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## Ending the Federal Cannabis Prohibition: Lessons Learned from the History of Alcohol Regulations, Twenty-first Amendment, and Dormant Commerce Clause Jurisprudence

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— Note —

ENDING THE FEDERAL CANNABIS  
PROHIBITION: LESSONS LEARNED  
FROM THE HISTORY OF ALCOHOL  
REGULATIONS, TWENTY-FIRST  
AMENDMENT, AND DORMANT  
COMMERCE CLAUSE JURISPRUDENCE

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INTRODUCTION

Public attitudes toward cannabis are changing. As of September 2019, sixty-seven percent of Americans favors legalization of cannabis,

a considerable shift from just twelve percent in 1969.<sup>1</sup> The growth in public support has caused an expanding number of jurisdictions to reform their cannabis laws: thirty-six states and the District of Columbia have legalized cannabis for medical purposes, and seventeen states and the District of Columbia have legalized the drug for adult recreational purposes.<sup>2</sup> Additionally, nine states are projected to be next to say yes to some form of cannabis legalization in 2020.<sup>3</sup>

Cannabis remains a Schedule I drug under the federal Controlled Substances Act (CSA)<sup>4</sup>—even for medical use—and the cultivation, distribution, or possession of cannabis carry hefty prison sentences and fines.<sup>5</sup> Yet the sheer volume of commercial cannabis activities within states that have legalized cannabis<sup>6</sup> have far exceeded the federal government’s capacity to enforce the CSA, and its struggle has been compounded by the growing number of states that support cannabis

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1. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/2VF4-UMY2].
  2. *State Medical Marijuana Laws*, NAT’L CONF. STATE LEGISLATURES (May 17, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/68G4-TETH].
  3. Keith Speights, *9 States That Could Vote to Legalize Marijuana in 2020*, MOTLEY FOOL (Oct. 6, 2019, 9:00 AM), <https://www.fool.com/investing/2019/10/06/9-states-that-could-vote-to-legalize-marijuana-in.aspx> [https://perma.cc/8MHH-DE4E].
  4. 21 U.S.C. § 812(c) sched. I(c)(10) (2018); *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-scheduling> [https://perma.cc/M7PF-J6PM] (last visited May 26, 2021).
  5. 21 U.S.C. § 841(a) (prohibiting any person “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”); *id.* § 841(b) (listing penalties for violations of § 841(a)); *id.* § 802(6) (defining controlled substance to include “schedule I” drugs).
  6. The regulated cannabis industry in the United States topped \$9.8 billion in annual sales in 2018, and is projected to grow to \$30 billion by 2024. The ArcView Grp., *Global Legal Cannabis Markets to Grow 36% in 2019 Despite 2018 Challenges; To Break \$40 Billion by 2024*, CISION: PR NEWSWIRE (June 20, 2019, 7:00 AM), <https://www.prnewswire.com/news-releases/new-report-global-legal-cannabis-markets-to-grow-36-in-2019-despite-2018-challenges-to-break-40-billion-by-2024-300871588.html> [https://perma.cc/FAC9-5J6V]. The industry directly employed more than 211,000 full-time workers in 2018, adding more than 64,000 new jobs during the year. Kevin Murphy, *Cannabis is Becoming a Huge Job Creator*, FORBES (May 20, 2019, 9:00 AM), <https://www.forbes.com/sites/kevinmurphy/2019/05/20/cannabis-is-becoming-a-huge-job-creator/#79212c1049bf> [https://perma.cc/HG97-93F6].

legalization.<sup>7</sup> In April 2019, Attorney General William Barr stated that although he would personally favor one uniform federal law against cannabis, if there is insufficient consensus to obtain that then the Department of Justice would be better off continuing the Obama Administration's hands-off enforcement policy in states that enforce their own cannabis laws.<sup>8</sup> This is a complete reversal of the former Attorney General Jeff Sessions's pledge of criminal prosecution for cannabis use, and may signify the federal government's resignation that it is too late to try to contain consumer demand in the expanding number of states that have legalized cannabis.<sup>9</sup>

Since 2015, "various bills have been introduced in Congress to legalize cannabis at the federal level."<sup>10</sup> By far, the 116th Congress has been the most pro-cannabis in history, with an unprecedented number of hearings held in 2019 to consider issues caused by the discrepancy between federal and state laws on cannabis.<sup>11</sup> No fewer than sixty-one individual cannabis reform bills were introduced in the first seven months of the 116th Congress.<sup>12</sup> Given the current political climate with respect to solving the federal-state divide over cannabis, it is imperative that Congress carefully consider its stance on cannabis as well as potential legal implications that may follow from it. The most critical question to be answered, as the CEO of the Cannabis Trade Federation Neal Levine put it, is "a matter of timing and political calculus about what kind of reform is achievable and can help stop many ongoing harms of prohibition in the short term."<sup>13</sup>

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7. David Koch, Dawn Newton & Frank Robinson, *The Distribution of Legal Cannabis: Impact and Opportunities for Franchising*, INT'L FRANCHISE ASS'N (May 2019), <https://www.franchise.org/sites/default/files/2019-05/DistributionofLegalCannabis.pdf> [<https://perma.cc/W552-6NVY>].
  8. Nina Godlewski, *Attorney General Barr Says He Would Favor Making Marijuana Illegal Across the United States*, NEWSWEEK (Apr. 10, 2019, 5:32 PM), <https://www.newsweek.com/attorney-general-barr-marijuana-law-1392561> [<https://perma.cc/3D48-AKZX>].
  9. Rochelle Spandorf, *Franchising in the Cannabis Industry Begins to Light Up*, LAW360 (May 2, 2019, 2:27 PM), <https://www.law360.com/articles/1154096/franchising-in-the-cannabis-industry-begins-to-light-up> [<https://perma.cc/8SP9-PYX3>].
  10. Bill Weinberg, *The United States of Cannabis*, PAPER (Mar. 15, 2019), <https://www.papermag.com/the-united-states-of-cannabis-2631648590.html> [<https://perma.cc/7GYH-H69E>].
  11. Tom Angell, *This is the Most Marijuana-Friendly Congress in History*, FORBES (Jul. 31, 2019, 11:31 AM), <https://www.forbes.com/sites/toman-gell/2019/07/31/this-is-the-most-marijuana-friendly-congress-in-history/> [<https://perma.cc/3FQQ-2A8U>].
  12. *Id.*
  13. Kyle Jaeger, *The Debate Over How, Not Whether, Congress Should Legalize Marijuana is Heating Up*, MARIJUANA MOMENT (July 9, 2019), <https://www.marijuanamoment.net/the-debate-over-how-not-whether-congress-should-legalize-marijuana-is-heating-up/>.

Currently, there are two competing types of policy proposals on ending the federal cannabis prohibition.<sup>14</sup> One type includes *intrastate* measures, such as the Strengthening the Tenth Amendment Through Entrusting States (STATES) Act<sup>15</sup> and the Compassionate Access, Research Expansion, and Respect States (CARERS) Act,<sup>16</sup> which would empower states to enforce their own cannabis laws free from the federal government's interference but leave cannabis as a Schedule I drug under the CSA. Such measures would inevitably maintain the status quo of balkanized state markets of cannabis.<sup>17</sup> The other type includes *interstate* measures such as the Marijuana Opportunity, Reinvestment and Expungement (MORE) Act<sup>18</sup> and the Marijuana Revenue and Regulation Act,<sup>19</sup> which would remove cannabis from Schedule I under the CSA entirely and allow cannabis trades between states where the drug is legal.<sup>20</sup>

This Note evaluates the two competing types of reform measures for legalizing cannabis at the federal level and proposes that Congress should adopt an interstate measure while explicitly authorizing states to regulate cannabis within their borders. Part I discusses the current legal landscape of the cannabis industry and explains intrastate and interstate measures in depth. Part II addresses the history of alcohol regulations and applies it to an issue stemming from small businesses' domination in the current cannabis industry. It then asserts that interstate measures would more likely resolve the issue than intrastate measures would. Part III analyzes the Supreme Court's Dormant Commerce Clause jurisprudence on alcohol regulations and anticipates how courts would rule if Congress were to adopt an interstate measure. It then proposes that Congress completely disclaim any intent to regulate cannabis in terms of interstate commerce when adopting an interstate measure.

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[www.marijuanamoment.net/the-debate-over-how-not-whether-congress-should-legalize-marijuana-is-heating-up/](http://www.marijuanamoment.net/the-debate-over-how-not-whether-congress-should-legalize-marijuana-is-heating-up/) [<https://perma.cc/YGF4-RBSY>].

14. Ilya Shapiro & Randal John Meyer, *Congress Needs to Settle the Looming Cannabis-Regulation Fight*, NAT'L REV. (July 10, 2019, 1:00 PM), <https://www.nationalreview.com/2019/07/congress-must-settle-the-looming-cannabis-regulation-fight/> [<https://perma.cc/WX93-DLKW>].
15. S. 1028, 116th Cong. (2019).
16. H.R. 127, 116th Cong. (2019).
17. Shapiro & Meyer, *supra* note 14.
18. H.R. 3884, 116th Cong. (2019).
19. H.R. 1120, 116th Cong. (2019).
20. Shapiro & Meyer, *supra* note 14.

## I. CURRENT LEGAL LANDSCAPE OF THE CANNABIS INDUSTRY

Legal cannabis is the fastest growing industry in the United States.<sup>21</sup> As of February 2020, the legal cannabis industry employed a record-high 243,700 Americans, with a stunning 100% growth since 2017.<sup>22</sup> In the year 2019 alone, sales of recreational cannabis in the United States rose by 45% to hit \$8.9 billion, and sales of medical cannabis grew even faster, rising at a rate of 54% to hit \$6.2 billion.<sup>23</sup> Nevertheless, despite such rapid growth and money at stake, legal obstacles to states' cannabis liberalization efforts still remain, the most pronounced of which is the CSA.<sup>24</sup>

### A. *Discrepancy Between State and Federal Cannabis Laws and the Preemption Doctrine*

Under the CSA, cannabis is classified as a Schedule I controlled substance,<sup>25</sup> a status reserved for the most dangerous class of drugs “with no currently accepted medical use and a high potential for abuse.”<sup>26</sup> This status puts cannabis in a category on par with ecstasy, heroin, and LSD.<sup>27</sup> Those convicted of simple possession of cannabis may face one year in prison and a minimum fine of \$1,000.<sup>28</sup> Punishments can extend to life in prison and millions of dollars in fine for large-volume manufacturers and dealers of the drug.<sup>29</sup>

The preemption doctrine derives from the Supremacy Clause in the Constitution. Under that clause, all treaties made by the United States and “the Laws of the United States which shall be made in Pursuance” of the Constitution are the “supreme Law of the Land,” notwith-

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21. See *Leafly Jobs Report: Cannabis is the Fastest-Growing American Industry, Surpassing 240,000 Jobs*, BUS. WIRE (Feb. 7, 2020, 11:00 AM), <https://www.businesswire.com/news/home/20200207005038/en/Leafly-Jobs-Report-Cannabis-fastest-growing-American-industry> [<https://perma.cc/4QFV-ELEQ>].
  22. *Id.*
  23. John Whitefoot, *2019 Global Cannabis Sales Were Stunning, 2020 Looks Even Better*, PROFIT CONFIDENTIAL (Jan. 27, 2020), <https://www.profitconfidential.com/marijuana/2019-global-cannabis-sales-stunning-2020-looks-even-better/> [<https://perma.cc/4G4V-52A2>].
  24. Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 *et seq.* (2012)).
  25. 21 U.S.C. § 812, Sched. I(c)(10) (2018).
  26. *Drug Scheduling*, *supra* note 4.
  27. 21 U.S.C. § 812, Sched. I(b)(10), (c)(7), (c)(9), (c)(10).
  28. 21 U.S.C. § 844(a).
  29. 21 U.S.C. § 841(b).

standing contrary state laws or constitutions.<sup>30</sup> In essence, the doctrine provides that if Congress exercises its valid legislative authority, then any conflicting state laws are superseded by the federal law.<sup>31</sup> Due to the preemption doctrine, ever since California first legalized cannabis use for medical purposes in 1996,<sup>32</sup> there has been tension between permissive state regimes and the federal prohibition.<sup>33</sup> A detailed exploration of whether Congress may or may not preempt states' cannabis liberalization efforts and the corresponding issues of federalism exceeds the scope of this Note.<sup>34</sup> Instead, it must suffice to simply state that the Supreme Court has upheld the federal government's constitutional authority to enforce the CSA in states that have decriminalized or legalized cannabis usage,<sup>35</sup> and that the federal statute, accompanied by the preemption doctrine, have prevented normalized commercial activities for cannabis businesses and consumers within such states.<sup>36</sup>

*B. Non-Enforcement of the Federal Cannabis Laws*

Despite the federal government's constitutional power to prohibit the cultivation, distribution, or possession of cannabis pursuant to the CSA, it "lacks the fiscal and political capital" necessary to enforce the

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30. U.S. CONST. art. VI, cl. 2.
31. *See Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (noting that where the federal government has enacted a regulation, states may not enact laws that conflict or interfere with the federal law).
32. *See John Balzar, Voters Approve Measure to Use Pot as Medicine*, L.A. TIMES (Nov. 6, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-11-06-mn-62740-story.html> [<https://perma.cc/SM8T-GJ82>].
33. Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 568 (2015).
34. *See generally* Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016) (analyzing recent interstate issues that stem from tension between state marijuana laws).
35. *See Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (holding that the Supremacy Clause unambiguously confers the federal government authority "superior to that of the States" to regulate intrastate medical cannabis, "however legitimate or dire those [medical] necessities may be" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 195–96 (1968))); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (holding that the CSA is not subject to implied exception of medical necessity for cannabis).
36. *See Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90–100 (2015) (addressing legal issues created by the discrepancy between the federal and state cannabis laws with respect to banking, taxation, access to lawyers, and risks to cannabis patients and consumers).

statute aggressively,<sup>37</sup> and its ability to enforce the statute is heavily dependent on state and local cooperation.<sup>38</sup> To put it simply, there are about four times as many state and local law enforcement officers within the states of Colorado and Washington alone as there are federal Drug Enforcement Administration agents around the world.<sup>39</sup> Thus, if state and local governments were not to cooperate, the federal government would be left with a grossly insufficient number of officers to handle the enforcement of the CSA.<sup>40</sup>

The longstanding history of the federal government's pushback against states' liberalization efforts of cannabis usage exceeds the scope of this Note. While the federal government's enforcement actions still continue, it suffices to say that the growing number of states reforming their cannabis laws,<sup>41</sup> together with the unprecedented volume of commercial cannabis activities<sup>42</sup> and decline of prosecution therefor,<sup>43</sup> have effectively incapacitated the federal government's ability to properly enforce the CSA within those states.<sup>44</sup>

During the Obama Administration, recognizing the difficulty of fully enforcing the federal cannabis prohibition, then-Deputy Attorney General James Cole issued a memorandum (Cole Memorandum), announcing that the Department of Justice would not prioritize the enforcement of the CSA in states with their own robust cannabis regulations.<sup>45</sup> Early in the Trump Administration, then-Attorney

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37. Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 1009 (2012).

38. See Chemerinsky et al., *supra* note 36, at 84 ("Since the CSA's implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level. For example, of the nearly 900,000 marijuana arrests in 2012, arrests made at the state and local level dwarfed those made by federal officials by a ratio of 109 to 1."); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1, 1 (2013) ("[M]arijuana remains illegal under federal law, but the federal government lacks the capacity to fully enforce that law without state and local cooperation.").

39. Mark Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY (Mar./Apr./May 2014), <https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/> [<https://perma.cc/U7B7-ZBJE>].

40. *See id.*

41. Daniller, *supra* note 1.

42. *See supra* note 6 and accompanying text.

43. *See infra* note 53 and accompanying text.

44. Koch et al., *supra* note 7.

45. *See* Memorandum from Deputy Att'y Gen. James M. Cole on Guidance Regarding Marijuana Enforcement to All U.S. Att'ys (Aug. 29, 2013),



General Jeff Sessions rescinded the Cole Memorandum by issuing a new memorandum, which provided in part: “In deciding which marijuana activities to prosecute under these laws with the Department’s finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions.”<sup>46</sup> The phrase “these laws” referenced the CSA,<sup>47</sup> among others, and many viewed the rescission of the Cole Memorandum as a declaration of a new “War on Drugs.”<sup>48</sup>

In February 2019, however, William Barr replaced Jeff Sessions as Attorney General.<sup>49</sup> During his confirmation process, Barr responded to written questions and pledged that “I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum.”<sup>50</sup> Further, in April 2019, Barr testified during a Senate appropriations subcommittee that he is in favor of a more lenient, federalist approach to cannabis laws.<sup>51</sup> Barr said he would prefer that cannabis be legalized at the federal level rather than just let individual states do their own thing in the face of federal prohibition.<sup>52</sup> Attorney General Barr’s statements with respect to following the Cole Memorandum as well as favoring the federal legalization of cannabis have resulted in a corresponding decrease of marijuana-based criminal cases; Chief Justice John Roberts wrote in his end-of-year report that “[d]rug crime defendants, who accounted for 28 percent of total filings, grew

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<http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>  
[<https://perma.cc/E885-PM6X>].

46. See Memorandum from Att’y Gen. Jefferson B. Sessions III on Marijuana Enforcement to All U.S. Att’ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/EY7C-BNQG8>].
47. *Id.* (citing 21 U.S.C. §§ 812, 841 (2018)).
48. German Lopez, *Trump and Sessions’s Quiet Success: Reinvigorating the Federal War on Drugs*, VOX (Jan. 5, 2018, 11:30 AM), <https://www.vox.com/policy-and-politics/2018/1/5/16851120/trump-sessions-war-on-drugs> [<https://perma.cc/FJK8-29VD>].
49. David Shortell, *William Barr Confirmed as Attorney General*, CNN (Feb. 14, 2019, 1:44 PM), <https://www.cnn.com/2019/02/14/politics/william-barr-senate-confirmation-vote/index.html> [<https://perma.cc/AWS9-HEEB>].
50. Tom Angell, *Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing*, FORBES (Jan. 28, 2019, 1:23 PM), <https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#3ab16a745435> [<https://perma.cc/CD76-QQU9>].
51. Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), <https://www.forbes.com/sites/sarabrittany Somerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/#5e84927bc4c8> [<https://perma.cc/9E67-S9JG>].
52. *Id.*

five percent, although defendants accused of crimes associated with marijuana decreased 28 percent.”<sup>53</sup>

*C. Movement Towards the Federal Legalization of Cannabis: Intrastate and Interstate Approaches*

Whether the federal government is willing to forgo criminal cannabis prosecutions under the CSA does not alone resolve the underlying conflict between state and federal laws and its impact on the legal cannabis industry.<sup>54</sup> This is because even if cannabis businesses and consumers do not get charged with a crime under the CSA, the fact that they intentionally violate the federal statute has many indirect legal consequences.<sup>55</sup> In the meantime, the federal government has not yet adopted cannabis legalization in any form,<sup>56</sup> and this has resulted in “consumer confusion and inconsistent compliance” with the CSA regarding cannabis use and distribution.<sup>57</sup>

Nevertheless, the reduction in criminal cannabis prosecutions under the CSA<sup>58</sup> as well as the growing public support for cannabis legalization<sup>59</sup> have caused scholars and political commentators to make bold predictions of impending cannabis legalization on a national level.<sup>60</sup> Their predictions are further bolstered by the unprecedented number of

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53. JOHN G. ROBERTS, JR., CHIEF JUSTICE’S YEAR-END REPORTS ON THE FEDERAL JUDICIARY 6 (2019).
54. See Chemerinsky et al., *supra* note 36, at 100–13 (explaining the preemption conflict).
55. *Id.* at 90–100 (explaining negative consequences relating to banking, tax, access to legal services, and risks to consumers and patients).
56. Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms a Nation*, 50 GONZ. L. REV. 241, 243 (2015).
57. *Id.*; see also Chemerinsky et al., *supra* note 36, at 90–100; Denning, *supra* note 33, at 568–69 (noting that the fact that cannabis remains illegal under federal law has resulted in legal uncertainty, causing numerous problems for cannabis businesses).
58. ROBERTS, *supra* note 53, at 6.
59. Daniller, *supra* note 1.
60. Chemerinsky et al., *supra* note 36, at 113–22; see also Kyle Jaeger, *Federal Marijuana Prosecutions Are Dropping in Era of Legalization, Chief Justice Reports*, MARIJUANA MOMENT (Jan. 1, 2019), <https://www.marijuana-moment.net/federal-marijuana-prosecutions-are-dropping-in-era-of-legalization-chief-justice-reports/> [<https://perma.cc/EA29-PDQF>] (“NORML political director Justin Strekal . . . [said] ‘[t]he decrease in federal criminal charges is a direct reflection of both the increasing number of states that have decriminalized marijuana possession and distribution, as well as the evolving nature of federal agents recognizing the futility of maintaining prohibition . . . it is time that Congress act to deschedule cannabis . . . .’”).

pro-cannabis bills that have been introduced in the 116th Congress.<sup>61</sup> Recently, interest groups have coalesced around two major cannabis reform measures to end the federal cannabis prohibition.<sup>62</sup>

Under *intrastate* measures such as the STATES Act<sup>63</sup> and the CARERS Act,<sup>64</sup> Congress would effectively legalize cannabis within states where cannabis is legal, but leave cannabis as a Schedule I controlled substance at the federal level.<sup>65</sup> For instance, the STATES Act provides in relevant part that the provisions of the CSA with respect to cannabis “shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.”<sup>66</sup> Essentially, even though cannabis would remain a Schedule I drug, intrastate measures would make the CSA unenforceable to the extent that it conflicts with state cannabis laws.<sup>67</sup> Nevertheless, due to the continued illegality of cannabis under the CSA, interstate cannabis commerce would not be allowed.

Intrastate measures would encompass what is known as permissive federalism, in which the federal government could, for example, allow an administrative agency to grant revocable waivers of the CSA’s cannabis provisions to the states that meet certain criteria set forth by the federal government.<sup>68</sup> Examples of permissive federalism in action include state welfare policies. For instance, section 1115 of the Social Security Act authorizes the Secretary of Health and Human Services to waive certain statutory requirements for states to experiment with novel welfare policies.<sup>69</sup> Intrastate measures would also encompass cooperative federalism, which allows the federal government and the states to resolve legal issues without their laws being in direct conflict.<sup>70</sup> Under cooperative federalism, Congress would amend the CSA to allow

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61. See Angell, *supra* note 11.

62. Shapiro & Meyer, *supra* note 14.

63. See S. 1028, 116th Cong. (2019).

64. See H.R. 127, 116th Cong. (2019).

65. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCE ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS 28 (2021).

66. S. 1028.

67. Ian A. Stewart & Dean A. Rocco, *Federal Cannabis Legalization May be Closer Than You Think*, LAW360 (July 16, 2018), <https://www.law360.com/articles/1063280/federal-cannabis-legalization-may-be-closer-than-you-think> [<https://perma.cc/HU77-7VNL>].

68. Chemerinsky et al., *supra* note 36, at 115.

69. *Id.*

70. *Id.* at 116.

states to opt out of the CSA's cannabis provisions within their borders, so long as they comply with federal guidelines similar to those set out in the Cole Memorandum.<sup>71</sup> Some examples of cooperative federalism in action are the Clean Air Act<sup>72</sup> and the Clean Water Act,<sup>73</sup> under which each state is responsible for its own air and water quality, but if the state does not meet certain federal requirements, then the federal standards take over.<sup>74</sup>

Under *interstate* measures, such as the MORE Act<sup>75</sup> and the Marijuana Revenue and Regulation Act,<sup>76</sup> Congress would remove cannabis from Schedule I of the CSA altogether and allow import and export of cannabis between states that legalize cannabis.<sup>77</sup> For instance, the MORE Act provides in relevant part that cannabis “shall . . . be deemed to be a drug or other substance that does not meet the requirements for inclusion in any schedule.”<sup>78</sup> By decriminalizing cannabis at the federal level, interstate measures would closely resemble the Twenty-first Amendment, which ended the nationwide prohibition of alcohol and allowed the states to adopt and enforce their own alcohol regulations.<sup>79</sup>

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71. The eight federal enforcement priorities listed in the Cole Memorandum are: (1) “preventing the distribution of marijuana to minors;” (2) “preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;” (3) “preventing the diversion of marijuana from states where it is legal under state law in some form to other states;” (4) “preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;” (5) “preventing violence and the use of firearms in the cultivation and distribution of marijuana;” (6) “preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;” (7) “preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;” and (8) “preventing marijuana possession or use on federal property.” See Cole, *supra* note 45, at 1–2.

72. 42 U.S.C. §§ 7401–7671q (2018).

73. 33 U.S.C. §§ 1251–1387 (2018).

74. See 33 U.S.C. § 1313(c); 42 U.S.C. § 7410(c)(1).

75. H.R. 3884, 116th Cong. (2019).

76. H.R. 1120, 116th Cong. (2019).

77. See Shapiro & Meyer, *supra* note 14.

78. H.R. 3884 § 3(a).

79. See U.S. CONST. amend. XXI.

## II. LESSONS FROM THE HISTORY OF ALCOHOL REGULATIONS

Many policy experts argue that federal cannabis prohibition mirrors the alcohol-prohibition era.<sup>80</sup> They believe that cannabis is following the same pattern as alcohol, where the states began with legalizing medicinal usage and slowly created their ways to state-based regulations.<sup>81</sup> Therefore, analyzing how alcohol regulations have developed could shed a great deal of light on Congress's next move with respect to legalizing cannabis.

### A. *The Eighteenth and Twenty-first Amendments*

The Prohibition era came from the Temperance Movement of the early nineteenth century.<sup>82</sup> Alcohol was seen as a “great evil to be eradicated,”<sup>83</sup> and one year after thirty-six states ratified it the Eighteenth Amendment to prohibit alcohol went into effect on January 17, 1920.<sup>84</sup> But alcohol prohibition actually led to a considerable increase in organized crime and alcohol trafficking in neighborhoods.<sup>85</sup> There were twice as many speakeasies than there were saloons prior to Prohibition when alcohol was largely unregulated,<sup>86</sup> and these speak-easies sold more potent whiskey than beer and wine.<sup>87</sup> In addition, as

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80. Hilary Bricken, *Marijuana Legalization and Marriage Equality: Similar but Different*, HARRIS BRICKEN: CANNA L. BLOG (Sept. 15, 2015), <http://www.cannalawblog.com/a-tale-of-two-movements-marriage-equality-and-marijuana-legalization/> [<https://perma.cc/P3A4-4BCD>]; see also JOHN HUDAK & JONATHAN RAUCH, WORRY ABOUT BAD MARIJUANA—NOT BIG MARIJUANA, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 7–9 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/big-marijuana-1.pdf> [<https://perma.cc/5A2R-ZPDY>].
81. Bricken, *supra* note 80 (noting that during the prohibition years, states allowed alcohol for medical purposes and that those states later opted out of the prohibition and allowed alcohol for recreational purposes).
82. David Crary, *100 Years Later, Prohibition's Legacy Remains*, PBS (Jan. 12, 2020, 2:34 PM) <https://www.pbs.org/newshour/arts/100-years-later-prohibitions-legacy-remains> [<https://perma.cc/W48T-EVHV>].
83. Ken Burns, *Roots of Prohibition*, PBS, <https://www.pbs.org/kenburns/prohibition/roots-of-prohibition/> [<https://perma.cc/JJ8R-NWYV>] (last visited Mar. 4, 2021).
84. Alexandra Thompson, Note, *The Legacy of Granholm v. Heald: Questioning the Constitutionality of Facially Neutral Direct-Shipping Laws*, 61 CASE W. RESV. L. REV. 309, 316 (2010).
85. See Crary, *supra* note 82.
86. See Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INSTITUTE (July 17, 1991) <https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure> [<https://perma.cc/P4MB-9TU6>].
87. See *id.*

the country was going through the Great Depression, many states wanted to increase their tax revenues by levying high taxes on alcohol.<sup>88</sup>

Ultimately, after the failed experiment with alcohol prohibition, Congress drafted the Twenty-first Amendment to put an end to it, which the states ratified in 1933.<sup>89</sup> Section 1 of the Amendment repealed the nationwide prohibition of alcohol.<sup>90</sup> Section 2 then provided, “The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>91</sup> By prohibiting interstate shipment of alcohol in violation of applicable state laws, the states retained the ability to continue to prohibit or regulate alcohol within their borders.<sup>92</sup>

*B. Alcohol Regulations after the Twenty-first Amendment*

When alcohol prohibition was repealed, regulation of alcohol became the domain of the states, allowing them to decide how their regulatory systems should be constructed.<sup>93</sup> Although the states do things differently, the current norm is a so-called three-tier distribution system, in which suppliers (the first tier—e.g., brewers, vintners, and distillers) are required to sell only to wholesalers (the second tier—e.g., distributors and shippers) who, in turn, are required to sell only to retailers (the third tier—e.g., liquor stores, restaurants, and bars).<sup>94</sup> As each tier is required to have a separate, mutually exclusive license from the state, the three-tier distribution system prevents vertical integration among different tiers.<sup>95</sup>

Under the three-tier distribution system, larger suppliers tend to drive out their smaller counterparts.<sup>96</sup> As larger suppliers mass-produce alcohol, they can purchase raw materials at a discounted price.<sup>97</sup> In ad-

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88. See Mark Thornton & Chetley Weise, *The Great Depression Tax Revolts Revisited*, 15 J. LIBERTARIAN STUD. 95, 99–102 (2001); Garrett Peck, *For Marijuana Legalization, Lessons from Prohibition*, N.Y. TIMES (May 22, 2013), <https://www.nytimes.com/roomfordebate/2013/05/22/how-can-marijuana-be-sold-safely/for-marijuana-legalization-lessons-from-prohibition> [<https://perma.cc/A7XZ-92C5>].

89. Thompson, *supra* note 84, at 316.

90. U.S. CONST. amend. XXI, § 1.

91. U.S. CONST. amend. XXI, § 2.

92. Thompson, *supra* note 84, at 317.

93. Jonathan R. Elsner, *An Argument against Regulating Cannabis like Alcohol* 3 (Ohio St. Pub. L. Working Paper No. 482, 2019), <https://ssrn.com/abstract=3395308> [<https://perma.cc/V32H-XJGZ>].

94. Thompson, *supra* note 84, at 311.

95. Elsner, *supra* note 93, at 4.

96. See *id.* at 4–5.

97. *Id.* at 4.

dition, due to their superior advertising resources, larger suppliers can better attract end consumers to recognize and purchase their brand,<sup>98</sup> and this, in turn, causes upstream demand from wholesalers, which gives the larger suppliers substantial leverage.<sup>99</sup> Therefore, over time, smaller suppliers are forced to exit the market either by acquisition or extinction.<sup>100</sup> This phenomenon is readily apparent in the current beer and wine industries. Anheuser-Busch Inbev and MillerCoors, LLC account for approximately 63 percent of the beer market in the United States.<sup>101</sup> Fewer than 100 wineries have stable national distribution in any form, and more than 3000 wineries do not have any wholesaler at all.<sup>102</sup>

Although imperfect, the three-tier distribution system has proven to be effective. There are three main categories of societal benefits that the three-tier distribution system brings forth. First, the three-tier distribution system offers regulatory benefits. Because each tier is responsible for one another in terms of complying with the laws and regulations, the three-tier distribution system provides safeguards to ensure lawful trade practices and safe handling of alcohol before it reaches consumers.<sup>103</sup> This transparent regulatory scheme promotes consumer confidence as it ensures that only licensed suppliers, wholesalers, and retailers can produce and sell alcohol.<sup>104</sup> Second, the three-tier distribution system offers public health and safety benefits. As actors within each tier must be licensed and accountable for the alcohol they sell, this effectively prevents tainted alcohol from entering the market.<sup>105</sup> In other countries that do not follow the three-tier distribution system, including the United Kingdom, tainted alcohol from the black market has been a major concern.<sup>106</sup> Third, the three-tier distribution system offers economic benefits. The alcohol industry provides tens of billions of tax dollars to federal, state, and local

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98. *Id.*

99. *Id.*

100. *Id.*

101. *See Industry Fast Facts*, NAT'L BEER WHOLESALERS ASS'N, <https://www.nbwa.org/resources/industry-fast-facts> [https://perma.cc/2ZPW-AQ8C] (last visited Mar. 5, 2021).

102. Thompson, *supra* note 84, at 311.

103. *The Three-Tier System: A Modern View*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, <https://www.nabca.org/three-tier-system-modern-view-0> [https://perma.cc/ATK9-VS2K] (last visited Mar. 5, 2021).

104. *Id.*

105. *Id.*

106. *Id.*

governments.<sup>107</sup> Because of the checks and balances within the three-tier distribution system, the risk of untaxed, even potentially tainted alcohol from the black market is substantially lessened.<sup>108</sup>

*C. Problematic Structure of the Cannabis Industry*

Due to the possibility for both criminal<sup>109</sup> and civil<sup>110</sup> liabilities, the current cannabis industry is dominated by small businesses.<sup>111</sup> Large corporations have been reluctant to enter the market because they have significant assets that could be lost if the federal government were to prosecute their commercial cannabis activities.<sup>112</sup> On the other hand, because small businesses have fewer assets to lose and selling cannabis has proven to be extremely profitable,<sup>113</sup> they are willing to take greater risks.<sup>114</sup> Commentators predict that so long as the current conflict between federal and state cannabis laws continues, it is unlikely that large corporations will move into the cannabis industry.<sup>115</sup>

The small-business dominance of the legal cannabis industry presents potential risks. Laws and regulations for cannabis rely heavily on voluntary compliance with often complex and costly rules.<sup>116</sup> The rules contain “extensive record-keeping, product accountability, and public health and reporting requirements.”<sup>117</sup> They are also “very dynamic,” so businesses are faced with “constant changes that may or may not require capital investment and operational changes.”<sup>118</sup> Even if intending to fully comply with these rules, barriers exist for small businesses that are not equipped with the necessary financial and

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107. *Id.*

108. *Id.*

109. 21 U.S.C. §§ 844(a), 841(b) (2018).

110. *Id.* § 844a.

111. Luke Scheuer, *The Worst of Both Worlds: The Wild West of the “Legal” Marijuana Industry*, 35 N. ILL. U. L. REV. 557, 566 (2015).

112. *Id.*

113. *Id.*; Whitefoot, *supra* note 23.

114. Scheuer, *supra* note 111, at 566–67.

115. Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 530 (2015).

116. See Lewis Koski, *America’s Cannabis Industry: Balancing Strong Regulation with Businesses’ Desire for Accountability*, FORBES (Sept. 3, 2019, 10:13 AM), <https://www.forbes.com/sites/lewiskoski/2019/09/03/americas-cannabis-industry-balancing-strong-regulation-with-businesses-desire-for-accountability/#10bf5c423ed2> [<https://perma.cc/75C9-B9KJ>] (asserting that businesses incur costs as a result of compliance with mandated procedures).

117. *Id.*

118. *Id.*



human capital to obey them.<sup>119</sup> In contrast, compliance is much easier for large corporations to afford and manage.<sup>120</sup> Large corporations are generally well-known to state regulators, and thus, it is very difficult for them to elude scrutiny.<sup>121</sup> Because violation of the rules can severely damage a large corporation with so many stakeholders invested, large corporations face internal pressure to play by the rules.<sup>122</sup> Their broader capital bases and bureaucratized structures also offer them a leg up over small businesses on maintaining legal expertise and internal oversight.<sup>123</sup>

One of the most significant issues in the legal cannabis industry is that the cannabis being sold in the market today is considerably more potent than what was being sold in the 1960s and 1970s.<sup>124</sup> For example, dispensaries often sell baked goods infused with cannabis, which makes its effects much more powerful.<sup>125</sup> There are also reports of synthetic cannabis strains combined with other chemicals, which have resulted in serious side effects.<sup>126</sup> Currently, due to the evolution of states' licensing schemes, the bulk of the legal cannabis industry is vertically integrated, with businesses owning their own production, distribution, and retail.<sup>127</sup> With potentially thousands of cannabis businesses in each state handling their own production, distribution, and retail, it is becoming increasingly difficult to track what is in their products and what health effects they may possess.<sup>128</sup> It would certainly be easier for the federal government to regulate and hold the right people accountable if there were only a few large corporations in the cannabis market instead.<sup>129</sup> As noted previously, if the federal government were to resolve the conflict between federal and state cannabis laws, numerous major investors and

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119. *Id.*

120. HUDAK & RAUCH, *supra* note 80, at 13.

121. *Id.* at 12.

122. *Id.*

123. *Id.*

124. Scheuer, *supra* note 111, at 565.

125. *Id.*

126. *Id.*

127. Marc Hauser, *Envisioning the Future of the Cannabis Interstate Commerce*, BLOOMBERG (Sept. 23, 2019, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-envisioning-the-future-of-the-cannabis-interstate-commerce> [<https://perma.cc/5T2D-ERHQ>].

128. Scheuer, *supra* note 111, at 568.

129. *Id.*; HUDAK & RAUCH, *supra* note 80, at 2, 12–13.

large corporations would eagerly enter into the profitable cannabis market.<sup>130</sup>

*D. The Potential Solution: Interstate Measures*

Adopting *interstate* measures is likely to resolve the problematic structure of the current cannabis industry. Interstate measures would remove cannabis from Schedule I of the CSA entirely and allow the states to regulate cannabis within their borders, and closely resemble the Twenty-first Amendment's language. Thus, it is predictable that such measures would have similar effects on states' cannabis regulations as the Twenty-first Amendment did on their alcohol regulations. In particular, assuming that the majority of states will adopt a three-tier distribution system for their cannabis regulations as they did for alcohol regulations after the Twenty-first Amendment's ratification,<sup>131</sup> it is foreseeable that a few large corporations would ultimately dominate the national cannabis industry.<sup>132</sup> This, in turn, would effectively solve the issues stemming from small businesses' dominance in the current cannabis industry.

On the contrary, adopting *intrastate* measures is much less likely to resolve these issues. Intrastate measures would leave cannabis as a Schedule I controlled substance at the federal level, with any interstate cannabis trade treated as if it were drug trafficking.<sup>133</sup> Thus, their overall effect would be simply maintaining the status quo of isolated state cannabis markets.<sup>134</sup> Given that most states have currently adopted vertically integrated distribution system for their cannabis regulations<sup>135</sup> and that intrastate measures do not bear much resemblance to the Twenty-first Amendment, it is less predictable that the states would later pursue a three-tier distribution system. Further, even assuming they would do so, interstate shipments of cannabis would still be strictly prohibited, so larger corporations would have fewer

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130. Scheuer, *supra* note 111, at 566; Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, *supra* note 115, at 529; see also Allison Hall, *Brewing Up Buds: Beverages Companies Enter Cannabis Game*, SPOKESMAN-REV. (Jan. 21, 2020), <https://www.spokesman.com/stories/2020/jan/21/brewing-buds-beverages-companies-enter-cannabis-ga/> [<https://perma.cc/2ZE4-UYPY>] (noting that soft drink companies have expressed tentative interest in entering the cannabis market but are hesitant due to the unsettled legality of marijuana).

131. Thompson, *supra* note 84, at 311; *The Three-Tier System: A Modern View*, *supra* note 103.

132. See *supra* note 96–100 and accompanying text.

133. Shapiro & Meyer, *supra* note 14.

134. *Id.*

135. Hauser, *supra* note 127.

advantages to dominate the industry against small businesses in comparison to what they would have under interstate measures.

It is important to also note here that many legal scholars have proposed and supported intrastate measures such as permissive or cooperative federalism for legalizing cannabis at the federal level.<sup>136</sup> They acknowledge that such measures are a more modest federal legislative solution than removing cannabis from the CSA entirely, which appears not to be on the horizon at this time.<sup>137</sup> But they overlook the problem of shortage and oversupply of cannabis that intrastate measures simply would not be able to cure.

For instance, a recent study by Illinois state legislators concluded that legalizing recreational cannabis in Illinois could increase the overall demand for cannabis to as high as 550,000 pounds a year, far exceeding the production capacity of the state's sixteen licensed growers for medical use.<sup>138</sup> On the other hand, Oregon, which does not limit the number of cannabis production licenses, has ended up with a gross oversupply of cannabis. The Oregon Liquor Control Commission, which licenses producers in that state, recently advised the state legislature of a huge excess of supply over recreational demand, a six-and-a-half years' worth of inventory.<sup>139</sup>

To be sure, intrastate measures would work well for states that wish to legalize cannabis or keep it legal, while protecting the public health and safety by moderating its citizens' cannabis consumption. Intrastate measures would accomplish this goal as they would limit competition by excluding out-of-state cannabis businesses, thus increasing the price of cannabis. But intrastate measures could leave states with an oversupply of cannabis, as is currently the case for Oregon and Washington,<sup>140</sup> which would decrease the price of cannabis and may

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136. See, e.g., Chemerinsky et al., *supra* note 36, at 114–16; Denning, *supra* note 33, at 587; Jonathan H. Adler, *Marijuana, Federal Power and the States: Introduction*, 65 CASE W. RES. L. REV. 505, 512 (2015); Susan F. Mandiberg, *A Hybrid Approach to Marijuana Federalism*, 23 LEWIS & CLARK L. REV. 823, 826, 843 (2019).

137. Chemerinsky et al., *supra* note 36, at 122.

138. Gaurav Dubey & Dean Sangalis, *As Illinois Looks Ahead to Cannabis Legalization, Lawmakers & Lobbyists Play Politics*, GREEN MKT. REP. (Mar. 4, 2019), <https://www.greenmarketreport.com/as-illinois-looks-ahead-to-cannabis-legalization-lawmakers-lobbyists-play-politics/> [<https://perma.cc/72M4-XWA8>].

139. Pete Danko, *Oregon's Cannabis Inventory: 6.5 Years' Worth*, PORTLAND BUS. J. (Jan. 31, 2019, 1:26 PM), <https://www.bizjournals.com/portland/news/2019/01/31/oregons-cannabis-inventory-6-5-years-worth.html> [<https://perma.cc/4CZS-XCTY>].

140. Nick Kovacevich, *The Giant Cannabis Problem No One Saw Coming*, FORBES (May 6, 2019, 7:15 AM), <https://www.forbes.com/sites/nickkov>

lead to unintended, excessive consumption by citizens as well as drug trafficking to other states, which would still be prohibited under the CSA. On the other end of the spectrum, by limiting interstate competition, intrastate measures could also leave states with a shortage of cannabis, as is currently the case for Illinois and Michigan,<sup>141</sup> which may lead to cannabis patients' denial of access to affordable cannabis products as well as illegal drug trafficking from other states.

In order to resolve the issue of shortage and oversupply of cannabis, Congress should adopt interstate measures of legalization. Under interstate measures, by allowing free trade of cannabis between states where the drug is legal, there would no longer be an issue of shortage and oversupply of cannabis. Nevertheless, there is a potential issue with the Dormant Commerce Clause for states that want to legalize cannabis or keep it legal, but at the same time wish to limit the influx of out-of-state cannabis businesses in order to keep the cannabis price high for public health and safety concerns. Part III will address this issue.

### III. LESSONS FROM THE DORMANT COMMERCE CLAUSE JURISPRUDENCE ON ALCOHOL REGULATIONS

The development of alcohol regulations provides an excellent analogy on how Congress should consider adopting an interstate cannabis reform, not only because alcohol was the subject of a federal ban, but also because the Twenty-first Amendment, which repealed the ban, contains Section 2 that explicitly allows states to adopt and enforce their own alcohol regulations.<sup>142</sup> Much of the litigation under the Twenty-first Amendment has involved arguments about whether Section 2 authorizes state discrimination which otherwise would violate the Dormant Commerce Clause.<sup>143</sup>

The Commerce Clause provides that “the Congress shall have Power . . . To regulate Commerce . . . among the several

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acevich/2019/05/06/the-giant-cannabis-problem-no-one-saw-coming/#3b17c1f95a25 [https://perma.cc/X55P-ZUPC].

141. Geoffrey Lawrence, *Illinois' Legal Marijuana Shortage Will Continue Until Original Legislation Is Fixed*, REASON FOUND. (Mar. 6, 2020), <https://reason.org/commentary/illinois-legal-marijuana-shortage-will-continue-until-original-legislation-is-fixed/> [https://perma.cc/MX5D-5VF3]; Steve Carmody, *Shortage of Medical Marijuana Expected to Continue in 2020*, MICH. RADIO (Dec. 25, 2019), <https://www.michiganradio.org/post/shortage-medical-marijuana-expected-continue-2020> [https://perma.cc/LFY8-J94X].

142. U.S. CONST. amend. XXI, § 2.

143. *See* State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 60–61 (1936); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 137–38 (1939); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 266, 273 (1984); *Granholm v. Heald*, 544 U.S. 460, 471 (2005); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

States . . . .”<sup>144</sup> Although framed as an affirmative grant of power to Congress, the Supreme Court has long held that the Commerce Clause, by extension, also prohibits states from enacting laws that discriminate against or otherwise unduly burden commerce.<sup>145</sup> This implicit principle that states may not interfere with the free flow of commerce is known as the Dormant Commerce Clause. The Dormant Commerce Clause has prevented states from adopting protectionist laws, and thus preserved a national market for goods and services.<sup>146</sup>

A long and complicated history of the Dormant Commerce Clause<sup>147</sup> exceeds the scope of this Note. Instead, this Note focuses specifically on the Supreme Court’s Dormant Commerce Clause jurisprudence on states’ alcohol regulations and proposes how Congress should draft its interstate measure to legalize cannabis at the federal level.

*A. Early Dormant Commerce Clause Jurisprudence  
on Alcohol Regulations*

The Supreme Court struck down many state alcohol regulations prior to the Eighteenth Amendment’s ratification, and by the late nineteenth century it had held that the Commerce Clause prevents states from discriminating against out-of-state citizens and products.<sup>148</sup> As the Temperance Movement was gaining momentum in the late nineteenth century, the Dormant Commerce Clause became troublesome for states that wanted to go dry. If a state enacted a law to ban the production and sale of alcohol within its borders, its citizens could simply order shipments of alcohol from other wet states. If the state then enacted a law to ban the importation of alcohol, the Court would

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144. U.S. CONST. art. I, § 8, cl. 3.

145. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) (“Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978); *Cooley v. Bd. of Wardens*, 53 U.S. 299, 318–19 (1852); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

146. *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2459; *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

147. *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2459 (noting that the Dormant Commerce Clause’s roots “go back as far as *Gibbons v. Ogden*, where Chief Justice Marshall found that a version of the [D]ormant Commerce Clause argument had ‘great force’” (citation omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824))).

148. *Walling v. Michigan*, 116 U. S. 446, 460 (1886); *see also* *Scott v. Donald*, 165 U.S. 58, 100 (1897); *Tiernan v. Rinker*, 102 U.S. 123, 124 (1880).

invalidate the law as unconstitutional.<sup>149</sup> In essence, these Dormant Commerce Clause cases left the dry states “in a bind,” and it became difficult for the states to properly enforce their prohibition laws.<sup>150</sup>

Representatives of the dry states and temperance advocates turned to Congress, which enacted the Wilson Act<sup>151</sup> in 1890. The Act subjected all imported alcohol “to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner” as though they had been produced there.<sup>152</sup> The aim of the Act was to allow states to decide whether to admit imported alcohol.<sup>153</sup> But the Act failed to relieve the dry states’ dilemma, as the Supreme Court interpreted the Act narrowly and held that it applied only to the resale of imported alcohol and did not apply to the direct shipment of alcohol to consumers.<sup>154</sup>

In 1913, Congress tried to patch this loophole by enacting the Webb-Kenyon Act.<sup>155</sup> The Act provided that shipment of alcohol into a state for use in any manner “in violation of any law of such State” was prohibited.<sup>156</sup> The Webb-Kenyon Act’s reference to “any law of such State” was much broader than the Wilson Act’s reference to “the laws of such State or Territory enacted in the exercise of its police powers.”<sup>157</sup> Thus, the Webb-Kenyon Act seemed to grant the states plenary authority to prohibit all imported alcohol that did not comply with their laws. This suggested that states could potentially enact and enforce laws that discriminate against out-of-state citizens and products, while being shielded from any Dormant Commerce Clause challenges.

As noted in Part II, the national alcohol prohibition under the Eighteenth Amendment proved to be a failure, and Congress drafted,

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149. See, e.g., *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 479 (1888) (invalidating an Iowa law that restricted the production or sale of alcohol as applied to beer imported from Illinois); *Leisy v. Hardin*, 135 U.S. 100, 124 (1890) (holding that liquor shipments in their original packages were not susceptible to state regulation).

150. *Granholt v. Heald*, 544 U.S. 460, 477 (2005).

151. Ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2018)).

152. *Id.*

153. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2465 (2019).

154. See *Rhodes v. Iowa*, 170 U.S. 412, 416–17 (1898); *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 444 (1898).

155. Pub. L. No. 62-398, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2018)).

156. *Id.*

157. Ch. 728, 26 Stat. at 313 (emphasis added).

and the states ratified in 1933, the Twenty-first Amendment to end the prohibition era.<sup>158</sup> Section 2 of the Amendment provides that “[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.”<sup>159</sup> This language is very similar to the Webb-Kenyon Act’s reference to “any law of such State.”<sup>160</sup> The Supreme Court’s early cases interpreting Section 2 of the Twenty-first Amendment concluded that it granted each state plenary power “to forbid all importations which do not comply with the conditions which it prescribes,”<sup>161</sup> which included laws that discriminated against out-of-state citizens and products.<sup>162</sup> The Court went as far as to conclude that even the Fourteenth Amendment did not impose any barrier to states’ plenary power to regulate the importation of alcohol.<sup>163</sup>

*B. Modern Dormant Commerce Clause Jurisprudence  
on Alcohol Regulations*

A major shift in the Supreme Court’s Dormant Commerce Clause jurisprudence on state alcohol regulations took place in the 1980s. The Court began to examine whether a state’s alcohol regulations that burden interstate commerce serve legitimate state interests, which did not include mere economic protectionism.<sup>164</sup> Applying this principle, the Court has “invalidated state alcohol regulations aimed at giving a competitive advantage to in-state” citizens and products.<sup>165</sup> In *Bacchus Imports, Ltd. v. Dias*,<sup>166</sup> the Court struck down a Hawaiian law that favored certain in-state alcohol producers against out-of-state producers.<sup>167</sup> The Court rejected the state’s argument that even if its law violated the Dormant Commerce Clause, it was saved by Section 2 of

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158. Thompson, *supra* note 84, at 316.

159. U.S. CONST. amend. XXI, § 2 (emphasis added).

160. Pub. L. No. 62-398, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2018)).

161. State Bd. of Equalization of Cal. v. Young’s Market Co., 299 U.S. 59, 62 (1936); *see also* Ziffirin, Inc. v. Reeves, 308 U.S. 132, 138–139 (1939).

162. *See, e.g., Young’s Market*, 299 U.S. at 62; Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938); Indianapolis Brewing Co. v. Liquor Control Comm’n, 305 U.S. 391, 394 (1939).

163. *Young’s Market*, 299 U.S. at 77 (“A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.”).

164. Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2469 (2019).

165. *Id.* at 2470.

166. 468 U.S. 263 (1984).

167. *Id.* at 265, 276.

the Twenty-first Amendment.<sup>168</sup> The Court noted instead that the relevant question is “whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [discriminatory] exemption . . . to outweigh the Commerce Clause principles that would otherwise be offended,”<sup>169</sup> and held that Section 2 of the Twenty-first Amendment did not save the Hawaii law because it clearly aimed “to promote a local industry” rather than “to promote temperance or to carry out any other purpose of the Twenty-first Amendment.”<sup>170</sup>

The Court’s modern Dormant Commerce Clause jurisprudence on states’ alcohol regulations has followed in *Bacchus*’ footsteps, and refused to read Section 2 of the Twenty-first Amendment to grant states plenary power to regulate alcohol within their borders.<sup>171</sup> More recently, in *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*,<sup>172</sup> the Court struck down Tennessee’s two-year durational-residency requirement for a liquor license as unconstitutional.<sup>173</sup> The Court reasoned that under the Dormant Commerce Clause, if a state law discriminates against out-of-state economic actors or goods, the law can only be sustained on demonstrating that it is narrowly tailored to advance a legitimate state objective.<sup>174</sup> The Court again rejected the state’s argument that Section 2 of the Twenty-first Amendment grants states virtually limitless authority to regulate intrastate distribution of alcohol, and stated that such a broad reading of Section 2 “would lead to absurd results that the provision cannot have been meant to produce.”<sup>175</sup> *Tennessee Wine* reaffirmed *Bacchus*’ holding that even though Section 2 of the Twenty-first Amendment grants states certain latitude with respect to regulation of alcohol, it does not allow the states to enact protectionist laws that discriminate against interstate commerce.<sup>176</sup>

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168. *Id.* at 274–75.

169. *Id.*

170. *Id.* at 276.

171. *See, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (invalidating a Connecticut law that restricted the wholesale price that out-of-state shippers of beer can charge in the state); *Granholm v. Heald*, 544 U.S. 460 (2005) (invalidating Michigan and New York’s discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors).

172. 139 S. Ct. 2449 (2019).

173. *Id.* at 2456–57.

174. *Id.* at 2461.

175. *Id.* at 2462.

176. *Id.* at 2457; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)



*C. Applying the Dormant Commerce Clause Jurisprudence on Alcohol Regulations to Interstate Cannabis Measures*

Given the Supreme Court's modern Dormant Commerce Clause jurisprudence on alcohol, if Congress were to adopt interstate cannabis reform measures with similar language to Section 2 of the Twenty-first Amendment, the Court will likely rule that the states do not have a plenary authority to regulate cannabis within its borders. Specifically, states that want to legalize cannabis or keep it legal, but at the same time want to limit the influx of out-of-state cannabis businesses in order to keep the cannabis price high for public health and safety concerns, will be challenged by the Dormant Commerce Clause. Because differential treatment between in-state and out-of-state citizens or products would trigger Dormant Commerce Clause strict scrutiny,<sup>177</sup> once a state legalizes cannabis, it would be very difficult to restrict the flow of out-of-state cannabis into the state.

One possible option that Congress can take to resolve this issue is to adopt interstate measures while explicitly granting the states plenary power to regulate cannabis within their borders—even by enacting laws that may be discriminatory to out-of-state citizens and products. Because the Commerce Clause grants Congress the power to regulate interstate commerce, Congress is free to negate any implication of unconstitutionality that may otherwise arise under the Dormant Commerce Clause by explicitly allowing states to adopt discriminatory laws.<sup>178</sup> Congress has done so in other contexts, and the Supreme Court has upheld both state laws that discriminate against interstate commerce and federal laws that expressly allow those state laws.<sup>179</sup> The

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177. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (holding that discriminatory state regulations are subject to a “virtually per se” rule of unconstitutionality).

178. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2476 (2019); *see also Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434–36; *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 895 (1985) (O’Connor, J., dissenting) (“[T]here can be no dispute that [state laws discriminatory to interstate commerce] are constitutionally permitted where Congress itself has affirmatively authorized the States to promote local business concerns free of Commerce Clause constraints. Neither the Commerce Clause nor the Equal Protection Clause bars Congress from enacting or authorizing the States to enact legislation to protect industry in one State ‘from disadvantageous competition’ with less stringently regulated businesses in other States.” (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 (1981))).

179. *See, e.g., Hodel*, 452 U.S. at 329 (holding the federal Surface Mining Act that allow states to adopt laws discriminatory to out-of-state mine operators constitutional); *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 669–70 (1981) (holding that with congressional approval, states may promote domestic insurers by seeking to deter other states from enacting discriminatory or excessive taxes).

reason why the modern Dormant Commerce Clause jurisprudence on alcohol regulations rejects the argument that Section 2 of the Twenty-first Amendment supersedes the Commerce Clause is precisely because the Court did not find any congressional intent to depart from the principle that discrimination against interstate commerce is disfavored.<sup>180</sup> Therefore, in order to respect the states that hope to limit the influx of out-of-state cannabis businesses to the extent of keeping the cannabis price high for public health and safety concerns, Congress, when adopting an interstate cannabis reform measure, should make its intent abundantly clear that states are free to enact cannabis laws that may be discriminatory against interstate commerce.

### CONCLUSION

It is indisputable that the time is quickly approaching for Congress to address the longstanding conflict between federal and state cannabis laws. Each of the two competing policy proposals that are currently on Congress's table has its advantages and disadvantages. Intrastate measures, though more modest considering Congress's reluctance to adopt any type of cannabis reform, would not be a permanent solution as there would be continuing problems from small businesses' market dominance as well as shortage or oversupply of cannabis. On the other hand, interstate measures that would grant the states plenary power to regulate cannabis within their borders may effectively resolve most of the ongoing issues relating to cannabis while respecting the decisions of the citizens in each state.

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180. *See* *Granholm v. Heald*, 544 U.S. 460, 482 (2005).

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