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From Licensure to Localism: How Overregulation is Hindering the Cannabis Supply Chain

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The State of California grows nearly all the avocados produced in the United States. Despite the state's size, California's avocado industry satisfies only 10% of the country's demand for the fruit. To meet the remaining 90%, *CNN Business* reports that the United States imports avocados from Chile, Peru, and the Dominican Republic.¹ Now, imagine the California legislature has passed a statute prohibiting Californians from consuming avocados that were not cultivated, processed, and packaged in as well as distributed from California. The expected initial response would be one of outrage and wonder as to how such a statute could be constitutional. Albeit fiction, this scenario accurately depicts existing legal restraints on the consumption of cannabis as it relates to the plant's transportability across state lines. The marijuana scheduling under the Controlled Substances Act (CSA), as well as state cannabis legalization statutes and regulations, prohibit the transportation of marijuana across state lines. This Article contends that these laws and regulations, which are creatures of federal supremacy and state protectionism, stifle the growth potential of the cannabis industry in the United States.

INTRODUCTION

Despite recent efforts to legalize recreational cannabis use on the federal level,² the federal government has largely relinquished control of the issue to the states.³ Existing legal restraints on the transportation of cannabis the federal Controlled Substances Act ("CSA"), as

¹ Jackie Wattles, *Guess Where All Those Avocados Come From*, CNN BUSINESS (Jan. 27, 2017), <https://money.cnn.com/2017/01/27/news/economy/avocados-trump-mexico/index.html> [<https://perma.cc/DNV5-NLAE>].

² See, e.g., MORE Act, H.R.3617, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/3617> [<https://perma.cc/HC2E-FP5Z>].

³ See Staff of H. Rules Comm. 113th Cong., Text of House Amendment to the Senate Amendment to H.R. 213-14 (2014) ("[n]one of the funds made available in this Act to the Department of Justice may be used [...] to prevent [...] States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana").

well as various state laws and regulations, limit the potential for natural growth of the cannabis industry supply chain. The cannabis supply chain is made up of five key stages: cultivation, manufacturing, distribution, transportation, and retail. While this paper focuses on the existing legal restraints as applied to the transportation stage of the cannabis supply chain, it also discusses the effect of those restraints on the cannabis supply chain as a whole.

This paper proceeds in six parts. Part I provides an explanation of the term “supply chain,” an overview of the existing cannabis supply chain, and additional information as to the activities that take place during each stage of the supply chain. Part II outlines the existing legal restraints, both federal and state, that stifle the cannabis industry’s potential for domestic and national growth. Part III examines the impact of those legal restraints on the cannabis industry’s supply chain and growth. Part IV details proposed solutions, while Part V analyzes potential roadblocks and/or issues that may result from Part IV’s proposals. Part VI concludes this paper by analyzing the cannabis industry’s potential for growth and examining how current legal restraints impact aspects of the cannabis industry beyond transportation.

I. FROM SEED TO SALE: THE CANNABIS SUPPLY CHAIN

A. *What is the Supply Chain?*

In our post-pandemic world, news outlets are rife with articles concerned about global “supply chain” disruptions and their impacts.⁴ For example, the recent shortage of computer chips has negatively impacted manufacturers including major industry players such as Tesla and Whirlpool.⁵ As a result, many find themselves seeking deeper understanding about the supply chain, and why it matters in the larger context of global commerce. A supply chain is a network

⁴ E.g., Will Knight, *The Supply Chain Crisis Is About to Get a Lot Worse*, WIRED (Mar. 28, 2022), <https://www.wired.com/story/supply-chain-crisis-data/> [https://perma.cc/VSM7-3ZT6].

⁵ Peter Goodman, *A Normal Supply Chain? It’s ‘Unlikely’ in 2022.*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/business/supply-chain-disruption.html> [https://perma.cc/2HQM-8PV4].

consisting of a series of steps between a company and its suppliers.⁶ This network outlines the process of producing consumer goods from inception to consumption, connecting raw material suppliers, manufacturers, distributors, retailers, and consumers in a horizontal progression. Every item you have ever purchased, from the shoes on your feet to the car you drive, has ridden the long highway known as the supply chain.⁷

All tangible goods begin their lives as nothing more than a set of raw materials, procured from different sources. For example, a pair of leather shoes begins its supply chain journey as a length of animal hide or leather to create the shoe's body, unprocessed rubber to make the shoe's outsoles, and cord or fabric to become the shoe's laces. Through the placement of specialized actors in the supply chain such as manufacturers, distributors, and retailers, raw materials transform from distinct, separate building blocks into a single, consumable good. Without raw materials, manufacturers would be unable to produce the finished goods that would eventually make their way into consumers' hands. The importance of an adequate supply of raw materials is increasingly felt in today's construction industry, which is experiencing the largest raw materials shortage in fifteen years, affecting the basic building blocks for any construction project including lumber and steel.⁸ Raw material shortages have a direct impact on market pricing, specifically because demand outpaces supply, causing exponential increases in average costs.⁹

⁶ Will Kenton, *Supply Chain*, INVESTOPEDIA (Aug. 29, 2021), <https://www.investopedia.com/terms/s/supplychain.asp> [<https://perma.cc/CD56-243A>].

⁷ Note that the supply chain does not only facilitate the creation of finished goods but can also apply to services such as after-sales support for products including warranties, parts, and maintenance.

⁸ Abe Eshkenazi, *Supply Chains Encounter a Global Raw Materials Crisis*, ASS'N FOR SUPPLY CHAIN MGMT. (Apr. 30, 2021), <https://www.ascm.org/ascm-insights/scm-now-impact/supply-chains-encounter-a-global-raw-materials-crisis/> [<https://perma.cc/UG78-9S8K>].

⁹ Abe Eshkenazi, *The Best-Laid House Plans . . .*, ASS'N FOR SUPPLY CHAIN MGMT. (Mar. 12, 2021), <https://www.ascm.org/ascm-insights/scm-now-impact/the-best-laid-house-plans/> [<https://perma.cc/F8L2-9EM8>].

Once raw materials are procured, they must be transformed into a tangible, singular good, and this is when manufacturers come into play. Manufacturers are responsible for creating goods for distribution and sale.¹⁰ After the manufacturer has combined the raw materials to create a finished product, a wholesaler will typically purchase the finished goods in bulk and store those goods in a proprietary or third-party warehouse.¹¹ Wholesalers are then responsible for connecting with retailers who act either as the online or brick-and-mortar locales where consumers can purchase the finished goods.¹² Wholesalers typically sell the finished goods at a specified price, which usually consists of their costs plus a predetermined markup percentage.¹³ Retailers similarly determine the price of the goods they offer for sale to the everyday consumer.¹⁴

B. The Road to Cannabis Consumption

Consumable cannabis in all forms begins as the plant *Cannabis sativa L.* and follows the typical supply chain cycle of many consumer goods. There are a myriad of factors specific to growing plants, however, that must be considered in the production of consumable cannabis including hydration, light, and harvesting methods.¹⁵

The production of consumable cannabis begins at the cultivation stage. Like any plant, cannabis has its own set of specific cultivation needs ranging from the amount of water supplied

¹⁰ *Manufacturing a Product in a Supply Chain*, ELMHURST UNIV. (Mar. 29, 2022), <https://www.elmhurst.edu/blog/manufacturing-a-product/> [https://perma.cc/EK67-C9YH].

¹¹ *Id.*

¹² *Wholesale's Role in the Supply Chain*, CLEANLINK (Mar. 29, 2022), <https://www.cleanlink.com/cleanlinkminute/details.aspx?id=27441> [https://perma.cc/T98U-RYXH].

¹³ *E.g.*, Alexis Damen, *Product Pricing: How to Set Prices for Wholesale and Retail*, SHOPIFY RETAIL BLOG (Mar. 16, 2022), <https://www.shopify.com/retail/product-pricing-for-wholesale-and-retail> [https://perma.cc/766B-P5SN].

¹⁴ *Id.*

¹⁵ Gibson Lannister, *Harvesting Cannabis for Maximum Strength and Quality*, MAXIMUM YIELD (Feb. 14, 2022), <https://www.maximumyield.com/harvesting-cannabis-for-maximum-strength-and-quality/2/17480> [https://perma.cc/7R4H-FFMK].

to the plants to the temperature of the growth environment to the amount of light to which the plants are exposed within that environment.¹⁶ Cannabis next proceeds to the manufacturing stage, where, prior to being extracted into a myriad of by-products, the harvest must undergo testing at a state-accredited laboratory to ensure alignment with established safety and potency standards.¹⁷ Once the harvest completes the manufacturing stage, the product must be distributed for retail sales via the transportation portion of the supply chain.

Due to the legal status of cannabis, transportation of finished cannabis goods presents a myriad of difficulties around which suppliers must navigate.¹⁸ Because cannabis remains illegal under federal law, the interstate movement of cannabis is federally prohibited under the Controlled Substances Act (CSA), which states that, “[e]xcept as authorized by this title, it shall be unlawful for any person knowingly or intentionally [...] to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”¹⁹ CSA challengers have been unsuccessful in their claims that the statute specifically defines “marijuana” as *Cannabis sativa L.*, and, therefore, that congressional intent was to prohibit only one species of cannabis.²⁰ Moreover and despite legalization of recreational cannabis on a state level, some states impose restrictions on exactly *who* may transport cannabis from manufacturer to retailer, requiring special distribution licenses granted by state regulatory authorities.²¹

¹⁶ *Id.*

¹⁷ Marcy Greenfield, *Time to Understand the Cannabis Supply Chain*, BERDON LLP (Aug. 16, 2021), <https://www.berdonllp.com/time-to-understand-the-cannabis-supply-chain/> [<https://perma.cc/ARY3-NZEH>].

¹⁸ Kelly Vo, *Cannabis Transportation: The Challenges of Getting Product from Point A to Point B*, DOPE MAG. (Feb. 12, 2018), <https://dopemagazine.com/cannabis-transportation/> [<https://perma.cc/7S2G-SF32>].

¹⁹ Controlled Substances Act, 21 U.S.C. § 841.

²⁰ *United States v. Walton*, 514 F.2d 201, 204 (D.C. 1975) (holding that Congress “believed it was outlawing all marijuana which contained THC” in enacting the CSA).

²¹ *See, e.g.*, N.J. STAT. ANN. § 24:6I-31 et seq. (2021) (defining “cannabis distributor” based on licensure with a Class 4 Cannabis Distributor license authorizing intrastate bulk transportation of cannabis).

If a cannabis distributor manages to make it to the other end of the transportation maze, the finished product is delivered to retail establishments for sale to consumers. Retail sale of recreational cannabis, however, comes with its own restrictions, which dictate where and to whom the cannabis may be sold.²² The plethora of restrictions on recreational cannabis at most stages of the supply chain indicate that the cannabis supply chain cannot achieve sustainable, long-term growth without either federal legalization or state reforms or both. The next section of this paper details where these restrictions come from and who is to blame—the federal government or the state—for the current state of affairs.

II. FORMING THE BORDERS: LEGAL RESTRAINTS ON CANNABIS TRANSPORTATION

Traditional wisdom attributes the restrictive nature of cannabis transportation to the federal prohibition of marijuana under the CSA. While correct in part, this wisdom overstates the case because “neither federal law nor federal law enforcement policy treats state-authorized cannabis commerce differently just because the activity crosses state lines, i.e., just because it is interstate.”²³ Some posit that state legalization statutes that limit cannabis commerce to intrastate actors do so “to minimize the potential for scrutiny from the federal government and criminal penalties stemming from discrepancies between state and federal laws.”²⁴ Commentators also claim that federal prohibition gives states “free rein to discriminate against outsiders in their local cannabis markets.”²⁵ As explained below, existing legal restraints on interstate cannabis transportation are an amalgamation of both federal and state initiatives to both prevent cannabis from crossing state borders as well as keep all cannabis-related business intrastate.

²² Greenfield, *supra* note 17.

²³ Robert Mikos, *Symposium: Interstate Commerce in Cannabis*, 101 B.U.L. REV. 857, 860 (2021).

²⁴ Geoff Korff, *The Quagmire of Marijuana Interstate Commerce*, MJBIZDAILY (Aug. 24, 2021), <https://mjbizdaily.com/the-pros-and-cons-of-marijuana-interstate-commerce/> (updated Mar. 9, 2022) [<https://perma.cc/7WG4-8MM9>].

²⁵ *Id.* at 858.

A. The Constitution and the Controlled Substances Act: Federal Restrictions

Article I, Section 8, Clause 3 of the United States Constitution states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States”²⁶ The Commerce Clause is an affirmative grant of power authorizing Congress to regulate activities that “substantially affect” interstate commerce.²⁷ The Supreme Court has held that the purpose of the Commerce Clause is to ensure that those who wish to participate in the national economy “will have free access to every market in the Nation.”²⁸ The CSA’s prohibition of cannabis, however, has created a barrier to market access for those who wish to participate in the cannabis industry.

As stated previously, the CSA prohibits the manufacture, distribution, transport, and sale of cannabis.²⁹ As a result, cannabis finds itself in a legal gray area by virtue of federal prohibition and state legalization. The CSA classifies controlled substances that fall under its purview by assigning them to one of five schedules.³⁰ The statute outlines various factors that the Attorney General must consider when either scheduling or de-scheduling a particular substance, including:

- 1) Its actual or relative potential for abuse; 2) Scientific evidence of its pharmacological effect, if known; 3) The state of current scientific knowledge regarding the drug or other substance; 4) Its history and current pattern of abuse; 5) The scope, duration, and significance of abuse; 6) What, if any, risk there is to public health; 7) Its psychic or physiological dependence liability; [and] 9)

²⁶ U.S. CONST. art. I, § 8, cl. 3.

²⁷ *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that an activity does not need to have a direct effect on interstate commerce to fall within the commerce power as long as its effect is “substantial and economic” in nature); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (recognizing broader grounds upon which the Commerce Clause can be used to regulate state activity, holding that an activity is considered “commerce” if it has a “substantial economic effect” on interstate commerce or if the “cumulative effect” of an act could have an effect on commerce).

²⁸ *H.P. Hood & Sons, Inc. v. Du Mond*, 366 U.S. 525, 539 (1949).

²⁹ 21 U.S.C. § 841.

³⁰ *Id.* § 811.

Whether the substance is an immediate precursor of a substance already controlled under this title.³¹

Cannabis is assigned to CSA Schedule I, a designation reserved for substances that meet three criteria: 1) they have a high potential for abuse; 2) no currently accepted medical use in treatment; and 3) there is a lack of accepted safety for use of the substance under medical supervision.³² Other CSA Schedule I substances include heroin, psilocybin,³³ lysergic acid diethylamide (LSD), and peyote.³⁴ Opioid painkillers such as oxycodone and hydrocodone, as well as cocaine and methamphetamines, are Schedule II drugs due to their high potential for abuse, but with the caveat that they have a recognized, currently accepted medical use in treatment.³⁵ The scheduling dichotomy between the publicly-perceived low-risk cannabis and high-risk cocaine or methamphetamine has generated confusion as to cannabis' Schedule I placement.³⁶

While previous Department of Justice (DOJ) guidance on marijuana enforcement (“Cole Memo”) removed cannabis enforcement from federal priorities,³⁷ former Attorney General Jeff Sessions (“Sessions Memo”) rescinded those policies.³⁸ The Cole Memo refocused DOJ enforcement efforts to prevent sale to minors, organized crime, and illegal interstate movement

³¹ *Id.* § 811(c).

³² 21 U.S.C. § 812(b)(1); *see also* 21 C.F.R. § 1308.11(d)(23) (listing marijuana among Schedule I “[h]allucinogenic substances”).

³³ Psilocybin is the active ingredient in hallucinogenic mushrooms. U.S. DRUG ENF’T ADMIN., PSILOCYBIN DRUG FACT SHEET, https://www.dea.gov/sites/default/files/2020-06/Psilocybin-2020_0.pdf [<https://perma.cc/X4FJ-HCY3>].

³⁴ 21 U.S.C. § 812.

³⁵ *Id.* at § 812(b)(2).

³⁶ German Lopez, *The Federal Drug Scheduling System, Explained*, VOX (Aug. 11, 2016), <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> [<https://perma.cc/P5FF-EGV8>].

³⁷ Press Release, U.S. DEPT. OF JUST., *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/LFZ7-CXMY>].

³⁸ Press Release, U.S. DEPT. OF JUST., *Marijuana Enforcement 1.4.18* (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/8FSU-Z76V>].

of marijuana whereas the Sessions Memo reversed course and instructed federal prosecutors and agencies to consider “the seriousness of the crime, the deterrent effects of criminal prosecution, and the cumulative impact of particular crimes on the community.”³⁹

B. State Legalization Statutes: A Potential Dormant Commerce Clause Conflict

States have undoubtedly led the way on recreational cannabis legalization in the United States. As of January 2022, eighteen states and the District of Columbia have legalized recreational cannabis, with more expected to follow suit as the year progresses.⁴⁰ Despite the public consensus that states have triumphed where the federal government could not, a closer look at state legalization statutes reveals self-imposed restrictive regimes under which states ensure that all aspects of the cannabis supply chain, from cultivation to retail, are limited to intrastate operation.

This hyper-localization of the cannabis supply chain prohibits the import and export of cannabis, leaving both producers and consumers to operate within the confines of state borders. Those who wish to enter the retail cannabis business and follow the traditional path to commercial growth would have to, at significant capital expense, invest in brick-and-mortar facilities for each segment of the cannabis supply chain in each state they wish to operate.

Professor Robert Mikos notes that states likely impose these restrictions to protect their respective local cannabis industries and to enjoy the economic benefits that result from locking out out-of-state competition.⁴¹ These restrictions, however, inhibit the growth of both small businesses and multistate operators who are licensed in multiple states with subsidiaries in those

³⁹ *Id.*

⁴⁰ Claire Hansen et. al., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Jan. 6, 2022), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization>.

⁴¹ Mikos, *supra* note 23, at 860.

states by requiring them to operate separate facilities in each state.⁴² Mikos goes on to argue that “instead of limiting the flow of cannabis across state lines . . . these laws limit the flow of capital across state lines,” preventing intrastate investment from out-of-state actors and actually hurting the state’s economic interests in the end.⁴³

Colorado became the first state to legalize recreational marijuana in 2012 after voters approved Amendment 64 to the Colorado Constitution, which authorized the personal use, possession, and limited home-grow of marijuana for adults at least twenty-one years of age.⁴⁴ Despite legalization, Colorado restricts the interstate movement of cannabis, specifically stating that “[a] Delivery Motor Vehicle must not leave the State of Colorado while any amount of Regulated Marijuana is in the Delivery Motor Vehicle.”⁴⁵

In 2015, Oregon made news by becoming the second state in the country to legalize recreational cannabis use. Similar to Colorado, Oregon’s legalization statute includes an interstate restriction, which provides that “[a] person may not import marijuana items into this state or export marijuana items from this state.”⁴⁶ These restrictions also carry with them sanctions of up to five years’ imprisonment for violations.⁴⁷ Even California, which is widely regarded as one of the most liberal state jurisdictions in the country, restricts the transport of cannabis across state lines, stating that “[a] delivery employee shall not leave the State of California while possessing cannabis goods.”⁴⁸

⁴² *Id.* at 863.

⁴³ *Id.*

⁴⁴ COLO. CONST. art. XVIII, sec. 16 (2020).

⁴⁵ COLO. CODE REGS. § 212-3:3-615(E)(8).

⁴⁶ OR. REV. STAT. ANN. § 475B.227.

⁴⁷ *Id.* at § 475B.277(3)-(4) (specifying grades of offenses).

⁴⁸ CAL. CODE REGS. tit. 16, § 5416(b).

While bans on the import and export of cannabis are ubiquitous in state legalization statutes, some states have gone further and imposed residency requirements as a barrier to participate in their respective cannabis markets. In addition to restrictions placed on transporting cannabis, even out-of-staters who seek to operate within state lines have been met with resistance by state-imposed residency requirements, both durational and non-durational. While these state-imposed restrictions on cannabis have not been addressed by the Supreme Court, non-cannabis precedent teaches that state laws which discriminate against out-of-state residents are virtually *per se* invalid.⁴⁹

In 2016, Maine voters approved a ballot referendum to legalize recreational cannabis.⁵⁰ In response, the Maine legislature passed the Marijuana Legalization Act (MLA), establishing the regulatory framework that would facilitate legalization.⁵¹ Despite its similar structure to most other legalization statutes authorizing recreational cannabis, Maine's MLA included a requirement that applicants for recreational cannabis retailer licenses must either be a resident of the state, or, if the applicant is a corporation, that all corporate officers be Maine residents.⁵²

In 2020, Wellness Connection, an applicant for an adult-use retail cannabis license, brought suit against the city of Portland, Maine, contending that the city's licensure ordinance was unconstitutional.⁵³ Wellness Connection was a wholly-owned Delaware corporation and nearly all of its officers were non-Maine residents.⁵⁴ In its challenge, Wellness Connection asserted that the ordinance's residency criteria "create[d] an unconstitutional preference for

⁴⁹ *E.g.*, *Granholm v. Heald*, 544 U.S. 460, 476 (2005) ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" (quoting *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978))).

⁵⁰ *Maine Results*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/elections/2016/results/maine> [<https://perma.cc/G5HC-U3XF>].

⁵¹ ME.REV.STAT.. tit. 28-B, § 101 (2021).

⁵² *Id.* at § 202(2).

⁵³ *NPG, LLC v. City of Portland*, 2020 U.S. Dist. LEXIS 146958 (D. Me. Aug. 14, 2020).

⁵⁴ *Id.* at 7.

Maine residents” in direct contravention of the Dormant Commerce Clause.⁵⁵ The Dormant Commerce Clause, while not specifically enumerated as a congressional power in the Constitution, prevents states from enacting protectionist legislation designed to benefit its own economic interests to the detriment of non-residents.⁵⁶ Wellness Connection ultimately prevailed in obtaining a preliminary injunction against the ordinance. The court held that ordinance’s residency provisions unfairly discrimination against non-resident applicants in violation of the Dormant Commerce Clause (DCC).⁵⁷

In 2021, the City of Detroit enacted an ordinance that gave preferential treatment to “longtime” city residents in its cannabis licensure application process.⁵⁸ The City defined “longtime” residents as individuals who had lived in the city for at least fifteen of the prior thirty years, or who met certain other conditions and lived in the city for at least ten years.⁵⁹ The City extended to these “legacy” applicants an exclusive six-week early application window and reserved to them at least fifty percent of its adult-use cannabis retail licenses. A Detroit resident, who did not meet the legacy conditions, challenged the ordinance, arguing that the conditions were *per se* invalid under the DCC for being facially discriminatory.⁶⁰ Despite the City’s arguments that there was technically no interstate market for its ordinance to burden under the DCC, the Eastern District of Michigan held that the ordinance showed “facial favoritism toward

⁵⁵ *Id.* at 19.

⁵⁶ *See New Energy Co. v. Limbach*, 486 U.S. 269, 273-274 (1988); *see also Dep’t of Revenue v. Davis*, 553 U.S. 328, 337-338 (2008).

⁵⁷ *Id.* (quoting *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 10 (1st Cir. 2007)).

⁵⁸ Gus Burns, *After Failed First Attempt, Detroit Takes Second Shot at Recreational Marijuana*, MLIVE (Apr. 6, 2022), <https://www.mlive.com/public-interest/2022/04/after-failed-first-attempt-detroit-takes-second-shot-at-recreational-marijuana.html> [<https://perma.cc/2N5F-TLRQ>].

⁵⁹ *Id.*

⁶⁰ *Lowe v. City of Detroit*, 544 F. Supp. 3d 804 (E.D. Mich. 2021).

Detroit residents of at least 10-15 years” and that favoritism “embodies precisely the sort of economic protectionism that the Supreme Court has long prohibited.”⁶¹

Missouri also saw a challenge to its residency requirements where a nonresident minority owner of a licensed Missouri cannabis dispensary wished to purchase a majority stake in the business. Missouri’s Department of Health and Human Services (DHSS) issued regulations conditioning the approval of a cannabis license on a business owner proof that the business is majority-owned by a Missouri resident of at least one year.⁶² The nonresident plaintiff argued that the durational residency requirement violated the DCC, and surprisingly, the state did not dispute the facially discriminatory nature of the requirement. Instead, it argued that the requirement facilitated a faster and easier method for the state to conduct background checks on in-state residents.⁶³ The district court held that the durational residency requirement was *per se* invalid and that the state’s justification was not narrowly tailored given the available nondiscriminatory alternatives.⁶⁴

Part IIA of this Essay outlined the source of congressional cannabis oversight through the Commerce Clause, which vests Congress with the power to legislate and regulate all activities with a substantial effect on commerce. While not explicit in the Constitution, the Dormant Commerce Clause (DCC) exists as a negative imposition on the states as a counterpart to the positive grant of the Commerce Clause power. Specifically, the DCC prohibits states from passing legislation that “discriminates against or excessively burdens interstate commerce.”⁶⁵ In so prohibiting, the DCC seeks to foster and promote the development of a national market and

⁶¹ *Id.* at 816.

⁶² *Toigo v. Dep’t of Health & Senior Servs.*, 549 F. Supp. 3d 985, 988 (W.D. Mo. 2021).

⁶³ *Id.* at 991.

⁶⁴ *Id.* at 993.

⁶⁵ *Commerce Clause*, CORNELL LEGAL INFO. INST., (Mar. 29, 2022), https://www.law.cornell.edu/wex/commerce_clause [<https://perma.cc/QFP6-8SAW>].

the free flow of goods, services, and capital across state borders.⁶⁶ Only through congressional authorization may a state purposely discriminate against interstate commerce, since the Commerce Clause vests the power to regulate said commerce with Congress.⁶⁷

The state legalization statutes reviewed in this part appear to be directly inapposite to the DCC's prohibitions against discrimination by one state of another state's citizens in commerce. States often look to the federal marijuana ban as an excuse for imposing interstate restrictions on cannabis. Specifically, states have claimed that: 1) they must bar interstate commerce in cannabis to appease the federal government; or, in the alternative, 2) Congress has implicitly overridden the DCC's anti-protectionism default rules and authorized them to discriminate against interstate commerce in cannabis by banning marijuana.⁶⁸ States seemingly fail to recognize, however, that as it relates to all other types of consumer goods, the prohibitions on the interstate sale of cannabis are likely unconstitutional under the DCC.⁶⁹

While federal cannabis legalization does not appear likely in 2022, should Congress adopt reforms to legalize cannabis, the DCC would likely force legalization states to open their borders to the import and export of cannabis, as well as to remove any barriers to nonresidents

⁶⁶ Mikos, *supra* note 18.

⁶⁷ *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("It is well established that Congress may authorize States to engage in regulation that the Commerce Clause would otherwise forbid.").

⁶⁸ *Id.* at 861.

⁶⁹ *Id.*

establishing cannabis businesses within the state’s borders. Should nonresidents decide to challenge state residency requirements for cannabis licensure, precedent is in their corner.⁷⁰

III. IMPACT OF RESTRICTIONS ON INTERSTATE CANNABIS COMMERCE

A. *Too Little or Too Much: Overregulation and Supply*

A key indicator of supply chain efficiency is whether it facilitates the careful balance of supply and demand that ensures adequate product for consumption. The cannabis industry is one of the most highly regulated in the United States next to finance and healthcare.⁷¹ As it relates to product supply and demand, the more regulated an industry is, the more likely it is to experience supply chain issues.⁷²

Over regulation—and by extension over restriction—of the cannabis industry has led to issues of both oversupply and undersupply in many states that have either recently legalized recreational cannabis or have had legalization statutes in place for a few years. New Jersey legalized recreational cannabis in February 2021 by passing the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM),⁷³ but nearly a year post-legalization, the state’s Cannabis Regulatory Commission (CRC) announced that it faces a shortage of over 100,000 pounds of cannabis to adequately supply both medical and recreational cannabis consumers.⁷⁴ Although New Jersey Governor Phil Murphy recently announced that the

⁷⁰ NPG, LLC v. City of Portland, *supra* note 53.

⁷¹ Benjamin M. Adams, *A Majority of Companies in Tightly-Regulated Industries Say Compliance is Biggest Barrier*, HIGH TIMES (Sep. 21, 2021), <https://hightimes.com/news/a-majority-of-companies-in-tightly-regulated-industries-say-compliance-is-biggest-barrier/> [https://perma.cc/D2DX-MVHF].

⁷² OpenStax, *Principles of Microeconomics*, OPENSTAX CNX (Apr. 14, 2015), <http://cnx.org/contents/ea2f225e-6063-41ca-bcd8-36482e15ef65@10.31> [https://perma.cc/QQ9J-YNG6].

⁷³ N.J. STAT. ANN. § 24:6I-31.

⁷⁴ Suzette Parmley, *N.J. Legal Weed Market Delay is ‘Totally Unacceptable,’ and Top Lawmaker Demands Answers*, NJ.COM (Mar. 29, 2022), <https://www.nj.com/marijuana/2022/03/top-democrat-orders-probe-into-unacceptable-delay-in-launching-nj-legal-weed-market.html> [https://perma.cc/35JL-7WPA].

state's adult-use market's launch was "a matter of weeks, not months" away, the CRC does not expect to begin recreational cannabis sales until 2023 at the earliest.⁷⁵

On the other hand, some cannabis growers in New Jersey are experiencing an oversupply of legal cannabis, largely due to the state's delays in getting the adult-use market up and running. Operators at two major alternative treatment centers (ATC) in New Jersey, Verano and Curaleaf, voiced concerns about having to destroy cultivated cannabis grown in anticipation of the adult-use market going live due to the product's limited shelf life of six months. Cannabis cultivators in New Jersey began to ramp up production after the CREAMM Act was signed into law in February 2021, but over a year later the market is still not live, leading to an oversupply of product. Despite the CREAMM Act providing that the adult-use market could open six months after the CRC adopted regulations for the industry—making the presumed market launch land somewhere around February 2022—cultivators are finding that the CRC is dragging its heels on license approvals. While the CRC claims that these cultivators have yet to comply with the Act's stipulations, including municipal approval, relevant necessary supply to serve their patient base, and operational capacity to continue to serve and expand access, cultivators like Verano claim that they are still waiting on approvals for applications submitted prior to January 2022.

New Jersey is not the only state that is experiencing, or has experienced, supply problems because of overregulation. In 2019, Michigan faced a medical marijuana shortage because of newly imposed regulations that required medical cannabis dispensaries to obtain cannabis solely from licensed commercial growers.⁷⁶ The state failed to realize, however, that it did not have enough growers and processors to meet the existing medical cannabis demand even prior to the

⁷⁵ *Id.*

⁷⁶ Susan Gunelius, *State Cannabis Regulations Lead to Imbalances in Supply and Demand*, CANNABIZ MEDIA (Oct. 11, 2019), <https://www.cannabiz.media/blog/state-cannabis-regulations-lead-to-imbalances-in-supply-and-demand> [https://perma.cc/8LE8-CVVA].

regulations taking effect. As a result, Michigan's governor had to request that the state's medical marijuana regulatory board allow dispensaries with temporary licenses to reopen with supply from caregivers, the network of growers who had been supplying Michigan's dispensaries since medical marijuana was legalized in Michigan in 2008.⁷⁷ Further, the restrictions imposed on dispensaries that limited source from licensed growers yielded a subsequent shortage in recreational cannabis once Michigan's adult-use market went live in late 2019.⁷⁸ Industry leaders in Michigan pointed to the state's decision to provide licenses to cannabis service providers, such as transporters and testers, prior to licensing growers.⁷⁹ As a result, the cost of one pound of cannabis in Michigan rose to over \$4,000 per pound—nearly \$3,000 more than the same pound in Colorado at that time.⁸⁰

Regulations also burdened California's industry in 2018 when new testing regulations caused a product testing backlog and shortage of legal cannabis. As of December 2018, California only had fifty-seven testing laboratories available to test products from the 641 licensed retailers.⁸¹ Based on these figures, it is not difficult to imagine why a testing backlog occurred after the imposition of the new regulations. Not only did California experience a shortage of legal cannabis, but the California Growers Association noted that nearly half of the state's 50,000 cannabis cultivators (of which only 6,970 had been licensed in 2018) had been driven back to the

⁷⁷ Kathleen Gray, *Michigan Cuts a Big Part of the Supply Chain for Recreational Marijuana Market*, DETROIT FREE PRESS (Apr. 14, 2020), <https://www.freep.com/story/news/marijuana/2020/04/14/state-eliminates-big-part-supply-chain-legal-weed-market/2986352001/> [https://perma.cc/8Z2Z-F6G8].

⁷⁸ Riley Beggin, *Why Easy Access to Recreational Marijuana is Taking So Long in Michigan*, BRIDGE MICH. (Nov. 25, 2019), <https://www.bridgemi.com/michigan-government/why-easy-access-recreational-marijuana-taking-so-long-michigan> [https://perma.cc/72YB-PQWX].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Susan Gunelius, *High Cannabis Prices and Overregulation in California Bolster the Black Market*, CANNABIZ MEDIA (Jan. 22, 2019), <https://www.cannabiz.media/blog/high-cannabis-prices-and-overregulation-in-california-bolster-the-black-market> [https://perma.cc/T5F2-BQTW].

illicit market, or never left it, due to overregulation.⁸² In addition to pushing cultivators back to illicit trade and producing a licit cannabis shortage, California overregulation contributed to increased prices on legal cannabis.

Increased regulation creates increased compliance costs for those who wish to obtain or keep active licenses. Those costs must be borne by someone and are generally passed on to consumers in the form of higher product prices.⁸³

In sum, overregulation of the legal cannabis industry has created access problems, a lack of incentive for illicit businesses to join the legal market, and both supply shortages and surpluses, resulting in products that never make their way into the consumer's hands even if purchased legally. This pattern of overregulation not only affects states that have legalized and have an active legal cannabis market, such as Michigan and California, but also states that have yet to fully realize an operational legal cannabis market, such as New Jersey. In attempting to create fully fleshed out legal markets, legalization states are imposing regulatory frameworks that are overly burdensome to all actors in the cannabis supply chain from cultivators to retailers. Restrictions and regulations on the cultivation, testing, transportation, and sale of recreational cannabis create production bubbles within these states, causing the opposite effect that legalization statutes wish to achieve, namely bolstering—or even encouraging—sales via the illicit cannabis market.

B. Barriers to Entry & Monopolistic Behavior

Existing regulatory restrictions on cannabis have created significant barriers to industry entry, and consequently, less opportunity for competition in the field. Cannabis industry experts

⁸² *Id.*

⁸³ *Id.*

have noted that marijuana localism, or the cession of regulatory control over cannabis from state agencies to local towns and municipalities, creates the biggest barrier to entry for new cannabis businesses.⁸⁴ Specifically, experts cite high levels of bureaucracy and red tape, significant capital outlays, and lengthy timelines from application to open doors as the leading causes of disincentivized new cannabis businesses.⁸⁵ Noting the difficult and time-consuming application process for licensure, high application fees, extremely short application windows, and high minimum funding requirements, experts criticize the “pay-to-play” model that many states have imposed on entry into their legal cannabis markets.⁸⁶ The money required to invest in licensing and adhering to the overly burdensome regulatory frameworks keeps most would-be retailers from entering the legal cannabis industry.⁸⁷ As a result, some cannabis operators who were fortunate enough to obtain more than one license subsequently sold those licenses to others seeking to enter the legal cannabis market, using the proceeds from the license sales to fund their operations.⁸⁸

Another form of localism that creates a high barrier to market entry comes in the form of license capping, or the practice of limiting the number of licenses available. The practice of capping the total number of cannabis licenses available in a state or city tends to favor those with connections and lobbying resources.⁸⁹ For instance, Curaleaf, one of the largest cannabis

⁸⁴ Amy Ta & Steve Chiotakis, *5 Years of Legal Weed in CA: Barriers to Entry, Social Equity Challenges, Booming Illicit Market*, KCRW (Nov. 4, 2021), <https://www.kcrw.com/news/shows/greater-la/cannabis-pot-panel> [https://perma.cc/S7NS-V5N8].

⁸⁵ *Id.*

⁸⁶ Hilary Bricken, *The Future of Marijuana Licensing: Greater Barriers to Entry?*, HARRIS BRICKEN (Jun. 8, 2015), <https://harrisbricken.com/cannalawblog/the-future-of-marijuana-licensing-greater-barriers-to-entry/> [https://perma.cc/MK25-NWCB].

⁸⁷ Susan Gunelius, *High Cannabis Prices and Overregulation in California Bolster the Black Market*, CANNABIZ MEDIA (Jan. 22, 2019), <https://www.cannabiz.media/blog/high-cannabis-prices-and-overregulation-in-california-bolster-the-black-market> [https://perma.cc/F7PX-QL2Y].

⁸⁸ Ta & Chiotakis, *supra*.

⁸⁹ Shaleen Title, *Bigger is Not Better: Preventing Monopolies in the National Cannabis Market*, OHIO STATE UNIV. (Jan. 26, 2022), <https://ssrn.com/abstract=4018493> [https://perma.cc/S6BG-XXQL].

companies by revenue in the United States, boasted in an annual report that it “maintains an operational footprint of primarily limited-license states, with natural high barriers to entry and limited market participants.”⁹⁰ Green Thumb, another cannabis company in the same revenue tier, laid out plans to become “oligopolistic” in seven state markets in 2018.⁹¹

Aside from license capping, there have been other instances where concern about monopolistic behavior by cannabis companies and the creation of barriers to entry by state legislatures have led to criticism from cannabis activists. Shaleen Title, vice-chair of the Cannabis Regulators of Color Coalition, points to two specific examples of monopolistic behavior in the cannabis industry. First, Title notes that consumers commonly complain that cannabis businesses collude with one another to fix cannabis prices, citing a previously threatened antitrust lawsuit against cannabis operators in the state of Washington.⁹² Second, Title points to a North Carolina medical marijuana bill that required businesses to have five years of out-of-state experience, effectively disqualifying new or local entrants⁹³ Title also notes that allowing a small number of dominant companies to own a particular market segment could lead to potential public health concerns, drawing a parallel to the alcohol and tobacco industries.⁹⁴

To remedy the potential issues presented by localism, Title suggests allowing for personal cannabis cultivation at home, prohibiting vertical integration (e.g., the control of

⁹⁰ Chris Roberts, *Leaked Document Shows How Legal Weed Could Go Horribly Wrong*, THE DAILY BEAST (Nov. 7, 2021), <https://www.thedailybeast.com/leaked-document-shows-how-legal-weed-could-go-horribly-wrong> [no permalink available].

⁹¹ Green Thumb Indus. Inc., *Annual Information Form* (2018).

⁹² Sam Becker, *Price Fixing and Collusion in the New Market for Legal Marijuana*, SHOWBIZ CHEATSHEET (Dec. 31, 2014), <https://www.wallstwatchdog.com/money-career/price-fixing-and-collusion-in-the-new-market-for-legal-marijuana/> [https://perma.cc/6E3V-ZKXS].

⁹³ Kyle Jaeger, *North Carolina Senators Approve Medical Marijuana Legalization Bill in Committee*, MARIJUANA MOMENT (Aug. 24, 2021), <https://www.marijuanamoment.net/north-carolina-senators-approve-medical-marijuana-legalization-bill-in-committee/> [https://perma.cc/V8ND-JJYP]. The out-of-state experience requirement was later rescinded.

⁹⁴ Title, *supra*, at 5.

multiple stages of the supply chain by a single entity), removing license caps, and incentivizing market participation for small businesses.⁹⁵ Personal cultivation would avoid requiring consumers to only purchase recreational cannabis from commercial entities, leveling the power imbalance that exists between the producer and the consumer. With respect to vertical integration, Title explains that many states, including Washington, West Virginia, Maryland, Pennsylvania, Massachusetts, and Michigan have already imposed limitations on the quantity and type of cannabis business licenses that one entity may possess.⁹⁶ The final two suggestions—removing license caps and creating incentives for small businesses—would work in tandem with each other, given that license caps generally create an overly competitive market for the licenses and drive smaller would-be operators out of the running for market participation.

IV. HOW TO FIX THE PROBLEM

A. *Interstate Agreements*

Proponents of widespread recreational cannabis legalization have contended that the solution to the illicit drug market is legalization. Only through legalization, they argue, can regulators ensure that the illicit market fails. By causing cannabis production to be hyper-localized within state lines, however, responsible parties are all but guaranteeing the growth of an illicit market for marijuana from other states, effectively rendering their legalization efforts useless.

To combat the potential growth of an interstate illicit drug market, the Alliance for Sensible Markets (ASM), a non-profit coalition of business and advocacy leaders who seek to create a sustainable cannabis industry, have called for the proliferation of direct interstate

⁹⁵ *Id.* at 8-9.

⁹⁶ Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry*, 15 J. BUS. & TECH. L. 235 (2020).

agreements between legalization states. According to the ASM’s website, its goal is to petition “governors of established producer states California, Colorado, Oregon, and Washington to seek guidance from the U.S. Department of Justice on the agency’s stance should two or more medical or adult-use states decide to regulate commerce between themselves.”⁹⁷

Recently, the California legislature introduced SB-1326, which would amend the state’s legalization statute, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) by authorizing interstate cannabis sales, notwithstanding federal law.⁹⁸ Specifically, SB-1326 permits the Governor of California to enter into direct agreements with other states authorizing interstate cannabis commerce for both medicinal and adult-use commercial activities.⁹⁹ The bill would also:

- 1) Limit interstate commercial cannabis activities to out-of-state operators that secure a state license, or a local license, permit, or other authorization issued by the local jurisdiction; 2) Require that the other states impose requirements, including product safety, labeling, and testing requirements, on their cannabis licensees that meet or exceed the requirements applicable to MAUCRSA licensees; and 3) Mandate that the agreement include provisions for collection of applicable taxes.¹⁰⁰

Of the requirements imposed by SB-1326, the second clause imposing one-to-one requirements that mirror California’s MAUCRSA could face potential Dormant Commerce Clause challenges should that provision be viewed as overly burdensome on out-of-state operators. Potential challengers should not lose sight of the potentially positive consequences of enacting such a bill, however, as it would arguably pave the way for other states to do the same

⁹⁷ All. for Sensible Mkts., *Strategy* (2020), <https://www.sensiblemarkets.org/strategy> [<https://perma.cc/K84P-8LJB>].

⁹⁸ S.B. 1326, 2022 Leg., Reg. Sess. (Cal. 2022).

⁹⁹ Nathalie Bougenies, *California Might Legalize Interstate Cannabis Sales*, LEXOLOGY (Mar. 17, 2022), <https://www.lexology.com/library/detail.aspx?g=4374fetc-ec9d-41f4-8570-70627c7c6d24> [<https://perma.cc/953T-SRQE>].

¹⁰⁰ *Id.*

and create a pseudo-national network that would allow the cannabis supply chain to grow naturally through interstate commerce.

If enacted, SB-1326 would help address California's oversupply problems by allowing cannabis operators to export their surplus to retailers in other states.¹⁰¹ Opening up interstate cannabis commerce through an agreement would also uniquely position California to be one of the first states to take advantage of federal legalization since it would already have a system for interstate exportation in place.¹⁰² The California bill is similar to SB-1042 in Oregon, which was enacted in 2019. SB-1042 grants the Governor the power to enter into agreements with neighboring states to regulate interstate cannabis commerce, but with the caveat that federal legalization must happen first.¹⁰³ California's act is not contingent upon federal legality, so the Governor of California arguably has significantly more leeway to enter into the agreements. If enacted, SB-1326 would help to legitimize and promote interstate cannabis commerce, and, if mirrored in other legalization states, could foster the natural growth of the cannabis supply chain and its corresponding market without worrying about federal legalization.

B. A Novel Idea: The 2014 & 2018 Farm Bills

The federal Agricultural Act of 2014 did not amend the definition of "marijuana" under the CSA. The statutory language included a provision which excluded the Act from the CSA's reach by stating that the bill's provisions were enacted "notwithstanding the Controlled

¹⁰¹ Chris Roberts, 'It's Gonna Be A Bloodbath': Epic Marijuana Oversupply is Flooding California, Jeopardizing Legalization, FORBES (Aug. 31, 2021), <https://www.forbes.com/sites/chrisroberts/2021/08/31/its-gonna-be-a-bloodbath-epic-marijuana-oversupply-is-flooding-california-jeopardizing-legalization/?sh=7f5321087ddb> [<https://perma.cc/U4SG-YTMP>].

¹⁰² Bougenies, *supra* note 99.

¹⁰³ Natalie Bougenies, *Oregon Taking a Hard Look at Interstate Marijuana Sales*, HARRIS BRICKEN (Jan. 9, 2019), <https://harrisbricken.com/cannalawblog/oregon-taking-a-hard-look-at-interstate-marijuana-sales/> [<https://perma.cc/BMM2-6EDA>].

Substances Act . . . or any other Federal law.”¹⁰⁴ In *United States v. Mallory*, the West Virginia Southern District Court noted that, although the 2014 Act “did not amend the definition of ‘marijuana’ under the CSA, its use of the term ‘notwithstanding’ indicates Congress intended to override any conflicting provisions in the CSA.”¹⁰⁵ Based on that rationale, the inclusion of a “notwithstanding” clause created a sort of loophole for Congress to avoid conflicts between two statutes. Should Congress decide to enact legislation that would promote, or even permit, cooperative interstate agreements, it could avoid conflict issues between such legislation and the CSA by including a “notwithstanding” clause.

Further supporting this notion is the existence of cannabis-specific precedent in the Agriculture Improvement Act of 2018 (AIA), which expressly permitted the transport of hemp, its seeds, and hemp-derived products across state lines.¹⁰⁶ Hemp and cannabis are the same species of plant.¹⁰⁷ “Legally, hemp is defined as a cannabis plant that contains 0.3 percent or less [tetrahydrocannabinol] (THC), while marijuana is a cannabis plant that contains more than 0.3 percent THC.”¹⁰⁸ To avoid conflict between the AIA and the CSA, Congress amended the CSA to specifically exclude THC in hemp from Schedule I classification and remove hemp from the definition of “marijuana” under the CSA.¹⁰⁹ While the main driver behind this congressional action was likely the difference in concentration of the hallucinogenic THC in marijuana versus

¹⁰⁴ Agricultural Act of 2014, Pub. L. No. 113-79, § 7606(a), 128 Stat. 649 (2014).

¹⁰⁵ *United States v. Mallory*, 372 F. Supp. 3d 377, 384 (S.D. W. Va. 2019); *see also* *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993) (noting that the use of a “notwithstanding” clause signals an intent to prevent any provisions in the “notwithstanding” section from conflicting with provisions in any other section).

¹⁰⁶ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10114, 132 Stat. 4490 (2018) (“No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . .”).

¹⁰⁷ Sian Ferguson, *Hemp vs. Marijuana: What’s the Difference?*, HEALTHLINE (Aug. 27, 2020), <https://www.healthline.com/health/hemp-vs-marijuana#uses> [<https://perma.cc/KJ43-4TQD>].

¹⁰⁸ *Id.*

¹⁰⁹ Pub. L. No. 115-334, *supra* at § 12619; *see also* 21 U.S.C. § 812(c)(17)..

hemp, Congress's actions with the AIA clearly prove that it has the capability of legislating around the CSA without offending its provisions or purpose.

V. BUMPS IN THE ROAD: POTENTIAL ROADBLOCKS TO FIXING THE PROBLEM

A. *Federal Roadblocks*

The federal government's power to issue directives to the states to address a particular problem or administer or enforce a federal regulatory program is limited by the Tenth Amendment's anti-commandeering doctrine.¹¹⁰ The Supreme Court has held that the Tenth Amendment specifically prohibits the federal government "from imposing targeted, affirmative, coercive duties upon state legislators or executive officials."¹¹¹ In *New York v. United States*, the Court recognized the anti-commandeering doctrine, stating that "Congress may not simply . . . commandeer[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."¹¹²

Imagine a world where the anti-commandeering doctrine did not exist. In this parallel universe, Congress would be empowered to step into effect either positive or negative change as it relates to state protectionism. Should potential Dormant Commerce Clause challenges to state statutes fail, Congress could pass legislation to specifically address the purportedly discriminatory provisions in state legalization statutes that prohibit interstate commerce in cannabis. This action could require states to cooperate with one another to facilitate the creation of a pseudo-national cannabis industry, notwithstanding federal cannabis prohibition. Arguably, such legislation could find support both under Congress's Commerce Clause power, allowing Congress to regulate activities which directly affect interstate commerce, as well as under the

¹¹⁰ U.S. CONST. amend. X.

¹¹¹ Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, AM. ACAD. OF POL. & SOC. SCI., 574 ANNALS 158 (2001).

¹¹² 505 U.S. 144, 161 (1992).

Dormant Commerce Clause, preventing states from enacting protectionist measures to the detriment of non-residents. Conversely, in a negative view, Congress could enact legislation which explicitly barred states from joining in cooperative interstate agreements for the manufacture, transportation, and sale of recreational cannabis. Congressional regulation of the cannabis industry has found judicial support in the past, so envisioning legislation to further curtail interstate activity in cannabis is more realistic than one would believe.¹¹³

Direct interstate agreements to regulate cannabis commerce could be further obstructed by another, less notable part of the Constitution. Article I contains the Compact Clause. That Clause provides that “[n]o State shall, *without the consent of Congress*, . . . enter into any Agreement or Compact with another State, or with a foreign Power.”¹¹⁴ At first glance, the Compact Clause seems at odds with the Tenth Amendment’s anti-commandeering doctrine. The Supreme Court, however, has held that congressional approval is only required when an agreement “might affect injuriously” other state interests or when the compact would infringe on the “rights of the national government.”¹¹⁵ The Court further ruled in *Virginia v. Tennessee* that congressional consent is not required in instances concerning minor matters such as state boundaries,¹¹⁶ recognizing that such matters would “have no tendency to increase the political powers of the contracting states or to encroach upon the just supremacy of the United States.”¹¹⁷ Depending on how an interstate agreement with respect to cannabis commerce would be graded, the Compact Clause could either be a hindrance or not applicable.

¹¹³ See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the Controlled Substances Act was a valid exercise of congressional power under the Commerce Clause).

¹¹⁴ U.S. CONST. art. I, § 10, cl. 3.

¹¹⁵ *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (quoting *Florida v. Georgia*, 58 U.S. 478, 494 (1855)).

¹¹⁶ 148 U.S. 503, 518 (1893).

¹¹⁷ U.S. CONST. art. I, § 10, cl. 3.

B. Marijuana Localism

Most legalization states have ceded the power to decide if marijuana retailers can open in any given community to towns and municipalities, creating a disjointed patchwork of legalization and prohibition of retail cannabis businesses. For example, of New Jersey's 565 towns and municipalities,¹¹⁸ only ninety-eight—or seventy percent—will allow cannabis dispensaries to open for recreational use.¹¹⁹ In most localities, voters have not had a direct say about opting into or out of the recreational cannabis business as that decision is generally left to local officials, like city councils. Although most opt-outs are a result of negative sentiment toward recreational cannabis businesses, some municipalities enacted local-level bans on retail recreational cannabis businesses simply to buy themselves more time to craft individualized regulations befitting their area before giving the go-ahead to marijuana retailers.¹²⁰

When recreational cannabis was legalized in Colorado in December 2012 and state-licensed retail sales began in January 2014, 165 municipalities voted to ban retail cannabis sales while another fifty-three voted to permit them.¹²¹ Moreover, among the Colorado municipalities that voted to permit retail cannabis sales, only half voted to levy local taxes on those sales.¹²²

¹¹⁸ Lauren Marcus et. al., *New Jersey Marijuana Law Employment Provisions Take Effect*, SOC'Y FOR HUMAN RES. MGMT. (Sep. 1, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-jersey-marijuana-law-employment-provisions-take-effect.aspx> [<https://perma.cc/Z2B5-9WRY>].

¹¹⁹ Kyle Jaeger, *Why Most New Jersey Municipalities Are Banning Marijuana Shops Despite Overwhelming Public Support*, MARIJUANA MOMENT (Aug. 23, 2021), <https://www.marijuanamoment.net/why-most-new-jersey-municipalities-are-banning-marijuana-shops-despite-overwhelming-public-support/> [<https://perma.cc/BWD2-EE6H>].

¹²⁰ *Id.*

¹²¹ Jon Murray & John Aguilar, *Colorado Cities and Towns Take Diverging Paths on Recreational Pot*, THE DENVER POST (Dec. 19, 2014), <https://www.denverpost.com/2014/12/19/colorado-cities-and-towns-take-diverging-paths-on-recreational-pot-2/> [<https://perma.cc/8DR4-J6UJ>].

¹²² *Id.*

Municipalities diverge from one another even further regarding their respective requirements as to the number, location, and size of retail cannabis stores.¹²³

Professor Robert Mikos, outlining the “marijuana localism” theory (discussed in Part IIIB, *infra*). In favor of localism, he argues that “localism theory suggests that more people might be satisfied if their local government rather than the state (or national) government controlled marijuana sales policy.”¹²⁴ On the other hand, Mikos notes that marijuana localism could potentially lead to two negative consequences: marijuana smuggling and marijuana tourism.¹²⁵ Mikos points out that local residents have a constitutional “right to travel and to take advantage of the legal entitlements of neighboring jurisdictions.”¹²⁶ This right to travel technically prohibits localities from barring its residents from buying marijuana somewhere else, even if it bans marijuana within its own borders.¹²⁷ In so doing, these residents would be achieving their original goal of obtaining cannabis while simultaneously rendering their home locality’s prohibitions ineffective and pointless. Marijuana smuggling clearly has the potential to undermine any policy objectives of retail-prohibitive communities.¹²⁸

With respect to marijuana tourism, Mikos points out that individuals who travel from their retail-prohibitive jurisdiction to a retail-permissive one to both buy and use cannabis create potential costs for both the home and destination jurisdictions.¹²⁹ First, there is the inherent risk posed by consuming marijuana, which contains the hallucinogenic THC, and the operation of a

¹²³ Jeremy Nemeth & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, J. AM. PLAN. ASSOC. 6 (Aug. 2014) (outlining the varying regulations imposed on medical marijuana dispensaries across several localities).

¹²⁴ Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 733 (2015).

¹²⁵ *Id.* at 737.

¹²⁶ *Id.* at 738 (quoting Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 462 (1992)).

¹²⁷ *Id.*

¹²⁸ *Id.* at 742.

¹²⁹ *Id.* at 745.

vehicle to return home.¹³⁰ Second, Mikos notes the potential for a “crashing the party problem,” proposing that marijuana destinations would not be able to control the tourists’ actions.¹³¹

Building on this idea, Mikos explains that marijuana tourists, or “outsiders,” are more likely to create problems than locals because:

(1) [T]heir connection to the local community is weaker, so they feel less inhibited while there; (2) their lack of familiarity with the local environment may make them more prone to accidents; (3) they have to travel farther than residents to consume marijuana, so they might drive longer distances under the influence of marijuana; (4) they may be more inclined to overindulge since they have limited access back home; and (5) on average, tourists may be less experienced with marijuana use and thus more susceptible to—or simply less aware of—its psychoactive effects.¹³²

Similarly, California saw an increase in illicit market sales in response to the creation of access problems resulting from local overregulation of cannabis. California’s state legislature ceded the power to ban cannabis retailers and dispensaries to localities, similar to New Jersey. As a result, many Californians seized upon cannabis “NIMBYism,” or the desire to have a particular result “not in my backyard.” In a July 2018 study, researchers found that one-in-five Californians over the age of twenty-one had purchased cannabis from unlicensed sellers, and a further eighty-four percent of those consumers said they were highly likely to continue to purchase from the illicit market, citing lower prices and no taxation.¹³³ The study concluded that California’s recreational cannabis market was plagued by three distinct issues: 1) under-saturation of legal marijuana retailers due to local overregulation; 2) additional access problems

¹³⁰ *Id.* at 745-746.

¹³¹ *Id.* at 747.

¹³² *Id.* at 748.

¹³³ Eaze Insights, *The High Cost of Illegal Cannabis*, MJBIZ DAILY (2018), https://mjbizdaily.com/wp-content/uploads/2018/08/EMBARGOED_8.8_EAZE-INSIGHTS.pdf [<https://perma.cc/Y3H6-W2ZH>].

due to state overregulation; and 3) overregulation at both the state and local levels creating high prices and taxes, rendering legal cannabis unaffordable.¹³⁴

Opponents of marijuana localism argue that local-level restrictions on retail cannabis operations lead to social inequity and the potential for abuse of local zoning powers.¹³⁵

Professors William Bunting and James Lammendola posit that inequity occurs when localities that ban retail cannabis sales benefit from state sales tax revenues that are generated by cannabis operations in permissive localities, creating a “free-rider” problem.¹³⁶ The free-rider problem is common in the context of public goods, or goods with non-excludable benefits.¹³⁷ For example, more state tax revenue from retail cannabis sales benefits everyone within the state, even those localities that have banned retail cannabis sales. Bunting and Lammendola further note that although two out of three Americans support recreational cannabis legalization,¹³⁸ nearly half of Americans oppose having cannabis dispensaries in their neighborhood.¹³⁹ As a result, those who reside in localities that have banned or meaningfully restricted cannabis receive the benefits of legalization without incurring any of the corresponding social costs (should they exist).¹⁴⁰

In sum, marijuana localism could potentially undermine any solutions that allow for interstate commerce in cannabis. It appears that state governments appreciate that our federalist

¹³⁴ *Id.*

¹³⁵ William C. Bunting & James M. Lammendola, *Why Localism is Bad for Business: Land Use Regulation of the Cannabis Industry*, 2021 N.Y.U. J.L. (2021).

¹³⁶ *Id.*

¹³⁷ William J. Baumol, WELFARE ECONOMICS AND THE THEORY OF THE STATE, 937-940 (Charles K. Rowley & Friedrich Schneider eds., 2004).

¹³⁸ Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Recreational or Medical Use*, PEW RES. CTR. (Apr. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/> [<https://perma.cc/V7EH-7WUE>].

¹³⁹ See Cassie Slane, *We’d Rather Not: Americans Like Marijuana But Don’t Want a Dispensary in Their Town*, NBC NEWS (Apr. 19, 2019), <https://www.nbcnews.com/business/business-news/we-d-rather-not-americans-marijuana-don-t-want-dispensary-n996306> [<https://perma.cc/HN98-GJ8U>].

¹⁴⁰ Bunting & Lammendola, *supra* note 135.

system allows them to decide for themselves to legalize cannabis and are extending that same ideology to the local level. However, state delegation of power to authorize or prohibit retail cannabis to their respective localities could potentially create more harm than benefit. In closing their borders to retail cannabis, local communities create an environment primed for marijuana smuggling and marijuana tourism, which individually and collectively obviate the need for local approval powers in the first place.

C. Lack of Incentive to Change State Laws

Economic protectionism is the most generally accepted reason why states lack the incentive to change their restrictive regulatory regimes on cannabis.¹⁴¹ By banning interstate activities associated with cannabis, states have all but ensured that their respective local cannabis industries are shielded from any potential out-of-state competition. Legalization states are likely worried that, if they open their borders to interstate cannabis activities, the economic benefits associated with creating a cannabis supply chain silo within the state would face the risk of reduction or outright disappearance. In fact, in its push to persuade voters to legalize marijuana, states such as South Dakota informed voters through marketing materials that “[a]ll marijuana sold in South Dakota must be grown and packaged inside our borders, which will lead to hundreds of jobs for construction workers, plumbers, electricians”¹⁴² By framing their regulatory regimes as achieving economic protectionism goals, states ensure that voters are none-the-wiser to the potential negative consequences of sealing their borders to interstate cannabis commerce.

¹⁴¹ See Mikos, *supra* note 23, at 865.

¹⁴² KEA WARNE, OFF. OF THE S.D. SEC’Y OF STATE, SOUTH DAKOTA 2020 BALLOT QUESTIONS, <https://sdsos.gov/elections-voting/assets/2020BQPamphletColorVersion.pdf> [<https://perma.cc/VJ2U-J4NY>].

Legalization states also may worry that, if they engage in interstate cannabis commerce through direct agreements, their respective marijuana tourism industries may suffer. As previously explained, marijuana tourism occurs when a resident of one jurisdiction travels to another for the purpose of buying and consuming cannabis. In today's intrastate-only cannabis economy, a resident of State A must physically travel to State B to obtain his or her favorite strain or edible that may not be produced in State A, either due to varying growing environments, availability of raw materials, or lack of a market for the product in State A. Should the states enter into direct state agreements and decide to regulate interstate commerce in cannabis amongst themselves, the need to physically travel between states could be rendered unnecessary.

It is generally accepted that the advent of eCommerce, or online shopping, has taken a large portion of the retail market share away from brick-and-mortar stores.¹⁴³ Kids of the 1990s will remember the excitement of a family trip to the local Blockbuster store to rent the latest VHS release—an activity rendered obsolete with the invention of online streaming. It is reasonable to believe that, if states choose to engage in interstate cannabis commerce, it would open the (non-literal) doors to online cannabis commerce, allowing a resident in State A to purchase their favorite strain or edible from State B via the Internet, obviating the need to travel. States could potentially be wary of the loss of marijuana-adjacent additional revenues they might have enjoyed had the State A resident physically traveled to State B, from activities like hotel stays, sightseeing, and dining out in State B.

Despite the incentives for states to retain their existing intrastate frameworks, it would be irresponsible for them to ignore potential legal challenges rooted in the Dormant Commerce

¹⁴³ Anhisek Roy, *Impact of eCommerce: The Growth Story of Online Sales*, PROMPTCLOUD (2022), <https://www.promptcloud.com/blog/impact-of-ecommerce-on-brick-and-mortar-stores/> [<https://perma.cc/5FTX-VLQX>].

Clause. As explained above, Maine recently lost a case, which was based on a challenge to Maine's cannabis legalization statute requiring licensees to be Maine residents, where the court deemed the requirement unconstitutional under the DCC.¹⁴⁴ It is not unlikely that states could face similar challenges to their intrastate cannabis frameworks on the presumption that the DCC expressly prohibits State A from discriminating against residents of State B in interstate commerce. Therefore, states should consider the potential legal ramifications of such a challenge to their legalization statutes.

VI. CONCLUSION

While the legal cannabis industry is one of the most exciting and fresh in today's economy, the industry faces many roadblocks to its natural growth from local to national scale. Due to its unique nature of being federally prohibited but legalized on a state level, cannabis falls in a legal gray area that has led to a lack of regulatory uniformity from state-to-state. Numerous factors, including state-authorized prohibitions on interstate commerce, cession of regulatory oversight from state to local governments, and significant barriers to entry into the recreational cannabis industry have created supply chain disruptions that range from lack of ample suppliers or cultivators, under/oversupply of product, and the bolstering of the illicit cannabis market. While large operators in the cannabis industry can take on the significant costs and navigate the complicated application process that comes along with entering the market, small businesses are left at a disadvantage, yielding potentially monopolistic consequences.

Although federal legalization would resolve many of these issues, the possibility still seems years away. Given that states are vested with the power to legalize and regulate recreational cannabis intrastate, it stands to reason that the states have the power to regulate

¹⁴⁴ NPG, LLC v. City of Portland, 2020 U.S. Dist. LEXIS 146958 (D. Me. Aug. 14, 2020).

interstate cannabis commerce as well. Legalization states have demonstrated that they clearly recognize their respective capabilities to circumvent federal law as it relates to cannabis legalization, so they should have no issue opening the cannabis trade to facilitate interstate cannabis commerce. Without expansion, an industry either becomes stagnant or disappears. The advent of eCommerce pushed traditional brick-and-mortar retailers to modernize their supply chains, opening a new revenue stream and allowing each to stay in business. eCommerce, by definition, has allowed retailers to sell beyond their borders, leading to the natural growth of a business. The cannabis industry faces a long and arduous road to self-sustainability if no action is taken to curtail the issues plaguing its supply chain.