic Analysis of Cannabinoid Variation in Cannabis (Cannabaceae)*, 91 AM. J. OF BOTANY 966, 966 (2004), available at <http://www.amjbot.org/> (scroll to bottom of homepage, search for article, click on PDF hyperlink).

49. Joan T. Pickens, *Sedative Activity of Cannabis in Relation to its delta'-trans-Tetrahydrocannabinol and Cannabidiol Content*, 72 BR. J. PHARMAC. 649, 649 (1981); see also Ernest Small & David Marcus, *Hemp: A New Crop with New Uses for North America*, TRENDS IN NEW CROPS AND NEW USES 284, 291 fig. 9, 292 (2002) [hereinafter *New Crop*], available at <http://www.hort.purdue.edu/newcrop/ncnu02/v5-284.html> (click on PDF link).

50. See *New Crop*, *supra* note 49, at 291-92 (noting the inverse relationship between levels of THC and levels of CBD).

51. See *id.*

52. See *id.* (noting CBD reduces the effects of THC).

53. WEST, *supra* note 37, at 11 (quoting William M. Pierce, Associate Professor of Pharmacology and Toxicology at the University of Louisville School of Medicine).

54. *Id.* at 12.

55. *Id.* (quoting Professor Pierce).

56. USDA, INDUSTRIAL HEMP IN THE UNITED STATES: STATUS AND MARKET POTENTIAL 2 (2000), available at <http://www.ers.usda.gov/publications/ages001E/ages001E.pdf>. The USDA concluded that "short of [a] chemical analysis of the THC content, there was no way to distinguish between marijuana and hemp varieties." *Id.* at 2; see discussion *infra* Part VII.D (discussing that the similar appearance between industrial hemp plants and marijuana plants is a significant concern of the DEA regarding drug enforcement).

57. KRAENZAL ET AL., *supra* note 11, at 5.

58. *Id.*

through high-yielding strains that are low in THC.⁵⁹ Since the purpose of growing industrial hemp is to make money and not marijuana, the next section provides an analysis of the economics of industrial hemp.

C. THE ECONOMICS OF INDUSTRIAL HEMP

Industrial hemp produces a variety of products which have been used by nearly every culture for thousands of years.⁶⁰ Worldwide production of industrial hemp has decreased since the end of World War II.⁶¹ However, increased efficiency in industrial hemp cultivation and production, coupled with a growing market for environmentally friendly products, has created a promising future for industrial hemp products.⁶² The success of a potential North Dakota market for industrial hemp relies in large part on the global demand and production of other countries. Therefore, the viability of growing industrial hemp in North Dakota will be in many ways intertwined with the overall global market for industrial hemp.

1. *Global Market*

Currently, more than thirty nations permit the growing of industrial hemp.⁶³ Industrial hemp is also recognized as a legal and legitimate crop in both the North American Free Trade Agreement (NAFTA) and General Agreement on Tariffs and Trade (GATT).⁶⁴ The United States is the only industrialized nation that does not permit the production of industrial hemp.⁶⁵ Other countries, such as Canada, allow hemp production due to its cultivation advantages and growing demand for hemp products in the North

59. RAWSON, *supra* note 3, at 1.

60. BONNIE & WHITEBREAD, *supra* note 12, at 1-5.

61. KRAENZAL ET AL., *supra* note 11, at 17.

62. *See New Crop*, *supra* note 49, at 321 (stating that due to the diversity of products and enthusiastic support from market developers, industrial hemp “is likely to carve out a much larger share of the North American marketplace than its detractors are willing to concede”).

63. *See* RAWSON, *supra* note 3, at 3 (“Approximately 30 countries in Europe, Asia, and North and South America currently permit farmers to grow hemp, although most banned production for certain periods of time in the past.”); *see also* Hemp Industries Association [hereinafter HIA], <http://www.thehia.org/facts.html#Countries> (listing the countries that allow the production of industrial hemp for either commercial or experimental purposes including: Australia, which has commercially produced industrial hemp since 1998; Canada, where farmers have grown hemp crops of “6,000 acres in 2003 and 8,500 acres in 2004, yielding almost four million pounds of seed;” China, which “is the largest exporter of hemp textiles;” France and Spain, which have never prohibited hemp production; and Germany, where Mercedes and BMW use hemp fiber for door panels, dashboards, and other parts).

64. KRAENZAL ET AL., *supra* note 11, at Abstract.

65. RAWSON, *supra* note 3, at 4.

American market.⁶⁶ Moreover, the United States is a leading importer of hemp products.⁶⁷ Currently, the North American hemp market exceeds an estimated \$300 million in annual retail sales.⁶⁸

From fertilizer to paper to food to personal care products, industrial hemp has numerous uses.⁶⁹ There are an estimated 25,000 different industrial hemp products.⁷⁰ The wide range of products and uses makes many industrial hemp products competitive commodities.⁷¹

One of the main reasons for the resurgence of the industrial hemp market is its marketability as a “green” product and its increased demand in retail markets.⁷² Many industrial hemp products have found a niche among environmentally conscious consumers.⁷³ These industrial hemp products include apparel, body care, food products, textiles, and paper.⁷⁴ Consumers have given industrial hemp an “eco-friendly” label because it is easily renewable and because the entire plant can be put to productive use.⁷⁵

Industrial hemp has also been advocated as a bio-fuel.⁷⁶ Hemp oil that has been turned into biodiesel is cleaner and has a higher cetane value than

66. Agriculture and Agri-Food Canada, *Canada's Industrial Hemp Industry*, Mar. 2007, http://www.agr.gc.ca/misb/spcrops/sc-cs_e.php?page+hemp-chanvre (click on “Industrial Hemp” link under Special Crops). Advantages of industrial hemp include:

[I]t can be grown without . . . herbicides . . . it absorbs carbon dioxide five times more efficiently than the same acreage of forest and it matures in three to four months. Hemp can be used to create building materials, textiles, clothing, inks, and paints and has potential use in other non-food products. These advantages are in tune with the environmental and health preferences of today's North American public. The growing curiosity of consumers, the interest shown by farmers and processors, and [North America's] excellent growing conditions for industrial hemp allow optimistic views for its future.

Id.

67. Press Release, Vote Hemp, *Governor Schwarzenegger Vetoes Industrial Hemp Bill*, (Oct. 12, 2007), http://www.votehemp.com/PR/10-12-07_schwarzenegger_vetoes_bill.html.

68. *Id.*

69. See KRAENZAL ET AL., *supra* note 11, at 5, 7 (describing the products and various uses of industrial hemp).

70. *Id.* at 5. Industrial hemp products can be classified in the following nine submarkets: agriculture, automotive, construction materials, cosmetics, food/nutrition/beverages, furniture, paper, recycling, and textiles. *Id.* The specific number of 25,000 uses is more than likely a reference from a 1938 Popular Mechanics magazine advocating hemp as the “New Billion Dollar Crop.” *Id.* at 16.

71. *Id.* at 5.

72. See Marisa Belger, *Hemp: The little plant that could*, TODAYSHOW.COM, Nov. 26, 2007, <http://www.msnbc.msn.com/id/21982584/>.

73. See, e.g., *id.*

74. See HIA, *supra* note 63 (providing a more detailed list of hemp products); KRAENZAL ET AL., *supra* note 11, at 7 fig. 2.

75. Belger, *supra* note 72.

76. Holly Jessen, *Hemp Biodiesel: When the Smoke Clears*, BIODIESEL MAGAZINE, available at http://www.biodieselmagazine.com/article.jsp?article_id=1434 (last visited Oct. 6, 2009).

biodiesel made from either canola or soy.⁷⁷ However, the industrial hemp biodiesel market is relatively nonexistent due to the lack of economic efficiency.⁷⁸

The reason industrial hemp is not grown for biodiesel is that hemp growers can get better prices when they sell hemp for food rather than for biodiesel.⁷⁹ Another obstacle in creating a sustainable hemp-to-biodiesel market is the limited supply of industrial hemp.⁸⁰ Even with growing demand, there is not enough industrial hemp to supply the market, as industrial hemp continues to be a specialty crop.⁸¹ The currently low oil productivity of hemp also contributes to the lack of a hemp-to-biodiesel market as other crops, such as canola, are more productive.⁸²

The potential success and profitability of industrial hemp in America is not an absolute certainty.⁸³ However, if America allowed the growing of industrial hemp, emergence of new technologies and economies of scale would create more efficiency in the hemp market.⁸⁴ Overall, the continued growth in demand for industrial hemp products combined with greater productivity, ingenuity, and product offerings has created a promising global market for industrial hemp products and producers.⁸⁵ Nevertheless, a strong global market does not necessarily transcend to local economies.⁸⁶ Therefore, to determine whether industrial hemp grown in North Dakota will be economically viable, the next section provides an analysis of the state's market.

77. *Id.* Higher cetane value means that the energy source has higher productivity and lower emissions. *Id.*

78. *Id.*

79. *See id.* ¶ 5 (indicating that the return on hemp oil turned into biodiesel is cost prohibitive and would be efficient if the plant did not meet standards or if there was a surplus of the seed).

80. *Id.* ¶ 8.

81. *Id.*

82. *See id.* ¶ 9 (explaining that since the oil used for biodiesel is concentrated higher in canola as compared to industrial hemp and because industrial hemp produces from 700 to 1,200 pounds of seed per acre, it is not as efficient as canola, which can produce anywhere from 1,500 to 2,600 pounds of seed oil per acre).

83. *See* USDA, *supra* note 56, at 25 (“since there is no commercial production of industrial fiber hemp in the United States, the ‘size’ of the market can only be estimated from hemp fiber and product imports”); *see also* RAWSON, *supra* note 3, at 7 (indicating that recent studies have been much more optimistic than the USDA’s study conducted in 2000).

84. KRAENZAL ET AL., *supra* note 11, at 11. *See* Jessen, *supra* note 76, ¶ 11 (quoting the executive director of the Canadian Hemp Trade Alliance, who stated that “[i]f hemp production was allowed in the United States, the unfair stigma directed toward the crop would dissipate . . . [which] would be good for the whole industry . . . and help to increase markets”).

85. *Id.*

86. *See generally* *New Crop*, *supra* note 49, at 321 (describing the optimism of the industrial hemp market cautiously as “the old adage ‘find your market before you plant your seed’ remains sound advice”).

2. *The North Dakota Market*

Agriculture is the largest sector of North Dakota's economy, as it is a \$4 billion industry that employs twenty percent of the North Dakota workforce.⁸⁷ If North Dakota produced industrial hemp, the state would be uniquely positioned through its established grain-processing facilities, making industrial hemp a promising new agricultural product.⁸⁸ Industrial hemp is projected to be as profitable, if not more so, than other crops.⁸⁹

One study regarding the use of industrial hemp and its impact on North Dakota's economy shows that industrial hemp would be a viable alternative rotation crop because it is used to make so many different products.⁹⁰ The production of industrial hemp in North Dakota would create significant economic opportunities for the state and its farmers.⁹¹ The fact that hemp was grown successfully in the southeastern portion of North Dakota in the 1940s is a good indication that it could grow here again.⁹² Growing industrial hemp is also agronomically beneficial to North Dakota farmers as it is "relatively disease free, and is a good rotation crop because it may enhance yields in crops that follow it."⁹³

The "value-added product market is ripe for new technology that can increase the uses for industrial hemp."⁹⁴ If North Dakota were to build a processing plant and focus on production, the state would have a "monopoly on the market."⁹⁵ This comparative advantage would enable

87. *Introduction of Industrial Hemp Farming Act*, 1 (June 23, 2005) (statement of Roger Johnson, N.D. Agriculture Comm'r), available at <http://www.agdepartment.com/Testimony/Testimony2005/IndustrialHempJune2005.pdf>.

88. KRAENZAL ET AL., *supra* note 11, at 9.

89. *See id.* at 12-14 (discussing the profitability of industrial hemp). The expected profitability of North Dakota hemp compared to other crops showed that hemp had a higher dollar return per acre than spring wheat, malting barley, corn, and sunflowers. *Id.* at 13 tbl. 1.

90. *See id.* at 19 (explaining that industrial hemp grown in North Dakota would be a viable alternative rotation crop because it requires few pesticides, is disease free, improves soil health, and may enhance yields in subsequent crops); *see also* James Macpherson, *Hemp Applications to be Taken*, BISMARCK TRIBUNE, Dec. 5, 2006, at 5B ("Industrial hemp would be an alternative cash crop for North Dakota farmers because it's used to make food, clothing, cosmetics, paper, rope and other products.").

91. Letter from Burton L. Johnson, Assoc. Professor, Plant Sci. Dep't and Kenneth F. Grafton, Dean and Dir., N.D. State Univ., Coll. of Agriculture, Food Systems, and Natural Res., to the Office of Diversion Control, DEA (July 27, 2007), available at http://www.votehemp.com/PDF/NDSU_Letter_7-30-2007.pdf [hereinafter NDSU Letter].

92. *See* KRAENZAL ET AL., *supra* note 11, at 19 (noting that the short growing season, rainfall, and soil composition in North Dakota are "all concerns that need to be addressed"). Hemp has also grown naturally in the western part of the state. *Id.*

93. *Id.*; *see* Dictionary.com, <http://dictionary.reference.com/browse/agronomics> (defining agronomy as "the science of soil management and the production of field crops").

94. KRAENZAL ET AL., *supra* note 11, at 11.

95. Sue Roesler, *Proposed legislation licenses industrial hemp processors*, FARM & RANCH GUIDE (2007), http://www.farmandranchguide.com/articles/2007/01/23/ag_news/regional_news

North Dakota farmers to not only grow industrial hemp, but would also allow them to process and distribute their products throughout the world.⁹⁶ Moreover, the cultivation of industrial hemp in North Dakota would also promote technical advances in the overall United States market.⁹⁷

The chief impediment to the development of industrial hemp in North Dakota is not economic conditions or public sentiment.⁹⁸ Rather, Congress's legal definition and interpretation of industrial hemp poses the greatest challenge to North Dakota farmers.⁹⁹ Specifically, the main legal hurdle for North Dakota farmers is the Drug Enforcement Agency's (DEA) classification of industrial hemp as marijuana.¹⁰⁰

III. DEVELOPMENT OF INDUSTRIAL HEMP LAW

Before discussing the DEA's classification of industrial hemp, the authority of Congress to regulate industrial hemp is first discussed. Since producing industrial hemp is an economic activity, the first section will begin with a brief overview of the Commerce Clause.¹⁰¹ Background on the Marihuana Tax Act of 1937 is also discussed in order to gain a better insight into the legislative history and Congressional intent behind the DEA's present-day classification of industrial hemp as a controlled substance under the CSA.¹⁰²

A. CONGRESS'S POWER TO REGULATE INDUSTRIAL HEMP THROUGH THE COMMERCE CLAUSE

The Commerce Clause, under the United States Constitution article I, section 8, vests Congress with the power "[t]o regulate Commerce with

11.txt (quoting Rep. David Monson's testimony before North Dakota legislature on North Dakota Senate Bill 2099); see KRAENZAL ET AL., *supra* note 11, at 9 (explaining that since North Dakota already has established grain processing facilities, including a state-of-the-art oil processing facility, the state's current processing infrastructure would give North Dakota a significant advantage).

96. KRAENZAL ET AL., *supra* note 11, at 19. (defining comparative advantage as "the ability of an individual or group to carry out an economic activity, such as production, at a lower cost and more efficiently than another entity").

97. NDSU Letter, *supra* note 91, at 3.

98. See Vote Hemp, Press Release, *New Poll Shows Strong Voter Support for Industrial Hemp Farming in North Dakota*, Mar. 12, 2008, <http://www.reuters.com/article/pressRelease/idUS227688+12-Mar-2008+PRN20080312> [hereinafter North Dakota Poll] (describing a poll of 807 likely North Dakota voters conducted by Zogby International and showing that seventy-four percent of North Dakotans support regulated hemp farming). The HIA estimates that the North American sales of hemp products exceeded \$330 million in 2007. *Id.* ¶ 2.

99. See generally discussion *infra* Part V.A-B.

100. See discussion *infra* Part V.A-B.

101. See discussion *infra* Part III.A.

102. See discussion *infra* Part III.B.

foreign Nations, and among the several States. . . .”¹⁰³ As expressed in *Gonzales v. Raich*,¹⁰⁴ Congress has the authority to regulate any economic activities that substantially affect interstate commerce.¹⁰⁵ This allows Congress to regulate not only interstate commerce, but also intrastate and local commerce.¹⁰⁶ Congress may also regulate purely local activities so long as the activities are a part of an economic “‘class of activities’ that have a substantial effect on interstate commerce.”¹⁰⁷ Even if the activity is purely local, it still may be regulated by Congress.¹⁰⁸ The production and distribution of industrial hemp is quintessentially an economic activity, as the purpose of its growth is to sell its bi-products throughout the country and the world, placing it squarely under the control of Congress through the Commerce Clause.¹⁰⁹

B. THE MARIHUANA TAX ACT OF 1937

The regulation of marijuana by the federal government began with the passage of the Harrison Act in 1914.¹¹⁰ The Harrison Act, through its regulation of the interstate sale of drugs, laid the foundation for federal law to control narcotic drugs in America.¹¹¹ The main objective of the Harrison Act was to regulate and tax the narcotic trade.¹¹² Through a tax provision, the Harrison Act allowed the federal government to regulate the distribution of illegal drugs at the local level.¹¹³ Since Congress did not at that time establish its power to directly regulate local activity, it instead used its taxing powers through the Harrison Act to facilitate its regulation of the narcotic trade.¹¹⁴ Furthermore, under the Harrison Act, the line between legitimate

103. U.S. Const. art. I, § 8, cl. 3.

104. 545 U.S. 1 (2005).

105. *Raich*, 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

106. *Id.* at 17-18.

107. *Id.* at 17 (citing *Perez*, 402 U.S. at 151 and *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)).

108. *Raich*, 545 U.S. at 18. The Court explained that “a primary purpose of the CSA is to control the supply and demand of controlled substances. . . .” *Id.* at 19. Therefore, in *Wickard*, whose farm products were consumed at home, the Court concluded “that Congress had a rational basis for believing that” those farm products would affect the aggregate price and market conditions. *Id.*

109. See generally *id.* (discussing the history and proper role of the Commerce Clause).

110. BONNIE & WHITEBREAD, *supra* note 12, at 15-16.

111. *Id.* at 16.

112. *Id.*

113. *Id.* (stating that the taxing powers incidentally regulated the distribution of illegal drugs at the local level).

114. *Id.*

and illegal drug use became blurred as all uses of drugs became associated with criminal behavior and street use.¹¹⁵

The Marihuana Tax Act of 1937 was prompted by the inability of state and local governments to combat the use of marijuana as an illegal drug.¹¹⁶ The Marihuana Tax Act, like the Harrison Act, failed to overtly prohibit possessing or selling marijuana.¹¹⁷ Rather, the Marihuana Tax Act “imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana.”¹¹⁸ Although the Marihuana Tax Act did not explicitly pronounce marijuana illegal, the “prohibitively expensive taxes” reduced the marijuana trade.¹¹⁹

The legislative history of the Marihuana Tax Act shows that Congress was informed that hemp products may contain THC.¹²⁰ Experts testified that “hemp seed and oil contain small amounts of the active ingredient in marijuana, but that the active ingredient was not present in sufficient proportion to be harmful.”¹²¹ Moreover, testimony before the committee showed a clear separation between the meaning of industrial hemp and marijuana.¹²²

Congress passed the Marihuana Tax “[w]ith little debate and even less public attention.”¹²³ Furthermore, the federal government, through the Federal Bureau of Narcotics (FBN), prompted state agents to seek a federal remedy to pass the Act.¹²⁴ As a result, the Marihuana Tax Act was neither

115. *See id.* at 17.

116. *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

117. *Id.*

118. *Id.*

119. *Id.*; *see United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006) (describing how legitimate users of industrial hemp were subject to a small tax (one dollar per year), and by contrast, a prohibitively high tax (one hundred dollars per transfer) applied to anyone who had not registered with the government in order to discourage illegal use).

120. *See Hemp Indus. Ass’n v. DEA (Hemp I)*, 333 F.3d 1082, 1088-89 (9th Cir. 2003) (citing Hearing on H.R. 6385, 75th Cong., 1st Sess. 8 (1937) and *Hearing on H.R. 6906 Before the S. Comm. on Finance*, 75th Cong., 1st Sess. 9 (1937)).

121. *Id.* at 1089.

122. *Id.* at 1088-89 (citing S. REP. No. 900, at 1, 4 (1937)). The ninth circuit described the Marihuana Tax Act as follows:

The form of the bill is such . . . as not to interfere materially with any industrial, medical or scientific uses which the plant may have. Since hemp fiber and articles manufactured therefrom are obtained from the harmless mature stalk of the plant, all such products have been completely eliminated from the purview of the bill by defining the term “marijuana” in the bill, so as to exclude from its provisions the mature stalk and its compounds or manufacturers.

Id.

123. BONNIE & WHITEBREAD, *supra* note 12, at 174 (“After less than two pages of debate, the [Marihuana Tax Act of 1937] passed [the House of Representatives] without a roll call.”).

124. *See id.* at 65, 66 (noting that the FBN was the precursor to the DEA and “was as important as any other single factor in influencing public policy toward drugs from 1930 to 1968”).

indicative of the scientific study presented to Congress, nor was it tailored to meet the enforcement needs of the states and federal government.¹²⁵ In the end, the Marihuana Tax Act became a hastily conceived and controversial law.¹²⁶ However, due to the CSA's adoption of the language used in the Marihuana Tax Act, the next section examines the history of the Marihuana Tax Act as it relates to the CSA's classification of industrial hemp.

IV. THE CONTROLLED SUBSTANCES ACT AND THE CLASSIFICATION OF INDUSTRIAL HEMP AS MARIJUANA

The DEA's classification of industrial hemp as marijuana is perhaps the largest hurdle facing North Dakota farmers in their attempt to grow industrial hemp.¹²⁷ Due to the importance of the DEA's classification of industrial hemp, section A provides background information on the CSA. Section B describes the reasons behind the CSA's classification of industrial hemp as marijuana. Also, to better understand the recent legal developments surrounding the industrial hemp debate, section C provides an overview of the DEA's most recent rulings on industrial hemp law.

A. BACKGROUND OF THE CONTROLLED SUBSTANCES ACT

The CSA was initiated under Title II of the Comprehensive Drug Prevention and Control Act of 1970.¹²⁸ The CSA went into effect on May 1, 1971.¹²⁹ It streamlined federal drug enforcement by replacing more than fifty pieces of drug legislation.¹³⁰ The purpose of the CSA was to focus the federal government's efforts in curtailing the spread of drug use in America.¹³¹ The subsequent enforcement of the criminal and regulatory pro-

Some researchers have gone so far as to suggest that "the FBN's own desire to expand its jurisdiction ignited passage of the Marihuana Tax Act." *Id.* at 175.

125. *Id.* at 174.

126. *Id.*

127. *See* *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007) (describing how the classification of industrial hemp as marijuana by the CSA prevents North Dakota farmers from growing industrial hemp).

128. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1242.

129. *See* Drug Enforcement Agency, <http://www.usdoj.gov/dea/pubs/history/1970-1975.html> (providing the historical and political background of the DEA).

130. *Id.*

131. John T. Woolley & Gerhard Peters, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=2767>. President Nixon stated the following when he signed the CSA:

I hope that . . . the whole Nation will join with us in a program to stop the rise in the use of drugs and thereby help to stop the rise in crime; and also save the lives of hundreds of thousands of our young people who otherwise would become hooked on drugs and be physically, mentally, and morally destroyed.

Id.

visions of the CSA were consolidated into the DEA under the Department of Justice in 1973.¹³²

By creating the CSA, the federal government established a single system of control for both narcotic and psychotropic drugs for the first time in United States history.¹³³ In effect, the CSA makes it illegal “to manufacture, distribute, dispense, or possess . . . a controlled substance” except as authorized by the CSA.¹³⁴ An essential component of this regulatory scheme was to implement a series of categories or “schedules” in order to distinguish potency among various drugs.¹³⁵ The CSA has implemented five schedules and determined various findings in order to properly classify each drug through three categories: (1) the drug’s potential of abuse; (2) its medical relevance; and (3) the safety of use of the drug.¹³⁶

B. CLASSIFICATION OF MARIJUANA UNDER THE CONTROLLED SUBSTANCES ACT

The CSA classifies marijuana in the first category of schedules, placing it among the most harmful and dangerous drugs.¹³⁷ Marijuana meets the criteria for a Schedule I controlled substance because of its THC content, which is a psychoactive hallucinogenic substance with a high potential for abuse.¹³⁸ Another key classification made by the CSA regarding marijuana was its broad definition of the drug.¹³⁹ The CSA defines marijuana as follows:

The term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except*

132. Exec. Order No. 11,727, 38 Fed. Reg. 18357 (July 10, 1973).

133. See Drug Enforcement Agency, *supra* note 129.

134. 21 U.S.C. § 841(a)(1) (2009); see generally 21 U.S.C. § 844(a) (2006).

135. 21 U.S.C. § 812(a)-(b) (2006).

136. *Id.* § 812(b).

137. 21 U.S.C. § 812(c) (Schedule I(c)(10)). “Marihuana” is the spelling used in the CSA. *Id.* The common spelling “marijuana” will be used in this note except for references to specific provisions of the CSA or to the Marihuana Tax Act of 1937.

138. 21 U.S.C. 812(b)-(c) (schedule I (c)(10), (17)).

139. See 21 U.S.C. § 802(16).

the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.¹⁴⁰

This effectively placed the entire use of the hemp plant, whether for drug use or as industrial hemp, squarely under the control of the CSA.¹⁴¹ Therefore, the DEA views industrial hemp containing .3% THC the same as marijuana grown for drug use which commonly contains a 24% THC level, or eighty times more THC.¹⁴²

The CSA permits the United States Attorney General to establish the schedules of drugs in accordance with the CSA.¹⁴³ The Attorney General must consider several factors in determining whether a drug should be controlled or removed from the schedule.¹⁴⁴ Also, the Attorney General, when appropriate, is authorized to enforce any rules, regulations, and procedures in order to execute the purpose of the CSA.¹⁴⁵ These duties have been shifted to the Administrator and Deputy Administrator of the DEA, which allows them to maintain or exempt substances from the schedule.¹⁴⁶ Accordingly, when the DEA executes rules regarding controlled substances, the newly implemented rules have the full force of the law.¹⁴⁷

C. THE DEA ISSUES NEW RULES

The DEA's power to make rulings on its regulation of industrial hemp is an important tool for the agency to influence the regulation of industrial hemp.¹⁴⁸ The most recent substantive rulings on industrial hemp are provided in the next two sections to develop a better understanding of the

140. *Id.* (emphasis added).

141. *Id.*

142. Clarification of Listing of "Tetrahydrocannabinols" in Schedule I and Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant; Final Rules, 68 Fed. Reg. at 14,114, 14, 114 (March 21, 2003) (to be codified at 21 C.F.R. pt. 1308)).

143. *Id.* (citing 21 U.S.C. §§ 811 and 812).

144. 21 U.S.C. § 811(c). The specific factors include:

(1) Its actual or relative potential for abuse; (2) Scientific evidence of its pharmacological effect, if known; (3) The state of current scientific knowledge regarding the drug or other substance; (4) Its history and current pattern of abuse; (5) The scope, duration, and significance of abuse; (6) What, if any, risk there is to the public health; (7) Its psychic or physiological dependence liability; (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

Id. § 811(c) 1-8.

145. Clarification of Listing of "Tetrahydrocannabinols," 68 Fed. Reg. at 14,114 (March 21, 2003) (citing 21 U.S.C. § 871(b)).

146. 21 U.S.C. 871(a); 28 CFR 0.100(b), 0.104, appendix to subpart R, sec. 12. *See* Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant, 68 Fed. Reg. at 14,119 (describing how the Attorney General is authorized to exempt, by regulation, any substance if the substance does not meet the requirements of a controlled substance).

147. Clarification of Listing of "Tetrahydrocannabinols," 68 Fed. Reg. at 14,119.

148. *See id.*

proper role of the CSA as well as to present various regulatory issues facing American industrial hemp producers. Also, the subsequent section provides a brief overview of the DEA registration requirements, which is the basis to understand the purpose of the North Dakota registration requirements.

1. *DEA Issues an “Interpretive Ruling”*

Since its inception, the DEA has interpreted every product that contains any amount of THC to be a Schedule I controlled substance.¹⁴⁹ In response to increased requests for clarifications on industrial hemp law, the DEA, on October 9, 2001, issued an interpretive ruling.¹⁵⁰ The purpose of the interpretive ruling was to make clear that the listing of THC “refers to both natural and synthetic THC.”¹⁵¹ This ruling initiated a lawsuit from the Hemp Industries Association (HIA) because the ruling would have banned them from selling their products.¹⁵²

In *Hemp Industries Association v. Drug Enforcement Administration (Hemp I)*,¹⁵³ American hemp importers challenged the validity of the DEA’s interpretive ruling of October 9, 2001.¹⁵⁴ Since the ruling would have banned many industrial hemp products that the petitioners sold, the HIA petitioned the Ninth Circuit to declare the rule invalid.¹⁵⁵ The HIA argued that the interpretive rule issued by the DEA was legislative and, therefore, subjected the DEA to the notice and comment procedure required by the Administrative Procedures Act (APA).¹⁵⁶

149. Clarification of Listing of “Tetrahydrocannabinols,” 68 Fed. Reg. at 14,119.

150. Interpretation of Listing of “Tetrahydrocannabinolis” in Schedule I, 66 Fed. Reg. 51,530 (Oct. 9, 2001) (to be codified in 21 C.F.R. pt. 1308). In its “interpretative ruling,” the DEA is effectively able to prohibit the use of various industrial hemp products derived from the hemp plant. The key difference between an interpretative rule, as opposed to a proposed rule, is that the DEA is not required to give general notice in accordance with the Administrative Procedures Act. *Id.* at 51,533.

151. *See* *Hemp Indus. Ass’n v. DEA (Hemp I)*, 333 F.3d 1082, 1090 (9th Cir. 2003) (explaining the relevance of the distinction between natural and synthetic THC because the DEA, by trying to list synthetic with natural THC, when only synthetic THC is covered under the CSA, would have the effect of banning exempted industrial hemp products with natural THC). The *Hemp I* Court also found that there was absolutely no indication that the regulatory history suggested that exempted natural THC products (industrial hemp) were to be included in the CSA. *Id.* In fact, the DEA previously admitted that the CSA did not cover organic THC. *Id.* at 1091.

152. *Id.*

153. 333 F.3d 1082 (9th Cir. 2003).

154. *Hemp I*, 333 F.3d at 1084. In *Hemp I*, Petitioners challenged the validity of the DEA’s interpretative rule combining natural THC with synthetic, with the purpose of placing natural THC products under Schedule I of the CSA, as it would have banned the sale of their industrial hemp products. *Id.*

155. *Id.*

156. *Id.*

Whether the ruling was interpretive or legislative was a critical determination because if the DEA's rule had the effect of a legislative rule, it would be invalid, because the agency cannot make legislative rules under the APA.¹⁵⁷ The DEA argued that its interpretative ruling did not have the effect of a legislative ruling.¹⁵⁸ However, the court concluded that because the interpretive ruling would have altered the way in which American hemp retailers could operate, it had the force of law.¹⁵⁹ Also, because the DEA did not post notice or comment regarding the rule, the DEA did not properly implement the ruling even if it was a legislative rather than an interpretive ruling.¹⁶⁰ The Ninth Circuit subsequently granted HIA's request and declared the ruling invalid.¹⁶¹

2. *DEA Issues a "Final Ruling"*

On March 21, 2003, the DEA issued the agency's final rules regarding the listing of industrial hemp products containing THC.¹⁶² The purpose of the rules was to clarify the DEA's position that the CSA applied to both natural and synthetic THC.¹⁶³ Although the Ninth Circuit held that the DEA's interpretive rule had the effect of a legislative rule, the DEA determined that the October 2001 rule was consistent with APA principles.¹⁶⁴

According to the DEA, the agency's final ruling only prohibited hemp products that did not enter the human body, regardless of THC content.¹⁶⁵ It did not matter whether the product was grown naturally or synthetically.¹⁶⁶ The DEA's examples of exempted industrial hemp products that contain THC included, but were not limited to, paper, rope, clothes, animal feed mixtures, and personal care products.¹⁶⁷ The exemption effectively altered the scheduling from all products with THC to all products containing THC, excluding products that are not used for human consumption.¹⁶⁸ The practical reason behind the DEA's exemption of industrial hemp products

157. *Id.* at 1087.

158. *Id.* at 1085.

159. *Id.* at 1084.

160. *Id.* at 1091.

161. *Id.*

162. Clarification of Listing of "Tetrahydrocannabinols" in Schedule I and Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant; Final Rules, 68 Fed. Reg. 55, 14,119 (Mar. 21, 2003) (to be codified at 21 C.F.R. pt. 1308).

163. *Id.*

164. *Id.* at 14,115.

165. *Id.* at 14,117 (describing how industrial hemp products such as animal feed are exempted, even though they contain THC).

166. *Id.*

167. *Id.* at 14,119.

168. *Id.*

was due to the DEA's belief that the regulation of these products was not an appropriate prioritization of its time.

The Ninth Circuit Court of Appeals permanently enjoined the enforcement of the final rule.¹⁶⁹ In *Hemp Industries Association v. Drug Enforcement Administration (Hemp II)*,¹⁷⁰ American importers of hemp challenged the DEA's final rule, which regulated any product that contained any amount of natural or synthetic THC.¹⁷¹ The Ninth Circuit Court of Appeals held that the DEA could regulate synthetic THC of any kind.¹⁷² However, the court also held that the DEA could not regulate naturally-occurring THC not contained within or derived from marijuana products, because non-psychoactive hemp is not included in Schedule I.¹⁷³ The Ninth Circuit Court of Appeals held that the DEA's definition of THC contradicts the "unambiguously expressed intent of Congress in the CSA" and therefore cannot be upheld.¹⁷⁴ Moreover, the court determined that the inclusion of hemp products would place non-psychoactive industrial hemp in Schedule I for the first time and therefore voided the DEA's rule making THC applicable to all parts of the Cannabis plant.¹⁷⁵

3. *DEA Registration Requirements*

Although 21 C.F.R. § 1308.35 exempted certain products from the CSA Schedule I list, the DEA clearly stated that the exemptions did not change the rule for the manufacturing or cultivation of any THC-containing product, which still requires registration under the CSA.¹⁷⁶ Registration through the DEA is an essential component of the CSA as it "provides for control by the Justice Department of problems related to drug abuse" and "makes transactions outside the legitimate distribution chain illegal."¹⁷⁷ The importance placed on registration and the ability of the DEA to control the manufacturing of THC-containing products has prohibited North

169. *Hemp. Indus. v. Drug Enforcement Admin. (Hemp II)*, 357 F.3d 1012, 1019 (9th Cir. 2004).

170. 357 F.3d 1012 (9th Cir. 2004).

171. *Hemp II*, 357 F.3d at 1014. In *Hemp II*, producers of industrial hemp products challenged the DEA regulations banning the sale or possession of industrial hemp products even if they contained only trace amounts of THC. *Id.* at 1013.

172. *Id.* at 1018.

173. *Id.*

174. *Id.*

175. *Id.* at 1018-19.

176. Clarification of Listing of "Tetrahydrocannabinols" in Schedule I and Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant; Final Rules 68 Fed. Reg. 55, 14,123 (Mar. 21, 2003) (to be codified at 21 C.F.R. pt 1308).

177. H.R. REP. NO. 91-1444, at 3 (1970), as reprinted in 1970 U.S.C.C.A.N. 4566, 4569.

Dakota farmers from growing industrial hemp even though the .3% THC content makes it illegal.¹⁷⁸

V. INDUSTRIAL HEMP LAW IN NORTH DAKOTA

North Dakota farmers seeking to grow industrial hemp are caught in an unenviable position.¹⁷⁹ Although they have the full support of the governor, the state legislature, and from the citizens of the state, they have been unsuccessful in obtaining a permit, much less a rule change, from the DEA.¹⁸⁰ In order to understand industrial hemp law in North Dakota, the next section provides an overview of the legal background and relevant case law.

A. BACKGROUND OF INDUSTRIAL HEMP LAW IN NORTH DAKOTA

In response to the economic and agronomic advantages of producing industrial hemp, the 56th Legislative Assembly (1999) overwhelmingly passed HB 1428 by an 86-7 vote in the North Dakota House and 44-3 in the North Dakota Senate.¹⁸¹ The bill amended North Dakota Century Code Section 4-09-01, relating to noxious weeds and authorized the production of industrial hemp.¹⁸² Upon codification, North Dakota Century Code section 4-41-01 permitted the cultivation of industrial hemp containing up to .3% THC.¹⁸³

But North Dakota Century Code Section 4-41-02 includes a stringent licensing provision administered through the DEA.¹⁸⁴ In order to obtain an industrial hemp farm license, a North Dakota farmer is required to: (1) obtain a state license; (2) plant a minimum of ten acres; (3) list every individual that would be involved in “any manner;” (4) submit to a criminal history background check and fingerprinting; and (5) provide an aerial map

178. Clarification of Listing of “THC,” 68 Fed. Reg. at 14,119.

179. See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (“[T]he growing of industrial hemp may be a viable agricultural commodity and . . . there may be ‘countless numbers of beneficial products which utilize hemp in some fashion’ Nevertheless, the Eighth Circuit has clearly and unequivocally held that industrial hemp is subject to the Controlled Substance Act.”) (citing *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006)).

180. See *North Dakota Poll*, *supra* note 98, ¶ 4 (describing the political support for North Dakota farmers to grow industrial hemp).

181. House Journal, 56th Legis. Assem., 1344-45 (N.D. 1999); Senate Journal, 56th Legis. Assem., 1209 (N.D. 1999). See discussion *supra* Part II.C.1 (discussing the economic advantages of growing industrial hemp in North Dakota).

182. House Journal, 56th Leg. Assem., 1344-45 (N.D. 1999); Senate Journal, 56th Leg. Assem., 1209 (N.D. 1999).

183. N.D. CENT. CODE § 4-41-01 (2008).

184. N.D. ADMIN. CODE § 7-14-02(2)-(3) (2007).

of their field location.¹⁸⁵ Even if an applicant meets the state licensing requirements, he or she is obligated to register with the DEA.¹⁸⁶ This effectively placed the authority for final approval in the DEA and not the North Dakota State Agriculture Commissioner.¹⁸⁷

Through its registration requirements, North Dakota Century Code Section 4-41-04 adheres to the federal registration requirements of the DEA, which directs the cultivation of any product containing THC to be registered.¹⁸⁸ In response to the unlikelihood that farmers in North Dakota would be allowed to grow industrial hemp, North Dakota Agriculture Commissioner Roger Johnson wrote to the DEA requesting that the DEA “waive individual DEA registration for North Dakota-licensed industrial hemp farmers and allow the State of North Dakota, with [the DEA’s] guidance, to regulate industrial hemp farming within its borders.”¹⁸⁹

The DEA responded that, since registration is paramount to the CSA, industrial hemp would not be allowed unless it is registered through the DEA.¹⁹⁰ In denying Johnson’s proposal, the DEA emphasized the classification of industrial hemp as marijuana.¹⁹¹ The DEA stated that although the agency strives to cooperate with state efforts, North Dakota farmers would not be allowed to grow industrial hemp.¹⁹²

The licensing provision through the DEA, under the North Dakota statute, was repealed in 2007.¹⁹³ The elimination of the registration requirement through the DEA was partly due to the DEA’s reluctance to grant the North Dakota farmers industrial hemp cultivation licenses.¹⁹⁴ Consequently, the role of the DEA to issue licenses under North Dakota Century Code Section 4-41-02 was replaced by the North Dakota Agriculture Commissioner.¹⁹⁵ Even though North Dakota issued state licenses, North Dakota

185. *Id.* § 7-14-02-02. See *Monson v. DEA*, No. 07-3837 (8th Cir. argued Nov. 12, 2008) (arguing that these registration requirements provide more than adequate enforcement of industrial hemp).

186. *Id.* § 7-14-02-04.

187. *Id.*

188. 21 U.S.C. § 802(16) (2006), H.R. Rep. No. 91-1444, at 3 (1970), as reprinted in U.S.C.C.A.N. 4569.

189. DEA Brief Exhibit B, *Monson v. DEA*, 522 F. Supp. 2d 1188 (D.N.D. 2007) (No. 4:07-CR-042).

190. *Id.*

191. See *id.* (“[T]o waive the requirement of registration for manufacturers of marijuana—which is the most widely abused controlled substance in the United States and, as a schedule I controlled substance, is subject to the strictest CSA controls—is untenable.”).

192. *Id.*

193. H.B. 1020, 60th Legis. Assem. (N.D. 2007); 2007 N.D. Laws 108.

194. See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1197 (D.N.D. 2007) (describing the undue delay on the part of the DEA to provide North Dakota farmers with industrial hemp licenses).

195. N.D. CENT. CODE § 4-41-02(1) (2009).

farmers would still face potential prosecution from the DEA.¹⁹⁶ This uncertainty initiated a lawsuit by two North Dakota farmers who received state but not federal licenses to grow industrial hemp.¹⁹⁷

B. MONSON V. DRUG ENFORCEMENT ADMINISTRATION

In *Monson v. Drug Enforcement Administration*,¹⁹⁸ the United States District Court for the District of North Dakota determined whether the CSA prohibits the cultivation of industrial hemp.¹⁹⁹ The petitioners were two North Dakota farmers who sought to cultivate industrial hemp under North Dakota Century Code Section 4-41-01.²⁰⁰ Since growing industrial hemp is forbidden by the CSA, the farmers sought a declaration barring them from any possible future criminal prosecution.²⁰¹

The plaintiffs in *Monson*, Dave Monson and Wayne Hauge, sought to plant up to ten and one hundred acres of industrial hemp respectively.²⁰² After receiving the nation's first state licenses to grow industrial hemp, the two farmers sought to speed up the federal registration process.²⁰³ Both farmers submitted applications to the federal government and collectively paid \$5,733 in nonrefundable fees.²⁰⁴

The plaintiffs in *Monson* argued that classifying industrial hemp with marijuana was like "comparing pop guns and M-16s."²⁰⁵ Accordingly, the farmers argued that productive uses of industrial hemp should not fall within the scheduling of marijuana as a controlled substance.²⁰⁶ In its analysis of whether the CSA considered industrial hemp a controlled substance, the court in *Monson* turned to the state of the law in the Eighth Circuit.²⁰⁷ In *Monson*, the court followed the Eighth Circuit's approach by simply stating

196. See *Monson*, 522 F. Supp. 2d at 1191.

197. See discussion *infra* Part V.B (discussing the court's decision in *Monson*).

198. 522 F. Supp. 2d 1188 (D.N.D. 2007).

199. *Id.* at 1191.

200. *Id.*

201. *Id.*

202. See Monica Davey, *Sober North Dakotans Hope to Legalize Cannabis Without the Kick*, N.Y. TIMES, July 21, 2007, at A1, A10 (describing David Monson, North Dakota State legislator and high school principal, as a farmer who is trying to grow industrial hemp); see also Blake Nicholson, *Government: Dismiss Hemp Suit*, BISMARCK TRIB., Aug. 23, 2007, at B1 (describing the prospective industrial hemp crop of both farmers).

203. Davey, *supra* note 202, at A10; Nicholson, *supra* note 202, at B1.

204. Elliott C. McLaughlin, *Farmers Sue DEA for Right to Grow Industrial Hemp*, CNN.COM (Oct. 18, 2007), <http://www.cnn.com/2007/US/10/17/pip.hempregulation/>.

205. *Id.*

206. *Monson*, 522 F. Supp. 2d at 1198.

207. *Id.* at 1199 (discussing the Eighth Circuit's decision in *United States v. White Plume*).

that “[t]he CSA does not distinguish between marijuana and hemp in its regulation.”²⁰⁸

The *Monson* court suggested that the contradiction between North Dakota Century Code section 4-41-01 and the DEA’s classification of industrial hemp would not be resolved through the DEA.²⁰⁹ Nevertheless, the court showed great deference towards the Eighth Circuit’s interpretation of Congress’s legislative intent of the CSA when it declined to advance the efforts of North Dakota farmers.²¹⁰ The *Monson* court concluded that “whether North Dakota farmers will be permitted to grow industrial hemp in the future, are issues that should ultimately rest in the hands of Congress rather than in the hands of a federal judge.”²¹¹ The unfavorable result for the North Dakota farmers prompted their appeal to the Eighth Circuit on February 19, 2008.²¹²

VI. EFFORTS TO LEGALIZE INDUSTRIAL HEMP

Other states besides North Dakota have also made efforts to legalize industrial hemp.²¹³ The collective efforts by the states have resulted in the introduction of congressional legislation aimed at permitting the cultivation of industrial hemp in America.²¹⁴ Therefore, the next two sections provide an overview of the specific state and congressional efforts.

A. STATE EFFORTS

Across America, farmers and business people have expressed excitement over the economic potential of industrial hemp.²¹⁵ This excitement has initiated a wave of industrial hemp legislation over the last ten years.²¹⁶ Currently twenty-eight states have introduced hemp legislation.²¹⁷ Eight of

208. *Id.*

209. *Id.* at 1197. The court acknowledged the impracticability of North Dakota farmers ever receiving a license through the DEA by stating that “there is no realistic prospect that the [North Dakota farmers] will ever be issued a license by the DEA to grow industrial hemp.” *Id.*

210. *Id.*

211. *Id.* at 1202.

212. Vote Hemp website [hereinafter Vote Hemp], http://www.votehemp.com/legal_cases_ND.html#Overview.

213. See discussion *infra* Part VI.A (discussing the development of state efforts to legalize the production of industrial hemp).

214. See discussion *infra* Part VI.B (explaining the Congressional efforts to legalize the production of industrial hemp).

215. Christopher S. Wren, *U.S. Farmers Covet a Forbidden Crop*, N.Y. TIMES, Apr. 1, 1999, at A22.

216. See Vote Hemp, *supra* note 212 (providing examples of industrial hemp legislation over the last ten years).

217. *Id.* These states include Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Minnesota, Montana, Nebraska, New

these states allow either the production or research of industrial hemp.²¹⁸ Although other states have passed industrial hemp legislation, Vermont is the only state besides North Dakota to have passed laws allowing the growth of industrial hemp.²¹⁹

B. CONGRESSIONAL EFFORTS

The Industrial Hemp Farming Act of 2005 was the first bill introduced in Congress designed to separate industrial hemp from marijuana.²²⁰ Due to a lack of congressional support, the Act failed to become law.²²¹ However, the Industrial Hemp Farming Act of 2007, which was introduced on February 13, 2007, renewed the issue in Congress.²²² The bill has thirteen co-sponsors from across the political spectrum and is sponsored by Representative Ron Paul.²²³

In his introduction of the Act, Congressman Ron Paul presented the benefits of industrial hemp.²²⁴ Representative Paul argued that the federal government is standing in the way of farmers' ability to grow a harmless and lucrative crop.²²⁵ Paul also argued that "the founders of our Nation, some of whom grew hemp, would surely find that Federal restrictions on farmers growing [industrial hemp]. . . [is] inconsistent with the constitutional guarantee of a limited, restrained federal government."²²⁶

The Industrial Hemp Farming Act of 2007 proposes to amend the CSA by legally distinguishing industrial hemp from marijuana.²²⁷ The Act would clarify the difference between industrial hemp and marijuana by using "the term 'industrial hemp' [to] mean. . . the plant *Cannabis sativa* L.

Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

218. *See id.* The states include Hawaii, Kentucky, Maine, Maryland, Montana, North Dakota, Vermont, and West Virginia. *Id.*

219. *Id.*

220. H.R. 3037, 109th Cong. (2005). The bill would distinguish industrial hemp from marijuana through chemical differences rather than physical similarities. *Id.*

221. *Id.*

222. H.R. 1009, 110th Cong. (2007).

223. *See* The Library of Congress (THOMAS) website available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01009:@@X> [hereinafter HR 1009 Congressional Action] (indicating that since the introduction of H.R. 1009 on February 13, 2007, the legislation was referred to the Committee on Energy and Commerce and House Energy and Commerce as well as to the House Judiciary Committee).

224. 153 CONG. REC. E339 (2007) (statement of Rep. Paul).

225. *Id.* Congressman Ron Paul supported his argument that industrial hemp is a "safe and profitable crop" by noting that the federal government "concedes the safety of industrial hemp by allowing it to be legally imported for use as food," and that the "United States is the only industrialized nation that prohibits industrial hemp cultivation." *Id.*

226. *Id.*

227. Industrial Hemp Farm Act 2007, H.R. 1009, 110th Cong. (2007).

and any part of such plant, whether growing or not, with a . . . [THC] concentration that does not exceed .3%.”²²⁸ This proposed change would clearly characterize the difference between industrial hemp and marijuana as a biochemical rather than a physical difference.²²⁹

The wording of the Industrial Hemp Farming Act of 2007 is almost identical to North Dakota’s law in its most relevant parts.²³⁰ The Industrial Hemp Farming Act would also allow individual states to determine whether plants grown for industrial hemp meet the concentration limitation set forth in the Act.²³¹ This would presumably shift the responsibility for classifying industrial hemp from the DEA to the state of North Dakota and allow North Dakota farmers to grow industrial hemp.²³²

VII. LEGAL ARGUMENTS SURROUNDING THE INDUSTRIAL HEMP DEBATE

Unfortunately for North Dakota farmers, without the passage of the Industrial Hemp Farming Act, it appears that their chances of growing industrial hemp are unlikely.²³³ The last action on H.R. 1009 was on April 20, 2007, when it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security.²³⁴ With passage of the Act unlikely, industrial hemp producers have focused on the federal courts to provide them with the ability to grow industrial hemp.²³⁵ Relevant legal arguments will likely include the concept of federalism, the Commerce Clause, interpretation of the Marihuana Tax Act, as well as enforcement concerns of the DEA.²³⁶

A. THE ROLE OF FEDERALISM

One of federalism’s chief virtues is that it promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

228. *Id.*

229. *Id.*

230. *Compare* N.D. CENT. CODE § 4-41-01 (1999) (allowing the cultivation of industrial hemp containing .3% or less THC content), *with* Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007) (permitting the domestic production of industrial hemp with .3% or less THC content).

231. Industrial Hemp Farm Act 2007, H.R. 1009, 110th Cong., *available at* <http://thomas.loc.gov>.

232. *See* N.D. CENT. CODE § 4-41-01 (1999); Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007).

233. Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007), *available at* <http://frwebgate.access.gpo.gov/>.

234. HR 1009 Congressional Action, *supra* note 223.

235. *Id.*

236. *See* discussion *infra* Parts VI.A-D.

experiments without risk to the rest of the country.”²³⁷ Regarding Congress’s power to regulate the states, the United States Supreme Court has reasoned that federalism is not used for the sake of the federal government.²³⁸ Rather, federalism is used “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.”²³⁹

One of the central issues of federalism is the federal government’s delegation of police powers.²⁴⁰ The states’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.²⁴¹ One example of the states’ expansion of police powers is the Personal Responsibility and Work Opportunity Reconciliation Act (welfare reform).²⁴² Arguably, the success of welfare reform was due to the experimenting of programs at the state level.²⁴³ Like the federal experimentation with welfare reform, North Dakota may be the ideal “laboratory” in discovering whether industrial hemp is viable for the entire country.²⁴⁴

B. THE COMMERCE CLAUSE

A central issue on appeal in *Monson* was that the Commerce Clause does not pertain to the production of industrial hemp in North Dakota because growing industrial hemp would not impact the interstate marijuana market.²⁴⁵ Although industrial hemp production in North Dakota would not likely substantially affect the marijuana drug market, it does not mean that Congress does not have the power to regulate local economic activities

237. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

238. *Id.*

239. *Id.*

240. *See id.* at 57 (O’Connor, J., dissenting) (“[W]e would do well to recall [that]. . . [t]he powers delegated by the proposed Constitution to the federal government are few and defined. . . . Those which are to remain in the State governments are numerous and indefinite.”) (citing *The Federalist* No. 45, pp. 292-93 (C. Rossiter ed. 1961)).

241. *Id.* at 42.

242. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 1305, P. Law 104-193 (104th Congress, 1996). The Act delegated more authority to the states to oversee welfare. *Id.*

243. *See generally* Bill Clinton, *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, available at <http://www.nytimes.com/2006/08/22/opinion/22clinton.html> (suggesting that the success of welfare reform worked due to the reform programs initiated at the state level).

244. *See generally* KRAENZAL ET AL., *supra* note 11, at 19 (listing the economic, agricultural, and geographic advantages of North Dakota growing industrial hemp).

245. Brief and Addendum of Appellants David Monson and Wayne Hauge, *Monson v. DEA*, 522 F. Supp. 2d 1188 (D. N.D. 2007), No. 07-3837 (8th Cir. argued Nov. 12, 2008).

regardless of their insignificance.²⁴⁶ Congress has used the Commerce Clause to regulate activity that was much more localized than the economic activity at issue in *Monson*.²⁴⁷ However, it would be difficult to agree that allowing industrial hemp production would not affect the “instrumentalities of the market” because any production by North Dakota farmers would certainly have at least some impact on the country’s economy.²⁴⁸

C. JUDICIAL INTERPRETATION OF THE MARIHUANA TAX ACT OF 1937

The First, Eighth, and Ninth Circuits have noted that the legislative history behind the Marihuana Tax Act indicates a separation between industrial hemp and marijuana.²⁴⁹ In *United States v. White Plume*,²⁵⁰ the Eighth Circuit Court of Appeals stated that there is a possibility that Congress would not have adopted the CSA in its present form if it had been aware of its negative effect on the domestic cultivation of plants for industrial uses.²⁵¹ However, the court limited this possibility by explaining that there is no basis for reading the CSA contrary to its literal language without a clear indication that Congress intended to protect plant production for industrial use as it existed under the Marihuana Tax Act.²⁵²

The court in *White Plume* also examined the legislative history of the CSA.²⁵³ The court hinted at the possibility that the legislative intent was to separate the drug and commercial purposes of marijuana.²⁵⁴ Nevertheless, the court in *White Plume* adhered to the “unambiguous” language of the CSA.²⁵⁵

246. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Perez v. United States*, 402 U.S. 146, 151 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

247. *Gonzales*, 545 U.S. at 17; *Perez*, 402 U.S. at 151; *Wickard*, 317 U.S. at 128-29.

248. KRAENZAL, ET AL., *supra* note 11, at 19.

249. *See* *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 6-7 (1st Cir. 2000); *United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006); *Hemp Indus. Ass’n v. DEA*, 357 F.3d 1012, 1018 (9th Cir. 2004).

250. 447 F.3d 1067 (8th Cir. 2006). In *White Plume*, the United States brought an action for declaratory and injunctive relief against Alex White Plume, who grew industrial hemp on Indian land and contracted to sell the hemp to a hemp processing company. The company, pursuant to tribal ordinance, produced industrial hemp on tribal land without DEA registration. *Id.* at 1069.

251. *Id.* at 1072 (citing *Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000)).

252. *Id.* The court held that “the industrial hemp debate is better suited for the congressional hearing room [rather] than the courtroom” in denying the petitioner’s request to grow industrial hemp. *Id.* at 1076.

253. *Id.* at 1072.

254. *See id.* (“Given the legislative history of the [Marihuana] Tax Act [of 1937] and the CSA’s adoption of its definition of marijuana, Appellants’ argument that Congress did not intend to criminalize the growing of marijuana for industrial purposes is plausible, but ultimately not persuasive, for we are bound by the language of the CSA.”).

255. *Id.*

Most courts have interpreted the statutory definition of marijuana under the CSA to be unambiguous.²⁵⁶ Unlike the Marihuana Tax Act, federal courts have not questioned Congress's intent to ban the growing of marijuana under the CSA.²⁵⁷ Without legislative intent demonstrating that industrial hemp was not intended to be classified with marijuana, the courts have reasoned that since the language of the CSA is clear it should be enforced as written, that is, classify industrial hemp as a controlled substance.²⁵⁸

D. ENFORCEMENT

Besides its economic advantages, North Dakota would be a good candidate to produce industrial hemp because of its low crime rate and sense of community, which creates less law enforcement issues.²⁵⁹ Nevertheless, the courts have justified the DEA's refusal to grant industrial hemp licenses largely because of the detection and enforcement problems of growing industrial hemp.²⁶⁰ Instead of altering the classification of industrial hemp from marijuana, the DEA has stood firm on its position that allowing industrial hemp production would increase the illegal marijuana trade.²⁶¹ In doing so, the DEA places too much focus on enforcement and detection of illegal marijuana at the expense of a prospectively successful industry.²⁶²

VIII. LIKELY OUTCOME OF *MONSON V. DRUG ENFORCEMENT ADMINISTRATION*

In order to emphasize the importance of the Industrial Hemp Farming Act of 2007, the next two sections analyze *Monson* under both current and proposed law. This analysis is important to the overall issue of whether in-

256. *Id.*

257. *Id.*

258. *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002).

259. *See generally* Chuck Haga, *North Dakota's Nice*, GRAND FORKS HERALD, Sept. 11, 2008, available at <http://www.commerce.nd.gov/news/detail.asp?newsID=149> (describing the benevolent and involved nature of North Dakotans); *see also* Press Release, CONGRESSIONAL QUARTERLY (Mar. 17, 2008), available at http://os.cqpress.com/Press%20Release_Crime%20State%20Rankings%202008.pdf (ranking North Dakota as one of the safest states in the country). Since enforcement is often cited by the DEA as the reason for not allowing American production of industrial hemp, the relative safety and culture of North Dakota would seem to negate much of the DEA's enforcement concerns.

260. *See, e.g., White Plume*, 447 F.3d at 1076 (citing enforcement as the main reason for why the DEA does not permit production of industrial hemp).

261. *See* Clarification of Listing of "Tetrahydrocannabinols" in Schedule I, 68 Fed. Reg. at 14,114 (Mar. 21, 2003) (to be codified at 21 C.F.R. pt. 1308) (noting if natural THC was a non-controlled substance, drug traffickers might find a loophole in the law).

262. *See* discussion *supra* Part IV.C.3 (suggesting that the DEA's registration requirements are essential to the overall mission of the agency).

dustrial hemp will be allowed as the current and proposed law present different outcomes.²⁶³

A. UNDER CURRENT LAW

Growing hemp legally in North Dakota can be accomplished through either a change in federal law, an intervention by the federal courts, or a change in policy by the DEA.²⁶⁴ Given the repeated refusals to grant permits or clarify the definition of industrial hemp, it seems highly unlikely that the DEA would change its position.²⁶⁵ On February 19, 2008, in response to the United States District Court for the District of North Dakota's decision in *Monson*, the petitioners appealed to the Eighth Circuit.²⁶⁶

One of the grounds the petitioners challenged was that the court erroneously declined to accept factual allegations differentiating industrial hemp from marijuana.²⁶⁷ However, since the CSA does not differentiate between marijuana and industrial hemp, the Eighth Circuit will most likely defer to the DEA's classification.²⁶⁸ Given the similarity between the legal issues presented in *Monson* and *White Plume*, it is difficult to imagine the Eighth Circuit ruling for the North Dakota farmers.²⁶⁹

B. UNDER PROPOSED LAW

Although its passage is unlikely, the Industrial Hemp Farming Act of 2007 would clearly exempt industrial hemp from the CSA.²⁷⁰ Federal courts have been reluctant to change the current state of the law, but have hinted that congressional legislation would help resolve the industrial hemp issue.²⁷¹ As in *White Plume*, the appellants in *Monson* are essentially ask-

263. See discussion *infra* Parts VIII.A-B.

264. See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1197 (D.N.D. 2007) (noting that the DEA has "prejudged the merits of the registration applications by characterizing [the North Dakota farmers'] requests [by] being submitted by manufacturers of marijuana, which is the most widely abused controlled substance in the United States").

265. *Id.*

266. Brief and Addendum of Appellants David Monson and Wayne Hauge, *Monson v. DEA*, No. 07-3837 (8th Cir. Feb. 19, 2008).

267. *Id.* at 1.

268. See *United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006) (holding that although Congress's intent is unclear, the language is unambiguous and therefore industrial hemp is regarded as a controlled substance).

269. *Id.*

270. See H.R. 1009 Congressional Action, *supra* note 223 (showing that the Industrial Hemp Farming Act has been in Committee since April 20, 2007); see also *Monson*, 522 F. Supp. 2d at 1202 (indicating that federal action by Congress would allow production of industrial hemp).

271. See *Monson*, 522 F. Supp. 2d at 1202 (indicating that the industrial hemp issue is more appropriate for Congress than the federal courts).

ing the court to make a policy determination.²⁷² The key provision in the Industrial Hemp Farming Act is the declassification of industrial hemp from the CSA.²⁷³ This effectively removes the regulatory power of the DEA to combine marijuana and industrial hemp regulations.²⁷⁴ Presumably, this change would allow the Eighth Circuit to defer to the law-making authority of Congress rather than the regulatory rules of administrative agencies and would, more importantly, allow the production of industrial hemp.²⁷⁵

IX. CONCLUSION

Given the resurgence of research and debate regarding industrial hemp, there appears to be a national trend to legalize industrial hemp.²⁷⁶ Twenty-eight states have introduced hemp legislation within the past ten years.²⁷⁷ With more than thirty countries producing industrial hemp, the United States remains the only industrialized nation in the world that does not allow industrial hemp production.²⁷⁸

Even with distinguishable physical and chemical characteristics, it seems highly unlikely that the DEA will alter its classification of industrial hemp.²⁷⁹ Instead of focusing solely on the chemical connection between industrial hemp and marijuana, the DEA should also focus on the economic potential of the industrial hemp market.²⁸⁰ By refusing to reclassify industrial hemp, the DEA is ignoring the economic components of promoting the public welfare, which is a main goal of the agency.²⁸¹

Since congressional action seems unlikely, the only way for immediate change will be through the federal courts.²⁸² The courts could use the ambiguity of the adoption of the CSA with the clear intention of Congress during the passage of the Marihuana Tax Act to provide a legal justification for

272. *Id.*

273. Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007).

274. *Id.*

275. *Id.*

276. *See* discussion *supra* Part VI.A (describing the national trend in favor of industrial hemp production).

277. *Id.*

278. Rawson, *supra* note 3, at 2.

279. *See generally* Clarification of Listing of “Tetrahydrocannabinols” in Schedule I, 68 Fed. Reg. 14,117 (Mar. 21, 2003) (“[O]ne of the chief aims of the [DEA when considering regulations]. . . is to ensure that agencies consider the potential economic ramifications of imposing new regulations.”).

280. *Id.*; *see* discussion *supra* Part II.C (discussing the economics of industrial hemp).

281. *Id.*

282. *See* discussion *supra* Part VII.B (suggesting that since Congress will more than likely not pass hemp legislation, and because the DEA is unwilling to change its classification of industrial hemp, the only immediate solution lies with the federal courts).

allowing industrial hemp.²⁸³ However, such a scenario is unlikely, as the courts have chosen to adhere to the actual language, rather than the intent of Congress, when it passed the CSA.²⁸⁴

North Dakota appears to be an unlikely, yet ideal, vehicle for promoting industrial hemp legislation.²⁸⁵ North Dakota farmers are not promoting a pro-marijuana agenda.²⁸⁶ Rather, they are simply seeking another source of income.²⁸⁷ Moreover, North Dakota's culture and demographics are ideally suited to minimize the DEA's concern over enforcement issues.²⁸⁸ However, given Congress's inability to pass legislation and the federal courts' reluctance to permit production of industrial hemp, it appears that industrial hemp production, even with all of its economic advantages, will unfortunately continue to be a dream rather than a reality for North Dakota farmers.

*Thomas A. Duppong**

283. *See* *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007).

284. *Id.*

285. *See* *Davey*, *supra* note 202, ¶ 4 (suggesting that a more rebellious state such as Massachusetts or California, rather than North Dakota, is more likely to be at the forefront of the industrial hemp debate).

286. *See id.* ¶ 3 (describing *Monson* as a farmer and legislator, not as a marijuana advocate).

287. *Id.*

288. *See* discussion *supra* Part II.C.2 (describing North Dakota's advantages in the industrial hemp market).

*J.D. candidate at the University of North Dakota School of Law. I would like to specially thank my family including Laura, Audrey, Mom and Dad, and Todd and Laura for their love, encouragement, and support throughout law school.