

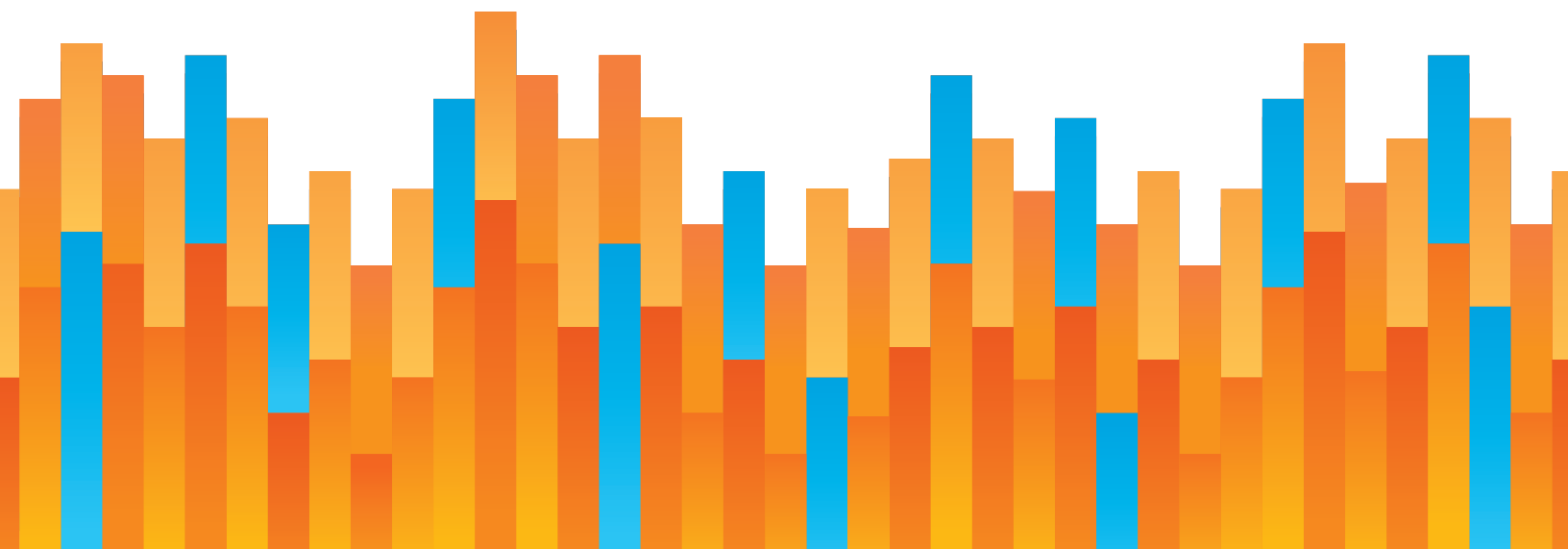


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THE CASE FOR INTERSTATE MARIJUANA COMMERCE RIGHT NOW

by Geoffrey Lawrence and Michelle Minton

January 2024





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EXECUTIVE SUMMARY

Interstate commerce in marijuana is likely inevitable. Twenty-four states have legalized marijuana for recreational use by adults, and 38 states have legalized its medical use. But these states all ban the import of marijuana products made outside their borders. A consumer in Massachusetts may not legally purchase a product made in California or Oregon even though those locations offer better growing conditions.

As a result, state marijuana markets are entirely balkanized, preventing the emergence of regional specializations. States with poor growing conditions nevertheless bar consumers from purchasing products that might otherwise be offered at lower cost or higher quality because they were grown elsewhere. Marijuana companies that operate in multiple states must inefficiently allocate their capital to build duplicative production and distribution facilities in every state where they operate. Innovative upstart marijuana companies that produce unique and sought-after products may find that their commercial success is impeded by an inability to access markets outside their home state.

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These state bans against interstate commerce violate a legal concept known as the dormant Commerce Clause. The U.S. Constitution reserves to Congress the exclusive jurisdiction to regulate commerce between the states. Because this jurisdiction is exclusive, states cannot erect barriers to interstate trade. These precepts are foundational to the American republic, because eliminating state-level protectionism was among the primary motivations for abandoning the Articles of Confederation in favor of the U.S. Constitution, which ushered in a nationwide free-trade zone.

State policymakers may have mistakenly believed that they could shield state-licensed marijuana companies from federal prosecution by permitting only intrastate commerce in marijuana. However, the U.S. Supreme Court has been clear that even purely intrastate commerce in marijuana invokes Congress's regulatory authority under the Commerce Clause. Although marijuana's status under the federal Controlled Substances Act makes its possession, manufacture, and distribution illegal, if a state chooses to sanction these activities within its borders, it cannot exclude marijuana products made in other states solely on that basis.



Federal courts have already struck down several state regulations that restricted the freedom of commerce in marijuana across state lines because those regulations violated the dormant Commerce Clause.



Federal courts have already struck down several state regulations that restricted the freedom of commerce in marijuana across state lines because those regulations violated the dormant Commerce Clause. More of these state-imposed barriers to interstate commerce are likely to be struck down in the future. Although two federal district courts have declined to strike down state restrictions on interstate commerce in highly publicized cases, a close inspection of those rulings reveals that there were confounding factors, and each court recognized the underlying dormant Commerce Clause claims. It appears a matter of time before courts invalidate all state rules barring the import of marijuana products made in other states.

Such a decision could usher in mass confusion. There is currently no regulatory framework to govern interstate shipments in marijuana goods. These products remain criminal at the federal level even if the relevant laws remain largely unenforced. It would be prudent for Congress to proactively establish a regulatory framework for interstate shipments of marijuana products and to remove marijuana from the Controlled Substances Act. Failing that, states should at least start to relax their own unconstitutional bans on interstate commerce and work to foster a coordinated mechanism for facilitating trade in these goods.



Federal regulation of the alcoholic beverage industry offers key insights into how a federal regulatory framework might be structured.



Congress has considered several proposals that would remove marijuana from the auspices of the Controlled Substances Act or establish a federal regulatory structure to govern interstate transfers. Federal regulation of the alcoholic beverage industry offers key insights into how a federal regulatory framework might be structured. Like marijuana, alcohol enjoyed a long period of federal legality, followed by a period of federal prohibition and then a period in which states took the lead in regulation of products and businesses. Federal agencies had to learn how to respond to and work within the regulatory apparatus that had already been erected by the states in order to facilitate orderly commerce. These same agencies should take the lead in regulating interstate commerce for marijuana products and work to minimize technical barriers to trade that result from disparate state approaches to regulation.

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PART 1

INTRODUCTION

When California voters legalized marijuana for medical purposes in the fall of 1996, they set in motion a slow-moving freight train in which increasingly more states would enact marijuana laws in direct conflict with federal law. This metaphorical momentum accelerated in the fall of 2012, when voters in Colorado and Washington approved initiatives to legalize marijuana for recreational purposes. As of early 2024, 38 states now authorize the medical use of marijuana while 24 of those states authorize marijuana for recreational use. These changes to state law have all occurred despite marijuana's strict illegality under the federal Controlled Substances Act.

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An interesting and underappreciated aspect of the resulting state-regulated marketplaces is that they also conflict with provisions of the U.S. Constitution that reserve to Congress the

exclusive jurisdiction to regulate interstate commerce. State policymakers may believe that their wholly intrastate markets are shielded from Congressional regulatory authority, but the U.S. Supreme Court has been clear that even wholly intrastate commerce in marijuana falls within the congressional ambit to regulate commerce between the states. Meanwhile, every state-regulated marijuana market expressly excludes the import of marijuana products produced beyond state borders. This is a clear violation of a legal concept known as the dormant Commerce Clause.

This paper reviews the legal theory and history of the dormant Commerce Clause as well as recent case law, which largely affirms that existing state barriers to interstate commerce in marijuana are unconstitutional. Essentially, once multiple states had legalized marijuana, they had the obligation to permit an interstate marketplace regardless of the federal illegality of the underlying goods.

The paper examines possible pathways to establishing an interstate marketplace for marijuana. First, states could voluntarily remove their existing barriers against interstate commerce. Second, Congress could make its regulatory authority explicit by establishing a system to govern interstate transfers of marijuana inventory. Finally, federal courts could continue to strike down state barriers to interstate commerce, resulting in cross-state trade even if political leaders fail to make changes to the law.

Finally, the paper outlines proposals recently considered in Congress to regulate interstate trade in marijuana goods and makes recommendations based largely on how alcoholic beverages are regulated.

PART 2

THE LEGAL CONTOURS OF INTERSTATE COMMERCE

2.1

EXCLUSIVE JURISDICTION TO REGULATE COMMERCE IS VESTED IN THE U.S. CONGRESS

The drafting of the United States Constitution was driven, in part, by a desire to prevent the balkanization of state economies and to instead usher in a free-trade zone among the states in which people, goods, and capital could move without impediment. As the U.S. Supreme Court opined in 2019:

[R]emoving state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods ... The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification.¹

¹ *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019).

The Constitution aims to foster “free trade among the States” through the Commerce Clause. This clause is found in Article 1, Section 8, which enumerates the powers of Congress. It grants Congress the power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”² Through the years, federal courts have interpreted this authority as an exclusive grant of power to the Congress to pass laws governing commerce between the states. This is not only an affirmative right of Congress to pass laws regulating interstate commerce, but has also been interpreted as a proscription against states passing similar laws. Even in cases where Congress has remained silent on an issue, courts have inferred that states have no authority to act on their own in ways that could impede the free flow of commerce. This interpretation was developed early in the history of the republic under Chief Justice John Marshall³ and has been referred to as the “dormant Commerce Clause,” because it indicates that Congress retains exclusive jurisdiction even when it has not yet taken action on an issue. As the U.S. Supreme Court has said, “Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue.”⁴



On dormant Commerce Clause grounds, courts have invalidated state laws that would erect barriers or otherwise exercise a discriminating effect against interstate commerce.



Dormant Commerce Clause restrictions apply only to state actions. On dormant Commerce Clause grounds, courts have invalidated state laws that would erect barriers or otherwise exercise a discriminating effect against interstate commerce. For example, in *Granholm v. Heald*, the Court ruled that state licensing schemes erected by Michigan and New York permitting in-state wineries to make direct sales to customers while out-of-state wineries were required to sell to licensed distributors in those states were unconstitutional on dormant Commerce Clause grounds. The Court indicated in that ruling that “State laws that

² United States Constitution, Article 1, Section 8. Available at: <https://www.archives.gov/founding-docs/constitution-transcript>.

³ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁴ *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019).

discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”⁵ Elsewhere, the Court stated, “Time and again this Court has held that, in all but the narrowest of circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”⁶

The Court has recognized few exceptions to this “virtually *per se* rule of invalidity.” Indeed, the only recognized exception is the state exercise of police power to protect the public health and safety.⁷ One example given in *Granholm* is that a state can ban direct-to-consumer sales by wineries, or can ban the sale of alcohol altogether, but it cannot use its licensing rules to discriminate against out-of-state producers. Laws fitting within the police power of the states must be applied uniformly and regardless of the origin of the product, but states needn’t accept the import of products from other states that they have declared illegal within their borders.



... states cannot create laws or licensing restrictions simply on the unsupported claim that these structures will protect the public safety. They must be able to demonstrate the rule in question has a tangible likelihood of bringing about the specified policy aim.



Further, even when states claim to be exercising their police power in passing regulations, there are limits. First, states must be able to demonstrate that those regulations “have a *bona fide* relation to protecting ‘the public health, the public morals or the public safety.’”⁸ In other words, states cannot create laws or licensing restrictions simply on the unsupported claim that these structures will protect the public safety. They must be able to demonstrate the rule in question has a tangible likelihood of bringing about the specified policy aim. In *Granholm*, the Court rejected claims from Michigan and New York that they could not effectively police underage drinking if online sales of wine by out-of-state sellers

⁵ *Granholm v. Heald*, 544 U.S. 460 (2005).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019).

were permitted. Those states provided no evidence that purchases of alcoholic beverages by underage minors would increase if these sales were permitted. “Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors,” the Court opined, “we are left with the States’ unsupported assertions.”⁹

Second, even when states use their police power to achieve a legitimate public purpose, they must use the least discriminatory approach possible. In *Dean Milk Co. v. City of Madison*, the Court struck down a city ordinance declaring that milk sold within city limits had to have been pasteurized within the city.¹⁰ The city argued this provision was necessary so that officials could inspect pasteurization facilities to ensure safety protocols were followed. The Court rejected this argument, pointing out that the city could send its inspectors to distant plants or it could rely on third-party ratings or certifications of other facilities. States and their political subdivisions cannot hide behind a claim of police power to enact policies that have the clear effect of discriminating against economic interests from out of state. Instead, policies must be narrowly tailored to advance a legitimate local purpose.

2.2

CONGRESS’S EXCLUSIVE JURISDICTION UNDER THE COMMERCE CLAUSE DOES NOT END AT STATE BORDERS

The Court has been clear that the Commerce Clause, and Congress’s dormant powers thereunder, prevents states from erecting barriers to the free movement of goods, people, and capital across state borders. In addition, in a series of controversial opinions the Court has held that Congress’s authority to regulate commerce is not limited to purely interstate transactions. Instead, the Court has interpreted any action that could affect the supply or demand for a particular product in the aggregate as affecting interstate commerce and therefore subject to Congress’s exclusive jurisdiction.

The Supreme Court has even accepted Congress’s broad authority over commerce within a single state even when there was no actual economic transaction between people. In *Wickard v. Filburn*, the Court held that Congress had the authority to fine Roscoe Filburn for evading federal price controls by growing wheat to feed his own animals on his Ohio farm.¹¹ At the time of the New Deal-era case, the Agricultural Adjustment Act placed strict

⁹ *Granholm v. Heald*, 544 U.S. 460 (2005).

¹⁰ *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

¹¹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

limits on the allowable amount of wheat production so that farmers could not evade federal price controls. Filburn contended that he sold no wheat, and certainly never sold any across state lines, so Congress held no jurisdiction to regulate his actions. The Court ruled against Filburn, declaring:

*[E]ven if [Filburn]'s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'*¹²

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This ruling expanded the scope of Congress's powers under the Commerce Clause far beyond traditional interpretations. It implies that virtually all commerce is subject to regulation by Congress even if it occurs entirely within the boundary of a single state. This implication was confirmed by the Court in 2005 when the Court ruled Congress held the authority to intervene in state-regulated marijuana markets. In *Gonzales v. Raich*, Angel Raich and Diane Monson were patients who cultivated marijuana in their own homes as a treatment for severe pain and believed they were protected by California's medical marijuana laws. They were raided by the Drug Enforcement Administration (DEA) and their plants were destroyed. They sued, claiming the DEA acted in violation of the Commerce Clause, the Due Process Clause of the Fifth Amendment, and the Ninth and Tenth Amendments, which reserves powers not specifically enumerated in the Constitution to the states. The Court ruled 6-3 in favor of the government, relying upon the *Filburn* notion that growing marijuana at home for personal use can affect the supply of and demand for marijuana in the aggregate.¹³

In a strongly worded dissent to *Gonzales*, Justice Clarence Thomas opined in favor of a more traditionalist interpretation of the Commerce Clause's scope:

¹² *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹³ *Gonzales v. Raich*, 545 U.S. 1 (2005).

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers. ... In the early days of the Republic, it would have been unthinkable that Congress could prohibit the cultivation, possession, and consumption of marijuana.¹⁴

Notwithstanding the dissenting opinion of Thomas, the *Gonzales* decision not only reaffirms the *Filburn* scope of Congress’s power over intrastate commerce but also made clear that this power applies to state-regulated marijuana markets. These lessons are pivotal for state marijuana programs because they mean that all existing state-regulated marijuana markets have relied on a series of flawed assumptions in erecting barriers to the interstate transfer of marijuana products.

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2.3

LEGACY OF THE COLE MEMO

Today, every state that sanctions a commercial marijuana market for either medical or adult use strictly proscribes the import of marijuana products from other states. State policymakers and regulators frequently point to a memorandum circulated within the U.S. Department of Justice (DOJ) in 2013 by Deputy Attorney General James Cole (the “Cole Memo”) as a reason for these bans. The Cole Memo advised U.S. attorneys to focus their enforcement of the federal ban on marijuana toward eight specific priorities, including

¹⁴ *Gonzales v. Raich*. 545 U.S. 1 (2005), dissenting opinion by Justice Clarence Thomas.

“Preventing the diversion of marijuana from states where it is legal under state law in some form to other states.”¹⁵



Whatever direction may have been given to federal prosecutors through the Cole Memo cannot protect states from their constitutional obligations to not erect barriers to interstate trade.



State policymakers appear to have interpreted this provision of the Cole Memo as implying that purely intrastate commerce in marijuana would be protected and so they have designed state regulations to prevent any interstate shipments. However, this interpretation is misguided for numerous reasons:

1. The Cole Memo offered only nonbinding guidance to federal prosecutors—any prosecutor was free to ignore its guidance and enforce federal law as written.
2. The Cole Memo was rescinded in January 2018 by then-Attorney General Jeff Sessions.¹⁶
3. It is unclear from the wording of the Cole Memo that it intended to safeguard only intrastate commerce. It states a priority of the DOJ was to prevent marijuana from being diverted “from states where it is legal under state law to other states.” This phrasing could be interpreted to mean that marijuana could travel from one state where it is legal to another state where it is legal, but not to states where it is illegal.
4. Any pretense that the DOJ, as an executive branch agency, could modify the powers to regulate commerce reserved by the Constitution to the Congress would fundamentally violate the separation of powers principles enshrined elsewhere in the Constitution. Regulating commerce is not only a legislative function, but that power is foundational to the Constitution. A memo circulated by an unelected

¹⁵ U.S. Deputy Attorney General James Cole, “Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement,” August 29, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁶ U.S. Attorney General Jeff Sessions, “Memorandum for All United States Attorneys: Marijuana Enforcement,” January 4, 2018, https://www.justice.gov/d9/press-releases/attachments/2018/01/04/ag_marijuana_enforcement_1.4.18_0.pdf.

appointee can abrogate neither the express power to regulate by Congress, nor the implied ban on state regulation under the Commerce Clause.¹⁷

Whatever direction may have been given to federal prosecutors through the Cole Memo cannot protect states from their constitutional obligations to not erect barriers to interstate trade. Further, the Court's decisions in *Filburn* and *Gonzales* directly contravene any notion that purely intrastate commerce in cannabis is shielded from the reach of federal authorities, regardless of how state policymakers may have chosen to interpret the Cole Memo.

2.4

FEDERAL COURTS HAVE ALREADY STRUCK DOWN NUMEROUS STATE CANNABIS LAWS FOR VIOLATING THE COMMERCE CLAUSE

Several state rules barring aspects of interstate commerce in the marijuana industry have already been overturned in federal court on dormant Commerce Clause grounds. To date, these cases have addressed whether out-of-state residents can be restricted from either obtaining a license to operate a cannabis business or investing into a licensed cannabis business.

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Missouri. The first major case challenged a provision of Missouri's medical marijuana program that required any licensed cannabis business to be “majority owned by natural persons who have been citizens of the state of Missouri for at least one year prior to the

¹⁷ These arguments are explored in detail in a law review article by Prof. Robert Mikos, who argues that the true motivation for state proscriptions against interstate commerce in cannabis is simple economic protectionism. See: Robert Mikos, “Interstate Commerce in Cannabis,” Vanderbilt University Law School Faculty Publications, 2021, <https://scholarship.law.vanderbilt.edu/faculty-publications/1223>.

application for such license or certification.”¹⁸ This language was included in the text of a state constitutional amendment legalizing medical marijuana approved by Missouri voters in November 2018 and was later implemented by agency rulemaking. Mark Toigo, a Pennsylvania resident who became a minority owner in a medical marijuana licensee, wished to invest additional capital to purchase majority ownership but was denied based on the durational residency requirement. Toigo filed in federal district court for an injunction against the requirement, claiming it violated the dormant Commerce Clause by discriminating against out-of-state economic interests.

Federal district court judge Nanette Laughrey granted a preliminary injunction, writing:

*It is not necessary to look beyond the face of the State’s durational residency requirement to determine whether it is discriminatory. A law that prevents persons from becoming majority shareholders in Missouri businesses that engage in the cultivation, manufacture, and dispensation of medical marijuana products unless they have lived in Missouri for one year and do not reside in any other state is facially discriminatory against out-of-state economic interests.*¹⁹

State regulators did not dispute the facially discriminatory nature of the residency requirement. Instead, the state argued that the residency requirement was necessary under its police power to enforce drug laws and prevent the diversion of marijuana to another state. Laughrey held that this was a legitimate local purpose, but that there were nondiscriminatory means available to accomplish that purpose, such as inventory monitoring and video surveillance.

A bench trial in this case was held in October 2021, in which the federal judge granted a permanent injunction against Missouri’s enforcement of its residency requirement within 10 minutes of hearing opening statements.²⁰

Maine. In 2009, the Maine legislature authorized the commercial sale of medical marijuana products through licensed dispensaries. Lawmakers included in the authorizing statute a requirement that “[a]ll officers or directors of a dispensary must be residents of this State,” although it did not include a minimum duration of residency. A nonresident investor wished

¹⁸ Missouri Constitution, Article XIV, § 1.7(3).

¹⁹ *Toigo v. Department of Health & Senior Services*, 549 F. Supp. 3d 985 (W.D. Mo. 2021).

²⁰ Harris Sliwoski, Canna Law Blog, “Are More Successful Residency Challenges Coming for Cannabis?” October 15, 2021, <https://harris-sliwoski.com/cannalawblog/are-more-successful-residency-challenges-coming-for-cannabis>.

to purchase a business operating three dispensaries in Maine and filed in federal district court for an injunction against the residency requirement, claiming it violated the dormant Commerce Clause.

The state conceded that no local purpose could be used to justify the residency requirement through exercise of the state's police power. Instead, the state argued that "the dormant Commerce Clause is not about protecting individual rights but rather about preserving a national market and prohibiting state laws that interfere with that national market."²¹ The state continued by raising an innovative argument, claiming, "Congress has eliminated the national market for marijuana and thus there is no national market with which Maine can interfere." If successful, this line of reasoning would invalidate all dormant Commerce Clause claims with regard to intrastate marijuana markets.



The state conceded that no local purpose could be used to justify the residency requirement through exercise of the state's police power.



Federal Judge Nancy Torreson of the Maine District Court rejected this argument on several grounds. First, Maine did not prevent nonresidents from purchasing medical marijuana, indicating that at least some aspects of the market were interstate. Second, she noted the federal Controlled Substances Act might criminalize the possession, manufacture, and distribution of marijuana, but it says nothing about eliminating an interstate market.

An intervenor in this case appealed to the First Circuit Court of Appeals, which delivered its opinion in August 2022. The First Circuit upheld the district court's ruling, noting that both Congress and the U.S. Supreme Court have recognized an interstate market in marijuana. Indeed, the Court recognized in *Gonzales* that Congress held the authority to intervene in California's intrastate marijuana market precisely because activity within the intrastate market would affect aggregate supply and demand on the interstate market. In addition, the First Circuit pointed to Congress's inclusion of the Rohrabacher-Farr Amendment to every appropriations bill between 2015 and 2022. That amendment prohibits the U.S.

²¹ *Northeast Patients Group v. Maine Department of Administration & Financial Services*, 554 F. Supp. 3d 177 (D. Me. 2021).

Department of Justice from spending any money to intervene in state-regulated medical marijuana markets. This legislation is evidence, the First Circuit found, that Congress recognizes an interstate market in marijuana no matter what it intended through the Controlled Substances Act.²²

The First Circuit Court’s ruling is particularly relevant for two reasons. First, it remains the highest court to have directly adjudicated on the issue of state barriers to interstate commerce in cannabis. Second, its finding that both the U.S. Supreme Court and Congress recognize an interstate market in marijuana makes clear that all dormant Commerce Clause restrictions against state-imposed barriers to interstate trade apply within the marijuana market even though Congress has declared the substance contraband.

New York. In late 2022, an applicant for an adult-use dispensary license in New York asked U.S. District Court Judge Gary Sharpe of the Northern District of New York for an injunction against state regulations because those regulations would preclude its eligibility for a license. Regulators insisted that the majority owner of any applicant hold a “significant presence” in New York. Although the applicant was incorporated in New York, its principal owner lived in Michigan. Sharpe agreed that the requirement would “have a discriminatory effect on out-of-state residents seeking a CAURD [cannabis retail] license” and awarded the injunction (while also noting that incorporation in New York should be sufficient to meet the “significant presence” requirement).

2.4.1 CONFLICTING RULINGS

Although courts have awarded injunctions or struck down state regulations that discriminate against out-of-state economic interests in several cases—including in the only federal Circuit Court ruling to date—some federal district courts have offered alternative interpretations of the dormant Commerce Clause’s applicability to marijuana.

Oklahoma law restricts nonresidents from owning more than 25 percent of any licensed medical marijuana establishment...

²² *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine*, No. 21-1719 (1st Cir. 2022).

Oklahoma. The U.S. District Court for Western Oklahoma in June 2021 denied an injunction against state residency requirements to obtain a license to operate a medical marijuana establishment. Oklahoma law restricts nonresidents from owning more than 25 percent of any licensed medical marijuana establishment, and the plaintiff sought to acquire a greater ownership share of licensed medical marijuana establishments. The court denied injunctive relief on the basis of the so-called “dirty hands” doctrine, or the notion that a court cannot use its equitable powers to facilitate criminal activity. If the court allowed the plaintiff to acquire a medical marijuana license, it would use that license to engage in activity that is criminal under the federal Controlled Substances Act. According to the opinion:

*Plaintiff seeks declaratory and injunctive relief to prohibit the enforcement of the residency requirements in section 427.14(E)(7) so it can obtain an Oklahoma medical marijuana business license to pursue economic opportunities in Oklahoma’s medical marijuana market. As stated, defendants argue that the court should not use its equitable power to facilitate conduct that is illegal under federal law. The court agrees.*²³

Recognition of the “dirty hands” doctrine was sufficient for the court to rule in this case without opining on the merits of the plaintiff’s dormant Commerce Clause claims. However, the court noted that “the underlying claim is not frivolous” and pointed to a recent case in which the same court had struck down a similar Oklahoma law that allowed in-state wineries, but not out-of-state wineries, to ship wine directly to retailers and restaurants rather than to a distributor.

Washington. In February 2023, U.S. District Court Judge Benjamin Settle of the Western District of Washington State delivered a ruling citing the dissenting opinion from the First Circuit case regarding Maine’s residency requirements and which directly rebutted some reasoning from the majority opinion in that case. Settle rejected the notion that Congress has recognized a nationwide market in marijuana through passage of the Rohrabacher-Farr Amendment by pointing to marijuana’s illegality under the Controlled Substances Act. In Settle’s opinion, “it makes little sense to retain the presumption that [the public interest is best served by maintaining an unencumbered national market for competition] when Congress has explicitly acted to make the market in question illegal.”²⁴

Settle adopts an originalist interpretation of statute, saying, “Courts are to interpret statutes in line with Congressional intent. Here, there is no doubt that Congress intended to restrict

²³ *Original Investments v. Oklahoma*, 542 F. Supp. 3d 1230 (W.D. Okla. 2021).

²⁴ *Brinkmeyer v. Washington State Liquor & Cannabis Board*, C20-5661 BHS (W.D. Wash. Feb. 7, 2023).

all commerce in cannabis by adding it to Schedule I of the CSA.”²⁵ Ergo, concludes Settle, Washington’s residency requirements actually further congressional intent by attempting “to prevent any interstate commerce in cannabis and to prevent any cannabis from Washington from moving into states where it remains illegal.”

Settle dismissed on these grounds without ruling as to whether Washington’s residency requirements would run afoul of the dormant Commerce Clause were marijuana federally legal. A notable flaw in Settle’s reasoning in this case, however, is his failure to consider how the *Filburn* interpretation of the Commerce Clause might affect his conclusion that Washington’s residency requirements serve to prevent interstate commerce in cannabis. The Court extended the *Filburn* rationale expressly to state marijuana markets in *Gonzales*, which means that even purely intrastate commerce invokes Congress’s regulatory powers under the Commerce Clause and, therefore, Washington’s requirements would not fulfill the purpose claimed by Settle.

2.4.2 SUM OF PRECEDENTS



The majority of cases that have examined state restrictions against the free interstate movement of persons and capital within state-regulated marijuana markets have held those restrictions in violation of the dormant Commerce Clause.



The majority of cases that have examined state restrictions against the free interstate movement of persons and capital within state-regulated marijuana markets have held those restrictions in violation of the dormant Commerce Clause. This includes the highest federal court to have examined the issue—the First Circuit. Only two major cases have upheld state restrictions and one intimated that the underlying claim of a dormant Commerce Clause violation held merit, but that the court could not facilitate criminal activity under federal law. This leaves the district court decision from the Western District of Washington as the sole major outlier regarding the applicability of the dormant Commerce Clause to state-regulated marijuana markets. Therefore, despite some

²⁵ Ibid.

disagreement, the preponderance of rulings has held that state restrictions against interstate commerce amount to unconstitutional usurpations of Congress's exclusive authority to regulate that commerce.

2.5

ALL STATE MARIJUANA PROGRAMS INCLUDE FACIALLY UNCONSTITUTIONAL BANS ON INTERSTATE COMMERCE

To date, court rulings on interstate commerce in marijuana have addressed only the free movement of people and capital between the states. They have not directly addressed the free movement of goods. However, all states with adult-use or medical marijuana markets include a statutory or regulatory ban on the shipment or delivery of marijuana inventory across state lines. In other words, all state marijuana programs are facially discriminatory against out-of-state economic interests.

States can use their police power to ban marijuana entirely or to ban the nonmedical use of marijuana, as many states have done. In the past, states have banned the sale of liquor along with the importation of liquor from other states in the belief that banning liquor would improve public safety and welfare. As the Court noted in *Granholm*, “The cases under the Webb-Kenyon Act [dealing with state liquor regulation] uphold state prohibition and regulation in the exercise of the police power yet they clearly forbid laws which discriminate arbitrarily and unreasonably against liquor produced from outside of the state.”²⁶ By the same reasoning, states may be able to ban marijuana within their borders, but if they permit the sale of marijuana, the dormant Commerce Clause prevents them from discriminating “arbitrarily and unreasonably” against marijuana “produced from outside of the state.”

“

... states may be able to ban marijuana within their borders, but if they permit the sale of marijuana, the dormant Commerce Clause prevents them from discriminating “arbitrarily and unreasonably” against marijuana “produced from outside of the state.”

”

²⁶ *Granholm v. Heald*, 544 U.S. 460 (2005).

It should come as no surprise that the same logic that applies to the free movement of productive resources like persons and capital also applies to final products within a free trade zone like the one established by the U.S. Constitution. Although state policymakers may have misunderstood the scope of federal authority to regulate commerce following the Cole Memo—or perhaps may have hidden behind the Cole Memo as a rationale for policies they understood to be unconstitutionally protectionist—court precedent is clear that states allowing the sale of marijuana cannot discriminate against marijuana produced in other states.

This means states have erred in the construction of their marijuana regulations, and a correction to these regulations is inevitable.

PART 3

POSSIBLE PATHWAYS TO INTERSTATE COMMERCE

A correction to these errant state marijuana regulations could come through one of three primary pathways. First, federal courts could strike down those restrictions directly. Second, states could proactively eliminate these restrictions. Already, several legislatures have passed authorizing statutes that would enable cross-border commerce through interstate compacts. Third, Congress could invoke its authority under the Commerce Clause directly by enacting legislation to regulate marijuana commerce nationwide and thus remove the dormant restrictions currently facing states.

3.1

FEDERAL COURTS COULD STRIKE DOWN EXISTING STATE RESTRICTIONS

Except for the Western District of Washington, federal courts have consistently held that state barriers to the free movement of persons and capital within the marijuana industry violate the dormant Commerce Clause.

A similar logic might be applied to state-imposed barriers to the free movement of marijuana goods irrespective of their current illegality under the federal Controlled Substances Act. Given the First Circuit Court's precedent regarding residency requirements, the First Circuit might be an ideal geographic region for a plaintiff to challenge state barriers to interstate commerce in marijuana goods. For example, a cultivator or

manufacturer of marijuana licensed in Maine might seek an injunction against the Massachusetts Cannabis Control Commission's enforcement of regulations restricting the import of marijuana products from other states on the grounds that the plaintiff is being irreparably harmed by its inability to sell its products in a state where those products are legal.



Any injunction issued against state-imposed barriers to trade would likely invite states to appeal to higher levels of adjudication until the issue is fully resolved, which may require a ruling from the U.S. Supreme Court.



Any injunction issued against state-imposed barriers to trade would likely invite states to appeal to higher levels of adjudication until the issue is fully resolved, which may require a ruling from the U.S. Supreme Court. Such a ruling would, by extension, invalidate all state restrictions against trade, leaving states with a choice to participate in a national market for marijuana products or to use their police power to ban marijuana products entirely.

3.2

STATES COULD PROACTIVELY ELIMINATE THEIR UNLAWFUL RESTRICTIONS ON INTERSTATE COMMERCE

Alternatively, states could avoid court orders by proactively eliminating their own restrictions against interstate commerce. Already, three states have passed legislation that would authorize their governors to enter into agreements with the governors of other states to allow the cross-border shipment of marijuana goods. Oregon and Washington condition this authority on a change to federal law that would allow the interstate transfer of marijuana goods or receipt of an opinion from the federal Department of Justice stating that interstate transfers are permissible.²⁷

²⁷ Oregon Legislative Assembly, 2019 Regular Session, Senate Bill 582, <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/SB582/Enrolled>; Washington State Legislature, 2023 Session, Senate Bill 5069, <https://app.leg.wa.gov/billsummary/?BillNumber=5069&Year=2023&Initiative=false>.

California's law, however, grants wider discretion to that state's governor by enumerating two additional authorizing events. First, the governor would gain this power if a federal law is enacted that "specifically prohibits the expenditure of federal funds to prevent the interstate transfer of cannabis or cannabis products between authorized commercial cannabis businesses." Second, the governor could do so if the California attorney general issues an opinion stating that commerce between marijuana businesses licensed in California and those licensed in other states "will not result in significant legal risk to the State of California under the federal Controlled Substances Act."²⁸

Already, the California Department of Cannabis Control has requested a formal opinion from the attorney general and offered the regulator's own opinion that the legal risk to California would be insignificant. The agency argues that the federal Controlled Substances Act cannot prohibit a state from legalizing and regulating commercial cannabis activity with out-of-state licensees because that would amount to an unconstitutional commandeering of state lawmaking authority. Further, the "operative provisions of the Controlled Substances Act make no distinction between activity involving multiple states and wholly intrastate activity; under the Controlled Substances Act, both kinds of activity are equally illegal," according to the agency's interpretation.²⁹ As a result, there is no reason California should face greater legal risk by authorizing the sale of marijuana products created in other states than it already faces by authorizing purely intrastate commerce in marijuana.

In addition to passage of these laws by California, Oregon, and Washington, New Jersey State Senate President Nicholas Scutari has proposed similar legislation in his state.³⁰

This legislative activity shows state policymakers are already reconsidering restrictions on interstate commerce currently included within their marijuana regulations. However, most of these state laws fail to acknowledge that no change to federal law is needed to allow states to remove these restrictions. By contrast, Congress's exclusive jurisdiction for regulating interstate commerce forbids states from enacting these restrictions in the first place, even if Congress has declared the underlying product to be illegal.

²⁸ California Legislature, 2022 Session, Senate Bill 1326, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1326.

²⁹ California Department of Cannabis Control, Letter to California Attorney General's Office, January 27, 2023. Available at: <https://www.documentcloud.org/documents/23590184-dcc-letter-interstate?responsive=1&title=1>.

³⁰ New Jersey Legislature, Session 2022-2023, Senate Bill 3012, <https://www.njleg.state.nj.us/bill-search/2022/S3012>.

Moreover, states within the free trade zone created by the U.S. Constitution needn't enter into any interstate compact to authorize the unrestricted cross-border flow of goods, as the Constitution itself already authorizes this commerce. In fact, the U.S. Supreme Court expressly noted in *Granholm* that "States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests."³¹ In the Court's view, interstate compacts regarding commerce could lead to regional balkanization that undermines the original purpose of the U.S. Constitution.



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So, while some states have signaled their intent to relax barriers to interstate commerce in marijuana products, a more appropriate response would be to directly remove the offending language from statute and regulation. States not only have the authority, but also the obligation, to allow the sale of marijuana products made in other states if they allow the sale of marijuana products made in their own state.

3.3

CONGRESS COULD MAKE ITS REGULATORY POWER EXPLICIT

A final pathway to full interstate commerce in marijuana would be for Congress to remove the dormant aspect of its regulatory power by making that power explicit. In other words, Congress could pass a law expressly governing interstate commerce in marijuana.

To date, Congress has considered an array of bills that would either remove marijuana from scheduling under the Controlled Substances Act or that would go further by establishing a

³¹ *Granholm v. Heald*, 544 U.S. 460 (2005).

federal regulatory structure governing interstate commerce. Most prominently, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act has twice passed the U.S. House of Representatives but has not secured a hearing in the U.S. Senate. The MORE Act removes marijuana from the Controlled Substances Act but does not establish a regulatory structure, leaving dormant Congress's regulatory authority under the Commerce Clause.³² An implication of this treatment is that Congress would remove any confusion created by the illegality of marijuana, but states would still remain barred from discriminating against out-of-state economic interests.



States not only have the authority, but also the obligation, to allow the sale of marijuana products made in other states if they allow the sale of marijuana products made in their own state.



Two other bills—the Cannabis Administration and Opportunity Act (CAOA) and the States Reform Act—would both remove marijuana from the Controlled Substances Act and make Congress's regulatory power explicit by creating a federal regulatory apparatus. These bills vary in their proposed tax rates and structures and regulatory regimes. The CAO, for instance, would impose up to a 25% federal excise tax on marijuana at the wholesale level and would designate the Food and Drug Administration as a primary regulator of marijuana products.³³ By contrast, the States Reform Act would impose only a 3% federal excise tax on marijuana products, would limit licensing fees to \$10,000 and would designate the Alcohol and Tobacco Tax and Trade Bureau as the primary regulator while declaring that the Food and Drug Administration would hold no more authority to regulate marijuana products than it does for alcoholic beverages.³⁴

³² United States Congress, 117th Congress, House Resolution 3617, <https://www.congress.gov/bill/117th-congress/house-bill/3617>.

³³ United States Congress, 117th Congress, Senate 4591, <https://www.congress.gov/bill/117th-congress/senate-bill/4591>; See also: Tax Foundation, September 2, 2021, <https://taxfoundation.org/blog/federal-cannabis-administration-opportunity-act>.

³⁴ United States Congress, 117th Congress, House Resolution 5977, <https://www.congress.gov/bill/117th-congress/house-bill/5977/text>; See also: Geoffrey Lawrence, "Frequently Asked Questions About the States Reform Act, a Proposed Marijuana Bill," Reason Foundation, November 2021, [.https://reason.org/faq/frequently-asked-questions-about-the-states-reform-act](https://reason.org/faq/frequently-asked-questions-about-the-states-reform-act).

Regardless of the specific proposal chosen by Congress, its decision to directly exercise regulatory authority under the Commerce Clause would mean these powers no longer lay dormant. States that authorize commercial marijuana markets would thus gain clarity about how to treat interstate shipments of marijuana goods.

In one isolated example, Congress has used this power to authorize states to erect their own regulatory schemes. The McCarran-Ferguson Act declares that federal laws that do not expressly purport to regulate the business of insurance do not preempt state laws that regulate that industry. In other words, so long as states do not pass laws that directly conflict with federal law, they have wide discretion to regulate the insurance industry even to the exclusion of out-of-state economic interests.³⁵ Some observers have argued that Congress should grant similar treatment to the marijuana industry, at least on a temporary basis.³⁶

However, fundamental differences exist between markets for insurance and marijuana. Insurance markets allow large groups of individuals to pool and price many different forms of risk. Because insurance amounts to pooling risk for prospective adverse events rather than the sale of an immediate good or service, courts did not consider the industry to constitute “commerce” for nearly a century. That meant states could regulate the industry free of dormant Commerce Clause restrictions. It was not until insurers were sued on antitrust grounds for fixing prices across the states that the U.S. Supreme Court decided in 1944 that insurance constitutes commerce and could therefore be subject to federal antitrust law.³⁷ Congress responded with the McCarran-Ferguson Act to make clear that existing state regulations governing the insurance market would remain valid.

By contrast, there is no credible argument that the sale of marijuana goods does not constitute commerce. It involves the immediate sale of a tangible commodity. Marijuana does hold intoxicating properties for users, which makes it perhaps comparable to alcoholic beverages or tobacco. These industries enjoy no exemption from dormant Commerce

³⁵ Charles D. Weller, “McCarran-Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy,” *Duke Law Journal*, Vol. 2 (1978), pp. 587-644, <https://scholarship.law.duke.edu/dlj/vol27/iss2/7>.

³⁶ Scott Bloomberg and Robert A. Mikos, “Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana,” *Vanderbilt Law Research Paper No. 21-33*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909972; see also, Tamar Todd, “How to Federally Legalize Cannabis Without Violating the Constitution or Undermining Equity and Justice,” *Parabola Center for Law and Policy*, September 2023, <https://www.parabolacenter.com/img/interstate.pdf>.

³⁷ *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

Clause restrictions. Although the 21st Amendment does allow states to bar the importation of any intoxicating liquors that violate their laws, the Court has consistently held that states must apply their police power evenhandedly to products produced within and out-of-state. In *Granholm, Tennessee Wine* and other cases, the Court held that states cannot use their regulatory powers under the 21st Amendment to subvert Congress's exclusive right to regulate interstate commerce under the Commerce Clause. If this is true for intoxicating liquors, it must certainly be true of marijuana.



Although the 21st Amendment does allow states to bar the importation of any intoxicating liquors that violate their laws, the Court has consistently held that states must apply their police power evenhandedly to products produced within and out-of-state.



However Congress may choose to exercise its regulatory powers over interstate commerce in marijuana, it should take care not to empower states to create balkanized markets. Free trade across large geographic regions and population centers benefits the consuming public. Consumers gain access to a wider range of goods at lower prices that enhances their buying power. Free trade empowers the consumer and allows consumers to shape demand such that the most efficient producers succeed in the marketplace.³⁸ By contrast, state balkanization of marijuana markets has bred corruption³⁹ and enabled well-capitalized insiders to corner the market through rent-seeking rather than consumer preference.⁴⁰

³⁸ See, e.g., Donald J. Boudreaux and Nita Ghei, "The Benefits of Free Trade: Addressing Key Myths," Mercatus Center at George Mason University, May 2018, <https://www.mercatus.org/research/policy-briefs/benefits-free-trade-addressing-key-myths>.

³⁹ Geoffrey Lawrence, "Nevada's Flawed Marijuana Licensing Process Leads to Corruption and Lawsuits," Reason Foundation commentary, October 22, 2019, <https://reason.org/commentary/nevadas-flawed-marijuana-legalization-process-leads-to-corruption-and-lawsuits/>.

⁴⁰ Van McConnon, "Opinion: Limiting Marijuana Licenses Benefits Only Multistate Operators," MJ Biz Daily, December 22, 2021 (Updated: March 28, 2022), <https://mjbizdaily.com/limiting-marijuana-licenses-benefits-only-multistate-operators/>.

PART 4

INTRODUCING FEDERAL INTERSTATE COMMERCE REGULATION

Because Congress possesses exclusive jurisdiction to regulate the interstate commerce in marijuana, it's worth exploring the range of possible actions. First, Congress could take no action and allow federal courts or state governments to resolve legal questions regarding the dormant Commerce Clause restrictions. Second, Congress could remove some confusion by removing marijuana from the auspices of the Controlled Substances Act without prescribing any federal regulatory apparatus, leaving its regulatory authority dormant and allowing courts to reign in any protectionist tendencies of state regulators. Third, Congress could both legalize the possession, manufacture, and distribution of marijuana at the federal level and also implement a regulatory regime to govern this commerce nationwide. (It seems implausible that Congress would enact a federal regulatory regime for marijuana while continuing to ban the underlying products.)

If Congress chooses this third option, there are a variety of regulatory structures it could adopt, as evidenced by the very different proposals incorporated into the CAO and the States Reform Act.

4.1

PREPARE ACT COULD SET THE STAGE

One proposal, titled “the Preparing Regulators Effectively for a Post-prohibition Adult-use Regulated Environment Act” or PREPARE Act, could allow Congress to signal its intent to explicitly regulate marijuana commerce without needing to decide on the details of that regulation in advance.⁴¹ Introduced in the House by Reps. Dave Joyce (R-Ohio) and Hakeem Jeffries (D-N.Y.) with a near-identical Senate version filed by Sen. John Hickenlooper (D-Colo.), the PREPARE Act directs the attorney general to establish a Commission on Federal Regulation of Cannabis to study potential pathways to cannabis regulation. The PREPARE Act charges the Commission with crafting a recommended regulatory framework modeled on state and federal regulations for the interstate sale of alcohol.



One proposal, titled “the Preparing Regulators Effectively for a Post-prohibition Adult-use Regulated Environment Act” or PREPARE Act, could allow Congress to signal its intent to explicitly regulate marijuana commerce without needing to decide on the details of that regulation in advance.



The Commission would be instructed to examine the impact of cannabis criminalization, particularly in marginalized communities, the lack of consistent regulations regarding cannabis product safety, use, and labeling, and the lack of guidance for cannabis crop production, sale, intrastate, interstate, and international trade. Additionally, the Commission’s report, due one year after the law’s passage, would also provide recommendations on how to remedy barriers to cannabis banking, research, and medical staff training.

The Commission’s membership would be appointed from key agencies across the government in addition to some members of the cannabis industry, endowing it with the

⁴¹ Preparing Regulators Effectively for a Post-prohibition Adult-use Regulated Environment Act of 2023, PREPARE Act, H.R. 2598, 118th Cong. (2023)

knowledge to address key facets of federal law and regulation relevant to the cannabis market and to predict the effects of potential changes on that market, its participants and customers, and broader society.

PART 5

USING FEDERAL LIQUOR INTERSTATE COMMERCE REGULATION AS A MODEL

While the PREPARE Act could be an impactful half-step for Congress to regulate marijuana, key questions would remain about the optimal method of regulation. The parallels between the markets for marijuana and liquor are difficult to miss. Both substances have enjoyed long periods of federal legality, followed by federal prohibition and then the prospective return to legality. Both substances are inebriating and carry similar concerns regarding public safety, such as how best to regulate the use of automobiles or heavy machinery, how best to encourage moderation or treat problematic use, how best to control access by minors, etc. Finally, both substances are extensively regulated at the state level and states have adopted a wide range of approaches governing the commercial sales and distribution of these substances.

One of the key challenges for federal regulators in the wake of the 21st Amendment's passage was in determining how federal agencies could effectively navigate around these differing state rules. After all, the 21st Amendment expressly allowed states to pass their own laws governing intoxicating liquors. Similarly, federal inaction on marijuana has

emboldened states to pass comprehensive laws governing the manufacture and sale of marijuana products.



The parallels between the markets for marijuana and liquor are difficult to miss. Both substances have enjoyed long periods of federal legality, followed by federal prohibition and then the prospective return to legality.



It is natural, therefore, to look toward the alcohol industry's interstate market that is concurrently governed by both federal and state law for possible lessons about how to govern interstate shipments of marijuana products. The authors of the PREPARE Act call for regulatory initiatives to be based on the framework governing the interstate transfer of alcoholic beverages. This system, developed over decades of trial, error, and litigation, informs our recommendations on how state and federal authorities can work together to regulate interstate cannabis transfers to promote a legal, transparent, and secure interstate cannabis market.

5.1

LICENSEE-MANAGED TRANSFERS WITH FEDERAL OVERSIGHT

The federal government has little direct involvement in the physical transfer of alcoholic beverages in interstate commerce. Firms in the interstate supply chain, however, must comply with a set of rules and standards applicable to registration, beverage formulation, product standards, manufacturing processes, taxation, labeling, and marketing of alcoholic beverages.

At the federal level it is the Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Treasury Department that is primarily responsible for administering federal alcohol statutes applicable to beverages over 7% alcohol by volume via the Federal Alcohol Administration Act. This includes registering and permitting alcohol producers or importers, approving labels, approving formulas when necessary, and collecting federal excise taxes.

TTB also ensures compliance with all federal alcohol laws, including U.S. Food and Drug Administration (FDA) “standards of identity,” which act as definitions for product categories, like beer, wine, and spirits, as well as FDA’s good manufacturing and storage standards regarding alcohol made for human consumption.⁴² In other words, while there are several different federal statutes and regulations applicable to the interstate transfer of alcoholic beverages, promulgated by various agencies, it is largely TTB which oversees their administration at the federal level.



For the transportation and transfer of alcoholic beverages in interstate commerce, the producers, distributors, carriers, and retailers involved in the supply chain are responsible for ensuring compliance with both federal and state laws.



For the transportation and transfer of alcoholic beverages in interstate commerce, the producers, distributors, carriers, and retailers involved in the supply chain are responsible for ensuring compliance with both federal and state laws. TTB has the authority to verify the legality of such transfers and ensure all parties maintain the appropriate permits and manifests. TTB may also conduct facility and records inspections or audits to ensure compliance and investigate potential violations. This scope of authority is similar to that held by existing state regulators of marijuana over shipments that occur within their own states.

Regardless of intent to operate across state lines, all manufacturers, importers, and retail dealers of alcohol intended for sale must first register with TTB for tax filing purposes.⁴³ Additionally, most must also receive the appropriate TTB permit. Manufacturers or producers of distilled spirits and wine, for example, can apply for a manufacturer’s Basic Permit on TTB’s website, while brewers must submit a Brewer’s Notice application to TTB. Wholesalers and importers must obtain Basic Wholesaler or an Importer’s Basic permit,

⁴² “Alcohol Beverages with Added Caffeine,” Alcohol and Tobacco Tax and Trade Bureau, www.ttb.gov, 23 November 2011. www.ttb.gov/main-pages/caffiene-added (2 Jan. 2024).

⁴³ “Beverage Alcohol Retailers,” Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, 14 Jan. 2015. www.ttb.gov/nrc/retail-beverage-alcohol-dealers (2 Jan. 2024).

while retail dealers of spirits, wine, and beer must file an Alcohol Dealer Registration with TTB.

In addition to the TTB and the FDA, other federal agencies tangentially regulate interstate alcohol transfers. For example, the Department of Transportation under the Hazardous Materials Transportation Act (49 CFR 171-180), provides guidelines on packaging, labeling, and securing hazardous materials for transport, including alcoholic beverages that meet the criteria of hazardous materials (e.g. as flammable liquids). Similarly, the Federal Motor Carrier Safety Administration also establishes safety and security requirements for commercial shipping across state lines, but these regulations do not specifically apply to alcoholic beverages.

State governments may also impose additional requirements. Most require businesses transporting alcohol into the state to at least register with a designated state agency. This typically applies to importers, but may also apply to carriers. New York State, for example, requires shippers of alcohol to apply for an Alcohol Carrier License from the New York State Liquor Authority, which authorizes them to transport alcoholic beverage within New York. Additionally, some states require permits for the transportation of alcoholic beverages *through* their borders, even when the origin and final destination are outside of that state.⁴⁴

APPLICABILITY TO MARIJUANA

Both the CAO and the States Reform Act call for a system of computerized inventory tracking as marijuana products move from one state to another. All states with adult use markets already require this form of track-and-trace over marijuana inventory using radio frequency identification tags to both protect against illegal diversion and also to facilitate product recalls when necessary. A federal tracking system could either replace these existing state systems or could integrate with state systems, allowing inventory to be checked out of one state system and into a federal system while the inventory is in transit before being checked into a different state's system upon delivery to its destination.

Otherwise, the physical transportation of marijuana inventory across state lines could be governed similarly to both the interstate transfer of alcohol and the intrastate transfer of marijuana, with licensed and regulated private firms handling these transfers subject to a

⁴⁴ "Beer Distribution 101: Licensing and States That Require Permits to Transport Alcohol," *Brew Movers*, 8 June 2022. www.brewmovers.com/articles/guide-to-alcohol-transportation-permits-by-state (2 Jan. 2024).

written manifest detailing the contents of the inventory, along with its origin and destination and a proposed route of transport. Licensed distributors or transporters could be required to retain these documents for inspection or audit, consistent with existing rules in most states.



... the physical transportation of marijuana inventory across state lines could be governed similarly to both the interstate transfer of alcohol and the intrastate transfer of marijuana, with licensed and regulated private firms handling these transfers subject to a written manifest detailing the contents of the inventory, along with its origin and destination and a proposed route of transport.



5.2

POINT OF FEDERAL TAXATION

The TTB collects federal excise taxes on all alcoholic beverages. All businesses in the supply chain must comply with TTB's regular reporting requirements and ensure they remit the appropriate tax. This includes maintaining accurate records of production, distribution, and sales, as well as submitting tax returns and supporting documentation.⁴⁵ Typically, the tax is due when the alcohol is removed from the manufacturer's warehouse for sale and paid by the alcohol manufacturer when sold to consumers (if the producer is self-distributing) or when it is transferred to wholesalers. However, the tax obligation may not be due immediately if the product is transferred to a bonded facility. In this case, the wholesaler or importer would pay the tax when the alcohol is removed from their warehouse or bonded facility and then billed back to the manufacturer.⁴⁶

⁴⁵ "Tax Rates," Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, 22 Dec. 2020. www.ttb.gov/tax-audit/tax-and-fee-rates (2 Jan. 2024).

⁴⁶ "Beverage alcohol compliance basics: The three-tier system, product registration, and taxes," Avalara, Alvalara.com. <https://www.avalara.com/us/en/learn/whitepapers/beverage-alcohol-compliance-basics-the-three-tier-system-product-registration-and-taxes.html> (2 Jan. 2024).

Federal excise taxes on alcohol are thus assessed at the wholesale level, which eases the administration and collection of these taxes. States impose wildly different regulations governing the distribution and retail sales of alcohol with some states owning all retail outlets directly while others license private entities as retailers. Although wholesale taxes are generally less transparent to the ultimate consumer as retail taxes—a key plank of efficient tax policy—differing state regulatory regimes make this approach simpler to administer than retail taxation.⁴⁷

Businesses must also remit state-level excise taxes on alcohol. Similar to the federal tax, this is typically paid at the point that the alcoholic beverages are produced, bottled, and removed for final sale. This can occur when the product leaves a producer’s facility for direct-to-consumer sales, when the product is removed from a bonded warehouse for distribution to retailers, or when the product enters the state. Which entity in the supply chain is responsible for paying the state excise tax can depend on the type of alcohol, whether it was produced out-of-state, and the type of facility or entity receiving it. In California, for example, the excise tax for wine and beer is typically paid by the manufacturer, winegrower, or importer. The excise tax on distilled spirits, meanwhile, is typically paid by the wholesaler in California.⁴⁸ In Maryland, it is the out-of-state manufacturer that is responsible for the tax on beverages when they enter the state, while a wholesaler or importer must pay the tax for alcohol coming from outside of the country.⁴⁹

Though appearing byzantine from the outside, this system is a relatively streamlined process for the individual entities within the supply chain. This is particularly true of TTB processes and those in many states, which provide specific guidance and pathways through the process for each type of business operating in interstate alcohol commerce. Moreover, both at the state and federal levels, the processes of acquiring a permit or license, registering new products, paying taxes, and filing reports can be done entirely online.

⁴⁷ “Principles of Sound Tax Policy,” Tax Foundation. <https://taxfoundation.org/taxedu/principles> (2 Jan. 2024).

⁴⁸ “Tax Guide for Alcoholic Beverage,” Alcohol and Tobacco Tax and Trade Bureau, TTB.gov. www.cdtfa.ca.gov/taxes-and-fees/alcoholic-beverage-tax.htm#topics (2 Jan. 2024).

⁴⁹ “Alcohol Tax,” Comptroller of Maryland, Marylandtaxes.gov. www.marylandtaxes.gov/business/alcohol/index.php (2 Jan. 2024).

APPLICABILITY TO MARIJUANA

Both the COAO and the States Reform Act envision a federal excise tax to be assessed and collected by the TTB at the point of separation from a cultivator, producer or bonded facility. This structure would closely parallel the federal taxing structure for alcohol.

5.3

PRODUCT FORMULATION

Standards of identity act as category definitions for various types of alcoholic beverages at the federal level. These are dictated by the FDA and used by TTB in approving labels for new products and developing regulatory guidance for the industry. Alcoholic beverages typically do not require federal formula approval or testing. However, those that have ingredients outside of those listed in standards of identity—those with added coloring and flavor additives, or which utilize certain manufacturing processes, like freezing, as examples—may require Alcohol Beverage Formula Approval from TTB prior to beginning production or applying for label approval.⁵⁰

States may have their own definitions of categories that differ from federal standards of identity. Alaska, for example, has no special definitions for beer, wine, or distilled spirits beyond a general definition of alcoholic beverages as products greater than 0.5% ABV that are intended for human consumption.⁵¹ Texas, meanwhile, has two different defined categories for beer, “beer,” defined as a malt beverage between 0.5% and 4% alcohol by weight and “ale or malt liquor,” defined as a malt beverage containing greater than 4% alcohol by weight.⁵²

To these authors’ knowledge, no state requires formula testing or ingredient disclosures in addition to those required by the TTB. However, many require new products to register with state authorities and show proof of compliance with both federal labeling and formulation requirements.

⁵⁰ “Formulation – Alcohol Beverage Formula Approval” Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, 21 Aug. 2013. www.ttb.gov/formulation (2 Jan. 2024).

⁵¹ “Beer Distribution Rules: State-by-State Beer Distribution Rules Within the Three-Tier System,” SOVOS, Sovos.com, 20 July 2023. sovos.com/shipcompliant/resources/beer-distribution-rules-by-state (2 Jan. 2024).

⁵² “Alcoholic Beverage Code,” Texas Constitution and Statutes. www.statutes.capitol.texas.gov/Docs/AL/htm/AL.1.htm (2 Jan. 2024).

APPLICABILITY TO MARIJUANA

We envision a similar scenario working for marijuana products, with federally defined product categories (e.g. flower, concentrates, edibles), standards of quality, and basic labeling requirements serving as a streamlined means for state oversight.



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5.4

LABEL APPROVAL

Before new alcoholic beverages can be sold or distributed, their labels must receive approval from TTB, either as a Certificate of Label Approval (COLA) or a Certificate of Exemption from Label Approval (CELA).⁵³ A COLA verifies that the product formula has been approved or did not require approval by TTB and that the label meets federal minimum labeling standards, including the display of the federal alcohol health warning, alcohol content disclosure, and other requirements.⁵⁴ Alternatively, alcoholic beverages intended only for intrastate sale may apply for a CELA, though their labels must still display the federal health warning.⁵⁵

Though the federal government does not require such TTB approvals for alcoholic beverages made and sold within a single state, nearly all alcoholic beverages obtain either a COLA or CELA as states often rely on TTB approvals in state-level alcohol regulation. Many states, for example, require submission of proof of TTB label approval or exemption

⁵³ Michael G. Webster, “TTB Labeling Requirements,” Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, April 2019. www.ttb.gov/images/pdfs/presentations/part6.pdf (2 Jan. 2024).

⁵⁴ Michael G. Webster, “TTB Labeling Requirements,” presentation for the 2016 Craft Brewers Conference, May 6, 2016 <https://www.ttb.gov/images/pdfs/presentations/part6.pdf>.

⁵⁵ “Certification/Exemption of Label/Bottle Approval (COLA)” Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, 12 May 2022. www.ttb.gov/alfd/certificate-of-label-approval-cola (2 Jan. 2024).

as a condition of registering new products with the state, even those intended only for intrastate sale.⁵⁶ Some states impose additional labeling requirements, such as Missouri which stipulates that alcoholic beverage labels must also list the address and owner name of the facility in which it was produced.⁵⁷

APPLICABILITY TO MARIJUANA

A similar standard could prove effective for intrastate cannabis commerce, with a federal authority, such as the FDA, setting minimum labeling standards to which state authorities may default in order to ensure uniform and adequate labeling of new cannabis products.

⁵⁶ “Liquor Code” Colorado Department of Revenue Division of Liquor Enforcement. www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=4031 (2 Jan. 2024).

⁵⁷ “State of Missouri Alcohol & Tobacco Laws & Regulations 2023,” Missouri Division of Alcohol and Tobacco Control, www.atc.dps.mo.gov.atc.dps.mo.gov/documents/liquor-lawbook.pdf (2 Jan. 2024).

PART 6

FEDERAL GUIDANCE CONSIDERATIONS FOR REGULATORY HARMONY

Federal guidance serves as a pivotal tool in regulatory frameworks governing commerce in controlled substances, providing clarity to industry, ensuring compliance, and maintaining consistency. Federal guidance includes areas in which federal agencies do not exert direct regulatory authority, but in which federal authorities elucidate their intentions and understanding for state regulators and industry participants. This guidance plays a crucial role in delineating the parameters within which industries operate, serving as a bridge between overarching federal regulations and state-level implementation.

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Federal guidance, in this context, functions to assist both federal authorities and state agencies in achieving regulatory harmony, as well as assisting industry stakeholders in complying with broad and ever-evolving rules. It offers interpretative insights, outlines best practices, and aligns industry practices with overarching federal objectives.

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Once again, we can draw on parallels from the well-established regulatory landscape of alcoholic beverages for the prospective interstate commerce of cannabis. As with alcoholic beverages, federal guidance regarding marijuana products can help to establish minimum safety standards for manufacturing and storing inventory, ingredient safety and quality, clear labeling for consumers, and parameters around the marketing of various types of marijuana products. These guidelines could serve as an efficient baseline for state regulation and create a more uniform national market unmolested by technical barriers to trade.

6.1 COMPARISON WITH ALCOHOL REGULATION

In the domain of alcoholic beverages, federal agencies, notably the TTB, provide extensive guidance on formulas, manufacturing processes,⁵⁸ labeling, advertising,⁵⁹ taxation, and quality control. For example, the "TTB Beverage Alcohol Manual" provides a comprehensive resource with specific instructions on label design, mandatory statements, and allowable claims. The manual serves as a primary reference for industry stakeholders, ensuring that alcoholic beverage labels meet federal requirements.⁶⁰

Agencies other than the TTB, notably the FDA and the Federal Trade Commission (FTC), offer additional guidance on issues such as standards of identity, good manufacturing practices, and fair-trade practices. For example, the Federal Trade Commission publishes its "Green Guides"—a set of guidelines to ensure industry marketing claims around

⁵⁸ "Procedures," Alcohol and Tobacco Tax and Trade Bureau, TTB.gov. www.ttb.gov/procedures#95-1 (2 Jan. 2024).

⁵⁹ Jason R Canvasser, Alyson Acheson, "The Alcohol and Tobacco Tax and Trade Bureau Updates Its Guidance for Industry Members on the Use of Social Media To Advertise Alcohol Beverages," Clark Hill, clarkhill.com, 15 Feb. 2023. www.clarkhill.com/news-events/news/the-alcohol-and-tobacco-tax-and-trade-bureau-updates-its-guidance-for-industry-members-on-the-use-of-social-media-to-advertise-alcohol-beverages (2 Jan. 2024).

⁶⁰ "The Beverage Alcohol Manual (BAM): A Practical Guide," Alcohol and Tobacco Tax and Trade Bureau, TTB.gov, April 2007. www.ttb.gov/images/pdfs/beer-bam/complete-malt-beverage-alcohol-manual.pdf (7 Dec. 2023).

environmental impacts, often referred to as "green" or "eco-friendly" claims, are truthful and not deceptive. These guides provide recommendations on how to substantiate and qualify such claims to avoid misleading consumers and maintain trust in their environmental marketing practices. These guidelines are instrumental in shaping the industry's operations while accommodating variations and intricacies at the state level.

The regulation of alcoholic beverages and marijuana share certain common objectives, such as public safety, quality control, and the prevention of illicit trade. Federal guidance for alcohol focuses on labeling, advertising, taxation, and distribution, aiming to strike a balance between commerce and public health. These principles can be adapted to the marijuana industry with due consideration for the unique attributes of marijuana products.

6.2

LABELING AND ADVERTISING GUIDELINES

Existing federal guidance for alcoholic beverages includes comprehensive labeling requirements to inform consumers about the product's origin, content, and responsible consumption. These standards could serve as a foundation for developing marijuana-specific labeling and packaging guidance. For instance, guidance can be developed to specify the content and format of labels for marijuana products, including information on potency, cannabinoid profile or recommended dosage.

Similarly, federal guidance regarding permissible advertising practices, age restrictions, and content guidelines for alcoholic beverages could provide a model for cannabis regulatory guidance to address concerns related to targeting minors or promoting false claims.

6.3

QUALITY ASSURANCE AND SAFETY STANDARDS

The alcohol industry adheres to strict quality control standards, ensuring that products meet established safety criteria. Regulatory guidance, particularly from the TTB, provides clarity for industry as federal laws governing alcohol evolve. For example, after the 2018 Farm Bill excluded hemp from the Controlled Substances Act, essentially decriminalizing its use, the TTB issued guidance clarifying the use of hemp as an ingredient in beverage alcohol and requirements for the industry to legally produce and sell such beverages.

As another example, in 2014 the FDA issued new rules governing “gluten-free” claims in foods and beverages.⁶¹ This led the TTB to issue TTB Ruling 2014-2 and later TTB Ruling 2020, providing updated guidance for the alcoholic beverage industry on making such claims in compliance with the new FDA rules.⁶²

Federal marijuana guidance may establish similar protocols and requirements. They may also establish “standards of identity” similar to those for alcoholic beverages, specifying the nature, composition, and essential characteristics of various cannabis products. These standards can serve to bolster consumer safety, as well as industry compliance with other rules and requirements, such as those regarding accurate labeling, truthful marketing, or testing requirements for contaminants and potency.



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6.4

INTERPLAY WITH STATE LAWS

Just as state-level regulations significantly shape the alcoholic beverage industry, state-level marijuana laws and regulations will continue to be integral in defining the market landscape for marijuana products. Federal guidance should delineate the roles and responsibilities of federal and state authorities, fostering cooperation and consistency while respecting states' autonomy in regulating marijuana products. Indeed, federal policymakers should view the market function of their role as minimizing technical barriers to trade that might arise due to incoherent regulations across states. Providing guidance for states to follow thus enables the emergence of a more cohesive interstate market.

⁶¹ “Gluten and Food Labeling,” Food and Drug Administration, FDA.gov, 16 July 2018. www.fda.gov/food/nutrition-education-resources-materials/gluten-and-food-labeling (7 Dec. 2023).

⁶² “TTB Ruling Number: 2020-2: Gluten Content Statements in the Labeling and Advertising of Wine, Distilled Spirits, and Malt Beverages,” Alcohol & Tobacco Tax & Trade Bureau, TTB.gov, 13 Oct. 2020. www.ttb.gov/rulings/r2020-2 (7 Dec. 2023).

6.5 BALANCING UNIFORMITY AND FLEXIBILITY:

As the marijuana industry continues to evolve, it is essential that federal guidance remains flexible, adaptable, and responsive to emerging trends, scientific research, and consumer preferences. For federal guidance to facilitate, rather than hinder, interstate cannabis commerce, it must strike a careful balance between providing uniform standards and allowing for regional variation.

Alcoholic beverage regulation, for example, generally serves as a federal minimum standard, allowing state authorities to implement additional rules so long as they comply with federal law. This equilibrium ensures that federal oversight complements the diverse approaches taken by individual states and allows for cooperative regulation between federal and state authorities. It also acknowledges the evolving nature of the industry and the need for guidance that can adapt to shifting legal, societal, and market dynamics.

PART 7

CONCLUSION

Interstate commerce in marijuana is inevitably emerging as part of legalization. Existing state prohibitions against the import of marijuana products produced in other states are facially discriminatory against out-of-state economic interests. The U.S. Supreme Court has held that facially discriminatory state laws face a “virtually *per se* rule of invalidity.” States are able to use their police power to regulate or ban certain products or activities to promote the public health and safety, but if a state permits any product to be sold within its borders, it must allow similar products made out-of-state to be sold on an equal basis.

This dormant Commerce Clause jurisprudence applies to any product that has entered into interstate commerce. Through a series of controversial opinions, the U.S. Supreme Court has also held that economic activity that occurs within the boundaries of a single state also constitutes interstate commerce. That means marijuana is clearly subject to dormant Commerce Clause restrictions even though Congress has declared the substance contraband. States do not have the authority to exclude marijuana products made in other states from their state-regulated markets.

Nevertheless, all states that have sanctioned a regulated marijuana market have included regulations unconstitutionally banning the import of marijuana products made in other states. State policymakers may have relied on a misunderstanding of the Cole Memo when approving these regulations, but it is clear they would usurp Congress’s exclusive jurisdiction for regulating interstate commerce and are barred by the dormant Commerce Clause. A series of recent rulings by federal district and circuit courts have already struck

down state barriers to the free movement of persons and capital within the marijuana industry on these grounds.



... marijuana is clearly subject to dormant Commerce Clause restrictions even though Congress has declared the substance contraband. States do not have the authority to exclude marijuana products made in other states from their state-regulated markets.



This means change is inevitable. States could abandon these policies, federal courts could invalidate them, or Congress could make its regulatory power explicit by establishing a federal framework to govern interstate commerce in marijuana. Congress has already considered a handful of regulatory proposals. Two such proposals would immediately establish a comprehensive regulatory framework while others would simply remove the federal ban on marijuana while leaving Congress's regulatory powers dormant. The PREPARE Act is a half-measure that would empower a federal commission to recommend a regulatory framework to Congress.

Federal regulation of commerce is not always a burden and can, in fact, facilitate an orderly interstate marketplace by removing technical barriers to trade that arise from disparate regulatory frameworks at the state level. The alcoholic beverages industry offers interesting parallels to marijuana in that both substances were once federally illicit and both are subject to extensive and varying regulation at the state level. In the case of alcohol, federal agencies have learned to navigate differing state approaches to regulation and facilitate vibrant interstate trade, assurance over product safety, and efficient collection of excise taxes to defray the costs of this regulation.

As Congress debates proposals for exercising its regulatory powers under the Commerce Clause, it should adapt its existing regulatory framework for alcohol to marijuana. In particular, this should include naming TTB as the primary regulator of interstate commerce, collector of federal excise taxes, and federal licensing authority for marijuana businesses. Other agencies, including the FDA or the Departments of Transportation and Justice, may play supporting roles.

Time is of the essence for any prospective action by Congress. If Congress does not act, federal courts may soon usher in an interstate marketplace for marijuana despite its federal illegality under the Controlled Substances Act because dormant Commerce Clause jurisprudence makes it clear that balkanized state markets cannot legally persist.

ABOUT THE AUTHORS

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