

CONVERGENCE AND DIVERGENCE OF ALCOHOL AND MARIJUANA REGULATION IN A FEDERALIST SYSTEM

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I. INTRODUCTION

Marijuana prohibition in the United States (“U.S.”) is on the wane. Eighteen U.S. states and the District of Columbia have “legalized” adult-use (also known as “recreational”) marijuana (also known as “cannabis”) possession and use under state law as of the beginning of 2022.¹ This is an increase of three states in just two years.² Early legalization efforts succeeded through popular referendums, but over the past few years, reform efforts have succeeded through state legislation as well.³ Medical marijuana is

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¹ *Cannabis Overview*, NAT’L CONF. OF STATE LEGS. (July 6, 2021), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

² See H. Justin Pace, *The “Free Market” for Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy*, 24 LEWIS & CLARK L. REV. 1219, 1220 (2020) [hereinafter, Pace, *Free Market*] (citing *Cannabis Overview*, *supra* note 1).

³ See Pace, *Free Market*, *supra* note 2, at 1254 (noting that Illinois was “the first state to provide for legalization and regulation of adult use marijuana sales

even more popular; a total of thirty-seven states have legalized it.⁴ Marijuana remains illegal under U.S. federal law,⁵ however, and only limited congressional or regulatory movement has been made on reform at the federal level.⁶ As state legalization efforts continue and accelerate, state-level marijuana regulation is showing signs of convergence.⁷

The U.S. experimented with federal alcohol prohibition as well during a period bookended by the Eighteenth and Twenty-first Amendments.⁸ The Twenty-first Amendment did not create a federal regulatory scheme for alcohol or even empower Congress to create one; rather, it left the matter to the states.⁹ It even buttressed state law by prohibiting the “transportation or importation” of alcohol into a state “in violation of” that state’s laws.¹⁰ States did not respond uniformly to the Twenty-first Amendment. Individual states continued to prohibit alcohol or allow subsidiary government units to prohibit alcohol. Certain common elements like the three-tier system predominated, but state alcohol regulation also showed substantial divergence.¹¹ That divergence has persisted.¹²

legislatively”). In the scant few years since the Illinois legislature legalized marijuana, state legislatures in Connecticut, Virginia, New York, and New Mexico have legalized marijuana via statute. *Cannabis Overview*, *supra* note 1.

⁴ *State Medical Cannabis Laws*, NAT’L CONF. OF STATE LEGS. (Feb. 3, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁵ 21 U.S.C. § 812 Schedule I(c)(10).

⁶ Pace, *Free Market*, *supra* note 2, at 1222–24.

⁷ Pace, *Free Market*, *supra* note 2, at 1255–56; see also Martin Gelter, *Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?*, in RSCH. HANDBOOK ON COMPAR. CORP. GOVERNANCE 282, 284 (Afra Afsharipour & Martin Gelter, eds. 2021) (“‘Convergence’ in corporate governance refers to the idea that corporate and securities laws across countries are evolving toward a single model.”). The concept of convergence can be extended beyond the corporate governance context.

⁸ U.S. CONST. amends. XVIII, XXI.

⁹ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980) (stating that the Twenty-first Amendment “grants the States virtually complete control over whether to permit importation or sale of [alcohol] and how to structure the [alcohol] distribution system”).

¹⁰ U.S. CONST. amend. XXI.

¹¹ *Supra* Part IIa.

¹² *Supra* Part IIa.

Canada ended the prohibition of marijuana nationwide in 2018 with the Cannabis Act.¹³ The Cannabis Act set up a basic federal framework to regulate marijuana, but it left designing and implementing the bulk of the new marijuana regulatory framework to the provinces (the sub-federal government units in Canada analogous to U.S. states).¹⁴ The end of Canadian marijuana prohibition, then, looks more like the abrupt end of U.S. alcohol prohibition than the slow wane in U.S. marijuana prohibition. Prohibition ended all at once, with the details left to each sub-national unit, rather than gradually, on a sub-national unit by sub-national unit basis.¹⁵ It should come as no surprise then that Canadian marijuana regulation displays the divergence present in U.S. alcohol regulation rather than the convergence present in U.S. marijuana regulation.¹⁶

Legal scholarship on marijuana regulation is still in its adolescence, with the bulk of legal scholarship on marijuana reaching publication only over the last few years, a rapid growth in legal scholarship on marijuana, and a great deal of scholarly territory still to be trod. Scholars have frequently looked to alcohol regulation in analyzing marijuana policy, but no known paper considers U.S. alcohol regulation, U.S. marijuana regulation, and Canadian marijuana regulation together. State comparative law remains undertheorized. “Convergence” and “divergence” have been identified and addressed in the state constitutional law literature but have received scant attention otherwise.¹⁷ This paper

¹³ Cannabis Act, S.C. 2018, c. 16 (Can.).

¹⁴ See Alice de Koning & John F. McArdle, *Implementing Regulation in an Emerging Industry*, 55 J. OF CAN. STUD. 362, 364 (2021) (“Effectively, Canada simultaneously created 13 distinct emerging economies within a mature economic framework. Each of those 13 distinct economic models approached opening their markets somewhat differently, but all of them did so at the same time.”).

¹⁵ *Supra* Part IIa.

¹⁶ *Supra* Part IIc.

¹⁷ See, e.g., Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 302 (2011)

Scholars of state constitutional law have identified two distinct approaches to federal adjudicatory doctrines in construing rights guarantees stemming from constitutional language similar to that found in the federal document. State courts may adopt federal doctrine in whole or in part—what is sometimes referred to as “convergence”—or they may choose to craft their own doctrine—

contributes to the literature by analyzing new developments in alcohol and marijuana regulation; considering U.S. state-level alcohol regulation, U.S. state-level marijuana regulation, and Canadian province-level marijuana regulation together; and by developing a theory of why state law sometimes converges and sometimes diverges.

Part II of this paper tracks the history of alcohol reform in the United States and marijuana reform in the U.S. and Canada, with an emphasis on the way that alcohol regulation and marijuana regulation in Canada have shown divergence, while marijuana regulation in the U.S. has shown convergence. Part III proposes a theory as to why this divergence and convergence occurred. In addition to interest group politics and path dependence, this distinction is driven by a temporal effect. Multiple sub-national units making regulations at the same time will result in divergence; sub-national units reforming one by one will result in convergence as reformers and interest groups learn from the processes. Part IV concludes.

II. DIVERGENCE AND CONVERGENCE IN STATE LAW

The U.S. and Canada are both federalist nations, meaning the governments in both countries consist of a central, national government as well as regional, sub-national governments, each with the power to act independently.¹⁸ Federalism is advantageous to a heterogenous society because it facilitates pluralism: sub-national units can adopt policies that suit a population that might differ quite a bit in relevant ways from the population of another sub-national unit.¹⁹ Sub-national units can “serve as a laboratory; and try novel social and economic experiments without risk to the

what has been referred to as “divergence.”
(citations omitted).

¹⁸ Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, in RSCH. HANDBOOK ON COMPAR. CONST. L. 356, 357 (Tom Ginsburg & Rosalind Dixon eds., 2013) (citing K.C. WHEARE, *FEDERAL GOVERNMENT*, 4–5 (1964)).

¹⁹ Choudhry & Hume, *supra* note 18, at 360 (“Federalism allows groups that have a history of self-government or a distinct culture or economy to preserve some measure of autonomy. By definition, it offers the benefits of unity without the costs of imposing uniformity on a diverse population.”) (citing WHEARE, *supra* note 18; RONALD L. WATTS, *NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH* (1966)).

rest of the country.”²⁰

States can learn from marijuana reform pioneers like Colorado, which may lead them to push reform, fight against it, or change how they design their own marijuana regulations. However, Federalism brings disadvantages as well. Changes to the law in one sub-national unit can spill over into another. Nebraska and Oklahoma, for example, sued Colorado arguing that by legalizing marijuana, Colorado “‘increased trafficking and transportation of Colorado-sourced marijuana’ into their territories, requiring them to expend significant ‘law enforcement, judicial system, and penal system resources’ to combat the increased trafficking and transportation of marijuana.”²¹

The tendency of law in sub-national units to converge at times²² and diverge at times²³ is under-theorized. Alcohol and marijuana reform in the United States and Canada offer a compelling case study of why and how reform in a similar direction in a similar area (vice legalization and regulation) can lead to convergence of law under one set of circumstances and divergence under another set of circumstances. Alcohol and marijuana regulation is not an unimportant, esoteric area of the law. The (quasi-legal) U.S. marijuana industry is much smaller than the alcohol industry—with \$17.5 billion in sales in 2020 dwarfed by

²⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²¹ *Neb. v. Colo.*, 577 U.S. 1211, 1214 (2016) (quoting Compl. ¶ 58; Br. In Support of Mot. For Leave to File Compl. 11–16).

²² *See, e.g.*, Gelter, *supra* note 7, at 2

Convergence in corporate governance has been debated for the past 20 years, particularly in the legal and the law and economics literature. Broadly speaking, proponents argue that laws and practices in corporate governance have been converging to a single standard that emphasizes the interests of shareholders, including outside investors (as opposed to prioritizing, for example, employees, other stakeholders, controlling shareholders, or the ‘public interest.’);

Bauries, *supra* note 17, at 322, 352 (identifying both doctrinal and conceptual convergence in state court interpretation of state constitutional provisions concerning school finance).

²³ *See, e.g.*, Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 129 (1999) (arguing that convergence among countries in corporate governance has been prevented by path dependence).

\$253.8 billion in alcohol sales in 2018.²⁴ But, the market for legal marijuana in the U.S. is growing rapidly. It generated only \$2.7 billion in sales in 2014, just a couple of years after the first states legalized adult-use marijuana and before the surge in legalization between 2018 and 2021.²⁵

The “breweries, wineries, and distilleries” category produced the second largest gain in U.S. manufacturing jobs in 2018, and the sector has been adding jobs at a much higher rate than the economy overall.²⁶ Marijuana jobs have been growing even more rapidly, with, for example, forty-four percent more jobs added in 2018 relative to 2017, making it the “fastest growing labor market in the U.S.”²⁷ Adult-use marijuana sales generated \$10.4 billion in tax revenue from 2014 to 2021 (none of which went to the federal government, of course).²⁸ Marijuana tax revenue is dwarfed by alcohol tax revenue, with just the federal government collecting \$10 billion in alcohol tax revenue in 2019 alone.²⁹

²⁴ Sharon Lam, *Canada’s Weed Lead is Running Out of Puff*, REUTERS (Dec. 21, 2021, 9:59 AM), <https://www.reuters.com/breakingviews/canadas-weed-lead-is-running-out-puff-2021-12-21/>; Seren Morris, *US Alcohol Sales Increased by 5.1% in 2018*, DRINKS BUS. (Jan. 17, 2019), <https://www.thedrinksbusiness.com/2019/01/us-alcohol-sales-increased-by-5-1-in-2018>; see also John T. Holden & Marc Edelman, *Regulating Vice: What the U.S. Marijuana Industry Can Learn From State Governance of Sports Gambling*, U. OF ILL. L. REV. 1051, 1083 (2021) (noting that “the market for the illegal purchase of marijuana in the United States is approaching \$50 billion per year”) (relying on Will Yakowicz, *Illegal Pot Sales Topped \$46.4 Billion in 2016, and That’s Good News for Marijuana Entrepreneurs*, INC. (Jan. 17, 2017), <https://www.inc.com/will-yakowicz/marijuana-sales-2016-50-billion.html>)).

²⁵ Pace, *Free Market*, *supra* note 2, at 1257 (citing Luke Scheuer, *Are “Legal” Marijuana Contracts “Illegal”?*, 16 U.C. Davis Bus. L. J. 31, 42 (2015)).

²⁶ Justin Fox, *In the Future, There Will Be a Distillery on Every Corner*, BLOOMBERG (Mar. 16, 2018, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2018-03-16/americans-aren-t-letting-go-of-their-craft-beer-wine-and-whisky>.

²⁷ Jeff Cox, *The Marijuana Industry Looks Like the Fastest-Growing Labor Market in the Country*, CNBC (Mar. 14, 2019, 1:48 PM), <https://www.cnbc.com/2019/03/14/the-marijuana-industry-looks-like-the-fastest-growing-job-market-in-the-country.html>.

²⁸ Tiffany Kary, *Almost Half of New York Towns Opt Out of Pot, For Now*, BLOOMBERG (Jan. 10, 2022, 7:00 AM), <https://www.bloomberg.com/news/newsletters/2022-01-10/marijuana-sales-in-new-york-must-overcome-local-resistance>.

²⁹ *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-major-federal-excise-taxes-and-how-much-money-do-they-raise> (last accessed May 25, 2022).

The economic activity, though, is balanced by substantial costs. The Centers for Disease Control and Prevention (“CDC”) estimates that excessive consumption of alcohol cost the U.S. a quarter-trillion dollars in 2010.³⁰ Alcohol played “a significant role in” “a sharp and country-specific increase in mortality among white, non-Hispanic, middle-aged men and women.”³¹ Of the two, alcohol is not only more dangerous than marijuana, it “carries a much higher addiction risk.”³² But marijuana is not without its risks. Those risks include psychosis, susceptibility to false memories, lower birth weight, cardiovascular risks, and a higher risk of depression.³³ More specific to reform efforts, drivers testing positive for marijuana after auto accidents and “[c]alls to poison control after accidental ingestion of marijuana edibles by children” have increased after legalization.³⁴ Compounding matters, “marijuana may be a complementary good for alcohol.”³⁵ Alcohol and, to a lesser extent, marijuana use is common in the U.S. Over

³⁰ *Data on Excessive Drinking*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/alcohol/data-stats.htm> (last reviewed Apr. 12, 2022).

³¹ Pace, *Free Market*, *supra* note 2, at 1262, 1264 (relying on ANNE CASE & ANGUS DEATON, *DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM* 3–9 (2020); Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT’L ACAD. SCI. U.S. 15078, 15078–79 (2015)).

³² Pace, *Free Market*, *supra* note 2, at 1264 (relying on Dirk W. Lachenmeier & Jürgen Rehm, *Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach*, 5 SCI. REP. 1, 2 (2015); Aubree L. Walton et al., *The Potential Health Risks and Legal Implications of Cannabis*, at *19 (unpublished manuscript) (on file with author)).

³³ Pace, *Free Market*, *supra* note 2, at 1260 (relying on Lilian Kloft et al., *Cannabis Increases Susceptibility to False Memory*, 117 PROC. NAT’L ACAD. SCI. 4585, 4588 (Feb. 10, 2020), <https://doi.org/10.1073/pnas.1920162117>; Robin M. Murray et al., *Traditional Marijuana, High-Potency Cannabis and Synthetic Cannabinoids: Increasing Risk for Psychosis*, 15 WORLD PSYCHIATRY 195, 195 (2016); Walton et al., *supra* note 32, at *12–13).

³⁴ Pace, *Free Market*, *supra* note 2, at 1260 (relying on Stacy Salomonsen-Sautel et al., *Trends in Fatal Motor Vehicle Crashes Before and After Marijuana Commercialization in Colorado*, 140 DRUG & ALCOHOL DEPENDENCE 137, 140 (2014); Walton et al., *supra* note 32, at *21–22); *but see generally* Pace, *Free Market*, *supra* note 2, at 1259–68 (analyzing externalities—positive and negative—related to marijuana legalization, including early empirical evidence that marijuana may be a substitute good for opioids and thus reduce opioid overdose deaths).

³⁵ Pace, *Free Market*, *supra* note 2, at 1264 (relying on Philip Wallach & Jonathan Rauch, *Bootleggers, Baptists, Bureaucrats, and Bongs: How Special Interests Will Shape Marijuana Legalization*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 8 (2016)).

half of Americans over the age of eleven reported using alcohol in the past month; over fifteen percent of the same population reported using marijuana.³⁶

A. *Divergence: State Alcohol Regulation in the U.S. Post-Prohibition*

A widespread and sustained temperance movement in the U.S.³⁷ culminated in replacing a “largely unregulated” alcohol industry with capital-P Prohibition.³⁸ The Eighteenth Amendment prohibited the importation, “manufacture, sale, or transportation” (but not possession) of alcohol within the entire U.S.³⁹ The Eighteenth Amendment did not remotely eliminate alcohol consumption in the U.S.,⁴⁰ but it *did* come with negative spillover effects.⁴¹ Although it led to some reduction in overall alcohol

³⁶ Audrey Redford & Angela K. Dills, *The Political Economy of Drug and Alcohol Regulation During the COVID-19 Pandemic*, 87 SOUTHERN ECON. J. 1175, 1175–76 (2021) (citing *Key substance use and mental health indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/>).

³⁷ See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 461, 462–63 (1991)

By the mid-1830s temperance had become a mass movement of the middle class. . . . From roughly the 1850s on, many temperance supporters endorsed the idea of prohibition. . . . In the twentieth century a new prohibitionist organization—the Anti-Saloon League—came to dominate the movement. . . . The League put its considerable resources behind candidates of any party who would vote as it directed on the single issue of liquor.

³⁸ Jonathan R. Elsner, *An Argument Against Regulating Cannabis Like Alcohol*, 3 (Ohio St. Pub. L., Working Paper No. 482, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395308.

³⁹ U.S. CONST. amend. XVIII.

⁴⁰ See, e.g., Levine & Reinerman, *supra* note 37, at 464 (“Prohibition was massively and openly violated, and alcohol was readily available in most of the United States.”); see also Drive-By Truckers, *Where the Devil Don’t Stay*, on THE DIRTY SOUTH (New West Records 2004) (“Prohibition was the talk, but the rich folks walked to the woods where my daddy stayed. Jugs and jars from shiners.”).

⁴¹ See, e.g., Levine & Reinerman, *supra* note 37 at 464–65, 471 (“Adulterated and even poisonous alcohol was sold and many people were locked up for violating prohibition laws. . . . [P]rohibition, many came to believe, undermined respect for all law. . . . Prohibition, . . . produced far more substantial negative side effects than did regulation.”).

consumption,⁴² Prohibition was a failure and regarded as such.⁴³ Less than fifteen years after the Eighteenth Amendment was ratified, the Twenty-first Amendment repealed Prohibition.⁴⁴

The Supreme Court has inferred that the Twenty-first Amendment “grants the States virtually complete control over whether to permit importation or sale of [alcohol] and how to structure the [alcohol] distribution system.”⁴⁵ States rushed to regulate alcohol.⁴⁶ The *Toward Liquor Control* report, commissioned by John Rockefeller, Jr., promoted two models of alcohol regulation: (1) a private system featuring a three-tier distribution scheme and (2) a public alcohol control system.⁴⁷ A

⁴² See Pamela E. Pennock & K. Austin Kerr, *In the Shadow of Prohibition: Domestic American Alcohol Policy since 1933*, 47 BUS. HIS. 383, 385 (2005) (“In the early years of prohibition, alcoholic beverage consumption declined dramatically, with police, social workers, ministers and journalists reporting noticeable reductions in the problems associated with alcohol abuse.”); *but see* Levine & Reinerman, *supra* note 37, at 469 (noting that, after the first three years, alcohol consumption was higher per capita during Prohibition than it had been during World War I, when alcohol was highly taxed and production and sale restricted) (relying on CLARK WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* 260 (1932)).

⁴³ See Levine & Reinerman, *supra* note 37, at 470 (“It is difficult to disagree with Nadelmann’s conclusion that the ‘British experience [and, we would add, the Australian experience] strongly indicates that the national prohibition of alcohol in the United States was, on balance, not successful.’”) (quoting Ethan Nadelmann, *Response to Letters*, 246 SC. 1102 (1989)); *cf.* DOUGLAS ADAMS, *The Restaurant at the End of the Universe*, *THE ULTIMATE HITCHHIKER’S GUIDE TO THE GALAXY* 144, 149 (Wings Books 1996) (“In the beginning the Universe was created. This has made a lot of people very angry and been widely regarded as a bad move.”).

⁴⁴ U.S. CONST. amends. XVIII, XXI.

⁴⁵ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980). The federal government mostly took a hands-off approach to alcohol regulation until the 1980s, when it “set the drinking age nationally at 21, required a stricter threshold for determining when a driver was drunk, and prescribed warnings about the dangers of [fetal] alcohol syndrome and drunk driving.” Pennock & Kerr, *supra* note 42, at 384. The ATF and the U.S. Department of the Treasury’s Alcohol and Tobacco Tax and Trade Bureau are the federal agencies primarily responsible for enforcing federal alcohol regulation, focusing, for example, on the “traffic [of] illicit liquor . . . in interstate commerce” and “[c]ollection of the Alcohol . . . Excise Taxes imposed on manufactures [sic] and importers of these products.” The BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (“ATF”), <https://www.atf.gov/alcohol-tobacco> (last accessed May 25, 2022).

⁴⁶ Jarrett Dieterle, *Enjoy Prohibition Repeal Day, but These Crazy Alcohol Laws Show We have a Long Way to Go*, WASH. EXAM’R (Dec. 4, 2018, 12:00 AM), <https://www.washingtonexaminer.com/opinion/enjoy-prohibition-repeal-day-but-these-crazy-alcohol-laws-show-we-have-a-long-way-to-go>.

⁴⁷ Elsnér, *supra* note 38, at 3.

majority of states adopted a three-tier distribution system.⁴⁸ The three-tier distribution system was a response to the perceived evils of vertical integration pre-Prohibition.⁴⁹ As the name suggests, the three-tier system mandates alcohol pass through three stages before landing in the consumer's hands: (1) manufacturers/suppliers, (2) distributors/wholesalers, and (3) retailers.⁵⁰ Licenses for each stage are traditionally mutually exclusive,⁵¹ and manufacturers/suppliers, wholesalers/distributors, and retailers are prohibited "from having any financial interest in each other."⁵² The economics of the three-tier distribution system favor large manufacturers and distributors/wholesalers.⁵³

A minority of states adopted an alcohol control system.⁵⁴ An alcohol control system involves some level of state-owned or state-supported monopoly. Seventeen states mandate purchase from a state-owned or state-protected wholesaler, and thirteen of those states also monopolize retail sales through "government-operated [liquor] stores or designated agents."⁵⁵ For example, a consumer in Michigan purchasing liquor for off-premises consumption can buy from privately owned and operated retailers but must pay (at least) a state minimum price consisting of the price charged by the

⁴⁸ Elsner, *supra* note 38, at 4 (citing *Birth of State Based, Three Tier Alcohol Regulation*, MONT. BEER & WINE DISTR. ASS'N, <https://mbwda.org/birth-of-state-based-three-tier-alcohol-regulation> (last visited April 10, 2022)).

⁴⁹ Elsner, *supra* note 38, at 3.

⁵⁰ Jeffrey C. O'Brien, *The Craft Brewing Boom and Minnesota's Three-Tier System: The Case for Change*, 43 MITCHELL HAMLINE L. REV. 971, 973 (2017). Manufacturers/suppliers include "brewers, vintners, and importers" and retailers include "liquor stores, restaurants, etc." O'Brien, *supra* note 50, at 975.

⁵¹ Elsner, *supra* note 38, at 4.

⁵² O'Brien, *supra* note 50, at 975.

⁵³ See Elsner, *supra* note 38, at 3 (explaining the economics of how the three-tier distribution system favor large manufacturers and distributors/wholesalers: "This 'tied-house' concept was prevalent up until Prohibition, when it was criticized as being a corrupt system whereby brewers and distillers cared only about 'increased sales' and 'nothing about the community.'"); see also O'Brien, *supra* note 50, at 973 (explaining how the system gives large distributors/wholesalers a major incentive to preserve the system and how franchise law further entrenches the system).

⁵⁴ Elsner, *supra* note 38, at 4 (citing *Birth of State Based, Three Tier Alcohol Regulation*, MONT. BEER & WINE DISTR. ASS'N, <https://mbwda.org/birth-of-state-based-three-tier-alcohol-regulation> (last visited Apr. 3, 2022)).

⁵⁵ *Control State Directory and Info*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, <https://www.nabca.org/control-state-directory-and-info> (last accessed Apr. 3, 2022).

state distributor plus a minimum profit,⁵⁶ and a consumer in North Carolina purchasing spirits for off-premises consumption must buy from an Alcohol Beverage Control Board (“ABC”) Store, owned by a local, governmental ABC Board, which receives all its liquor from one of two state-owned warehouses.⁵⁷ Whether under the three-tier distribution system or an alcohol control system, post-Prohibition alcohol regulation treated and licensed beer, wine, and liquor separately.⁵⁸

U.S. states are split between the three-tier distribution system and alcohol control system approaches, but state law that tracks one of two dominant models, similar to the split in limited liability company (“LLC”) law between the Delaware approach and the Uniform Limited Liability Act (“ULLCA”) approach, does not alone qualify as “divergent.”⁵⁹ Alcohol regulations diverge in another way via “what is known as ‘local option.’”⁶⁰ Half a century after Prohibition ended, thirty-seven states provided for a local option that allowed local jurisdictions to “decide whether to allow liquor sales (wet option) or to prohibit them (dry option).”⁶¹ Beyond those relatively binary choices, state alcohol law demonstrates tremendous variety, with laws that are frequently unique, odd, or both.⁶²

⁵⁶ Vera Hogan, *High Liquor Prices? Blame State, not Store*, TRI-CNTY. TIMES (July 2, 2015), https://www.tctimes.com/living/features/high-liquor-prices-blame-state-not-store/article_eedf2312-20e5-11e5-a8e3-633296715936.html.

⁵⁷ John Trump, *Problematic and Inefficient: House Committee Reveals Condition of State-Run Liquor Monopoly*, CAROLINA J. (May 7, 2021, 4:00 AM), <https://www.carolinajournal.com/news-article/problematic-and-inefficient-house-committee-reveals-condition-of-state-run-liquor-monopoly/>.

⁵⁸ Elsner, *supra* note 38, at 3.

⁵⁹ See, e.g., H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 NEV. L. J. 1085, 1092–93 (2016) [hereinafter, Pace, *Delaware*] (noting that most states track the approach of Delaware or the ULLCA in setting rules governing waivers of fiduciary duties).

⁶⁰ Eugenia Froedge Toma, *State Liquor Licensing, Implicit Contracting, and Dry/Wet Counties*, 26 ECON. INQUIRY 507, 508 (1988).

⁶¹ Toma, *supra* note 60, at 508.

⁶² See Levine & Reinerman, *supra* note 37, at 475 (“States could, and often did, then allow for considerable local option and variation.”).

For example, Louisiana only began allowing the sale of mini-bottles of liquor in 2014.⁶³ Conversely, South Carolina only allowed bars and restaurants to serve liquor from bottles under two ounces until 2006, causing them to stock 1.7-ounce mini-bottles rather than standard 750 ml bottles of liquor.⁶⁴ South Carolina kept its mini-bottle rule fifteen years longer than the second-to-last state to end it, Utah.⁶⁵ Bartenders in Utah must still make and pour drinks behind a partition—a “Zion curtain”—that hides the sight from customers.⁶⁶ “[T]he only state to regulate the sale of beer by temperature,” Indiana, allows only package liquor stores and breweries to sell cold beer, forcing pharmacies, grocery stores, and convenience stores to sell room-temperature beer.⁶⁷ Maryland limits breweries to selling 3,000 barrels per year in their own taprooms and requires any barrels past 2,000 to be first sold to a distributor/wholesaler and then bought back by the brewery taproom.⁶⁸ Until 2018, “Oklahoma grocery and convenience stores could stock beer with only up to 3.2 percent alcohol content—considerably lower than even leading light beer brands.”⁶⁹ Liquor stores, on the other hand, were allowed to sell beer up to 8.99 percent alcohol by volume “but were prohibited from selling cold beer of any strength.”⁷⁰ After Oklahoma changed its law, only two states retained 3.2 percent beer laws (creating

⁶³ Wayne Curtis, *Mixopedia: The Secret Life of Mini Bottles*, IMBIBE MAG. (May 23, 2018), <https://imbibemagazine.com/mixopedia-mini-bottles/>.

⁶⁴ Ben Perrone, *How Mini-Bottles Shaped Charleston’s Cocktail Culture*, CAROLINAS EATER (Oct. 16, 2015, 3:33 PM), <https://carolinas.eater.com/2015/10/16/9553903/mini-bottles-charleston-law-cocktails>.

⁶⁵ *Id.*

⁶⁶ Jim Carlton, *Mommy, Where Do Cocktails Come From?*, WALL ST. J. (Mar. 16, 2017, 10:58 AM), <https://www.wsj.com/articles/mommy-where-do-cocktails-come-from-1489676329?mod=e2tw>.

⁶⁷ Chris Sikich, *Expansion of Cold Beer Sales not on Indiana Lawmakers’ Menu in 2019*, INDYSTAR (Sept. 18, 2018, 4:05 PM), <https://www.indystar.com/story/news/politics/2018/09/18/cold-beer-sales-not-lawmakers-menu-2019/1334375002/>.

⁶⁸ Kelsi Loos, *Bill Would Tie Taproom Barrel Limits to Brewery Production*, FREDERICK NEWS POST (Jan. 25, 2018), https://www.fredericknewspost.com/news/politics_and_government/bill-would-tie-taproom-barrel-limits-to-brewery-production/article_032aa8e8-e16c-58ba-94ca-51f3c657d992.html.

⁶⁹ Tim Talley, *Minnesota Will Soon Be One of Only Two States with 3.2 Percent Alcohol Beer Law*, TWIN CITIES PIONEER PRESS (Jan. 19, 2019 PM), <https://www.twincities.com/2019/01/19/minnesota-beer-alcohol-law-grocery-convenience-stores-oklahoma-colorado-utah-kansas/>.

⁷⁰ *Id.*

questions as to the viability of the 3.2 percent beer market).⁷¹ Minnesota required in-state wineries to make their wine from a majority of grapes grown in-state (Minnesota is not known as a wine grape growing state) until the rule was struck down in 2020 under the Dormant Commerce Clause doctrine.⁷²

The U.S. alcohol market experienced both major endogenous and exogenous shocks in the twenty-first century with, respectively, the craft beer (and micro-distillery) boom and the COVID-19 pandemic. Each has placed pressure on status quo alcohol regulation and resulted in significant change to that regulation.⁷³

B. *Convergence: State Marijuana Regulation in the U.S. in the 21st Century*

Like alcohol, marijuana experienced its own temperance movement. This followed a long period during which marijuana was unregulated in the U.S.⁷⁴ State-level prohibition of marijuana began in the 1910s,⁷⁵ pushed in part by what would become the

⁷¹ *Id.*

⁷² Ashley Brandt, *Farm Wineries Win as Court Declares Minnesota Law Mandating Use of Majority In-State Wine Ingredients in Wines Made by Farm Wineries Facially Unconstitutional in Light of SCOTUS Dormant Commerce Clause Jurisprudence. Bonus: We've got the Briefs for You.*, LIBATION L. BLOG (Sept. 2, 2020), <https://libationlawblog.com/2020/09/02/farm-wineries-win-as-court-declares-minnesota-law-mandating-use-of-majority-in-state-wine-ingredients-in-wines-made-by-farm-wineries-facially-unconstitutional-in-light-of-scotus-dormant-commerce-claus/>.

⁷³ See, e.g., Alistair Williams, *Exploring the Impact of Legislation on the Development of Craft Beer*, 3 *Beverages* 18, 19 (2017), <https://www.mdpi.com/2306-5710/3/2/18> (discussing how the demand for craft beer in North Carolina played a role in the state legislature loosening state alcohol regulations); Redford & Dills, *supra* note 36, at 1181–82 (discussing changes to alcohol regulation in response to the COVID-19 pandemic).

⁷⁴ See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. REV.* 74, 81 (2015) (“For most of American history, marijuana was legal to grow and consume.”) (citing MARK EDDY, CONG. RSCH. SERV., RL 33211, *MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES* 1 (2010), available at <https://sgp.fas.org/crs/misc/RL33211.pdf>).

⁷⁵ Chemerinsky, *supra* note 74, at 81 (charting the path of marijuana prohibition in the states) (citing RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 51–53 (1974); Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 *U. MICH. J. L. REFORM* 707, 749–51 (1998)).

U.S. Drug Enforcement Administration.⁷⁶ Federal regulation of marijuana culminated in complete federal prohibition with the passage of the Controlled Substances Act in 1970,⁷⁷ which defined marijuana by statute as “a drug with a high likelihood of addiction and no safe dose” and “not approved for any medical use.”⁷⁸ Marijuana was not prohibited via constitutional amendment, but the Supreme Court ruled in *Gonzales v. Raich* that federal marijuana prohibition was constitutional.⁷⁹ Not only did the federal government have the power to prohibit marijuana, but it also had the power to do so in states that had ostensibly legalized it: *Raich* involved two women using marijuana in compliance with California law.⁸⁰ What the government did *not* have the power to do, however, was to force the states themselves to prohibit marijuana.⁸¹

Despite the presence of the Controlled Substances Act, “state marijuana laws provide the basis for nearly every marijuana arrest in the country,” with “arrests made at the state and local level dwarf[ing] those made by federal officials by a ratio of 109 to 1” in 2012.⁸² This meant that a state-level reform effort would have a very real effect regardless of what the federal government did.

⁷⁶ Holden & Edelman, *supra* note 24, at 1056 (relying on Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1038 (1970)).

⁷⁷ Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 3 (2020) [hereinafter, Mikos, *Federal Response*] (citing 21 U.S.C. §§ 841, 844).

⁷⁸ Chemerinsky, *supra* note 74, at 82–83 (citing 21 U.S.C. § 812(b)(1), (c)(c)(10)).

⁷⁹ *Gonzales v. Raich*, 545 U.S. 1, 26–27 (2005).

⁸⁰ *Id.* at 6–7; *see also* Holden & Edelman, *supra* note 24, at 1059–60 (discussing *Gonzales v. Raich*).

⁸¹ *See* Holden & Edelman, *supra* note 24, at 1067–69 (arguing that *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018), stands for the proposition that state marijuana legalization is protected by the anti-commandeering doctrine and that it is not preempted by the CSA); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446–60 (2009) [hereinafter, Mikos, *Limits of Supremacy*] (arguing even before *Murphy* that Congress had not and could not preempt state marijuana legalization).

⁸² Chemerinsky, *supra* note 74, at 84 (relying on EZEKIAL EDWARDS ET AL., *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 8–9 (Vanita Gupta et al. eds., 2013); *see* MARK MOTIVANS, *FEDERAL JUSTICE STATISTICS*, 2010 8 (Jill Thomas ed., 2013).

Oregon was the first state to decriminalize marijuana,⁸³ but the reform wave officially kicked off when “California adopted the nation’s first modern medical marijuana law in 1996.”⁸⁴ In what would become a pattern, marijuana reform in California happened via voter referendum rather than through a statute passed by the state legislature.⁸⁵ Medical marijuana quickly picked up steam, with Alaska, Oregon, and Washington, legalizing it in 1998; Maine in 1999; Hawaii, Colorado, and Nevada, in 2000; and another five states by 2008.⁸⁶ Notably, these states were clustered in the West and New England, and each legalized medical marijuana by referendum rather than by statute.⁸⁷

In part due to public threats from then-Attorney General Eric Holder, a referendum that would have made California the first state to legalize adult-use marijuana failed in 2010.⁸⁸ The success of the threats notwithstanding, federal law enforcement followed up with aggressive enforcement efforts targeted at the medical marijuana industry in three states that had legalized medical marijuana.⁸⁹ Those enforcement efforts proved insufficient to chill

⁸³ Holden & Edelman, *supra* note 24, at 1058.

⁸⁴ Mikos, *Federal Response*, *supra* note 77, at 5.

⁸⁵ See Chemerinsky, *supra* note 74, at 85 (“In 1996 California became the first state to permit the use of marijuana for medical purposes, with voters passing Proposition 215 by a margin of 55.6 percent to 44.4 percent.”) (citations omitted).

⁸⁶ Chemerinsky, *supra* note 74, at 85–86 (relying on *Marijuana Law Reform Timeline*, NORML, <https://web.archive.org/web/20140713013741/norml.org/about/item/marijuana-law-reform-timeline> (last visited Mar. 13, 2022)).

⁸⁷ See Christian Britschgi, *Illinois Becomes 11th State to Legalize Weed*, REASON (June 25, 2019, 5:25 PM), <https://reason.com/2019/06/25/illinois-becomes-11th-state-to-legalize-weed/> (“By signing HB 1438 into law, Pritzker has made Illinois the first state in the country to pass a comprehensive legalization bill through its state legislature. Nine other states have passed ballot measures legalizing the possession and sale of recreational marijuana.”).

⁸⁸ Chemerinsky, *supra* note 74, at 87 (relying on *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, ABC7 (Oct. 7, 2011), <https://abc7.com/archive/8383655/>); see John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES (Oct. 16, 2010, 12 AM), <https://www.latimes.com/archives/la-xpm-2010-oct-16-la-me-marijuana-holder-20101016-story.html>; see also *Votes For and Against November 2, 2010, Statewide Ballot Measures*, (2010), <https://elections.cdn.sos.ca.gov/sov/2010-general/07-for-against.pdf>).

⁸⁹ See Chemerinsky, *supra* note 74, at 88

Enforcement actions in the fall of 2011 made clear that the administration meant what it said. The four U.S. Attorneys in California combined forces in a concerted action against California’s medical marijuana industry; Montana’s industry was

the advent of adult-use marijuana legalization. Two years later, ballot initiatives legalizing adult-use marijuana succeeded in Colorado and Washington.⁹⁰

State-level legalization efforts—of both the medical and adult-use variety—accelerated toward the end of the next decade. Adult-use marijuana legalization spread beyond the West and New England to the Midwest, with Michigan and Illinois allowing adult-use sales to begin in 2019 and 2020, respectively.⁹¹ Notably, Illinois became the first state to legalize adult-use marijuana by statute.⁹² In retrospect, 2020 may be the year the dam broke. The electorate in five states voted to legalize marijuana (adult-use marijuana in three states, medical marijuana in one state, and both adult-use and medical marijuana in one state).⁹³ Markedly,

essentially shut down by law enforcement actions; and Colorado dispensaries within a thousand feet of a school were told they must either relocate or close their doors.

(relying on Jamie Kelly, *Former Grizzly Pleads Not Guilty to Federal Drug Charges*, MISSOULIAN (Apr. 7, 2014), http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdFT; *Medical Marijuana: Federal Crackdown, Similar to That in California, Begins in Colorado*, HUFFINGTON POST (Jan. 12, 2012, 4:28 PM), http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html; *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, ABC7 (Oct. 7, 2011), <https://abc7.com/archive/8383655>).

⁹⁰ Chemerinsky, *supra* note 74, at 88 (citing Keith Coffman & Nicole Neroulis, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS (Nov. 6, 2012, 7:53 PM), <https://www.reuters.com/article/us-usa-marijuana-legalization/colorado-washington-first-states-to-legalize-recreational-pot-idUSBRE8A602D20121107>; *Amendments and Propositions*, COLO. SEC'Y STATE, <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html> (last visited Mar. 9, 2022); *November 6, 2012, General Election Abstract Of Votes Secretary of State*, OR. SEC'Y STATE (2012), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordhtml/6873690>; *November 06, 2012, General Election Results, Initiative Measure No. 502 Concerns Marijuana*, WASH. SEC'Y STATE (Nov. 27, 2012, 4:55 PM), https://results.vote.wa.gov/results/20121106/initiative-measure-no-502-concerns-marijuana_bycounty.html).

⁹¹ Pace, *Free Market*, *supra* note 2, at 1521–52 (citing *Adult-Use Stores Continue to Open; Expungement Bill Awaits Senate Action*, MARIJUANA POL'Y PROJECT (Jan. 13, 2020), <https://www.mpp.org/states/michigan/>; Robert McCoppin, *It's Now Only Days Away: Jan. 1 to Usher in the Era of Legalized Recreational Weed in Illinois. 'It Changes Everything.'*, CHI. TRIB. (Dec. 27, 2019, 3:08 PM) [hereinafter, McCoppin, *Days Away*], <https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-legalization-on-jan-1-20191227-aa52o6wmrnegvfpgb55uedlqgcq-story.html>).

⁹² Pace, *Free Market*, *supra* note 2, at 1254 (relying on Britschgi, *supra* note 87).

⁹³ Ryan Bort, *Every Single Weed Initiative Passed on Election Day*, ROLLING STONE (Nov. 4, 2020, 9:30 AM), <https://www.rollingstone.com/culture/culture->

referendums passed not just in Western states like Arizona and a liberal state (New Jersey), but also in a Southern state (Mississippi), and in other “deep red states like Montana and South Dakota.”⁹⁴ 2021 saw the dominance of reform by referendums end, as legislatures in four states—Connecticut, New Mexico, New York, and Virginia—legalized adult-use marijuana (Alabama also legalized medical marijuana by statute).⁹⁵

This incremental process of legalization has led to state marijuana regulation converging, as reformers learned how to build a politically palatable proposal from the experience of reformers in states that moved previously.⁹⁶ There are four important areas of convergence: regulation, *with* decriminalization; adult-use license preferences for existing medical marijuana licensees; an opt-out option for local jurisdictions; and, most recently, social justice provisions. Early reform efforts had a “more libertarian feel,” focusing on decriminalization rather than legalization and regulation.⁹⁷ In Oregon, for example, shifting the focus to regulation resulted in a nine-point swing in referendum results in just a two-year span.⁹⁸ Reforms typically include decriminalization *in addition to* regulation, removing criminal penalties for the possession of small amounts of marijuana while setting up a framework to regulate the sale of marijuana.⁹⁹

news/marijuana-election-guide-state-legalization-ballot-measures-1077510/). South Dakota’s successful referendum legalizing hemp, medical marijuana, and adult-use marijuana was overturned by the South Dakota Supreme Court for violating the state’s single subject rule for constitutional amendments. *South Dakota’s Supreme Court Rules Against Legalization of Recreational Marijuana*, NPR (Nov. 24, 2021, 1:08 PM), <https://www.npr.org/2021/11/24/1058884032/south-dakotas-supreme-court-rules-against-legalization-of-recreational-marijuana>.

⁹⁴ Kris Krane, *2021: The Least Eventful Year for Marijuana*, FORBES (Dec. 31, 2021, 12:34 PM), <https://www.forbes.com/sites/kriskrane/2021/12/31/2021-the-least-eventful-year-for-marijuana/?sh=bc1f24432554>.

⁹⁵ *Id.*

⁹⁶ See JOHN HUDAK & CHRISTINE STENGLEIN, PUBLIC OPINION AND AMERICA’S EXPERIMENTATION WITH CANNABIS REFORM IN MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 20 (Jonathan H. Adler, ed., 2020) (“Although differences exist among state systems, many state-based cannabis reform ballot initiatives build upon others, and there is a degree of policy learning from the experiences of other states.”).

⁹⁷ See Wallach & Rauch, *supra* note 35, at 14 (comparing an earlier, unsuccessful reform effort in Oregon to a later, successful effort).

⁹⁸ Wallach & Rauch, *supra* note 35, at 14.

⁹⁹ See Pace, *Free Market*, *supra* note 2, at 1252 (“The [Michigan] 2018

Giving existing medical marijuana licensees priority access to adult-use licenses has become a standard feature of legalization efforts, appearing in Arizona, Illinois, and Michigan, for example.¹⁰⁰ Montana went even further, giving existing medical marijuana licensees an eighteen-month head start on adult-use sales.¹⁰¹ Another aspect of contemporary U.S. marijuana

referendum immediately decriminalized marijuana.”) (relying on Kathleen Gray, *Legal Marijuana in Michigan: What You Need to Know*, DETROIT FREE PRESS (Nov. 7, 2018, 5:37 PM), <https://www.freep.com/story/news/marijuana/2018/11/07/michigan-marijuana-results-election-legalization/1835297002/>); *Key Dates in Connecticut’s New Cannabis Legislation*, NBC CONN. (Sept. 28, 2021, 10:40 PM) [hereinafter, *Key Dates*], <https://www.nbcconnecticut.com/news/local/key-dates-in-connecticuts-new-cannabis-legislation/2522672/> (“As of July 1 it is legal for adults 21 years and older to possess up to 1.5 ounces (42.5 grams) of marijuana” in Connecticut.); Curtis Segarra, *Recreational Marijuana Becomes Legal in New Mexico on June 29*, KRQE NEWS (Jun. 30, 2021, 10:48 AM), <https://www.krqe.com/news/marijuana/recreational-marijuana-becomes-legal-in-new-mexico-on-june-29/> (“Within the [New Mexico] law, personal use will be legal as of June 29, 2021.”); Ned Oliver, *Marijuana Will be Legal in Virginia on July 1. Here’s What is and isn’t Permitted Under the New Law*, VA. MERCURY (April 7, 2021, 5:46 PM), <https://www.virginiamercury.com/2021/04/07/marijuana-will-be-legal-in-virginia-on-july-1-heres-what-is-and-isnt-permitted-under-the-new-law/> (noting Virginia’s statute immediately decriminalizes possession of up to one ounce of marijuana by persons 21 and older); *New Jersey Governor Signs Laws to Legalize Marijuana Use, Decriminalize Possession*, NBC NEWS (Feb. 22, 2021, 1:54 PM), <https://www.nbcnews.com/news/us-news/new-jersey-governor-signs-laws-legalize-marijuana-use-decriminalize-possession-n1258534> (noting that legislation passed in response to a successful referendum decriminalizes possession of small amounts of marijuana for adults and provides for written warnings for underage possession of marijuana); Ray Stern, *Arizona Just Legalized Marijuana—Now What?*, PHX. NEW TIMES (Nov. 5, 2020, 6:00 AM), <https://www.phoenixnewtimes.com/marijuana/arizona-legal-marijuana-faq-answers-experts-legalization-prop-207-law-11510843> (noting Arizona’s referendum decriminalizes possession of up to one ounce of marijuana by persons 21 and older); McCoppin, *Days Away*, *supra* note 91 (“Under the new state law, adult residents [of Illinois] 21 and over may possess up to 30 grams of flower, 5 grams of concentrates, and 500 milligrams of THC in infused edibles and other products, and visitors may have half that much.”).

¹⁰⁰ Pace, *Free Market*, *supra* note 2, at 1255 (citing Jonah Meadows, *Illinois Marijuana Dispensary License Applications Unveiled*, PATCH (Oct. 2, 2019, 11:37 AM), <https://patch.com/illinois/springfield-il/marijuana-dispensary-license-applications-unveiled-regulators>).

¹⁰¹ Lindsey Stenger, *Marijuana Retailer Prepares for Legalization in Montana*, KRTV GREAT FALLS (Dec. 30, 2021, 6:02 PM), <https://www.krtv.com/news/montana-and-regional-news/marijuana-retailers-prepare-for-legalization-in-montana>; *see also* German Lopez, *Vermont Legalizes Marijuana Sales*, VOX (Oct. 8, 2020, 11:30 AM), <https://www.vox.com/policy-and-politics/2020/10/8/21507594/vermont-marijuana-legalization-sales> (noting concern by the governor that the legalization scheme as passed “would give ‘an unfair head start on market access’ to medical marijuana

legalization that shows convergence is the option for local jurisdictions to opt out of allowing dispensaries to operate within their jurisdiction. The regulatory schemes in Illinois, Michigan, Montana, New Jersey, and New York include an opt-out option.¹⁰² Opt-out is popular. Roughly half of local jurisdictions in New York opted out of allowing dispensaries and consumption sites.¹⁰³

A more recent addition to reform efforts is social justice provisions. Both Connecticut and Illinois, for example, give priority in granting dispensary license applications to “social equity applicants” disproportionality impacted by marijuana prohibition.¹⁰⁴ Arizona set aside twenty-six social equity licenses for “groups disproportionately affected by anti-marijuana laws.”¹⁰⁵ New York reserved a large portion of adult-use licensees “for minority business owners, disabled veterans and distressed farmers, among others” and plans to invest a portion of the tax revenue from marijuana sales into “communities affected by racially disproportionate policing on drugs.”¹⁰⁶ Additionally, Arizona, Illinois, New Mexico, New York, Vermont, and Virginia

businesses over new entrants”).

¹⁰² Pace, *Free Market*, *supra* note 2, at 1255–56 (citing Kathleen Gray, *Legal Marijuana in Michigan: What You Need to Know*, DETROIT FREE PRESS (Nov. 7, 2018, 5:37 PM), <https://www.freep.com/story/news/marijuana/2018/11/07/michigan-marijuana-results-election-legalization/1835297002/>); McCoppin, *Days Away*, *supra* note 91); *Legal Recreational Marijuana Sales Begin in Montana*, MTN NEWS (Jan. 1, 2022, 12:41 PM), <https://www.kpax.com/news/montana-news/legal-recreational-marijuana-sales-begin-in-montana>; Luis Ferré-Sadurní & Troy Closson, *New York Has Legalized Marijuana. Here's What to Know.*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/article/new-york-marijuana-legalization-facts.html>; Amy S. Rosenberg, *Legally Buying Weed at the Jersey Shore Will Depend on What Town You're in*, PHILA. INQUIRER (April 26, 2021), <https://www.inquirer.com/news/new-jersey-shore-cannabis-law-opt-out-20210426.html>; *see also* Oliver, *supra* note 99 (noting that the legalization bill in Virginia deferred decisions on priority for existing medical marijuana licensees, opt-out for local jurisdictions, and provisions for social equity).

¹⁰³ Kary, *supra* note 28.

¹⁰⁴ *See* Pace, *Free Market*, *supra* note 2, at 1253 (citing Jonah Meadows, *Illinois Marijuana Dispensary License Applications Unveiled*, PATCH (Oct. 2, 2019, 11:37 AM), <https://patch.com/illinois/springfield-il/marijuana-dispensary-license-applications-unveiled-regulators>) (noting that Illinois set up a “points-based scoring system that includes social metrics to evaluate applicants”); *Key Dates*, *supra* note 99 (noting that half of licenses in Connecticut were set aside for social equity applicants).

¹⁰⁵ Stern, *supra* note 99.

¹⁰⁶ Ferré-Sadurní & Closson, *supra* note 102.

all provided for expungement of prior marijuana convictions.¹⁰⁷

C. Divergence: Province Marijuana Regulation in Canada Post-Prohibition

Unlike in the U.S., where the states have led reform efforts while the federal government has dragged its feet, the Canadian federal legislature was the body to legalize marijuana, albeit reserving an important role for the provinces, the Canadian sub-national units that serve as analogs to U.S. states.¹⁰⁸ Marijuana prohibition in Canada lasted ninety-five years until medical marijuana “was deemed a constitutionally protected right” in 2000.¹⁰⁹ With the passage of the Canadian Cannabis Act, Canada legalized adult-use marijuana nationwide in 2018.¹¹⁰

A federal regulator “controls the licensing of all cultivator and cultivation facilities, defines legal product forms and testing standards, and sets a minimum standard for purchase aid,” but “[i]ndividual Canadian provinces have jurisdiction over retail distribution and sales in their province, whether through government-operated or privately-operated businesses and through physical stores or online and mail-order.”¹¹¹ As in the U.S., local jurisdictions play an important role in Canadian marijuana regulation.¹¹² Provincial governments determine “how

¹⁰⁷ Ferré-Sadurní & Closson, *supra* note 102; Oliver, *supra* note 99; Kyle Jaeger, *New Mexico Marijuana Legalization Law Officially Takes Effect*, MARIJUANA MOMENT (June 29, 2021), <https://www.marijuanamoment.net/new-mexico-marijuana-legalization-law-officially-takes-effect/>; Robert McCoppin, *Illinois Expunges Nearly Half a Million Cannabis Cases as Part of Legalization*, CHI. TRIB. (Dec. 31, 2020, 5:42 PM), <https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-pardons-expungements-20201231-mrhs3n7tsvchthlfexg3c5zdwm-story.html>; Stern, *supra* note 99; Lopez, *supra* note 101.

¹⁰⁸ Canada actually has two types of sub-national units, provinces and territories. Canada is made up of ten provinces and three territories. “There is a clear constitutional distinction between provinces and territories,” *Provinces and Territories*, CANADA, <https://www.canada.ca/en/intergovernmental-affairs/services/provinces-territories.html> (last accessed on May 25, 2022), but that distinction does not prove materially important to the arguments made in this article. For the sake of simplicity, I will refer to Canada’s sub-national units as provinces throughout.

¹⁰⁹ de Koning & McArdle, *supra* note 14, at 367.

¹¹⁰ de Koning & McArdle, *supra* note 14, at 363.

¹¹¹ Lawrence J. Trautman et al., *Cannabis at the Crossroads: A Transdisciplinary Analysis and Policy Prescription*, 45 OKLA. CITY U. L. REV. 125, 164 (2021).

¹¹² See de Koning & McArdle, *supra* note 14, at 368 (“[R]egulation of the

retail sales of cannabis products are regulated within their jurisdiction,” while “[m]unicipal governments exercise control over retail location, hours of operation, licensing, and other operational aspects of business activity through their power to regulate land use, zoning, and business licensing requirements via local ordinances.”¹¹³ Federal legalization offers advantages for Canadian marijuana businesses, such as the ability to access major stock exchanges.¹¹⁴

Similar to U.S. states after the end of Prohibition, Canadian provinces can be divided into broad categories. In five provinces (Quebec, Nova Scotia, New Brunswick, Prince Edward Island, and Northwest Territories), “the [provincial] government is the sole supplier of” adult-use marijuana.¹¹⁵ In seven provinces (British Columbia, Alberta, Manitoba, Ontario, Newfoundland & Labrador,¹¹⁶ Yukon, and Nunavut), “the [provincial] government takes control of—and participates in—some aspect of the market supply chain.”¹¹⁷ Only one province (Saskatchewan) has adopted a private market model.¹¹⁸ That is, in twelve of Canada’s thirteen provinces the province controls a monopoly in distribution, physical retail, online retail, or some combination thereof.¹¹⁹ In five provinces, (Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Northwest Territories (“NWT”)), the provincial government monopolizes all three.¹²⁰ In five other provinces (British Columbia, Alberta, Ontario, Newfoundland & Labrador, and Yukon), the provincial government monopolizes

recreational cannabis market is operationalized at three levels—federal, provincial, and municipal.”).

¹¹³ de Koning & McArdle, *supra* note 14, at 368.

¹¹⁴ Trautman et al., *supra* note 111, at 165–66.

¹¹⁵ de Koning & McArdle, *supra* note 14, at 369.

¹¹⁶ Newfoundland & Labrador is one province, not two. *See Newfoundland Labrador*, <https://www.newfoundlandlabrador.com/> (last accessed May 25, 2022).

¹¹⁷ de Koning & McArdle, *supra* note 14, at 369.

¹¹⁸ de Koning & McArdle, *supra* note 14, at 370. Lawmakers in New Mexico considered providing for the sale of marijuana in state-run stores, but ultimately crafted a regulatory framework similar to other U.S. states. Jaeger, *supra* note 107.

¹¹⁹ *See* de Koning & McArdle, *supra* note 14, at 369 (noting Saskatchewan is the only Canadian province whose private market model consists of the government acting as a regulator, instead of a market participant).

¹²⁰ de Koning & McArdle, *supra* note 14, at 370, tbl.2.

distribution and online retail.¹²¹ In two provinces (Manitoba and Nunavut), the provincial government monopolizes distribution but not retail, whether physical or online.¹²² New Brunswick initially monopolized all three, “only to realize that the approach did not work” and switch to a concessionaire model where a single private company would be granted a twenty-year monopoly (similar to how some U.S. alcohol control states approach distribution).¹²³ And in three provinces (British Columbia, Yukon, and Nunavut), government and private retail co-exist.¹²⁴

Among provinces that do not monopolize retail, there is also a basic split in the approach to initial license quantity.¹²⁵ Six provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Nunavut, and Yukon) have made a relatively large number of licenses available, similar to the approach they have taken for alcohol.¹²⁶ Two provinces (Ontario and Newfoundland & Labrador) have “strictly regulated the number of licenses issued.”¹²⁷ Marijuana will be presented for sale alongside alcohol, notwithstanding a task force recommendation to the contrary.¹²⁸ The government holds a monopoly over distribution (similar to the approach taken in other alcohol control states) in all but one province (Saskatchewan).¹²⁹ This means that a marijuana producer that wants to sell to consumers in those provinces would need to sell their product to the government distributor and then buy it

¹²¹ de Koning & McArdle, *supra* note 14, at 370, tbl.2.

¹²² de Koning & McArdle, *supra* note 14, at 370, tbl.2.

¹²³ de Koning & McArdle, *supra* note 14, at 388.

¹²⁴ de Koning & McArdle, *supra* note 14, at 370, tbl.2 ; de Koning & McArdle, *supra* note 14, at 382 (noting government and (heavily regulated) private retailers co-existing presents risks and ethical concerns of its own. In British Columbia, for example, the government sold marijuana online “at a price 30% lower than [private, physical retailers] could afford to match.”).

¹²⁵ See Chelsea Cox, *The Canadian Cannabis Act Legalizes and Regulates Recreational Cannabis Use in 2018*, 122 HEALTH POL’Y 205, 208 (2018) (stating similar to the approach taken in some U.S. alcohol control states, in these provinces “the existing liquor corporations take full control of cannabis distribution, sale, and oversight”).

¹²⁶ de Koning & McArdle, *supra* note 14, at 369.

¹²⁷ de Koning & McArdle, *supra* note 14, at 369. Ontario initially made only twenty-five licenses available (via lottery). de Koning & McArdle, *supra* note 14, at 385.

¹²⁸ de Koning & McArdle, *supra* note 14, at 369; Cox, *supra* note 125, at 208.

¹²⁹ de Koning & McArdle, *supra* note 14, at 371.

back.¹³⁰ Only three provinces (Saskatchewan, Manitoba, and Nunavut) allowed private market participants to handle online sales.¹³¹ Provincial marijuana regulation shows a strong east-west split, with eastern provinces taking a more restrictive approach.¹³²

As is common in the U.S., individual jurisdictions in Canada can (and often do) opt out of allowing dispensaries.¹³³ Even with a federal stamp of approval, and perhaps in part due to the use of unwieldy government monopolies, Canada lags the U.S. in marijuana sales. There were only \$2 billion in marijuana sales in Canada in 2020 compared to \$17.5 billion in sales in the U.S.¹³⁴ The province of Ontario actually managed to lose \$42 million engaging in the online sale and wholesale distribution of marijuana.¹³⁵ Physical dispensary openings got off to a slow start. Data collected in the first two months after legalization identified only “[twenty-two] online stores and 163 physical storefronts” operating nationwide.¹³⁶ The number of physical dispensaries had grown to 535 a year later (from the end of 2018 to the end of 2019).¹³⁷ By 2021, there were close to three thousand.¹³⁸

As with U.S. states and alcohol, Canadian provinces have a number of idiosyncratic marijuana regulations. Only Saskatchewan allows retailers to order product directly from producers.¹³⁹ This has allowed retailers there to move more quickly and avoid the supply chain issues that have bedeviled retailers in other provinces.¹⁴⁰ Saskatchewan is also the only province to allow

¹³⁰ Priyashni Goundar et al., *A Comparative Analysis of Laws on Recreational Cannabis Edibles Between Canada and the United States of America*, 94 INT’L J. DRUG POL’Y 1, 4 (2021).

¹³¹ de Koning & McArdle, *supra* note 14, at 373.

¹³² This shows similarities to the U.S., where western states have generally led the way in marijuana legalization. Pace, *Free Market*, *supra* note 2, at 1251.

¹³³ Kary, *supra* note 28.

¹³⁴ Lam, *supra* note 24.

¹³⁵ *The Ontario Government Lost \$42M Selling Cannabis in the Last Year*, CBC News (Sept. 13, 2019, 2:55 PM), <https://www.cbc.ca/news/canada/toronto/ontario-cannabis-loss-1.5282994>.

¹³⁶ Syed Mahamad et al., *Availability, Retail Price and Potency of Legal and Illegal Cannabis in Canada after Recreational Cannabis Legalisation*, 39 DRUG & ALCOHOL REV. 337, 339 (2020).

¹³⁷ de Koning & McArdle, *supra* note 14, at 377.

¹³⁸ Kary, *supra* note 28.

¹³⁹ de Koning & McArdle, *supra* note 14, at 383.

¹⁴⁰ de Koning & McArdle, *supra* note 14, at 383 (citing *Sask. Stores Get Cannabis*

retailers to transfer product between retail locations.¹⁴¹ Manitoba set up a private quasi-monopoly, giving licenses to four companies with the “clearly stated objective to ensure that 90% of the population was within a 30-minute drive” of a dispensary.¹⁴² Quebec prohibits marijuana edibles that look like a “toy, fruit, animal or real or fictional character” or that “are sweets, confectionary, dessert, or chocolate.”¹⁴³ Originally, nineteen was the minimum age to purchase marijuana, including edibles, “in all Canadian provinces and territories except for Alberta and Quebec, where the legal age” was set as eighteen.¹⁴⁴ After a change in government, Quebec raised the minimum age to purchase marijuana products to twenty-one.¹⁴⁵ Manitoba allows orders by app for home delivery.¹⁴⁶ Tax rates vary by province.¹⁴⁷

Edibles Just In Time for the Holidays, CBC NEWS (Dec. 24, 2019), <https://www.cbc.ca/news/canada/saskatchewan/cannabis-edibles-in-time-holidays-1.5408102>).

¹⁴¹ de Koning & McArdle, *supra* note 14, at 383.

¹⁴² de Koning & McArdle, *supra* note 14, at 383–84.

¹⁴³ Goundar et al., *supra* note 130, at 4 (citing *Regulation to Determine Other Classes of Cannabis that may be Sold by the Société Québécoise du Cannabis and Certain Standards Respecting the Composition and Characteristics of Cannabis*, LÉGISQUÉBEC (2019), <https://www.legisquebec.gouv.qc.ca/en/document/cr/C-5.3,%20r.%200.1%20>).

¹⁴⁴ Goundar et al., *supra* note 130, at 4 (citing *Authorized Cannabis Retailers in the Provinces and Territories*, GOV'T CAN., <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/provinces-territories.html#a4> (last modified Mar. 9, 2022)); *Legal Age to Buy Cannabis in Quebec is Now 21, the Highest in Canada*, CBC NEWS (Jan. 1, 2020, 4:00 AM), [hereinafter, *Legal Age*], <https://www.cbc.ca/news/canada/montreal/legal-age-cannabis-edibles-1.5399211>.

¹⁴⁵ *Legal Age*, *supra* note 144.

¹⁴⁶ de Koning & McArdle, *supra* note 14, at 383.

¹⁴⁷ See, e.g., Goundar et al., *supra* note 130, at 5 (“In select Canadian provinces—Alberta, Nunavut, Ontario, and Saskatchewan—the flat-rate additional cannabis duty is adjusted by 16.8%, 19.3%, 3.9%, and 6.45% respectively. Consumers, at the time of purchase pay a consumer sales tax which varies from 5% to 15% depending on the province.”) (citing *Charge and Collect the Tax – Which Rate to Charge*, GOV'T CAN., <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/charge-collect-which-rate.html> (last modified May 5, 2021); *EDN60 Calculation of Cannabis Duty and Additional Cannabis Duty on Cannabis Oil, Edible Cannabis, Cannabis Extracts and Cannabis Topicals*, GOV'T CAN. (Apr. 2019), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edn60/calculation-cannabis-duty-additional-cannabis-duty-cannabis-oil-cannabis-edibles-extracts-topicals.html>); see also Goundar et al., *supra* note 130, at 5 (finding that U.S. tax rates vary from state to state).

The variance in state regulations causes substantial variation in legal price by province.¹⁴⁸ Illegal prices vary less and are generally lower.¹⁴⁹ The variance in state regulations has also led to substantial variation in the ratio of physical storefronts to residents, with ratios in 2019 ranging from one storefront for every 7,471 residents to one storefront for every 606,939 residents.¹⁵⁰ Population density helps drive the variation in ratio, but Alberta, with little over a tenth of Canada's population, was home to almost *half* of its physical retail storefronts in 2019.¹⁵¹ Unsurprisingly, the six provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Nunavut, and Yukon) that make licenses broadly available account for only thirty-two percent of Canada's population, but 77.2 percent of its physical retail storefronts.¹⁵² The two provinces (Ontario and Newfoundland & Labrador) that sharply restrict license quantity, account for 40.2 percent of Canada's population, but only 8.1 percent of its physical retail storefronts.¹⁵³

¹⁴⁸ See Mahamad et al., *supra* note 136, at 339 (finding that legal prices varied among provinces by over eighty percent when purchasing small amounts of marijuana).

¹⁴⁹ See Mahamad et al., *supra* note 136, at 339, 344 (finding that illegal prices were “significantly lower than legal” prices and varied among provinces by seventeen percent to twenty percent when purchasing small amounts of marijuana). Prices tended to converge at larger amounts. Mahamad et al., *supra* note 136; see also Trautman et al., *supra* note 111, at 179 (“In Canada, as in the U.S. states, the complexities and costs of the current environment not only pose a burden to [marijuana] businesses but have created a significant disincentive for some consumers to participate in the legal market.”).

¹⁵⁰ de Koning & McArdle, *supra* note 14, at 377, tbl.3.

¹⁵¹ de Koning & McArdle, *supra* note 14, at 377, tbl.3 (finding in 2019, Alberta was home to 11.6 percent of Canadians and 47.7 percent of physical marijuana dispensaries).

¹⁵² de Koning & McArdle, *supra* note 14, at 377, tbl.3.

¹⁵³ de Koning & McArdle, *supra* note 14, at 377, tbl.3 (finding that the five provinces that monopolize retail account for 27.8 percent of Canada's population and 14.7 percent of its physical retail storefronts); de Koning & McArdle, *supra* note 14, at 377–78.

III. AN INTEREST GROUP, PATH DEPENDENCY, AND TEMPORAL THEORY OF CONVERGENCE

For the three bodies of law explored above, each reflecting policy and lawmaking by a sub-national body post-prohibition of a vice substance, two show signs of divergence in the law, and one shows signs of convergence. Further confusing matters, we see divergence in Canadian marijuana legalization and convergence in U.S. marijuana legalization despite both happening roughly contemporaneously. This divide can largely be explained by path dependency (and by conditions obviating path dependency), interest group politics, and temporal factors.

Divergence has its disadvantages. One of the chief advantages of sub-national units joining together under one federalist nation is to create “a common market that is larger and more efficient than one in which international borders impede the flow of goods, services and capital.”¹⁵⁴ Divergent state law diminishes those efficiency gains. Dealing with a thicket of disparate regulations raises the cost for a business to operate across state lines, cutting into economies of scale. A state that adopts inefficient rules for its businesses (including alcohol and marijuana businesses) inflicts costs on those businesses and puts itself at a competitive disadvantage relative to other states.¹⁵⁵ While divergence reflecting the differing policy preferences of heterogeneous electorates is to be expected, convergence reflecting sound policymaking is to be expected as well, and likely the stronger factor.

Substantial effort is devoted toward convergence in other areas of the law. The Uniform Law Commission (“ULC”) has published “more than 300 uniform acts.”¹⁵⁶ Many have been quite successful. All fifty states have adopted Article 9 of the Uniform

¹⁵⁴ Choudhry & Hume, *supra* note 18, at 360.

¹⁵⁵ See Gelter, *supra* note 7, at 8 (“Convergence theory posits that market forces reward efficient economies and legal systems and push them towards adopting efficient rules.”); *cf.* Bebchuk & Roe, *supra* note 23, at 134–35 (“Countries that fail to adopt efficient rules would inflict costs on their corporations, which would then be worth less and would then be less able to raise capital; as a result, firms, factories, and businesses might suffer, or they might migrate away from the country.”) (citations omitted).

¹⁵⁶ *What Kinds of Legal Issues Does the ULC Address?*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/faq#What%20kinds%20of%20legal%20issues%20does%20the%20ULC%20address?> (last accessed May 25, 2022).

Commercial Act governing secured transactions.¹⁵⁷ Forty-one states have adopted the 1997 Partnership Act, more commonly known as the Revised Partnership Act (“RUPA”), while forty-nine had previously adopted the original Uniform Partnership Act.¹⁵⁸ The ULC is not the only game in town: the National Association of Insurance Commissioners publishes model insurance laws,¹⁵⁹ and the American Bar Association published, among others, the Model Business Corporation Act.¹⁶⁰ A single state can influence its fellow states, as exemplified by Delaware and limited liability company law.¹⁶¹ The same can be said of judges, with the state court service of judges like Benjamin Cardozo and Roger Traynor having a substantial effect on the common law of other states by winning “the market of judicial reasoning.”¹⁶² Similarly, federal law can be a force for convergence. State constitutional law, for example, tends to follow federal constitutional law.¹⁶³

¹⁵⁷ *UCC Article 9, Secured Transactions*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=6317f73b-badb-47b2-8a5a-58ee62032ba1> (last accessed Apr. 6, 2022).

¹⁵⁸ *Partnership Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44> (last accessed Apr. 6, 2022).

¹⁵⁹ See generally Jingshu Luo et al., *Interest Group and Policy Diffusion: The Case of NAIC Model Laws* (Jan. 3, 2022) (unpublished manuscript) (on file with author).

¹⁶⁰ *Model Business Corporation Act 2016 Revision*, AM. BAR ASS’N, (Dec. 9, 2017), https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf.

¹⁶¹ See generally, Pace, *Delaware*, *supra* note 59, at 1092–93 (noting that most states track the approach of Delaware or the ULLCA in setting rules governing waivers of fiduciary duties).

¹⁶² JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (Oxford Univ. Press 2018).

¹⁶³ See Bauries, *supra* note 17, at 303

Studies of the convergence and divergence of state and federal constitutional law doctrine have generally focused on state interpretation or application of state constitutional provisions with analogues in the federal document. As Professor Williams points out, as to such analogous provisions, doctrinal convergence is the overwhelming majority approach among state courts.

(relying on ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 194 (2009)).

That being said, uniform and model acts explain little about why alcohol law in the U.S. has resisted convergence or why marijuana law does converge—uniform laws exist for neither.¹⁶⁴ Policymaking in both areas is marked by contradictory policy goals,¹⁶⁵ but that lacks explanatory power for convergence and divergence. Law does not automatically update to match the policy preferences of the public—or even represent the results of logrolling¹⁶⁶ by current interest groups. Law in the U.S. (and Canada) tends toward stability by design. Pushing almost any serious reform through a state legislature requires expending serious political capital. Existing rules have an additional advantage because “institutions and structures might have already developed to address needs and problems arising under these rules.”¹⁶⁷ Both government and business bear transition costs that may prevent a switch to otherwise better policy.¹⁶⁸ Amending existing regulatory frameworks can “have unforeseeable ripple effects and undermine legal certainty.”¹⁶⁹ Laws and regulatory structures that are a product of a specific place and time, responding to specific events can and often do then persist long after.¹⁷⁰

¹⁶⁴ The ULC did convene an Alcohol Direct-Shipping Compliance Act Committee charged with drafting “a uniform or model law addressing registration and licensing of the direct sale of wine to consumers and the prevention of illegal sales.” *Alcohol Direct-Shipping Compliance Act Committee*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=ae85397d-c04e-465d-a44b-b308d42b3160> (last accessed Apr. 6, 2022).

¹⁶⁵ See, e.g., Pennock & Kerr, *supra* note 42, at 383

Alcohol policy has typically been somewhat contradictory both in the United States and Western Europe. On the one hand, governments have often promoted the production of alcoholic beverages, motivated by desires for tax revenue and for agricultural prosperity. On the other hand, governments have also engaged in control policies, including marketing controls, in order to reduce the social and personal costs of alcohol misuse.

¹⁶⁶ OXFORD DICTIONARY OF ECONOMICS (5th ed. Oxford Univ. Press) (“Cooperation between representatives in national or local legislatures to support other members’ bids for public money in return for support for measures to benefit their own constituents.”).

¹⁶⁷ Bebchuk & Roe, *supra* note 23, at 156.

¹⁶⁸ See Gelter, *supra* note 7, at 8 (“Even if change would be economically efficient in principle, switching could be prohibitively costly.”).

¹⁶⁹ See Gelter, *supra* note 7, at 10.

¹⁷⁰ Cf. Levine & Reinerman, *supra* note 37, at 466 (“The production, sale, and

Add interest group politics into the mix, and path dependence results. Even as states may converge culturally and economically, their laws may continue to diverge for this reason.¹⁷¹ Any regulatory framework interferes with the market and results in winners and losers. The winners have much to lose if the regulatory framework is updated and so have a strong incentive to expend substantial resources to defend their existing advantages.¹⁷² In democracies, strongly motivated minorities tend to win out over weakly motivated majorities.¹⁷³ This can prevent the adoption of optimal policies.¹⁷⁴ For example, South Carolina's mini-bottle rule created a "Baptists and bootleggers" coalition in support of the rule, consisting not only of literal Baptists (who supported a rule that made alcohol consumption more costly and

distribution of alcoholic beverages today is still largely governed by the alcohol control structures designed and implemented at that time [after Prohibition]."); Bebchuk & Roe, *supra* note 23, at 129

Because of this path dependence, a country's pattern of ownership structures at any point in time depends partly on the patterns it had earlier. Consequently, when countries had different ownership structures at earlier points in time—because of their different circumstances at the time, or even because of historical accidents—these differences might persist at later points in time even if their economies have otherwise become quite similar.

¹⁷¹ Cf. Bebchuk & Roe, *supra* note 23, at 134

Take two countries and assume that, while different in their initial corporate structures and legal rules, the two became identical some time ago in terms of their economies, politics, types of firms, cultures, norms, and ideologies. Could differences in corporate structures still persist? They could to the extent that a country's corporate structures and rules depend, as we will argue, on the country's initial corporate structures and rules.

¹⁷² See Gelter, *supra* note 7, at 9 ("Past institutional choices have created interest groups whose members enjoy advantages from the present system. Such interest groups will lobby against changes that eliminate rents they draw from the current institutional arrangement."); Bebchuk & Roe, *supra* note 23, at 131, 163

If the initial pattern provides one group of players with relatively more wealth and power, this group would have a better chance to have [legal] rules that it favors down the road. . . . The changes in legal rules that would likely induce the fiercest opposition from interest groups would be ones that directly reduce their rents.

¹⁷³ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

¹⁷⁴ See Gelter, *supra* note 7, at 8 ("A jurisdiction may be at a local optimum that can be reached without incurring a prohibitive cost, but it will not move to the global optimum because the cost would fall heavily on one interest group that has the political power to block change.").

presumably reduced consumption) but also of liquor wholesalers (who benefited from the higher margins on mini-bottles).¹⁷⁵ New market entrants often choose legal certainty over pushing the outer bounds of the existing regulatory framework.¹⁷⁶ And industry lawyers have an incentive to both protect “human capital specialized in the current rules” and “requirements that give them a source of income.”¹⁷⁷

Interest groups play an important role in policymaking, including its spread from state to state.¹⁷⁸ The alcohol industry is an obvious interest group in the context of alcohol regulation.¹⁷⁹ Similarly, it is an interest group in the context of marijuana regulation.¹⁸⁰ For states that take the three-tier distribution system

¹⁷⁵ See Paul Wachter, *Bigger is Better: How Tiny Bottles got Booted out of South Carolina's Bars*, LEGAL AFF. (Apr. 2006), https://www.legalaffairs.org/issues/March-April-2006/scene_Wachter_marapr06.msp (explaining that liquor wholesalers supported the rule but that it fell after the South Carolina Baptist Convention finally changed its position). Interestingly, one study focused on referendums found “no relationship between the legalization of medical marijuana and . . . adherence to evangelical Protestantism.” Cynthia Rugeley et al., *Direct Democracy, Policy Diffusion, and Medicalized Marijuana*, 40 POL. & THE LIFE SCI. 72, 76 (2021). Another study focused on statutory legalization of medical marijuana found a correlation between the number of evangelical adherents in a state and a lowered likelihood of legalization. A. Lee Hannah & Daniel J. Mallinson, *Defiant Innovation: The Adoption of Medical Marijuana Laws in the American States*, 46 THE POL'Y STUD. J. 402, 416 (2018).

¹⁷⁶ See Gelter, *supra* note 7, at 9 (“While market participants may be willing to take risks, they put a premium on legal certainty. Lawyers therefore proceed on trodden paths.”); *but see generally*, H. Justin Pace, *Rogue Corporations: Unlawful Corporate Conduct and Fiduciary Duty*, 85 MO. L. REV. 1 (2020); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017) (discussing businesses that strategically seek to break and change the law).

¹⁷⁷ Gelter, *supra* note 7, at 10.

¹⁷⁸ See Kristin N. Garrett & Joshua M. Jansa, *Interest Group Influence in Policy Diffusion Networks*, 15 STATE POL. & POL'Y Q. 387, 390 (2015) (flagging “studies showing that interest group campaigns played a role in the spread of urban wage laws and same-sex marriage bans”) (citing Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 STATE POL. & POL'Y Q. 5 (2001); Isaac Martin, *Dawn of the Living Wage: The Diffusion of a Redistributive Municipal Policy*, 36 URB. AFF. REV. 470 (2001)).

¹⁷⁹ See Levine & Reinerman, *supra* note 37, at 470 (“[T]he liquor industry (like most other U.S. industries) gained increasing influence over the agencies that were supposed to regulate it” post-Prohibition).

¹⁸⁰ See Pace, *supra* note 2, at 1264 (noting that the alcohol industry has not fought marijuana legalization, which suggests that alcohol and marijuana are not substitute goods) (citing Wallach & Rauch, *supra* note 35, at 8).

approach to alcohol regulation, distributors are an important interest group.¹⁸¹ In alcohol control states, public policymakers and employees of the state monopoly form an interest group in favor of the status quo.¹⁸² Distributors that might prefer the three-tier distribution system are a less important interest group than in a three-tier distribution system state because they have weaker incentives. Dry counties persist in part because liquor stores in neighboring wet counties oppose a change in status.¹⁸³ In each case, the initial regulatory approach created interest groups with an incentive to maintain the status quo.

Interest group analysis is especially relevant in the marijuana context because “[m]ost observers of direct democracy now agree that initiatives and referendums lead to relatively high levels of interest group activity,”¹⁸⁴ as, until very recently, legalization only happened by referendums.¹⁸⁵ Marijuana legalization made slow initial progress in the U.S., likely, in part, because it lacked interest groups in support. But support for legalization has grown steadily. This century, support for marijuana legalization doubled to a record-high sixty-eight percent of Americans.¹⁸⁶ Legalization is an issue of low political salience (Americans do not list it among the most important issues driving their votes), but the high level of support makes referendums feasible. Without a legal or quasi-legal market, the sorts of commercial interests typically active in a regulatory space have not been present until recently.¹⁸⁷ With medical or adult-use marijuana now legal in most U.S. states and

¹⁸¹ See O’Brien, *supra* note 50, at 988 (“Wholesalers wield tremendous clout at the capitol.”).

¹⁸² Redford & Dills, *supra* note 36, at 1178–1179 (citations omitted).

¹⁸³ Redford & Dills, *supra* note 36, at 1178 (citing Jeremy Horpedahl, *Bootleggers, Baptists and Ballots: Coalitions in Arkansas’ Alcohol-Legalization Elections*, PUB. CHOICE (forthcoming)).

¹⁸⁴ Christopher A. Cooper et al., *Perceptions of Power: Interest Groups in Local Politics*, 37 STATE & LOC. GOV’T REV. 206, 207 (2005). *Contra id.* at 212 (finding “that cities with initiatives and/or referendums do not have higher relative levels of interest group activity”).

¹⁸⁵ See Pace, *Free Market*, *supra* note 2, at 1254 (noting that Illinois in 2020 was “the first state to provide for legalization and regulation of adult-use marijuana sales legislatively”) (citing Britschgi, *supra* note 87).

¹⁸⁶ *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx>.

¹⁸⁷ Wallach & Rauch, *supra* note 35, at 11.

Canada, that is no longer the case.

Because existing medical marijuana customers can switch to buying at adult-use dispensaries, existing medical marijuana dispensaries are an important interest group for adult-use marijuana legalization. Early adult-use legalization efforts were stymied by the opposition of existing medical marijuana dispensaries to what would amount to new competition.¹⁸⁸ Reformers learned to flip the interest groups' incentives by routinely giving existing medical marijuana dispensary licensees priority access to adult-use dispensary licenses.¹⁸⁹ In Washington in 2012, medical marijuana providers organized in opposition to the legalization of adult-use marijuana;¹⁹⁰ in New York in 2021, on the other hand, medical marijuana licensees aggressively lobbied for the right to participate in the adult-use market.¹⁹¹ Local jurisdictions are another important interest group, themselves influenced by neighborhood organizations¹⁹² that may be ambivalent toward marijuana so long as dispensaries are Not In My BackYard ("NIMBY"). Allowing local jurisdictions to opt out of allowing local dispensaries dulls the opposition of NIMBY neighborhood organizations.¹⁹³ Different jurisdictions may make different decisions on opt-out due to both differing views on marijuana and because "[i]nterest groups are not equally active in all cities."¹⁹⁴

Reform requires putting together a viable political coalition, especially if it is to happen legislatively. Legalization has moved from a libertarian approach that attracted weak support to a tax-and-regulate approach (with a dash of social justice) that appeals to a broad cross-section of interest groups on the American Left.

¹⁸⁸ Wallach & Rauch, *supra* note 35, at 7.

¹⁸⁹ Pace, *Free Market*, *supra* note 2, at 1255 (citing Wallach & Rauch, *supra* note 35, at 8).

¹⁹⁰ Wallach & Rauch, *supra* note 35, at 7.

¹⁹¹ Ferré-Sadurní & Closson, *supra* note 102.

¹⁹² See Cooper, *supra* note 184, at 206, 211 (noting that neighborhood organizations are an important interest group for local politics) (citing David R. Elkins, *The Structure and Context of the Urban Growth Coalition: The View from the Chamber of Commerce*, 23 POL'Y STUD. J. 583 (1995); ROBERT J. DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE (1992)).

¹⁹³ Pace, *Free Market*, *supra* note 2, at 1255–56 (citations omitted).

¹⁹⁴ Cooper et al., *supra* note 184, at 207.

The addition of social equity provisions attracts the support of minority and social justice groups.¹⁹⁵ Provisions designed to appeal to labor unions sometimes appear.¹⁹⁶ Further, potential tax revenue from legal marijuana sales appeals to policymakers. Other interest groups have had a perhaps surprisingly muted role. Big Tobacco is a latent interest group that may become more active in the future, especially if federal restrictions are eased.¹⁹⁷ Local law enforcement bureaus have an incentive to oppose legalization because they “can expand their budgets through civil asset forfeitures,”¹⁹⁸ but they have not been able to prevent the march of legalization through the states.¹⁹⁹

Convergence is in part “time-specific.”²⁰⁰ Two different regulatory approaches could have different costs and benefits but roughly equal out from an efficiency perspective (that is, there are multiple optima).²⁰¹ Given roughly equal efficiency, two states

¹⁹⁵ See *infra* Part IIb (identifying social equity provisions as a common element of recent, successful reform efforts); see also Wallach & Rauch, *supra* note 35, at 11 (noting that reformers “recruited organizations representing the interests of minority communities, including the NAACP and the League of United Latin American Citizens (LULAC).”).

¹⁹⁶ See, e.g., Pace, *Free Market*, *supra* note 2, at 1271 (noting that “labor interests in Michigan have already succeeded in inserting language in proposed marijuana regulations that would require a labor peace agreement be in place with a union before the state will grant a marijuana license”) (citing *Michigan Marijuana Agency Hears Mixed Reactions to Labor Peace Agreements*, CRAIN’S DETROIT BUS. (Feb. 13, 2020, 7:59 AM), <https://www.crainsdetroit.com/marijuana/michiganmarijuana-agency-hears-mixed-reactions-labor-peace-agreements>).

¹⁹⁷ Compare Holden & Edelman, *supra* note 24, at 1082 (“According to multiple sources, the largest cigarette manufacturing companies in the world have already begun to purchase stakes in leading marijuana startups with the hopes of gaining an early foothold into emerging marijuana markets.”) (relying on Thor Benson, *Big Tobacco Is Already Eyeing Pot*, ROLLING STONE, (Sept. 25, 2018, 3:45 PM), <https://www.rollingstone.com/culture/culture-features/big-tobacco-pot-weed-cannabis-industry-727407>); Rachel A. Barry et. al., *Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legislation*, MILBANK Q. 207, 209 (2014), with Pace, *Free Market*, *supra* note 2, at 1232 (arguing that the federal prohibition of marijuana might allow dissident shareholders to block tobacco corporations from entering the marijuana industry).

¹⁹⁸ Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 30–31 (1995).

¹⁹⁹ Cf. Wallach & Rauch, *supra* note 35, at 2 (describing law enforcement as part of “an ‘iron triangle’ of anti-legalization interests” that *slowed* reform).

²⁰⁰ Garrett & Jansa, *supra* note 178, at 389 (citing Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174, 1175 (1973)).

²⁰¹ Bebchuk & Roe, *supra* note 23, at 156.

deciding which approach to take might rationally choose different approaches. “Given that moving from one [approach] to another would involve [transition] costs, maintaining the status quo might be efficient in each” state, preventing convergence over time.²⁰² Even if one approach is more efficient than the alternative, divergence will persist if transition costs exceed potential efficiency gains from convergence. For example, alcohol control systems and dry jurisdictions have little effect on alcohol consumption.²⁰³ As the policy choice appears to change behavior little, the efficiency gains from changing policy may be small. The divergence between dry and wet jurisdictions may also be driven not just by different views on alcohol but by other factors such as economies of scale for the cost of enforcing alcohol rules, further limiting potential efficiency gains.²⁰⁴

States compete with other states.²⁰⁵ If one state pushes up alcohol or marijuana prices with heavy taxes, for example, residents near the border may choose to cross that border to buy alcohol or marijuana in a lower-tax state, costing the state where they reside tax revenue. Michigan and Illinois legalizing adult-use marijuana put pressure on neighboring states whose citizens can now much more easily travel across state lines to buy marijuana.²⁰⁶ Convergence is in part a product of “the external influences of

²⁰² Bebachuk & Roe, *supra* note 23, at 156.

²⁰³ Toma, *supra* note 60, at 508 (citing Janet Smith, *An Analysis of State Regulations Governing Liquor Store Licensees*, 25 J. L. & ECON. 301, 319 (1982); Stanley I. Ornstein, *Control of Alcohol Consumption Through Price Increases*, 41 J. STUD. ON ALCOHOL 807, XX (1980); Julian L. Simon, *The Economic Effects of State Monopoly of Packaged-Liquor Retailing*, 74 J. POL. ECON. 188, 193 (1966); Alan D. Entine, *The Relationship Between the Number of Sales Outlets and the Consumption of Alcoholic Beverages in New York and Other States*, STUDY PAPER NO. 2, ALBANY: NEW YORK STATE MORELAND COMMISSION OF THE ALCOHOLIC BEVERAGE CONTROL LAW (Oct. 1963)).

²⁰⁴ Toma, *supra* note 60, at 511.

²⁰⁵ See Choudhry & Hume, *supra* note 18, at 360 (“By engineering a competition among regional governments for mobile people, resources and money, [federalism] also ensures that those governments face economic and political pressure to refrain from infringing upon property rights and markets: a result that just so happens to enhance economic efficiency across the federal system.”) (citing Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L., ECON., & ORG. 1, 5 (1995)); see also Garrett & Jansa, *supra* note 178, at 389 (“Economic competition theory suggests that states compete with other states.”).

²⁰⁶ Pace, *Free Market*, *supra* note 2, at 1254–55.

neighboring or regional states.”²⁰⁷ And, indeed, U.S. marijuana legalization has shown regional patterns.

Information also flows from state to state, and interest groups²⁰⁸ and policy entrepreneurs help facilitate that flow.²⁰⁹ Time-constrained state legislators “are more likely to borrow existing policy ideas from other political actors.”²¹⁰ State legislators are more likely to borrow a policy approach that has succeeded in other states. Having borrowed policy, state legislators can focus on tweaks to further increase the likelihood of success.²¹¹ Those tweaks may then be borrowed in turn. Note that the knowledge being passed is what is politically feasible and how to build a viable political coalition for reform, not necessarily which policy approach is most efficient.²¹² This explains why U.S.

²⁰⁷ Garrett & Jansa, *supra* note 178, at 388–89 (citing Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969) [hereinafter, Walker, *Diffusion of Innovations*]).

²⁰⁸ Garrett & Jansa, *supra* note 178, at 388 (citing Bradley Kile, *Networks, Interest Groups, and the Diffusion of State Policy*, ELECTRONIC THESES, TREATISES AND DISSERTATIONS, FLA. STATE UNIV. LIBRS. 1, 45–47 (2005), <https://www.proquest.com/docview/304998009?pq-origsite=gscholar&fromopenview=true>); Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 AM. POL. RSCH. 221, 240–41 (2001); Haider-Markel, *supra* note 178; Jack L. Walker, *The Diffusion of Knowledge, Policy Communities, and Agenda Setting: The Relationship of Knowledge and Power*, in NEW STRATEGIC PERSPECTIVES ON SOCIAL POLICY 75 (J.E. Tropman et al. eds. 1981); Walker, *Diffusion of Innovations*, *supra* note 207).

²⁰⁹ Garrett & Jansa, *supra* note 178, at 392 (citing Michael Mintrom & Sandra Vergari, *Policy Networks and Innovation Diffusion: The Case of State Education Reforms*, 59 J. OF POL. 126, 144 (1998)).

²¹⁰ Garrett & Jansa, *supra* note 178, at 392; *see also* Garrett & Jansa, *supra* note 178, at 389 (“According to [social learning] theory, state officials who want to solve the policy problems facing their state look to and learn from other states that have experimented with policy solutions to similar problems.”).

²¹¹ *See* Daniel J. Mallinson & A. Lee Hannah, *Policy and Political Learning: The Development of Medical Marijuana Policies in the States*, 50 PUBLIUS: THE J. OF FEDERALISM 344, 344 (2020) (“[P]olicy learning is not the only learning process that occurs as a policy spreads. States also learn about the political ramifications of the policies that they are considering and legislators further adapt them to match the contours of local demands.” (citing Fabrizio Gilardi, *Who Learns from What in Policy Diffusion Processes?*, 54 AM. J. OF POL. SCI. 650, 660–61 (2010); Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RES. 1, 20 (2003); Jami K. Taylor et. al., *Content and Complexity in Policy Reinvention and Diffusion: Gay and Transgender-Inclusive Laws Against Discrimination*, ST. POL. & POL’Y Q. 12 (1), 75–98).

²¹² *Cf.* Bebchuk & Roe, *supra* note 23, at 160 (“There is in fact no mechanism that ensures that political processes will only produce and retain efficient

marijuana reforms show convergence. On the other hand, information flow was limited in creating U.S. state alcohol regulations because each state was acting contemporaneously (the same is true of Canadian provincial marijuana regulations).²¹³

Where policy is made in multiple sub-national units contemporaneously and a conscious decision is made not to coordinate policy at the federal level, divergence will result. Due to path dependence and interest group politics, that divergence will tend to persist. This is especially likely where state legislators have “little personal expertise in the complexities of” the regulation, as was the case with alcohol post-Prohibition in the U.S. and marijuana post-prohibition in Canada.²¹⁴ If, on the other hand, policy change is incremental, convergence is likely.

Convergence is likely to continue in the marijuana context. The million-dollar question is whether, when, and how the federal government will take a more active hand in marijuana policy. The federal government has substantial power to influence state policy. But Congress does not have the formal or informal power to roll back the clock to the pre-legalization status quo.²¹⁵ Legalization creates incentives for interest groups to fight to retain advantages and for continued liberalization of U.S. marijuana policy. And even if Congress decides to step in and set federal marijuana policy, it will benefit from years of experimentation at the state-level.²¹⁶

arrangements.”) (relying on Mancur Olson, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 17–35 (1982)).

²¹³ See de Koning & McArdle, *supra* note 14, at 364 (“Effectively, Canada simultaneously created 13 distinct emerging economies within a mature economic framework. Each of those 13 distinct economic models approached opening their markets somewhat differently, but all of them did so at the same time.”). Only two [U.S. states] allowed legal, [adult-use] sales at that time. de Koning & McArdle, *supra* note 14, at 368.

²¹⁴ Levine & Reinerman, *supra* note 37, at 477.

²¹⁵ See generally Mikos, *Limits of Supremacy*, *supra* note 81.

²¹⁶ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see also Sutton, *supra* note 162, at 10–11

The era between the Declaration of Independence in 1776 and the U.S. Constitutional Convention in 1787 was *the* seminal era of constitution writing. The most inspired constitution writing in this

IV. CONCLUSION

Despite the potential advantages of convergence, alcohol regulation in the U.S. continues to diverge. Marijuana regulation, on the other hand, is converging. This distinction is not driven by differences in sound policymaking or even cultural differences. Rather, it is driven by an accident of timing. Because the initial post-Prohibition alcohol regulation by states happened contemporaneously, states chose disparate approaches, and those idiosyncrasies were entrenched by interest group politics and path dependence. For U.S. marijuana regulation, on the other hand, legalization has been incremental, giving states considering legalization the chance to learn from the experiences of prior states. Interest group politics still apply, but in this scenario, interest groups work as a force for convergence rather than divergence. Convergence should be expected to continue in U.S. marijuana regulation and is likely to affect federal regulation when a shift finally happens at the federal level. The future of alcohol regulation is more uncertain: the craft alcohol boom began to push states toward convergence, but the COVID-19 pandemic may have shifted alcohol regulation back toward divergence.

country, perhaps at any time, perhaps anywhere, occurred before 1787, and it occurred in the States. . . . Whether it's the individual liberty guarantees added in 1791 (the Bill of Rights), in 1865 (the Thirteenth Amendment), in 1868 (the Fourteenth Amendment), or in 1920 (the Nineteenth Amendment), all of the language underlying these guarantees originated in the States.