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Cannabis Capitalism

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INTRODUCTION

The last 25 years have witnessed a revolutionary change in the status of cannabis under American law. Before 1996, state and federal law uniformly outlawed its distribution.¹ By contrast, today 36 states allow marijuana to be sold for its potential medical use and 15 (along with the District of Columbia) also permit its recreational use.² The federal Controlled Substances Act of 1970 (CSA), however, still bans the sale of cannabis for any purpose.³ The debate over the appropriate status of marijuana begun in the 1960s⁴ has only

1. See, e.g., 21 U.S.C. § 841; RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1999).

2. See, e.g., Wayne Hall & Michael Lynskey, *Assessing the Public Health Impacts of Legalizing Recreational Cannabis Use: The U.S. Experience*, 19 *WORLD PSYCHIATRY* 179, 179-80 (2020); Claire Hansen & Horus Alas, *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Nov. 13, 2020, 3:24 PM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization>; *Marijuana: Effects, Medical Uses, and Legalization*, DRUGS.COM, <https://www.drugs.com/illicit/marijuana.html> (last visited Jan. 2, 2020); *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (Feb. 19, 2021).

3. The Controlled Substances Act was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (current version at 21 U.S.C. §§ 801-904). Title I addressed prevention and treatment of narcotics addiction, and Title III dealt with the import and export of controlled substances. *Gonzales v. Raich*, 545 U.S. 1, 12 n.19 (2005). A “controlled substance” is “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this [subchapter],” except for “distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” 21 U.S.C. § 802(6). The Controlled Substances Act incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1).

4. See, e.g., NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* (1972) [hereinafter *MARIHUANA: A SIGNAL OF MISUNDERSTANDING*]; E.R. BLOOMQUIST, *MARIJUANA* (1968); *MARIJUANA* (Erich Goode ed., 1969); LESTER GRINSPOON, *MARIHUANA RECONSIDERED* (2d ed. 1977); JOHN KAPLAN, *MARIJUANA: THE NEW PROHIBITION* (1970); HERBERT L. PACKER,

accelerated since then and won't slow down anytime soon.⁵

A thorough debate is critical to informed policymaking. Unfortunately, however, “cannabis policy has raced ahead of cannabis science.”⁶ For example, much of the past discussion about legalization took place at a time when marijuana was far less potent than it is today.⁷ That development is an

THE LIMITS OF THE CRIMINAL SANCTION 333 (1968) (“A clearer case of misapplication of the criminal sanction would be difficult to imagine.”); JOHN ROSEVEAR, *POT: A HANDBOOK OF MARIHUANA* (1967); MICHAEL SCHOFIELD, *THE STRANGE CASE OF POT* (1971); *THE MARIHUANA PAPERS* (David Solomon ed., 1968) [hereinafter *THE MARIHUANA PAPERS*]; Geoffrey Richard Wagner Smith, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 103 (1969) (“In the same week that the President of the United States declared an all-out war on marijuana smuggling, . . . the Wall Street Journal reported discussion in the business world on the profit potential in legalized marijuana.”).

5. See, e.g., WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); ROBERT A. MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* (2017); Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*, GOVERNANCE STUDIES AT BROOKINGS (Brookings Inst., Washington, D.C.), Apr. 2013, at 1; ROBIN ROOM ET AL., *CANNABIS POLICY: BEYOND STALEMATE* (2010); CONTEMPORARY HEALTH ISSUES ON MARIJUANA (Kevin A. Sabet & Ken C. Winters eds., 2018); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016); Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013). For a summary of the competing arguments, compare Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99 (2018) (summarizing the pro-legalization case), with Kevin Sabet, *Marijuana and Legalization Impacts*, 23 BERKELEY J. CRIM. L. 84 (2018) (summarizing the anti-legalization case).

6. Archie Bleier & Brian Barnes, Comment & Response, *Opioid Death Rate Acceleration in Jurisdictions Legalizing Marijuana Use*, 178 JAMA INTERNAL MED. 1280, 1280 (2018).

7. From the 1960s through the 1980s, the THC content of agricultural marijuana was approximately only 1-3 percent. Today, that number is far higher, reaching 90-plus percent in some cases. See, e.g., KEVIN A. SABET, *SMOKESCREEN: WHAT THE MARIJUANA INDUSTRY DOESN'T WANT YOU TO KNOW* 32 (2021); Suman Chandra et al., *New Trends in Cannabis Potency in USA and Europe During the Last Decade (2008-2017)*, 269 EUR. ARCHIVES PSYCHIATRY CLINICAL NEUROSCIENCES 5 (2019); Wayne Hall & Louisa Degenhardt, Editorial, *High Potency Cannabis: A Risk Factor for Dependence, Poor Psychosocial Outcomes, and Psychosis*, 350 BMJ 1205 (2015); *infra* note 96. See

important one. As Nora Volkow, Director of the National Institute on Drug Abuse, has noted, “increase in THC content raises concerns that the consequences of marijuana use may be worse now than in the past”⁸ Beer and grain alcohol do not have the same per-ounce “kick,” and the same is true of granddaddy’s ganja and today’s weed. Just as no one would base alcohol policy on the psychoactive effects of only beer or wine to the exclusion of distilled spirits, so, too, no one should ignore the current state of scientific knowledge regarding contemporary marijuana. That is critical given the potentially life-shattering effects that long-term consumption of today’s cannabis can have on the labile adolescent brain.⁹

Yet, scientific issues are not the only ones that need close scrutiny in this regard.¹⁰ Numerous, novel economic,

generally Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J.L. & PUB. POL’Y 555, 573–74, 574 n.71 (2019) (collecting authorities).

8. Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2222 (2014). That is why she has questioned “the current relevance of the findings in older studies on the effects of marijuana use, especially studies that assessed long-term outcomes.” *Id.*

9. See, e.g., GEORGE F. KOOB ET AL., DRUGS, ADDICTION, AND THE BRAIN 269, 279–87 (2014); Alan J. Budney et al., *Cannabis*, in LOWINSON AND RUIZ’S SUBSTANCE ABUSE 227 (Pedro Ruiz & Eric Strain eds., 5th ed. 2011); ROOM ET AL., *supra* note 5, at 31–39 (describing studies investigating the risk that adolescent marijuana use could adversely affect learning, result in a greater drop-out rate, be a prelude to other drug use, or lead to schizophrenia or depression); Volkow, *supra* note 8, at 2219 (“The regular use of marijuana during adolescence is of particular concern, since use by this age group is associated with an increased likelihood of deleterious consequences.”); *id.* at 2220 tbl.1.1 (noting that altered brain development, poor educational outcome, cognitive impairment, and diminished life satisfaction are “strongly associated with initial marijuana use early in adolescence”). See generally Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears,”* 66 BUFF. L. REV. 313, 324–39, 326 nn.30–63 (2018) [hereinafter Larkin, *Gummy Bears*] (collecting authorities). That is a reason why the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Cancer Society, the American Academy of Ophthalmology, the National Institute for Drug Abuse, and others have said that minors should not use cannabis. *Id.* at 327–28, 328 n.31.

10. Most of the discussion to date focuses on the practical difficulty (and

business, and regulatory questions arise when a substance transitions from contraband to a consumer good.¹¹ Many of

intellectual impossibility) of continuing to allow two entirely different and inconsistent regulatory schemes to continue to butt heads over the identical subject. There is a clear conflict between federal criminal law and the statutes in more than 30 states, which grant people licenses to engage in conduct that federal law makes a crime. No one believes that the current state of affairs is a good one, but there is no consensus about which solution is optimal. *See* Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J.L. & PUB. POL'Y (forthcoming 2021) [hereinafter Larkin, *Reflexive Federalism*]. The states cannot remedy this problem on their own. The Supremacy Clause of Article VI of the Constitution makes federal law superior to state law when the two conflict. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Accordingly, states cannot exempt their residents from federal law by adopting their own regulatory programs. *See* *Gonzales v. Raich*, 545 U.S. 1, 23–33 (2005) (rejecting the argument that a state medical marijuana program available only for bona fide state residents should be exempt from federal regulation under the Commerce Clause); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494–95 (2001) (rejecting a medical necessity defense to federal prosecution in a state with a medical marijuana program). Congress could revise the CSA to eliminate the ban on cannabis trafficking in states that now permit it, but Congress has refused to tackle that issue head on. Instead, Congress has only nibbled around the edges of the issue. Since 2014, Congress has regularly passed appropriations bills prohibiting the U.S. Department of Justice from halting state medical marijuana programs. Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO STATE J. CRIM. L. 99, 108, 108 n.39 (2020) [hereinafter Larkin, *Reconsidering Marijuana*].

11. *See, e.g.*, JEFF CHAPMAN ET AL., PEW CHARITABLE TRUSTS, FORECASTS HAZY FOR STATE MARIJUANA REVENUE (2019); BEN CORT, WEED, INC.: THE TRUTH ABOUT THC, THE POT LOBBY, THC, AND THE COMMERCIAL MARIJUANA INDUSTRY (2017); DANIELLE DAVENPORT, CANNABIS, INC.: THE JOURNEY FROM COMPASSION TO INDUSTRY CONSOLIDATION (2019); JOHN GELUARDI, CANNABIZ: THE EXPLOSIVE RISE OF THE MEDICAL MARIJUANA INDUSTRY (2010); CHRISTIAN HAGESETH, BIG WEED: AN ENTREPRENEUR'S HIGH STAKES ADVENTURES IN THE BUDDING LEGAL MARIJUANA BUSINESS (2015); THE POT BOOK: A COMPLETE GUIDE TO CANNABIS (Julie Holland ed., 2010); ROSS O'BRIEN, CANNABIS CAPITAL: HOW TO GET YOUR BUSINESS FUNDED IN THE CANNABIS ECONOMY (2020); TRISH REGAN, JOINT VENTURES: INSIDE AMERICA'S ALMOST LEGAL MARIJUANA INDUSTRY (2011); D.J. SUMMERS, THE BUSINESS OF CANNABIS: NEW POLICIES FOR THE NEW MARIJUANA INDUSTRY (2018); Sam Kamin, *What California Can Learn from Colorado's Marijuana Regulations*, 49 U. PAC. L. REV. 13 (2017) [hereinafter Kamin, *Colorado's Marijuana Regulations*]; John Mixon, *Commercializing Cannabis: Confronting the Challenges and Uncertainty of Trademark and Trade Secret Protection for Cannabis-Related Businesses*, 16 WASH. J. L. TECH. & ARTS 1 (2020); Luke

those issues were not extensively discussed before 1996 because they would have been entirely academic when cannabis was outlawed everywhere and had to be grown, sold, possessed, and used in secret. After all, it makes little sense to spend much time deciding how to publicly regulate the distribution of contraband. Given the revolution in state law, however, marijuana no longer has that status in every state. Cannabis has become an item of “quasi-legal” commerce—quasi-legal because federal law remains unchanged, and there is disunity across the states.¹² The result is a pressing need to consider whether and how to regulate cannabis in states with medical or recreational marijuana programs.

What enhances the urgency of the matter is the risk that Congress might revise the CSA and allow the states to make all regulatory decisions.¹³ In theory, of course, Congress’s decision to allow the states to decide how to regulate an issue would be seen as a victory for the principles of federalism. It would allow each of the 50 states to “serve as a laboratory” and “try novel social and economic experiments” to develop

Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511 (2015); Thomas Stufano, *Through the Smoke: Do Current Civil Liability Laws Address the Unique Issues Presented by the Recreational Marijuana Industry?*, 34 TOURO L. REV. 1409 (2018); Ryan B. Stoa, *Marijuana Agricultural Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297 (2017); Brandon Mikhail Thompson, *The Incredible Edible: Protecting Businesses and Consumers in a Society of Legalized Cannabis*, 4 NEV. L. J. F. 60 (2020).

12. The rules governing medical and recreational programs vary from state to state. See, e.g., THOMAS F. BABOR ET AL., *DRUG POLICY AND THE PUBLIC GOOD* 245-54 (2d ed. 2018); Rosalie L. Pacula et al., *Words Can Be Deceiving: A Review of Variation among Legally Effective Medical Marijuana Laws in the United States*, 7 J. DRUG POL’Y ANALYSIS 1 (2014).

13. Toward the end of the 116th Congress, the House of Representatives passed the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act of 2020, H.R. 3884, 116th Cong. (2d Sess. 2020), which would have lifted the federal ban on distributing marijuana. The Senate did not act on the bill before the end of that Congress. Someone likely will reintroduce it in the 117th Congress. See also, e.g., Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. (1st Sess. 2019) (a bill that would amend the CSA to allow the states to decide whether to legalize marijuana).

different regulatory approaches in an effort to decide which one works best “without risk to the rest of the country.”¹⁴ The reality of the matter, however, could be quite different. As Carnegie-Mellon University Professor Jonathan Caulkins, an expert on marijuana policy, has admonished us, legalizing the for-profit sale of marijuana “is an irreversible leap into the unknown” and “would be next to impossible to unwind.”¹⁵ Before the nation commits itself to a potentially irreversible course, we should consider whether the current state programs—which permit the private, large-scale, commercial distribution of cannabis—represent the business model that we want to endorse nationwide.¹⁶

That discussion must focus on two unique challenges that cannabis poses, ones not raised by most other consumer products. Those challenges stem from one of cannabis’ biologically active constituents (known as cannabinoids)— Δ^9 -tetrahydrocannabinol or THC, the ingredient responsible

14. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See generally* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020) (collecting essays making that argument).

15. Jonathan Caulkins, *Against a Weed Industry*, NAT’L REV., Apr. 2, 2018, at 27 [hereinafter Caulkins, *Weed Industry*].

16. A few legal scholars have addressed those issues. *See, e.g.*, DOUGLAS A. BERMAN & ALEX KREIT, *MARIJUANA LAW AND POLICY* (2020); Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, Keynote Address at the UC Davis Law Review Symposium: Disjointed Regulation: State Efforts to Legalize Marijuana (Jan. 29, 2016), in 50 U.C. DAVIS L. REV. 573 (2016); Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 652 (2016) [hereinafter Kamin, *Legal Cannabis*]; Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719 (2015). The best policy analyses, however, are by non-lawyer cannabis experts, such as Jonathan Caulkins, Beau Kilmer, the late Mark Kleiman, and Rosalie Ricardo Pacula. *See, e.g.*, Caulkins, *Weed Industry*, *supra* note 15; Jonathan P. Caulkins, *A Principled Approach to Taxing Marijuana*, NAT’L AFFS., Summer 2017, at 22; Jonathan P. Caulkins, *The Real Dangers of Marijuana*, NAT’L AFFS., Winter 2016, at 21 [hereinafter Caulkins, *Marijuana Dangers*]; Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, NAT’L AFFS., Spring 2019, at 68 [hereinafter Kleiman, *Marijuana and Public Health*]; Mark A.R. Kleiman, *Cannabis, Conservatively*, NAT’L REV., Dec. 8, 2014, at 28 [hereinafter Kleiman, *Cannabis Conservatively*]. Their analyses, conclusions, and recommendations are worth very serious consideration.

for marijuana's well-known euphoric effect.¹⁷ THC puts marijuana into a small category of consumer products, like tobacco and alcohol, because regular use can render individuals dependent on the drug. Moreover, like alcohol, even occasional use of THC can impair someone's ability to safely operate a motor vehicle, which can lead to the grievous injury or death of third parties. For both reasons, cannabis use creates more misery than joy for some people.¹⁸ We should not adopt a potentially irreversible course of full commercialization before carefully examining the consequences.

The discussion below proceeds as follows: Part I discusses the evolution of cannabis from contraband to regulated consumer product. It will summarize how marijuana lost its status as kryptonite in contemporary America and what the cannabis industry looks like today. Part II will discuss state regulation of that industry. Part II.A. will discuss how states use the regulatory process to address traditional price and quality issues. Part II.B. will then examine the two issues mentioned above that arise because of the peculiar nature of marijuana: dependency and impairment. To address those problems, that Part recommends that states should own all retail stores where cannabis is sold and should refuse to advertise any aspect of its availability, price, and quality themselves. Those steps would address the dependency and impairment problems by making unlawful purchases far more difficult and legal purchases of cannabis only slightly more difficult. Part III then speaks to what Congress can do to help the states address dependency and impairment. It argues that Congress should require a state to adopt both regulatory tools as a condition of revising federal law to allow the cultivation and distribution of marijuana in its jurisdiction.

17. LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA* 100–04 (2d ed. 2008).

18. See ED GOGK, *MARIJUANA DEBUNKED* 140 (2015) (“The nature of all addictive drugs is to promise bliss but deliver woe.”).

Part III also discusses whether the Tenth Amendment forbids Congress from putting the states to that choice.

I. THE EVOLUTION OF CANNABIS FROM CONTRABAND TO CONSUMER PRODUCT

A. *The Legal Evolution*

The plant botanically classified as cannabis, but popularly called marijuana, has existed since at least the Neolithic Period, when humans began to learn agriculture, more than ten thousand years ago.¹⁹ Cannabis contains numerous biologically active compounds.²⁰ The best-known one is THC, which produces a euphoric effect.²¹ That effect, coupled with the argument that the plant has several potential medical benefits, has generated a large number of cannabis use advocates.²² At the same time, cannabis use can

19. Swedish botanist Karl Linnaeus labeled it as *cannabis sativa* in 1753. See, e.g., BRIT. MED. ASS'N, THERAPEUTIC USES OF CANNABIS 7 (1997); BRIAN F. THOMAS & MAHMOUD A. EL-SOHLI, THE ANALYTICAL CHEMISTRY OF CANNABIS 1 (2016); Sunil K. Aggarwal et al., *Medicinal Use of Cannabis in the United States: Historical Perspectives, Current Trends, and Future Directions*, 5 J. OPIOID MGMT. 153, 153–57 (2009).

20. Cannabis contains more than 100 known cannabinoids and, altogether, more than 700 known constituents. There are three categories of cannabinoids. *Endocannabinoids* are innate neurotransmitters produced in the brain or in peripheral tissues. *Phytocannabinoids* are compounds produced by the plants *Cannabis sativa* or *Cannabis indica*. *Synthetic cannabinoids* are laboratory-synthesized compounds that are structurally analogous or similar to phytocannabinoids or endocannabinoids, and may act by similar or different biological mechanisms. See NAT'L ACAD. OF SCI., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 54 tbl.2-2 (2017) [hereinafter NAT'L ACAD. REPORT]; Seddon R. Savage et al., *Cannabis in Pain Treatment: Clinical and Research Considerations*, 17 J. PAIN 654, 656 (2016).

21. See, e.g., *Marijuana Research Report*, NAT'L INST. ON DRUG ABUSE [hereinafter NAT'L INST., *Marijuana*], <https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuana-effects> (July 2020) (“Many people experience a pleasant euphoria and sense of relaxation. Other common effects, which may vary dramatically among different people, include heightened sensory perception (e.g., brighter colors), laughter, altered perception of time, and increased appetite.”).

22. See, e.g., Tamar Todd, *The Benefits of Marijuana Legalization and*

have harmful effects on users and third parties.²³ For example, heavy or long-term cannabis users can become dependent on the drug.²⁴ THC also impairs one's ability to handle a motor vehicle safely, with the result that driving under the influence of cannabis has become a major public health problem.²⁵ The debate whether cannabis' harms outweigh its benefits has generated considerable social, political, and legal controversy for the last 60 years.²⁶

Regulation, 23 BERKELEY J. CRIM. L. 99, 102 (2018). Potential therapeutic uses of cannabis include pain relief, treatment of chemotherapy-induced nausea and emesis, the neuropathic pain and spasticity caused by multiple sclerosis, and AIDS-induced cachexia. *See, e.g.*, BRITISH MEDICAL ASSOCIATION, *supra* note 19, at 21–49; WORLD HEALTH ORG., CANNABIS: A HEALTH PERSPECTIVE AND RESEARCH AGENDA (1997); NAT'L ACAD. REPORT, *supra* note 20, at 54 tbl.2-2, 128 box 4-1 (listing conditions for which marijuana is a treatment for which there are varying degrees of scientific support); Gemayel Lee et al., *Medical Cannabis for Neuropathic Pain*, 22 CURRENT PAIN & HEADACHE REPS. 8 (2018) (“Nearly 20 years of clinical data supports the short-term use of cannabis for the treatment of neuropathic pain.”). *See generally* Larkin & Madras, *supra* note 7, at 566–71 (collecting studies arguing that cannabis has analgesic properties).

23. *See, e.g.*, Sabet, *supra* note 5, at 86.

24. *See infra* text accompanying notes 111–37.

25. *See infra* text accompanying notes 138–44.

26. In addition to the publications cited elsewhere in this Article, *see*, for example, INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 218 (Janet E. Joy et al. eds., 1999) [hereinafter INST. OF MED.]; OFF. OF NAT'L DRUG CONTROL POL'Y, MARIJUANA MYTHS AND FACTS: THE TRUTH BEHIND 10 POPULAR MISCONCEPTIONS (2004); MARIJUANA: A SIGNAL OF MISUNDERSTANDING, *supra* note 4; WORLD HEALTH ORG., *supra* note 22; SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS (2019); WILLIAM J. BENNETT & ROBERT A. WHITE, GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA (2015); MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE (2002); TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA (2014); JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970); MARK A.R. KLEIMAN, MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL (1989); Magdalena Cerdá et al., *Medical Marijuana Laws in 50 States: Investigating the Relationship Between State Legalization of Medical Marijuana and Marijuana Use, Abuse and Dependence*, 120 DRUG & ALCOHOL DEPENDENCE 22 (2012); Wayne Hall, *What Has Research Over the Past Two Decades Revealed About the Adverse Health Effects of Recreational Cannabis Use?*, 110 ADDICTION 19 (2014); Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787 (2003). *See generally* Paul J. Larkin, Jr., *Introduction to a Debate: “Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?”*, 23 BERKELEY J. CRIM. L. 73 (2018) (summarizing

By comparison, until recently the number of economic, commercial, or regulatory issues generated by cannabis has been relatively small. The reason is that for most of the last century, federal and state law have uniformly treated marijuana as contraband, a substance that was illegal to grow, sell, or possess for any purpose.²⁷ As a result, there was no need to decide how to regulate a commercial marijuana market, since there can be no lawful sale of an item that the criminal code outlaws.

Starting in the 1960s, however, cannabis use became an alternative to alcohol as a source of relaxation for Baby Boomers and a potent political symbol of a generation rebelling against the status quo.²⁸ There was a serious discussion whether to revise federal and state law to treat cannabis like alcohol and tobacco, also dangerous products that nonetheless can be sold under government regulation.²⁹ Neither Congress nor the state legislatures completely restructured their approach to marijuana, although some localities effectively “decriminalized” its possession in small quantities by treating it as a minor infraction similar to a traffic or moving violation punishable only by a small fine. Marijuana trafficking, however, remained a serious crime under federal and state law.

In 1996, that uniformity disappeared. California voters enacted a statewide initiative—Proposition 215, also called the Compassionate Use Act—that became the nation’s first

arguments pro and con). That output will continue because of the differences between federal and state law, as discussed below. *See, e.g.,* Rosalie Liccardo Pacula & Eric L. Sevigny, *Marijuana Liberalization Policies: Why We Can’t Learn Much from Policy Still in Motion*, 33 J. POL’Y ANALYSIS & MGMT. 212 (2014).

27. *See supra* note 1.

28. *See* Larkin, *Reflexive Federalism*, *supra* note 10 (manuscript at 2–3).

29. *See, e.g.,* MARIHUANA: A SIGNAL OF MISUNDERSTANDING, *supra* note 4; BLOOMQUIST, *supra* note 4; MARIJUANA, *supra* note 4; GRINSPOON, *supra* note 4; KAPLAN, *supra* note 26; PACKER, *supra* note 4, at 333 (“A clearer case of misapplication of the criminal sanction would be difficult to imagine.”); ROSEVEAR, *supra* note 4; SCHOFIELD, *supra* note 4; THE MARIJUANA PAPERS, *supra* note 4.

state-law based “medical marijuana” program.³⁰ The initiative authorized cannabis to be grown, sold, and used in California to treat various medical conditions.³¹ Since then, more than 30 other states have followed suit with their own medical-use regulatory schemes.³² Atop that, more than a dozen states, including California, have gone a step further by allowing cannabis to be sold for purely recreational use—that is, merely to obtain the euphoric effect that THC produces.³³ States in that category regulate marijuana in much the same way that they treat cigarettes and alcohol.

The result is this: With respect to the legality of cannabis, to borrow from Cicero, we have one law for Athens and one for Rome. More than 60 percent of the states have turned what once was only a black market operation into an open, quasi-legitimate field of business. To be sure, marijuana distribution is still a crime under the federal CSA.³⁴ But the U.S. Department of Justice has gone back and forth on whether, when, and how to enforce the CSA,³⁵ and

30. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2021).

31. Larkin, *Reconsidering Marijuana*, *supra* note 10, at 106.

32. *See supra* note 4.

33. Larkin, *Reconsidering Marijuana*, *supra* note 10, at 106.

34. The Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (current version at 21 U.S.C. §§ 801-904). A “controlled substance” is “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this subchapter,” except for “distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” 21 U.S.C. § 802(6). The Controlled Substances Act incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1).

35. The Obama Administration Justice Department issued memoranda adopting enforcement guidelines that attempted to afford the banking industry some relief from its fear of dealing with businesses in the cannabis industry. The federal courts had an opportunity to offer some clarification of this matter in *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, 861 F.3d 1052 (10th Cir. 2017), but could not reach agreement. By a 2-1 vote but without a majority opinion, the court’s per curiam opinion dismissed without prejudice a credit union’s suit against the U.S. Federal Reserve Bank to be permitted to serve the cannabis industry. Each member of the three-judge panel majority gave a different reason for the court’s order, so the ruling effectively offers no guidance

Congress has treated the inconsistency between federal and state law as if it were the plague, something to be avoided at all cost.³⁶ As far as marijuana enforcement is concerned, the Drug Enforcement Administration has essentially been relegated to the sidelines for an indefinite period.

Where does that leave us? The states have the ball when it comes to setting cannabis policy, and they have generally decided to allow private enterprises to control the means of production and sale, albeit under different types and degrees of state regulation. Complicating the regulatory framework are differences among states as to the type and amount of local regulation that counties and cities may impose atop state rules.³⁷ The next part will summarize what the cannabis business looks like today.

B. *The Contemporary Cannabis Business*

The discord between federal and state law (or, in some cases, between state and local law) has an effect beyond

on the banking issues. In any event, in January 2018 U.S. Attorney General Jeff Sessions rescinded the earlier Justice Department memoranda. *See* Larkin, *Reflexive Federalism*, *supra* note 10 (manuscript at 6–7, 6 n.31). Accordingly, banks are back to square one—viz., they are again at risk of criminal liability for offering their services to the marijuana industry. In 2019, the House of Representatives passed the Secure and Fair Enforcement Banking Act of 2019 (the SAFE Banking Act of 2019), H.R. 1595, 116th Cong. (2019), which would allow financial institutions to service marijuana businesses in states where the substance is lawful. *See* H.R. Rep. No. 116-104, pt. 1 (2019). The Senate did not act on the House bill in the 116th Congress.

36. Larkin, *Reconsidering Marijuana*, *supra* note 10, at 108.

37. *See* Mikos, *supra* note 16, at 720 (“[S]tates are now facing growing opposition from within their own borders. Citing concerns over marijuana’s perceived harms, many local communities in marijuana legalization states are seeking to reinstate marijuana prohibitions at the local level. Communities in at least twelve marijuana legalization states have already passed local bans on marijuana dispensaries. Even in Colorado, arguably the state with the most liberal marijuana policies, more than 150 municipalities have passed ordinances banning the commercial sale of marijuana. And countless other communities that otherwise welcome or at least tolerate the marijuana industry are nonetheless attempting to regulate it, imposing their own idiosyncratic rules concerning the location, size, hours, signage, security, and goods sold and taxes paid by local vendors.” (footnote omitted)).

cannabis growers and sellers. Like any industry, businesses need assistance from other companies for a host of ancillary services. As a result, the states' decisions to legalize the commercial sale of marijuana under their own laws has created not only a cannabis industry, but also a support industry that also operates in a gray zone between lawful and illegal enterprises because that industry assists cannabis growers and sellers.³⁸ Every company that does business with the cannabis industry, even ones that supply only electricity or water, is in that zone and, to some degree, is at risk of being charged with aiding and abetting criminal activity, even though they would otherwise never be characterized as furthering the commission of a crime. Clarification of the law would help the owners, officers, and employees of such companies to know whether they are at risk of federal criminal liability for selling their products or offering their services to state-legal businesses.

For example, the people who own the facilities necessary to grow, package, transport, or distribute cannabis—colloquially known as “ganjapreneurs”—hire employees or use independent contractors for different responsibilities, such as in-store sales.³⁹ In some instances, the cannabis industry has merely increased the need for already existing services—such as web design, app creation, marketing, transportation, and delivery—that any firm producing a new consumer product must use.⁴⁰ Some retailers combine the

38. Compare, e.g., *United States v. Falcone*, 311 U.S. 205, 210–11 (1940) (ruling that a party who furnishes innocuous supplies (sugar, cans, etc.) to an illicit distiller is not guilty of conspiracy “even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge”), with, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (distinguishing the “articles of normal trade” in *Falcone* from the sale of “narcotic drugs” and other “restricted commodities” that have an “inherent capacity for harm”).

39. See, e.g., CORT, *supra* note 11, at 34–49; GELUARDI, *supra* note 11, at 2.

40. See GELUARDI, *supra* note 11, at 108; Jelena Milenkovic, *Dosing CBD Oil with Droppy Calculator App*, LEGAL READER (June 23, 2020), <https://www.legalreader.com/dosing-cbd-oil-with-droppy-calculator-app/>. Home delivery is a problem for cannabis retailers. The U.S. Postal Service, United

sale of marijuana with other products, opening (for instance) coffee shops that also sell cannabis.⁴¹

State regulatory programs might create a need for allied enterprises focused specifically on the cannabis industry.⁴² Some programs require cannabis to be tracked from “seed to sale,” which has led tech companies to create tracking badges and software so that companies can prove that they are not black marketeers.⁴³ Some state regulators require that companies have insurance. Since not every well-known insurance company is willing to sell coverage to firms that break federal law on an ongoing basis, new firms have arisen to take advantage of this opportunity.⁴⁴ Regulation can also include a requirement to test batches for toxins, pesticides, solvents, and other contaminants, which lead some entrepreneurs to create cannabis-testing labs.⁴⁵ State and

Parcel Service, and FedEx won’t deliver marijuana, and companies like Amazon have to date steered clear of entering that service line. *See* SUMMERS, *supra* note 11, at 66. Retailers are essentially limited to brick-and-mortar stores with “carry out” service or local delivery companies. *Id.*

41. *See* REGAN, *supra* note 11, at 41.

42. Such as books, magazines, and websites focused on cannabis business issues. *See, e.g.*, ALYSON MARTIN & NUSHIN RASHIDIAN, *A NEW LEAF: THE END OF CANNABIS PROHIBITION* 120–21 (2014); ED ROSENTHAL, *MARIJUANA GROWERS HANDBOOK* (2010); *MARIJUANA VENTURE: THE JOURNAL OF PROFESSIONAL CANNABIS GROWERS AND RETAILERS*, <https://www.marijuanaventure.com> (last visited June 5, 2020); *cf.* ANDREA DRUMMER, *CANNABIS CUISINE: BUD PAIRINGS OF A BORN AGAIN CHEF* (2017).

43. *See* SUMMERS, *supra* note 11, at 120; Davide Fortin, *Cannabis Cannibalization: Is the Recreational Market Appealing to Patients in Colorado?* (Nov. 2015) (M.Sc. thesis, Copenhagen Business School) (ResearchGate) (describing Colorado’s tracking program). There might be some slippage, however, in some of the tracking systems. *See* Chris Halsne, *Missing Marijuana: Weed Disappearing from Licensed Dispensaries, Not All Cheaters Get Caught* FOX31 (May 1, 2017, 8:51 PM), <https://kdvr.com/news/problem-solvers/missing-marijuana-weed-disappearing-from-licensed-dispensaries-not-all-cheaters-get-caught/>.

44. *See* SUMMERS, *supra* note 11, at 121–24.

45. *See, e.g.*, COLO. CODE REGS. §§ 212-3:4-105 to 212-3:4-135 (2020); SUMMERS, *supra* note 11, at 61-63; Anna L. Schwabe & Mitchell E. McGlaughlin, *Genetic Tools Weed Out Misconceptions of Strain Reliability in Cannabis Sativa: Implications for a Budding Industry*, 1 J. CANNABIS RSCH. 14 (2019) (“strain inconsistency is evident and is not limited to a single source, but rather exists

local packaging and labeling requirements—for example, rules demanding that bags be child resistant, resealable, and opaque—have led to the creation of companies to fill retailers’ need.⁴⁶ Finally, entrepreneurs in states with recreational-use marijuana laws have created “cannabis tourism” businesses for people who want to “live on the edge” for a few days or just smoke some dope.⁴⁷

Companies in this industry also have the same general need for lawyers, accountants, public relations advisors, political consultants, policy advocates, lobbyists, and ballot organizers that every other firm in a regulated industry must use whether to learn or change the law, obtain a license, or satisfy complex state and local rules.⁴⁸ Navigating the line

among dispensaries across cities in multiple states”).

46. See, e.g., COLO. CODE REGS. §§ 212-3:3-1005 to 212-3:3-1020 (2020); SUMMERS, *supra* note 11, at 124-25; Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 11 (2020); Julie Weed, *Two Retirees Create Marijuana Packaging Business in Colorado*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/business/small-business/cannabis-pot-entrepreneurs-marijuana-colorado.html?searchResultPosition=34>.

47. See, e.g., Susan G. Hauser, *Cannabis Tourism Is on the Rise*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/travel/marijuana-vacation-travel-cannabis-usa.html?searchResultPosition=10>.

48. See MARTIN & RASHIDIAN, *supra* note 42, at 121 (noting the emergence of an organization, the National Cannabis Industry Association, and a law firm, Vincente Sederberg LLC, to serve the cannabis industry); GELUARDI, *supra* note 11, at 124; SUMMERS, *supra* note 11, at 25 (“Licensing is so complex and laborious that many cannabis businesses devote themselves to it.”); *id.* at 29 (“An American business deals in laws and regulations along with buying for a dime and selling for a dollar. Cannabis does so much more because of the federal/state gap. This lends a unique flavor to the cannabis industry—whether advocates, lobbyists, prosecutors, regulators, business advisors, or criminal defense specialists—everything cannabis related starts moving with, moves through, moves around, is moved by, and stops with lawyers.”); *id.* at 102–03; Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, PLAN. & ENV’T L., Aug. 2010, at 3, 3–8 [hereinafter Salkin & Kansler, *Medical Marijuana Zoning*] (describing various municipal location restrictions, licensing processes, and operational and promotional rules). Not surprisingly, some former state regulators have switched over to the private sector to serve as consultants to states with their own new marijuana programs. See J.B. Logan, *For This Guy, States Are His Biggest Customers*, in LEGAL MARIJUANA: PERSPECTIVES ON PUBLIC BENEFITS, RISKS AND POLICY APPROACHES

between quasi-legitimate business and drug dealing is tricky and requires legal guidance⁴⁹ and political allies.⁵⁰ In fact, given the odd state of their business under federal and state law, their need might even be *greater* than that of a company manufacturing and selling a consumer product that is lawful everywhere.⁵¹ For example, local zoning rules can limit the

64, 64–69 (Joaquin Jay Gonzalez III & Mickey P. McGee eds., 2019) (describing the “technocratic expertise” that Andrew Freedman, former Colorado “state marijuana czar,” and Lewis Koski, former Colorado Department of Revenue Director of Marijuana Enforcement and one of Freedman’s partners, offer states building out their own cannabis programs).

49. See SUMMERS, *supra* note 11, at 46 (“As most industry leaders point out, the cannabis industry is not just risky, but complex for a garden-variety businessman. One prominent cannabis business attorney describes the Controlled Substances Act as the Lawyer’s Full Employment Act because of the sheer volume of restrictions, the federal/state gap, and the countless snags from cannabis business bans and moratoriums. In short, the legal complexity of the cannabis industry almost forces entrepreneurs to work with attorneys.” (footnote omitted)).

50. Companies in the cannabis industry have some allies to help them negotiate their way through the political maze. Members of the cannabis industry rely on the policy, lobbying, and public relations assistance of private organizations devoted to their cause, as well as the financial support that certain wealthy philanthropists provide them. For example, there are the “four horsemen of cannabis”: the National Organization for the Reform of Marijuana Laws (or NORML), the Drug Policy Alliance, the Marijuana Policy Project, and the National Cannabis Industry Association. SUMMERS, *supra* note 11, at 34–41. They hold ideological views supportive of marijuana legalization and seek (among other things) to create a favorable intellectual, social, and political climate for medical and recreational marijuana use. *Id.* Ideological allies also seek to dissuade the public from holding negative images of drug use and convince people that the “drug war” cure is worse than the disease. One such organization is the American Civil Liberties Union (ACLU). While not focused on cannabis legalization, the ACLU serves as “a well spring of cannabis legalization arguments.” *Id.* at 33. Individuals such as hedge fund manager George Soros and Progressive Insurance founder Peter Lewis were some of the largest funders for the early cannabis initiatives. *Id.* Not surprisingly, there are organizations, such as Smart Approaches to Marijuana, and wealthy individuals, such as the recently deceased Sheldon Adelson, along with private pro-law enforcement organizations, who oppose cannabis legalization and contribute their ideas, time, and money to those efforts. *Id.* at 41–46.

51. See Cassandra Burke Robertson, *Legal Advice for Marijuana Business Entities*, in MARIJUANA FEDERALISM, *supra* note 14, at 155–69. As one journalist colorfully put it:

The only thing separating legal pot from drug war pot is a state-issued

available business locations, thereby making it expensive to purchase or rent storefront property for their peculiar business.⁵² If the success to any business is “location, location, location,” cannabis retailers need the help of real estate specialists to find an affordable location that is accessible to clients, but distant from schools and tolerable to their neighbors.⁵³

license, the magical portal through which a black marketer can dance to become a media-anointed entrepreneur in exchange for licensing fees, taxes, and agreeing to play by certain rules, called regulations.

The growing, selling, and testing of cannabis are the market’s gatekeepers and state governments’ insurance policy against the feds. The federal government’s Cole Memo made it clear that states’ rights only exist for the states that make sure the black market isn’t involved. To make sure the new industry doesn’t invoke an army of DEA agents and IRS auditors, state licensing programs make sure [that] no buds get packed in pipes, no oils get vaped, no brownies get eaten without a chain of licensed farmers, retailers, and testers keeping the cannabis supply in traceably legal sources only.

SUMMERS, *supra* note 11, at 55–56.

52. See, e.g., HAGESETH, *supra* note 11, at 54–55; SUMMERS, *supra* note 11, at 80–81; Kyle A. Harvey, *Even Marijuana Needs a Zone: Utah’s H.B. 3001 as the Next Battleground for Zoning Ordinances and State Medical Marijuana Laws*, 34 BYU J. PUB. L. 43, 49–50 (2020); Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 162 (2012); Ian Morrison, Comment, *Where to Put It? The Confusing Question of How to Deal with Marijuana Dispensaries*, 3 U. BALT. J. LAND & DEV. 79, 84–85 (2013); Jeremy Nemeth & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, 80 J. AM. PLAN. ASS’N 1 (2014); Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Zoned Out: Local Regulation Meets State Acceptance and Federal Quiet Acquiescence*, 16 DRAKE J. AGRIC. L. 295 (2011) [hereinafter Salkin & Kansler, *Local Regulation*]; Salkin & Kansler, *Medical Marijuana Zoning*, *supra* note 48, at 3–8. Compare, e.g., *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 506 (Cal. 2013) (rejecting argument that state medical marijuana laws bar localities from banning or regulating retail cannabis distribution), with, e.g., *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 541 (Mich. 2014) (accepting same argument). For example, some localities treat retail marijuana facilities as a “nuisance” because cannabis distribution is illegal under federal law. Others limit retail facilities to business, commercial, or industrial zones or impose various other restrictions, such as limiting the number of retail facilities or requiring that facilities be a particular distance from schools. See Salkin & Kansler, *Local Regulation*, *supra*, at 301–19; Salkin & Kansler, *Medical Marijuana Zoning*, *supra* note 48, at 3–5.

53. See, e.g., Salkin & Kansler, *Medical Marijuana Zoning*, *supra* note 48, at 3–4 (noting that some municipalities prohibit dispensaries within a particular

In other cases, the quasi-legalized cannabis industry has generated the growth of businesses that previously existed only in the shadows.⁵⁴ Hydroponic supply stores, construction companies specializing in building “grow rooms,” and trade schools teaching the mechanics of operating a cannabis business are just a few examples.⁵⁵ Marijuana “brokers” (“dealers” has become *passé*) bridge growers and retailers or auction cannabis at a “pot clearinghouse.”⁵⁶

The industry also needs certain services that result from the fact that trafficking is still illegal under federal law. Growers and retailers⁵⁷ cannot use the federal banking

distance of a school, church, child care facility, park, playground, drug or alcohol rehabilitation facility, halfway house, residential area, or other dispensaries); Beth DeCarbo, *Homeowners Raise a Stink Over Pot-Smoking Neighbors*, WALL ST. J. (May 7, 2020, 8:00 AM), <https://www.wsj.com/articles/homeowners-raise-a-stink-over-pot-smoking-neighbors-11588852854?mod=searchresults&page=1&pos=7>; Zusha Elinson, *Fights Over Where to Grow Marijuana Cause Stink in California*, WALL ST. J. (Sept. 12, 2019, 12:01 PM), <https://www.wsj.com/articles/fights-over-where-to-grow-marijuana-cause-stink-in-california-11568301226?mod=searchresults&page=6&pos=13>. Some landlords, however, see cannabis growers and processors as good for their bottom line. See Esther Fung, *Essential Marijuana Sellers Are a Good Business for Their Landlords*, WALL ST. J. (June 2, 2020, 8:00 AM), https://www.wsj.com/articles/essential-marijuana-sellers-are-a-good-business-for-their-landlords-11591099202?cx_testId=3&cx_testVariant=cx_2&cx_artPos=1#cxrecs_s. In fact, during the 2020 COVID-19 pandemic, “More than 20 states have designated the cannabis industry to be essential, allowing medical marijuana dispensaries, and in some cases recreational facilities, to stay open during shelter-in-place orders.” *Id.*

54. See, e.g., SUMMERS, *supra* note 11, at xiv (“Illegal for nearly a century, legalization is dropping cannabis into something that will turn a formerly countercultural icon into commerce as usual. More than 80 years of prohibition means cannabis missed out on technological and industrial advances that would have given consumers more choice. With nearly every other agricultural product, consumers have a variety of value-added products—potatoes become Lays, corn becomes Maker’s Mark, yucca is processed to make aloe-packed skin care products. With cannabis, consumer demand in the regulated market is only starting to produce value-added products.”).

55. See GELUARDI, *supra* note 11, at 106–08 (noting the birth of an insurance company offering protection against “theft, spoilage, and equipment breakdown”).

56. REGAN, *supra* note 11, at 65–66.

57. There is a difference between companies that are in some way related to

system and the facilities of interstate finance to raise capital through initial public offerings,⁵⁸ to accept online orders, to make bank deposits, or to start employee retirement plans.⁵⁹ National banks cannot offer those services to firms that grow or sell cannabis in retail outlets without violating the federal controlled substances and money laundering statutes.⁶⁰

the cannabis business and companies that cultivate and sell smokable or edible cannabis. “The NASDAQ exchange lists several publicly traded cannabis companies, but the companies are mostly involved in industrial production rather than retail or grow operations. Indeed, the publicly traded companies associated with cannabis have more ties to the pharmaceutical industry than cannabis production and distribution.” SUMMERS, *supra* note 11, at 78. Among those companies, for example, is GW Pharmaceuticals, a United Kingdom-based biotech company with a cannabis-based epilepsy drug. *Id.* Those companies have only an “ancillary” connection to cannabis. “They focus on packaging, hydroponic gear, business and legal consulting, distribution, etc.” They also have an established track record in non-cannabis business. *Id.* at 79.

58. If they could, smaller businesses, particularly ones in a region where a statute or regulation limits the number of retail stores, might expand their operations considerably. *See, e.g.*, Christopher Caldwell, *Do We Really Want a Microsoft of Marijuana?*, N.Y. TIMES (Aug. 31, 2019), <https://www.nytimes.com/2019/08/31/opinion/sunday/marijuana-legal-states-federal.html?searchResultPosition=22>.

59. Julie Anderson Hill, *Banks and the Marijuana Industry*, in MARIJUANA FEDERALISM, *supra* note 14, at 139–54. Because banks cannot lend start-up businesses money, private venture capital firms and others have stepped into the breach. *See* SUMMERS, *supra* note 11, at 71–82; Ciara Linnane, *Cannabis Company Acreage Enters Funding Agreements for up to \$60 Million*, MARKETWATCH (June 1, 2020, 7:55 AM), https://www.marketwatch.com/story/cannabis-company-acreage-enters-funding-agreements-for-up-to-60-million-2020-06-01?cx_testId=3&cx_testVariant=cx_2&cx_artPos=6 (noting that an American cannabis company raised \$60 million via two funding arrangements, one with “an unnamed institutional investor,” the other through “a private placement”); Heather Mack, *Snoop Dogg-Backed Startup Offering Loans to Cannabis Companies*, WALL ST. J. (Oct. 23, 2019, 6:48 PM), <https://www.wsj.com/articles/snoop-dogg-backed-startup-offering-loans-to-cannabis-companies-11571783193?mod=searchresults&page=4&pos=19>; Heather Mack, *Cannabis Startup Raises \$100 Million With Eyes on Expansion*, WALL ST. J. (June 28, 2019, 11:30 AM), <https://www.wsj.com/articles/cannabis-startup-raises-100-million-with-eyes-on-expansion-11561735833?mod=searchresults&page=8&pos=2>; Vipal Monga et al., *Marijuana’s Money Man*, WALL ST. J. (Dec. 20, 2019, 2:15 PM), <https://www.wsj.com/articles/marijuanas-money-man-11576869335?mod=searchresults&page=3&pos=13>.

60. *See* HAGESETH, *supra* note 11, at 75–84; SUMMERS, *supra* note 11, at 76–78. Some small, local, state-chartered banks have taken the criminal liability risks associated with accepting deposits. *See id.* at 72; *see also* Tom Angell, *More*

Unable to take advantage of those payment mechanisms, firms in the cannabis industry initially operated on a strictly cash basis (but now have found some work-arounds, such as debit cards).⁶¹ Consequently, stores loaded with currency or an easily sellable commodity need to use armed private security services to deter robberies or burglaries (not always successfully⁶²), as well as to transport and store large quantities of cash.⁶³

Banks Working with Marijuana Businesses, Despite Federal Moves, FORBES (June 14, 2018, 9:31 AM), <https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#3b508e6f1b1b>; Caldwell, *supra* note 58.

61. Cannabis companies have also resorted to using “Bitcoin,” a cryptocurrency, or “Potcoin,” a cryptocurrency geared to cannabis. SUMMERS, *supra* note 11, at 80. At one time, retailers had to operate on a “cash only” basis because they could not allow parties to make purchases via credit cards, but debit cards have largely resolved that issue. Conversation with Garth Van Meter, former Director of Legislative Affairs, Smart Approaches to Marijuana (June 26, 2020).

62. See GELUARDI, *supra* note 11, at 82 (“According to a report prepared by LAPD narcotics detective Dennis Packer, numerous dispensaries had been robbed despite elaborate security precautions. In fact, the report claimed, some dispensaries hired gang members with long criminal histories as security guards.”); *id.* at 84–85 (describing a dispensary robbery and murder); HAGESETH, *supra* note 11, at 94–97; SUMMERS, *supra* note 11, at 65–66, 116–18; Gordon Oliver, *Where Will Legal Marijuana Industry STASH Its CASH?*, in LEGAL MARIJUANA, *supra* note 48, at 56, 57 (“It’s no secret that people in the medical marijuana field have been robbed quite often,” said Scott Jarvis, director of Washington’s Department of Financial Institutions.”); Sophie Quinton, *Why Legal Marijuana Businesses Are Still Cash Only*, in LEGAL MARIJUANA, *supra* note 48, at 61 (“Since Colorado fully legalized marijuana in January 2014, the Denver Police Department has logged over 200 burglaries at marijuana businesses, as well as shop lifting and other crimes.”).

63. Struggling cannabis businesses cannot take advantage of the federal bankruptcy laws to stay afloat or reorganize, a problem that has arisen due to the 2020 pandemic-caused recession. See, e.g., Jonathan Randles, *Justice Department Blocks ‘Essential’ Marijuana Workers from Bankruptcy Protection*, WALL ST. J. (May 28, 2020, 3:29 PM), <https://www.wsj.com/articles/justice-department-blocks-essential-marijuana-workers-from-bankruptcy-protection-11590694160?mod=searchresults&page=1&pos=4>; Jonathan Randles, *U.S. Says Employee at Cannabis Staffing Agency Can’t Use Bankruptcy*, WALL ST. J. (Apr. 30, 2019, 2:26 PM), <https://www.wsj.com/articles/u-s-says-employee-at-cannabis-staffing-agency-cant-use-bankruptcy-11556648808>; Jonathan Randles, *Randles’s Take: Justice Department Just Says No to Marijuana Businesses Reorganizing in Bankruptcy*, WALL ST. J. (Sept. 20, 2018, 6:01 PM),

What might surprise members of the *ancien régime* are three features of the contemporary cannabis industry. One is that, according to several commentators, the “counterculture pioneers, outlaws, and rebels of a generation ago” no longer are the face of the cannabis industry.⁶⁴ “Young entrepreneurs with newly minted business degrees” are running the show.⁶⁵ The people running companies in the cannabis industry far more closely resemble recent 2020 MBA graduates than members of the 1950s Beat Generation or 1960s Hippies.⁶⁶

Related to that fact is another one. Large businesses likely will replace the backyard growing enterprises that (along with smugglers) supplied the pre-1996 demand for marijuana.⁶⁷ Corporate growers, producers, and distributors,

https://www.wsj.com/articles/randless-take-justice-department-just-says-no-to-marijuana-businesses-reorganizing-in-bankruptcy-1537480896?mod=article_inline.

64. GELUARDI, *supra* note 11, at 5.

65. *Id.* at 4–5.

66. *See, e.g.*, CORT, *supra* note 11, at 34 (“These guys don’t wear tie dye and carry clipboards. They are lobbyists and privileged white guys (seriously, they are all white and rich) in \$5,000 suits carrying smartphones and being followed by personal assistants. They drive Mercedes not Subarus and have more money . . . than you and I will ever see in our lives, all stored up for one reason: *to get you to consume, and keep consuming, THC.*”); GELUARDI, *supra* note 11, at 96 (“[A] new generation of professionals was flocking to the medical marijuana industry from successful careers in science, corporate America, and the ministry. By taking prominent jobs as lobbyists, managers, teachers, and nonprofit fundraisers, they were helping to mainstream the industry’s image.”); *id.* at 105 (noting that “the business side of the cannabis industry was making the transition from a social movement to a commercial enterprise”); HAGESETH, *supra* note 11, at 43–44.

67. Indeed, if Congress were to legalize marijuana distribution, the tobacco companies and other large-scale entities might expand their product lines. *See, e.g.*, HAGESETH, *supra* note 11, at 8, 182; SUMMERS, *supra* note 11, at 135–36; Alexander Gladstone, *Why One of the World’s Largest Tobacco Companies Is Struggling*, WALL ST. J. (Feb. 19, 2020, 6:02 PM), <https://www.wsj.com/articles/why-one-of-the-worlds-largest-tobacco-companies-is-struggling-11582068998?mod=searchresults&page=2&pos=9>; Vipal Monga, *Legal Pot Sales Are Off to Slow Start in Canada*, WALL ST. J. (Apr. 13, 2019, 8:00 AM), https://www.wsj.com/articles/legal-pot-sales-are-off-to-slow-start-in-canada-11555156800?mod=article_inline (“Canada is the first Group of Seven

particularly ones that operate in multiple states, can achieve economies of scale unattainable by simple “mom and pop” operations,⁶⁸ and they can afford both the experts necessary to grow a commercially competitive product⁶⁹ and the phalanx of lawyers, accountants, lobbyists, and the like necessary to maintain (and expand) their quasi-legal status under state law while fending off the federal Leviathan from snuffing out the industry.⁷⁰ Descheduling, rescheduling, or

country to embrace legalization, joining 10 states in the U.S., although cannabis is still banned under U.S. federal law. Its move has promoted several big U.S. brands like Marlboro maker Altria Group Inc. and brewers like Constellation Brands Inc. to invest in Canadian growers.”); Carol Ryan, *Weed Versus Greed on Wall Street*, WALL ST. J. (Jan. 25, 2019, 2:14 PM) [hereinafter Ryan, *Weed Versus Greed*], https://www.wsj.com/articles/weed-versus-greed-on-wall-street-11548412203?mod=article_inline (“Marlboro cigarette maker Altria last month announced a \$1.8 billion investment in a grower following an almost \$4 billion bet by Corona brewer Constellation Brands in August. Executives at Coca-Cola and Pepsi have said publicly they are closely watching how the business develops.”).

68. See, e.g., DAVENPORT, *supra* note 11, at 173–94; HAGESETH, *supra* note 11, at 46 (according to one industry member, “the key to success in this business was growing the marijuana”); REGAN, *supra* note 11, at 69 (posing “one of the big open questions about the future of cannabis: will big commercial grows push out small artisans . . . ? Will legalization bring with it an industry like most agricultural products, with small farmers crushed by huge factory farms, or like the market for alcohol, which mixes high-end specialty brewers with international conglomerates?”); Hall & Lynskey, *supra* note 2, at 181; Carol Ryan, *Cannabis Investors Are Zoning Out About Supply*, WALL ST. J. (June 27, 2019, 5:11 AM) [hereinafter Ryan, *Cannabis Supply*], <https://www.wsj.com/articles/cannabis-investors-are-zoning-out-about-supply-11561626711?mod=searchresults&page=8&pos=3> (“The current need to cultivate cannabis in individual states to serve the local market is highly inefficient. Producers with operations in multiple states would be able to consolidate in regions with the consistently sunny conditions that the cannabis plant likes.”).

69. See JOHN HUDAK, MARIJUANA: A SHORT HISTORY 12 (2d ed. 2020) (“Although cannabis can grow under a variety of conditions, if a grower wishes to maximize a plant’s productivity and ensure that its chemical composition is consistent and true to its strain (an important aspect of cannabis grown commercially for the production of marijuana), success requires research, care, frequent attention, and horticultural and agricultural know-how.”).

70. See CORT, *supra* note 11, at 30–31, 34–36, 132–33; SUMMERS, *supra* note 11, at 56 (“On purpose or by accident, the regulations also tend to make the cannabis industry very hard on Mom and Pop. Combined with the larger problems of the federal/state gap, licensure and regulations have a way of choking out smaller players who can’t keep up with the expense of regulation, leading, as

outright legalization of marijuana would greatly alter the commercial aspects of the industry.⁷¹

The third fact is the enormous variety of cannabis strains and THC-infused products available for sale today.⁷² Cannabis “came of age,” so to speak, in the 1960s as a symbol of an intergenerational protest. The image of someone in his or her 20s or 30s smoking a joint could well serve as a representation of that generation’s attitudes toward then-contemporary social and political culture. Users can still smoke cannabis as a “joint” (botanical marijuana in wrapping paper) or a “blunt” (botanical marijuana wrapped in tobacco), by using a “bong” (a pipe or water pipe), or by vaporizing THC via an Electronic Nicotine Delivery Device (ENDD or e-cigarette).⁷³ Yet, today numerous food products,

in other businesses, to more and more businesses buying out, vertically integrating, and franchising to give cannabis its own class of top dogs. Across the nation, the top dogs’ rules get spread out.”); *id.* at 69 (“The industry has gotten more consolidated as it developed. In Colorado, 20 percent of the cannabis business licenses are owned by only 10 people, most of whom secured their franchises by buying out smaller companies.” (footnote omitted)). Five companies dominate the cannabis market in Canada, which legalized recreational-use marijuana in 2019. See Jacquie McNish & Vipal Monga, *Wall Street’s Marijuana Madness: It’s Like the Internet in 1997*, WALL ST. J. (Sept. 23, 2018, 12:00 PM), https://www.wsj.com/articles/wall-streets-marijuana-madness-its-like-the-internet-in-1997-1537718400?mod=article_inline (“There are more than 120 marijuana companies listed on Canadian stock exchanges, but the sector is dominated by five companies, whose total market value has catapulted from less than \$4 billion to nearly \$40 billion in the past year.”). Of course, just as Budweiser’s dominant position has not prevented the rise of microbreweries, so too might small, boutique cannabis stores avoid being absorbed or underpriced by larger companies. See HAGESETH, *supra* note 11, at 205.

71. See SUMMERS, *supra* note 11, at 140 (“Federal legalization would open opportunities to the average businessperson and to the most massive banking systems alike. Entrepreneurs could find loans easily. Companies could go public and move product across state lines. Big Cannabis would happen.”).

72. See, e.g., CORT, *supra* note 11, at 31; HUDAK, *supra* note 69, at 12–13 (“[A]n entire cottage industry has emerged around marijuana genetics, which involves the cross-pollination or cross-breeding of different strains and even different species of cannabis to produce new hybrid strains.”); Larkin, *Gummy Bears*, *supra* note 9, at 318–20 (discussing the variety of edible THC-infused products).

73. Recently, however, ENDDs, particularly when used by minors, have been associated with E-cigarette or Vaping Use-Associated Lung Injury. See, e.g., Editorial, *The Vaping-Marijuana Nexus*, WALL ST. J. (Dec. 25, 2019, 1:43 PM),

known as “edibles,” also contain THC.⁷⁴ In addition to the Alice B. Toklas brownies popular in the 1960s, numerous food products—such as coffee, tea, soda, cookies, candies, caramels, lozenges, salad dressing, marinara sauce, and others—contain THC.⁷⁵ As one commentator put it, a “cannabis culinary professional can infuse just about anything you want to eat with THC,” and the variety of available THC-infused food products is “a real testament to American entrepreneurialism and innovation.”⁷⁶

Those facts illustrate that the image of a twenty-something smoking a doobie at the 1969 Woodstock music festival is no longer an accurate representation of today’s marijuana users, let alone the people who created and expanded that business after 1996. On the contrary, marijuana legalization is potentially a huge business for private parties and a new source of revenue for states.⁷⁷ Estimates from a few years ago were quite bullish. Wall Street predicted that marijuana legalization would generate billions of dollars in revenues for private growers and distributors, create thousands of jobs in the cannabis business, and produce millions in government revenues from

<https://www.wsj.com/articles/the-vaping-marijuana-nexus-11577299411?mod=searchresults&page=3&pos=11>.

74. See, e.g., GELUARDI, *supra* note 11, at 31.

75. See, e.g., CORT, *supra* note 11, at 31; REGAN, *supra* note 11, at 41; Larkin, *Gummy Bears*, *supra* note 9, at 318–19, 319 nn.15–16.

76. HUDAK, *supra* note 69, at 18–19.

77. Thompson, *supra* note 11, at 60 (“The legalization of recreational marijuana has proven to be a very lucrative decision for the American economy.”); see also, e.g., Ciara Linnane, *Aurora Cannabis and Aphria Stocks Look More Attractive After Canopy Growth’s Friday Selloff: Cantor Fitzgerald*, MARKETWATCH (June 1, 2020, 7:04 AM), https://www.marketwatch.com/story/aurora-cannabis-and-aphria-stocks-look-more-attractive-after-canopy-growth-friday-selloff-cantor-fitzgerald-2020-06-01?cx_testId=3&cx_testVariant=cx_2&cx_artPos=6; Ryan, *Weed Versus Greed*, *supra* note 67 (“Serious money is now flooding into marijuana. In the fourth quarter of 2018 alone, \$7.9 billion of capital was raised by cannabis companies globally, according to the Viridian Cannabis Deal Tracker—nearly twice the amount raised in all of 2017.”).

taxes and fees.⁷⁸ Some more recent reports were bearish on the cannabis industry,⁷⁹ but it appears to have survived the

78. See, e.g., Debra Borchardt, *Marijuana Industry Projected to Create More Jobs than Manufacturing by 2020*, FORBES (Feb. 22, 2017, 10:51 AM), <https://www.forbes.com/sites/debraborchardt/2017/02/22/marijuana-industry-projected-to-create-more-jobs-than-manufacturing-by-2020/> (“A new report from New Frontier Data projects that by 2020 the legal cannabis market will create more than a quarter of a million jobs. This is more than the expected jobs from manufacturing, utilities or even government jobs, according to the Bureau of Labor Statistics. The BLS says that by 2024 manufacturing jobs are expected to decline by 814,000, utilities will lose 47,000 jobs and government jobs will decline by 383,000. This dovetails with data that suggests the fastest-growing industries are all healthcare related. The legal cannabis market was worth an estimated \$7.2 billion in 2016 and is projected to grow at a compound annual rate of 17%. Medical marijuana sales are projected to grow from \$4.7 billion in 2016 to \$13.3 billion in 2020. Adult recreational sales are estimated to jump from \$2.6 billion in 2016 to \$11.2 billion by 2020.”); Rory Carroll, *Hippy Dream Now a Billion-Dollar Industry with California Set to Legalize Cannabis*, GUARDIAN (Dec. 30, 2017, 3:30 PM), <https://amp.theguardian.com/us-news/2017/dec/30/california-legalise-cannabis-hippy-dream-billion-dollar-industry> (“The Salinas Valley, an agricultural zone south of San Francisco nicknamed America’s salad bowl, has already earned a new moniker: America’s cannabis bucket. Silicon Valley investors and other moneyed folk are hoping to mint fortunes by developing technology to cultivate, transport, store and sell weed. Entrepreneurs are devising pot-related products and services. Financiers are exploring ways to fold the revenue—estimated at \$7bn per annum by 2020—into corporate banking.”); Chris Morris, *Legal Marijuana Sales Are Expected to Hit \$10 Billion This Year*, FORTUNE (Dec. 6, 2017), <http://fortune.com/2017/12/06/legal-marijuana-sales-10-billion/>; Aaron Smith, *Market for Legal Pot Could Pass \$20 Billion*, CNN BUSINESS (Nov. 11, 2017, 7:08 AM), <http://money.cnn.com/2016/11/09/news/economy/marijuana-legalization-sales/index.html> (“Voters in four states approved legal recreational pot on Tuesday. Four more states expanded access to medical marijuana. All told, it could expand the national market to \$21 billion by 2020, according to New Frontier Data, which partnered with the marijuana industry organization Arcview Group. That is up from \$5.7 billion last year and an expected \$7.9 billion this year.”); Aaron Smith, *Colorado Passes a Milestone for Pot Revenue*, CNN MONEY (July 19, 2017, 2:52 PM), <http://money.cnn.com/2017/07/19/news/colorado-marijuana-tax-revenue/index.html> (“VS Strategies, a pro-legalization research company in Denver, says that the state has pulled in \$506 million since retail revenues began in January 2014. . . . Revenue from taxes and fees has increased each year, from \$76 million in 2014 to \$200 million last year, and the state is on track to beat that this year, according to VS Strategies, which used state revenue data in its report Wednesday.”).

79. See, e.g., Daniel Chase, *Will These Marijuana Stocks Start To Rebound?*, MARIJUANASTOCKS.COM (June 4, 2020), <https://marijuanastocks.com/will-these-marijuana-stocks-start-to-rebound/>; Max A. Cherney, *Pot Stocks Plunge after*

2020 recession caused by the COVID-19 pandemic.⁸⁰

Were cannabis to become a legalized commodity throughout the United States, over time the economy might come to treat it in the same manner as it handles tobacco or alcohol, analogous consumer products given their addictive potential, as explained below. Even so, the market would eventually treat the marijuana industry as just another business and cannabis as merely another item whose growers and sellers must navigate through the commercial

Another Round of Disappointing Earnings, MARKETWATCH (Mar. 30, 2020, 2:48 PM), https://www.marketwatch.com/story/pot-stocks-plunge-after-another-round-of-disappointing-earnings-2020-03-30?cx_testId=3&cx_testVariant=cx_2&cx_artPos=6; Charley Grant, *Cannabis Stocks Take a Hit*, WALL ST. J. (Mar. 3, 2020, 11:19), <https://www.wsj.com/articles/cannabis-stocks-take-a-hit-11583252358?mod=searchresults&page=2&pos=16>; Chris Kornelis, *A CEO Tries to Navigate the Legal Cannabis Sector's Bad Trip*, WALL ST. J. (Mar. 6, 2020, 1:08 PM), <https://www.wsj.com/articles/a-ceo-tries-to-navigate-the-legal-cannabis-sectors-bad-trip-11583518019?mod=searchresults&page=2&pos=5>; Jacquie McNish & Vipal Monga, *Marijuana Madness Turns into Cannabis Crash*, WALL ST. J. (Oct. 12, 2019, 10:00 AM), https://www.wsj.com/articles/marijuana-madness-turns-into-a-cannabis-crash-11570888800?mod=article_inline; Alexander Osipovich, *Cannabis Stocks Fall on Disappointing Earnings*, WALL ST. J. (Nov. 14, 2019, 4:38 PM), https://www.wsj.com/articles/cannabis-stocks-fall-on-disappointing-earnings-11573754223?mod=article_inline.

80. See, e.g., Editorial, *California Deems Pot an Essential Coronavirus Business*, WALL ST. J. (Mar. 23, 2020, 7:25 PM), <https://www.wsj.com/articles/california-deems-pot-an-essential-coronavirus-business-11585005903?mod=searchresults&page=2&pos=3>; Max A. Cherney, *Pot Shops Are Considered 'Essential' Businesses in Most States Where It's Legal, but the Rules Are Shifting*, MARKETWATCH (Apr. 11, 2020, 2:04 PM), <https://www.marketwatch.com/story/pot-shops-are-considered-essential-businesses-in-most-states-where-its-legal-but-the-rules-are-shifting-2020-04-08>; Gwynn Guilford, *Guns, Groceries and News: What Sells in a Pandemic—and Doesn't*, WALL ST. J. (Mar. 24, 2020, 11:31 AM), <https://www.wsj.com/articles/groceries-guns-and-news-what-sells-in-a-pandemic-and-what-doesnt-11585042200?mod=searchresults&page=2&pos=1> (“Cannabis: Consumers are turning to cannabis too, according to data from Weedmaps, the nation’s largest legal cannabis marketing platform. On March 19, Weedmaps’ Travis Rexroad said the site’s users placed a record number of orders on the platform, surpassing sales volume booked last year on April 20, an unofficial day of cannabis celebration. The company has also noticed a growing share of orders for edible products, which can be discreetly consumed.”); *Cannabis Sales Surge During Lock Down*, CANNABIS NEWS WIRE (June 24, 2020), <https://www.prnewswire.com/news-releases/cannabis-sales-surge-during-lock-down-301082604.html>.

and political worlds.⁸¹ That would not eliminate the need for specialists to guide firms through the statutes, rules, and policy preferences that federal, state, and local government officials would use to regulate commerce instead of the prohibitions currently in the CSA. Legalization would only reduce or eliminate the risk of criminal liability; it would not ease a company's way to earn a profit or avoid the burden of complying with regulatory mandates.

II. CANNABIS REGULATORY ISSUES

A. *Traditional Cannabis Regulatory Issues*

The debate over federal marijuana legalization occasionally seems like a binary choice between polar opposite approaches: allowing large-scale private ownership and commercialization of the means of production and distribution⁸² versus recommitting the nation to an

81. As one member of the industry put it:

In the U.S. commercial world, cannabis will grow more complex than an ear of corn, which by itself doesn't matter commercially or politically as much as farmers insurance for the corn grower, agricultural political action committees (PACs) that hunt for corn subsidies, ethanol for automobiles, high fructose corn syrup to save the U.S. sweet-lovers from Cuban sugarcane embargoes, irrigation equipment manufacturers, stock prices on one of hundreds of byproducts or direct supply chains and distribution networks from Nebraska to Maine and all the trucking and shipping companies that go with them, seed patents, and John Deere tractors. International commerce doesn't care about ears of corn, either—it cares about export agreements, global shipping magnates, political stability, commodity futures, and food security for citizens and for key allies.

SUMMERS, *supra* note 11, at xiv.

82. That was what happened in the tobacco industry. *See, e.g.*, ALLAN M. BRANDT, *THE CIGARETTE CENTURY* (2007); ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* (2011). Taking advantage of the cost-savings from the invention of a cigarette-rolling machine, James Buchanan Duke acquired roughly 250 tobacco companies and created the American Tobacco Company, which produced approximately 80 percent of all the cigarettes sold in the United States. *See United States v. Am. Tobacco. Co.*, 221 U.S. 106, 155–75 (1911). The same type of consolidation is likely to occur in the cannabis industry because larger firms

overwhelming use of law enforcement in a crackdown on everyone who grows, distributes, or uses cannabis. Of course, numerous options fall between those extremes.⁸³ In all likelihood, that middle ground is where any serious debate over the future of cannabis legalization would be conducted.

Most existing state cannabis programs fall into that intermediate range,⁸⁴ and every intermediate approach involves formal regulation by a state agency of some kind.⁸⁵

can take advantage of economies of scale that small boutique shops cannot. Hall & Lynskey, *supra* note 2, at 181. In fact, that might be happening already. See SUMMERS, *supra* note 11, at 14–15 (“[T]he cannabis industry is growing more stratified to reflect similar industries in agriculture, alcohol, tobacco, or pharmaceuticals. At the tip of the pyramid are those from the well-capitalized and well-established business and political worlds who are trying to fold their knowledge and lessons and experience into the new industry. Lower on the free market totem pole are the former black market actors, bootstrapped mom-and-pop shops, and independent contractors.”).

83. See, e.g., SUMMERS, *supra* note 11, at 83 (“Fundamentally, state and national governments can either let the market work as independently as possible or take a very acting hand in restricting it. States can legalize only medical cannabis, limit the number of licenses in a given area, only allow nonprofits, set prices or control the supply, and take 100 other routes to keep the market under control.”); Hall & Lynskey, *supra* note 2, at 179 (“In principle, adult cannabis use could be legalized in a range of different ways. Individuals could be allowed to grow cannabis for their own use and gift it to others. They could be allowed to form cannabis growers’ clubs that produce cannabis solely for their members’ use. The government could create a monopoly in cannabis production and sales in order to minimize the promotion of cannabis use, as some US states and Canadian provinces have done with alcohol. The government could license non-profit cooperatives or charitable cooperatives that produce and sell cannabis without making a profit. Finally, governments could allow the commercialization of cannabis production and sale under a for-profit model like that used for alcohol.” (footnote omitted)).

84. See MARTIN & RASHIDIAN, *supra* note 42, at 70 (“While [California’s] Proposition 215 went into effect as a single page of untouched text, newer laws . . . were not implemented until more than one hundred pages of rules were added.”). Most states permitting recreational use of cannabis treat it like alcohol: they limit its sale to adults, while regulating the businesses that cultivate and distribute it. That approach is well known, convenient and consistent with the theory that cannabis is no more harmful than alcohol. See SUMMERS, *supra* note 11, at 58; Hall & Lynskey, *supra* note 2, at 180.

85. The absence of regulation, or the use of an inadequate regulatory system, could lead to a “Wild West” state of affairs. GELUARDI, *supra* note 11, at 82 (“Instead of reining in dispensaries, the poorly crafted moratorium turned Los Angeles into a medical marijuana boomtown. Within two years of the

No state gives businesses free rein to sell anything and everything they might generate however they want. States have traditionally regulated local businesses since the colonial era⁸⁶ under their inherent “police power.”⁸⁷ That choice is a sensible and necessary one here too, for several reasons. Regulations allow the state to argue to the federal government that it is protecting consumers against charlatans and dangerous consumer goods. Regulation allows the state to earn income from licensing fees. And regulation provides enough of a state-action veneer that it might keep federal law enforcement officials at bay. A laissez-faire approach to cannabis distribution would be tantamount to encouraging private parties to flout the CSA at will, and the federal government would not sit idly by while marijuana traffickers rake in beaucoup bucks from illegal sales. Sergeant Schultz’s willful blindness was entertaining for viewers of “Hogan’s Heroes,”⁸⁸ but the DEA will not laugh at someone who makes it look inept or foolish.⁸⁹

moratorium’s effective date, more than 800 dispensaries were operating in Los Angeles. They opened in upscale business districts; near schools, playgrounds, and youth centers; and in high-crime neighborhoods. And without an ordinance requiring a criminal background check, many observers wondered whether some dispensaries were little more than covers for illicit drug dealing.” (footnote omitted)).

86. See, e.g., FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* 50 (1989). See generally Paul J. Larkin, Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1, 61-80 (2016) [hereinafter, Larkin, *Property*] (summarizing economic regulation in the nation’s salad days).

87. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (describing the states’ “police power”).

88. See generally Des Hammond, *The Very Best of Sergeant Schultz*, YOUTUBE (Mar. 20, 2017), <https://www.youtube.com/watch?v=OsXrpXo4uC0> (referencing *Hogan’s Heroes* (CBS television broadcast 1965–71)).

89. Apparently, not everyone got that message. See, e.g., GREG CAMPBELL, POT, INC.: INSIDE MEDICAL MARIJUANA, AMERICA’S MOST OUTLAW INDUSTRY ix–xi (2012); GELUARDI, *supra* note 11, at 92 (“The most embarrassing setbacks for the industry . . . were dispensary owners who behaved like big-shot drug dealers rather than compassionate caregivers. It was well known in the medical cannabis industry that the DEA frowned upon dispensary owners who promoted their

Governments have traditionally justified regulation on economic and consumer safety rationales. Price regulation is necessary in sectors where there is a natural monopoly—that is, industries, such as railroad service, where it is inefficient to allow more than one company to operate. Governments license only one firm, but regulate the prices it can charge to prevent monopoly pricing.⁹⁰ Product quality regulations protect consumers against hazardous goods. They ensure that a product is carefully grown or constructed; that it does not contain defects, toxins, impurities, or anything else that could harm consumers; and that it is appropriately packaged and labeled so that a purchaser knows what he or she is buying and what ingredients or components it contains, as well as prevent minors from easily accessing a potentially dangerous item.⁹¹ As discussed below, states have relied on both rationales to regulate this industry.

Treating cannabis as a medicine or a consumer good involves far more than simply removing marijuana from the penal code.⁹² There are numerous policy questions regarding

businesses on a large scale, flaunted their wealth, or took on the flamboyant characteristics of illicit drug dealers. Yet some dispensary owners couldn't resist the temptation."); *id.* at 93–96 (describing how the DEA pursued such parties).

90. *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM 15 (1982) ("The most traditional and persistent rationale for governmental regulation of a firm's prices and profits is the existence of a 'natural monopoly.' Some industries, it is claimed, cannot efficiently support more than one firm.").

91. *See id.* at 33–34 (discussing "moral hazard" (*viz.*, where goods affect third parties) and "paternalism" (*viz.*, where consumers make improvident decisions) as bases for regulation).

92. *See, e.g.*, JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS xiii (2015) [hereinafter CAULKINS, INSIGHT] ("Legalization is not simply a binary choice between making the production, sale, and possession of the drug legal on the one hand and continuing existing prohibitions on the other. Legalization encompasses a wide range of possible regimes, distinguished along at least four dimensions: the kinds of organizations that are allowed to provide the drug, the regulations under which those organizations operate, the nature of the products that can be distributed, and price. These choices could have profound consequences for the outcomes of legalization in terms of health and social well-being, as well as for job creation and government revenue."); SUMMERS, *supra* note 11, at xv ("In the black market, cannabis was untracked and untraced but

the implementation of any such program that elected officials should answer.⁹³ Among them are the following:

- Should a state adopt a medical-use program, a recreational-use program, or both?⁹⁴

largely uncomplicated: grow pot, sell pot, avoid cops. When and if cannabis becomes legal, it becomes part of the mix between corporate juggernaut and the leviathan, something inconceivably more complex.”).

93. For a comprehensive and thoughtful discussion of the implementation issues, see CAULKINS, INSIGHT, *supra* note 92, at 101–14. *See also, e.g.*, JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW (2d ed. 2016) [hereinafter CAULKINS ET AL., MARIJUANA]; Caulkins, *Marijuana Dangers*, *supra* note 16, at 33; Benedikt Fisher et al., Commentary, *Considering the Health and Social Welfare Impacts of Non-medical Cannabis Legalization*, 19 WORLD PSYCHIATRY 187 (2020); Beau Kilmer, *Policy Designs for Cannabis Legalization: Starting with the Eight Ps*, 40 AM. J. DRUG & ALCOHOL ABUSE 259–61 (2014); Kleiman, *Marijuana and Public Health*, *supra* note 16, at 78; Mark A.R. Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY (Mar./Apr./May 2014) [hereinafter Kleiman, *Cannabis Hash*], <https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/>; Rosario Queirolo, Commentary, *The Effects of Recreational Cannabis Legalization Might Depend upon the Policy Model*, 19 WORLD PSYCHIATRY 195 (2020).

94. *See, e.g.*, SUMMERS, *supra* note 11, at 83–84 (“The biggest commercial difference is medical vs. recreational. Most nations start with medical programs, and U.S. states follow the same pattern. This not only takes some pressure off the black market, but establishes the groundwork for a more well-oiled recreational machine further down the line (though some states and nations deny they have any interests).”) If a state adopts only a medical-use program, the question arises whether the legislature, an implementing agency, or a treating physician should decide for what conditions cannabis can be recommended. Numerous physicians have argued that cannabis is a legitimate medical treatment for a host of ailments. *See, e.g.*, DAVID BEARMAN WITH MARIA PETTINATO, CANNABIS MEDICINE: A GUIDE TO THE PRACTICE OF CANNABINOID MEDICINE (2019); DAVID CASARETT, STONED: A DOCTOR’S CASE FOR MEDICAL MARIJUANA (2015); PATRICIA C. FRYE WITH DAVE SMITHERMAN, THE MEDICAL MARIJUANA GUIDE: CANNABIS AND YOUR HEALTH (2018); BONNI GOLDSTEIN, CANNABIS REVEALED (2016); THE POT BOOK, *supra* note 11; MICHAEL H. MOSKOWITZ, MEDICAL CANNABIS (2017); J. Michael Bostwick, Clinical Decision, *Medicinal Use of Marijuana—Recommend the Medical Use of Marijuana*, 368 NEW ENG. J. MED. 866, 866–68 (2013); Jerome P. Kassirer, Editorial, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366 (1997). Yet, there are risks in handing the decision entirely over to physicians. Some states have broadly defined or loosely applied medical cannabis program laws that are just a sham for legalized recreational use. *See* MARTIN & RASHIDIAN, *supra* note 42, at 66–67 (“Proposition 215, as written and passed, was exceedingly vague. The law allowed unlimited cannabis for any condition. Odorous flatulence? A viable excuse. Chronic hangnail? You bet. Only

- What type of agency should be tasked with regulating the cannabis industry—for example, a state public health department or its revenue department?⁹⁵

a doctor's note stood between Californians and legal cannabis; for the first time they were able to possess, grow, or consume as much as they wanted.”); Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 509–12 (2015) [hereinafter Larkin, *Drugged Driving*]. California's Compassionate Use Act identified permissible conditions for which a physician could recommend marijuana (e.g., chemotherapy-induced nausea), but also contained a catchall provision allowing a physician to recommend it for any condition for which he thought it might be useful. Provisions like that are an invitation to recommend marijuana to treat anything, even just “feeling a little blue” one day. SUMMERS, *supra* note 11, at 83–84. Other ancillary issues are whether to require patient registration with the state; whether a patient (or his “caregiver”) can or must grow his own cannabis; how much cannabis or how many plants someone can possess or grow; whether to allow private businesses to open cannabis dispensaries (and, if so, on a for-profit or not-for-profit basis) but limit their number; and so forth. *Id.* at 86–88. In theory, medical and recreational programs could create very different markets. *Id.* at 84 (“Medical programs do not create the same kind of roaring commercialism the recreational cannabis industry produces. More often, medical programs simply produce an array of oligopolies that are then poised to corner the recreational market when that state decides to go all the way with its policy. In terms of money, the recreational industry is king.”). Some states with both programs tax medical cannabis purchases at a lower rate than recreation-use purchases. Those states have to ensure that people are not obtaining medical-use cards simply to avoid paying taxes. *See, e.g.*, Vikas Bajaj, *Rules for the Marijuana Market*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/opinion/high-time-rules-for-the-marijuana-market.html?searchResultPosition=14> (“States with an existing medical marijuana market will also have to make sure that users are not abusing it to evade taxes. In Colorado, for example, there are more than 111,000 people with medical marijuana cards. Those users can buy the drug at much lower tax rates [7.62%] than people buying recreational marijuana [21.12%] The problem is that almost anyone can get a card on a doctor's recommendation.”).

95. *See, e.g.*, COLO. CODE REGS. § 212-3 (LexisNexis 2020) (vesting regulatory authority in the Marijuana Enforcement Division of the Colorado Department of Revenue). That choice is an important one. A state health department will focus on enhancing the safety of the product and the health of its consumers, while a state revenue department will seek to raise state revenue above all else. *See, e.g.*, CAULKINS, INSIGHT, *supra* note 92, at 102 (“One might expect, as a general rule, that a liquor-control board (such as in Washington) might be more cognizant of the special circumstances surrounding a dependence-inducing intoxicant than would, say, a department of revenue, as in Colorado, which might be more focused on good governance that is mindful of matters of process and equitable treatment across licensees. One might also expect that neither would necessarily have as much of a proactive focus on protecting public health as a health or child-welfare

- Should the forms and potency of cannabis be limited or left to market forces?⁹⁶
- Should each person be permitted—or required—to grow cannabis for his or her personal medical or recreational use, or should private enterprises be free to become involved?⁹⁷
- Should the industry be freely open to all comers or should there be a limited number of growers and distributors?⁹⁸

agency would. Thus, it is useful and important to consider the role (and perhaps leadership or co-leadership) of a public health-minded state agency.”); cf. Carol Ryan, *Pot Industry Underestimates Old-School Dealers*, WALL ST. J. (Aug. 19, 2019, 7:34 AM) [hereinafter Ryan, *Old-School*], <https://www.wsj.com/articles/pot-industry-underestimates-old-school-dealers-11566214441?mod=searchresults&page=7&pos=3> (“Several factors are stymieing legitimate sales. . . . [T]he main barrier is the markup on legal cannabis from high taxes and the cost of complying with complex regulations. Consumers pay 77% more for the same product from a legal vendor, according to BDS Analytics. Unless taxes are cut, the research house expects almost half of California’s cannabis spending to remain in the illegal market in 2024.”).

96. Cannabis can be sold in a traditional cigarette-like format or in numerous other forms, including a variety of edible forms. The potency of marijuana has increased greatly since the Summer of Love in 1968, when it was in the low single digits. Today, potency can vary from 30 to 90-plus percent. CAULKINS, *INSIGHT*, *supra* note 92, at 106–08; Larkin, *Gummy Bears*, *supra* note 9, at 318–21, 319 nn.15–16, 337–38, 337 nn.56–62.

97. Vermont and the District of Columbia allow individuals to grow cannabis for their own use or to give it away, but they prohibit its sale. *See, e.g.*, Hall & Lynskey, *supra* note 2, at 180. Most states with recreational use laws allow each person to grow a limited number of plants per person (say, 6) or per household (say, 12). SUMMERS, *supra* note 11, at 59; *see, e.g., id.* at xiii–xiv (“What’s good for industry is good for legalization campaigns, and vice versa. Behind pot legalization is a fresh, new industrial complex all its own. The states that have had the most success and received the most press are those with the commercial recreational model, rather than the more highly controlled medical options or less consumerist decriminalization options practiced by other states. Consumer choice, profit motive, and need for taxes accelerated the cannabis reform movement to its present American speed.”).

98. Legalization options include the following: allowing small-scale cooperatives to combine resources for members, limiting the number of growers and retailers in a state or county, deciding whether to allow companies to vertically integrate and operate cultivation facilities and retail stores, deciding whether to allow counties to supplement state regulation, deciding whether to use the criminal justice system to police the cannabis business or turn

- What qualifications should exist for a licensee? In particular, should a criminal record (especially for drug trafficking) be a disqualification?⁹⁹
- How should a state license and inspect growers and distributors and, in general, enforce the new regulatory program?¹⁰⁰

enforcement over to a civil regulatory agency, deciding what licensing scheme is optimal, deciding whether to allow delivery service, and so forth. *See, e.g.*, CAULKINS, INSIGHT, *supra* note 92, at 108–09, 111–12; Bajaj, *supra* note 94 (“For each level of the industry, licensing systems ought to discourage the concentration of market power in the hands of a few businesses. It’s important for regulators to recall the American experience with the tobacco industry, which is dominated by a handful of large corporations. For decades, those big cigarette companies undermined scientific research into the damage their products were causing and blocked sensible regulations. If states allow marijuana businesses to become too big, they could face corporate juggernauts that may be hard to regulate.”). Most states allow commercial businesses to enter the industry. *See, e.g.*, SUMMERS, *supra* note 11, at xiii–xiv; *cf.* GELUARDI, *supra* note 11, at 88 (describing a 2010 Los Angeles ordinance limiting the number and location of medical marijuana dispensaries). The number of licensees could affect the supply and therefore the price. *See, e.g.*, Ryan, *Cannabis Supply*, *supra* note 68 (“When adult use was legalized in Oregon four years ago, too many growing licenses were issued. That has led to excess inventory—6.5 years’ worth, according to a 2019 Oregon Liquor Control Commission report. The price paid by consumers for usable marijuana has more than halved to less than \$5 a gram in the past two years.”). A large number of retail stores might be positively associated with increased cannabis use. *See, e.g.*, CAULKINS, INSIGHT, *supra* note 92, at 108 (“The alcohol literature suggests that alcohol outlet density is positively associated with the prevalence of alcohol-related problems There is suggestive evidence that marijuana could experience a similar fate: States that allow medical-marijuana dispensaries experience a higher adult prevalence rate.” (citations omitted)).

99. *See, e.g.*, COLO. CODE REGS. §§ 212-3:2-205 to 212-3:2-280 (application and licensing rules), 212-3:5-105 to 212-3.5-730 (medical marijuana stores), 212-3:6-105 to 212-3:6-115 (retail marijuana stores) (LexisNexis 2020). That issue is particularly salient in connection with efforts to increase minority ownership of companies in the cannabis industry. The argument is that minorities have borne the brunt of the drug war, a disproportionate number of Blacks and Hispanics therefore have criminal records, and treating that fact as a disqualification for ownership interest would have a disproportionate adverse effect on minorities. *See, e.g.*, Beau Kilmer & Erin Kilmer Neel, *Being Thoughtful About Cannabis Legalization and Social Equity*, 19 WORLD PSYCHIATRY 194 (2020).

100. *See, e.g.*, COLO. CODE REGS. §§ 212-3:8-105 to 212-3:8-130 (enforcement), §§ 212-3:8-205 to 212-3:8-240 (discipline) (LexisNexis 2020); CAULKINS, INSIGHT, *supra* note 92, at 114 (“Enforcement of regulations will fall on a variety of agencies, as described in greater detail in Chapter Seven, and is likely to involve the cost of regulating licenses (growing, processing, distributing, and retail

- What, if any, price regulations should be adopted?¹⁰¹
- Should localities be able to impose their own regulations, or even ban cannabis sales altogether under a so-called “local option”?¹⁰²

selling), regulating products (testing inspections, product availability in stores, random compliance checks), checking compliance and enforcing marketing regulations, regulating sales to out-of-state residents, regulating sales to and possession by minors, and regulating use and possession (e.g., in public parks, in restaurants.”). “Regulators usually chop the cannabis industry into a handful of licenses that match a particular business type. Depending on the state, these licenses can include retail, cultivation, testing, transportation, production, manufacturing, or medical care givers.” SUMMERS, *supra* note 11, at 58. For a lay overview of the marijuana licensing requirements and process, see *id.* at 56–59. A slow licensing process, whether accomplished intentionally or otherwise, can stall a nascent industry.

101. Price controls are like taxes. They are inversely related to demand and directly related to the presence of a black market. See, e.g., DAVENPORT, *supra* note 11, at 143–48; Tom James, *The Failed Promise of Legal Pot*, ATLANTIC (May 9, 2016), <https://www.theatlantic.com/politics/archive/2016/05/legal-pot-and-the-black-market/481506/> (“[W]hat is keeping people in Colorado’s black market is price, with a dose of convenience thrown in, says Mark Vasquez, a former narcotics detective ‘The black market,’ he says, ‘is alive and well and will continue to thrive in Colorado.’ There are a few basic reasons for this. First, the medical market, Vasquez says, can sell marijuana more cheaply than the state-licensed and -regulated stores because medical dispensaries don’t have to charge most of the combined 27.9 percent tax on the drug. This increases the resale of medical marijuana on the street. Second, there are the plants that are grown for personal use, which are allowed under the law. Vasquez says the result is a steady supply of marijuana not only for street dealers but also for Craigslist sales, which have become so ubiquitous that some city departments don’t have the resources to crack down on them.”); James Queally & Patrick McGreevy, *Nearly 3,000 Illegal Marijuana Businesses Found in California Audit, Dwarfing Legal Trade*, L.A. TIMES (Sept. 11, 2019, 5:14 PM), <https://www.latimes.com/california/story/2019-09-11/california-marijuana-black-market-dwarfs-legal-pot-industry> (“California’s black market for cannabis is at least three times the size of its regulated weed industry, according to an audit made public Wednesday, the latest indication of the state’s continued struggle to tame a cannabis economy that has long operated in legal limbo. . . . Legitimate marijuana businesses have repeatedly criticized state leaders and law enforcement for failing to curb unlicensed dispensaries and delivery services, which sell cannabis at a much lower price by skirting state and municipal cannabis taxes.”).

102. See CAULKINS, INSIGHT, *supra* note 92, at 110; SUMMERS, *supra* note 11, at 25–26 (“Most states with legal pot let local government create their own

- What state and local tax rules are appropriate? In particular, what is the appropriate tax rate?¹⁰³
- Should tax receipts be dedicated to a particular fund, such as treatment of cannabis dependence or other state or local government functions, such as schools, social services, or public employee

regulations, including an option to opt out of state law and keep cannabis illegal within their borders. So far [viz. as of 2018] only Washington does not allow local opt-out options, though several towns in Washington do so anyway. This creates layers and layers of complexity and cost. For example, a retail shop in Denver must go through two separate licensing ordeals—one from the Colorado Marijuana Enforcement Division and one from the City of Denver—pay taxes to two different entities, and adjust the business to two different sets of zoning standards—all the while complying with whatever they must do to stay out of the federal spotlight.”). If a state empowers localities to add their own regulations, a locality will need to decide how to zone for cannabis growing or retail operations. One decision that a city or country must make is whether it should spread out or concentrate retail cannabis stores. Each option has costs and benefits. For example, concentrating them in an area zoned for industrial use might keep them away from schools, playgrounds, and parks, but it might blight one area and drive up the real estate market. *See* SUMMERS, *supra* note 11, at 57.

103. *See, e.g.,* CAULKINS, INSIGHT, *supra* note 92, at 115–43; SUMMERS, *supra* note 11, at 95–103; JOSEPH HENCHMAN & MORGAN SCARBORO, TAX FOUND., MARIJUANA LEGALIZATION AND TAXES: LESSONS FOR OTHER STATES FROM COLORADO AND WASHINGTON (Special Rep. No. 231, 2016). Some politicians tout cannabis legalization as a way of boosting state treasuries through so-called “sin” taxes. Joseph De Avila, *Connecticut Governor Pitches Legalizing Marijuana, Other Measures in Budget*, WALL ST. J. (Feb. 5, 2020), https://www.marketwatch.com/story/cannabis-company-acreage-enters-funding-agreements-for-up-to-60-million-2020-06-01?cx_testId=3&cx_testVariant=cx_2&cx_artPos=6. Most states with legalized cannabis impose an excise tax on producers and a sales tax on retailers based on the retail price. Prices have fallen since the state legalization programs came on board, because in those states there is no need for a surcharge to offset the risk of state criminal liability. A weight-based tax approach would incentivize retailers to offer higher THC content products, such as extracts with 70 percent or greater THC content. Pricing the THC content or imposing a minimum unit price could reduce that incentive, but no state has yet done so. Deciding what the tax rate should be is a tricky issue. Set the rate too low and you fall short of projected receipts. Set the rate too high and you encourage black market sales. *See* SUMMERS, *supra* note 11, at 13–14, 97–98; Hall & Lynskey, *supra* note 2, at 180–81; Bajaj, *supra* note 94 (“Regulators will have to design policies that allow licensed businesses to undercut the illegal market but keep prices high enough so dependence on the drug does not increase a lot.”). Of course, large amounts of “loose cash” floating around the cannabis industry make it difficult to determine whether firms are paying what they owe. Quinton, *supra* note 62, at 61.

salaries?¹⁰⁴

Elected officials, of course, have a powerful incentive to answer as few of those questions as possible. Every decision risks antagonizing some of the electorate (or their donors),¹⁰⁵

104. See, e.g., *Marijuana Tax Reports*, COLO. DEPT OF REVENUE, <https://cdor.colorado.gov/data-and-reports/marijuana-data/marijuana-tax-reports> (March 2021) (reporting approximately \$223 million in overall revenue from marijuana sales for FY 2019 (Jan. 1 to Sept. 30, 2019) and approximately \$1.2 billion from February 1, 2014 (when the Colorado Department of Revenue began reporting data) to December 2019); Heather Gillers, *Is Your City's Pension Fund a Little Short? Marijuana Might Help*, WALL ST. J. (Feb. 4, 2020), <https://www.wsj.com/articles/is-your-citys-pension-fund-a-little-short-marijuana-might-help-11580812201?mod=searchresults&page=3&pos=14>. As for the use of cannabis tax receipts: Sales and income taxes generate income for local and state governments that can be used for cannabis treatment programs or the myriad other state budget items. Yet, in the long term cannabis legalization could leave states and localities in the red due to the costs of marijuana use, such as increased emergency room expenses from motor vehicle accidents and overdoses, as well as lost income as the number of long-term users increases (particularly, ones who initiated cannabis use during their adolescence). See CENTENNIAL INST., ECONOMIC AND SOCIAL COSTS OF LEGALIZED MARIJUANA 3 (2018) ("For every dollar gained in tax revenue, Coloradans spend approximately \$4.50 to mitigate the effects of legalization. Costs related to the healthcare system and from high school dropouts are the largest cost contributors, but many other costs were included as well. Costs of marijuana ranged from accidental poisonings and traffic fatalities to increased court costs for impaired drivers, juvenile use, and employer related costs."); see also SUMMERS, *supra* note 11, at 100; Larkin, *Reconsidering Marijuana*, *supra* note 10, at 130–31.

105. Polls indicate that a majority of Americans favor making cannabis more available, particularly for medical use. See, e.g., John Hudak & Christine Stenglein, *Public Opinion and America's Experimentation with Cannabis Reform*, in MARIJUANA FEDERALISM, *supra* note 14, at 15–34; Zusha Elinson, *Voters Approve Recreational Marijuana in Four States, Medical Marijuana in Three Others*, WALL ST. J. (Nov. 9, 2016), https://www.wsj.com/articles/voters-approve-recreational-marijuana-in-at-least-three-states-medical-marijuana-in-others-1478677170?mod=article_inline ("Sixty percent of Americans now favor legalizing marijuana, according to a Gallup poll from October. That is the highest level of support since Gallup first asked the question back in 1969 when just 12% of Americans supported legalization."). Yet, that majority opinion does not guarantee that a vote in favor of legalization avoids political risks. Elected officials represent particular states or counties, and national polls do not necessarily reflect the opinions of the people in those regions. The residents in New York City and Salt Lake City might have very different views about the wisdom of allowing cannabis to be sold for recreational use. Moreover, the people who favor legalization do not deem this issue as a particularly important one.

and no elected official eager to be *re*-elected will intentionally antagonize a single-issue voting bloc, even a small one, because such groups have an outsized effect on the political process.¹⁰⁶ That explains why most legalization programs result from voter referendums, rather than the traditional legislative process.¹⁰⁷ The safer course is to create a new administrative agency (or task an existing one) with the responsibility to promulgate rules, at least in the first instance, when implementing the new program.¹⁰⁸ States like Colorado have done just that.¹⁰⁹ Once the legislature

Hudak & Stenglein, *supra*, at 31. Finally, there is always the “not-in-my-backyard” (or NIMBY) problem—viz., people who support marijuana legalization as long as no dispensary opens in *their* neighborhood. See GELUARDI, *supra* note 11, at 86.

106. An interest group representing only a minority of voters who intensely oppose marijuana legalization can stymie legislative steps toward legalization despite nationwide majority support for that policy. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6, 13–17 (1974) (participants in the political process will seek to further their own interests, rather than the “public interest”); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971) (explaining why, according to collection action theory, a small coherent interest group with intensely-held views on a single issue can have more legislative influence than a majority of the population).

107. See, e.g., SUMMERS, *supra* note 11, at xiii; Hall & Lynskey, *supra* note 2, at 179. For example, in Colorado the voters authorized medical use of cannabis in 2000 and recreational use 12 years later in separate amendments to the state constitution. COLO. CONST. art. 18, § 14 (authorizing medical marijuana use); *id.* art. 18, § 16 (authorizing adult recreational marijuana use). The state later passed implementing legislation. See, e.g., S.B 19-224, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

108. Legislators could ask a task force for recommendations on those issues. Colorado did so after the electorate legalized recreational-use marijuana in 2012. See, e.g., STATE OF COLO., TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64 (2013). That would give the legislature the benefit of outside advice, which provides some cover, but it still leaves decision-making responsibility with elected officials.

109. Colorado regulates the sale of recreational-use cannabis through the Marijuana Enforcement Division of the Department of Revenue. See, e.g., COLO. REV. STAT. ANN. §§ 44-10-101 to 44-10-1301 (West 2020); COLO. CODE REGS. §§ 212-3:1-105 to 8-200 (LexisNexis 2020); webpage of the Marijuana Enforcement Division, COLO. DEP’T OF REVENUE, <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> (last visited May 21, 2020). See generally John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649

makes that assignment, the cannabis regulatory body, like every other administrative agency, will then govern the industry through a combination of licensing, inspections, enforcement proceedings, rulemaking, adjudication, advice-giving, and whatever informal “arm-twisting” agency officials can muster.¹¹⁰

B. *Nontraditional Cannabis Regulatory Issues*

Cannabis raises concerns not present in the case of most consumer goods. Two in particular stand out. One is that users can consume far too much of it and become dependent on it; the other is that people will become intoxicated by marijuana and drive, which puts them at risk of grave injury or death, along with passengers, pedestrians, and other drivers. Traditional price and quality regulation will not prevent those harms. Other supply-side regulations are necessary.

1. Two Problems: Cannabis Dependence and Driving Under the Influence of Cannabis

The cannabis plant is a peculiar consumer good because it can harm users and third parties. The reason why is that

(2015); Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 224–27 (2019) [hereinafter Kamin, *Colorado’s Regulation*]. That agency has collected the relevant statutes and rules in a manual that rivals *Anna Karenina* in length. Compare COLO. DEPT OF REVENUE MARIJUANA ENFT DIV., COLORADO MARIJUANA LAWS AND REGULATIONS (2020) (more than 800 pages long), with LEO TOLSTOY, ANNA KARENINA (Rosamund Bartlett trans., Oxford Univ. Press 2016) (1878) (896 pages long). Some states have even agreed to establish common regional regulatory schemes. See Joseph De Avila, *Four Northeastern Governors Team Up on Vaping and Marijuana Standards*, WALL ST. J. (Oct. 17, 2019), https://www.wsj.com/articles/four-northeastern-governors-team-up-on-vaping-and-marijuana-standards-11571347342?mod=article_inline.

110. To be sure, creating a cannabis regulatory framework, regardless of how strict it might be, does not eliminate all political risks. Some voters will treat any vote in favor of a regulatory program as a tacit endorsement of cannabis use, while others will see any restraint on its use as an arbitrary restriction on their rights. Why? As Peter Hitchens has noted, “Cannabis is not merely a drug. It is a cause.” PETER HITCHENS, THE WAR WE NEVER FOUGHT: THE BRITISH ESTABLISHMENT’S SURRENDER TO DRUGS 3 (2012).

it contains THC, the psychoactive ingredient responsible for its euphoric effect.¹¹¹ Unfortunately, for some people the “rush” that marijuana produces is more a curse than a blessing. Heavy or long-term cannabis use can lead to tolerance, which requires increasing amounts of THC to produce the desired effect.¹¹² Heavy or long-term use can also damage executive mental functioning,¹¹³ as well as lead

111. NAT’L ACAD. OF SCIS., ENG’G & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS* 54 tbl.2-2 (2017). Given its pharmacodynamics (the effect of a drug on the body), THC certainly qualifies as a “drug” for purposes of the Federal Food Drug and Cosmetic Act of 1938: a non-food substance consumed for the euphoria it produces. *See* 21 U.S.C. § 321(g)(1) (“The term ‘drug’ means (A) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).”).

112. *See, e.g.*, CARLTON K. ERICKSON, *THE SCIENCE OF ADDICTION* 28–30 (2d ed. 2018).

113. *See, e.g.*, WORLD HEALTH ORG., *THE HEALTH AND SOCIAL EFFECTS OF NONMEDICAL CANNABIS USE* 15 (2016) (“The daily use of cannabis over years and decades appears to produce persistent impairments in memory and cognition, especially when cannabis use begins in adolescence.”); JERROLD S. MEYER & LINDA F. QUENZER, *PSYCHOPHARMACOLOGY* 416 (2d ed. 2018) (“Heavy cannabis use for a long period of time may lead to impaired executive functioning for at least 2 to 3 weeks following cessation of use However, some of the data suggest that heavy, long-time users may continue to show impairment in decision making, planning, and concept formation.”); *id.* at 422–25 (discussing potential adverse psychological, neuropsychiatric, and physiological effects from long-term use); *id.* at 424–25 (discussing potential psychosis-causing effect of early-onset, long-term use); CAULKINS, *INSIGHT*, *supra* note 92, at 107 (“[A] relatively small number of heavy users account for the great bulk of total purchases; many of them have built up a chemical tolerance to the effects of THC and need higher doses than other consumers to achieve the effect they desire.”); Marta Di Forti et al., *Proportion of Patients in South London with First-Episode Psychosis Attributable to Use of High Potency Cannabis: A Case-Control Study*, 2 *LANCET PSYCHIATRY* 233, 236 (2015) (“People who used cannabis or skunk every day were both roughly three times more likely to have a diagnosis of a psychotic disorder than were those who never used cannabis.”); Marie Stefanie Keiser Starzer et al., *Rates and Predictors of Conversion to Schizophrenia or Bipolar Disorder Following Substance-Induced Psychosis*, 175 *AM. J. PSYCHIATRY* 343, 346 (2018) (“We found that 32.2% of patients with a substance-induced psychosis later converted to either bipolar disorder or schizophrenia. The highest

users to become dependent on the drug,¹¹⁴ which causes them to suffer withdrawal symptoms when they discontinue its use.¹¹⁵ The 2013 edition of the American Psychiatric

conversion rate (47.4%) was found for cannabis-induced psychosis. Young age was associated with a higher risk of conversion to schizophrenia; the risk was highest for those in the range of 16-25 years. Self-harm after a substance-induced psychosis was significantly linked to a higher risk of converting to both schizophrenia and bipolar disorder.”).

114. See, e.g., NAT’L INST. ON DRUG ABUSE, MARIJUANA 14 (Aug. 2017) (“Marijuana use can lead to the development of problem use, known as a marijuana use disorder, which takes the form of addiction in severe cases. Recent data suggest that 30% of those who use marijuana may have some degree of marijuana use disorder.”); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 509–16 (5th ed. 2013) [hereinafter DSM-5] (discussing diagnosis of “Cannabis Use Disorder”); ERICKSON, *supra* note 112, at 175–76, 267; WAYNE HALL & ROSALIE LICCARDO PACULA, CANNABIS USE AND DEPENDENCE (2003); MEYER & QUENZER, *supra* note 113, at 420 (noting that 10% of marijuana users become dependent, while 50% of daily users do so); CANNABIS DEPENDENCE (Roger A. Roffman & Robert S. Stephens eds., 2006); Udo Bonnet & Ulrich W. Preuss, *The Cannabis Withdrawal Syndrome: Current Insights*, 8 SUBSTANCE ABUSE & REHABILITATION 9 (2017); Alan J. Budney & John R. Hughes, *The Cannabis Withdrawal Syndrome*, 19 CURRENT OPS. PSYCHIATRY 233 (2006); Itai Danovitch & David A. Gorelick, *State of the Art Treatments for Cannabis Dependence*, 35 PSYCHIATRIC CLINICS N. AM. 309 (2012); Margaret Haney, *The Marijuana Withdrawal Syndrome: Diagnosis and Treatment*, 7 CURRENT PSYCHIATRY REP. 360 (2005); Wayne Hall, *What Has Research Over the Past Two Decades Revealed About the Adverse Health Effects of Recreational Cannabis Use?*, 110 ADDICTION 19 (2014); Wayne Hall & Nadia Solowij, *Long Term Cannabis Use and Mental Health*, 171 BRIT. J. PSYCHIATRY 107 (1997); Lindsey A. Hines et al., *Association of High-Potency Cannabis Use with Mental Health and Substance Use in Adolescence*, 77 JAMA PSYCHIATRY 1044 (2020).

115. See, e.g., Anees Bahji et al., *Prevalence of Cannabis Withdrawal Symptoms Among People with Regular or Dependent Use of Cannabinoids: A Systematic Review and Meta-analysis*, JAMA NETWORK OPEN, Apr. 2020, at 1, 11; Alan J. Budney et al., *Review of the Validity and Significance of Cannabis Withdrawal Syndrome*, 161 AM. J. PSYCHIATRY 1967 (2004); Alan J. Budney et al., *The Time Course and Significance of Cannabis Withdrawal*, 112 J. ABNORMAL PSYCH. 393 (2003); Alan J. Budney et al., *Marijuana Withdrawal Among Adults Seeking Treatment for Marijuana Dependence*, 94 ADDICTION 1311 (1999); Wilson M. Compton et al., *Marijuana Use and Use Disorders in Adults in the USA, 2002–14: Analysis of Annual Cross-Sectional Surveys*, 3 LANCET PSYCHIATRY 954 (2016); David A. Gorelick et al., *Diagnostic Criteria for Cannabis Withdrawal Syndrome*, 123 DRUG & ALCOHOL DEPENDENCE 141 (2012); Esme Fuller-Thomson et al., *Is Recovery from Cannabis Dependence Possible? Factors that Help or Hinder Recovery in a National Sample of Canadians with a History of Cannabis Dependence*, ADVANCES IN PREVENTATIVE MED., Apr. 15, 2020, at 1; Deborah S. Hasin et al., *Prevalence of Marijuana Use Disorders in the United States Between*

Association's *Diagnostic and Statistical Manual of Mental Disorders* defines that condition as "Cannabis Use Disorder."¹¹⁶

Like most issues concerning marijuana, the subject of dependency has been a contentious one. Some marijuana supporters have denied that it has any potential for dependency, and some of its opponents have claimed that it always leads to addiction.¹¹⁷ The truth lies between the extremes. Approximately ten percent of the people who ever smoke marijuana become dependent on it, but that risk goes up for someone who uses cannabis frequently, particularly when regular use began during adolescence.¹¹⁸ According to

2001–2002 and 2012–2013, 72 JAMA PSYCHIATRY 1235 (2015); Deborah S. Hasin et al., *Cannabis Withdrawal in the United States: Results from NESARC*, 69 J. CLINICAL PSYCHIATRY 1354 (2008). Cannabis withdrawal symptoms include craving, irritability, depression, anxiety, restlessness, weakness, and sleep disruption. See, e.g., WILLIAM R. MILLER ET AL., TREATING ADDICTION, 39, 96 box 6.6, 290 box 18.2 (2011) (describing the symptoms of cannabis withdrawal); Alan J. Budney et al., *Comparison of Cannabis and Tobacco Withdrawal: Severity and Contribution to Relapse*, 35 J. SUBSTANCE ABUSE TREATMENT 362 (2008); M. Claire Greene & John F. Kelly, *The Prevalence of Cannabis Withdrawal and Its Influence on Adolescents' Treatment Response and Outcomes: A 12-Month Prospective Investigation*, 8 J. ADDICTION MED. 359, 361–62 tbl.1 (2014).

116. DSM-5, *supra* note 114, at 509–16 (discussing diagnosis of "Cannabis Use Disorder"); see Alan J. Budney et al., *Update on the Treatment of Cannabis Use Disorder*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA, *supra* note 5, at 236; Tammy A. Chung & Ken C. Winters, *Clinical Characteristics of Cannabis Use Disorder*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA, *supra* note 5, at 72.

117. See IVERSEN, *supra* note 17, at 106–13, 209–12 (noting the competing views).

118. See, e.g., ERICKSON, *supra* note 112, at 267; HALL & PACULA, *supra* note 114, at 75–78; ROOM ET AL., *supra* note 5, at 25 (noting that the risk of dependence is "around 9% among persons who have ever used cannabis"); James C. Anthony et al., *Comparative Epidemiology of Dependence on Tobacco, Alcohol, Controlled Substances, and Inhalants: Basic Findings from the National Comorbidity Survey*, 2 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 244 (1994) (noting that 9 percent of all cannabis users met the DSM-III-R criteria for cannabis dependence at some point in their lives); Beau Kilmer, *Recreational Cannabis—Minimizing the Health Risks from Legalization*, 376 NEW ENG. J. MED. 705, 705 (2017) ("Approximately 9% of people who try cannabis meet criteria for cannabis dependence at some point. The rate roughly doubles for those who initiate use before 17 years of age and is much higher for adolescents who use cannabis weekly or more often."); Catalina Lopez-Quintero et al., *Probability and*

cannabis experts Wayne Hall and Rosalie Pacula, “the following rules of thumb” are useful in determining the likelihood of dependence: The risk is one in ten for people who have ever used cannabis. Using the drug on more than a few occasions increases the risk to between one in five and one in three. Use it daily and the risk jumps to approximately one in two.¹¹⁹ The risk is even higher for someone who begins marijuana use during adolescence, given the labile nature of the adolescent brain.¹²⁰

Prediction of Transition from First Use to Dependence on Nicotine, Alcohol, Cannabis, and Cocaine: Results of the National Epidemiological Survey on Alcohol and Related Conditions (NESARC), 115 *DRUG & ALCOHOL DEPENDENCE* 120, 126 (2011) (“[C]umulative probability estimates indicated that 67.5% of nicotine users, 22.7% of alcohol users, 20.9% of cocaine users, and 8.9% of cannabis users would become dependent at some time in their life.”); Randi Melissa Schuster et al., *Effects of Adolescent Cannabis Use on Brain Structure and Function: Current Findings and Recommendations for Future Research*, in *CONTEMPORARY HEALTH ISSUES ON MARIJUANA*, *supra* note 5, at 91–92 (noting that the “lifetime risk” for cannabis dependence is “17% when use is initiated as a teenager,” “approximately 9%” when use begins as an adult, and “25% to 50% in those who use daily”); *id.* (noting that the “rate of transition from non-problematic to problematic cannabis use may occur more rapidly with cannabis than nicotine or alcohol use,” although fewer cannabis users progress to dependence than nicotine or alcohol users (9 percent versus 67 and 23 percent, respectively)).

119. HALL & PACULA, *supra* note 114, at 75; *id.* at 78.

120. According to Dr. Nora Volkow, Director of the National Institute on Drug Abuse, “[A]s compared with persons who begin to use marijuana in adulthood, those who begin to use in adolescence are approximately 2 to 4 times as likely to have symptoms of cannabis dependence within 2 years after first use.” Volkow et al., *supra* note 8, at 2220; *see also, e.g.*, WORLD HEALTH ORG., *THE HEALTH AND SOCIAL EFFECTS OF NONMEDICAL CANNABIS USE* 15 (2016) (“The daily use of cannabis over years and decades appears to produce persistent impairments in memory and cognition, especially when cannabis use begins in adolescence.”); ROOM ET AL., *supra* note 5, at 25 (noting that the risk of dependence is “about one in six for young people who initiate in adolescence”); *id.* at 31–39 (describing studies investigating the risk that adolescent marijuana use could adversely affect learning, result in a greater drop-out rate, be a prelude to other drug use, or lead to schizophrenia or depression); Janni Leung et al., *What Is the Prevalence and Risk of Cannabis Use Disorders among People Who Use Cannabis? A Systematic Review and Meta-Analysis*, 109 *ADDICTIVE BEHAVS.* 106479 (2020) (the risk of dependence is 33 percent among young people who engaged in regular (weekly or daily) cannabis use); Volkow et al., *supra* note 8, at 2220 tbl.1 (noting that negative effects in brain development, educational outcome, cognitive impairment, and life satisfaction are “strongly associated with initial marijuana

To be sure, the risk of addiction to someone who samples any psychoactive drug is low,¹²¹ and cannabis is not as addictive as other drugs, such as nicotine, heroin, cocaine, or alcohol.¹²² But a 10 percent risk of dependency is far from trivial for anyone, and knowingly accepting a 50 percent risk of dependency—a mere coin flip—would legally be deemed reckless behavior.¹²³ The risk to society from cannabis

use early in adolescence”). *See generally* Larkin, *Gummy Bears*, *supra* note 9, at 325–31, 326 nn.30–40 (collecting authorities). Studies have found that a range of 30–84% of juveniles seeking treatment for cannabis dependence have suffered from withdrawal. Greene & Kelly, *supra* note 115, at 361–62, 366.

121. *See, e.g.*, Jill B. Becker & Elena Chartoff, *Sex Differences in Neural Mechanisms Mediating Reward and Addiction*, 44 *NEUROPSYCHOPHARMACOLOGY* 166, 166 (2019).

122. *See, e.g.*, ERICKSON, *supra* note 112, at 267 (noting that studies have found the approximate figures of addiction for various commonly used drugs is the following: of the people who smoke, 32% become addicted; for heroin, 23%; for cocaine, 17%; for alcohol, 10–15%; for marijuana, 9%); ROOM ET AL., *supra* note 5, at 25; Anthony et al., *supra* note 118, at 251 tbl.2 (noting comparative addiction rates of 32% for nicotine, 23% for heroin, 17% for cocaine, 15% for alcohol, 11% for stimulants, and 9% for cannabis); KEVIN P. HILL, *MARIJUANA: THE UNBIASED TRUTH ABOUT THE WORLD’S MOST POPULAR WEED* 37 (2015) (“Put simply, this data tells us that most people who begin using marijuana will not become addicted, but some will. And adolescents are about twice as likely as adults to become addicted.”); *id.* at 36–37, 55–63. The recent increase in the potency of cannabis, *see supra* note 7, however, might push up the percentage of addicted users.

123. *See, e.g.*, *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (stating that to act recklessly is to “consciously disregard[] a substantial risk that the conduct will cause harm to another” (quoting MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1962))); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (“The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.”); MODEL PENAL CODE § 202(2)(c) (AM. L. INST. 1962) (defining “recklessness” for purposes of the General Requirements of Culpability: “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”); RESTATEMENT (SECOND) OF TORTS § 500 (AM. L. INST. 1965) (defining “reckless disregard of safety”: “The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct

dependency is also considerable. Marijuana is the most widely available and used illicit drug.¹²⁴ As such, even a one-in-ten chance of becoming dependent, let alone a 50-50 chance, means that a sizeable number of people will likely suffer from that condition.¹²⁵

The risk of dependence puts marijuana in the same category of consumer goods as alcohol and tobacco, items sometimes called “temptation goods.”¹²⁶ Society might be forced to “tolerate grudgingly” their sale because the cost of trying to prevent people from using them by deeming them contraband eclipses any realistically obtainable benefits from making the effort.¹²⁷ Yet, given the potential for addiction and other harms associated with their use, society is under no obligation to embrace them or make it easy to purchase them. On the contrary, society is justified in

creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.”); *id.* § 500 cmt. a (“[Recklessness] must involve an easily perceptible danger of death or serious physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.”); *id.* § 502 (“The factors which determine when the conduct of an actor is in reckless disregard of another’s safety are applicable to determine whether the actor’s conduct is in reckless disregard of his own safety.”); PROSSER AND KEETON ON TORTS § 34, at 213–14 (W. Page Keeton et al. eds., 5th ed. 1984).

124. See, e.g., DRUG ENFT ADMIN., U.S. DEP’T OF JUST., 2019 NAT’L DRUG THREAT ASSESSMENT 77 (2019) (“As the most commonly used illicit drug . . . , marijuana is widely available and cultivated in all 50 states.”); ROOM ET AL., *supra* note 5, at 25 (“Community mental health surveys indicate that in many developed societies cannabis dependence is the most common type of drug dependence after alcohol and tobacco.”).

125. See CAULKINS ET AL., MARIJUANA, *supra* note 93, at 25 (“The self-report data suggest that 2.8 million Americans met clinical criteria for marijuana dependence in 2013, and another 1.3 million met the criteria for abuse, for a total of 4.1 million meeting the criteria for abuse or dependence. (That’s 1.6 percent of the population aged 12 and older.) Estimates from Europe and Australia also find rates of marijuana abuse and dependence in the general population between 1 percent and 2 percent.”). Fortunately, the prevalence of dependence might not be increasing. See Wilson M. Compton et al., *Cannabis Use Disorders Among Adults in the United States During a Time of Increasing Use of Cannabis*, 204 DRUG & ALCOHOL DEPENDENCE 107468 (2019).

126. Caulkins, *Marijuana Dangers*, *supra* note 16, at 33.

127. *Id.*

discouraging their use. If a jurisdiction decides to make a purchaser jump through a few additional hoops not present when purchasing, say, an iPhone to avoid impulsive or whimsical purchases, there is no serious infringement on individual liberty.

There is an important, related feature of that problem. Commercialization of cannabis has increased the number of marijuana users.¹²⁸ Cannabis users, however, do not all consume the same quantity of that drug. The evidence indicates that a small number of users consume the vast amount of marijuana.¹²⁹ For example, a university study of

128. See, e.g., Caulkins, *Weed Industry*, *supra* note 15, at 28 (“As policy liberalized, cannabis transformed from a weekend party drug to a daily habit, becoming more like tobacco smoking and less like drinking. The number of Americans who self-report using cannabis daily or near-daily grew from 0.9 million in 1992 to 7.9 million in 2016.”); Kleiman, *Marijuana and Public Health*, *supra* note 16, at 76–77 (“Over the past quarter-century, the population of ‘current’ (past-month) users has more than doubled (to 22 million) and the fraction of those users who report daily or near-daily use has more than tripled (to about 35%). Those daily or near-daily users account for about 80% of the total cannabis consumed. Between a third and a half of them report the symptoms of Cannabis Use Disorder: They’re using more, or more frequently, than they intended to; they’ve tried to cut back or quit and failed; cannabis use is interfering with their other interests and responsibilities; and it’s causing conflict with people they care about.”). A major cause of increased marijuana use is commercialization. See Caulkins, *Weed Industry*, *supra* note 15, at 28 (“use in Colorado rose not when its medical-marijuana law passed in 2000, but when dispensaries proliferated in 2009”); Andrew A. Monte et al., *The Implications of Marijuana Legalization in Colorado*, 313 JAMA 241, 241 (2015).

129. See, e.g., OR. LIQUOR CONTROL COMM’N, 2019 RECREATIONAL MARIJUANA SUPPLY AND DEMAND LEGIS. REP. 18 (2019); Caulkins, *Marijuana Dangers*, *supra* note 16, at 28; MARIJUANA POL’Y GRP., LEEDS SCH. OF BUS., UNIV. OF COLO. BOULDER, MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO: 2017 MARKET UPDATE 12 tbl.1 (2018) [hereinafter 2017 MPG MARKET UPDATE]; CAULKINS ET AL., MARIJUANA, *supra* note 93, at 29; BEAU KILMER ET AL., RAND CORP., BEFORE THE GRAND OPENING: MEASURING WASHINGTON STATE’S MARIJUANA MARKET IN THE LAST YEAR BEFORE LEGALIZED COMMERCIAL SALES 8 (2013) (“[T]he highest frequency users (those consuming on 21 days or more per month) utterly dominate the quantity consumed, accounting for close to 80 percent of total consumption.”); MILES K. LIGHT ET AL., COLO. DEP’T OF REVENUE, MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO 2–4, 2 tbl.1.1, 11–12 (2014) (hereinafter 2014 MPG REPORT); Kleiman, *Cannabis Hash*, *supra* note 93. See generally OFF. OF NAT’L DRUG CONTROL POL’Y, WHAT AMERICA’S USERS SPEND ON ILLEGAL DRUGS: 2000-2010, at 103 (2014) (“Total consumption and expenditures [on drugs] are

2016 data in Colorado prepared for the Colorado Department of Revenue revealed that 22.5 percent of marijuana users consumed 71.7 percent of all the cannabis used during that year.¹³⁰ A 2019 report by the state of Oregon reached the same conclusion.¹³¹ Two experts on the subject of cannabis found that the evidence points to a similar ratio. As the late NYU Professor Mark Kleiman explained, “Cannabis consumption, like alcohol consumption, follows the so-called 80/20 rule (sometimes called ‘Pareto’s Law’): 20 percent of the users account for 80 percent of the volume.”¹³² Professor Caulkins made the same point from another direction. “[D]aily users are thought to consume (on average) the equivalent of three to four joints per day.”¹³³ When marijuana consumption is measured on a total days-per-use basis, those daily users amount to “45% of the reported days of use and more than 50% of the weight consumed.”¹³⁴ As the result, “it seems literally true that the average gram of marijuana is consumed by someone who is under the influence of marijuana more than half of all their waking hours.”¹³⁵

Those harms are not hypothetical. The marijuana business pulls in approximately \$50 billion in sales each

driven by the minority of very heavy users who consume on 21 or more days each month.”).

130. See 2017 MPG MARKET UPDATE, *supra* note 129, at 12 tbl.1. The same group reached a similar conclusion in 2014. See 2014 MPG REPORT, *supra* note 129.

131. See OR. LIQUOR CONTROL COMM’N, *supra* note 129, at 18 (“Like many markets, including for alcohol, total consumption is overwhelmingly driven by the heaviest users through the ‘80/20 rule.’ Generally, 20% of users represent 80% of total consumption.”).

132. Kleiman, *Cannabis Hash*, *supra* note 93; see also, e.g., Rosalie L. Pacula et al., *Assessing the Effect of Medical Marijuana Laws on Marijuana Use: The Devil is in the Details*, 34 J. DRUG POL’Y ANALYSIS & MGMT. 7 (2015).

133. Caulkins, *Marijuana Dangers*, *supra* note 16, at 29.

134. *Id.*

135. *Id.*

year.¹³⁶ That spells trouble. As Professor Kleiman warned us, “The cannabis industry, like the alcohol industry, depends on people using more of the product than is good for them.”¹³⁷ Professor Caulkins agrees. In his words, “from the perspective of cannabis vendors, drug abuse isn’t the problem; it’s the target demographic.”¹³⁸

Cannabis dependency harms users, but it also can make third parties suffer its consequences if users drive while under its influence.¹³⁹ THC impairs a person’s ability to

136. Kleiman, *Marijuana and Public Health*, *supra* note 16, at 78.

137. *Id.* at 83.

138. Kleiman, *Cannabis Hash*, *supra* note 93 (“Since we can expect the legal cannabis industry to be financially dependent on dependent consumers, we can also expect that the industry’s marketing practices and lobbying agenda will be dedicated to creating and sustaining problem drug use patterns.”).

139. See, e.g., Robert L. DuPont et al., *Marijuana-Impaired Driving: A Path Through the Controversies*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA, *supra* note 5, at 183, 186 (“Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”); Wayne Hall, *What Has Research Over the Past Two Decades Revealed About the Adverse Health Effects of Recreational Cannabis Use?*, 110 ADDICTION 19, 21 (2014); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 CLINICAL CHEMISTRY 478 (2013); Russell S. Kamer et al., *Change in Traffic Fatality Rates in the First 4 States to Legalize Recreational Marijuana*, 180 JAMA INTERNAL MED. 1119, 1120 (2020) (“[L]egalization of recreational marijuana is associated with increased traffic fatality rates. Applying these results to national driving statistics, nationwide legalization would be associated with 6800 (95% CI, 4200-9700) excess roadway deaths each year.”); Johannes G. Ramaekers, *Driving Under the Influence of Cannabis: An Increasing Public Health Concern*, 319 JAMA 1433 (2018). See generally Larkin, *Drugged Driving*, *supra* note 94, at 473–78, 473 nn.87–103 (collecting studies). What is particularly disturbing is the large number of drivers who see no harm from “driving while stoned.” See Larkin, *Reconsidering Marijuana*, *supra* note 10, at 138–39, 139 n.155. A recent Colorado Department of Transportation report confirms that attitude among many Colorado drivers. See COLO. DEP’T OF TRANSP., THE CANNABIS CONVERSATION 5 (2020); see also MARY K. STOHR ET AL., OFF. OF JUST. PROGRAMS, EFFECTS OF MARIJUANA LEGALIZATION ON LAW ENFORCEMENT AND CRIME: FINAL REPORT 6–7, 20 (2020) (noting that legalization in Washington State has resulted in “increased drugged driving”); Thomas R. Arkell et al., *Driving-Related Behaviours, Attitudes and Perceptions Among Australian Medical Cannabis Users: Results from the CAMS 18-19 Survey*, ACCID. ANALYSIS & PREV. 105784 (2020) (“A key finding of the current study is that a substantial proportion of medical cannabis users are driving shortly after using cannabis, with some driving during the time of peak effects when impairment tends to be greatest. More than 19.0% of users

handle a motor vehicle safely if for no reason other than it impairs his or her ability to process information and make decisions quickly.¹⁴⁰ That is particularly true if someone consumes marijuana together with alcohol, which people often do,¹⁴¹ because each drug amplifies the effect of the

report[ed] driving within one hour of consuming cannabis and 34.6% of all users within 3 hours of use The finding that 71.9% of respondents felt that their medical cannabis use does not impair their driving is consistent with previous reports showing that cannabis users tend to perceive DUIC [Driving Under the Influence of Cannabis] as relatively low risk, especially when compared with alcohol.”). *But see id.* (“In a recent review, Celius et al. found that most patients with multiple sclerosis-related spasticity who were being treated with nabiximols actually showed an improvement in driving ability, most likely due to a reduction in spasticity and/or improved cognitive function.”).

140. *See, e.g.*, BRIT. MED. ASS’N, THERAPEUTIC USES OF CANNABIS 66 (1997) [hereinafter BRITISH MEDICAL ASSOCIATION, CANNABIS] (“Impairment of psychomotor and cognitive performance, especially in complex tasks, has been shown in normal subjects in many tests. Impairments include slowed reaction time, short-term memory deficits, impaired attention, time and space distortion, and impaired coordination. These effects combine with the sedative effects to cause deleterious effects on driving ability or operation of machinery.” (citations omitted)); *see also, e.g.*, NAT’L ACAD. REP., *supra* note 20, at 85–99, 230; NAT’L INST., *Marijuana*, *supra* note 21. *See generally* Larkin, *Reflexive Federalism*, *supra* note 10.

141. *See, e.g.*, Alejandro Azofeifa et al., *Driving Under the Influence of Marijuana and Illicit Drugs Among Persons Aged ≥16 Years—United States, 2018*, MORBID. & MORTAL. WKLY. REP. (Ctrs. for Disease Control & Prev., Atlanta, Ga.), Dec. 20, 2019, at 1153, 1154 (“In a study of injured drivers aged 16–20 years evaluated at level 1 trauma centers in Arizona during 2008–2014, 10% of tested drivers were simultaneously positive for both alcohol and [THC.]” (footnote omitted)); BECKY BUI & JACK K. REED, COLO. DEP’T OF PUB. SAFETY, DRIVING UNDER THE INFLUENCE OF DRUGS AND ALCOHOL: A REPORT PURSUANT TO HOUSE BILL 17-1315 7 (2018) (noting that in 2016 alcohol and THC were the most common drug combination in cases with test results); DARRIN T. GRONDEL ET AL., WASH. TRAFFIC SAFETY COMM’N, MARIJUANA USE, ALCOHOL USE, AND DRIVING IN WASHINGTON STATE 1-2 (2018) (“Poly-drug drivers (combinations of alcohol and drugs or multiple drugs) is now the most common type of impairment among drivers in fatal crashes. . . . The most common substance in poly-drug drivers is alcohol, followed by THC. . . . Since 2012, the number of poly-drug drivers involved in fatal crashes [has] increased an average of 15 percent every year By 2016, the number of poly-drug drivers [was] more than double the number of alcohol-only drivers and five times higher than the number of THC-only drivers involved in fatal crashes.”); 6 ROCKY MTN. HIGH INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 10 (2019) (chart depicting that 46% of the drivers who tested positive for marijuana also had used alcohol and that 40% of marijuana users also used

other.¹⁴² A THC-alcohol cocktail can disable someone from being able to drive safely even if neither drug alone would do so.¹⁴³ Even short-term or occasional cannabis use poses serious societal risks if someone “drives while high,” and it is likely that someone who is dependent on cannabis will often do so. For reasons such as these, the federal government has found that driving under the influence of cannabis is a major public health problem.¹⁴⁴

alcohol and another drug) [hereinafter ROCKY MTN. HIDTA 2019 REPORT]; CAULKINS ET AL., INSIGHT, *supra* note 92, at 44 (“Marijuana users are much more likely than are nonusers to drink and to abuse alcohol. For example, current marijuana users are five times as likely as nonusers to meet DSM-IV criteria for alcohol abuse or dependence (26 percent versus 5 percent); that is, one in four current marijuana users is a problem drinker (calculated using 2012 NSDUH data using the SAMHSA online tool). . . . The national household survey asks people what, if any, other substances they used the last time they drank alcohol. Among the 15.4 million people who used both alcohol and marijuana at some time in the past 30 days, 54 percent reported using marijuana along with alcohol the last time they drank, a proportion that rises to 83 percent among daily or near-daily marijuana users.” (footnote omitted)); ROBERT L. DUPONT, INST. FOR BEHAV. & HEALTH, IMPLEMENT EFFECTIVE MARIJUANA DUID LAWS TO IMPROVE HIGHWAY SAFETY (2016). *See generally* Larkin, *Drugged Driving*, *supra* note 94, at 478–79, 478 nn.104–07. The number of THC and alcohol users noted in studies is likely low because the police often do not drug test a driver arrested for DUI, since testing is costly and a positive test result would not increase the punishment. *See, e.g.*, ROCKY MTN. HIDTA 2019 REPORT, *supra*, at 14.

142. *See, e.g.*, BRITISH MEDICAL ASSOCIATION, CANNABIS, *supra* note 140, at 73 (noting the “additive effect” when marijuana and alcohol are combined); IVERSEN, *supra* note 17, at 96 (“It may be that the greatest risk of marijuana in this context is to amplify the impairment caused by alcohol when, as often happens, both drugs are taken together . . .”); R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ADDICTION 185 (2009). *See generally* Larkin, *Drugged Driving*, *supra* note 94, at 478–80, 479 nn.105–08 (collecting authorities).

143. *See, e.g.*, Stanford Chihuri et al., *Interaction of Marijuana and Alcohol on Fatal Motor Vehicle Crash Risk: A Case-Control Study*, 4 INJURY EPIDEMIOLOGY 8 (2017); Guohua Li et al., *Role of Alcohol and Marijuana Use in the Initiation of Fatal Two-Vehicle Crashes*, 27 ANNALS OF EPIDEMIOLOGY 342 (2017). *But see* Julian Santaella-Tenorio et al., *US Traffic Fatalities, 1985-2014, and Their Relationship to Medical Marijuana Laws*, 107 AM. J. PUB. HEALTH 336 (2017) (finding a decrease in traffic fatalities in states with medical marijuana programs).

144. *See, e.g.*, OFF. OF NAT’L DRUG CONTROL POL’Y, NATIONAL DRUG CONTROL STRATEGY 23 (2010) (concluding that, because drug-impaired driving poses a threat to public safety similar to the one resulting from alcohol-impaired driving,

We cannot rely on the market to prevent those problems. On the contrary, firms in the cannabis industry have every

the nation should undertake “a response on a level equivalent to the highly successful effort to prevent drunk driving”); *Drugged Driving*, DRUGFACTS (Nat’l Inst. on Drug Abuse, Bethesda, Md.), Nov. 2013, at 2 (“Considerable evidence from both real and simulated driving studies indicates that marijuana can negatively affect a driver’s attentiveness, perception of time and speed, and ability to draw on information obtained from past experiences.”); *see also, e.g.*, 5 ROCKY MTN. HIGH INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 5–17 (Supp. 2019); BRITISH MEDICAL ASSOCIATION, CANNABIS, *supra* note 140, at 66 (“Impairment of psychomotor and cognitive performance, especially in complex tasks, has been shown in normal subjects in many tests. Impairments include slowed reaction time, short-term memory deficits, impaired attention, time and space distortion, and impaired coordination. These effects combine with the sedative effects to cause deleterious effects on driving ability or operation of machinery.” (citations omitted)); ROOM ET AL., *supra* note 5, at 18–19 (“Better-controlled epidemiological studies have recently provided credible evidence that cannabis users who drive while intoxicated are at increased risk of motor vehicle crashes.”); D. Mark Anderson et al., *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J. L. & ECON. 333 (2013); DuPont et al., in CONTEMPORARY HEALTH ISSUES ON MARIJUANA, *supra* note 5, at 186 (“Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 CLINICAL CHEMISTRY 478 (2013); Paul J. Larkin, Jr., *The Problem of “Driving While Stoned” Demands an Aggressive Public Policy Response*, J. DRUG POL’Y ANALYSIS, 2018, at 1; Ed Wood, *Skydiving Without a Parachute*, 4 J. ADDICTION MED. & THERAPY 1020 (2016). *See generally* Larkin, *Reconsidering Marijuana*, *supra* note 10, at 135–37, 135 nn.145–51 (collecting studies). There are other potential harms from smoking cannabis. For a sample, see Larkin, *Gummy Bears*, *supra* note 9, at 323–31; Zara Latif & Nadish Garg, *The Impact of Marijuana on the Cardiovascular System: A Review of the Most Common Cardiovascular Events Associated with Marijuana Use*, 9 J. CLINICAL MED. 1925, 1936 (2020) (“Although it is widely viewed as a safe drug, marijuana has been strongly linked to various cardiovascular adverse events over the years. Many cases have linked marijuana to myocardial infarction, especially in young healthy men with no other risk factors. Marijuana has also been associated with a worse mortality rate post MI [myocardial infarction, or heart attack]. Cases of marijuana precipitating arrhythmias, stress cardiomyopathy, and arteritis have all been described. With the rise in cannabis use among older patients, who are the most vulnerable to cardiovascular events, it is expected that these reports will increase in the next few years.”); Nora D. Volkow, *Marijuana and Medicine: The Need for a Science-Based Approach*, in 2 PROFESSIONAL PERSPECTIVES ON ADDICTION MEDICINE 23, 28 (Mark Stanford & Donald Avoy eds., 2009) (“Marijuana is not a benign drug. It is illegal and has significant adverse health and social consequences associated with its use.”).

incentive to see an increase in the number of casual users.¹⁴⁵ The incentive is even stronger to create as many heavy users as possible. As Professor Kleiman cleverly put it, the cannabis industry is “financially dependent on dependent consumers.”¹⁴⁶ Accordingly, just as the tobacco industry did for most of the twentieth century, the cannabis industry will devote its marketing practices toward increasing the number of heavy, long-term users, because those people are the primary source of its revenue.¹⁴⁷ Increasing the number of cannabis-dependent people, however, is not a sensible public health approach to cannabis legalization. In fact, it is difficult to find a public policy field where addiction is regarded as a social benefit.¹⁴⁸

145. See, e.g., SUMMERS, *supra* note 11, at 31 (“Drug policy is all about reducing demand, and a company that has a profit motive is only going to increase demand,” [former Marijuana Policy Project lobbyist Don] Riffle said. “Having a big commercial marijuana industry runs counter to public health goals.”); Kamin, *Legal Cannabis*, *supra* note 16, at 652 (“The downside of a free market model, of course, is the lack of restraint on the profit motive. In an unregulated market, there will be no check on the desire of businesses to increase profits at the expense of customers. The profit motive will drive businesses to develop new products and cultivate new consumers by targeting new users.”).

146. Kleiman, *Cannabis Hash*, *supra* note 93.

147. *Id.*; see also, e.g., Caldwell, *supra* note 58 (“Any businessman would want in on marijuana. It is a legal drug, and a legal drug is a gold mine. If it is addictive, it creates a compulsion to purchase. As we learned from the tobacco hearings of the 1990s, not all businessmen can resist exploiting their customers’ compulsions. The National Institute on Drug Abuse says marijuana ‘can’ be addictive. But even if a drug is merely ‘habit forming,’ as many doctors believe marijuana to be, it creates an unlevel playing field between seller and consumer. The more ‘efficient’ the market, the more powerful this inequality. . . . But corporations bring to the fore questions of size, power and accountability. Do we want multinational businesses using vast marketing budgets and gifted creative teams to teach our children that smoking a lot of pot is somehow sexy, or manly, or sophisticated? Do we want labs to come up with new flavors and varieties that turn pot-smoking into an adventure in connoisseurship and a way of demarcating oneself by class? Would we be content with a Microsoft of marijuana?”); Kamin, *Legal Cannabis*, *supra* note 16, at 652 (“[A]s with the tobacco and alcohol industries, there is reason to be concerned that a commercial marijuana industry will seek to profit from the heavy users who account for the overwhelming majority of marijuana consumed.”).

148. See Bonnie, *supra* note 16, at 591 (“While caution is indicated, legalizing states are ignoring the lessons of history by creating a commercial market with

Traditional forms of regulation, like the ones used in Colorado and elsewhere, do not address those problems.¹⁴⁹ Rules governing a product's price and quality are designed to protect consumers against monopoly pricing and unsafe goods. Those rules do not address improvident decisions by users and externalities imposed on unwilling third parties. The rules assume that consumers can make sensible choices and leave to them the responsibility to decide whether a particular widget will generate more benefits than harms. They also operate against the background assumption that the tort system will provide a remedy for any injuries caused to third parties in an efficient manner. Those assumptions, however, are misplaced when the product is both addictive and potentially harmful to users and others. Persons who become addicted to a substance have lost most, if not all, of their ability to make a rational choice whether to consume it. That loss, after all, is a defining feature of an addiction.¹⁵⁰ Moreover, users can decide whether to drive after smoking marijuana, but no one can make that decision for someone else. Every day during rush hour we see proof of the proposition that "No man is an island." John Stuart Mill did not live in the age of motor vehicles, so his libertarian philosophy does not make sense in a world where they have

vested interests in promoting increased consumption and aggressive advertising that inevitably encourages youthful use. This is the wrong path. A cautious approach would gradually open the regulatory spigot while carefully monitoring the consequences of doing so. Proper public health surveillance mechanisms must be in place from the beginning so that the effects of different regulatory choices can be measured.").

149. See Kamin, *Colorado's Regulation*, *supra* note 109, at 226 (describing Colorado's regulatory approach as "a market-based licensing scheme that has served as a model for other states and nations around the world."); *id.* at 226–27 ("While other states have capped either the number of marijuana businesses that will be authorized or the total amount of marijuana they will be permitted to produce, Colorado did neither. Rather, it created a compulsory licensing and tiered-production system that would allow supply and demand to determine how much marijuana would be produced by how many entities." (footnotes omitted)).

150. See ERICKSON, *supra* note 112, at 28–32 ("Chemical dependence is compulsive, pathological, impaired control over drug use, leading to an inability to stop using drugs in spite of adverse consequences.").

become a necessity despite their potential to maim or kill—and that happens all too often when a driver is under the influence of an impairing drug like THC.

* * * * *

The result is this: Cannabis is not an unadulterated good. Heavy, long-term, and widespread cannabis use has the potential to exceed any potential benefits that its euphoria-inducing cannabinoid might have. Most regulatory restrictions do not directly address those problems. Yet, there are two other forms of supply-side regulation that might: state ownership of wholesale or retail cannabis distribution facilities and advertising bans. The next section discusses their utility.

2. A Response: State Ownership of Retail Cannabis Stores

One alternative to large-scale commercialization would be to permit only individuals to grow and possess a limited amount of marijuana for personal use. Vermont uses that system. That option might work in largely rural areas, like Montana, but would not in large cities, such as Chicago, or in their components, such as Queens, New York City, where there are no large unoccupied areas open for agricultural use. Some other cultivation and distribution system would be necessary there.

Another approach would be to limit wholesale or retail sales to not-for-profit organizations. Professor Caulkins has endorsed that option.¹⁵¹ It has the advantage of using for distribution organizations that do not have profit maximization as their *raison d'être*. That reduces the risk

151. See Caulkins, *Marijuana Dangers*, *supra* note 16, at 33 (“There are many ways of putting that [harm-avoidance or -reduction] philosophy into practice. One way is to start by restricting production and distribution to non-profits or for-benefit corporations whose charters mandate that they merely meet existing demand, not pursue unfettered market growth to maximize shareholders’ returns and owners’ wealth. It would also be wise to require these organizations’ boards to be dominated by public health and child-welfare advocates.”).

that the competitive spirit of their owners and operators will seek to addict as many people as possible by persuading non-users to become occasional users and occasional users to become heavy users.¹⁵² Unfortunately, however, not-for-profit entities might not enforce restraints on sales to minors as strictly as the state might desire, because of the lost revenue involved in rigorous enforcement. Moreover, as discussed below, a state should ban cannabis advertising by wholesale or retail stores to reduce purchases, but a state might not be able to prevent a private enterprise, whether for-profit or not-for-profit, from advertising the sale of cannabis, given the First Amendment Free Speech Clause issues that any advertising ban would raise.¹⁵³

A third option, as a 2015 RAND Corporation report has identified, is to restrict distribution to state-owned cannabis stores.¹⁵⁴ The Twenty-First Amendment gives states that

152. Placing regulatory responsibility in the hands of public health agencies rather than state revenue departments would also help avoid encouraging overuse as a revenue-generating opportunity.

153. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (holding unconstitutional a federal law prohibiting the advertising of certain compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding unconstitutional state restrictions on the advertising of cigars and smokeless tobacco); *Greater New Orleans Broadcast. Ass'n v. United States*, 527 U.S. 173 (1999) (holding unconstitutional a federal ban on casino gambling in a state where it was a lawful activity); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding unconstitutional a state ban on accurate information about the retail prices of alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (holding unconstitutional a federal ban on the alcoholic content of beverages); Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081 (2017).

154. See CAULKINS ET AL., *INSIGHT*, *supra* note 92, at 60–64; see also *Unlocked Potential: Small Businesses in the Cannabis Industry, Hearing Before the House Small Business Committee*, 116th Cong. (2019) (statement of Paul J. Larkin, Jr., recommending state ownership). That would include in-state brick-and-mortar stores, online stores, and delivery services (e.g., a Grubhub for marijuana). Additional options that are a variant of the three mentioned above include (1) limiting distribution to members of small co-operatives or buyers' clubs; (2) permitting locally controlled retail sales without legalizing large-scale commercial production (the "Dutch coffee-shop model"); and (3) having very few closely monitored for-profit licensees. Jonathan P. Caulkins et al., *Options and*

authority to control the distribution of alcohol within their jurisdictions.¹⁵⁵ Exercising that authority, states regulate the sale of wine, beer, and distilled spirits in numerous ways.¹⁵⁶ For example, some states allow only wine and beer to be sold at grocery or convenience stores, with the sale of distilled spirits limited to separate liquor stores. Some states prohibit the sale of alcohol on Sunday. More than a dozen states, however, have decided to own and operate or contract the wholesale or retail distribution facilities for alcohol.¹⁵⁷

Issues Regarding Marijuana Legalization, PERSP. (RAND Corp., Santa Monica, Cal.), 2015, at 1, 4.

155. U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

156. See, e.g., Paul Byrne & Dmitri Nizovtsev, *Exploring the Effects of State Differences in Alcohol Retail Restrictions*, 50 INT’L REV. L. & ECON. 15, 16 (2017) (“States currently regulate the sale of alcoholic beverages under two general systems: a control system or a licensure system. Generally, when a state directly controls the pricing of some types of alcoholic beverages—through operating state stores, regulating agency stores, or directly setting the retail price—such a state is considered a ‘control’ or ‘monopoly’ state. When a state government indirectly controls the sale and distribution of alcohol through licensing of privately owned establishments, it is considered a ‘licensure’ or ‘privatized’ state. Currently in the United States most states operate under a licensure system. However, 18 states maintain some direct control over certain sectors of the alcoholic beverage market. . . . Among the licensure states, retail restrictions also vary significantly. Some states have few restrictions whereas others have restrictions on the days and hours of alcohol sales or the type of establishments through which alcohol can be sold to consumers. In the most restrictive states, all alcoholic beverages must be sold at licensed retail liquor stores. There are also states in which such limitations apply to stronger alcoholic beverages whereas beverages with lower alcohol content can be sold at a wide range of establishments. The line between the beverage groups can differ by state but in all cases restrictions (or absence thereof) are tied to the alcohol content.”).

157. See, e.g., ALA. CODE §§ 28-3-1 to 28-3-75 (2020); Idaho Liquor Act, IDAHO CODE ANN. §§ 23-101 to 23-312 (West 2020); IOWA CODE ANN. §§ 123.1 to 123.37 (West 2020); MAINE REV. STAT. ANN. tit. 28-A, §§ 451-461 (West 2020); MICH. CONST. art. IV, § 40 (West, Westlaw through Nov. 2020 amendments); MICH. COMP. LAWS ANN. §§ 436.1204 to 436.1205, 436.1209, 436.1211 (West 2020); MISS. CODE ANN. §§ 67-1-3, 67-1-5(i), (j) (West 2020); VA. CODE ANN. § 4.1-100 (West 2020) (defining “Alcohol,” “Alcoholic beverages,” “Beer,” “Spirits,” and “Wine”); *id.* § 4.1-101 (creating the Virginia Alcoholic Beverage Control Authority); *id.* § 4.1-103 (empowering the Board of Directors of the Virginia Alcoholic Beverage Control Authority to sell distilled spirits). See generally *Control State Directory and Info*, NAT’L ALCOHOLIC BEVERAGE CONTROL ASS’N,

Some own the facilities or contract them out only for distilled spirits or for alcohol above a certain potency. Other states have different approaches for wholesale and retail sales (New Hampshire) or have different systems in different counties (Maryland).

States should adopt a state ownership model as part of any legalization program. Limiting distribution to state businesses carries a lower risk of overall societal harm. If the demand for cannabis resembles the demand for alcohol or tobacco—remember: alcohol, nicotine, and THC are all potentially addictive substances—there will always be a demand for that product. If the marijuana industry grows in the same way that the tobacco industry did, over time a small number of very large companies will distribute the vast majority of the product.¹⁵⁸ The new industry is likely to generate substantial profits, which would translate into enormous political power.¹⁵⁹ Once it has secured the legalized commerce of marijuana, the industry would fight tooth-and-nail to maintain its profits and influence. Witness how the tobacco industry fought regulation of tobacco by the Food and Drug Administration for decades. Allowing nationwide commercialization of marijuana might generate considerable harms but prove to be politically irreversible.

We generally do not approve, let alone applaud, policies or practices that worsen the lives of a large percentage of the people who undertake them. Few members of Congress

<https://www.nabca.org/control-state-directory-and-info> (last visited Mar. 16, 2021).

158. See *supra* text accompanying notes 58 and 67–71.

159. See Kleiman, *Cannabis Hash*, *supra* note 93 (recommending state ownership as one option: “As more and more states begin to legalize marijuana over the next few years, the cannabis industry will begin to get richer—and that means it will start to wield considerably more political power, not only over the states but over national policy, too. That’s how we could get locked into a bad system in which the primary downside of legalizing pot—increased drug abuse, especially by minors—will be greater than it needs to be, and the benefits, including tax revenues, smaller than they could be.”); Larkin, *Gummy Bears*, *supra* note 9, at 355–56, 355 nn.99–100.

would be willing to appear at a town hall meeting and tell their constituents that, if cannabis is legalized, one of every ten will use marijuana on a regular basis and that one of every ten children who start using it as adolescents will become addicted or suffer some form of mental illness.¹⁶⁰ Nonetheless, if Congress were to legalize marijuana use in one way or another—for example, by deleting it from the CSA generally or in those states that permit it to be used recreationally—Congress would need to decide if marijuana should be treated in the same manner as other consumer goods.¹⁶¹

It might seem odd for a state to consider turning its back on private ownership of any commodity. Since our colonial period, the nation has had a capitalist economy that protected the right to own and operate the machinery of commerce.¹⁶² Yet, the nation has never been committed to a purely laissez-faire approach to economic governance.¹⁶³ As noted above, governments have traditionally justified legislative interference in commerce on the ground that market defects—such as natural monopolies or externalities—justify regulation. In those circumstances, governments establish administrative agencies to regulate a good or service rather than leave it to the market or tort

160. See Larkin, *Gummy Bears*, *supra* note 9, at 326–31, 326 nn.30–40.

161. Removing cannabis from Schedule I of the CSA, or deleting it from the CSA entirely, would not eliminate all federal regulation of THC. THC is a drug and therefore would remain subject to regulation by the FDA under the FDCA. See Larkin, *Reconsidering Marijuana*, *supra* note 10, at 115–27; Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823 (2019); Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845 (2017).

162. See, e.g., BERNARD BAILYN, *THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY* (1955); JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607-1789* (1985); EDWIN J. PERKINS, *THE ECONOMY OF COLONIAL AMERICA* (2d ed. 1988). See generally Larkin, *Property*, *supra* note 86, at 4–6, 21–54 (describing the understanding of “property” held by the Colonists and Framers).

163. See, e.g., BOURGIN, *supra* note 86.

system.¹⁶⁴

A state-run system has several additional advantages over a for-profit or not-for-profit system. State ownership of distribution stores would make it easier for a state to monitor marijuana sales (and employees) to prevent unauthorized distribution to minors and to the black market¹⁶⁵ (which has not disappeared¹⁶⁶). State ownership would help avoid the

164. See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051–2084 (establishing the U.S. Consumer Product Safety Commission and empowering it to create safety standards and initiate recalls of products that present an unreasonable risk of injury or death); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION (global ed., 4th ed. 2015).

165. See Bonnie, *supra* note 16, at 591–92 (“States would be well-advised to think about alternatives to a commercialized marijuana market while they still have that opportunity. . . . In short, if we are going to legalize, it needs to be done in a way that protects the public health. The right starting point is not the alcohol model. It is a *non-commercialized ‘containment’ model*.”); Benjamin M. Leff, *Tax Benefits of Government-Owned Marijuana Stores*, 50 U.C. DAVIS L. REV. 659, 683 (2016) (“Local governments may be in a better position than for-profit sellers to operate marijuana stores consistent with the public welfare, and several commentators, including some participants in this symposium, have advocated that at least some states should experiment with a government monopoly on marijuana sales.” (footnote omitted)).

166. See John Schroyer, *California Marijuana Notebook: How Illicit Market Competition, Industry Divisiveness Hound the State’s Legal Cannabis Market*, MARIJUANA BUS. DAILY (Feb. 20, 2020), <https://mjbizdaily.com/california-marijuana-notebook-how-illicit-market-competition-industry-divisiveness-hound-the-states-legal-cannabis-market/> (“It’s an open secret in the California marijuana industry that since the state launched licensed adult-use sales in 2018, many – if not most – legal operators have done business illegally to some degree. And that’s still the case, according to Chris Coulombe, CEO of Sonoma-based distributor Pacific Expeditors. ‘I have to imagine that 60% of the market overall is probably playing in parallel markets, but I don’t think they enjoy that. It’s truly a decision of necessity,’ Coulombe told *Marijuana Business Daily*. ‘You have a lot of retailers that are selling knockoff products . . . and you have cultivators that are selling product out the backdoor so they can keep their business alive.’ As one source told *MJBizDaily* in early 2019: ‘Anybody who’s profitable still has at least one foot in the black market.’”); ARCVIEW MARKET RSCH. & BDS ANALYTICS, CALIFORNIA: THE WORLD’S LARGEST CANNABIS MARKET 7-8, 10 (2019) (“A unique feature of the California market that contributed to these dives in topline sales figures is the robust competition from the illicit market with which licensed retailers are forced to contend. Given the state’s lengthy history as the source for the bulk of the nation’s illicit cannabis, and the fact that many producers and retailers opted not to enter the regulated market due to compliance costs, Californian consumers have no shortage of cheap illicit

problems that arise whenever the law permits only one business form—such as not-for-profit concerns—to participate in an activity, even though the members of the industry prefer other forms—such as for-profit companies. Corporation law is largely within the bailiwick of the states to devise,¹⁶⁷ and there is a risk that particular states might bend their laws to enable (if not encourage) parties to obscure the true ownership of a not-for-profit enterprise. That risk might be slight, but there is far less risk of such legal chicanery if the state itself must own the cannabis distribution business.¹⁶⁸

A second restriction is an advertising ban. Every legitimate business engages in price and quality advertising to persuade consumers that its product costs less and

sources for their cannabis. They rushed into dispensaries amid the hoopla of long-awaited legalization and then quietly returned to traditional sources when they saw after-tax prices reflective of the 77% tax-and-regulatory load the legal market bears. . . . In an \$11.3 billion total cannabis market of 2017, \$8.3 billion was already being spent in extra-legal channels. For the first time anywhere, adult use legalization actually prompted growth in illicit sales in California in 2018.”); Brooke Staggs, *Legal? Illegal? Some Players Still Work Both Sides of State Marijuana Industry*, ORANGE CNTY. REG. (Mar. 15, 2019, 6:00 AM), <https://www.ocregister.com/2019/03/15/legal-illegal-some-players-still-work-both-sides-of-state-marijuana-industry/> (“The state’s illicit market—which has its roots in the medical marijuana market California created 21 years ago—is thriving, more profitable and roughly eight times bigger than the legal world.”).

167. See, e.g., *Rodriguez v. FDIC*, 140 S. Ct. 713, 718 (2020) (“Corporations are generally ‘creatures of state law,’ and state law is well equipped to handle disputes involving corporate property rights.” (citation omitted) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975))); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83–89 (1994).

168. State ownership also might not have the same banking problems that for-profit and not-for-profit business would have with using the national banking system for receipts from the sale of marijuana. Banks that accept deposits from businesses selling marijuana in violation of the CSA would violate the federal money laundering statutes. See 18 U.S.C. §§ 1956–1957. States that have the same structure as the federal government—that is, states that have a state-owned and -operated treasury—can deposit the proceeds into its treasury rather than use the interstate banking system. That might avoid the need for Congress to revise the banking laws to address the problems resulting from the operation of a large-scale cash business. The fewer statutes modified, the lesser the risk of unintended statutory consequences.

delivers more than its competitors.¹⁶⁹ Companies in the cannabis industry generally do not. The U.S. Postal Service will not deliver marijuana ads, and the Federal Communications Commission has not approved radio or television advertising over the federally regulated airwaves.¹⁷⁰ The major social media opportunities are also unavailable because (at present) Facebook, Twitter, and Instagram will not accept cannabis advertisements.¹⁷¹ State laws vary as to whether medical or recreational cannabis businesses can advertise. Some states prohibit advertising altogether. Others, such as Colorado, treat cannabis advertising like alcohol advertising. A third group, like New Mexico, has no rules on the subject.¹⁷² If cannabis retailing were left to private ownership, the cannabis industry would no doubt pressure the government (and major media companies) to lift any ban on advertising, and more advertising would mean more dependency. A state monopoly, by contrast, could easily maintain a ban on advertising.

May a state monopolize the retail distribution of cannabis? Yes. No one has a constitutional right to distribute or possess marijuana,¹⁷³ and the CSA does not prohibit the

169. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557 (2001) (“[W]e have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect.”); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495–96 (1996) (plurality opinion) (“Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on ‘commercial speech’ for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.” (citations omitted)); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 567–68 (1980).

170. See, e.g., SUMMERS, *supra* note 11, at 66.

171. See, e.g., *id.* at 67.

172. See, e.g., *id.* at 66–67.

173. For examples of cases rejecting various claims that the federal or state bans on marijuana distribution or possession are unconstitutional see *United States v. Fogarty*, 692 F.2d 542, 547–48 (8th Cir. 1982); *United States v. Kiffer*,

states from changing their penal codes to legalize it for medical or recreational use.¹⁷⁴ Accordingly, a state can choose to treat cannabis as contraband or allow it to be sold and owned but regulated.¹⁷⁵ A state limitation on entry into a market is a form of regulation, even if the state grants itself the monopoly. In fact, numerous states use their Twenty-First Amendment authority over alcohol distribution by owning or contracting out the retail sale of one or more types of intoxicating beverages.¹⁷⁶ The reach of a state's inherent police power over marijuana is at least as broad as its power under the Twenty-First Amendment to regulate alcohol.¹⁷⁷

477 F.2d 349, 352–57 (2d Cir. 1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1220–21 (9th Cir. 1972); *United States v. Scales*, 464 F.2d 371, 373–76 (6th Cir. 1972); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *State v. Leins*, 234 N.W.2d 645, 645–48 (Iowa 1975); *State v. Donovan*, 344 A.2d 401, 405–06 (Me. 1975); *Blincoe v. State*, 204 S.E.2d 597, 599 (Ga. 1974); *State v. Tabor*, 196 S.E.2d 111, 112–14 (S.C. 1973); *State v. Parker*, 256 A.2d 159 (N.H. 1969); *Commonwealth v. Leis*, 243 N.E.2d 898 (Mass. 1969); *People v. Stark*, 400 P.2d 923 (Colo. 1965). *See also, e.g.*, Larkin, *Reflexive Federalism*, *supra* note 10 (manuscript at 3, 3 n.17); *cf.* *Crane v. Campbell*, 245 U.S. 304 (1917) (ruling that there is no federal constitutional right to possess or use alcohol). The Supreme Court has not squarely addressed the issue, but its decisions in related cases make the point. *See* *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587–94 (1979) (rejecting an Equal Protection Clause challenge to a city policy refusing to hire methadone users); *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (rejecting the argument that there is an express or implied exception to the FDCA for drugs that can be used to treat the terminally ill); *cf.* *Marshall v. United States*, 414 U.S. 417, 422–30 (1974) (rejecting due process and equal protection challenges to Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§ 4251–55, which excludes repeat offenders from discretionary rehabilitative addiction treatment in lieu of incarceration).

174. *See* Larkin, *Reconsidering Marijuana*, *supra* note 10, at 110–11.

175. The principal federal statute protecting the economic benefits of a free market and interstate commerce—the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*—permits the states to decide whether to adopt a laissez-faire approach to their local economies or regulate the cultivation and distribution of plants like cannabis. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) (“We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”).

176. *See supra* text accompanying notes 130–33.

177. *Compare, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative

Accordingly, a state clearly can monopolize the sale of cannabis.

The next question logically follows from that one. Having legislated itself a monopoly over cannabis distribution, may a state decline to advertise its new consumer product? The answer again is, yes. Neither the Constitution nor any act of Congress requires any market participant, including a monopolist, to advertise its wares. On the contrary, a number of Supreme Court cases have placed restrictions on what speech the government may demand someone utter.¹⁷⁸ To be sure, a state is not a “person” for constitutional purposes and therefore does not possess First Amendment free speech rights.¹⁷⁹ Nonetheless, a state, like any other market participant, can decide not to advertise marijuana or any other item it sells. Moreover, a government, like a person, can decide what message to endorse or reject.¹⁸⁰ That

enactment as will protect the public health and the public safety.”), *with, e.g.*, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2462–76 (2019) (describing a state’s Twenty-First Amendment regulatory authority).

178. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986) (ruling that the state cannot require a regulated energy utility to place a third-party’s newsletter discussing electric power conservation in its billing envelopes); *Wooley v. Maynard*, 430 U.S. 705, 714–17 (1977) (ruling that New Hampshire cannot force drivers to display the state’s motto of “Live Free or Die” on state-owned motor vehicle license plates).

179. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (“The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.”).

180. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”); *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (a government entity has the right to “speak for itself.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view”); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (observing that a government entity “is entitled to

decision is certainly a sensible one in the case of goods like tobacco, alcohol, or cannabis, for the reasons given above. If a state had to justify its decision, it could readily do so by arguing that its refusal to advertise might help prevent overuse of cannabis and reduce dependence and roadway crashes.¹⁸¹

III. STATE SOVEREIGNTY AND COOPERATIVE FEDERALISM

However a state chooses to regulate the cannabis industry, the conflict between state and federal law will remain unchanged unless and until Congress decides to revise the CSA or directs the Executive Branch to enforce it as it is currently written. There is a possibility, however, that Congress could decide to lift the CSA's ban in states that have legalized cannabis for medical or recreational use.¹⁸² Members of Congress have introduced bills to achieve that result by amending the CSA or limiting the use of federal

say what it wishes"); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

181. See Bonnie, *supra* note 16, at 593 ("If the legislature's objective in repealing prohibition is to set up a regulatory policy that allows recreational use (or medical use for that matter) while seeking to contain it, then it would be illogical to permit private sellers to promote and encourage consumption. In my opinion, once commercialization is permitted, the public health costs will be difficult to contain. As already indicated, I believe that Washington and Colorado are making a huge mistake by starting with a private commercial model for cultivation and distribution. In my opinion, legislatures legalizing recreational use of marijuana should declare explicitly that the ultimate regulatory objective is to protect the public health, not to facilitate commerce in cannabis products (or to serve the economic interests of suppliers and retailers). Legalization should be designed to *accommodate* liberty, not to *celebrate* it. The policy aim should not be to promote or facilitate marijuana use (or even 'responsible use'), but rather to manage lawful commerce in marijuana in a way that protects the public health.").

182. I have argued elsewhere that, if Congress decides to revisit the CSA, it should make clear that the Food and Drug Administration is responsible for regulating botanical cannabis and any cannabinoids derived from it, regardless of whether and how the states permit marijuana to be used for medical purposes. See Larkin, *Reflexive Federalism*, *supra* note 10 (manuscript at 25–30); Larkin, *Reconsidering Marijuana*, *supra* note 10, at 115–27.

funds to enforce it.¹⁸³ Congress, however, has not yet passed any of them.

That impasse raises the final issue. Suppose Congress decides that a state retail-store ownership requirement and an advertising ban are sensible ways to accommodate a state's desire to allow the sale of marijuana while also reducing cannabis dependency and promoting roadway safety. That is, imagine that Congress concludes that requiring the states to take those two steps is a reasonable compromise between the desire of some parties to see the issue of marijuana legalization altogether left to the states and the hope of other parties that Congress will direct the Executive Branch to enforce the CSA as written. If so, may Congress require a state to adopt one or both of those regulatory tools as a condition of exempting the state's legalization program from the CSA? Does Congress have the constitutional authority to demand that a state accept those conditions to allow cannabis to be sold under whatever other rules it cares to impose?

This scenario is a novel one. There is no precedent squarely on point, so resort to first principles is necessary. Some (if not all) states will certainly object to any such requirements on the ground that they trespass on state sovereignty, in violation of the Tenth Amendment.¹⁸⁴ The state's argument would go as follows:

First, a state retail store-ownership requirement would intrude on a state's authority to define its internal governmental structure. The Constitution divides the federal government into three branches, but that framework, and its

183. *See, e.g.*, Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. (1st Sess. 2019) (permitting the states to decide whether to legalize marijuana); State Cannabis Commerce Act, S. 2030, 116th Cong. (2019) (preventing federal funds from being used to prevent the states from implementing cannabis legalization programs).

184. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

underlying separation-of-powers principles, does not apply to the states.¹⁸⁵ Each state enjoys the prerogative to define and structure its government in any way it sees fit as long as it retains a “Republican Form of Government,”¹⁸⁶ which is no more threatened by allowing private enterprise to operate retail cannabis stores than by permitting private ownership of retail liquor stores.¹⁸⁷ However much Congress might desire to reduce cannabis dependence and impairment, and however great those harms might be in a particular jurisdiction, Congress can no more demand that a state take ownership of marijuana than it can direct the states to take possession of radioactive waste, which the Supreme Court held in *New York v. United States* that Congress cannot do.¹⁸⁸ However much Congress might want the states to decide when, where, and how cannabis sales will be made, and however often private parties might be willing to look the other way when (for instance) a minor tries to purchase marijuana, Congress can no more impress state employees into that retail identification task than it could force state law enforcement officers to conduct firearms background checks, which the Court ruled in *Printz v. United States* that

185. See, for example, *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605, 615 (1974), *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937), and *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902), all ruling that federal separation of powers principles do not bind the states. See also *Highland Farms*, 300 U.S. at 612 (“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”); *Dreyer*, 187 U.S. at 84 (“Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.”); cf. *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (ruling that Congress cannot prohibit a state from moving the location of its capital as a condition of approving its entry into the union).

186. See U.S. CONST. art. IV (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

187. See *Highland Farms*, 300 U.S. at 612 (ruling that a state law delegating minimum price-setting authority to private parties does not violate the Guaranty Clause).

188. 505 U.S. 144 (1992).

Congress also cannot do.¹⁸⁹ To paraphrase Chief Justice Warren Burger's opinion for the Supreme Court in *INS v. Chadha*, the fact that a congressionally required state cannabis retail-operation requirement is efficient, convenient, and useful in forestalling cannabis dependence or motor vehicle crashes, standing alone, will not save that law if it is contrary to the Constitution.¹⁹⁰

Second, an ownership requirement and advertising ban requirement impermissibly directs the state to adopt legislation that the state would prefer not to see become law.¹⁹¹ Congress has the power to pass legislation regulating interstate and intrastate commerce,¹⁹² along with the authority to create federal agencies to implement those laws.¹⁹³ Congress cannot, however, direct states to adopt state law or to create their own administrative agencies. Accordingly, the Tenth Amendment forbids Congress from putting the states to the choice between continued application of the CSA as it stands today and adopting the requirements as the price for an exemption.

189. 521 U.S. 898 (1997).

190. 462 U.S. 919, 944 (1983). It is beyond the scope of this Article to decide whether only a state can make that argument or an entrepreneur can also do so. See *Bond v. United States*, 564 U.S. 211 (2011) (ruling that, in a criminal prosecution, the defendant has standing to claim that the statute underlying the charge violates the Tenth Amendment).

191. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (applying the Anticommandeering Doctrine to hold that Congress cannot forbid a state from changing state law); *New York*, 505 U.S. at 155–69, 174–83 (ruling that Congress cannot force the states to accept either possession of radioactive waste or whatever rules the federal government adopts for its management).

192. U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

193. The Constitution contemplates that Congress will create “executive Departments” filled by “Officers of the United States” who will assist the President with “tak[ing] Care that the Laws be faithfully executed.” U.S. CONST. art. II, §§ 2–3. Under the Necessary and Proper Clause, Congress has the authority to create an administrative state to assist the President perform his responsibilities. See *infra* note 196.

The states' argument is a reasonable one, but the response to it is compelling. The reason is that Congress has the authority to negotiate a "deal" with the states in which they agree to perform responsibilities that they would otherwise be free to decline. In that regard, Congress can condition the states' receipt of federal benefits on their willingness to "cooperate" with the federal government to achieve a legitimate goal that is beyond Congress's direct regulatory authority. In other words, Congress may put the states to the choice described above under its Spending Clause authority, even if not under its Commerce Clause power.

Start by considering the latter. Congress lacks the inherent "police power" that states enjoy,¹⁹⁴ but the Commerce Clause,¹⁹⁵ buttressed by the Necessary and Proper Clause,¹⁹⁶ authorizes Congress to regulate inter- and

194. Compare, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) ("The authority of the state to enact this statute [viz., a smallpox vaccination requirement] is to be referred to what is commonly called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution. . . . According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1924), with, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power . . .") and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 317, 405 ("Th[e] [federal] government is acknowledged by all, to be one of enumerated powers.").

195. U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

196. U.S. CONST. art. I, § 8, cl. 18 ("[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); see, e.g., *United States v. Comstock*, 560 U.S. 126, 133–35 (2010); *McCulloch*, 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

intrastate commerce in several ways.¹⁹⁷ As relevant here, Congress may prohibit anyone from using the facilities of interstate commerce, including the interstate highway and the national banking systems,¹⁹⁸ for the cultivation or distribution of cannabis. Congress may also prohibit the purely intrastate growth or sale of marijuana to prevent any spillover into interstate commerce. The Supreme Court expressly so held in *Gonzales v. Raich*,¹⁹⁹ and it also rejected the argument that Congress cannot rely on the Commerce Clause to regulate the intrastate cannabis market if a state has its own regulatory program.²⁰⁰

Occasionally, Congress's exercise of its regulatory authority butts up against state preferences. When that happens, the states claim that the Tenth Amendment entitles them to go their own way. For the last 150 years, the Supreme Court has followed an erratic trajectory on the appropriate place of the states and role for the Tenth Amendment in constitutional law.²⁰¹ On three recent

197. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 548-58 (2012) (opinion of Roberts, C.J.); *id.* at 653-60 (opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *United States v. Morrison*, 529 U.S. 598, 607-19 (2000); *United States v. Lopez*, 514 U.S. 549, 558-68 (1995); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Congress may regulate the "channels" and "instrumentalities" of interstate commerce, as well as the goods transiting them, *Lopez*, 514 U.S. at 558-59, including items that Congress believes are dangerous or "immoral." See, e.g., *Hoke v. United States*, 227 U.S. 308 (1913) (regarding prostitution); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (regarding impure food and drugs); *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1901) (regarding lottery tickets and prize lists). Congress's regulatory authority also reaches entirely intrastate activities that, considered individually or as a class, have "a substantial relation to" or "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559; see also, e.g., *Morrison*, 529 U.S. at 609-13; *Jones & Laughlin Steel*, 301 U.S. at 37.

198. See *McCulloch*, 17 U.S. (4 Wheat.) (upholding Congress's authority to create a national bank).

199. 545 U.S. 1 (2005).

200. *Id.* at 26-33.

201. Late in the nineteenth and early in the twentieth centuries, the Court waxed eloquently regarding "the necessary existence" of the states, *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868), preserving the states' "separate and independent autonomy," *Texas v. White*, 74 U.S. 700, 725 (1868), and protecting

occasions, however, the Court has treated the Tenth Amendment as a substantive constraint on Congress's legislative powers. It is worth analyzing those decisions.

The first case was *New York v. United States*. It held unconstitutional a provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that directed the state legislative or executive branch to assume title to radioactive waste or dispose of it as directed by the federal government.²⁰² The Court reasoned that the Tenth

the states' "indispensable" powers and "essential function[s]," *Lane Cnty.*, 74 U.S. at 76; *see also* *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (ruling that Congress cannot prohibit a state from moving the location of its capital as a condition of approving its entry into the union); *id.* at 565 ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained."). Beginning in the 1930s, however, the states and the Tenth Amendment waned in importance. The amendment reached its nadir in 1941 in *United States v. Darby*, 312 U.S. 100 (1941). In the course of upholding the constitutionality of a federal minimum wage law over a Tenth Amendment challenge, the Court gave the back of the hand to the notion that the amendment played any role in constitutional law. "The amendment states but a truism," the Court wrote, "that all is retained which has not been surrendered." *Id.* at 124. The amendment appeared to stage a comeback in 1976 when, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held unconstitutional a federal law extending minimum wage and maximum hour provisions to almost all state and local employees. The Court reasoned that states enjoy certain "attribute[s] of sovereignty" that Congress cannot shear away and are constitutionally entitled to independence from congressional directives regarding any "functions essential to [their] separate and independent existence." *Id.* at 845 (quoting *Coyle*, 221 U.S. at 580). That resurgence was short-lived, however, because only nine years later the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Since the *Garcia* case, the Court has principally used the Tenth Amendment (and its sibling, the Eleventh Amendment) as a rule of construction, demanding that Congress legislate with specificity before the Court will conclude that an act of Congress applies to the states or their operations. In numerous cases raising Tenth and Eleventh Amendment issues, the Court has adopted a "plain statement" rule, requiring Congress to specify clearly if a statute applies to the states. *See, e.g.*, *Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140–41 (2004); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 460–64 (1991); *Dellmuth v. Muth*, 491 U.S. 223, 228, (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

202. Pub. L. No. 99-240, 99 Stat. 1842 (1985).

Amendment prohibits Congress from treating states like federal administrative agencies.²⁰³ In *Printz v. United States*, the Court held unconstitutional a provision in the Brady Handgun Violence Prevention Act directing state and local law enforcement officers to implement the act's background check provisions.²⁰⁴ That directive, the Court found, was tantamount to the impermissible "conscripting" or "commandeering" of state officers.²⁰⁵ Finally, in *Murphy v. National Collegiate Athletic Association* the Court concluded that the Professional and Amateur Sports Protection Act²⁰⁶ unconstitutionally prohibited the states from revising their own laws outlawing sports gambling.²⁰⁷ Those three cases have given rise to the so-called Anticommandeering Doctrine, which would serve as the basis of a state Tenth Amendment challenge to imposition of state retail-ownership and advertising-ban requirements as a condition of modifying the CSA.²⁰⁸

Yet, even when Congress cannot invoke the Commerce Clause to *order* the states to undertake certain obligations—such as setting a minimum driving age or defining a particular blood-alcohol content to establish impairment as a matter of law—Congress instead can rely on its appropriations authority under the Spending Clause to *persuade* the states to join in a cooperative federal-state program by offering them something in return for their participation. Congress has the Article I authority to raise taxes and spend federal funds,²⁰⁹ and it can use that power

203. *New York v. United States*, 505 U.S. 144, 155-69, 174-83 (1992).

204. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

205. *Printz v. United States*, 521 U.S. 898, 925 (1997); *see also id.* at 904-35.

206. Pub. L. No. 102-559, 106 Stat. 4228 (1992).

207. 138 S. Ct. 1461, 1475 (2018).

208. I have argued elsewhere that the Anticommandeering Doctrine is ill-conceived. *See* Larkin, *Reflexive Federalism*, *supra* note 10. For present purposes, that argument is immaterial.

209. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the

to underwrite collaborative programs.²¹⁰ Historically, those programs have involved an exchange of federal funds for the states' willingness to undertake some particular regulatory task, such as administering a state-managed health care system for the elderly or poor. A state will receive the funds only if it agrees to perform whatever tasks Congress would like to see implemented. The Supreme Court has placed only a limited number of requirements on Congress's ability to place conditions on the receipt of federal funds. Any conditions must be for the purpose of improving the general welfare, they must be clear and unambiguous, they must be reasonably related to the purpose of the federal expenditure, they must be otherwise constitutional, and they cannot retroactively nullify already earned benefits.²¹¹ Call that doctrine "cooperative federalism," "bribery," the "Golden Rule" (viz., whoever has the gold makes the rules), or something else, well-settled Supreme Court case law recognizes that Congress may buy cooperation from a state when it cannot demand it.

That rationale applies here. Lifting the CSA ban on cannabis trafficking benefits the state—and its residents and businesses—in several ways. Once the sale of marijuana is no longer a felony under federal law, ganjapreneurs may use the federally regulated banking and financial systems to make deposits and credit card sales, as well as to raise capital for start-up companies or expansion of ones already in business. The risk of robbery and burglary of individuals

United States . . .").

210. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.' Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys . . .'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.))).

211. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 579–85; *New York v. United States*, 505 U.S. 144, 171–72 (1992); *Dole*, 483 U.S. at 207–08.

and companies will drop off because they will be able to offer credit card purchases. Companies can also take advantage of the interstate transportation systems to expand their markets beyond their states of origin. Some individuals who are fearful of breaking the law as long as the CSA is in effect might be willing to purchase cannabis. And as business improves for all or some of those reasons, states might take in greater tax receipts.

To be sure, that exchange is not identical to the ones that the Supreme Court approved in cases like *South Dakota v. Dole*, where Congress conditioned a percentage of federal highway funds otherwise allocable to the states on their adoption of 21 as the minimum drinking age. Here, the states would not receive federal funds, and the states would not have a guarantee of receiving additional tax revenues for agreeing to follow Congress's wishes. Nonetheless, Congress's decision to exempt a state from the CSA is a legitimate type of "consideration" for contract purposes, and that should be sufficient here.²¹²

Contract law has traditionally required some form of consideration for an agreement to bind the parties.²¹³ Congress's revision of the CSA is ample in form and amount. As the *Restatement (Second) of Contracts* makes clear, "Consideration may consist of performance or of a return promise," "performance may be a specified act of forbearance . . . or such conduct as will produce a specified result,"²¹⁴ and (with certain exceptions) "any performance which is

212. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577–77 ("We have repeatedly characterized . . . Spending Clause legislation as much in the nature of a contract.") (emphasis and internal punctuation omitted) (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

213. RESTATEMENT (SECOND) OF CONTRACTS § 17 (Am. L. Inst. 1981) ("(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. (2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.").

214. *Id.* § 71 cmt. d.

bargained for is consideration.”²¹⁵ Like all voluntary exchanges, the offer described above leaves each party free to decide whether it is better off by accepting the deal or standing pat. Because Congress is under no obligation to modify the CSA to allow medical or recreational marijuana programs to exist, its decision to exempt a state from the CSA is a legitimate benefit, not “a pretense of [a] bargain.”²¹⁶ A state is free to decline the offer because Congress would not be making it an offer it can’t refuse.²¹⁷ Moreover, state residents who work in the cannabis industry or who consume its products benefit, and their benefit redounds to the state where they reside, pay taxes, or contribute to the local economy. It is, as they say, a “fair deal.” The Tenth Amendment requires no more than that.²¹⁸

In fact, the “pioneering case” establishing the Anticommandeering Doctrine,²¹⁹ *New York v. United States*, approved Congress’s use of nonfinancial incentives to obtain state cooperation. To ensure the proper disposal of the accumulating amount of radioactive waste generated within the states, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985. The act represented a “compromise” between the three states with operating

215. *Id.* § 72; *see id.* § 75 (“Except as stated in §§ 76 and 77, a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.”).

216. *Id.* § 73.

217. *Cf. Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 581 (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”).

218. *See id.* at 578 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.’ Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.” (alteration in original) (citation omitted) (quoting *New York v. United States*, 505 U.S. 144, 169 (1992))).

219. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018).

radioactive waste disposal facilities (Nevada, South Carolina, and Washington) and the 47 others. At the center of the “intricate” mechanics of the law was the hope that states would enter into regional compacts to ensure the safe disposal of waste generated within their borders.²²⁰ To nudge the states toward that goal, the act created three “incentives.”²²¹ The first incentive was financial. On a certain date, the three states with operating disposal facilities could impose surcharges on radioactive waste arriving from any state not a party to a local waste disposal compact.²²² The second incentive was non-financial. States that failed to meet a deadline to join a regional disposal compact, or to establish its intent to develop an in-state disposal facility, could be denied access to out-of-state disposal facilities.²²³ The final incentive was that in name only. It provided that a state must “take possession” of any waste that a state could not adequately dispose of by a date fixed by the act.²²⁴

The Supreme Court held that the first two incentives were constitutional.²²⁵ The financial incentive was a straightforward exercise of Congress’s regulatory authority under the Commerce and Spending Clauses. Congress could itself impose the surcharges, Congress can allow individual states to burden interstate commerce by imposing a surcharge on waste generated in another state, and Congress can require states to achieve certain milestones to avoid

220. *New York*, 505 U.S. at 152–54

221. *Id.* at 152.

222. *Id.* at 152–53, 171 (“The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.”).

223. *Id.* at 153, 173 (“In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines.”).

224. *Id.* at 153–54.

225. *Id.* at 171–86.

paying those surcharges.²²⁶ Like the first incentive, the second one was also lawful. Here, too, Congress can permit a state to discriminate against interstate commerce by refusing to dispose of waste generated elsewhere.²²⁷ Moreover, the consequence for a state of failing to achieve Congress's designated milestone fell on the party who generated the waste, not the receiving state.²²⁸ Only the third "incentive"—the so-called "take title" requirement—was unconstitutional.²²⁹ As the Court saw it, a requirement that a state take possession of hazardous waste generated within its borders "crossed the line distinguishing encouragement from coercion."²³⁰

The ownership and no-advertising requirements should be permissible under *New York v. United States*. Unlike the third "choice" given to the states in that case, Congress clearly has the power to demand that states accept the status quo in which federal law prohibits any and all marijuana distribution.²³¹ Lifting the ban in states that agree to the

226. *Id.* at 171–73.

227. *Id.* at 173–74.

228. *Id.* at 174 ("This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit." (citation omitted)).

229. *Id.* at 174–77.

230. *Id.* at 175.

231. *Id.* at 175–76 ("The take title provision offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions

ownership and advertising conditions is a permissible option because Congress can sacrifice uniformity in the application of federal law if it has a legitimate reason for doing so.²³² Reducing the risk of marijuana dependency and lowering roadway mortality unquestionably are legitimate goals. The conditions also rationally strive toward their achievement. Congress could believe that state officials will have a greater incentive than private retailers to ensure that minors do not purchase cannabis, and the advertising ban imposes a limited restraint²³³ that does not threaten free speech interests because states do not have First Amendment

of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.”).

232. See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (holding Congress can prohibit broadcast lottery advertising in states that forbid lotteries and allow advertising in states where lotteries are lawful); *New York*, 505 U.S. at 171–73 (holding Congress can allow states to impose a surcharge on hazardous waste generated out of state, or refuse to accept it altogether, as part of a plan to encourage each state to develop waste storage facilities); *Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174–78 (1985) (holding Congress can condition interstate bank acquisitions); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422–27 (1946) (holding Congress may authorize a state to pass legislation that would otherwise violate the Dormant Commerce Clause).

233. Several apps—such as Leafly, MassRoots, Weedmaps, and Eaze—enable prospective consumers to find potential sellers. See SUMMERS, *supra* note 11, at 112–15. Whether a state or Congress could prohibit private parties from advertising the availability, price, and quality of cannabis is beyond the scope of this Article.

rights.²³⁴ In addition, here as in *New York v. United States*, the harm from the state's rejection of the conditions falls on the cannabis industry, not the state, because companies miss out on the financial and commercial benefits from a truly legal business, not just a quasi-legal one.²³⁵

To be sure, there are strings attached to the choice Congress would encourage the states to pick. Congress also might not be able to put the states to accept conditions like these two in other circumstances, such as where Congress has not outlawed the product in question and could not do so. But Congress can and has outlawed cannabis distribution under the CSA for 50 years, so the choice offered to the states hardly presents them with an unforeseeable decision. Unlike the "choice" put to the states in *New York v. United States*, Congress is still giving the states an honest alternative.²³⁶ That should be sufficient to defeat any Tenth Amendment challenge.

CONCLUSION

Like alcohol and tobacco, marijuana is a consumer good that can harm individual users and third parties. Most states with medical or recreational cannabis programs permit private businesses to own the means of production and sale, and the states regulate those operations. But traditional regulatory tools such as licensing, product quality testing, and taxation do not address the harms caused to users by

234. See *supra* note 177.

235. See *New York*, 505 U.S. at 174.

236. See *id.* at 176–77 (“Respondents emphasize the latitude given to the States to implement Congress’ plan. The Act enables the States to regulate pursuant to Congress’ instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.”).

cannabis dependency and to third parties by marijuana-impaired drivers. Additional supply-side approaches are also necessary. States should assume responsibility for the retail sale of cannabis, just as many already do in the case of alcohol. States should also decline to advertise their own cannabis sales. Finally, as an exercise in cooperative federalism, Congress should offer to lift the federal ban on marijuana sales if states assume those responsibilities. Some states do that now in the case of alcohol. The states and Congress should use the same approach for cannabis.