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Residents Welcome: Marijuana Regulation and the Dormant Commerce Clause

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Introduction

If a tree falls in a forest, and no one is there to hear it, does it make a sound? It depends on what you mean by "sound."[1] If I am an Ohio-based trash collection company, can the Indiana state legislature impose an embargo on the shipment of my waste across state lines? No.[2] If I

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1. Matt Bobrowsky, *Q: If a Tree Falls in a Forest, and There's No One Around to Hear It, Does It Make a Sound?*, Sci. & Child., Apr./May 2019, at 72, 72–75.

2. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978) (invalidating a New Jersey prohibition on the shipment of out-of-state garbage into the state). For more on state and local waste disposal

want to open a brand-new Tennessee-based liquor retail store, can the Tennessee state legislature enact laws that require liquor retailers to have been state residents for at least two years? No.[3] Can a state that legalizes marijuana for medical purposes enact legislation to prevent an expansive interstate market by requiring all owners of a retail cannabis business to be state residents? Maybe—and the answer to that question is more complicated.

For years, scholars have predicted that state marijuana laws could come under constitutional fire.[4] Recently, federal courts have been faced with challenges to state marijuana laws that discriminate against out-of-state individuals to benefit an in-state marijuana market. The United States Court of Appeals for the First Circuit, on a matter of first impression, invalidated a provision of Maine's marijuana regulatory regime that requires all retail cannabis licensees to be state residents.[5] Many federal district courts are seeing similar issues.[6]

In deciding these cases, courts have relied on the Dormant Commerce Clause, a judicially created application of the Commerce Clause. The Commerce Clause gives Congress the affirmative ability to "regulate Commerce . . . among the several States."[7] Courts have recognized that this power also implicitly denies the states' power to regulate interstate commerce in the absence of authority from Congress.[8] In other words, states may not unjustifiably discriminate against or burden interstate commerce for the "benefit [of] in-state economic interests."[9]

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programs and the Dormant Commerce Clause, see BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.07[L] (2d ed. 2013) (noting that "state and local waste disposal programs have created what may be the largest single segment of [D]ormant Commerce Clause litigation").

3. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2475–76 (2019) (finding Tennessee's residency requirement that favored residents over nonresidents to be violative of the Dormant Commerce Clause).

4. *See, e.g.*, Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on "Pot Tourism" Restrictions*, 66 FLA. L. REV. 2279, 2283–84 (2014); Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RSRV. L. REV. 567, 591–92 (2015); Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 863–64 (2021).

5. Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me. (*Northeast Patients Group II*), 45 F.4th 542, 556–58 (1st Cir. 2022).

6. *See infra* Part III.

7. U.S. CONST. art. I, § 8, cl. 3.

8. Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 98 (1994).

9. New Energy Co. v. Limbach, 486 U.S. 269, 273–74 (1988).

Most courts faced with this issue have seemingly found simplicity in applying the Dormant Commerce Clause to strike down state-imposed residency requirements as unconstitutional.[10] This Article argues that there might be a deeper complexity at play. The complexity is that marijuana is a unique commodity—unlike any other legal or illegal drug, or other interstate product. Marijuana is unique because, while a majority of states have legalized the drug in some form,[11] it remains federally illegal under the Controlled Substances Act (CSA).[12] Marijuana is also subject to vastly different laws in the states where it has been legalized. To comply with federal enforcement priorities, some states legalizing the drug have created comprehensive regulatory regimes where marijuana is cultivated, processed, and sold wholly within state borders.[13] These states have effectively created "hermetically sealed" intrastate cannabis markets,[14] with some having their own economic motivations for preventing the growth of a more robust interstate marijuana commerce.[15]

Despite being illegal under the CSA, there is still an interstate market for marijuana.[16] And neither the Supreme Court nor Congress denies the existence of an interstate cannabis market.[17] Thus, a legal gray area exists where on the one hand, courts are quick to invalidate residency requirements under the Dormant Commerce Clause—ostensibly to encourage interstate commerce of an illegal drug. On the other hand, a looming uncertainty remains as to what extent interstate cannabis commerce can grow without changes to the drug's status under federal law.

10. *See infra* Part III.

11. *See* Alex Leeds Matthews & Christopher Hickey, *More US States Are Regulating Marijuana. See Where It's Legal Across the Country*, CNN (Nov. 7, 2023, 9:35 PM), https://www.cnn.com/us/us-states-where-marijuana-is-legal-dg/index.html [https://perma.cc/4RYW-ZFY9].

12. 21 U.S.C. §§ 801–904.

13. *See infra* Part II.

14. Mikos, *supra* note 4, at 859.

15. *See infra* Part II.

16. *Northeast Patients Group II*, 45 F.4th 542, 547 (1st Cir. 2022).

17. *See* Gonzales v. Raich, 545 U.S. 1, 18 (2005) (finding that marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market"). Since 2014, Congress has attached an appropriation rider declaring that the Department of Justice may not "prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). And the rider makes no distinction between intrastate and interstate marijuana markets. *See id.*

This Article analyzes Dormant Commerce Clause jurisprudence and recent federal court decisions in the context of state marijuana laws. Part I will provide an overview of how courts generally apply the Dormant Commerce Clause. Part II will discuss marijuana regulation and how states structure their regulatory schemes to limit interstate marijuana commerce by using residency requirements in retail licensure. Part III will discuss recent decisions in Dormant Commerce Clause challenges to state residency requirements for retail marijuana licenses. Part IV will evaluate these decisions and argue that a temporary judicial carve-out should exist for marijuana to prevent strict application of the Dormant Commerce Clause. And finally, Part IV will also pose potential justifying factors for residency requirements that could survive strict scrutiny review.

I. DORMANT COMMERCE CLAUSE DOCTRINE OVERVIEW

The Commerce Clause "is one of the most prolific sources of national power,"[18] granting Congress the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[19] The Constitution is silent, however, on the states' authority to regulate interstate commerce. It merely grants a specific power to Congress, without saying "what the states may or may not do in the absence of congressional action."[20] From this silence, courts have created the Dormant Commerce Clause, which operates primarily to restrict states from acting in certain ways that impede interstate commerce. In this vein, states may not enact legislation with the goal of "economic protectionism" which would "benefit in-state economic interests by burdening out-of-state competitors."[21] Federal courts' distaste for protectionist state legislation lies "at the heart of the Constitution itself," which is a "commitment to the free movement of goods among the states."[22]

There is much scholarly debate over whether the Framers intended the Commerce Clause, "in its dormant state, *i.e.*, before being 'awakened' by Congressional action," to prevent state action.[23] The

18. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949).

19. U.S. CONST. art. I, § 8, cl. 3.

20. *H.P. Hood & Sons*, 336 U.S. at 534–35.

21. New Energy Co. of Ind. v. Limbach, 496 U.S. 269, 273–74 (1988).

22. DENNING, *supra* note 2, § 6.06.

23. *Id.* § 6.01[A] (quoting Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 732 (1866)); *id.* § 6.02[C]. For a discussion of legislative history of the Framers' thoughts on the development of the Dormant Commerce Clause, see Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The*

Supreme Court's textualist and originalist members have frequently attacked the doctrine. Justice Scalia described the Dormant Commerce Clause as a "judicial fraud"[24] and as illustrating the Supreme Court's "ad hocery."[25] He focused on the Constitution's text and the lack of historical record for "reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."[26] Justice Thomas has more directly attacked the doctrine by stating that there is "no basis" in the Constitution for the Dormant Commerce Clause.[27] Critics have observed that the Dormant Commerce Clause potentially undermines federalism and judicial restraint because it allows the Court to strike down state laws without sufficient constitutional foundation.[28]

Despite what the Framers may have intended, courts regularly apply the Dormant Commerce Clause to protect interstate commerce from protectionist regulation by the states. Traditionally, the Dormant Commerce Clause prohibits three types of conduct: facial discrimination against out-of-state interests, imposition of unreasonable burdens upon interstate commerce, and extraterritorial regulation.

Courts review state laws that facially discriminate against out-of-state competitors under a rule of almost per se invalidity.[29] A facially discriminatory law will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[30] When a law is facially discriminatory, courts review

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Constitutional Legitimacy of the Dormant Commerce Clause, 97 VA. L. REV. 1877, 1884–94 (2011).

24. Comptroller of Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

25. *Id.* at 574.

26. Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260–61, 263 (1987) (Scalia, J., concurring in part and dissenting in part).

27. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

28. *See generally* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (arguing that the Dormant Commerce Clause has no textual basis); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409 (1992) (pointing out that the Supreme Court's Dormant Commerce Clause jurisprudence grants Congress powers that are not grounded in a textual source).

29. *United Haulers*, 550 U.S. at 338; Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575 (1997).

30. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (quoting Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 101 (1994)).

it under the "strictest scrutiny," where the regulating state bears the burden of proof.[31] While in most cases proof of facial discrimination is fatal, courts have found some state interests—such as preventing fish from infection,[32] scarcity of parking,[33] and preserving "small town communit[ies]"[34]—sufficient to overcome the presumption of unconstitutionality.

Under per se invalidity, courts are not even deferential to state legislatures in the context of traditionally state-regulated industries. Recently, in *Tennessee Wine & Spirits Retailers Association v. Thomas*,[35] the Supreme Court struck down a durational Tennessee residency requirement for retail alcohol licensure. Tennessee required prospective alcohol retailers to be Tennessee residents for two years before applying for a retail liquor license.[36] The Court held that such a residency requirement is unconstitutional because it discriminates on its face against non-Tennessee residents.[37] But the state argued that the Twenty-First Amendment authorized states to limit alcohol sales to certain individuals, thereby allowing states to create regulations as they see fit.[38] The Court recognized the history of alcohol regulation and how it has traditionally been left to the states. Ultimately, however, the Court found itself "firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce."[39] Thus, despite the states' regulatory authority in this context, the Constitution does not give states a "free hand to restrict the importation of [out-of-state] alcohol for purely protectionist purposes."[40]

31. *See* Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979).

32. Maine v. Taylor, 477 U.S. 131, 142–43, 151 (1986).

33. Meekins v. City of New York, 524 F. Supp. 2d 402, 411 (S.D.N.Y. 2007).

34. *See* Island Silver & Spice, Inc. v. Islamorada, 475 F. Supp. 2d 1281, 1291–92 (S.D. Fla. 2007) (suggesting that preserving a small town's character can be a legitimate purpose but ultimately holding that the town's ordinance in this case failed to demonstrate such a purpose).

35. 139 S. Ct. 2449 (2019).

36. Act of June 19, 1997, ch. 543, 1997 Tenn. Pub. Acts 992, 993 (amended 2014) (current version at TENN. CODE ANN. § 57-3-204(b)(2)(A) (Supp. 2017)).

37. *Tenn. Wine & Spirits*, 139 S. Ct. at 2476.

38. *Id.* at 2462–74 (discussing the Dormant Commerce Clause and the Twenty-First Amendment).

39. *Id.* at 2464.

40. *Id.* at 2469 (citing Granholm v. Heald, 544 U.S. 460, 486–87 (2005); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

Even if a law is neutral on its face, it can still be unlawful if it unduly burdens interstate commerce. In *Pike v. Bruce Church, Inc.*,[41] the Court articulated a balancing test: when a "statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[42] Courts have held that states may permissibly require a specific label be placed on products sold within its borders without violating the Dormant Commerce Clause.[43] For example, the United States Court of Appeals for the Sixth Circuit applied the *Pike* balancing test to conclude that Ohio's interest in protecting its consumers "against fraud and deception in the sale of [milk]" outweighed the economic burden the processors faced in complying with the labeling requirements.[44]

Finally, a relatively unexplored area of Dormant Commerce Clause jurisprudence prohibits states from directly regulating commerce occurring wholly outside its own borders.[45] A common context where courts have analyzed extraterritoriality under the Dormant Commerce Clause is in striking down price-posting regulations. Courts usually find that price-posting requirements impermissibly burden interstate commerce by trying to regulate prices beyond a state's borders.[46]

41. 397 U.S. 137 (1970). In *Pike*, the Court invalidated an Arizona statute that required all Arizona cantaloupe to be packed within the state. This statute prohibited a California company, which did not have access to an acceptable packaging facility in Arizona, from shipping cantaloupes to its California packing plant. The Court held that while the law did not discriminate against those engaged in interstate commerce, the state's interest in enhancing the reputation of Arizona cantaloupes was outweighed by the national interest in unencumbered trade. *Id.* at 145.

42. *Id.* at 142.

43. Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 634, 647 (6th Cir. 2010) (label describing nonuse of an artificial hormone in milk); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107–08 (2d Cir. 2001) (label indicating that certain lamps contained mercury).

44. *Boggs*, 622 F.3d at 649–50 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963)).

45. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–643 (1982)) (explaining that the Dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State").

46. *Id.* at 328–29, 338–40 (invalidating a statute which required out-of-state beer shippers to affirm that their prices for products sold to Connecticut businesses were not higher than prices in any bordering state); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580, 583–84 (1986) (invalidating a statute that required alcoholic-beverage sellers to

Recently, the Supreme Court decided that California's ban on the sale of pork from animals confined in a manner inconsistent with California standards did not amount to an impermissible extraterritorial regulation in violation of the Dormant Commerce Clause.[47] The Court held that despite the ban's regulation of out-of-state conduct, the "harm to interstate commerce remains nothing more than a speculative possibility."[48]

Because the Dormant Commerce Clause gives Congress broad authority over interstate commerce, Congress may also authorize state laws that would otherwise be considered discriminatory or unconstitutional. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack . . . ."[49] Accordingly, when a court determines that a state law violates the Dormant Commerce Clause, that decision is only "provisional," as it is subject to

price their product for sale in New York no higher than the out-of-state prices).

47. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157–63 (2023). The district court dismissed the complaint for failure to state a claim, and the Ninth Circuit affirmed, finding that the complaint did not plausibly plead that the California regulation violates the Dormant Commerce Clause. Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1208 (S.D. Cal. 2020), *aff'd*, 6 F.4th 1021 (9th Cir. 2021).

48. *Nat'l Pork Producers Council*, 143 S. Ct. at 1163.

49. Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 174 (1985) (holding that a federal banking statute allowed a group of states to establish a system of banking that discriminated against out-of-state companies, even though it would be invalid under the Dormant Commerce Clause). For a comprehensive review of this topic in the marijuana context, see Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. 839 (2022). Professor Mikos offers a similar theory to the underlying thesis of this Article—namely that, application of the Dormant Commerce Clause to the marijuana industry would be harmful and disruptive. *Id.* at 845. His solution, however, is centered around Congress's ability suspend the Dormant Commerce Clause. *Id.* at 884–92. But that may not be realistic because Congress has become far less productive, passing less than thirty bills in 2023. Moira Warburton, *Why Congress Is Becoming Less Productive*, REUTERS (Mar. 12, 2024), https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/ [https://perma.cc/H4KR-YPWR]. Therefore, as these constitutional challenges continue to appear before courts across the country, the judiciary may be the only branch of government able to address them now and protect fragile intrastate marijuana markets from disruption.

"reallocation by Congress via its consent or reconveyance authority."[50] In other words, Congress may override the Dormant Commerce Clause's normal application by expressly authorizing states to discriminate against interstate commerce. Congressional consent to an otherwise unconstitutional state law must be "unmistakably clear."[51]

For example, the United States Court of Appeals for the Third Circuit found "unmistakably clear" congressional authorization in the Intermodal Surface Transportation Efficiency Act (ISTEA)[52] to allow states to enact legislation that allocates highway toll revenue for purposes unrelated to toll roads.[53] The court found that the ISTEA specifically contemplated that excess toll funds collected would be collected and spent on non-toll projects.[54] In contrast, the Supreme Court found that the Federal Agriculture Improvement and Reform Act[55] did not authorize California to discriminate against out-of-state dairy farmers via price-regulation statutes.[56] While the statute did not explicitly mention laws regulating pricing, the Supreme Court refused to assume that Congress intended to "insulate California's pricing and pooling laws from a Commerce Clause challenge."[57] The Supreme Court

50. DENNING, *supra* note 2, § 9.01 (alterations omitted) (quoting Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 221 (1957)).

51. *Id.* § 9.06 (quoting South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 91 (1984)). While consent need not be "an explicit statement," courts are usually reluctant to infer consent even "if Congress has provided similar authorization in other specific instances." *Id.* (discussing *Sporhase v. Nebraska*, 458 U.S. 941, 958–60 (1982), where the Court found no congressional intent to exempt state water regulation from the Dormant Commerce Clause, even though Congress had deferred to state water control statutes thirty-seven other times). Justice Scalia rejected this inquiry—he argued that it is "utterly illogical" to accept that congressional authorization would allow states to enact laws that discriminate against interstate commerce. Comptroller of the Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

52. Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified as amended in scattered titles of U.S.C.); 23 U.S.C. § 129(a)(3).

53. Owner Operator Indep. Drivers Ass'n v. Pa. Tpk. Comm'n, 934 F.3d 283, 292–94 (3d Cir. 2019). Motorists who routinely used toll highways sued arguing that the state's implementation of "exorbitantly high tolls" violated the Dormant Commerce Clause. *Id.* at 288.

54. These projects included improvements to walkways and public transportation facilities. *Id.* at 292–93.

55. Pub. L. No. 104-127, 110 Stat. 888 (1996) (codified as amended in scattered titles of U.S.C.); 7 U.S.C. § 7254.

56. Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 66–67 (2003).

57. *Id.* at 66.

has even found evidence of congressional consent lacking in a situation where Congress has banned the same interstate activity that the state seeks to inhibit.[58]

The Dormant Commerce Clause has a long history in the federal courts. While the law applied under this doctrine may seem "hopelessly confused,"[59] it nonetheless creates a struggle concerning the role of federalism in commerce regulation. The inherent tug-of-war between federal and state law is underscored by the unique status of marijuana and interstate regulation of the drug.

II. MARIJUANA REGULATION IN THE STATES

For most of American history, marijuana use was legal under both federal and state law.[60] But in the early twentieth century, motivated in large part by racism and xenophobia, states began criminalizing the drug.[61] In 1937, Congress passed the Marihuana Tax Act,[62] which did not criminalize marijuana outright but significantly constrained doctors from prescribing the drug.[63] Marijuana was then dropped from the *United States Pharmacopeia* in 1942, causing the drug to lose much of its remaining therapeutic legitimacy.[64]

58. Maine v. Taylor, 477 U.S. 131, 132–33, 137–40 (1986) (finding that a federal statute which made it a crime to import and export "any fish or wildlife taken . . . in violation of any . . . State [law]," did not authorize states to ban importation of out-of-state bait fish but upholding Maine's regulation because it served "a legitimate local purpose") (quoting 16 U.S.C. § 3372(a)(2)(A)).

59. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

60. Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81 (2015). Marijuana was used to treat a variety of ailments. Kennedy Dickson, Catherine Janasie & Kristine L. Willett, *Cannabinoid Conundrum: A Study of Marijuana and Hemp Legality in the United States*, 10 ARIZ. J. ENV'T L. & POL'Y, 132, 135 (2019).

61. Chemerinsky et. al, *supra* note 60, at 81.

62. Pub. L. No. 75-238, 50 Stat. 551 (1937), *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

63. *See id.* § 2, 50 Stat. at 552–53; *see also* Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO ST. J. CRIM. L. 99, 101–02 (2020).

64. Chemerinsky et al., *supra* note 60, at 82; David Downs, *The Science Behind the DEA's Long War on Marijuana*, SCI. AM. (Apr. 19, 2016), https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/ [https://perma.cc/56UG-NMHH]. The United States Pharmacopeia (USP) is a compendium of drug information that establishes reference standards for medicines, dietary supplements, and

Since 1970, marijuana has been classified as a Schedule I drug under the CSA.[65] Schedule I substances are a category of drugs that includes heroin and LSD, which, among other things, have no currently accepted medical use.[66] Classification as a Schedule I controlled substance makes an interstate market for a drug illegal.[67] But for a variety of reasons—including widespread availability of the drug, history of racially disparate impacts of drug laws, and economic impact of marijuana law enforcement—states have moved away from outright prohibition of marijuana.[68] Since 1996, thirty-eight states have legalized marijuana for medical purposes.[69] Since 2012, twenty-four states have legalized marijuana for recreational purposes.[70] And because of the federal prohibition, states that have legalized the drug each have been tasked with developing their own unique marijuana regulatory schemes. Accordingly, intrastate cannabis market regulation varies widely from state to state.

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food ingredients. These standards are then used by federal regulatory agencies and manufacturers to ensure that products are safe and consistent for use. *See What Is the U.S. Pharmacopeia?*, U.S. PHARMACOPEIA (Aug. 4, 2015), https://qualitymatters.usp.org/what-us-pharmacopeia [https://perma.cc/NG4B-6S5G]. Interestingly, eighty years later, USP is in the process of adding cannabis back to the list of herbal medicines. Leo Bear-McGuinness, *United States Pharmacopeia Prepares to Add the Cannabis Plant to Its List of Herbal Medicines*, ANALYTICAL CANNABIS (Sept. 28, 2022), https://www.analyticalcannabis.com/news/united-states-pharmacopeia-prepares-to-add-the-cannabis-plant-314194 [https://perma.cc/H679-9XJY].

65. 21 U.S.C. § 812(c). Recently, the Attorney General submitted a notice of proposed rulemaking to initiate a formal rulemaking process to consider moving marijuana from a Schedule I to Schedule III drug. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (proposed May 21, 2024) (to be codified at 21 C.F.R. pt. 1308).

    If implemented, this proposal would mark a monumental shift in drug regulation. Some commentators, however, are not convinced the DEA is on board with this plan. David Pozen, *Reading the Tea Leaves on Marijuana Rescheduling*, BALKINIZATION (May 20, 2024), https://balkin.blogspot.com/2024/05/reading-tea-leaves-on-marijuana.html [https://perma.cc/7925-RVTY]. This Article proceeds on the assumption that, at least for the foreseeable future, marijuana will remain a Schedule I drug.

66. *Id.* § 812(b)(1).

67. *See id.* §§ 841, 844; Gonzales v. Raich, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense . . . .").

68. Chemerinsky et al., *supra* note 60, at 84–85.

69. Matthews & Hickey, *supra* note 11.

70. *Id.*

In 2012, following the legalization of recreational marijuana in Colorado and Washington,[71] the federal government issued the Cole Memorandum to provide guidance on federal drug law enforcement of marijuana.[72] Of relevance to interstate commerce, the Cole Memorandum stated that one of the government's top priorities is to "[p]revent[] the diversion of marijuana from states where it is legal under state law in some form to other states."[73] Thus, to comply with the federal government's enforcement priorities, states have restricted interstate marijuana commerce in two ways. First, every state that has legalized marijuana in some form prohibits interstate sales of cannabis.[74] Individuals cannot import out-of-state marijuana, nor can they export marijuana grown in-state. For example, Minnesota prohibits the intentional transfer of "medical cannabis to a person . . . outside of Minnesota."[75] Oregon prohibits any person from "import[ing] marijuana items into [the] state or export[ing] marijuana items from [the] state."[76] While not the focus of this Article, a question remains as to whether these export-import laws may also violate the Dormant Commerce Clause.[77]

71. *Id.*

72. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to All U.S. Att'ys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf [https://perma.cc/7RLQ-7AX2] [hereinafter Cole Memorandum]. Although the Department of Justice has since rescinded the memorandum, the government still adheres to its nonenforcement policy toward state-legal cannabis activities through congressional enactment of appropriation riders. Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Just., to All U.S. Att'ys (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement [https://perma.cc/CT6K-3DQ7]; JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10694, FUNDING LIMITS ON FEDERAL PROSECUTIONS OF STATE-LEGAL MEDICAL MARIJUANA 1–3 (2022). Federal courts have also interpreted the rider to prohibit certain federal prosecutions of individuals who participate in state-authorized medical marijuana activities. *See, e.g.*, United States v. McIntosh, 833 F.3d 1163, 1176–79 (9th Cir. 2016).

73. *See* Cole Memorandum, *supra* note 72, at 1.

74. Mikos, *supra* note 4, at 862.

75. MINN. STAT. § 152.33(1a) (2023) (levying a $250,000 fine on violators of this law).

76. OR. REV. STAT. § 475C.229(2) (2023). Other examples include WASH. ADMIN. CODE. § 314-55-520 (2023) ("Transportation of cannabis outside of Washington state boundaries" results in retail "license cancellation") and 28 PA. CODE § 1161a.35(a)(3) (2023) ("A dispensary may not transport medical marijuana products to any location outside of this Commonwealth.").

77. Robert A. Mikos, *Are State Bans on the Importation of Marijuana Next to Fall Under the DCC?*, VAND. UNIV.: MARIJUANA L., POL'Y, & AUTH.

The second type of restriction, and the restriction of focus in this Article, are state residency requirements for retail marijuana license applications. Early residency requirements were based on a fear that legally obtained marijuana could be easily diverted into the black market.[78] Many state residents even demanded residency requirements because they believed that "[a]llowing people from outside the state" would not benefit in-state residents who fought for marijuana legalization in the employment context.[79] Residency requirements are also touted as necessary to allow in-state small businesses to flourish without fear of "Big Marijuana" usurping opportunities and investment capital.[80] State residency requirements can also be seen as a way to protect public health. Requiring that only residents participate in retail

BLOG (Aug. 22, 2022), https://my.vanderbilt.edu/marijuanalaw/2022/08/are-state-bans-on-the-importation-of-marijuana-next-to-fall-under-the-dcc/ [https://perma.cc/KU9Y-T2RD]; Marc Hauser, *How Interstate Commerce Could Upend the Marijuana Industry*, MJ BIZ DAILY (Dec. 20, 2021), https://mjbizdaily.com/how-interstate-commerce-could-upend-the-marijuana-industry/ [https://perma.cc/68ZX-8P43]. The Supreme Court has largely avoided the issue of controversies between states after legalization. *See* Nebraska v. Colorado, 577 U.S. 1211 (2016) (Thomas, J., dissenting from denial of motion for leave to file bill of complaint). After Colorado legalized marijuana in 2012, Nebraska and Oklahoma filed a motion seeking leave to file a complaint against Colorado. The states (who share borders with Colorado) alleged that state marijuana legalization was preempted by the CSA and "affirmatively facilitate[d] the violation and frustration of federal drug laws." *Id.* at 1213–14. The states worried that legalization in Colorado would lead to increased marijuana trafficking across state borders. The Supreme Court ultimately denied the motion for leave. But Justice Thomas dissented, arguing that the Court does not have discretion to deny states leave to file original actions. *Id.* at 1211, 1213–14.

78. ALLIE HOWELL, RESIDENCY REQUIREMENTS FOR MARIJUANA LICENSURE, REASON FOUND. 3 (2019), https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf [https://perma.cc/NWD5-DB7F]. Colorado has since relaxed its state residency requirement. *Id.* at 5. *See* COLO. REV. STAT. § 44-10-313 (2023).

79. Jackie Borchardt, *Ohio Medical Marijuana Entrepreneurs Want Residency Requirement for Business Licenses*, CLEVELAND.COM (Mar. 20, 2017, 10:00 PM), https://www.cleveland.com/metro/2017/03/ohio_medical_marijuana_entrepr.html [https://perma.cc/P8PX-ZME6].

80. John Schroyer, *For Some, US Marijuana Industry Becoming a David-Versus-Goliath Battle*, MJ BIZ DAILY (Mar. 15, 2022), https://mjbizdaily.com/is-big-versus-small-battle-emerging-in-us-cannabis-industry/ [https://perma.cc/9SDQ-7JB5]; Jeff Smith, *Have Cannabis Residency Requirements Worn Out Their Welcome?*, MJ BIZ DAILY (Dec. 17, 2021), https://mjbizdaily.com/have-cannabis-residency-requirements-worn-out-their-welcome/ [https://perma.cc/2TSD-XTVW].

sale of marijuana could help ensure that all products being sold meet the state's regulatory manufacturing and packaging requirements.[81]

The requirements vary in their particulars from state to state, but state residency is a firm prerequisite to obtaining licensure.[82] For example, some states, like Washington, require applicants to have resided in the state for at least six months prior to application.[83] Others, like Alaska, require residency only at the time of application.[84]

Various states and localities have also created social equity licensing initiatives to assist state residents with obtaining retail marijuana licenses. Social equity programs operate to address historical injustices of the War on Drugs by providing opportunities in the cannabis industry for those most impacted.[85] Social equity programs give eligible individuals benefits, such as extra points on their applications for licensure or access to special resources, that would be unavailable to noneligible individuals.[86] Licenses obtained through these initiatives are often based on an applicant's "personal circumstances and . . . a broader conceptualization of a disproportionately affected or deserving

81. *See* Mona Zhang, *Courts Could Throw State Marijuana Markets into Disarray*, Politico (Oct. 2, 2022, 7:00 AM), https://www.politico.com/news/2022/10/02/courts-could-throw-state-marijuana-markets-into-disarray-00058029 [https://perma.cc/4XTW-Q642]; Patrick Murphy & John Carnevale, *A Framework for Regulating Legal Marijuana*, *in* Legal Marijuana: Perspectives on Public Benefits, Risks and Policy Approaches 181, 182–85 (Joaquin Jay Gonzales III & Mickey P. McGee eds., 2019); *see also* Conn. Gen. Stat. § 21a-421*l* (2023) (requiring all policies and procedures for cannabis cultivation, processing, manufacture, security, storage, inventory, and distribution to "promote public health and safety").

82. *See* Alaska Admin. Code tit. 3, § 306.015(b) (2024); 935 Mass. Code Regs. 500.101(b)(1)(a) (2024); Wash. Admin. Code § 314-55-020(1)(d) (2023); 410 Ill. Comp. Stat. 705/15-30(c)(8) (2022); Nev. Admin. Code § 453D.272 (2019); Miss. Code Ann. § 41-137-35(12) (2024); Mont. Code Ann. § 16-12-203(1)(a)(ii) (2023); N.Y. Cannabis Law § 3(1) (McKinney Supp. 2024); Okla. Stat. tit. 63, § 427.14(E)(11) (2023); 21 R.I. Gen. Laws § 21-28.11-10.2(b) (Supp. 2023).

83. Wash. Admin. Code § 314-55-020(1)(d) (2023).

84. Alaska Admin. Code tit. 3, § 306.015(b) (2024).

85. *See* Alex Malyshev & Sarah Ganley, *The Challenges of Getting Social Equity Right in the State-Legal Cannabis Industry*, Reuters (July 22, 2021, 10:48 AM), https://www.reuters.com/legal/litigation/challenges-getting-social-equity-right-state-legal-cannabis-industry-2021-07-22/ [https://perma.cc/QY7V-RBKH].

86. The type of benefits available will also vary by state and program. Lauren Devine, Comment, *The Ethics and Economics of Social Equity in the Cannabis Industry: Making a "Compelling" Case for Constitutional, Impactful, and Sustainable Inclusivity Programs in Ohio and Beyond*, 47 U. Dayton L. Rev. 341, 352 (2022).

community."[87] Residency requirements are a common part of social equity initiative criteria.[88]

For example, Vermont's social equity initiative requires an applicant to be a resident of Vermont and meet at least one of the following criteria: (1) be a "socially disadvantaged individual"; (2) have served a sentence of incarceration in a correctional facility as a result of a cannabis-related conviction; (3) have a family member who has served a sentence for incarceration for a similar offense; or (4) be able to demonstrate that they are from a community that historically has been disproportionately impacted by cannabis prohibition and that they have been personally harmed by that impact.[89] Further, to benefit from the social equity program, at least 51 percent of the business must be owned by other social equity applicants.[90]

In states without residency requirements, several cannabis corporations have mastered the art of obtaining retail marijuana licenses. These

87. JANA HRDINOVÁ & DEXTER RIDGWAY, DRUG ENF'T & POL'Y CTR., THE OHIO STATE UNIV. MORITZ COLL. OF L., MAPPING CANNABIS SOCIAL EQUITY: UNDERSTANDING HOW OHIO COMPARES TO OTHER STATES' POST-LEGALIZATION POLICIES TO REDRESS PAST HARMS, OHIO STATE DRUG ENFORCEMENT & POLICY CENTER 13 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4710513 [https://perma.cc/CP8C-5XLC].

88. In Illinois, social equity program applicants with at least 51 percent ownership control of a marijuana business must have been state residents for five of the preceding ten years in a disproportionately impacted area. ILL. ADMIN. CODE tit. 14, § 650.15 (2020). Massachusetts's social equity program requires residency in the state for at least the past twelve months. MASS. CANNABIS CONTROL COMM'N, GUIDANCE ON EQUITY PROGRAMS 3 (2020), https://masscannabiscontrol.com/wp-content/uploads/2023/03/Guidance-on-Equity-Programs.pdf [https://perma.cc/KHM4-Q782]. Oakland, California's social equity program requires Oakland residency for ten years at the time of application. OAKLAND MUN. CODE § 5.81.060 (2024), https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT5BUTAPERE_CH5.81MEADECACUMAOTFAPE_5.81.060EQPEPR [https://perma.cc/3XSF-8PZ8].

89. VT. CANNABIS CONTROL BD., Rule 1.1.3, https://ccb.vermont.gov/sites/ccb/files/2023-10/CCBRule1-Licensing.pdf [https://perma.cc/5284-32CM]. A "socially disadvantaged individual" must either meet certain federal criteria under the Disadvantaged Business Enterprise (DBE) Program or be "from a community that has historically been disproportionately impacted by cannabis prohibition and [is] able to demonstrate" personal harm by the disproportionate impact. *Id.*; *see also* 49 C.F.R. § 26.67(a)(1) & (b)(2)–(3) (DBE regulations).

90. VT. CANNABIS CONTROL BD., GUIDANCE FOR SOC. EQUITY APPLICANTS 3 (2022), https://ccb.vermont.gov/sites/ccb/files/2022-07/Social.Equity.Guidance_FINAL_0.pdf [https://perma.cc/MH4U-B6YH].

companies are known as "multi-state operators" (MSOs).[91] Many MSOs are publicly traded with billion-dollar valuations.[92] While these companies are not permitted to ship cannabis products across state lines, "they can share intellectual property, equipment, branding, and employees across states."[93] With an ever-growing market for both medical and recreational marijuana, MSOs are an attractive and potentially lucrative opportunity in the industry. Thus, it is likely that more MSOs, or companies attempting to become MSOs, will challenge the constitutionality of state residency requirements to open the borders on the interstate cannabis market.

III. RECENT DORMANT COMMERCE CLAUSE CHALLENGES TO STATE MARIJUANA LAWS

In a matter of first impression, the First Circuit held that Maine's residency requirement for officers and directors of medical marijuana dispensaries violated the Dormant Commerce Clause. At issue in *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine* (*Northeast Patients Group II*)[94] was a portion of Maine's marijuana regulatory regime which provided that, for a dispensary to be authorized to sell medical marijuana, "[a]ll officers or directors . . . must be residents of [Maine]."[95] Northeast Patients Group is a corporation wholly owned by three Maine residents, and it owns and operates three of the state's seven licensed dispensaries.[96] High Street

91. Jeff Smith, *Marijuana Multistate Operators Set to Capitalize on New Markets, but Small Firms Face Hurdles*, MJ BIZ DAILY (Dec. 17, 2021), https://mjbizdaily.com/marijuana-multistate-operators-set-to-capitalize-on-new-markets-but-small-firms-face-hurdles/ [https://perma.cc/QEZ9-KK9R].

92. Debra Borchardt, *The Cannabis Industry's Top 12 U.S. Multi-State Operators*, GREEN MKT. REP. (Mar. 20, 2019), https://www.greenmarketreport.com/the-cannabis-industrys-top-12-u-s-multi-state-operators/ [https://perma.cc/4TMH-YYQT].

93. *Id.*

94. 45 F.4th 542, 558 (1st Cir. 2022) (affirming summary judgment for plaintiffs challenging the constitutionality of Maine's residency requirements).

95. ME. REV. STAT. ANN. tit 22, § 2428(6)(H) (2023). "Dispensary" is defined as "an entity . . . that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, sells, supplies or dispenses cannabis plants or harvested cannabis or related supplies and educational materials to qualifying patients and the caregivers of those patients." *Id.* § 2422(6). "Officer or director" is defined to include "a director, manager, shareholder, board member, partner or other person holding a management position or ownership interest in the organization." *Id.* § 2422(6B).

96. *Northeast Patients Group II*, 45 F.4th at 544.

Capital, a Delaware corporation owned by non-Maine residents, attempted to acquire Northeast Patients Group. But under Maine law, the resulting company would not have been able to obtain a dispensary license because the "officers or directors" of the new company would have included non-Maine residents.[97]

The two corporations sued the state alleging that the residency requirements violated the Dormant Commerce Clause. The district court permanently enjoined the enforcement of Maine's residency requirement because it violated the Dormant Commerce Clause.[98] The district court found that the facially discriminatory residency requirement is the "sort of economic protectionism that the Supreme Court has long prohibited."[99] On appeal, the state defendants did not dispute that if Maine's residency requirement were applied to a lawful market, it would fail under the Dormant Commerce Clause's per se rule of invalidity. Nor did they disagree that the law would fail strict scrutiny because it was not "narrowly tailored to advance a legitimate local purpose."[100] Thus, the only question posed to the First Circuit was whether the Dormant Commerce Clause applied to the cannabis market at all, even though the drug remained illegal under federal law. The answer was a decisive yes.

That court reasoned that it would be a logical fallacy to assume that "it is impossible for there to be an interstate market in any good that, under federal law, is contraband throughout the country."[101] In the First Circuit's view, an interstate market for marijuana exists based on three premises: (1) the persistence of "black markets" for the drug;[102] (2) the Supreme Court's recognition of an interstate marijuana market in connection with Congress's attempt to exercise its affirmative

97. *Id.* at 544–45.

98. Ne. Patients Grp. v. Me. Dep't of Admin. & Fin. Servs. (*Northeast Patients Group I*), 554 F. Supp. 3d 177, 185 (D. Me. 2021).

99. *Id.* (quoting Lowe v. City of Detroit, 544 F. Supp. 3d 804, 813, 815–16 (E.D. Mich. 2021) (enjoining enforcement of a similar residency-requirement marijuana retail license law)). The district court also emphasized that this is the first final decision confronting this specific issue. "But given the Supreme Court's and First Circuit's unmistakable antagonism towards state laws that explicitly discriminate against nonresident economic actors," Maine's residency requirement was deemed unconstitutional. *Id.*

100. *Northeast Patients Group II*, 45 F.4th at 546 (alteration omitted) (quoting Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019)).

101. *Id.* at 547. The district court also emphasized that "[t]he CSA says nothing about eliminating a national market, but merely criminalizes various acts of possession, manufacture, and distribution of [marijuana]." *Northeast Patients Group I*, 554 F. Supp. 3d at 184.

102. *Northeast Patients Group II*, 45 F.4th at 547.

Commerce Clause power in *Gonzales v. Raich*;[103] and (3) Congress's enactment of the Rohrabacher-Farr Amendment.[104] The court emphasized that the very barrier Maine imposed on out-of-state actors entering the in-state cannabis market "reflects the reality that the [interstate] market continues to operate," and that it "attract[s] entrants [from] far and wide."[105] Thus, the First Circuit found it unlawful for Maine to interfere with interstate cannabis commerce by imposing a residency requirement on retail business owners.[106]

In dissent, Judge Gelpí argued that the national market for marijuana is unlike any other market relevant to Dormant Commerce Clause jurisprudence "in one crucial regard: it is illegal."[107] Despite Maine's residency requirement being "incontestably . . . protectionist legislation," Judge Gelpí wrote that the traditional tests of per se invalidity for discriminatory laws should not apply because illegal markets are "constitutionally different in kind."[108] In Judge Gelpí's view, the medical marijuana corporations here "should not be able to receive a constitutional remedy in federal court to protect the sale" of a federally illegal drug.[109]

103. *Id.* (citing Gonzales v. Raich, 545 U.S. 1, 5 (2005)). In *Gonzales*, the Court held that Congress has the authority under the Commerce Clause to criminalize the production and use of homegrown cannabis even if state law allows it for medical purposes. 545 U.S. at 9.

104. *Northeast Patients Group II*, 45 F.4th at 547. The Rohrabacher-Farr Amendment bars the Justice Department from using federal funds to interfere with state-legal medical cannabis markets. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 ("None of the funds made available . . . to the Department of Justice may be used . . . to prevent [such States] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."). The amendment does not affect the drug's legality under the CSA, and it must be renewed each fiscal year to remain in effect. Congress has renewed the amendment through September 30, 2024. Consolidated Appropriations Act, 2024, Pub. L. No. 118-122, § 531.

105. *Northeast Patients Group II*, 45 F.4th at 547.

106. *Id.* at 556, 558.

107. *Id.* at 558 (Gelpí, J., dissenting).

108. *Id.* at 558–59.

109. *Id.* at 560. Recently, the United States District Court for the District of Maryland adopted Judge Gelpí's reasoning in denying a preliminary injunction against Maryland's cannabis administration. Jensen v. Md. Cannabis Admin., No. 24-0273-BAH, 2024 WL 811479, at *10 (D. Md. Feb. 27, 2024). The plaintiff requested that the court enjoin enforcement of Maryland's retail cannabis social equity program, which requires state residency to participate. *Id.* at *1–2. The court refused and found application of the Dormant Commerce Clause to state recreational marijuana laws logically inconsistent because it "would only encourage

In a similar approach to the majority in *Northeast Patients Group II*, federal district courts in Michigan and Missouri have recently issued preliminary injunctions blocking the enforcement of marijuana license residency requirements. In the Michigan decision *Lowe v. City of Detroit*,[110] plaintiffs challenged a city ordinance that prioritized residents of Detroit for at least ten years among those applying for a retail marijuana license.[111] That court endorsed the *Northeast Patients Group I*[112] reasoning, finding that Detroit's residency requirement largely mirrored Maine's. Thus, the court enjoined enforcement of the Detroit ordinance because its "facial favoritism . . . embodie[d] precisely the sort of economic protectionism that the Supreme Court has long prohibited."[113]

In the Missouri decision *Toigo v. Department of Health and Senior Services*,[114] the court proceeded similarly, finding that a marijuana license applicant was likely to succeed on his Dormant Commerce Clause claim that Missouri's one-year durational residency requirement was unconstitutional.[115] The state argued that the residency requirement fulfilled legitimate local interest because it was necessary to conduct thorough background checks on prospective licensees.[116] But the court rejected this argument, emphasizing that there were other "nondiscriminatory means of advancing [the] interest of preventing illicit diversion of medical marijuana" besides enforcing a residency requirement for retail license applicants.[117] Thus, the court held that

out-of-state participation in the [in-state] cannabis market, which would be contrary to Congress' exercise of Commerce Clause power in enacting the [Controlled Substances Act]." *Id.* at *11 (alterations in original) (quoting Variscite NY Four, LLC v. N.Y. State Cannabis Control Bd., No. 1:23-cv-01599, 2024 WL 406490, at *12 (N.D.N.Y. Feb. 2, 2024)).

110. 544 F. Supp. 3d 804 (E.D. Mich. 2021).

111. *Id.* at 806. This residency requirement was tied to social equity efforts to alleviate the impact of the War on Drugs on Detroit residents. *Id.* at 812.

112. NPG, LLC v. City of Portland, No. 20-CV-00208, 2020 WL 4741913 (D. Me. Aug. 14, 2020).

113. *Lowe*, 544 F. Supp 3d at 816 (citing Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008)). The *Lowe* court also found that Detroit's residency requirement probably violated the Equal Protection Clause and the Right to Travel guaranteed by the Michigan Constitution. *Id.* at 814–15.

114. 549 F. Supp. 3d 985 (W.D. Mo. 2021).

115. *Id.* at 993–94, 996.

116. *Id.* at 991–92.

117. *Id.* at 987, 992–94. A nondiscriminatory means could be requiring "applicants to consent to a criminal background check and disclos[ing] their own records." *Id.* at 993.

this justification likely was not "narrowly tailored to advance [a] legitimate interest in crime prevention."[118]

In contrast, other district courts have shied away from the merits of Dormant Commerce Clause claims. These courts fear that enjoining residency requirements would compel performance of an illegal activity, thereby violating the notion that plaintiffs seeking equitable relief "must come with clean hands."[119]

The United States District Court for the Western District of Oklahoma recently dismissed a challenge to Oklahoma's marijuana license residency requirement under the "unclean hands doctrine" in *Original Investments, LLC v. Oklahoma*.[120] There, a Washington-owned corporation attempted to obtain an Oklahoma retail medical marijuana license but was precluded from doing so by law.[121] Oklahoma's residency requirement bars nonresidents from obtaining retail marijuana licenses and from owning more than 25 percent of any state-licensed marijuana business.[122] The firm sued various state officials, claiming that the state's residency requirement violated the Dormant Commerce Clause.[123]

But in evaluating the state's motion to dismiss, the court never reached the merits of the Dormant Commerce Clause claim. Instead, the court invoked the unclean hands doctrine and refused to "use its equitable power to facilitate illegal conduct."[124] The unclean hands doctrine is a defense that applies to withhold equitable relief that would encourage illegal activity.[125] Determining whether the doctrine of

118. *Id.* at 993–94.

119. Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 959 (9th Cir. 2015) (quoting Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944)). For example, courts have denied jurisdiction over marijuana licensing disputes. *See* Medigrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n, 487 F. Supp. 3d 364, 368–69, 376 (D. Md. 2020); Brinkmeyer v. Wash. State Liquor & Cannabis Bd., No. C20-5661 BHS, 2020 WL 5893807, at *2–3 (W.D. Wash. Oct. 5, 2020).

120. 542 F. Supp. 3d 1230, 1234–35, 1237 (W.D. Okla. 2021).

121. *Id.* at 1231 & n.1.

122. *See* OKLA. STAT. tit. 63, § 427.14(E)(7)(c) (2023).

123. *Original Investments*, 542 F. Supp. 3d at 1231.

124. *Id.* at 1232–34 (quoting Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1054 (10th Cir. 2017)).

125. *See* Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 174 (3d Cir. 2001) (citing Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933)). For more on the unclean hands doctrine, see T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1829–31, 1836–90 (2018).

unclean hands precludes relief requires balancing the alleged wrongdoing of the plaintiff against that of the defendant.[126]

Here, the court found that allowing nonresidents to obtain retail marijuana licenses "does not tip the scale" in favor of granting equitable relief.[127] And if the court were to invalidate the residency requirement as unconstitutional under the Dormant Commerce Clause, that action "would facilitate criminal activity more . . . than would a denial of equitable relief."[128]

In contrast, the United States District Court for the Northern District of Illinois rejected the applicability of the unclean hands defense in a similar constitutional challenge.[129] In *Finch v. Treto*,[130] the court held that "both parties have 'unclean hands' in that they are engaging with the business of distributing a controlled substance, but only one party has soiled the federal Constitution."[131] Thus, the court found that enjoining the enforcement of Illinois's residency requirement "[did not] conflict with federal law" because an injunction does not compel any party to participate in marijuana commerce.[132]

The United States District Court for the Eastern District of California took a more nuanced approach to the applicability of the unclean hands defense against a Dormant Commerce Clause challenge to the City of Sacramento's social equity marijuana licensing program.

126. Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 960 (9th Cir. 2015).

127. *Original Investments*, 542 F. Supp. 3d at 1235.

128. *See id.* The court here assumes "without deciding" that allowing nonresidents to have medical marijuana business licenses is an illegal activity because "Congress has expressly declared [marijuana] to be criminal under federal law." *Id.*

129. Finch v. Treto, 606 F. Supp. 3d 811, 831, 833–35 (N.D. Ill. 2022), *aff'd in part, dismissed in part*, 82 F.4th 572 (7th Cir. 2023). *Finch* involved nonresident prospective owners of retail cannabis businesses challenging Illinois's residency requirement. *Id.* at 816. Illinois employed a social equity lottery wherein state residents meeting certain criteria were given preferential treatment during the application process. *Id.* at 818. The court found that while the prospective owners were likely to succeed on the merits of their Dormant Commerce Clause claim, the balance of equities supported denial of the preliminary injunction. *Id.* at 834, 839–40. The court held that although the prospective owners' ability to obtain a license would be narrowed absent an injunction, an injunction would cause applicants to incur more costs and delay in receiving their licenses. *Id.* at 835–38.

130. 606 F. Supp. 3d 811.

131. *Id.* at 833.

132. *Id.* at 833–34.

In *Peridot Tree, Inc. v. City of Sacramento*,[133] a California company sought to obtain a dispensary license but was denied because its application did not meet the requirements of the city's social equity initiative.[134] The social equity program—known as CORE—provides "cannabis business development resources, services, and contracting and shareholder opportunities" to current or former Sacramento residents who live in or previously resided in low-income households.[135] Plaintiffs asserted that the CORE program was unconstitutional because it discriminated against out-of-state applicants in violation of the Dormant Commerce Clause.[136]

Like in *Original Investments*, the court did not reach the merits on the constitutional claim. But instead of making the illegality defense dispositive, the court discussed the applicability of the unclean hands defense and expressed concern that if the court found the defense viable, "it would risk upending significant portions of [California's marijuana regulatory regime]."[137] And if the City were successful in raising the defense, participants in the state's cannabis industry "could likely assert it in any dispute about their businesses and contracts."[138] Because of these concerns, and the lack of clarity on federal law, the court invoked the *Burford* abstention doctrine and abstained from exercising jurisdiction over the case.[139]

133. No. 2:22-cv-00289-KJM-DB, 2022 WL 10629241 (E.D. Cal. Oct. 18, 2022), *rev'd*, 94 F.4th 916 (9th Cir. 2024). On appeal, the Ninth Circuit held that the district court erred in abstaining from deciding the constitutional question presented—whether Sacramento's social equity initiative violated the Dormant Commerce Clause. *Peridot Tree, Inc.*, 94 F.4th at 926–33, 936 (describing that abstention was not appropriate under *Pullman*, *Burford*, *Thibodaux*, or *Colorado River*, nor under general principles of "comity"). The Ninth Circuit understood "the district court's hesitation to resolve whether the Constitution's dormant Commerce Clause prohibits Sacramento's alleged conduct, which may require venturing into the murky forests of state and federal recreational-marijuana law." *Id.* at 935–36. Ultimately, the district court could not avoid the issue "because it approaches the confines of the [C]onstitution." *Id.* at 936 (alteration in original) (quoting Cohens v. State of Virginia, 19 U.S. 264, 404 (1821)).

134. *Peridot Tree, Inc.*, 2022 WL 10629241, at *1–2.

135. *Id.* at *1.

136. *Id.* at *2–3.

137. *Id.* at *9–10.

138. *Id.* at *10.

139. *Id.* at *11 (citing Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943)) ("And the constitutional question, how to apply the Dormant Commerce Clause, is difficult. It is better to allow state courts to answer that question, as they are well-equipped to do."). The court found that despite the plaintiff's raising of constitutional claims, "[d]isputes about California's

Finally, the United States District Court for the Western District of Washington held that the Dormant Commerce Clause does not apply to Washington's intrastate cannabis market and, therefore, could not invalidate the state's residency requirement.[140] In *Brinkmeyer v. Washington State Liquor & Cannabis Board*,[141] an Idaho resident sought "to invest in and own cannabis retail stores in Washington."[142] The court stressed that Congress intended to restrict all types of cannabis commerce with the passage of the CSA.[143] Thus, while marijuana legalization in Washington conflicts with congressional intent, "residency requirements attempt to prevent any interstate commerce in cannabis and to prevent" Washington-grown cannabis from leaving the state.[144]

These recent decisions create severe uncertainty for state marijuana regulation. If more courts reach the merits of constitutional challenges to residency requirements, other aspects of state regulatory regimes and many intrastate markets could be upended. A more uniform approach and treatment of these laws is needed to ensure the stability of intrastate marijuana markets.

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foray into marijuana regulation are thus better resolved in state courts." *Id.* The Ninth Circuit rejected this analysis describing that it was unclear whether Sacramento's permit process for retail marijuana dispensaries qualified as a "complex administrative process" as required under *Burford*. Peridot Tree, Inc. v. City of Sacramento, 94 F.4th 916, 930 (9th Cir. 2024). Overall, the Ninth Circuit held that this case did not warrant *Burford* abstention because it posed significant issues of federal law, did not involve a specialized state-court resolution mechanism, and did not implicate state agency review. *Id.* at 930–31.

140. Brinkmeyer v. Wash. State Liquor & Cannabis Bd., No. C20-5661 BHS, 2023 WL 1798173, at *11–13 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, No. 23-35162, 2023 WL 3884102 (9th Cir. Apr. 11, 2023); WASH. REV. CODE § 69.50.331(b) (2023) ("No license of any kind may be issued to . . . [a] person doing business as a sole proprietor who has not lawfully resided in the state for at least six months prior to applying to receive a license . . . .").

141. No. C20-5661 BHS, 2023 WL 1798173 (W.D. Wash. Feb. 7, 2023).

142. *Id.* at *2. Brinkmeyer provided debt financing to a Washington cannabis store owner. *Id.* The store owner hoped that Brinkmeyer would take over the business. *Id.*

143. *Id.* at *12. "It is also true that the CSA does not affirmatively grant states any power to regulate cannabis, to create wholly intrastate markets in cannabis, or to discriminate against out-of-state citizens in relation to any such state markets. Rather, the CSA flatly forbids the sale and use of cannabis." *Id.*

144. In this way, Washington's residency requirement is more aligned with Congress's intent to "restrict all cannabis commerce." *Id.*

IV. Suggestions for Intrastate Marijuana Market Protection

Marijuana regulation is at a pivotal point in United States history. Recent challenges to state marijuana regulatory regimes risk upending almost forty insular intrastate markets. This Part will evaluate those decisions and argue that, because marijuana is a unique commodity, the Dormant Commerce Clause should not apply so harshly to invalidate residency requirements. But absent special treatment of marijuana, courts will evaluate residency requirements under strict scrutiny. Thus, this Part will also describe potential justifications for residency requirements that could serve as compelling governmental interests.

A. Carve-Out Proposal to Limit Judicial Invalidation of State Laws

This Subpart will evaluate the courts' underlying legal reasoning in considering marijuana residency requirements.

First, it will address the per se invalidity applied in *Northeast Patients Group II*, *Lowe*, and *Finch*. Second, it will suggest the possibility of courts, upon review of state laws, treating marijuana as a unique commodity, thereby necessitating special application of the Dormant Commerce Clause. And third, this Subpart will address why courts should avoid applying the unclean hands defense in the marijuana context.

1. Per Se Invalidity

The First Circuit's invalidation of Maine's residency requirement is the correct constitutional answer when the Dormant Commerce Clause is applied as it is generally understood and marijuana is treated like any other interstate commodity. This is because "[l]icensing statutes that require residency are nearly always invalidated" under the Dormant Commerce Clause.[145] Courts have frequently invalidated durational residency requirements in licensing statutes.[146] For example, statutes requiring out-of-state individuals to pay more in fees to obtain licensing than state residents are also invalid under the Dormant Commerce Clause.[147] Even laws that were facially neutral (i.e., did not directly discriminate against out-of-state individuals), but gave local

145. Denning, *supra* note 2, § 6.07(H).

146. *See, e.g.*, Atlanta Taxicab Co. Owners Ass'n v. Atlanta, 638 S.E.2d 307, 312–13 (Ga. 2006).

147. *See, e.g.*, Pro. Dog Breeders Advisory Council v. Wolff, No. 1:CV-09-0258, 2009 WL 2948527, at *7 (M.D. Pa. Sept. 11, 2009) (invalidating a provision imposing an additional $300 license fee on out-of-state dog breeders while exempting in-state breeders).

businesses the ability to block granting licenses to of out-of-state entities, were found to impermissibly discriminate against interstate commerce.[148] While this may be the most straightforward answer for courts to apply now, it creates significant problems for the future of the federal and state balance of marijuana regulation as discussed below.

2. Treatment as a Unique Commodity

Per se invalidity should not be the end of the inquiry. Marijuana is a unique commodity and should be treated as such—take state alcohol regulation as a model. Both the alcohol and cannabis industries are built traditionally on state-level regulation.[149] Alcohol is also a unique commodity, given its regulatory history and high social costs.[150] Notwithstanding the Supreme Court's invalidation of Tennessee's two-year residency requirement for retail liquor licenses in *Tennessee Wine & Spirits*,[151] in other contexts, courts treat alcohol regulation differently than other interstate commodities under the Dormant Commerce Clause.

For example, courts have upheld the validity of states' "three-tier" alcohol licensing systems.[152] These systems generally require separate licensure for producers, wholesalers, and retailers of alcohol.[153] Many

148. *See* McNeilus Truck & Mfg., Inc. v. Ohio *ex rel.* Montgomery, 226 F.3d 429, 442–43 (6th Cir. 2000).

149. The Twenty-First Amendment respects states' authority to regulate alcohol, which may "slight[] the Dormant Commerce Clause's efforts to halt barriers to free commerce." Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 873 (6th Cir. 2020) (discussing U.S. CONST. amend. XXI, § 2).

150. *See* THOMAS BABOR ET AL., ALCOHOL: NO ORDINARY COMMODITY 11–21, 60–63 (2d ed. 2010) (discussing the history of alcohol regulation, its scientific analysis, and alcohol-related harm and crime).

151. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2476 (2019). *See also supra* notes 35–40 and accompanying text.

152. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 489 (2005) (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)) (finding that the practice of three-tier state alcohol regulatory regimes is "unquestionably legitimate"). But it should not be interpreted that if states implement three-tier systems, they are immune from all Dormant Commerce Clause inquiries. Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1180 (8th Cir. 2021).

153. *Granholm*, 544 U.S. at 466. For example, most wine in the United States is distributed through a three-tier system. *See* FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5 (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf [https://perma.cc/EEE5-RNPZ]. First, a producer must obtain a federal permit to make wine. *Id.* Next, the producer "sells its wine to a licensed wholesaler." *Id.* Finally, the wholesaler then sells the wine to a licensed retailer. *Id.*

states also restrict vertical integration between the tiers.[154] Courts reason that these systems "*can* be a legitimate non-protectionist ground inherently tied to public health and safety measures [that] the Twenty-First Amendment was passed to promote."[155] Within these systems, a state's distinction between in-state and out-of-state participants is permissible if it is "an inherent aspect of the three-tier system."[156] For example, states may regulate wholesalers to control the volume of alcohol sold and require retailers to be physically present within state borders.[157] States may also require that individuals interested in selling liquor within the state participate in the state's three-tier system.[158]

The United States District Court for the Western District of North Carolina, in *B-21 Wines, Inc. v. Stein*,[159] recently upheld a law prohibiting retailers from shipping wine to in-state consumers without a liquor license within the state's three-tier alcohol regulation system.[160] One condition of obtaining a liquor license was that applicants be North Carolina residents unless they fell within a defined exception.[161] The court, citing *Tennessee Wine & Spirits*, noted that there was a "meaningful[]" distinction between discrimination against out-of-state *producers* and out-of-state *retailers*.[162] "[A]llowing out-of-state retailers to circumvent the three-tier system—while still requiring in-state retailers to participate in the system—would render the three-tier system meaningless."[163] The court found that if it invalidated the

154. *See, e.g.*, Bainbridge v. Turner, 311 F.3d 1104, 1106–07 (11th Cir. 2002).

155. B-21 Wines, Inc. v. Stein, 548 F. Supp. 3d 555, 560–61 (W.D.N.C. 2021), *aff'd sub nom.* B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 229 (4th Cir. 2022). *See also Sarasota Wine Mkt.*, 987 F.3d at 1180.

156. Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730, 743 (5th Cir. 2016).

157. Lebamoff Enters. Inc. v. Witmer, 956 F.3d 863, 869–71, 873 (6th Cir. 2020) (rejecting a Dormant Commerce Clause challenge to a Michigan law that permitted Michigan alcohol retailers to deliver directly to Michigan consumers and denying the same delivery options to Indiana retailers who did not have Michigan retail licenses).

158. In other words, alcohol retailers may not sell alcohol outside the system's restraints. *See, e.g.*, Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006); *Cooper*, 820 F.3d at 742–43.

159. 548 F. Supp. 3d 555 (W.D.N.C. 2021), *aff'd*, 36 F.4th 214 (3d Cir. 2022).

160. *Id.* at 561–63.

161. N.C. GEN. STAT. § 18B-102.1(a) (2019).

162. *B-21 Wines*, 548 F. Supp. 3d at 562 (citing Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2470 (2019)).

163. *Id.* (finding that the Twenty-First Amendment does not give states the authority to discriminate against out-of-state alcohol products and producers, and that "[a]llowing producers to circumvent the three-tier system does not undermine the system" like allowing retailers would).

challenged laws, it would treat out-of-state retailers more favorably by putting "North Carolina wine retailers . . . at a competitive pricing disadvantage."[164] The court also recognized that North Carolina had an important interest in maintaining its three-tier system to justify "public health or safety."[165] Overall, the court did not separately address the residency requirement's constitutionality. Instead, it focused its decision on keeping the three-tier system in place in the interest of the stability of the North Carolina alcohol industry.[166]

Treatment of cannabis as a unique commodity, like alcohol, may allow for a more lenient application of the Dormant Commerce Clause in future constitutional challenges. This treatment would align with Judge Gelpí's dissent in *Northeast Patients Group II*, and it may be a better way to respect a state's legitimate interest in the drug's intrastate regulation.[167] Judge Gelpí reasoned that because marijuana is an illegal drug, the traditional Dormant Commerce Clause cases do not apply "automatically or with equal vigor."[168] The Supreme Court has "never indicated that it is a constitutionally cognizable harm"—when laws run afoul of the Dormant Commerce Clause—to out-of-state actors if their interest "consists solely in peddling illicit goods."[169] Thus, if courts treated marijuana as a unique commodity and left intrastate regulation to the states' best judgment, residency requirements for retail marijuana licensure may stand despite the limitations imposed by the Dormant Commerce Clause.[170] Similar to the approach in *B-21*

164. *Id.* (noting that this is "a result not mandated by the [D]ormant Commerce Clause").

165. *Id.* at 560.

166. *Id.* at 561–62.

167. Judge Gelpí even distinguished between a market for liquor licenses and marijuana. *Northeast Patients Group II*, 45 F.4th 542, 558 (1st Cir. 2022) (Gelpí, J., dissenting). For a discussion on states' legitimate interests in creating potentially unconstitutional intrastate marijuana laws, see *infra* Part IV.B.

168. *Northeast Patients Group II*, 45 F.4th at 558.

169. *Id.* at 559 n.1 (discussing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984)).

170. It may be worth considering for states who have legalized marijuana to investigate creating a three-tier system for cannabis regulation. For a more in-depth discussion of this topic, see Jonathan R. Elsner, *An Argument Against Regulating Cannabis Like Alcohol* 2, 5–7 (Ohio State Univ. Drug Enf't & Pol'y Center, Student Paper Series, No. 5, 2019); Rick Kiley, *Can Cannabis Avoid Alcohol's 3-Tier Distribution System?*, CANNABIS INDUS. J. (July 29, 2021), https://cannabisindustryjournal.com/column/can-cannabis-avoid-alcohols-3-tier-distribution-system/ [https://perma.cc/PS3L-5MAY]. A three-tier system may make marijuana more

Wines, the treatment of marijuana as a unique commodity would ensure the stability of states' regulatory regimes.[171] After residency requirements are invalidated, a more robust interstate cannabis industry would arise, and its stability could be impacted by new Dormant Commerce Clause challenges. Instead of arguing that state marijuana laws are discriminatory on their face, out-of-state cannabis industry participants may argue that such laws should be subject to constitutional review because they exert an undue burden on interstate commerce.[172]

Thus, given the unique legal status of marijuana in the United States, Congress should be the branch to regulate the industry on the federal level, as opposed to the federal courts.[173] To hold that states may not erect barriers against interstate cannabis commerce based on a "legislation by default" rationale violates federalism and separation of powers principles.[174]

Marijuana legalization is predicated on a delicate balance of federalism.[175] Federalism dictates that states have inherent self-governance authority. As such, states can "try novel social and

amenable to the alcohol case law and reasoning described *supra* notes 152–53 and accompanying text.

171. *B-21 Wines*, 548 F. Supp. 3d at 560–63.

172. *See* Mikos, *supra* note 4, at 885–88; *see also* Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 982–90 (2017) (discussing the applicability of the extraterritoriality Dormant Commerce Clause doctrine to regulating out-of-state marijuana transactions).

173. Invalidation of state marijuana law not only puts entire regulatory schemes in peril, see *infra* Part IV.B, but it also raises concerns for state authority. *See also* Mikos, *supra* note 49, at 879–84.

174. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (discussing bicameralism and presentment). *See also* Redish & Nugent, *supra* note 28, at 572 ("Our federal constitutional democracy prohibits the unrepresentative federal judiciary from invalidating decisions of the state legislatures except when authorized by some provision or combination of provisions of the Constitution . . . ."). While Redish and Nugent go so far to conclude that the Dormant Commerce Clause is invalid in all contexts, this Article is limited in its scope to show how courts should create a carve-out to the doctrine in the marijuana context. *Id.* at 572–73.

175. Friedman & Deacon, *supra* note 23, at 1879 (quoting *Camps Newfound/Owatonna*, 520 U.S. at 612 (Thomas, J., dissenting)) ("Given that the [courts are] striking down state laws without sufficient constitutional foundation, the dormant Commerce Clause 'undermines the delicate balance [of federalism] . . . .'").

economic experiment[ation] without risk to the rest of the country."[176] Marijuana regulation is the perfect example of state experimentation because "it is arguably the first time since the Constitution was adopted in 1787 that states have created and operated entire economies outside of federal law."[177] As Justice O'Connor lamented in her *Gonzales v. Raich* dissent, federal regulation of intrastate marijuana activities through the Commerce Clause "extinguishes" the role of states as laboratories.[178] While states establish and work with their marijuana regulatory regimes, courts should allow for experimentation and individual state judgment to take priority over strict application of the Dormant Commerce Clause.

A carve-out for marijuana under the Dormant Commerce Clause would also protect the critical "political inertia" of federalism.[179] When courts employ the Dormant Commerce Clause to invalidate state marijuana law, states must force Congress to reverse the judicial decision through legislation. But because of the "difficulty in obtaining affirmative congressional action,"[180] deregulating state marijuana regimes cuts further against state authority.[181]

When respecting the federalism balance, the federal judiciary, as the "most insulated" branch of government from state influence, should not be forced to make the "initial legislative judgment" on the validity of state marijuana laws.[182] In a situation where Congress has acted to explicitly make the market in question illegal, "it makes little sense to

176. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

177. Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019, 8:01 AM), https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031/ [https://perma.cc/DT9W-ZJ7N].

178. 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting); *see also* Redish & Nugent, *supra* note 28, at 617.

179. Redish & Nugent, *supra* note 28, at 573.

180. *Id.* at 591–92 (emphasizing that "[a]ny attempt to obtain a specific piece of legislation from Congress presents a nearly insurmountable task for the state").

181. Redish and Nugent argue that the structure of the Constitution establishes "inertia *in favor* of the exercise of state power, because the states do not need to overcome any federal barrier before they enact their economic legislation." *Id.* at 592. Congressional action is then required to invalidate the legislation. When courts apply the Dormant Commerce Clause, this political inertia is reversed, "turning the constitutional balance of federalism against the states." *Id.* Further, when a court has spoken on a matter (like whether residency requirements unduly burden interstate commerce), Congress is less likely to question the court's decision. *See id.* at 593.

182. *Id.* at 573.

retain the presumption that [the public interest is best served by maintaining an unencumbered national market for competition]."[183]

Congress can affirmatively regulate interstate cannabis commerce, either by legalizing the drug or consenting to states' discriminatory legislation through statute.[184] Congress has not yet legalized marijuana.[185] Congress also has not "consented" to state impediments of interstate cannabis commerce. First, the federal marijuana ban does not operate as clear congressional authorization to states because the enactment of the CSA "did not necessarily authorize states to discriminate against nonresident economic interests."[186] Second, the riders Congress attaches to the Department of Justice's (DOJ) yearly appropriations[187] do not allow states to discriminate against interstate commerce. Instead, Congress bars the executive branch from prosecuting individuals participating in state-legal activity.[188] And finally, the Cole Memorandum does not serve as congressional authorization because the DOJ has no power to "authorize states to impair interstate commerce."[189]

Without congressional consent or legalization, states are left uncertain about whether marijuana should still be regulated following the CSA (which makes an interstate market illegal) or to what extent an interstate market could exist without federal intervention. The current ambiguity of federal marijuana policy juxtaposed with substantial state interests in maintaining new cannabis programs are reasons to doubt whether traditional application of the Dormant Commerce Clause is proper.

183. Brinkmeyer v. Wash. State Liquor & Cannabis Bd., No. C20-5661 BHS, 2023 WL 1798173, at *11 (W.D. Wash. 2023) (alterations in original) (quoting *Northeast Patients Group II*, 45 F.4th 542, 559 (1st Cir. 2022) (Gelpí, J. dissenting)). These views are consistent with Justice Scalia's and Justice Thomas's criticisms of the Dormant Commerce Clause. Both Justices have emphasized the doctrine's unworkability in application. *See supra* notes 23–28 and accompanying text; Comptroller of the Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

184. *See supra* notes 49–58 and accompanying text (discussing how Congress can consent to otherwise unconstitutional state laws).

185. While over the last few years Congress has considered various legislative proposals for federal marijuana legalization, none have passed. *See* Mikos, *supra* note 4, at 884–85 (discussing recent legislative proposals).

186. *Id.* at 877.

187. *See supra* notes 17 & 72 and accompanying text.

188. Mikos, *supra* note 4, at 882–83.

189. *Id.* at 883–84.

A temporary judicial carve-out for state marijuana regulation would prevent harsh application of the Dormant Commerce Clause until Congress acts to regulate the drug on a larger interstate scale. How the carve-out would operate in practice is a different question—it could work as a form of abstention[190] or courts could simply refuse to apply the Dormant Commerce Clause in similar constitutional challenges to state residency requirements.[191] The courts that have taken the latter approach have each held that the doctrine does not apply to illegal interstate markets.[192] That conclusion is logical because the federal government cannot have its proverbial edible and eat it too. Congress criminalized an interstate marijuana market under the CSA through its commerce authority. Protectionist regulations, like residency requirements, seek to prevent proliferation of an interstate marijuana market—falling squarely within congressional intent.[193] The Dormant Commerce Clause is an atextual interpretation of the Constitution, which should make it amenable to atypical application in a market for a unique commodity.

190. While the Ninth Circuit held that none of the traditional abstention doctrines nor the notion of comity applied to warrant against exercise of federal jurisdiction, Peridot Tree, Inc. v. City of Sacramento, 94 F.4th 916, 926–35 (9th Cir. 2024), assuming that this analysis is correct, courts could develop a new type of abstention specifically for challenges to state marijuana licensing regimes. However, many courts and scholars are critical of abstention because it improperly avoids difficult and significant questions of constitutional law. *Id.* at 935–36; *see also* William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 884–92 (2013) (outlining common critiques of abstention including that precedent in this area is convoluted and hard to apply, it requires courts to refuse to exercise jurisdiction when it would otherwise be proper to do so, and it violates the separation of powers).

191. Several district courts have already implemented this reasoning. *See, e.g.*, Brinkmeyer v. Wash. State Liquor & Cannabis Bd., No. C20-5661 BHS, 2023 WL 1798173, at *11, *13 (W.D. Wash. 2023); Variscite NY Four, LLC v. N.Y. State Cannabis Control Bd., No. 1:23-cv-01599, 2024 WL 406490, at *12–13 (N.D.N.Y. Feb. 2, 2024). This approach may be superior to abstention because it respects state authority while still addressing the constitutional question, and importantly, does not involve federal courts abstaining from the exercise of otherwise proper jurisdiction.

192. *Brinkmeyer*, 2023 WL 1798173, at *11; *Variscite NY Four, LLC*, 2024 WL 406490, at *12; *see also Northeast Patients Group II*, 45 F.4th 542, 558–59 (1st Cir. 2022) (Gelpí, J., dissenting).

193. *Variscite NY Four, LLC*, 2024 WL 406490, at *12. As described, the Supreme Court recognizes that an interstate market for the drug exists. *See supra* notes 101–105 and accompanying text. Nevertheless, the fact that the CSA has not eradicated such a market does not justify application of the Dormant Commerce Clause. *Northeast Patients Group II*, 45 F.4th at 560 (Gelpí, J., dissenting) (collecting cases).

3. Unclean Hands

Finally, if widely adopted, the unclean hands doctrine as applied in *Original Investments* would allow courts to foreclose legal remedy, in any context—constitutional or otherwise—to those engaged in the cannabis industry.[194] This result may forestall legal challenges to state marijuana regimes, favoring states interested in maintaining their potentially unconstitutional residency requirements. But overall, it would significantly hamper the burgeoning marijuana industry.[195] Individuals engaged in this business would be left in legal limbo with no recourse to enforce constitutional, contract, or property rights. Denial of relief in the courts only underscores the uncertainty created by the federal government's "half-in, half-out" regulatory regime.[196] Therefore, courts should not adopt unclean hands as the solution to Dormant Commerce Clause challenges of retail marijuana license residency requirements. Doing so would create only more uncertainty and unfairness than would simply leaving state residency requirements in place.

Stripped of grand legal theory about the Dormant Commerce Clause and whether federal judges may employ the "unwritten constitution"[197] to invalidate state law, the situation states are faced with now is difficult to understand from the most practical level. Marijuana is a unique commodity. While outlawed on the federal level, it is legal in some form in all states. The inherent disconnect between federal and state law demands different treatment of the drug under the traditional application of the Dormant Commerce Clause.

194. The Western District of Oklahoma was not the first court to refuse to hear the merits of a case or deny relief based on this defense in the marijuana context. *See, e.g.*, *In re* Arenas, 535 B.R. 845, 854 (B.A.P. 10th Cir. 2015) (denying relief in bankruptcy court for marijuana growers and dispensary owners); Tracy v. USAA Cas. Ins. Co., No. 11-00487 LEK-KSC, 2012 WL 928186, at *13 (D. Haw. Mar. 16, 2012) (denying relief to homeowners to recover unpaid insurance claims involving stolen marijuana plants).

195. Although those engaged in state-legal cannabis activities do not have to worry much about the threat of federal action, those individuals may face difficulty in conducting their businesses. *See* Steven Mare, Note, *He Who Comes Into Court Must Not Come With Green Hands: The Marijuana Industry's Ongoing Struggle with the Illegality and Unclean Hands Doctrines*, 44 HOFSTRA L. REV. 1351, 1370–73 (2016) (emphasizing the uncertainty with the enforceability of business contracts, availability of credit, and bankruptcy recourse).

196. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236–37 (2021) (Thomas, J., respecting denial of certiorari).

197. Redish & Nugent, *supra* note 28, at 572 (quoting Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975)).

B. Potential Compelling Governmental Interests to Justify Residency Requirements

The Supreme Court has held that "[w]hen a state statute clearly discriminates against interstate commerce, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[198] This Subpart will describe justifications for residency requirements and how persuasive they may be to a reviewing court. Because most courts do not treat marijuana as a unique commodity to avoid applying the Dormant Commerce Clause as it is traditionally understood, states defending challenges to these laws may still need to present compelling governmental interests that justify discriminatory restrictions in interstate cannabis commerce. First, this Subpart will address the main justifications for marijuana residency requirements: benefitting the local economy, impeding the illicit markets to comply with federal law, and protecting public health. Second, this Subpart will address the War on Drugs justification of residency requirements in social equity programs.

1. Main Justifications

Marijuana legalization is commonly promoted as an opportunity to bolster the local economy and create jobs within the state.[199] It is reasonable that states would then want to safeguard their intrastate market for the benefit of state residents for these reasons. A strong intrastate market isolated from outsiders may be crucial to appease voters who voted for legalization to create jobs.[200] But advancing protectionist interests of state residents to the detriment of out-of-state

198. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (citation omitted). In future decisions on these issues, the laws will likely also be challenged on the grounds that they are not "narrowly tailored" to achieve a governmental purpose. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) (requiring that there be no less discriminatory means available to the state to effectuate their compelling government purpose). This Article does not evaluate whether retail marijuana residency requirements fulfill the narrow-tailoring inquiry of strict scrutiny analysis.

199. *See* HOWELL, *supra* note 78, at 3; Melissa Schiller, *Adult-Use Cannabis Legalization Could Give Arkansas' Economy Major Boost, Study Shows*, CANNABIS BUS. TIMES (Sept. 29, 2022), https://www.cannabisbusinesstimes.com/article/adult-use-cannabis-legalization-could-give-arkansas-economy-major-boost-study-shows/ [https://perma.cc/W25M-VVW6]; Tom Angell, *MD Gov Lets Legal Cannabis Bill Take Effect (Newsletter: April 11, 2022)*, MARIJUANA MOMENT (Apr. 11, 2022), https://www.marijuanamoment.net/md-gov-lets-legal-cannabis-bill-take-effect-newsletter-april-11-2022/ [https://perma.cc/9BE6-U5JM] (collecting statements from state politicians touting the economic benefits of marijuana legalization).

200. *See* Borchardt, *supra* note 79.

individuals contravenes the core of the Dormant Commerce Clause.[201] Thus, state justifications for benefitting local state residents at the expense of out-of-state individuals will likely not pass constitutional muster.

Another compelling state interest is that limiting out-of-state participation in the marijuana market would allow states to comply with federal enforcement priorities. As discussed, the federal government has adopted a laissez-faire approach to enforcing the CSA against state-legal cannabis activities.[202] Commenters have suggested that if a state's marijuana market expands to allow more interstate activity, the federal government may undertake a more proactive enforcement role.[203] But scholars have commented that the "danger of a federal crackdown has been grossly overblown."[204] This would make states' worries about compliance with federal law look more like impermissible protectionist motivations than compelling governmental interests.

Both the First Circuit in *Northeast Patients Group II* and the Supreme Court in *Gonzales v. Raich* recognized the obvious: that an interstate marijuana market exists.[205] For the last decade, as marijuana legalization has progressed in the states, the federal government has not indicated that it would be concerned about interstate sales of marijuana, nor has the DOJ changed its nonenforcement policy towards state-legal marijuana activities.[206] And given President Biden's recent pardons of marijuana offenses and Congress's recent interest in passing marijuana legislation—fears of compliance with the federal forbearance policies espoused in the Cole Memorandum may be even more attenuated.[207]

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201. DENNING, *supra* note 2, § 6.06[A].

202. *See supra* Part II.

203. Mikos, *supra* note 4, at 868 n.41 (collecting examples of journalists' and government officials' fear of federal drug enforcement with a more robust interstate marijuana market).

204. *See id.* at 870.

205. *Northeast Patients Group II*, 45 F.4th 542, 547 (1st Cir. 2022); Gonzales v. Raich, 545 U.S. 1, 18–22 (2005). The Supreme Court in *Gonzales* suggested that because the interstate and intrastate markets for marijuana are so intertwined—for Commerce Clause purposes—they cannot be effectively distinguished. And thus, Congress had a rational basis for seeking to regulate purely intrastate activity. 545 U.S. at 15–19, 22.

206. Mikos, *supra* note 4, at 870.

207. Eugene Daniels & Natalie Fertig, *Biden Pardons Marijuana Offenses, Calls for Review of Federal Law*, POLITICO (Oct. 6, 2022, 5:35 PM), https://www.politico.com/news/2022/10/06/biden-to-pardon-marijuana-offenses-call-for-review-of-federal-law-00060796 [https://perma.cc/MCD8-D2YQ]. Kyle Jaeger, *Congress Will Hold a Marijuana Hearing One Week After Five States Vote on Legalization Ballot Measures*, MARIJUANA

But there remains a stark conflict in federal and state marijuana law. An interstate market for the drug exists—but that market remains illegal under federal law.[208] And no promises of new federal marijuana legislation or enforcement restraint from the other two branches of government change that analysis. Thus, compliance with federal law may be a compelling governmental interest in restricting interstate marijuana commerce to ensure that marijuana markets remain truly intrastate.

Finally, public health concerns may be the most persuasive state interest to justify residency requirements. Marijuana's current regulatory scheme effectively creates almost forty intrastate markets, all subject to different regulations on the processing, sale, labeling, and manufacture of cannabis products—with some of the regulations enacted with the goal of protecting public health.[209] The Supreme Court has recognized that the protection of public health is a fundamental component of the states' broad police powers.[210] And courts consider the protection of public health to be a compelling state interest.[211] But courts have sometimes been hesitant to uphold facially discriminatory regulations for public health or consumer protection reasons.[212] This

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MOMENT (Nov. 8, 2022), https://www.marijuanamoment.net/congress-will-hold-a-marijuana-hearing-one-week-after-five-states-vote-on-legalization-ballot-measures/ [https://perma.cc/Z3RC-MK7J] (discussing various federal marijuana reform and regulation bills).

208. *See Northeast Patients Group II*, 45 F.4th at 547 (citing *Gonzales*, 545 U.S. at 18).

209. *See supra* notes 60–76 and accompanying text. For example, some regulations restrict the potency of THC in cannabis products sold within state borders. *Compare* 935 MASS. CODE REGS. 500.150(4) (2023) (requiring cannabis edibles sold in Massachusetts to have a maximum of 5.5 milligrams of THC per serving and 110 milligrams per container), *with* CAL. CODE REGS. tit. 4 § 17304(a) (2022) (requiring cannabis edibles sold in California to have a maximum of 10 milligrams of THC per serving and 100 milligrams per container).

210. Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954).

211. *See, e.g.*, Does 1-6 v. Mills, 16 F.4th 20, 32 (1st Cir. 2021); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) ("[U]nder the pressure of great dangers," constitutional rights may be restricted, "as the safety of the general public may demand.").

212. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 350, 356 (1951) (finding that a local ordinance banning the sale of milk pasteurized and bottled more than five miles from the city center violates the Dormant Commerce Clause); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977) ("[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry."); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019) (recognizing that the Twenty-First Amendment

hesitancy is because some state measures are not narrowly tailored or the least discriminatory means available to protect public health.[213]

But in the marijuana context, absent a federal law legalizing and regulating the drug, industry participants will likely struggle to comply with each state's regulations.[214] While courts could likely sever unconstitutional portions of state marijuana laws,[215] any deregulation in nascent intrastate cannabis industries is concerning because it could affect other "regulatory structures necessary for the orderly business" of each state's marijuana market.[216] A court's treatment of "much needed" state marijuana law (like residency requirements or social equity programs) as "potential impediments to a robust, safe, *nationwide* marketplace for cannabis"[217] could create regulatory gaps where no state or federal law govern the industry.[218]

The Food and Drug Administration (FDA) is the executive agency tasked with protecting public health by assuring the "safety, efficacy, and security of" drugs.[219] But the FDA exercises no direct authority over marijuana products.[220] The only direct oversight over marijuana is

was adopted to "give each [s]tate the authority to address alcohol-related public health and safety issues").

213. *Tennessee Wine & Spirits*, 139 S. Ct. at 2461–62, 2471–74 (finding that while alcohol regulation can be a legitimate nonprotectionist goal to protect public health, a durational residency requirement for retail alcohol licenses was not narrowly tailored to advance that purpose).

214. Zhang, *supra* note 81; Mikos, *supra* note 4, at 874.

215. Some state marijuana regulatory regimes have severability clauses that would serve to protect the entirety of a statutory regime if a court were to invalidate any portion therein. *See, e.g.*, N.Y. CANNABIS LAW § 139 (McKinney 2022); 935 MASS. CODE REGS. 501.900 (2024).

216. Tommy Tobin & Andrew Kline, *A Sleeping Giant: How the Dormant Commerce Clause Looms over the Cannabis Marketplace*, 2022 YALE L. & POL'Y REV. 1, 2.

217. *Id.* at 2–5 (emphasis added).

218. Application of the Dormant Commerce Clause has created regulatory gaps in the energy and natural resource markets. *See* Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 408–10 (2016); C.M.A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 655–61 (1995).

219. *See generally* Thomas R. Fleming, David L. Demets & Lisa M. McShane, *Discussion: The Role, Position, and Function of the FDA—The Past, Present, and Future*, 18 BIOSTATISTICS 417 (2017).

220. *See* DOUGLAS C. THROCKMORTON, FDA ROLE IN REGULATION OF CANNABIS PRODUCTS 7 (2021), https://www.fda.gov/media/152407/download [https://perma.cc/B6WS-5D7K]. The FDA does regulate several drugs that include cannabis chemical derivatives, including Epidiolex (a cannabidiol (CBD) derivative that is used to treat childhood epilepsy), and Marinol

through the Drug Enforcement Agency (DEA), which neither promotes nor regulates the consistency and safety of marijuana products. Instead, its purpose is to enforce criminal penalties for those associated with manufacturing and distributing controlled substances.[221]

One way to differentiate marijuana from cases where public health was insufficient to justify discriminatory laws is to again treat it as a unique commodity. The safety and consistency of the interstate products in the line of public health cases are unlike marijuana because they are subject to federal regulation for quality and safety. For example, the milk at issue in *Dean Milk Co. v. City of Madison*,[222] is subject to FDA oversight.[223] The alcohol at issue in *Tennessee Wine & Spirits* is subject to the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau oversight.[224] Thus, the invalidation of state regulatory laws in these industries does not create the same regulatory gaps that would exist in the marijuana context.

Regulatory gaps could lead to a "race to the bottom," where the least regulated and most cheaply produced cannabis products are the most profitable, with no guarantees of product safety.[225] Thus, upholding discriminatory state marijuana laws may serve a compelling nonprotectionist interest. And absent federal legalization or regulation, there is no less discriminatory way to protect public health.[226]

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and Syndros (a synthetic delta-9-tetrahydrocannabinol (THC) drug that is used to treat weight loss and nausea in cancer and HIV/AIDS patients). *Id.* at 6. But the state regulatory regimes do not concern these types of marijuana products. The regimes regulate marijuana plants, edibles, and other products available in local dispensaries—that is, products that are not FDA approved.

221. *See* LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 14–15 (2014).

222. 340 U.S. 349, 350–51 (1951).

223. *See* 21 C.F.R. § 131.110 (2022).

224. *See Beverage Alcohol—TTB Regulated Industry*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/alcohol/beverage-alcohol [https://perma.cc/84KR-T3QL] (May 24, 2021); 27 C.F.R. § 24.1 (2022).

225. *See* Mikos, *supra* note 4, at 893 (noting that a large interstate cannabis market "could create a race to the bottom, with states competing to relax their controls and thereby attract (or keep) more cannabis jobs"). States likely would be unable to ensure that out-of-state products were safe or produced in a certain manner. Under the Dormant Commerce Clause's prohibition of extraterritoriality regulation, states may have difficulty forcing out-of-state cannabis product producers or retailers to adopt and follow state-specific regulations. *See supra* notes 45–48 and accompanying text; *see also* Mikos, *supra* note 49, at 865–67.

226. If Congress federally legalized marijuana, its regulation would fall under the Food Drug & Cosmetic Act (FDCA). *See* Sean M. O'Connor & Erika

2. Social Equity Initiatives

Relatedly, social equity initiatives requiring state residency are likely vulnerable to the same per se invalidity rules as described above.[227] But the residency requirements for these programs could serve a compelling governmental interest that outright legalization could not. While most of these programs do not explicitly mention race, there is an obvious correlation between the targeted communities (who would theoretically benefit from the initiatives) and racial minorities.[228] Throughout the War on Drugs, several factors—such as highly punitive state and federal drug laws and societal stigma—created a disparate impact on racial minorities.[229] And despite more lenient state marijuana laws, in 2021, 45 percent of drug seizure offenses involved marijuana.[230] And a majority of marijuana arrests involve racial minorities.[231] These disparities carry over into the retail market, as African Americans represent roughly 13 percent of the country's population, but only 1.2 to 1.7 percent of marijuana business owners.[232] Thus, so-called "marijuana affirmative action"[233] through social equity programs could

Leitzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823, 832–33 (2019).

227. *See supra* Part IV.A; *see also* Lowe v. City of Detroit, 544 F. Supp. 3d 804, 815–16 (E.D. Mich. 2021) (finding that Detroit's residency-based social equity program likely violates the Dormant Commerce Clause). While not the focus of this Article, social equity programs may also be challenged under the Commerce Clause's related constitutional doctrine, the right to travel. *See generally* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 639, 644–48 (2014); David A. Donahue, Note, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451, 453–68 (1998).

228. *See* Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690–92, 705–06 (2016).

229. Devine, *supra* note 86, at 349–50.

230. *FBI: Nearly Half of All Drug Seizures in 2021 Involved Marijuana*, NORML (Oct. 5, 2022), https://norml.org/blog/2022/10/05/fbi-nearly-half-of-all-drug-seizures-in-2021-involved-marijuana/ [https://perma.cc/25PC-5HDN].

231. *See* ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 28–36 (2020), https://aclu.org/publications/tale-two-countries-racially-targeted-arrests-era-marijuana-reform [https://perma.cc/5C3L-JW72].

232. BRUCE BARCOTT, BEAU WHITNEY & JANESSA BAILEY, LEAFLY, JOBS REPORT 2021, at 13 (2021), https://leafly-cms-production.imgix.net/wp-content/uploads/2021/02/13180206/Leafly-JobsReport-2021-v14.pdf [https://perma.cc/RKE3-Y2VW].

233. *See generally* Eleni Christofides, *Forty Greenhouses and a Dispenser's License: Affirmative Action and Racial Equity in Marijuana Licensing*,

be seen as a way to remedy years of disparate impact by increasing the rate of minority-owned marijuana businesses.[234]

Residency criteria targeting in-state communities may be one of the only suitable criteria states could use to identify qualified applicants to achieve marijuana equity goals, while still maintaining a state's intrastate marijuana market. Given the War on Drugs' direct impact on racial minorities, race could be a qualifier for awarding social equity benefits.[235] But like the Supreme Court's treatment of discriminatory interstate commerce laws, its treatment of laws that create racial classifications is similarly unforgiving.[236] The Supreme Court has held that, if used, racial preferences must alleviate harm caused by a government's specific policy, not simply the effects of generational social discrimination.[237]

At least one court has already invalidated a state marijuana law using race as a qualifier for application benefits. In *PharmaCann Ohio, LLC v. Williams*,[238] an Ohio law requiring the state Department of Commerce to award 15 percent of medical marijuana cultivation,

OHIO ST. U. DRUG ENF'T & POL'Y CENTER, no. 33, Oct. 2021; Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 WILLAMETTE U. COLL. L. SOCIAL JUST. & EQUITY J. 205 (2019); Dede Perkins, *Where Are We Now? Social Equity in the US Cannabis Industry*, CANNABIS INDUS. J. (Oct. 5, 2021), https://cannabisindustryjournal.com/feature_article/where-are-we-now-social-equity-in-the-us-cannabis-industry/ [https://perma.cc/4YRC-WZEB].

234. Social equity programs may also foster the desired economic boost of marijuana legalization by creating more jobs and opportunities for local communities. Devine, *supra* note 86, at 365–66.

235. *See id.* at 342–44; Mikos, *supra* note 49, at 871. Another race-neutral alternative includes allocating retail marijuana licenses to lower-income individuals. But this alternative poses its own issues. Steven W. Bender, *Racial Justice and Marijuana*, 59 CAL. W. L. REV. 223, 236 (2023) (citation omitted) (describing that low-income as a qualifier "fail[s] to account for wealth disparities" and the "economic impact of generational government discrimination"). At least one court has been critical of using residency for social equity program eligibility and suggests that such criteria "prefers wealthy applicants who have had no interaction with the War on Drugs to low-income applicants who have been ravaged by it, so long as the wealthy applicants have lived in [a specific place] for the right amount of time." Lowe v. City of Detroit, 544 F. Supp. 3d 804, 814 (E.D. Mich. 2021) (quoting and endorsing the plaintiff's brief).

236. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed . . . under strict scrutiny."); *contra* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2175–76 (2023).

237. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500–02 (1989).

238. No. 17-CV-10962, 2018 WL 7500067 (Franklin Cnty. Ct. C.P. Nov. 15, 2018).

processing, and testing licenses to "economically disadvantaged groups," defined further as only racial minorities, was held invalid under the Equal Protection Clause.[239] To defend the law, the state needed to show that the racial preference was directly related to discrimination in the marijuana industry. Consequently, the court did not consider evidence of increased arrest rates for minorities, marijuana licensing data from other states, or Ohio's own history of discrimination in government contracting generally as sufficient to support a compelling governmental interest.[240] The court reasoned that because the marijuana industry is so new, "such newness necessarily demonstrates that there is no history of discrimination in this particular industry."[241]

Social equity programs serve an important purpose in helping state residents impacted by historically disparate marijuana law enforcement. If these programs are invalidated, based on application of the Dormant Commerce Clause, it would disrupt the states' efforts to lessen the inequities caused by the War on Drugs. Because race is not a viable alternative to state residency in achieving this goal, there is arguably no less discriminatory qualifier to serve states' compelling interests in marijuana equity than using residency as a factor in awarding benefits. Like general residency requirements, social equity residency requirements may also only be in place until Congress affirmatively acts to legalize marijuana or consents to discriminatory state law.[242]

Conclusion

As almost forty states have welcomed the development of intrastate cannabis markets, they have also significantly limited interstate commerce by implementing residency requirements for retail marijuana licensure. This limitation arises out of economic interests, fear of federal enforcement, and concerns about public health. While potentially compelling governmental interests underlay residency requirements, their legality is questionable. Indeed, the First Circuit's invalidation of Maine's residency requirement under the Dormant Commerce Clause could undermine other states' residency requirements and make the intrastate marijuana regulatory regimes vulnerable to other types of constitutional challenges.

But this Article argues that the law underlying the Dormant Commerce Clause should not apply so harshly to marijuana regulation. The complexity lies in recognizing that marijuana is unlike any other

239. *Id.* at *10.

240. *See id.* at *4–6.

241. *Id.* at *1, *6.

242. *See supra* Part IV.A.2.

retail product—it is a unique commodity. Judicial intervention into state law ignores that fact. Marijuana is likely the only product that is simultaneously legal under state law and completely prohibited under federal law. The Supreme Court has cautioned against "judges using the [D]ormant Commerce Clause as 'a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.'"[243] Potential widespread invalidation of state marijuana law under the Dormant Commerce Clause exacerbates the tension between the state and federal regulation of the drug.

If almost forty states create intrastate marijuana markets, will Congress listen? That is still unclear. So, until Congress affirmatively acts to legalize the drug or consents to discriminatory state laws, courts should apply a carve-out to avoid harsh application of the Dormant Commerce Clause when reviewing state marijuana laws. A carve-out would allow residency requirements and other state regulations to remain in place as states continue to act as the all-important laboratories for marijuana regulatory experimentation.

243. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1159 (2023) (quoting United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007)).