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Just Don't Do It: Why Cannabis Regulations are the Reason Cannabis Businesses are Failing

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JUST DON'T DO IT: WHY CANNABIS REGULATIONS ARE THE REASON CANNABIS BUSINESSES ARE FAILING

Edward Adams*

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INTRODUCTION

While cannabis legalization has increasingly entered the limelight in the United States, the reality of cannabis companies succeeding in the United States is diminishing. Cannabis companies during the pandemic took significant short-term borrowings as there was an increase in demand for cannabis.¹ From the beginning of 2021 through December 16, 2023, “U.S. cannabis companies have borrowed around \$4.2 billion.”² Paying back the debt will be challenging for most cannabis companies.³ Notably, cannabis sales have started to slow, “falling 1% in November from a year earlier.”⁴ Along with sale decreases, cannabis prices are 28 percent lower than a year ago in November as well.⁵ Larger cannabis companies will likely be able to pay off the debt, while smaller ones likely will not.⁶

¹ Carol Ryan, *Cannabis Stocks Are Stuck with Their Toxic Ingredients*, WALL ST. J. (Dec. 30, 2022, 7:00 AM), <https://www.wsj.com/articles/cannabis-stocks-are-stuck-with-their-toxic-ingredients-11672356174> [<https://perma.cc/D9FC-KA3C>].

² *Id.*

³ *Id.* (“This will be painful to refinance as the average cost of debt for cannabis companies has jumped from 9% in the second quarter of this year to 13% to 16% today depending on the borrower . . .”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Cannabis regulation plays a significant role in cannabis companies failing and experiencing these financial hardships. Most recently, the SAFE Banking Act failed to pass.⁷ The SAFE Banking Act would have allowed cannabis companies to “access normal financial services like checking accounts and commercial mortgages.”⁸ The SAFE Banking Act could also have made it easier for financial institutions to finance and support U.S. cannabis companies.⁹ Even at the state level, issues continue to arise. In Oklahoma—a state that produces more marijuana than it dispenses—the state’s governor put a moratorium on issuing any new medical-marijuana business licenses.¹⁰ Thus, the chance for cannabis legal reform within the state and federal level seems unlikely.¹¹

However, these recent, complex issues between cannabis and the United States are not unique as the United States has a long and complicated history with cannabis. Despite nearly seventy years of federal criminal sanctions for cannabis use, most of which are still in place today,¹² a quickly growing cannabis industry has sprung up across the country. In the last decade, more and more states have legalized the recreational or medicinal use of cannabis and, in the coming years, many more are likely to follow.¹³ The change that has been advocated by proponents of cannabis reform, including some organizations like NORML, the National Organization for the Reform of Marijuana Laws, that have existed since the 1970s, is finally upon us.¹⁴ Nevertheless, the path forward remains hazy. To better understand where we are heading, this Article will begin with a recitation of where we have been. To that end, Part I will provide a historical overview of the cannabis plant and our country’s experience with it prior to the election of President Richard Nixon. It is at that point, the early 1970s, that the current federal cannabis scheme began to take shape. Sections I.A through I.C will discuss the inception of the War on Drugs during the Nixon Administration

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ Adolfo Flores, *Oklahoma Has Become a Top Source of Black-Market Weed*, WALL ST. J., <https://www.wsj.com/articles/oklahoma-has-become-a-top-source-of-black-market-weed-11671990991?page=1> [<https://perma.cc/Q9FB-TCZL>] (Dec. 26, 2022, 4:23 PM).

¹¹ *Id.*; *see also* Ryan, *supra* note 1.

¹² *See Marijuana Timeline*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/L9KR-SB2V>]; *see also* John Mascolo, *Federal Marijuana Laws*, FINDLAW, <https://www.findlaw.com/criminal/criminal-charges/federal-marijuana-laws.html> [<https://perma.cc/5BEN-JDWD>] (Oct. 23, 2023).

¹³ *See, e.g.*, Sarah Trumble & Nathan Kasai, *America’s Marijuana Evolution*, THIRD WAY (Aug. 24, 2017), <https://www.thirdway.org/report/americas-marijuana-evolution> [<https://perma.cc/Q7MB-6NKQ>].

¹⁴ *About NORML*, NORML, <https://www.norml.org/about-norml/> [<https://perma.cc/7TNL-SHXM>].

and examine the subsequent social movement that led President Reagan to revamp and expand the War on Drugs throughout the 1980s.

The legal framework for federal cannabis regulation has largely remained stagnant since the Reagan Administration. Nevertheless, the federal stance on cannabis, influenced in recent years by fluctuation in Executive Branch law enforcement policies, has shifted significantly. Part II will set out the current system of federal regulation and discuss the variable enforcement policies that have allowed the cannabis industry to explode despite the continuing federal prohibition.

Due to political variation among the states and the protracted process of reform, the cutting edge of cannabis regulation is in an incredible state of flux, and the nation-wide regulatory scheme is a jumble of policy choices; many of which are directly opposite to those of neighboring states. In attempt to impose some order on the complexities of state cannabis regulation, Part III will canvas the current legal status of the substance in the United States, including a state survey and an in-depth exploration of the various policy decisions facing states that are considering reform. This portion will also examine some recent, incremental shifts in the federal laws that overlay what is primarily a state level regulatory scheme.

Even after looking to the past and the present, the future remains uncertain. Many significant impediments to the reform movement remain in place. For example, even in states where cannabis has been recreationally legalized, local governments have retained (and exercised) the power to prohibit the substance within their jurisdictions. Part IV will contain a discussion of this and similar roadblocks to reform that lurk in the background of the dynamic environment surrounding cannabis regulation in the United States.

Through understanding the complex history of cannabis regulation and legalization, the current legal landscape, and the existing roadblocks to reform, Part V will discuss how the legal and regulatory landscape causes so many cannabis companies to fail. Cannabis reform needs to happen in order for cannabis companies to become profitable. For now, the cannabis legal regime creates significant hurdles that result in failing companies with little chance of success.

I. THE ORIGINS OF CANNABIS USE AND REGULATION IN THE UNITED STATES

With respect to the United States, or what is now the United States, cannabis was first introduced and cultivated in 1611 in Jamestown, Virginia.¹⁵ It was a prominent textile source in the United States until the mid-1800s, when it was replaced by cotton.¹⁶ Several of the founding fathers, in-

¹⁵ David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 4 (2020).

¹⁶ *Id.*

cluding, by some accounts, George Washington¹⁷ and Thomas Jefferson,¹⁸ grew hemp for industrial purposes. As early as 1839, it was employed medicinally to treat rheumatic disorders and other ailments.¹⁹ Cannabis was even used by military physicians as “an analgesic in the treatment of combat injuries during the U.S. Civil War.”²⁰ Throughout the nineteenth century, cannabis in the United States was primarily used for medicinal purposes.²¹ It was not until the early 1900s that its use as an intoxicant became popular as a result of its introduction by immigrants and merchants from Mexico and the Caribbean.²² Shortly thereafter, the first cannabis prohibitions entered the law books, and the plant’s usage became inexorably intertwined with its regulation.

A. *The Early 1900s*

Until 1870, there were almost no direct legal prohibitions on narcotics in the United States.²³ State antinarcotics legislation began to proliferate in the quarter-century before 1900.²⁴ These early laws, where enacted, focused primarily on prohibiting the distribution, sale, and sometimes, in the case of opium, the use of narcotics.²⁵ They did not, however, prohibit possession.²⁶ Thus, at the turn of the century, only Maine and Oregon prohibited the unauthorized possession of restricted drugs.²⁷

¹⁷ *Did George Washington Grow Hemp?*, GEORGE WASHINGTON’S MOUNT VERNON, www.mountvernon.org/george-washington/farming/washingtons-crops/george-washington-grew-hemp [https://perma.cc/5LKX-QU7K].

¹⁸ Samantha Putterman, *Claims about Thomas Jefferson and Marijuana Are Mostly Off*, POLITIFACT (Mar. 13, 2019), <https://www.politifact.com/factchecks/2019/mar/13/facebook-posts/claims-about-thomas-jefferson-and-marijuana-are-mo/> [https://perma.cc/GHH3-HU34].

¹⁹ Patton, *supra* note 15, at 4–5.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *See id.* at 5–6.

²³ Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 985 (1970) (Many states, however, regulated narcotics indirectly through their general “poison laws.”).

²⁴ *Id.*

²⁵ *Id.* at 985–86.

²⁶ *Id.* at 986.

²⁷ *Id.*; Troy R. Bennett, *Maine Was at the Forefront of the Crusade Against Marijuana Before It Became a Force for Legalization*, BANGOR DAILY NEWS (Oct. 8, 2020), <https://www.bangordailynews.com/2020/10/08/news/how-maine-pot-went-from-legal-to-illicit-to-available-without-a-prescription/> [https://perma.cc/9RBD-DLBN].

Cannabis itself was not prohibited or regulated by any state until 1914,²⁸ but its eventual outlawing was largely a result of the same social and political forces that led to the alcohol prohibition in 1919. Commenting on the striking similarities between the antinarcotics and temperance movements of the late 1800s and early 1990s, Richard J. Bonnie and Charles H. Whitebread II stated:

Both were first directed against the evils of large scale use and only later against all use. Most of the rhetoric was the same: These euphoriant produced crime, pauperism and insanity. Both began on the state level and later secured significant congressional action. Both ultimately found favor with the courts, provoking interchangeable dissenting opinions.²⁹

Prompted by the concurrent temperance and antinarcotics movements, states had been slowly enacting antidrug legislation for thirty years when, in 1909, the federal government began regulating narcotics distribution.³⁰ That year, Congress passed an act, described as an “Act [t]o prohibit the importation and use of opium” which, as its description implies, barred the importation of opium for nonmedicinal use.³¹

As state antidrug legislation expanded rapidly in the first decade of the twentieth century, so did the pressure on Congress to regulate interstate commerce in an expanding list of problematic drugs.³² The result of this pressure was the Harrison Act. Passed in 1914, the Harrison Act was a taxing measure that required the “registration and payment of an occupational tax by all persons who imported, produced, dealt in, sold or gave away opium, cocaine or their derivatives.”³³

A significant consequence of the Harrison Act was that drug addicts, a large percentage of which became addicted accidentally via medical prescriptions, were cut off from their supply and forced to turn to the black market.³⁴ Inflated underground prices followed, which tended to provoke criminal activity, and the criminal activity “in turn evoked in the public a moral response, cementing the link between iniquity and drug addiction.”³⁵ Thus, the Harrison Act set the stage for the negative perception of narcotic addiction that persisted for decades. Moreover, because the Harrison Act was an attempt at indirect regulation of opiates, rather than a criminal pro-

²⁸ CLAYTON J. MOSHER & SCOTT AKINS, *IN THE WEEDS: DEMONIZATION, LEGALIZATION, AND THE EVOLUTION OF U.S. MARIJUANA POLICY* 30 (2019) (“Between 1914 and 1937, at least thirty states passed anti-marijuana laws.”).

²⁹ Bonnie & Whitebread, *supra* note 23, at 976.

³⁰ *Id.* at 986.

³¹ Act to Prohibit Importation and Use of Opium, ch. 100, 35 Stat. 614 (1909) (codified as amended at 21 U.S.C. § 173 (1964) (repealed 1970)).

³² Bonnie & Whitebread, *supra* note 23, at 987 (including opium, cocaine, morphine, and heroin).

³³ *Id.*

³⁴ *Id.* at 988.

³⁵ *Id.*

hibition on drug use and addiction, it spurred an “immediate need for complementary residual state legislation in order to deal effectively with the drug problem.”³⁶

While public awareness and discussion of drug-related issues were at the forefront in the early 1900s, there appears to have been little or no public concern with cannabis.³⁷ Its inclusion in some of the early state drug-prohibition regulations has been ascribed to an assumption that cannabis would be used as a substitute for alcohol or other proscribed drugs and, perhaps more directly, racial prejudice against Mexican-Americans.³⁸ Indeed, the early state prohibitions broadly followed migration patterns of Mexican-American laborers who are attributed with the introduction of cannabis in most western states.³⁹ The first statewide prohibition on the sale and possession of cannabis was enacted in Utah in 1915.⁴⁰ By 1931, twenty-two other states had enacted similar laws.⁴¹

As state regulation of cannabis progressed, another major development came in the form of the Uniform Narcotic Drug Act. Proposed in 1932, the uniform law was proposed for adoption by all fifty states in order to ensure a uniform system of interstate antinarcotic regulations.⁴² The proposal went through five different drafts.⁴³ The first two contained cannabis within their prohibitions, but the later three, including the final proposal, merely instructed states that they could choose to include cannabis within the act’s definition of narcotic drugs.⁴⁴

By the year 1937, the Uniform Narcotic Drug Act had been adopted in thirty-five states, and every state in the country had enacted some form of legislation relating to cannabis.⁴⁵ Thus, the stage was set for direct federal intervention.

³⁶ *Id.* at 989.

³⁷ *Id.* at 1011.

³⁸ *Id.* at 1011–12. Professors Bonnie and Whitebread also conclude that the coverage of cannabis in the Geneva Conventions in 1925 may have had some influence. *Id.*

³⁹ Patton, *supra* note 15, at 6; *see also* Trish Long, *1915: El Paso Becomes First City in United States to Outlaw Marijuana*, EL PASO TIMES, <https://www.elpasotimes.com/story/news/2019/11/14/el-paso-history-pot-possession-first-city-outlaw-weed-tbt/2579079001> [<https://perma.cc/48Y6-53M9>] (Nov. 16, 2019, 3:22 PM).

⁴⁰ Bonnie & Whitebread, *supra* note 23, at 1010.

⁴¹ *Id.*

⁴² *Id.* at 1030, 1033.

⁴³ *Id.* at 1033.

⁴⁴ *Id.* at 1031–33.

⁴⁵ Marihuana Tax Act of 1937, H.R. 6906, 75th Cong. (1937); *see also* Bonnie & Whitebread, *supra* note 23, at 1034.

B. The 1930s and the Marihuana Tax Act

The Marihuana Tax Act of 1937, the first uniform federal regulation of cannabis, imposed a prohibitory tax on cannabis sales nationwide.⁴⁶ Curiously, at the time of its passage, the cannabis “problem” was largely unnoticed—and the federal solution was largely uncalled for—by the middle-class electorate.⁴⁷ In fact, many of members of Congress who voted for the Act “were acquainted neither with marijuana nor with the purpose of the Act.”⁴⁸ The debate on the House floor was short and included one House Member stating: “is this a matter we should bring up at this late hour of the afternoon? *I do not know anything about the bill.*”⁴⁹ Nevertheless, the Act passed the House without a roll call.⁵⁰

The question arises: if the drug and its perceived problems were unknown, how did this bill make it to the floor of Congress? The answer was Harry J. Anslinger. Anslinger was the commissioner of the Federal Bureau of Narcotics (“FBN”), which was established in 1930.⁵¹ Throughout the twenty-year period preceding the Act’s passage, Anslinger had waged a campaign of propaganda against cannabis.⁵² The film *Reefer Madness* covered one piece of the campaign and is still watched today, mostly as a satirical representation of the anti-cannabis craze of the times.⁵³ Anslinger’s efforts ensured that the Marihuana Tax Act would be met with little opposition.

Still, the Act on its face did little to change the framework of cannabis legislation in the US; at least, with every state already regulating cannabis in some way, the Act was not a revolutionary prohibition. Instead, the Act’s principal effect was a substantial increase in the jurisdiction of the FBN, which was tasked with enforcing the new cannabis tax.⁵⁴ And, perhaps unsurprisingly, the FBN began exercising its newfound authority with vigor, making 369 seizures from October 1 to December 31, 1937.⁵⁵ Despite this

⁴⁶ Marihuana Tax Act of 1937, H.R. 6906, 75th Cong. (1937); Bonnie & Whitehead, *supra* note 23, at 1048.

⁴⁷ Bonnie & Whitehead, *supra* note 23, at 1060.

⁴⁸ *Id.* at 1061.

⁴⁹ 81 CONG. REC. 5575 (1937) (statement of Rep. Snell) (emphasis added).

⁵⁰ Bonnie & Whitehead, *supra* note 23, at 1061.

⁵¹ *Id.* at 1062 (“Provoked almost entirely by the Federal Bureau of Narcotics and by a few hysterical state law enforcement agents hoping to get federal support for their activities, the law was tied neither to scientific study nor to enforcement need.”).

⁵² MOSHER & AKINS, *supra* note 28, at 23 (“[W]e proceed to a discussion of arguably the most important period in the history of marijuana regulation in the United States—the 1930s and 1940s, what some have referred to as the ‘reefer madness era.’ During this period, the head of the Federal Bureau of Narcotics, Harry Anslinger, engaged in a concerted campaign to demonize and ban marijuana.”).

⁵³ See Patton, *supra* note 15, at 9.

⁵⁴ Bonnie & Whitehead, *supra* note 23, at 1062.

⁵⁵ *Id.* at 1068.

stringent enforcement, calls for a new, stronger federal prohibition of cannabis soon arose.

C. The 1950s through 1970: The Boggs Act and the Narcotic Control Act of 1956

Into the late 1940s, narcotic drug abuse was on the rise in America.⁵⁶ This generated increased public interest in narcotic drug regulation, which prompted Congress in 1951, to enact the first significant federal drug legislation since the Marihuana Tax Act: the Boggs Act.⁵⁷ For the first time on the federal level, the Boggs Act treated cannabis as equivalent to other narcotic drugs like cocaine and heroin.⁵⁸ Notably, there was little, if any, scientific justification for cannabis's inclusion in the Act. The principal driving force behind the treatment of cannabis was its perception as a gateway drug; that is, a drug that would prompt users to seek out harder, more dangerous drugs.⁵⁹ This theory ran contrary to emerging medical literature that demonstrated the substance's relative harmlessness.⁶⁰ Nevertheless, the idea was popular enough to justify the inclusion of cannabis in the Boggs Act, enshrining the theory that cannabis is a gateway drug.⁶¹

The Boggs Act aimed to decrease the use of drugs by increasing and regularizing the criminal penalties for possession.⁶² As written, the Act called for a two-to-five-year sentence after a first offense, with the sentences increasing after each subsequent offense.⁶³ At the time, the harsh penalties were embraced by mainstream American society and cannabis came to be seen as extremely dangerous.⁶⁴ As the result of encouragement from the FBN, states began to enact legislation mirroring the harsh penalties of the Boggs Act.⁶⁵ By 1957, twenty-eight states had increased the penalties for drug-related offenses, many matching the penalties of the Boggs Act exactly.⁶⁶

⁵⁶ *Id.* at 1063.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Patton, *supra* note 15, at 12.

⁶⁰ MOSHER & AKINS, *supra* note 2828, at 41. It is worth noting that the LaGuardia Committee studied and debunked the claims made by Anslinger surrounding cannabis. *Id.* at 41 n.3.

⁶¹ See Bonnie & Whitebread, *supra* note 23, at 1073; see also Patton, *supra* note 15, at 12 (explaining the importance of the Boggs Act in the rise of the Gateway Drug theory).

⁶² Bonnie & Whitebread, *supra* note 23, at 1063.

⁶³ *Id.* at 1067.

⁶⁴ See Patton, *supra* note 15, at 12.

⁶⁵ Bonnie & Whitebread, *supra* note 23, at 1074.

⁶⁶ *Id.* at 1074–75.

As the demonization of the drug was solidified, cannabis use was all but nonexistent except among those in the lowest echelons of society.⁶⁷ The uniform increases in criminal penalties, brought about by the efforts of Anslinger and others, led to a decrease in drug use, and public attention on the narcotics issue faded.⁶⁸ At the same time, however, “state and federal police authorities, armed with data suggesting that the strengthening of the drug laws had at least halted the increase in drug use, pressed for further increases in penalties.”⁶⁹ In response to their calls for increases in criminal penalties, Congress passed the Narcotic Control Act of 1956.⁷⁰ This new Act made various changes to the existing laws, but for our purposes, it is sufficient to state that the Act increased the penalties for violations of federal drug laws.⁷¹ While the Act was making its way through the Capitol, little consideration was given to cannabis.⁷² Yet, it was again included alongside other more dangerous drugs, confirming the precedent established by the Boggs Act.⁷³

The draconian penalties imposed by the Boggs Act and the Narcotic Control Act were not free from public criticism for long.⁷⁴ Throughout the turbulence that began in the 1960s, cannabis use became more mainstream.⁷⁵ It was adopted by the counterculture movement and continued to be used by a larger majority of youths in the U.S.⁷⁶ A gradually increasing view held that the penalties for cannabis were too harsh.⁷⁷ Many police officers began ignoring small infractions of cannabis laws and multiple states reduced the penalties for possession.⁷⁸ Indeed, a governmental report published in 1967 went so far as to reject the gateway drug theory.⁷⁹ Throughout this same time, however, many continued to espouse the conservative notion of harsh penalties for drug-related offenses that had prevailed throughout the previous decade.⁸⁰ In 1961, the United Nations published the Single Convention on Narcotic Drugs, a treaty that furthered narcotics control and created an international committee to address the problem of drug

⁶⁷ Patton, *supra* note 15, at 12–13.

⁶⁸ Bonnie & Whitebread, *supra* note 23, at 1076.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1077.

⁷¹ *Id.* at 1077–78.

⁷² *Id.* at 1077.

⁷³ *Id.*

⁷⁴ Patton, *supra* note 15, at 13–14.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.*

⁷⁷ *Id.* at 14.

⁷⁸ *Id.*

⁷⁹ MOSHER & AKINS, *supra* note 28, at 43.

⁸⁰ Patton, *supra* note 15, at 14.

use.⁸¹ Thus, while conventional thought about cannabis was being challenged, a tension remained between the increasing mainstream acceptance of cannabis and its prevailing treatment as a heroin- or cocaine-equivalent.

D. The Establishment of the Modern Framework: The Controlled Substances Act, the Parent Movement, and the War on Drugs

The confluence of two events in 1969 launched the infamous “War on Drugs.” First, the election of Richard Nixon, a staunch opponent of cannabis who declared drugs to be “public enemy number one” two years after his election.⁸² The second event was the Supreme Court’s decision in *Leary v. United States*.⁸³ In *Leary*, the Supreme Court declared the Marihuana Tax Act unconstitutional.⁸⁴ While this was a far cry from a sudden legalization of cannabis, it did prompt congressional action. Motivated in part by the desire to replace the Marihuana Tax Act and in part by the need to modernize American drug policy, in 1970 Congress passed the Comprehensive Drug Abuse Prevention and Control Act and, more importantly for our discussion, the Controlled Substances Act (“CSA”).⁸⁵

The CSA established a five-tiered schedule for drugs, with Schedule I drugs being the most regulated and Schedule V drugs being the least.⁸⁶ Cannabis, after much debate, was provisionally classified as a Schedule I drug.⁸⁷ Schedule I drugs are statutorily defined as having “high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and a “lack of accepted safety for use of the drug under medical supervision.”⁸⁸ Faced with evidence that cannabis did not meet the statutory definition for a Schedule I drug, Congress compromised on the issue.⁸⁹ The CSA empowered the Attorney General to re-schedule existing drugs and established a

⁸¹ Lyle Therese A. Hilotin-Lee, *The Single Convention on Narcotic Drugs*, FINDLAW (Oct. 20, 2023), <https://www.findlaw.com/criminal/criminal-charges/the-single-convention-on-narcotic-drugs.html> [<https://perma.cc/4J7Y-DSYU>]; see also MOSHER & AKINS, *supra* note 28, at 32.

⁸² Richard Nixon Foundation, *President Nixon Declares Drug Abuse “Public Enemy Number One”*, YOUTUBE (Apr. 29, 2016), <https://www.youtube.com/watch?v=y8TGLLQID9M> [<https://perma.cc/2FR7-FUWU>]; see also Conor Friedersdorf, *The War on Drugs Turns 40*, ATLANTIC (June 15, 2011), <https://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472> [<https://perma.cc/8WWN-L38B>]; Patton, *supra* note 15, at 17.

⁸³ *Leary v. United States*, 395 U.S. 6 (1969).

⁸⁴ *Id.* at 6.

⁸⁵ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; see also Patton, *supra* note 15, at 15.

⁸⁶ Patton, *supra* note 15, at 15; see also Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1236, 1247.

⁸⁷ Patton, *supra* note 15, at 15.

⁸⁸ *Id.*; Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202(b)(1), 84 Stat. 1236, 1247.

⁸⁹ See Patton, *supra* note 15, at 15; see also MOSHER & AKINS, *supra* note 28, at 44.

Presidential Commission on Marihuana and Drug Abuse to determine how cannabis should be scheduled.⁹⁰

That Commission, commonly known as the “Shafer Commission,” was comprised of thirteen members: nine appointed by the President and four appointed by Congress.⁹¹ Thus, President Nixon had the ability to appoint a majority of the Commission and was ostensibly capable of affecting their ultimate decision on cannabis.⁹² However, Nixon publicly stated, “[e]ven if the Commission does recommend that [cannabis] be legalized, I will not follow that recommendation.”⁹³ Evidence has since revealed that the Nixon Administration’s stance on cannabis may have been motivated in part by racial prejudice.⁹⁴ Despite his warning and clear preference against cannabis legalization, the Shafer Commission recommended that cannabis be decriminalized in 1972.⁹⁵ Staying true to his word, President Nixon rejected the Shafer Commission’s findings, thereby causing cannabis to remain a Schedule I drug under the CSA.⁹⁶ Today, cannabis is still a Schedule I drug and, for over fifty years, the CSA has remained the primary vehicle for federal regulation of cannabis.⁹⁷

Concurrently with the beginning of the War on Drugs, the battle for cannabis legalization began in the states. In 1972, the issue of cannabis legalization reached the ballot in California in the form of Proposition 19.⁹⁸ If it had passed, the voter-initiated measure would have legalized personal cultivation and possession of cannabis but retained criminal prohibitions on the sale of the plant.⁹⁹ The year after the defeat of Proposition 19, Oregon became the first state to decriminalize cannabis.¹⁰⁰ Several states followed Oregon in decriminalizing cannabis in the next decade.¹⁰¹ Throughout the Ford

⁹⁰ See Patton, *supra* note 15, at 15–16.

⁹¹ *Id.* at 16.

⁹² *See id.*

⁹³ *Id.* (quoting RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION* 256 (1974)).

⁹⁴ *Id.* at 16–17; see also MOSHER & AKINS, *supra* note 28, at 43–44.

⁹⁵ Patton, *supra* note 15, at 17.

⁹⁶ *Id.* at 18.

⁹⁷ See DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., *DRUGS OF ABUSE: A DEA RESOURCE GUIDE 9* (2020), https://www.dea.gov/sites/default/files/2020-04/Drugs%20of%20Abuse%202020-Web%20Version-508%20compliant-4-24-20_0.pdf [<https://perma.cc/D55R-ENGD>].

⁹⁸ See Everett R. Bolles, *Drive to Legalize Marijuana Is Funded by Nonprofit Company in California*, N.Y. TIMES, Oct. 10, 1972, at 19 [<https://nyti.ms/3UFnVrH>].

⁹⁹ *Id.*; see also Burrell Vann Jr., *Direct Democracy and the Adoption of Recreational Marijuana Legalization in the United States, 2012-2019*, 102 INT’L J. DRUG POL’Y 1, 2 (2022).

¹⁰⁰ Vann, *supra* note 99, at 2; see also discussion *infra* Part III.

¹⁰¹ See Vann, *supra* note 99, at 2.

and Carter presidencies, social attitudes toward cannabis continued to move in a more permissive direction, despite the persisting federal prohibition.¹⁰²

When Manatt's manifesto, *Parents, Peers, and Pot*, was published in 1979, it became a lightning rod for the Parent Movement. The nearly one hundred-page handbook had a heavy focus on the health risks of cannabis, including lung and throat damage, panic attacks, and impaired immune function.¹⁰³ While Manatt cited numerous medical studies in her work, it was ripe with claims that induced scorn from critics—including that marijuana caused chromosome damage and that it decreased the presence of sex hormones, leading to breast development in boys.¹⁰⁴ Nevertheless, the booklet was inordinately successful, with the distribution of more than one million copies making it one of the most disseminated publications in the NI-DA's history.¹⁰⁵

Parents, Peers, and Pot, which galvanized the Parent Movement against cannabis, also revealed the deep moral underpinnings of the Movement. Undoubtedly, cannabis was the explicit focus of their ire. The members of the Parent Movement were as concerned about the health effects of marijuana as they were about its status as a "gateway drug" that would inevitably lead to the use of more serious narcotics, a view that would be furthered by their ally Robert DuPont in the years to come.¹⁰⁶ In the eyes of the parents, the hazard of marijuana reflected a broader deterioration of societal norms that dated to the prior decade.¹⁰⁷ The publication itself included a strong condemnation of the themes of "self-expression and freedom of choice" in child rearing.¹⁰⁸ Indeed, Manatt linked the social corrosion to increased divorce rates and latchkey kids, left alone without supervision while their parents were away at work.¹⁰⁹ The Parent Movement wanted more than just stricter drug policies, as they sought to push back against permissive social attitudes and strengthen the idea of the American family that had faded since the Vietnam war.¹¹⁰ Viewing the marijuana issue in a moral light, ra-

¹⁰² See Philip Shabecoff, *Ford Urges Shift in U.S. Drug Fight*, N.Y. TIMES, Oct. 15, 1975, at 1, 25 [<https://nyti.ms/48bwaPf>]; see also Keith Stroup, *A Founder Looks at 50: NORML and the Carter Administration*, NORML (July 10, 2020), <https://norml.org/blog/2020/07/10/a-founder-looks-at-50-norml-and-the-carter-administration> [<https://perma.cc/A5DT-K6T3>].

¹⁰³ See MARSHA MANATT, PARENTS, PEERS, AND POT 39, 43–44 (Dep't of Health and Hum. Servs. ed., 1979).

¹⁰⁴ *Id.* at 34–35, 41, 47.

¹⁰⁵ Emily Dufton, *Parents, Peers and Pot: The Rise of the Drug Culture and the Birth of the Parent Movement, 1976–1980*, 3 TRANS-SCRIPTS 211, 226 (2013).

¹⁰⁶ See *id.* at 213.

¹⁰⁷ See *id.* at 215.

¹⁰⁸ MANATT, *supra* note 103, at iii.

¹⁰⁹ *Id.* at 29–30.

¹¹⁰ See JEREMY KUZMAROV, THE MYTH OF THE ADDICTED ARMY: VIETNAM AND THE MODERN WAR ON DRUGS 172 (2009) (Describing how Reagan aligned himself with traditional values and stated "[d]rug abuse is the repudiation of everything America is.").

ther than merely a public health issue, the parents would accept nothing less than zero tolerance.

By the mid-1980s, the strong moral message of the Parent Movement had won over. To a majority of Americans, drugs had become one of the worst social problems and threats to national security.¹¹¹ From 1980 to 1985, the coalition of suburban parents against cannabis continually gained ground.¹¹² They had swarmed the Capitol Building and testified their way to defeating a congressional attempt at federal decriminalization for simple marijuana possession.¹¹³ Shortly after, Manatt and her anti-marijuana partner, Buddy Gleaton, hosted their annual PRIDE¹¹⁴ Conference in Atlanta. At that year's conference, which was attended by Lee Dogoloff and Robert Dupont, the leaders of the Parent Movement gathered to plot the establishment of a Washington-based lobbying organization—the National Federation of Parents for Drug-Free Youth (“NFP”).¹¹⁵ And, perhaps most importantly to the story of cannabis in the United States, the Parents Movement had helped secure the election and re-election of President Ronald Reagan.¹¹⁶

There was plenty of overlap between the members of the Parent Movement and the Republican supporters of Ronald Reagan's 1980 campaign for the Presidency, particularly with regard to the groups' views on the supposed liberal permissiveness that were destabilizing the country.¹¹⁷ Indeed, a significant factor in Reagan's landslide defeat of incumbent President Jimmy Carter was Carter's failure to address widespread concerns over drugs in America.¹¹⁸ His support for an easing of criminal punishments for marijuana and the idea that “penalties for possession of a drug shouldn't be more damaging to an individual than the use of the drug itself,” exposed him to accusations of being soft on crime.¹¹⁹ Marsha Manatt wrote that President Carter's White House had failed to assert the necessary moral leadership to lead the country through the drug crisis.¹²⁰ Carter's final years at the helm

¹¹¹ *Id.* at 166.

¹¹² See Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperatives of America's War on Drugs*, 102 J. AM. HIST. 126, 136–37 (2015).

¹¹³ See *id.* at 137–38.

¹¹⁴ “PRIDE” stood for the Parents' Resource Institute for Drug Education, which was founded by Keith Schuchard and Buddy Gleaton in 1978. Dufton, *supra* note 105, at 224–25.

¹¹⁵ Unsurprisingly, Manatt and Gleaton were among those named to the board. See *id.* at 229.

¹¹⁶ *Id.* at 230–31.

¹¹⁷ Joseph Moreau, *“I Learned It by Watching You!”: The Partnership for a Drug-Free America and the Attack on “Responsible Use” Education in the 1980s*, 49 J. SOC. HIST. 710, 719 (2016).

¹¹⁸ Dufton, *supra* note 105, at 227–28, 230.

¹¹⁹ KUZMAROV, *supra* note 110, at 168.

¹²⁰ *Id.* at 169.

were marred by the admission of his chief of staff and national campaign manager to drug problems and the scandal involving the Drug Czar Peter Bourne's alleged cocaine use.¹²¹ In stark contrast to Carter, Reagan carried with him a straight-laced, traditionalist persona, and appeared dedicated to hard work, religious conformity, and patriotism.¹²²

Early in his first term, Reagan gave televised speeches announcing new initiatives against narcotics.¹²³ While cocaine was the focus of these early initiatives, cannabis achieved increased negative attention, due in no small part to the organization of the Parent Movement. Reagan increased federal funding for drug control, primarily funneled through the DEA and FBI, created a set of prosecutor-led drug-fighting units, and authorized the CIA to produce intelligence on drug trafficking.¹²⁴ Vice President George H.W. Bush was tasked with facilitating cooperation between federal forces and local police in closing down pathways for cannabis and cocaine to enter the country through Florida.¹²⁵

Into the 1980s, Reagan's War on Drugs, reinstated from the Nixon Administration, became increasingly militaristic. At the President's request, Congress repealed aspects of a hundred-year-old law so that federal military force could be mobilized to support civilian officers in drug enforcement efforts.¹²⁶ The Department of Defense began using Black Hawk assault helicopters and Blue Thunder speedboats in the war on drugs.¹²⁷ Claiming that "narco-guerrillas" in Latin America were plotting to undermine national security, the State Department justified the use of advanced military equipment, including B-52 bombers, in strikes on insurgents throughout Central America and western South America.¹²⁸

At home, Nancy Reagan joined the fight against drugs with her well-known "Just Say No" campaign.¹²⁹ Aimed at using the media to fight drug use in America, the campaign was launched by the First Lady in a California elementary school.¹³⁰ In time, thousands of local organizations were formed to participate in a national walk against drugs and sponsor parades and anti-

¹²¹ *Id.*

¹²² *Id.* at 172.

¹²³ See, e.g., Reagan Library, *President Reagan's Remarks Against Drug Trafficking and Organized Crime on October 14, 1982*, YOUTUBE (Aug. 3, 2016), <https://www.youtube.com/watch?v=e4-7vOJcRyY> [<https://perma.cc/9BY2-CPJV>]; Andrew Glass, *Reagan Declares 'War on Drugs,' October 14, 1982*, POLITICO (Oct. 14, 2010, 4:44 AM), <https://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552> [<https://perma.cc/48YT-C4BK>].

¹²⁴ KUZMAROV, *supra* note 110, at 172.

¹²⁵ *Id.*

¹²⁶ *Id.* at 173.

¹²⁷ *Id.*

¹²⁸ *Id.* at 177.

¹²⁹ *Id.* at 174.

¹³⁰ *Id.*

drug rallies.¹³¹ At one such rally, more than 8,000 young people read their “Just Say No” drug pledge together and released red, white, and blue balloons carrying some of the many “Just Say No” mottos.¹³² Urged by Congress and President Reagan in the latter half of the decade, television networks began adopting antidrug themes in their most popular shows.¹³³ In NBC’s sensational show, *Different Strokes*, Nancy Reagan appeared as a guest star, railing against the use of drugs at the school attended by Gary Coleman’s character, Arnold.¹³⁴ Beyond the “Just Say No” campaign, Nancy gained international influence by sponsoring international antidrug education and arranging antidrug meetings with fellow first ladies around the world.¹³⁵

Between Nancy Reagan’s influence and Ronald Reagan’s military crusade, the War on Drugs had reached a fever pitch by the mid-1980s. In 1984, President Reagan signed the Comprehensive Crime Control Act (“CCCA”) into law, which carried with it stricter sentencing requirements for drug offenses, even elevating the maximum penalty for serious drug traffickers to life in prison without parole.¹³⁶ In 1986, the apparent cocaine-induced deaths of two popular athletes—soon-to-be NBA star Len Bias and current Cleveland Browns’s player Don Rogers—lead journalists to increase attention on the drug crisis.¹³⁷

The Omnibus Anti-Drug Abuse Act was passed in 1986 and included even stiffer sentencing and mandated drug testing for all federal employees.¹³⁸ The fanatical opposition to drugs that was present at the time is aptly demonstrated by many statements made by public officials. Nancy Reagan, in 1988, said that she believed casual drug users were essentially “accomplices to murder.”¹³⁹ Representative Arthur Ravenal Jr., a Republican from South Carolina, stated that the military should “shoot down on sight any aircraft suspected of smuggling drugs.”¹⁴⁰ This earned rebuke from economist and Reagan-advisor Milton Friedman, who wrote that “[a] country in which shooting down unidentified planes ‘on suspicion’ can be seriously

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 173.

¹³⁶ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1979.

¹³⁷ KUZMAROV, *supra* note 110, at 183–84; Andrew Gribble, *1986 Browns Tribute: Death of Don Rogers Hit Players Hard, Hangs with Them Today*, CLEVELAND BROWNS (Oct. 25, 2016, 7:48 AM), <https://www.clevelandbrowns.com/news/1986-browns-tribute-death-of-don-rogers-hit-players-hard-hangs-with-the-17957206> [<https://perma.cc/J68H-QQ7A>].

¹³⁸ KUZMAROV, *supra* note 110, at 185.

¹³⁹ *Id.* at 184.

¹⁴⁰ *Id.* at 185.

considered as a drug war tactic is not the kind of United States I want to hand to future generations.”¹⁴¹

Alongside the increased focus on use-prevention and the enforcement of drug laws came a reduction in rehabilitation resources. The 1986 Anti-Drug Abuse Act certainly prioritized policing over rehabilitation, and, in 1987, Reagan cut \$200 million in federal funding for federal rehabilitation programs.¹⁴² This left many treatment centers established by the Nixon Administration with insufficient funding, forcing their closure and foreshadowing the continued underfunding of such centers across the country.¹⁴³ By the end of the decade, with the heavy focus on aggressive enforcement, less than 30 percent of federal drug funding went to prevention, while overall drug control expenditures grew by around 5 billion dollars from 1981 to 1989.¹⁴⁴ This imbalance, combined with the one-two punch of the CCCA and the Anti-Drug Abuse Act, caused the United States prison population to swell.¹⁴⁵ America became the world leader in proportional imprisonment by the mid-1980s, passing both the Soviet Union and apartheid South Africa.¹⁴⁶

II. THE CURRENT FEDERAL CANNABIS SCHEME

The Controlled Substances Act (“CSA”), which is codified at 21 U.S.C. § 812, has been the primary vehicle for federal drug regulation since it was enacted in 1970. At its core, the CSA outlaws the unauthorized manufacturing or distribution of all drugs listed as a controlled substance. Controlled substances are sorted into one of five Schedules based on the drug’s accepted medicinal value and potential for abuse or dependency.¹⁴⁷ The ultimate authority to classify or “schedule” controlled substances has rested with the Drug Enforcement Administration (“DEA”) since its inception in 1973, when the power was delegated to the DEA by the Attorney General.¹⁴⁸ However, the DEA’s scheduling authority is not absolute. The Food and Drug Administration (“FDA”), in consort with the National Institute on Drug Abuse (“NIDA”), issues medical and scientific conclusions that are legally binding on the DEA.¹⁴⁹ Thus, in some respects, the DEA’s authority to

¹⁴¹ *Id.* at 187.

¹⁴² *Id.* at 186.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 185–86.

¹⁴⁵ *See id.* at 173, 186.

¹⁴⁶ *Id.* at 186.

¹⁴⁷ *See* 21 U.S.C. § 812(b)(1–5); *see also Drug Scheduling*, DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/54KP-UMDR>].

¹⁴⁸ David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 192 (2018).

¹⁴⁹ Letter from Chuck Rosenberg, Acting Adm’r, U.S. Dep’t of Just., Drug Enf’t Admin., to Gov. Gina M. Raimondo, Gov. Jay R. Inslee, & Bryan A. Krumm, Off. of the Admin. (Aug. 11, 2016) (on file with Nevada Law Journal).

schedule, deschedule, and reschedule controlled substances is curtailed by the FDA. This is a sensible arrangement, as the responsibility to enforce the CSA also lies with the DEA.¹⁵⁰ The extent of the DEA's power to regulate a drug depends on the Schedule to which it is assigned.¹⁵¹

Under the classification system imposed by the CSA, the most dangerous drugs, those that have a high potential for abuse and no recognized medical use, fall within Schedule I.¹⁵² The DEA's authority is at its highest with Schedule I drugs. Controlled substances that are listed under Schedule I are subject to production quotas set by the DEA.¹⁵³ Such drugs cannot be legally prescribed by doctors.¹⁵⁴ Schedule I drugs also carry the most severe sanctions for unauthorized manufacturing or distribution.¹⁵⁵ It is under Schedule I, alongside heroin, fentanyl, lysergic acid diethylamide ("LSD"), and a myriad of other dangerous substances, that cannabis has been classified since 1970.¹⁵⁶ The numerous attempts by cannabis advocates to have the plant rescheduled, the first arising just two years after the enactment of the CSA, have been unsuccessful. Most recently, in 2016, the DEA denied two separate petitions to initiate rescheduling proceedings, insisting that marijuana continues to meet the criteria for Schedule I control.¹⁵⁷

Absent some recent and relatively minor developments, the CSA has retained its status as the dominant form of cannabis regulation in the United States.¹⁵⁸ However, in the late 1990s, individual states began a twenty-year effort to seize control of cannabis regulation from the federal government. In 1996, California voters passed Proposition 215, making it the first state in the country to permit the use of cannabis for medical purposes.¹⁵⁹ Soon after, the California Legislature codified the ballot initiative as the Compassionate Use Act of 1996, in direct contradiction to federal drug policy.¹⁶⁰ The activities sanctioned by the act, including the production of cannabis by medical marijuana patients, were unquestionably violations of the CSA. In-

¹⁵⁰ Katner, *supra* note 148, at 178.

¹⁵¹ Drug Enf't Admin., *The Controlled Substances Act*, 6 DRUG ENF'T 2, 3, 4, 6–8 (1979).

¹⁵² Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN ST. L. REV. 333, 338 (2014).

¹⁵³ Katner, *supra* note 148, at 178.

¹⁵⁴ *Id.*

¹⁵⁵ See 21 U.S.C. § 841(b)(1)(C); see also 21 U.S.C. § 842(b); 21 U.S.C. § 843(a)(1).

¹⁵⁶ DRUG ENF'T ADMIN., *supra* note 97, at 18–25.

¹⁵⁷ Letter from Chuck Rosenberg to Gov. Gina M. Raimondo et al., *supra* note 149.

¹⁵⁸ LISA N. SACCO, CONG. RSCH. SERV., R44782, THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP 1 (2022).

¹⁵⁹ John Balzar, *Voters Approve Measure to Use Pot as Medicine*, L.A. TIMES (Nov. 6, 1996, 12:00 AM), www.latimes.com/archives/la-xpm-1996-11-06-mn-62740-story.html [<https://perma.cc/LLE9-FMY6>]. That same year, Arizona voters also approved a medical cannabis initiative, but it was quickly "neutralize[d]" by the Arizona Senate. See Tim Golden, *Medical Use of Marijuana to Stay Illegal in Arizona*, N.Y. TIMES, Apr. 17, 1997, at 16 [<https://nyti.ms/3HSeRba>].

¹⁶⁰ CAL. HEALTH & SAFETY CODE § 11362.5.

deed, in the years that followed, the Supreme Court confirmed that the federal government was well within its power to enforce the CSA against Californian medical marijuana patients despite the inconsistent state law.¹⁶¹

Soon after medical legalization in California, the Clinton Administration threatened prescribing doctors with the loss of their prescription-writing privileges (which are regulated by the DEA) and potential criminal charges.¹⁶² When George W. Bush took office in 2001, the DEA stepped up efforts to enforce the CSA in the group of states that had legalized medicinal cannabis, which had grown to include seven other states.¹⁶³ In the first three years of the Bush Administration, over one hundred medical marijuana growers and dispensaries were raided by the federal government.¹⁶⁴

The tide began to turn when Barack Obama took office. The Obama Administration issued an informal memo encouraging, but not requiring, federal prosecutors to avoid prosecuting medical cannabis distributors who operated within the bounds of state law.¹⁶⁵ While the criminal prosecution of large-scale, state-legal grow operations did not cease,¹⁶⁶ President Obama's perceived hands-off position toward enforcement of the CSA in legal states signaled an impending shift in federal enforcement policy, though this would not be fully recognized until his second term.¹⁶⁷

The legalization of recreational adult cannabis use in Colorado and Washington in 2012 marked an inflection point.¹⁶⁸ Spurned by this groundbreaking state action and Obama's guidance, Deputy Attorney General James Cole issued what has come to be known as the "Cole Memorandum" in August of 2013.¹⁶⁹ The Cole Memorandum deprioritized the enforcement of federal drug policy, including both civil enforcement and criminal prosecutions, against cannabis users, prescribers, and businesses in legal states.¹⁷⁰ Except with regard to an enumerated list of priorities, including cannabis distribution to minors and interstate transportation of cannabis, the Cole Memorandum formalized the DOJ's new, uninvolved approach toward

¹⁶¹ See *Gonzales v. Raich*, 545 U.S. 1, 8–9 (2005) (holding that Congress can regulate homegrown cannabis in medicinally legal states under the Commerce Clause).

¹⁶² See *Doctors Given Federal Threat on Marijuana*, N.Y. TIMES, Dec. 31, 1996, at A1, 65.

¹⁶³ Sarah Trumble & Nathan Kasai, *Past—and Future—of Federal Marijuana Enforcement*, THIRD WAY, www.thirdway.org/memo/the-past-and-future-of-federal-marijuana-enforcement [<https://perma.cc/DKB3-EQNU>] (May 12, 2017); see also Figure A, *infra* Section IV.C.

¹⁶⁴ Trumble & Kasai, *supra* note 163.

¹⁶⁵ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to All U.S. Att'ys (Aug. 29, 2013) (on file with the Nevada Law Journal) [hereinafter Cole Memorandum].

¹⁶⁶ Trumble & Kasai, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Cole Memorandum, *supra* note 165.

¹⁷⁰ *Id.* at 2–3.

state-level legalization.¹⁷¹ Notably, Cole warned states that inadequate regulation or lax enforcement of their own laws could lead the DOJ to challenge state legalization statutes in court.¹⁷² However, the teeth of that warning were summarily removed the following year when Congress passed the Rohrabacher-Farr Amendment.¹⁷³ This provision prohibits the DOJ from using federal funds to prevent states from implementing laws that legalize medical cannabis.¹⁷⁴ While the Amendment requires annual renewal to stay in effect, it has consistently been renewed since enactment.¹⁷⁵

In contrast to the shift toward nonenforcement of the CSA during the Obama Administration, the election of Donald Trump brought with it the risk of renewed federal enforcement. In 2018, Attorney General Jeff Sessions, announced the rescission of the Cole Memorandum and all previous DOJ guidance regarding enforcement of federal cannabis laws in states that had legalized the drug.¹⁷⁶ This Marijuana Enforcement Memorandum directed DOJ attorneys to return to previous standards for exercising prosecutorial discretion, with the intent of “disrupt[ing] criminal organizations, tackl[ing] the drug crisis, and thwart[ing] violent crime.”¹⁷⁷ Separately, the DOJ called for the Marijuana Enforcement Memorandum as a “return to the rule of law,”¹⁷⁸ while Sessions pointed out that Congress had classified marijuana as a dangerous drug.¹⁷⁹ Jeff Sessions’s successor under President Trump, William Barr, initially made it known that he did not intend to “upset settled expectations and the reliance interests that have arisen as a result of the Cole [M]emoranda”¹⁸⁰ Nevertheless, after a period of no newsworthy steps toward enforcement of the CSA in states that had legalized cannabis, the Trump Administration launched multiple antitrust probes into cannabis

¹⁷¹ *Id.* at 3.

¹⁷² *Id.*

¹⁷³ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (Dec. 16, 2014).

¹⁷⁴ *Id.*

¹⁷⁵ Consolidated Appropriations Act, 2021, Pub. L. No. 116-220, § 531, 134 Stat. 1182, 1282–83 (Dec. 27, 2020).

¹⁷⁶ Memorandum from Jefferson B. Sessions, III, Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’y’s (Jan. 4, 2018) (on file with the Nevada Law Journal) [hereinafter Sessions Memo].

¹⁷⁷ Press Release, U.S. Dep’t of Just., Just. Dep’t Issues Memo on Marijuana Enf’t (Jan. 4, 2018) (on file with Nevada Law Journal).

¹⁷⁸ *Id.*

¹⁷⁹ See Sessions Memo, *supra* note 176.

¹⁸⁰ Steven T. Dennis, *Barr Won’t ‘Go After’ Marijuana Companies, He Tells Senate Panel*, BLOOMBERG L. (Jan. 15, 2019, 3:55 PM), <https://news.bloomberglaw.com/business-and-practice/barr-wont-go-after-marijuana-companies-he-tells-senate-panel-1> [<https://perma.cc/R5JT-K8X5>].

producers.¹⁸¹ A DOJ whistleblower subsequently asserted that the investigations were inconsistent with Department policy and politically motivated.¹⁸²

While nothing substantial came of the Trump Administration's apparently hostile stance toward cannabis, the fluctuation in federal enforcement of cannabis laws is unsettling. Under the CSA and other federal laws, cannabis remains an illegal substance. Should the Executive Branch choose to enforce existing federal law, it is all but certain to preempt any conflicting state policies toward cannabis. Even cannabis businesses that are fully compliant with state regulations are potentially subject to federal prosecution.

III. STATE LEGALIZATION OF CANNABIS

While there has been little change in federal cannabis law since the 1980s, the states have moved incrementally toward cannabis legalization. Oregon was one of only a few states to prohibit drug possession at the beginning of the twentieth century, but in 1973, it became the first state to decriminalize cannabis possession.¹⁸³ Medicinal use of cannabis was first legalized in California in 1996,¹⁸⁴ and sixteen years later, recreational use was legalized for the first time in Colorado and Washington.¹⁸⁵ Today, medicinal cannabis is legal in thirty-eight states, and twenty-four states have legalized recreational use.¹⁸⁶ Of the thirty-two states that still prohibit nonmedical cannabis use or possession, twenty-seven states and the District of Columbia have decriminalized possession of small amounts of the substance.¹⁸⁷

The persistent federal inaction has resulted in a patchwork of state level cannabis schemes. At the highest level of generality, the laws can be broken into three overlapping categories: decriminalization, medicinal legalization, and recreational legalization. Decriminalization generally involves remov-

¹⁸¹ Ciara Linnane, *Attorney General Barr Ordered Antitrust Probes of 10 Cannabis Mergers, Because He Dislikes the Industry, Prosecutor Says*, MARKETWATCH (June 26, 2020, 6:46 AM), <https://www.marketwatch.com/story/attorney-general-barr-ordered-antitrust-probes-of-10-cannabis-mergers-because-he-dislikes-the-industry-prosecutor-says-2020-06-24> [<https://perma.cc/DFG4-C2V5>].

¹⁸² *Id.*

¹⁸³ See Paul H. Blachly, *Effects of Decriminalization of Marijuana in Oregon*, 282 ANNALS N.Y. ACAD. SCIS. 405, 405 (1976).

¹⁸⁴ John Balzar, *Voters Approve Measure to Use Pot as Medicine*, L.A. TIMES (Nov. 6, 1996, 12:00 AM), www.latimes.com/archives/la-xpm-1996-11-06-mn-62740-story.html [<https://perma.cc/LLE9-FMY6>].

¹⁸⁵ John Walsh, *Q&A: Legal Marijuana in Colorado and Washington*, BROOKINGS, (May 21, 2013), www.brookings.edu/research/qa-legal-marijuana-in-colorado-and-washington [<https://perma.cc/3SFN-TZFH>].

¹⁸⁶ Nat'l Conf. of State Legislatures, *State Medical Cannabis Laws*, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/B5TE-ME5W>] (June 22, 2023).

¹⁸⁷ Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/C6D4-NG2D>] (Nov. 9, 2023) (see decriminalization section).

ing criminal sanctions against the possession of small amounts of cannabis and instead imposing civil fines, mandatory drug education or treatment, or no penalty at all.¹⁸⁸ Medicinal legalization entails authorizing doctors to prescribe and businesses to sell cannabis to patients as a treatment for diseases or conditions.¹⁸⁹ When cannabis is only legalized for medicinal use and not decriminalized, it remains illegal to possess the substance without proof of prescription.¹⁹⁰ Finally, cannabis is recreationally legalized when adults are affirmatively permitted to purchase and possess it for personal use, similar to tobacco and alcohol.¹⁹¹ Cannabis has necessarily been decriminalized in all states that have recreationally legalized the substance. Beyond the three broad categories of decriminalization, medical legalization, and recreational legalization, there is still significant variation among the cannabis systems in “legal” states.

A. Differing Schemes at the State Level

1. Licensing

The first major split between “legal” states is the licensing of cannabis businesses, and the split falls along two distinct fault lines: vertical integration and limits on license issuance. In most state cannabis schemes, licensing or registration is stratified or divided into different classes, but the number of license classes can vary wildly.¹⁹² For instance, Iowa’s Medical Cannabidiol Act only permits two kinds of licenses, manufacturing and dispensing,¹⁹³ while California issues at least twenty different types of cannabis-related licenses, including licenses for cultivation, manufacturing, testing, and retail sale.¹⁹⁴ Still, some state programs offer only one, all-encompassing license to cannabis businesses.¹⁹⁵

Most states use licensing as a mechanism to regulate the ability of cannabis companies to vertically integrate. Vertical integration generally means the consolidation of different production functions—in the case of cannabis:

¹⁸⁸ Dragan M. Svrakic et al., *Legalization, Decriminalization & Medicinal Use of Cannabis: A Scientific and Public Health Perspective*, 109 MO. MED. 90, 90 (2012).

¹⁸⁹ *Id.*

¹⁹⁰ Joseph Gregorio, *Physicians, Medical Marijuana, and the Law*, AMA J. ETHICS (Sept. 2014), <https://journalofethics.ama-assn.org/article/physicians-medical-marijuana-and-law/2014-09> [<https://perma.cc/YS9M-MRA6>].

¹⁹¹ Svrakic et al., *supra* note 188, at 90.

¹⁹² See BARRY WEISZ, CANNABIS STATE-BY-STATE REGULATIONS 2, https://www.thompsoncoburn.com/docs/default-source/acartha/here.pdf?sfvrsn=fe4654ea_1 [<https://perma.cc/6X44-WA3B>] (Aug. 2022).

¹⁹³ IOWA CODE § 124E.6 (2023); IOWA CODE § 124E.8 (2023).

¹⁹⁴ CAL. BUS. & PROF. CODE § 26050.

¹⁹⁵ See, e.g., HAW. REV. STAT. § 329D–2 (imposing the single category of “medical cannabis dispensary” licenses, which allow production, manufacture, and dispensing of cannabis).

cultivation, distribution, and retail sale—inside a single company.¹⁹⁶ A few states, including Washington, bar vertical integration by prohibiting licensed cannabis producers and processors from holding a financial interest in a cannabis retailer.¹⁹⁷ A second category of states, of which Oregon is a member, permit, but do not require, cannabis companies to own more than one step in the supply chain.¹⁹⁸ Finally, many states, particularly those that only allow medicinal cannabis programs, *require* cannabis companies to be vertically integrated; that is, they cannot sell any cannabis that they do not produce themselves.¹⁹⁹

From a regulatory perspective, mandated vertical integration is advantageous in that it makes it easier for authorities to oversee the production and sale process.²⁰⁰ This makes good sense in states that treat cannabis solely as a medicine. Vertical integration can also be better for business, as control over inventory and a reduction of competitors at every level may increase profit margins.²⁰¹ Moreover, for businesses that have already overcome entry barriers, mandatory vertical integration serves to keep undercapitalized competitors out of the market.²⁰²

Entry barriers, however, are the primary objection to mandatory vertical integration. By requiring startup cannabis companies to immediately incorporate cultivation, processing, and sale of the substance, such schemes make it incredibly difficult to enter the market and impose immense restrictions on competition. It is estimated to be three to ten times more expensive to launch a top-to-bottom cannabis conglomerate than a retail dispensary.²⁰³ Beyond expense, managing all levels of the supply chain requires considerable expertise, and overall risk is increased because failure at one level is likely to affect the others.²⁰⁴ With all that is required to enter the industry as a fully integrated business, mandatory vertical integration tends to produce market consolidation.²⁰⁵ The consolidation produced as a result of mandatory vertical integration can even create monopolies and oligopolies.

¹⁹⁶ Adam Hayes, *Vertical Integration Explained: How It Works, with Types and Examples*, INVESTOPEDIA, <https://www.investopedia.com/terms/v/verticalintegration.asp> [<https://perma.cc/V5W6-NEQ8>] (Jan. 12, 2024).

¹⁹⁷ WASH. REV. CODE § 69.50.328 (Westlaw through 2023 legislation).

¹⁹⁸ *See, e.g.*, OR. REV. STAT. § 475C.061 (Westlaw through 2023 legislation) (“A person may hold . . . [m]ultiple licenses . . .”).

¹⁹⁹ *See, e.g.*, HAW. REV. STAT. § 329D-1 (2023) (definition of “[m]edical cannabis production center”); FLA. STAT. § 381.986(8)(e) (2023) (“A licensed medical marijuana treatment center may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices . . .”).

²⁰⁰ Ryan B. Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297, 323 (2017).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Ryan B. Stoa, *Equity in Cannabis Agriculture*, 101 B.U. L. REV. 1135, 1146 (2021).

²⁰⁴ *Id.* at 1146–47.

²⁰⁵ *Id.* at 1147.

These market structures, in turn, cause higher prices and inconsistent supply for patients or consumers.²⁰⁶

Interestingly, similar concerns about monopoly power were likely a significant motivation for states that prohibit the vertical integration of cannabis businesses. Such systems resemble the “Three-Tier System” of alcohol regulation used in the vast majority of US states.²⁰⁷ Under the typical Three-Tier System, a business can only be licensed as an alcohol producer, distributor, or retailer, but cannot hold a license in more than one tier.²⁰⁸ Additionally, commerce must flow down the tiers; that is, producers can only sell to distributors and the distributors are the only entities that can sell to retailers.²⁰⁹

After the end of the alcohol Prohibition in the US, the Three-Tier System was implemented to *prevent* vertical integration and the prospect of monopolistic markets.²¹⁰ An additional justification for barring vertical integration for both alcohol and cannabis businesses is to disincentivize businesses from promoting alcohol or drug abuse.²¹¹ The model has not been very successful in the alcohol industry, where “distributors have become powerful middlemen and may be dampening the potential for innovation.”²¹² However, the same criticism might not apply to cannabis schemes like Washington’s. At first glance, the system looks three-tiered. However, it operates more like a two-tiered system because it permits producer licensees to hold processor licenses and both producers and processors can sell directly to retailers.²¹³ While a ban on vertical integration might be preferable to requiring it, industry pundits have looked favorably on systems like Nevada’s²¹⁴ that allow, but do not mandate, vertical integration.²¹⁵ A flexible approach might work best in a still-blossoming industry like cannabis.

The second major point of difference between states with regard to licensing is license caps. Many states, including Oregon, do not limit the

²⁰⁶ See Letter from Maren Schroeder, Pol’y Dir., Sensible Change Minn., to Sen. Michelle Benson & Member of the Minn. Senate Health & Human Servs. Fin. & Pol’y Comm. (Feb. 3, 2020) (on file with Nevada Law Journal).

²⁰⁷ See Drew Thornley, *Opening the Taps of Freedom to Distribute Alcohol: An Overview of State Alcohol Regulation in the United States and Recommendations for Reform*, 52 U. PAC. L. REV. 821, 823–24 (2021).

²⁰⁸ *Id.* at 824.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 825.

²¹¹ Stoa, *supra* note 203, at 1147. For a discussion of how this might occur, see Thornley, *supra* note 207, at 825 n.11.

²¹² Stoa, *supra* note 200, at 324.

²¹³ Compare WASH. REV. CODE § 69.50.328 (2023) (“Neither a licensed cannabis producer nor a licensed cannabis processor shall have a direct or indirect financial interest in a licensed cannabis retailer.”), with WASH. REV. CODE § 69.50.325 (2023) (discussing requirements for producer, processor, and retailer licenses).

²¹⁴ NEV. REV. STAT. § 678C.410 (2023).

²¹⁵ See, e.g., Stoa, *supra* note 203, at 1147.

number of licenses that can be issued.²¹⁶ However, restrictions on the number of cannabis licenses that can be issued are imposed in several other states.²¹⁷ Oregon's neighbor, Washington, vests the Washington State Liquor and Cannabis Board with the power to determine how many licenses should be available.²¹⁸

In states without limitations on the quantity of licenses, any applicants that comply with the necessary standards are licensed.²¹⁹ It is not difficult to imagine how such systems can create massive regulatory burden for states. On the other hand, license caps make it easier for authorities to screen applicants and monitor businesses, an effect similar to that of mandatory vertical integration.²²⁰ Additionally, license caps bring with them a degree of predictability in the first years of legalization for newly legal states. Despite these regulatory benefits, license caps are often criticized on equity grounds. They are seen as mechanisms that filter out less capitalized and potentially innovative small businesses in favor of well-connected corporations that are better able to navigate a competitive application process.²²¹

2. Taxes and Tax Revenue Allocation

Aside from the differences in licensing requirements, there are also drastic divides between states with respect to taxation. There are three main methods employed by legal states, usually in some combination: taxing by price, weight, or potency. For an exploration of alternative methods, we will also address the approaches taken by Canada, Uruguay, and New Jersey, which are novel in the US.

Percentage-of-price taxes, also known as excise taxes, are the most commonly employed. Cannabis excise taxes operate in the same way as a statewide general sales tax, typically as an additional payment by the consumer at the time of the retail transaction.²²² Most legal recreational states, with the exception of Maine and Colorado, levy excise taxes on cannabis in

²¹⁶ OR. REV. STAT. § 475C.033 (Lexis through 2023 legislation); *see also* Stoa, *supra* note 203, at 1144.

²¹⁷ To name a few: Florida, Compassionate Medical Cannabis Act of 2014, ch. 2014-157, 2014 Fla. Laws 157; New York, Assemb. B. 6357, 2013 Leg., Reg. Sess. (N.Y. 2013); and Ohio, Ohio Dep't of Com. & Ohio Med. Marijuana Control Program, *Cultivator Application - Request for Applications (RFA) / Instructions Packet (MMCP-C-1000)*, (2017), <https://medicalmarijuana.ohio.gov/Documents/Cultivation/Cultivator%20Application/Cultivator%20Application%20Instructions.pdf> [<https://perma.cc/D9M5-VMMG>].

²¹⁸ *Laws and Rules*, WASH. ST. LIQUOR & CANNABIS BD., <https://lcb.wa.gov/laws/laws-and-rules> [<https://perma.cc/7A9U-DM8G>].

²¹⁹ Anna Pierret, "No Limit:" *Recreational Cannabis Licenses Getting Approval*, KRQE NEWS, <https://www.krqe.com/news/investigations/no-limit-recreational-cannabis-license-getting-approval/> [<https://perma.cc/RE83-NECR>] (Feb. 18, 2022, 7:14 AM).

²²⁰ *See* Stoa, *supra* note 203, at 1145.

²²¹ *See id.*

²²² ME. STAT. tit. 36, § 1811(1)(c)(5) (2021); ME. STAT. tit. 36, § 4923 (2021).

addition to their statewide general sales tax.²²³ Washington has the highest excise tax of all legal states at 37 percent.²²⁴

Alaska, California, and Maine tax cannabis by weight, assessing different rates for different parts of the plant.²²⁵ These taxes are levied against producers and are presumed to be factored into the price at which cannabis is sold to retail consumers. Rates range from \$50 per ounce of “mature flower” in Alaska, to approximately \$20.90 per ounce of flower in Maine and \$9.65 per ounce in California.²²⁶ Notably, Alaska does not levy an excise tax against consumers on top of this tax, while Maine (10 percent) and California (15 percent) do.²²⁷

Potency-based cannabis taxes are a more recent phenomenon and function similarly to “proof per gallon” liquor taxes.²²⁸ Illinois taxes products with different percentages of THC content at different rates²²⁹ and, when New York begins legal sales, it will tax products on a per milligram basis.²³⁰ This approach can theoretically provide more stable revenue for states,²³¹ but testing for THC content can be inaccurate and THC levels can vary even between different parts of the same plant, which makes the consistent administration of such a tax difficult.²³²

Although Canada and Uruguay are both sovereign, independent nations and thus subject to different constraints than US states, they provide interesting points of comparison to these approaches. Canada has effectively created an artificial price floor for legal cannabis flower by taxing it at one dollar per gram or 10 percent of the purchase price, whichever is higher.²³³ Uruguay, meanwhile, has chosen not to impose a traditional tax on cannabis

²²³ Ulrik Boesen, *How High Are Taxes on Recreational Marijuana in Your State?*, TAX FOUND. (Mar. 31, 2021), <https://taxfoundation.org/state-recreational-marijuana-taxes-2021> [https://perma.cc/DRC5-CKMD].

²²⁴ *Recreational and Medical Cannabis Taxes*, WASH. STATE DEP’T. REVENUE, <https://dor.wa.gov/about/statistics-reports/recreational-and-medical-marijuana-taxes> [https://perma.cc/R42D-7UTF].

²²⁵ Boesen, *supra* note 223.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Cannabis Taxes, State and Local Backgrounders*, URB INST., www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/marijuana-taxes [https://perma.cc/HUV5-ME65] [hereinafter *Cannabis Taxes*]; see also Jennifer Peltz, *Should States Set Pot Policy by Its Potency? Some Say Yes*, AP (Apr. 19, 2021, 10:01 PM), <https://apnews.com/article/government-and-politics-business-general-news-health-lifestyle-13f3edd7cfb98db9f1f2dadfbd6d11a8> [https://perma.cc/ML2F-GQBA].

²²⁹ *Cannabis Taxes, supra* note 228.

²³⁰ *Id.*

²³¹ Peltz, *supra* note 228.

²³² BENJAMIN HANSEN ET AL., UP IN SMOKE? THE MARKET FOR CANNABIS 17 (2021).

²³³ *How Are Cannabis Sales Taxed?*, LEGAL LINE, www.legalline.ca/legal-answers/how-are-cannabis-sales-taxed/ [https://perma.cc/7SSM-CG9R].

consumers, opting instead for a “variable fee” imposed on retailers that the government can adjust as needed to keep the price competitive with the black market.²³⁴

New Jersey, which has begun to allow recreational sales, has developed a unique approach.²³⁵ The state will levy a flat tax per ounce of cannabis that will increase as the average retail price of cannabis decreases.²³⁶ The tax will range from \$60 per ounce when the average retail price is below \$200, up to \$10 per ounce when the average retail price is above \$350.²³⁷ Theoretically, this should ensure the state continues to collect revenue even as the market matures, and prices fall. This addresses a problem that other states, particularly with percentage-of-price taxes, have encountered: as the price of recreational cannabis decreases, so do revenues. Colorado, for instance, struggled with decreasing sales to the point that, in 2017, it increased its excise tax on cannabis from 10 percent to 15 percent.²³⁸

Many states allocate revenue collected from legal recreational cannabis to their general funds and use it along with other collected tax revenue for various state expenditures.²³⁹ Colorado has a relatively unique fund dedicated to cannabis revenue—the Marijuana Tax Cash Fund.²⁴⁰ The fund receives 71 percent of the revenue collected from recreational sales and allocates the earnings to social programs and education.²⁴¹

Some states allow localities and municipalities to levy additional percentage-of-price taxes on cannabis, typically capped at a certain percentage.²⁴² The City of Evanston, Illinois, for example, levies a 3 percent tax on recreational cannabis sales in the city, which is accompanied by another 3 percent tax imposed at the county level.²⁴³ The revenue from Evanston’s

²³⁴ JOHN WALSH & GEOFF RAMSEY, URUGUAY’S DRUG POLICY: MAJOR INNOVATIONS, MAJOR CHALLENGES 9 (2016).

²³⁵ Carl Davis, *New Jersey Leads by Example with Its New Cannabis Tax*, INST. ON TAXATION & ECON. POL’Y (Jan. 12, 2021), itep.org/new-jersey-leads-by-example-with-its-new-cannabis-tax [https://perma.cc/FW94-K98Z].

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Washington Post, *Marijuana Is Getting Cheaper. For Colorado and Some States, That’s a Problem*, DENVER POST (Nov. 21, 2018, 3:08 PM), www.denverpost.com/2018/11/21/colorado-marijuana-getting-cheaper/ [https://perma.cc/C2Q7-5KF9].

²³⁹ *The State of State (and Local) Tax Policy: How Do Marijuana Taxes Work?*, TAX POL’Y CTR., https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work [https://perma.cc/3ZDY-4FSS].

²⁴⁰ Alexandra Hutzler, *Marijuana Tax Revenue Funds Over \$2M in Scholarships for Colorado Students*, NEWSWEEK (Aug. 5, 2021, 10:16 AM), www.newsweek.com/marijuana-tax-revenue-funds-over-2m-scholarships-colorado-students-1616559 [https://perma.cc/8GSV-TRTH].

²⁴¹ *Id.*

²⁴² See, e.g., *Massachusetts Tax Rates*, MASS.GOV, www.mass.gov/service-details/massachusetts-tax-rates [https://perma.cc/26R3-6MH9] (Jan. 25, 2024).

²⁴³ *Adult Use Cannabis FAQ*, CITY OF EVANSTON, https://www.cityofevanston.org/residen

municipal tax is used to fund a program that provides reparations to local African American people as compensation for decades of unjust drug policy and enforcement.²⁴⁴

3. Regulatory Obligations

Due in part to the lingering federal cannabis prohibition, states have implemented rigorous obligations for cannabis businesses, including, among others, “physical security, cultivation and processing practices, product specifications, and transaction conformance.”²⁴⁵ As a result, cannabis companies are required to spend money to navigate complex regulatory schemes; the upshot being that cannabis companies have higher operating costs than other businesses. The requirements for physical security alone generally include “seed-to-sale tracking and inventory reconciliation, building access control protocols, video surveillance, disposal of waste, separation of medical and recreational areas and products, and filing of product transportation manifests.”²⁴⁶ Moreover, what is required of cannabis businesses will invariably depend on the state, and cannabis businesses in one state may face lower operating costs than a cannabis business in another state.

Differences in compliance obligations do not just impose costs on businesses; they can also impose costs on consumers. For example, consider the regulation of cannabis cultivation and processing. With the federal prohibition still in place, the USDA has not promulgated any regulations on acceptable pesticide use for cannabis crops,²⁴⁷ and the FDA has not promulgated any regulations with respect to quality control, among other things. States have been forced to introduce their own models²⁴⁸ and no two of which are the same. Accordingly, consumers are left with “drastically different levels of protection, even in neighboring states.”²⁴⁹

A comparison of the regulatory approaches in California, Oregon, and Washington reveals the striking differences in the levels of consumer pro-

ts/cannabis [https://perma.cc/32TS-3TVG].

²⁴⁴ Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 8:03 AM), <https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707> [https://perma.cc/UGA2-KA25]; see also Jon Blistein, *Evanston, Illinois Will Use Weed Tax to Fund Nation's First Government Reparations Program*, ROLLING STONE (Mar. 23, 2021), <https://www.rollingstone.com/culture/culture-news/evanston-reparations-program-housing-marijuana-tax-1145588/> [https://perma.cc/4LMH-TARG].

²⁴⁵ Lawrence J. Trautman et al., *Cannabis at the Crossroads: A Transdisciplinary Analysis and Policy Prescription*, 45 OKLA. CITY UNIV. L. REV. 125, 161 (2021).

²⁴⁶ *Id.* at 162.

²⁴⁷ *Id.*

²⁴⁸ Colorado, for instance, has promulgated its own regulations on the use of pesticides in cannabis cultivation. COLO. REV. STAT. § 35-10-112.5(1)(d) (2022).

²⁴⁹ Nate Seltenrich, *Into the Weeds: Regulating Pesticides in Cannabis*, 127 ENV'T HEALTH PERSPS 1, 2 (2019).

tection in the cannabis industry. Oregon tests for a different set of pesticides than California, and it enforces different limits for chemical residue on cannabis products.²⁵⁰ Thus, Oregon's limits are simultaneously tighter and more lenient than California, depending on the specific regulation.²⁵¹ Even more unsettling, Washington does not require any pesticide testing.²⁵²

4. *Permissive or Restrictive Approaches to Local Regulation*

Perhaps surprisingly, despite the prevailing, binary perception of states that permit cannabis and states that prohibit it, much of cannabis regulation is made at the local level.²⁵³ Less surprising, however, is that legal states vary significantly in the extent to which they permit municipal governments to craft their own cannabis policies.²⁵⁴ Local regulation, where permitted, primarily occurs through land use regulation.²⁵⁵ While local governments in the United States have no intrinsic power to make or enforce land use restrictions,²⁵⁶ states have generally delegated most power to regulate the usage of real property to municipalities.²⁵⁷ With regard to cannabis, in particular, state policy on land use restrictions is best described as a continuum, ranging from hands-off approaches to outright constraints on local authority.

At the far left of the scale are states that are almost completely deferential to municipal authorities with regard to cannabis policy. Colorado is one state that has an exceedingly noninterventionist stance toward local regulation. The state constitutional amendment giving rise to recreational legalization permits local governments to restrict the time, place, manner, and number of cannabis operations within their jurisdiction.²⁵⁸ The state also explicitly permits the outright prohibition of cultivation, processing, testing,

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Local Government Impact on Cannabis Industry*, CURATE, <https://blog.curatesolutions.com/local-government-impact-on-cannabis-industry> [<https://perma.cc/DPW2-UNB3>].

²⁵⁴ Ward Williams, *Marijuana Laws by State*, INVESTOPEDIA, <https://www.investopedia.com/marijuana-legality-by-state-4844504> [<https://perma.cc/FJ9K-WY8W>] (Jan. 16, 2024).

²⁵⁵ ARIZ. REV. STAT. § 36-2857(A)(1) (2020); CURATE, *supra* note 253.

²⁵⁶ See *BLF Assocs., LLC v. Town of Hempstead*, 59 A.D.3d 51, 54 (N.Y. App. Div. 2008) (“Towns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant” (quoting *Matter of Kamhi v. Planning Bd. of Town*, 59 N.Y.2d 385, 389 (N.Y. 1983))); see also *Gendron v. Borough of Naugatuck*, 144 A.2d 818, 821 (Conn. C.P. 1958) (“Towns, cities and boroughs have no inherent police power The prerequisite to any effective municipal zoning action is legislation by the state delegating such power.”).

²⁵⁷ John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENV'T L. REV. 821, 821–22 (2006).

²⁵⁸ COLO. CONST. art. XVIII, § 16(5)(f).

and retail sale of cannabis.²⁵⁹ Alaska has mirrored Colorado's approach, almost verbatim.²⁶⁰ Despite initial confusion on whether state law preempted local restrictions, Washington state is similarly permissive of local prohibition and regulation of cannabis businesses.²⁶¹ Interestingly, all three of these states were among the first to legalize recreational cannabis.

Other states, while still relatively permissive, impose specific conditions on their delegation to local authorities. For example, California explicitly reserves for municipalities the authority to impose restrictive ordinances or completely prohibit cannabis businesses.²⁶² At the same time, however, the statute disallows prohibitions on personal cannabis cultivation inside a private residence.²⁶³ Likewise, Ohio, which tolerates local cannabis prohibitions, forbids local ordinances or resolutions that serve to limit medical or academic research on cannabis.²⁶⁴

Local authority is curtailed even further in states that, while generally accepting of municipal cannabis regulation, impose a "reasonableness" requirement on any restrictive rules. Arizona's statute on recreational cannabis only permits localities to "[e]nact *reasonable* zoning regulations."²⁶⁵ While the state still permits the outright prohibition of cannabis businesses, a city or county that does not impose an outright ban cannot "make[] the operation of a [cannabis business] unduly burdensome" or "[p]rohibit[] the transportation of [cannabis] . . . on public roads."²⁶⁶ When Illinois passed its Cannabis Regulation and Tax Act in 2019, it went a step further. Like California, it does not allow local laws to prohibit home cultivation and, like Arizona, imposes a reasonableness requirement on any local regulations that do not choose to prohibit cannabis business altogether.²⁶⁷ However, the state's reasonableness requirement goes beyond the home, stopping cities and counties from "unreasonably prohibit[ing] use of cannabis" in general.²⁶⁸ Massachusetts goes further still in this regard, requiring restrictive ordinances in some cities to be approved by voters if the ordinance would prohibit cannabis businesses altogether, limit the number of cannabis retailers

²⁵⁹ *Id.*

²⁶⁰ See ALASKA STAT. § 17.38.210 (2023).

²⁶¹ See WASH. REV. CODE § 69.51A.250 (2023); see also Att'y Gen. of Washington, Op. Letter from Robert W. Ferguson, Att'y Gen. of Wash., to the Hon. Sharon Foster, Chair, Wash. State Liquor Control Bd. (Jan. 16, 2014).

²⁶² CAL. BUS. & PROS. CODE § 26200(a)(1) (2022).

²⁶³ CAL. HEALTH & SAFETY CODE § 11362.2(b) (2017).

²⁶⁴ OHIO REV. CODE § 3796.29 (2016).

²⁶⁵ ARIZ. REV. STAT. § 36-2857(A)(1) (2023) (emphasis added).

²⁶⁶ *Id.* § 36-2857(C)(2-4)

²⁶⁷ ILL. COMP. STAT. 705/55-25 (2019).

²⁶⁸ *Id.*

to fewer than 20 percent of the number of liquor stores, or cause the city to have fewer recreational cannabis retailers than medical cannabis retailers.²⁶⁹

A number of other states, including Florida, New York, and Oregon, are more restrictive of local authority, while still allowing localities to “opt-out” of the cannabis industry. Florida retains most cannabis regulatory authority, generally preempting local regulation except as specified in the state’s medical marijuana statute.²⁷⁰ One such exception provides that counties and cities may prohibit dispensaries within their boundaries; however, if any dispensaries are permitted, the local authority cannot impose limits on the number of dispensaries that can operate in the area.²⁷¹ In a similar fashion, New York does not allow municipal governments to adopt “any law, rule, ordinance, regulation or prohibition pertaining to the operation or licensure of registered organizations, adult-use cannabis licenses or cannabinoid hemp licenses,” except for reasonable time, place, and manner restrictions on dispensary operations.²⁷² While this appears to be a nearly complete preemption of local authority, New York allows governments to opt out of legal cannabis operations via local laws rendering any purported licensure of a cannabis business inapplicable to that town, city, or village.²⁷³ Oregon operates in much the same manner.²⁷⁴

Vermont’s statutory framework similarly allows local restrictions and prohibitions on cannabis businesses but is better characterized as an “opt-in” system. In Vermont, a municipality may not expressly prohibit the operation of a cannabis business directly by ordinance or by law.²⁷⁵ For cannabis to be allowed, each municipality must “affirmatively permit” cannabis businesses via ballot initiative at an annual or special meeting.²⁷⁶ Thus, only the voters, and not the local powers that be, can determine the local stance on cannabis.

All of the states above allow counties and cities, in one way or another, to completely ban cannabis businesses from their jurisdiction. A smaller faction of states curtails local authority to the point that outright prohibitions are preempted or disallowed by state law. For instance, Hawaii’s medical cannabis statute appears to allow counties to ban retail dispensaries but does not permit the prohibition of farms or production centers “in any area in

²⁶⁹ MASS. GEN. LAWS ch. 94G, § 3(a)(2) (2022). Massachusetts also imposes a reasonableness requirement and allows some cities to prohibit cannabis businesses altogether. *See id.* § 3.

²⁷⁰ FLA. STAT. § 381.986(11) (2023).

²⁷¹ *Id.* § 381.986(11)(b)(1).

²⁷² N.Y. CANNABIS L. § 131(2) (McKinney 2023).

²⁷³ *Id.* § 131(1).

²⁷⁴ *See* OR. REV. STAT. §§ 475C.429, 475C.433 (2021).

²⁷⁵ VT. STAT. tit. 7, § 863(d)(1) (2020).

²⁷⁶ *Id.* § 863(a)(1).

which agricultural production is permitted.”²⁷⁷ Likewise, Pennsylvania appears to protect cannabis growers and processors, but not retailers, from local authority. The Pennsylvania Medical Marijuana Act of 2016 requires growers and processors to “meet the same municipal zoning and land use requirements as other manufacturing, processing and production facilities that are located in the same zoning district.”²⁷⁸ This implies that local governments cannot completely prohibit medical cannabis cultivation in zones where other manufacturing, processing, or production operations are permitted.

Delaware is even more restrictive of local authority to ban cannabis. While the state allows time, place, and manner restrictions on cannabis operations, it does not accept outright bans.²⁷⁹ Local governments cannot expressly prohibit cannabis or do so effectively by instituting ordinances that make operating a cannabis business unreasonable or impracticable in the jurisdiction.²⁸⁰ Finally, Oklahoma is perhaps the most stringent in restricting municipal authority, as it prohibits municipalities from “unduly chang[ing] or restrict[ing] zoning laws to prevent the opening of a retail marijuana establishment.”²⁸¹ Thus, under the current scheme in Oklahoma, any act that entirely prevents medicinal dispensaries from operating within municipal boundaries is prohibited and preempted by state law.

IV. ROADBLOCKS TO ROLLING OUT REFORM

A. *Local Restriction and Prohibition of Cannabis in Legal States*

The first major barrier to effective cannabis laws is local regulation of cannabis. Counterintuitively, legalization of cannabis at the state level is often insufficient to ensure its availability for adults or patients in any given city. Indeed, the majority of states that allow recreational or medicinal cannabis also allow local governments to outlaw cannabis within municipal boundaries. The result is a patchwork of different cannabis schemes, not only at the state level, but within individual states as well.

The most widely used mechanism for local regulation of cannabis is land use authority. California, the first state to legalize any form of cannabis, allows municipalities to prohibit cannabis businesses or impose other restrictive ordinances.²⁸² Since Proposition 215 was enacted in 1996, a plethora of

²⁷⁷ HAW. REV. STAT. § 329D-22 (2022).

²⁷⁸ Medical Marijuana Act of 2016, P. L. 84, No. 16 cl. 35, 9 § 2107 (codified at 2016 Pa. Laws 46).

²⁷⁹ DEL. CODE tit. 16, § 4917A (2023).

²⁸⁰ *Id.*

²⁸¹ OKLA. STAT. tit. 63, § 425v1(F)(1) (2019).

²⁸² *California’s Cannabis Laws*, CAL. DEP’T OF CANNABIS CONTROL, <https://cannabis.ca.gov/cannabis-laws/laws-and-regulations/> [<https://perma.cc/NRH7-P9HE>]; *Where Cannabis Businesses Are Allowed*, CAL. DEP’T OF CANNABIS CONTROL, <https://cannabis.ca.gov/canna>

local governments in the Golden State have employed land use restrictions to control the cannabis industry within their jurisdictions.²⁸³ San Francisco, for example, only permits the cultivation and sale of medical cannabis in areas zoned as Residential Commercial, medium- or high-density.²⁸⁴ The County of San Mateo imposes licensing criteria on cannabis businesses and allows dispensaries only in unincorporated areas (i.e., outside of city limits).²⁸⁵ Local governments in other states often relegate dispensaries to heavy industrial zones, or effectively ban cannabis altogether by zoning it as a nonpermitted use.²⁸⁶

Another common, and presumptively beneficial, use of municipal regulatory power is moratoria on the sale or use of cannabis. These temporary bans usually serve to prohibit cannabis businesses throughout the jurisdiction to allow local authorities time to assess and plan for an influx of new types of commerce.²⁸⁷ For instance, after Massachusetts legalized medicinal cannabis in 2017, 130 different municipalities had enacted a temporary moratorium on recreational cannabis retail sales by the following year.²⁸⁸

Cannabis businesses are also inhibited by the minimum spacing requirements that are imposed in many localities that cannot or do not prohibit cannabis altogether.²⁸⁹ Ordinances of this type prevent cannabis operations from locating with certain distances from other land uses.²⁹⁰ Brookline, Massachusetts, for example, prohibits cannabis businesses “within a radius of 500 feet of a school, daycare center, or any facility in which children commonly congregate.”²⁹¹ Such laws are intended to limit the geographical availability of cannabis and reduce problems like crime that are, rightly or not, associated with cannabis.²⁹² Minimum spacing laws can be astonishingly specific. Consider, for instance, the City of Tempe, Arizona, where cannabis establishments cannot be located within one mile of other cannabis businesses; 1,500 feet of daycares and schools; or 1,320 feet of places of worship,

bis-laws/where-cannabis-businesses-are-allowed/ [https://perma.cc/AYY3-MJED].

²⁸³ Alexis Holmes, *Zoning, Race, and Marijuana: The Unintended Consequences of Proposition 64*, 23 LEWIS & CLARK L. REV. 939, 951 (2019).

²⁸⁴ See S.F., CAL., PLAN. CODE art. 2, § 209.3 (2022); see also William C. Bunting & James M. Lammendola, *Why Localism Is Bad for Business: Land Use Regulation of the Cannabis Industry*, 17 N.Y.U. J.L. & BUS. 267, 276 (2021).

²⁸⁵ See SAN MATEO CNTY, CAL., CODE OF ORDINANCES, § 5.148.050 (2023).

²⁸⁶ Holmes, *supra* note 283, at 951.

²⁸⁷ Bunting & Lammendola, *supra* note 284, at 276.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 271–72.

²⁹⁰ See *id.* at 275.

²⁹¹ Little Children Schoolhouse, Inc. v. Town of Brookline Zoning Bd. of Appeals *ex rel.* Geller, No. 15-MISC-000518-KFS, 2016 WL 4162455, at *5 (Mass. Land Ct. Aug. 4, 2016).

²⁹² Bunting & Lammendola, *supra* note 284, at 277.

public parks, libraries, community centers, and residential zoning districts.²⁹³

In a similar vein, many cities place caps on the number of cannabis businesses allowed. Some caps are tied to population, while others are seemingly arbitrary. Oakland, California, for example, allows only eight new permits for cannabis dispensary operation per calendar year.²⁹⁴ At least half of those permits must go to Equity Applicants.²⁹⁵

B. State Preemption of Local Restrictions

Proponents of cannabis legalization in cities across the nation have turned to the courts, mostly in vain, to defeat local cannabis restrictions or prohibitions. Most of this litigation has addressed the question of whether state cannabis laws preempt local attempts to restrict or prohibit cannabis businesses. Indeed, in recent years, there have been more preemption disputes over cannabis than tobacco.²⁹⁶ Unfortunately for the challengers, courts are generally reluctant to conclude that state cannabis statutes preempt the traditional delegation of land use authority to municipalities.²⁹⁷

As with many topics in the universe of cannabis, California has been at the forefront of cannabis-related preemption litigation.²⁹⁸ In 2013, the California Supreme Court decided *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*²⁹⁹ This influential case answered the question of whether the state's medicinal cannabis statute preempted a ban on medical cannabis establishments imposed by the Riverside City Council.³⁰⁰ The city passed a law declaring that use of the substance in violation of state or federal law, as well as dispensaries themselves, were prohibited land uses subject to abatement as public nuisances.³⁰¹ However, the state's medical cannabis statute explicitly exempted patients and caregivers from sanction for the violation of certain state laws.³⁰² Most pertinently, patients and caregivers were exempted from violations of the state's antidrug abatement law, which makes locations used for unlawful, drug-related activities nuisances

²⁹³ Tempe, Ariz., Proposition 207, Ordinance O2021.xx (2021), <https://www.tempe.gov/Home/ShowDocument?id=87198> [<https://perma.cc/N575-AL7C>].

²⁹⁴ OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2024).

²⁹⁵ *Id.*

²⁹⁶ ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 48:27 (Sara C. Bronin & Dwight H. Merriam eds., 2023).

²⁹⁷ Martha Harrell Chumbler, *Land Use Regulation of Marijuana Cultivation: What Authority Is Left to Local Government*, 49 URBAN LAW. 505, 510 (2017).

²⁹⁸ RATHKOPF & RATHKOPF, *supra* note 296.

²⁹⁹ *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494 (Cal. 2013).

³⁰⁰ *Id.* at 496.

³⁰¹ *Id.* at 497.

³⁰² CAL. HEALTH & SAFETY CODE § 11362.75 (2017).

subject to abatement.³⁰³ Seeking to force the closure of local cannabis businesses, Riverside sued for injunctive relief.³⁰⁴

In analyzing the defendants' claim that the state statute preempted them from making their businesses prohibited land uses, the California Supreme Court emphasized the limited scope of the statute: it merely provided immunity from certain criminal and nuisance statutes imposed by the state.³⁰⁵ It did not, however, provide immunity from similar or more stringent laws adopted by cities. The court reasoned that, although the state declined to classify the cannabis related activities as nuisances, nothing explicitly or implicitly prevented localities from doing so.³⁰⁶ Furthermore, because California's medical program was a "careful and limited foray[] into the subject of medical marijuana," the state did not fully occupy the area to the exclusion of municipalities.³⁰⁷ Thus, the court found that Riverside's prohibition on medical cannabis establishments was not preempted by state law.³⁰⁸

One should not conclude, however, that the holding in *Inland Empire* gives municipal governments in the Golden State free reign to regulate cannabis. Challenges to some local statutes have found limited success with preemption claims. For example, in *Kirby v. County of Fresno*, an individual resident of the county sued to invalidate a county ban on cannabis possession and cultivation.³⁰⁹ Unlike the ban in *Inland Empire*, the ordinance passed by Fresno County was absolute—it made the sale, cultivation, and storage of cannabis in any zoning district a public nuisance and a criminal misdemeanor.³¹⁰ Nonetheless, for much the same reasons that the California Supreme Court declined to invalidate the local law in *Inland Empire*, the *Kirby* court found that the county ordinance was, for the most part, not preempted by state law.³¹¹ In the court's view, the state statute clearly did not explicitly preempt local land use authority.³¹² And, because implicit preemption "require[s] a clear indication of the Legislature's intent to restrict local government's inherent power to regulate land use," the ban on cultivation was allowed to stand.³¹³

The court did take issue, however, with the portion of the county's ordinance that made violations of the zoning ordinance a misdemeanor

³⁰³ *Id.*; see also *id.* § 11570 (1986).

³⁰⁴ *Inland Empire Patients Health & Wellness Ctr.*, 300 P.3d at 496.

³⁰⁵ *Id.* at 512 (The law "merely removes *state law* criminal and nuisance sanctions from the conduct described therein.").

³⁰⁶ See *id.* at 506–07.

³⁰⁷ See *id.* at 513.

³⁰⁸ *Id.* at 513.

³⁰⁹ *Kirby v. Cnty. of Fresno*, 195 Cal. Rptr. 3d 815, 819 (Cal. Ct. App. 2015).

³¹⁰ *Id.*

³¹¹ *Id.* at 820.

³¹² *Id.* at 836.

³¹³ *Id.* at 820.

crime.³¹⁴ The state's medical cannabis program did not fully occupy the entire field of medical cannabis regulation, but, in the court's view, it did "fully occupy the area of criminalization and decriminalization of activity directly related to marijuana."³¹⁵ Thus, while an individual in Fresno County could still be indirectly subject to criminal liability for failing to abate a public nuisance, the provision imposing direct criminal sanctions for violations of the ordinance was struck down.³¹⁶ But, beyond the bare minimum prohibition on local authority to criminalize acts that are protected by state statute, the *Kirby* case serves mostly to emphasize the broad municipal power to regulate and prohibit cannabis.

Courts in other states have generally fallen in line with California's preservation of local authority to regulate cannabis. Washington courts have placed emphasis on statutory language that "expressly contemplates local regulation of medical marijuana."³¹⁷ In a similar fashion, Maryland's statutory directive that cannabis businesses comply with local zoning requirements has caused the failure of a preemption claim.³¹⁸ Indeed, even some initially successful claims that local authority is preempted by state law have been defeated legislatively.

Two years after Michigan's medical cannabis program went into effect, the City of Wyoming, Michigan responded by banning all land uses that were prohibited by federal law.³¹⁹ Because of the unrelenting federal prohibition on cannabis, the city's ordinance acted as an outright ban on medicinal cannabis operations. In a suit challenging the local provision, the court found that it was preempted by the portion of the state law that immunized qualified medical marijuana users from any manner of penalties for legally compliant cannabis use.³²⁰ Nevertheless, the Michigan statute was amended after the decision and local authorities are now explicitly permitted to determine whether to allow cannabis businesses.³²¹

Cannabis proponents challenging local restrictions have been more successful in states that impose reasonableness requirements on municipal cannabis regulation. For example, in 2011, Maricopa County, Arizona passed a zoning ordinance that limited cannabis operations to a single industrial zone.³²² Like in the Michigan case, the county's ordinance also prohibited

³¹⁴ *Id.* at 830.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Cannabis Action Coal. V. City of Kent, 351 P.3d 151, 155 (Wash. 2015).

³¹⁸ Hippocratic Growth, LLC v. Bd. Of Cnty. Comm'rs, No. C-17-CV-17-000012, 2018 WL 3343588, at *6 (Md. Ct. Spec. App. 2018).

³¹⁹ Ter Beek v. City of Wyoming, 846 N.W.2d 531, 534 (Mich. 2014).

³²⁰ *See id.* at 544.

³²¹ Chumbler, *supra* note 297, at 506.

³²² White Mountain Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416, 420 (Ariz. Ct. App. 2016).

land uses that conflicted with federal, state, or local law.³²³ Under state law, an application for registration as a medical cannabis dispensary was required to include verification from the local zoning authority that the proposed dispensary would comply with local zoning laws.³²⁴ When a fledgling dispensary requested this verification from Maricopa County, it refused to issue it because “doing so would potentially subject the County and its employees to prosecution under federal law.”³²⁵ As a result, the dispensary’s application was denied by the state, and it sued seeking to require the county to issue the zoning documentation.³²⁶ The court construed the provision prohibiting land uses that conflicted with federal law as a “poison pill,” and, after determining that the prohibition was not reasonable, affirmed the invalidation of the provision as applied to dispensaries.³²⁷ Notably, the court found support in the Michigan case discussed above³²⁸ and distinguished the California Supreme Court case, *Inland Empire*, that upheld a local prohibition on medicinal cannabis.³²⁹ Unlike the medical marijuana statute at issue in *Inland Empire*, the Arizona statute challenged by Maricopa County was a “complex regulatory scheme” that explicitly limited the power of local jurisdictions to “reasonable zoning regulation . . . limit[ing dispensaries] to specified areas.”³³⁰ Thus, because the Arizona statute did not give local jurisdictions “carte blanche to ban private enterprise under the [statute] under the guise of regulation,” the county’s provision was preempted by state law.³³¹

These preemption cases demonstrate an unfortunate conclusion for proponents of cannabis reform: without careful wording at the legislative level, localities will likely be able to prohibit medicinal and recreational cannabis as they see fit. In states like California or Colorado, where cannabis statutes are deferential to local governments or fail to explicitly limit their land use powers, preemption challenges to local restrictions and prohibitions are all but doomed. Inevitably, some localities in those states will restrict cannabis businesses, and reform will continue to be geographically disjointed. Thankfully, it does not take much to ensure a more uniform system of cannabis legalization across a state. Merely adding a requirement that local cannabis regulation be reasonable should serve to ensure a tolerable level of consistency within a state.

³²³ *Id.*

³²⁴ *Id.* at 419–20.

³²⁵ *Id.* at 421.

³²⁶ *Id.*

³²⁷ *Id.* at 434–38.

³²⁸ *Id.* at 436. (“[I]n *Ter Beek* [846 N.W.2d 531 (Mich. 2014)] the Michigan Supreme Court held that a similar prohibition of acts in violation of federal law as applied to medical marijuana use and cultivation was in violation of state law.”).

³²⁹ *Id.* at 436–37 (distinguishing *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494 (Cal. 2013)).

³³⁰ *Id.* at 437 (emphasis added) (quoting ARIZ. REV. STAT. § 36-2806.01 (2023)).

³³¹ *Id.* at 436, 438.

*C. The Trials and Tribulations of State Legalization**1. The Importance of Direct Democracy to Cannabis Legalization*

Most of the states that have legalized recreational cannabis did not do so through traditional legislation, but through direct democracy, where proposed laws—called ballot measures, voter initiatives, or proposed measures—are put before a state’s voters for approval.³³² Voter-enacted reform was especially common at the beginning of both the medicinal and recreational legalization movements. The first nine states to legalize recreational cannabis did so with voter enacted legislation.³³³ And, while the majority of states that now allow medicinal cannabis legalized it through ordinary legislative channels, seven of the first ten legal-medical states used ballot measures to enact changes.³³⁴

³³² See Figure A, *infra* Section IV.C.

³³³ See Figure A, *infra* Section IV.C.

³³⁴ See Figure A, *infra* Section IV.C.

FIGURE A: DIFFERING LEGISLATIVE FORMATS FOR STATE CANNABIS REFORM

| Medicinal Cannabis | | | |
|-------------------------------------|---------------|-----------------------------------------|---------------|
| <i>Enacted via Direct Democracy</i> | | <i>Enacted via Ordinary Legislation</i> | |
| 1996 | California | 1999 | Maine |
| 1998 | Alaska | 2000 | Hawaii |
| 1998 | Oregon | 2004 | Vermont |
| 1998 | Washington | 2006 | Rhode Island |
| 2000 | Colorado | 2007 | New Mexico |
| 2000 | Nevada | 2010 | New Jersey |
| 2004 | Montana | 2011 | Delaware |
| 2008 | Michigan | 2012 | Connecticut |
| 2010 | Arizona | 2013 | Illinois |
| 2012 | Massachusetts | 2013 | New Hampshire |
| 2016 | Arkansas | 2014 | Maryland |
| 2016 | Florida | 2014 | Minnesota |
| 2016 | North Dakota | 2014 | New York |
| 2018 | Missouri | 2016 | Louisiana |
| 2018 | Oklahoma | 2016 | Ohio |
| 2020 | South Dakota | 2016 | Pennsylvania |
| | | 2017 | West Virginia |
| | | 2018 | Utah |
| | | 2020 | Virginia |
| | | 2021 | Alabama |
| | | 2022 | Mississippi |
| Recreational Cannabis | | | |
| <i>Enacted via Direct Democracy</i> | | <i>Enacted via Ordinary Legislation</i> | |
| 2012 | Colorado | 2018 | Vermont |
| 2012 | Washington | 2019 | Illinois |
| 2014 | Alaska | 2021 | Connecticut |
| 2014 | Oregon | 2021 | New Mexico |
| 2016 | California | 2021 | New York |
| 2016 | Maine | 2021 | Virginia |
| 2016 | Massachusetts | | |
| 2016 | Nevada | | |

| | |
|------|------------|
| 2018 | Michigan |
| 2020 | Arizona |
| 2020 | Montana |
| 2020 | New Jersey |

Popular democracy is, and will continue to be, critically important to cannabis reform. Despite the tremendous public support for cannabis legalization and its rise in popularity in the past two decades, overarching reform has yet to materialize. Understanding this contradiction requires an examination of the difference between the support for an issue and its salience.³³⁵ While national polling data suggests that a large percentage of the public is in favor of cannabis reform, the issue has not been salient. That is, it has remained relatively unimportant to voters. Indeed, a poll conducted in 2018 prior to the COVID-19 pandemic, revealed that fewer than 10 percent of Americans considered cannabis reform to be their number one issue of importance.³³⁶ Moreover, due in part to its lack of salience and in part to legislators' tendency to focus on older, unresolved issues, cannabis reform has been largely absent from legislative agendas.³³⁷

Direct democracy is critically important to cannabis reform because, in the face of legislative resistance, it provides a pathway to policy change that circumvents legislators who are disinterested in or opposed to reform.³³⁸ Thus, ballot initiatives allow voters to bring state policy into alignment with public opinion on the cannabis issue despite its lack of importance relative to other political problems.³³⁹ In a statistical analysis of the factors that lead to cannabis reform, Professor Burrell Vann Jr. found that "the degree of direct democracy in a state is a strong predictor of the likelihood of legalizing marijuana for recreational use."³⁴⁰ Interestingly, Professor Vann Jr. found no support for the contentions that Democratic party control of a state, a state's fiscal health, levels of marijuana use, or geographical proximity to legal states, lead to recreational cannabis legalization.³⁴¹ The ability to make policy via ballot measures may indeed be one of the *only* important factors that

³³⁵ John Hudak & Christine Stenglein, *Public Opinion and America's Experimentation with Cannabis Reform*, in MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 15, 30 (Jonathan H. Alder ed., 2020).

³³⁶ Hart Rsch. Assocs., *Study #18033*, NBC NEWS/WALL ST. J. SURV. 21 (2018), www.wsj.com/public/resources/documents/18033NBCWSJJanuaryPoll01192018Complete.pdf [<https://perma.cc/FVX4-EKYZ>].

³³⁷ Vann Jr., *supra* note 99, at 5.

³³⁸ *Id.* at 4.

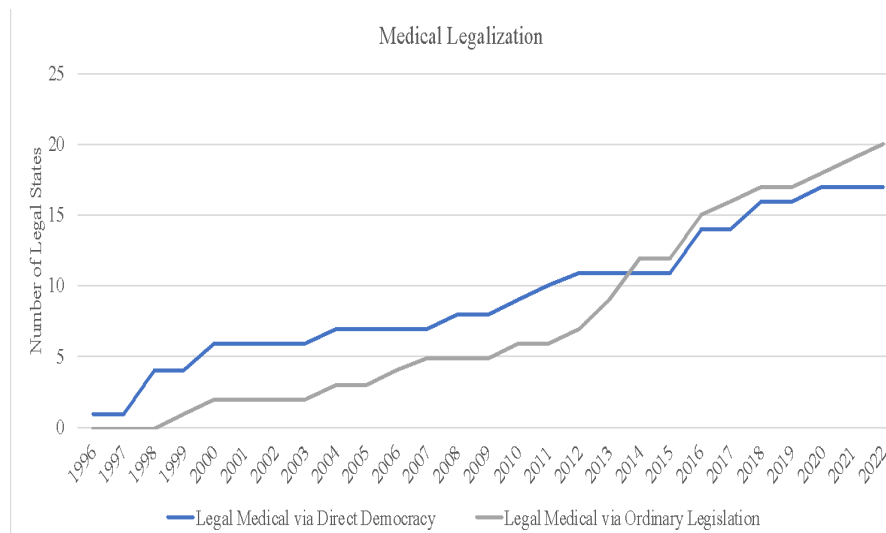
³³⁹ *Id.*

³⁴⁰ *Id.* at 2.

³⁴¹ *Id.* at 9–10. The only two factors with statistical significance were the level of direct democracy in a state and liberal citizen ideology. *Id.*

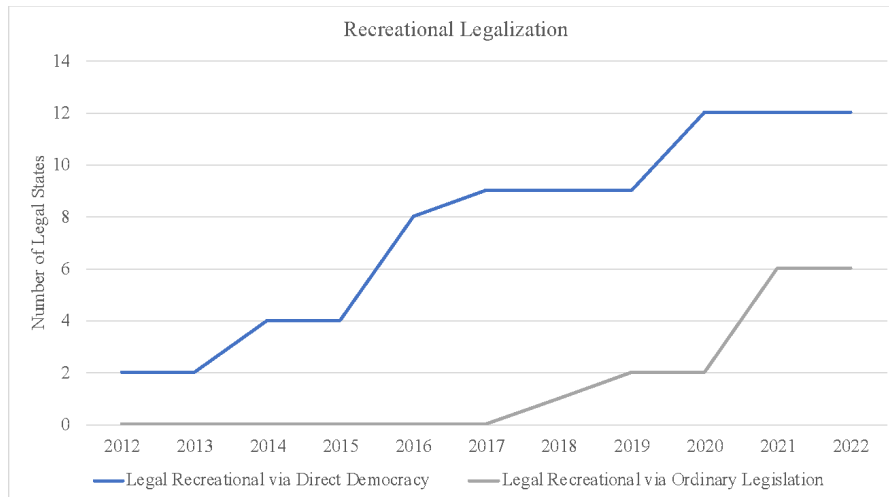
make it more likely for a given state to legalize recreational cannabis.³⁴² Notably, the recent increase in legislative action on cannabis reform could be a result of lawmakers' attempts to head off voter initiatives, where permitted, and impose their own policy preferences.

Direct democracy can also have a leading role. That is, as more states have legalized recreational and medicinal cannabis, there are more policies available for study. As a result, slower moving states are increasingly able to look to legal states for policy templates and examples of the effects of different approaches to cannabis regulation. Thus, the leading role of voter-driven reform is likely a contributing factor to the recent increase in legislative action on cannabis reform. As Figures B and C illustrate, legislative reform has lagged behind reform traced to direct democracy.

FIGURE B³⁴³

³⁴² *Id.* at 9.

³⁴³ For print readers: the line that begins higher initially is “Legal Medical via Direct Democracy.” Comparatively, the line that begins lower is “Legal Medical via Ordinary Legislation.”

FIGURE C³⁴⁴

Undoubtedly, direct democracy will continue to play an important role in cannabis reform efforts. Use of the plant remains illegal for medical purposes in twelve states and for nonmedical purposes in twenty-six states.³⁴⁵ Due in no small part to growing support for legalization, voters in more and more states are turning to ballot initiatives, where permitted, to force the issue of cannabis reform. Of the states that have yet to legalize medicinal and recreational cannabis use (four and eleven, respectively) permit voter initiatives.³⁴⁶ In all but one of these states, reform activists have obtained approval to begin collecting signatures to place cannabis legalization measures on the ballot for 2022.³⁴⁷ The yellow and red states in Figure D,

³⁴⁴ For print readers: the same is true for Figure C as it was for Figure B. The line that is higher is “Legal Medical via Direct Democracy” and the lower line is “Legal Medical via Ordinary Legislation.”

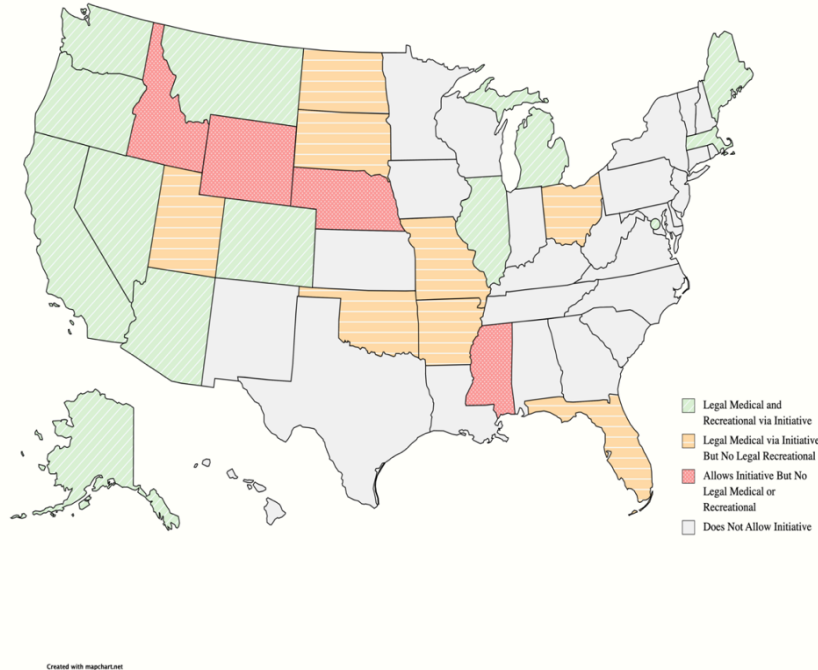
³⁴⁵ Nat’l Conf. of State Legislatures, *supra* note 186.

³⁴⁶ Idaho, Mississippi, Nebraska, and Wyoming allow initiatives but do not yet have a system of legalized medicinal or recreational use. The initiative states without legal recreational use include Arkansas, Florida, Missouri, North Dakota, Ohio, Oklahoma, South Dakota, and Utah. Notably, courts in Arkansas and Mississippi, and arguably Utah, do not apply the single-subject rule to ballot measures. See Rachael Downey et al, *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579, 584, 605–06, 623 (2004). The author of this Article has updated the authors’ research for states that allow initiative measures but do not apply the single-subject rule thereto.

³⁴⁷ See Griffin Coop, *Push Begins for Marijuana Legalization in Arkansas*, ARK. TIMES (Oct. 31, 2021, 7:00 AM), <https://arktimes.com/news/cannabiz/2021/10/31/push-begins-for-marijuana-legalization-in-arkansas> [https://perma.cc/6QVP-WRD4]; see also Kyle Jaeger, *Idaho Officials Clear Marijuana Activists to Collect Signatures for Revised Legalization Ballot Measure*, MARIJUANA MOMENT (July 29, 2021), <https://www.marijuanamome>

below, are the states that are likely to have cannabis-related ballot measures in the coming years.

nt.net/idaho-officials-clear-marijuana-activists-to-collect-signatures-for-revised-legalization-ballot-measure/ [https://perma.cc/ZGQ3-JTH6]; Kyle Jaeger, *Missouri Marijuana Activists File Legalization Initiatives for 2022 as Other Groups Prepare Separate Measures*, MARIJUANA MOMENT (July 19, 2021), https://www.marijuanamoment.net/missouri-marijuana-activists-file-legalization-initiatives-for-2022-as-other-groups-prepare-separate-measures/ [https://perma.cc/7W7V-2U5Q]; Chris Dunker, *Nebraskans for Medical Marijuana Planning Two New Petitions for 2022*, LINCOLN J. STAR, https://journalstar.com/news/state-and-regional/govt-and-politics/nebraskans-for-medical-marijuana-planning-two-new-petitions-for-2022-ballot/article_ba78ed6a-720a-54b3-b709-b1338915374b.html [https://perma.cc/76TA-TABL] (May 25, 2023); Kyle Jaeger, *North Dakota Activists Submit 2022 Marijuana Legalization Ballot Initiative*, MARIJUANA MOMENT (Jan. 12, 2021), https://www.marijuanamoment.net/north-dakota-activists-submit-2022-marijuana-legalization-ballot-initiative/ [https://perma.cc/CBY3-MX6V]; Andrew J. Tobias, *Marijuana Legalization Could Be on the Ohio Ballot in 2022. Should that Worry Republicans?*, CLEVELAND.COM, https://www.cleveland.com/open/2021/08/marijuana-legalization-could-be-on-the-ohio-ballot-in-2022-should-that-worry-republicans.html [https://perma.cc/4LHH-PS8G] (Mar. 7, 2023, 4:30 PM); Kyle Jaeger, *Oklahoma Activists Finalize Language For Two 2022 Marijuana Ballot Initiatives*, MARIJUANA MOMENT (Sept. 22, 2021), https://www.marijuanamoment.net/oklahoma-activists-finalize-language-for-two-2022-marijuana-ballot-initiatives/ [https://perma.cc/APE2-4Z26]; Stephen Groves, *Pot Legalization Advocates Launch Ballot Initiative Campaign*, AP (Oct. 12, 2021, 3:30 PM), https://apnews.com/article/sd-state-wire-south-dakota-recreational-marijuana-constitutional-amendments-18d2641b1e3a31ace3f4fbdd1b196f44 [https://perma.cc/DVS9-FLBM]; Mead Gruver, *Wyoming Pot Signature Effort to Begin in Early September*, AP (Aug. 18, 2021, 1:15 PM), https://apnews.com/article/business-health-wyoming-election-2020-a9cb2cf0f040e9ce7132b767a3692d2c [https://perma.cc/UCX3-MPQZ]. Utah has yet to have a cannabis reform measure filed with the Lieutenant Governor. *See Initiatives and Referenda*, VOTE UTAH, https://vote.utah.gov/initiatives-and-referenda/ [https://perma.cc/9RNG-YS78].

FIGURE D³⁴⁸

2. A Weapon for Cannabis Opponents: The Single-Subject Rule

The proliferation of voter initiatives proposing cannabis legalization has given rise to an emerging barrier to cannabis reform: the single-subject rule. Single-subject rules are intended to limit every law enacted in a state to a single topic or theme.³⁴⁹ These provisions were originally envisioned to prevent lawmakers from deceiving voters by sneaking unpopular provisions into unrelated legislation.³⁵⁰ But in recent years, the rule has been weaponized by conservative operators and cannabis opponents to prevent the use of voter-enacted ballot measures to legalize medicinal and recreational cannabis.³⁵¹ In the coming years, it is all but certain that cannabis legalization efforts in states across the nation will face single-subject challenges.³⁵²

³⁴⁸ For print readers: the diagonal striped states are “Legal Medical and Recreational via Initiative,” horizontal striped states are “Legal Medical via Initiative But No Legal Recreational,” dark solid states are “Allows Initiative But No Legal Medical or Recreational,” and light solid states are “Does Not Allow Initiative.”

³⁴⁹ Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1629 (2018).

³⁵⁰ *Id.* at 1632–34.

³⁵¹ See Kyle Jaeger, *Florida Supreme Court Hears Arguments in Case to Decide if Marijuana Legalization Will Appear on 2024 Ballot*, MARIJUANA MOMENT (Nov. 8, 2023), <https://marijuanamoment.net/>

Despite the overall success of cannabis legalizing voter initiatives, two such proposals have been judicially invalidated in recent years; first in Nebraska and then in South Dakota.³⁵³ In the Nebraska case, a procedurally compliant and certified ballot petition was removed from the ballot before the election for violating the single-subject rule, despite having been validly signed by more than 14 percent of the registered voters in the state.³⁵⁴ In South Dakota, the cannabis legalization proposition was invalidated by the state supreme court after being approved by voters with a margin of nearly 8.5 percent.³⁵⁵

When a given plaintiff challenges a law, constitutional amendment, or voter initiative for violating a single-subject rule, courts must apply a standard to determine whether the bill “contain[s] only one subject.”³⁵⁶ A number of different standards have developed across different state courts, but generally speaking, they all involve identifying the theme of a statute and then determining whether the challenged provisions fit within that theme.

In 2020, the Nebraska Supreme Court, relying on its “natural and necessary connection” standard for single-subject challenges, invalidated a ballot initiative that, had it passed, would have legalized medicinal cannabis in the state.³⁵⁷ Under that standard, proposed laws will be upheld “[w]here the limits of [the proposal] hav[e] [a] natural and necessary connection with each other, and, together, are a part of one general subject.”³⁵⁸ Applying this test

www.marijuanamoment.net/watch-live-florida-supreme-court-hears-arguments-in-case-to-decide-if-marijuana-legalization-will-appear-on-2024-ballot/ [<https://perma.cc/7YVX-CF2T>].

³⁵² See Fenit Nirappil & David Ovalle, *Marijuana Legalization Faces Tough Odds in Red States Despite Ohio Win*, WASH. POST (Nov. 9, 2023, 5:26 PM), <https://www.washingtonpost.com/health/2023/11/09/marijuana-legalization-ohio-republican-states-challenges/> [<https://perma.cc/5VDN-EEWX>]; see also Ivan Pereira, *Legal Marijuana Movement Builds as More States Change Laws*, ABC NEWS (Apr. 8, 2021, 2:05 AM), <https://abcnews.go.com/US/legal-marijuana-movement-builds-states-change-laws/story?id=76907902> [<https://perma.cc/4LHC-27F2>].

³⁵³ See *Thom v. Barnett*, 967 N.W.2d 261, 264 (S.D. 2021); see also *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 250 (Neb. 2020).

³⁵⁴ See Brief of Intervenors Nebraskans for Sensible Marijuana L., a/k/a Nebraskans for Med. Marijuana et al. at 8, *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244 (Neb. 2020) (No. S-20-623) (“[T]he Sponsors properly submitted over 182,000 sufficient and valid signatures of registered Nebraska voters . . .”). Nebraska requires petitions for constitutional amendments to be signed by ten percent of the registered voters in the state at the time of submission. NEB. CONST. art. III, § 2. In July 2020, the month the petition was submitted, there were approximately 1,222,740 registered voters in the state. *VR Statistics Count Report*, NEB. SEC’Y OF STATE (July 1, 2020, 4:26 PM), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/vrstats/2020vr/Statewide-July-2020.pdf> [<https://perma.cc/59G6-6N29>].

³⁵⁵ See *Thom*, 967 N.W.2d at 285 (54.2% voting yes and 45.8% voting no).

³⁵⁶ NEB. CONST. art. III, § 2.

³⁵⁷ *Christensen v. Gale*, 917 N.W.2d 145, 150 (Neb. 2018).

³⁵⁸ *Id.* at 156 (quoting *State ex rel. Loontjer v. Gale*, 853 N.W.2d 494, 513 (2014)).

to the medicinal cannabis initiative, the court determined that the general subject of the initiative was to grant a constitutional right to “produce and medicinally use” cannabis, not including the right to purchase or sell cannabis.³⁵⁹ The initiative, in addition to legalizing the use of medicinal cannabis, gave patients “the right to access or purchase cannabis . . . from private entities,” and gave businesses the right to sell it to businesses.³⁶⁰ Comparing this portion of the initiative to the general subject, the court determined that the right to commercially sell medicinal cannabis was neither naturally or necessarily connected to the right to use and produce it.³⁶¹ Finally, the court found that various other portions of the proposed law, including prohibitions on cannabis use in public, prison, while driving, and while working, were likewise unrelated to the production and medicinal use of cannabis.³⁶²

The majority opinion of the Nebraska Supreme Court, ripe with contradictions, demonstrates the problem of the single-subject rule for cannabis proponents. First, most scholarly accounts of the single-subject rule align on the conclusion that the fundamental flaw with the rule is the difficulty of defining the term “subject.”³⁶³ Professor Michael Gilbert has described the problem as attributable to the fact that “[t]opics or themes cannot *objectively* be classified into one subject or another . . . because subjects are defined not by logic but by social context.”³⁶⁴ Not only is that social context difficult to fully understand, but once understood, different individuals can interpret the context differently.³⁶⁵ What the Nebraska court saw as divergent subjects—allowing businesses to sell cannabis, prohibiting certain types of cannabis use, and enabling employers to prevent its use in the workplace, to name a few—another could see as part of a general scheme to legalize medicinal marijuana. It all depends on what level of abstraction that each person prefers to analyze the issue. Indeed, the problem is that “subjects are, as the word itself implies, subjective.”³⁶⁶

Moreover, the standards that courts have created to deal with the indeterminacy of the term “subject” invariably result in erratic and inconsistent outcomes. Reading the opinions of a given court fails to provide direction on

³⁵⁹ State *ex rel.* Wagner v. Evnen, 948 N.W.2d 244, 254–55 (Neb. 2020). The court did so despite the fact that the Attorney General’s explanatory statement, the initiative sponsors’ object statement, and the initiative itself included language giving eligible patients “the right to use, *possess*, *access*, *purchase*, and safely and discreetly produce” cannabis. *Id.* at 255 (emphasis added). No explanation was given for the omission of the terms “possess, access, [and] purchase” in the general subject.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 256–58.

³⁶² *Id.* at 259.

³⁶³ Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 806–07 (2006).

³⁶⁴ *Id.* at 825 (emphasis added).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

how that court will resolve single-subject disputes in the future.³⁶⁷ This unpredictability problem has been recognized by judges across the nation, with one state supreme court justice going so far as to claim that her court had regularly “utilize[d] the one-subject rule to invalidate legislation with little consistency or reason.”³⁶⁸ The irregularity in the rule’s enforcement imposes large costs on the sponsors of ballot initiatives and the public more broadly. The process of collecting signatures and placing an initiative on the ballot can be prohibitively expensive.³⁶⁹ By invalidating a ballot measure that was intentionally crafted to comply with the single-subject rule, a court can impose a large and unwarranted forfeiture on the measure’s sponsors. There are social costs as well. Beyond the fact that the money spent on an invalidated ballot measure could have been used to enact other socially beneficial policies, aggressive enforcement of the single-subject rule divests voters of the chance to realize their policy preferences. Even setting aside the often discussed equity implications of the cannabis prohibition,³⁷⁰ the Nebraska Supreme Court’s decision in *State ex rel. Wagner* will, at a minimum, deprive patients of the benefits that might be associated with medicinal cannabis until another initiative can be proposed.

Finally, the single-subject rule, as currently applied, does not do much to increase political transparency. Instead, it seems that the rule serves to undermine voter faith in the legislative and ballot initiative processes. Judges deciding single-subject cases are undoubtedly left in an undesirable position. Charged with the task of enforcing their state’s constitution, state courts do not have the choice to ignore the single-subject rule entirely. And yet, taking the step of striking down a popularly enacted ballot measure may be seen as both counter-majoritarian and offensive to the peoples’ popular sovereignty.³⁷¹ The enforcement of the single-subject rule, especially aggressive enforcement, has led to many accusations of judicial activism.³⁷²

As Professor Gilbert put it, “[j]udges have been accused of deciding single subject cases inconsistently, failing to explain the reasoning behind their decisions, permitting substantive legal considerations to influence procedural questions, and imposing their personal beliefs under the guise of the rule’s broad language.”³⁷³ A former Governor of Colorado has called the single subject rule an “arbitrary weapon wielded by an increasingly politicized ju-

³⁶⁷ See *id.* at 824, 829.

³⁶⁸ See *State ex rel. Ohio Civ. Serv. Emps. Ass’n v. State Emp. Rels. Bd.*, 818 N.E.2d 688, 706 (Ohio 2004) (Lundberg Stratton, J., dissenting).

³⁶⁹ See Downey et al, *supra* note 346, at 590.

³⁷⁰ See, e.g., Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 B.U. L. REV. 1003, 1005 (2021).

³⁷¹ See Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1269–70 (2017).

³⁷² See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 711 (2010).

³⁷³ See Gilbert, *supra* note 363, at 807 (internal citations omitted).

diciary.³⁷⁴ Gilbert warns that these problems should be attributed to the rule itself, rather than the judges.³⁷⁵ But nonetheless, there is empirical support for the conclusion that judicial determinations involving the single-subject rule are often the product of the judges' partisan political preferences.³⁷⁶ Professor Gilbert himself has found strong evidence that one can predict how a judge will rule on a single-subject case by looking at the judge's ideology and their political party's stance on the policy at issue.³⁷⁷ Indeed, a member of the Colorado Supreme Court has concluded that the court could never apply a standard as amorphous as the single-subject requirement without conforming it to their own policy preferences.³⁷⁸

The single-subject rule presents an obvious problem for proponents of cannabis reform laws in voter initiative states. While sponsors in five different states were collecting signatures and preparing their cannabis initiatives for the 2022 ballot,³⁷⁹ there is no way to know with certainty whether the initiatives will be found to comply with the single-subject rule. Because the rule itself is indeterminate and unworkable, it is nearly impossible to make *ex ante* conclusions about the "singleness of purpose" of any given ballot measure. Moreover, the divisive political nature of cannabis reform and the vague judicial standards used for determining compliance with the rule creates the risk that judges will decide the impending cases on the basis of their individual policy preferences.

Unless courts take it upon themselves to exercise restraint in their enforcement of the single-subject rule, cannabis reform proponents may have no better option than to prepare for a four-year process: bring a cannabis reform measure in 2022, have it defeated on single-subject grounds, and bring it again in 2024, following the court's opinion to the letter. But even then, given the judiciary's tendency to flip-flop on how they will apply their own standards, the initiatives could be at risk.

³⁷⁴ See Cooter & Gilbert, *supra* note 372, at 690 (quoting Governor Richard Lamm).

³⁷⁵ See Gilbert, *supra* note 363, at 808.

³⁷⁶ See John G. Matsusaka and Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, LOY. L. SCH. - L.A. LEGAL STUD. RSCH. PAPER SERIES, Paper No. 2010-4, 1, 2 (2010) ("[D]ecisions in single subject cases are heavily influenced by a judge's partisan inclinations, but the amount of partisan influence depends on whether the state's judicial [doctrine] directs judges to apply the single-subject rule aggressively or with restraint."); see also *id.* at 9-12 (making the case that logrolling, in addition to riding, produces beneficial outcomes in many situations).

³⁷⁷ See Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333, 335-36 (2011).

³⁷⁸ See *id.* at 339.

³⁷⁹ Mike Catalini, *Explainer: Which States Put Marijuana on the Ballot in 2022?*, AP NEWS (Oct. 24, 2022, 3:03 PM), <https://apnews.com/article/2022-midterm-elections-health-missouri-marijuana-government-and-politics-9e980221d47993b409629088ad1768bd> [https://perma.cc/48MN-V5FC].

D. The Public Health Effects of Cannabis Legalization

Another important aspect of the cannabis discussion that could be seen as a roadblock to reform is the potential negative public health effects of legalization. Unfortunately, due to the combination of limited existing data and a wide range of input variables, the isolation of specific causes and effects of cannabis legalization presents a unique challenge. There is a growing body of research evaluating the effects of cannabis legalization, but consensus is almost nonexistent. Indeed, one commonly cited study from the Centennial Institute at Colorado Christian University has suggested that the costs of legal recreational cannabis in Colorado outweigh the tax revenue collected by as much as four-and-half to one.³⁸⁰ At the same time, however, this study has been the subject of much criticism for its methodology and conclusions,³⁸¹ and other studies have suggested that the social harms of recreational cannabis are more limited than originally anticipated.³⁸² These social harms can be broadly separated into concerns involving public health on the one hand and individual health on the other.

In the public health domain, a major potential cost of legalization is the increased incidence of driving under the influence and, in turn, increased risk of traffic accidents. However, studies have suggested that the problem, while severe, might not be as acute as in the alcohol context.³⁸³ Indeed, driving under the influence of cannabis is associated with only a 20-30 percent increased risk of traffic accidents.³⁸⁴ This is one or two orders of magnitude lower than that of drivers with a high blood-alcohol content, and lower than that of drivers with a blood-alcohol level below the legal limit of 0.08 percent but still over 0 percent.³⁸⁵ Another potential public health cost of legalization can be found in the potential for children to be exposed to secondhand cannabis smoke. Recent studies suggest that children exposed to secondhand smoke can develop detectable levels of THC and suffer from the associated negative health risks.³⁸⁶ A related concern—the direct use of cannabis by minors—has, at least initially, proven to be less salient. A recent

³⁸⁰ Jeff Hunt, *Economic and Social Costs of Legalized Marijuana*, CENTENNIAL INST. AT COLO. CHRISTIAN U., <https://centennial.ccu.edu/policy-briefs/marijuana-costs/> [<https://perma.cc/8TC6-JVLG>].

³⁸¹ See *Reject the Centennial Institute's Claims on the Cost of Legalized Marijuana*, ILL. UPDATE, <https://illinoisupdate.com/2018/12/21/reject-the-centennial-institutes-claims-on-the-costs-of-legalized-marijuana/> [<https://perma.cc/Z57R-HXWF>].

³⁸² Greg Rosalsky, *The Data on Legalizing Weed*, NPR (Mar. 16, 2021, 6:30 AM), www.npr.org/sections/money/2021/03/16/976265525 [<https://perma.cc/4MDA-JFTL>].

³⁸³ R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ADDICTION 185, 185 (2009).

³⁸⁴ Ole Rogeberg & Rune Elvik, *Response: Cannabis Intoxication, Recent Use and Road Traffic Crash Risks*, 111 ADDICTION 1495, 1498 (2016).

³⁸⁵ *Id.*

³⁸⁶ COLO. DIV. CRIM. JUST., IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO A REPORT PURSUANT TO C.R.S. 24-33.4-516 35 (2021).

publication by the Colorado Division of Criminal Justice found no statistically significant increase in cannabis consumption among high school students between 2005 and 2019, despite the 2012 recreational legalization of cannabis.³⁸⁷ Moreover, there was no statistically significant difference in cannabis consumption among high school students in Colorado and the rest of the nation.³⁸⁸ Another study of teenage cannabis use in Washington state actually found that such use *decreased* after legalization.³⁸⁹

As for the effects of cannabis use on individual health, there is general acceptance that some unspecified degree of negative health consequences—particularly in children and pregnant women—is associated with cannabis use.³⁹⁰ However, the causal link between cannabis use and the negative health outcomes, as well as the severity of the outcomes, remains unclear. Despite heated debate on the topic, there is support for the conclusion that cannabis use can induce dependency due to its effects on the chemistry of the user’s brain—THC, the primary psychoactive component in *Cannabis Sativa*, elicits a dopamine release that has a cyclical and reinforcing impact.³⁹¹ Cannabis use disorder, the term used to describe dependence on the substance, has been said to occur in roughly 9 percent of those who use cannabis at least once.³⁹² The disorder is associated with a wide variety of “adverse psychosocial outcomes,” but researchers remain unsure of whether it is cannabis use that causes these issues or whether the patients become dependent in the first place because they use the substance as self-medication to treat preexisting psychological issues.³⁹³

Not surprisingly, given that the primary means of cannabis consumption is through smoke inhalation, respiratory health is implicated by cannabis use.³⁹⁴ However, research on the effects of such use on the lungs is mostly inconclusive, both with regard to the development of chronic obstructive

³⁸⁷ *Id.* at 94.

³⁸⁸ *Id.*

³⁸⁹ Julia A. Dilley et al., *Prevalence of Cannabis Use in Youths After Legalization in Washington State*, 173 JAMA PEDIATRICS 192, 192–93 (2019).

³⁹⁰ See, e.g., *Marijuana and Public Health Pregnancy*, CDC, <https://www.cdc.gov/marijuana/health-effects/pregnancy.html> [<https://perma.cc/AXQ9-7N4E>] (Oct. 19, 2020); *Marijuana and Public Health Teens*, CDC, <https://www.cdc.gov/marijuana/health-effects/teens.html> [<https://perma.cc/82UM-KQHT>].

³⁹¹ Amna Zehra et al., *Cannabis Addiction and the Brain: A Review*, 13 J. NEUROIMMUNE PHARMACOLOGY 438, 441 (2018).

³⁹² *Id.*

³⁹³ See Wayne Hall, *The Costs and Benefits of Cannabis Control Policies*, 22 DIALOGUES CLINICAL NEUROSCIENCE 281, 282 (2020).

³⁹⁴ Gillian L. Schauer et al., *Modes of Marijuana Use—Smoking, Vaping, Eating, and Dabbing: Results from the 2016 BRFSS in 12 States*, 209 DRUG & ALCOHOL DEPENDENCE 1,1 (2020).

pulmonary disorder (“COPD”) and lung cancer.³⁹⁵ In fact, some research suggests that cannabis use is associated with a lower morbidity rate amongst COPD patients³⁹⁶ and that CBD could serve as a potential treatment for COPD symptoms.³⁹⁷ In contrast, other studies have documented a phenomenon known as “marijuana lung,” the development of apical emphysema (a form of COPD) in younger cannabis smokers.³⁹⁸ Still, others have found a strong link between cannabis consumption and the development of histologic airway lesions.³⁹⁹ One well publicized negative health effect of cannabis has also been the subject of debate—reduction in IQ. A 2012 study associated repeated cannabis use by persons aged eighteen to thirty-eight with a six to eight point decrease in IQ over time.⁴⁰⁰ However, more recent research, performed on twins, has suggested that there is no significant correlation between cannabis consumption and a reduction in IQ over time.⁴⁰¹ In stark contrast to these divergent results, there does appear to be broad consensus on the relationship between cannabis use and the development of testicular cancer. Multiple studies have found a statistically significant link between regular cannabis use and the development of testicular germ cell tumors.⁴⁰²

³⁹⁵ Luis IG Ribeiro & Philip W. Ind, *Effect of Cannabis Smoking on Lung Function and Respiratory Symptoms: A Structured Literature Review*, 26 NPJ PRIMARY CARE RESPIRATORY MED. 1, 2–3, 6 (2016).

³⁹⁶ Ed Susman, *Marijuana Use Linked to Lower Hospital Mortality in COPD Patients*, MEDPAGE TODAY (Oct. 21, 2020), <https://www.medpagetoday.com/meetingcoverage/ches-t/89242> [<https://perma.cc/WAU4-A3NU>].

³⁹⁷ Timothy Gower, *COPD: Can CBD Help?*, WEBMD, www.webmd.com/lung/copd/features/cbd-help-copd [<https://perma.cc/3EHY-3EZ2>] (Dec. 17, 2021).

³⁹⁸ Morris Beshay et al., *Emphysema and Secondary Pneumothorax in Young Adults Smoking Cannabis*, 32 EUR. J. CARDIO-THORACIC SURGERY 834, 834 (2007).

³⁹⁹ Henry Gong, Jr. et al., *Tracheobronchial Changes in Habitual, Heavy Smokers of Marijuana with and Without Tobacco*, 136 AM. REV. RESPIRATORY DISEASE 142, 142, 147–48 (1987).

⁴⁰⁰ Madeline H. Meier et al., *Persistent Cannabis Users Show Neuropsychological Decline from Childhood to Midlife*, PNAS 2657, 2658, 2662 (2012).

⁴⁰¹ Godfrey Pearlson, *Marijuana May Not Lower Your IQ*, SCI. AM. (May 7, 2020), <https://www.scientificamerican.com/article/marijuana-may-not-lower-your-iq/> [<https://perma.cc/K5K4-C9W9>].

⁴⁰² See Albert Stuart Reece & Gary Kenneth Hulse, *Causal Inference Multiple Imputation Investigation of the Impact of Cannabinoids and Other Substances on Ethnic Differentials in US Testicular Cancer Incidence*, 22 BMC PHARMACOLOGY TOXICOLOGY 1, 1 (2021); see also Russell C. Callaghan et al., *Cannabis Use and Incidence of Testicular Cancer: A 42-Year Follow-Up of Swedish Men Between 1970 and 2011*, 26 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 1644, 1644 (2017); Mehrnaz Ghasemiesfe et al., *Association Between Marijuana Use and Risk of Cancer: A Systematic Review and Meta-analysis*, 2 JAMA NETWORK OPEN 1, 1 (2019). Notably, the cure rate for testicular cancer is 95 percent. *Testicular Cancer Statistics*, JOHNS HOPKINS MED., www.hopkinsmedicine.org/health/conditions-and-diseases/testicular-cancer/testicular-cancer-statistics [<https://perma.cc/KP66-HT7P>].

Interestingly, despite the lack of scientific consensus on the topic, the potential negative health effects of cannabis use may be less of a barrier to legalization today than in the past, when cannabis was seen as dangerous as other serious drugs. Polling data suggests that Americans are less concerned with the health effect of cannabis relative to other legal substances. When asked in 2018 which substance was the most harmful to individual health—alcohol, tobacco, cannabis, and sugar—only 9 percent of respondents chose cannabis, while nearly 18 percent chose sugar.⁴⁰³ In the same survey, 63 percent said that cannabis was less dangerous than other drugs, and less than 5 percent thought it was more dangerous.⁴⁰⁴

The final aspect of the public health discussion that merits consideration is the gateway drug theory. Taking root in the late 1940s, enshrined by the Boggs Act of 1951, and cemented in public parlance by 1960, the theory holds that cannabis is a gateway to other narcotics like cocaine and opioids.⁴⁰⁵ The term “gateway drug” and its connotation were further popularized during the Reagan Administration, particularly through the 1984 book, *Getting Tough on Gateway Drugs: A Guide for the Family*.⁴⁰⁶ The book was written by Dr. Robert L. DuPont, who served as the second ever “White House Drug Czar” under Presidents Nixon and Ford.⁴⁰⁷ In large part, the legal treatment of cannabis as kin to other drugs like heroin—remember, cannabis remains a Schedule I drug under the CSA, alongside heroin, LSD, ecstasy, Quaalude, and others⁴⁰⁸—is attributable to its characterization as a gateway drug. When polled on the topic in 1977, 60 percent of respondents agreed that “for most people the use of cannabis leads to the use of hard drugs.”⁴⁰⁹

Despite the central position that the gateway drug theory has played in the last seventy years of cannabis prohibition, research on the idea of cannabis as a gateway drug is inconclusive. Some contend that the use of other drugs by cannabis users is more likely a correlative effect than a causal one.⁴¹⁰ Other studies have shown that the effect is the opposite—rather than increasing the level of dangerous drug abuse, cannabis legalization may reduce it. One such study, examining data from 1999–2020, found that ten states with legal medicinal cannabis had around 25 percent lower opioid

⁴⁰³ Hudak & Stenglein, *supra* note 335, at 16.

⁴⁰⁴ *Id.*

⁴⁰⁵ Patton, *supra* note 15, at 12.

⁴⁰⁶ John Kleinig, *Ready for Retirement: The Gateway Drug Hypothesis*, 50 *SUBSTANCE USE & MISUSE* 1, 1 (2015).

⁴⁰⁷ *Id.* at 1 n.1; see also Robert DuPont, *Interview by Richard Norton Smith with Robert DuPont*, GERALD R. FORD FOUND. (Oct. 26, 2010), <https://geraldrfordfoundation.org/centennial/oralhistory/robert-dupont/> [<https://perma.cc/QU2J-QJG2>].

⁴⁰⁸ *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/54KP-UMDR>].

⁴⁰⁹ Hudak & Stenglein, *supra* note 335, at 27.

⁴¹⁰ See, e.g., *Debunking the “Gateway” Myth*, *DRUG POL'Y ALL.*, Feb. 2017, at 1.

mortality rate than other states without medical legalization.⁴¹¹ The findings of a different study, conducted in 2018, found that heroin overdoses decreased in several states with legal medicinal cannabis.⁴¹² And, finally, another study on the topic found that recreational legalization can reduce mortality associated with opioid use by between 20 and 35 percent.⁴¹³ These findings indicate the possibility that, rather than being a gateway drug, cannabis may serve as an alternative to other, potentially dangerous narcotics like opioids. Indeed, the public perception of cannabis as a gateway drug appears to be on the decline. In 2018, the percent of respondents to different surveys who believed that cannabis use leads to use of hard drugs had declined to between 30 and 40 percent, contrasted with 60 percent in the 1970s.⁴¹⁴ Another 2018 poll found that 50 percent of respondents did not think cannabis legalization would have much of an effect on the use of other drugs, while 28 percent thought cannabis legalization would make people more likely to use other illegal drugs and 20 percent thought illicit drug use would be less likely in the face of cannabis legalization.⁴¹⁵

In sum, the public health concerns over cannabis legalization are not in line with what might be expected. The problem is less that we know cannabis is bad for people who use it, and more that we do not quite know the long-term effects of its use. This lack of information could reasonably lead citizens and politicians alike to shy away from reform.

V. JUST DON'T DO IT: WHY THE REGULATORY ENVIRONMENT HARMS CANNABIS ENTREPRENEURS FROM BEING PROFITABLE AND THE NEED TO STRIP REGULATIONS

A. *The Regulatory Environment's Impact on Cannabis Businesses*

The various federal, state, and local regulations on cannabis hinder any chance of business success for those entering the cannabis industry and those currently in the industry. Notably, the regulations cause issues with entering in the market⁴¹⁶ and then to remain and compete within the market.⁴¹⁷ These regulations have a negative impact on small cannabis business-

⁴¹¹ Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, 174 JAMA INTERNAL MED. 1668, 1668 (2014).

⁴¹² David Powell et al., *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?*, 58 J. HEALTH ECON. 29, 30 (2018).

⁴¹³ Nathan W. Chan et al., *The Effects of Recreational Marijuana Legalization and Dispensing on Opioid Mortality*, 58 ECON. INQUIRY 589, 589 (2020).

⁴¹⁴ Hudak & Stenglein, *supra* note 335, at 27.

⁴¹⁵ *Id.*

⁴¹⁶ *See supra* Section III.A.1.

⁴¹⁷ *See supra* Sections III.A.3 & III.A.4.

es. Currently, the cannabis market is not thriving but quickly dying.⁴¹⁸ For example, the complex regulatory landscape and high taxes in California have been particularly burdensome on small cannabis farmers, resulting in little chance for them to succeed.⁴¹⁹ It is important to understand how each regulatory stage has harmful impacts on new cannabis businesses.

Licensing poses one of the greatest barriers of entry for anyone to start a cannabis business. First, licensing poses an undue costly burden on individuals trying to start a cannabis business. In California, for example, a license to sell cannabis can cost \$80,000 with an added \$8,000 filing fee.⁴²⁰ Oregon's licensing fee and application ranges between \$4,000 and \$10,000.⁴²¹ Some states even require a business to have \$250,000 in liquid capital to apply for a license.⁴²² Individuals may need a lease on the property they plan on selling cannabis from to get a license, including states like Oregon.⁴²³ While in Nevada, an individual must "install a video monitoring system" that needs to at least "[a]llow for the transmission and storage . . . of a video feed which displays the interior and exterior of the cannabis establishment" and also allow law enforcement to remotely access the system "in real-time upon request."⁴²⁴ These initial licensing requirements pose substantial hardship on new business owners. Some new cannabis business owners may not be able to get the capital until they obtain a license. Nevertheless, the cannabis business owner may need the capital in the first place to get the license. This inherent conflict in cannabis licensing can make it nearly impossible for a new cannabis business owner to start their cannabis venture.

Moreover, there are additional hurdles to receiving necessary startup capital. Due to the federal restrictions on cannabis, banks are hesitant to provide financial backing to a cannabis business.⁴²⁵ If a bank loans out money to a cannabis startup, then the bank may lose its FDIC status.⁴²⁶ Thus, federal illegality creates a chilling effect on cannabis businesses, as many

⁴¹⁸ See Scott Wilson, *The Casualties of California Legalizing Pot: Growers Who Went Legal*, WASH. POST (Aug. 21, 2022, 12:39 PM), <https://www.washingtonpost.com/nation/2022/08/21/california-marijuana-farms-failing/> [<https://perma.cc/GHP4-3BBY>].

⁴¹⁹ *Id.* ("The once-mystical heart of the nation's marijuana industry is dying, fast, strangled not by law enforcement but by the high taxes and baffling regulation that have crushed small farmers since state voters approved legalization almost six years ago.").

⁴²⁰ Abby Narishkin et al., *Why It's so Hard to Start and Own a Marijuana Business*, BUS. INSIDER (Sept. 7, 2021), <https://www.businessinsider.com/why-its-so-hard-to-start-cannabis-weed-marijuana-company-2021-8> [<https://perma.cc/2ASY-7L7Y>].

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ NEV. REV. STAT. § 678B.510(6) (Westlaw through 2023 legislation).

⁴²⁵ See Adam Uzialko, *Cannabis Industry Growth Potential for 2024*, BUS. NEWS DAILY, <https://www.businessnewsdaily.com/15812-cannabis-industry-business-growth.html> [<https://perma.cc/7978-YV4M>] (Jan. 11, 2024).

⁴²⁶ *Id.*

banks choose not to loan out capital to cannabis businesses.⁴²⁷ The chilling effect created by the federal regulations is having a significant impact on the cannabis market as “[c]apital raises are down more than 60 percent compared to 2021.”⁴²⁸ There is not even a guarantee that a new cannabis business owner can enter the cannabis market because of the harsh regulatory requirements to obtain a license. Rather, a cannabis startup would need the individual to invest a significant amount of his or her own finances to try and obtain a license.

Once someone obtains the capital and potentially has the property to sell, there is no guarantee that one can get the cannabis license. Many states limit how many licenses are given each year.⁴²⁹ With the high individual investment and the limited number of licenses, those wanting to enter the cannabis industry may not get a chance to even compete. For example, in California, ten of the largest cannabis growing companies have 22 percent of the state cultivation licenses.⁴³⁰ Thus, individuals considering entering the cannabis market should wait until the licensing application processes change and it is easier to obtain financial backing, which will reduce one’s own risk and increase one’s chance at success.

States can also change licensing regimes, making a small business have to go through the intensive licensing process again. For example, California recently updated its cannabis licensing requirements, making current cannabis businesses comply with the California Environmental Quality Act (“CEQA”) and requiring any new cannabis business seeking a license to fully comply with the CEQA.⁴³¹ California used to provide provisional licenses, but is now giving annual licenses.⁴³² Navigating CEQA compliance “is a costly and time-consuming process.”⁴³³ If a cannabis business has a provisional license and does not comply with the CEQA, then a cannabis business may have to shut down until it does meet the regulatory requirements.⁴³⁴

⁴²⁷ Paul Demko, *The Unintended Consequence of Trying to Give Black Marijuana Entrepreneurs a Head Start*, POLITICO (June 17, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/06/17/detroit-black-marijuana-businesses-00040007> [<https://perma.cc/T4L9-PH7N>] (“In addition, marijuana companies are cut off from most traditional sources of capital, since banks largely aren’t willing to do business with them.”).

⁴²⁸ Paul Demko, *Why Weed Companies Can’t Make Any Money*, POLITICO (Sept. 4, 2022, 7:00 AM), <https://www.politico.com/news/2022/09/04/weed-companies-cant-make-money-00054541> [<https://perma.cc/48TA-G4HJ>].

⁴²⁹ See Stoa, *supra* note 203, at 1144–45.

⁴³⁰ See Patrick McGreevy, *Inside California’s Pot Legalization Failures: Corporate Influence, Ignored Warnings*, L.A. TIMES (Sept. 22, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-22/california-legal-pot-measure-has-not-met-expectations> [<https://perma.cc/U7GW-SMHE>].

⁴³¹ WEISZ, *supra* note 192, at 3.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

Despite these initial challenges, there are numerous, state-specific regulations that new cannabis owners have to comply with continuously. These regulations hinder how one has to operate their cannabis business. Some states, like Oregon, require seed-to-sale tracking, which are special tags that have to stay with each cannabis plant through harvest with each tag costing fifty cents.⁴³⁵ Other states regulate dosage amount, packaging, and using a special THC symbol on a cannabis gummy.⁴³⁶ Each state has different requirements that a cannabis business has to comply with,⁴³⁷ making it difficult to have one cohesive cannabis business across states. The difficulty is amplified because a cannabis business cannot even sell cannabis across state lines.⁴³⁸ Even employment matters are regulated, such as employees needing a permit to work⁴³⁹ or, in extreme cases, requiring employers to enter into labor peace agreements.⁴⁴⁰ These limit how a cannabis business chooses to operate—creating greater challenges on hiring talent, dictating how many employees a cannabis business may want to hire, and potentially forcing additional legal and human resources compliance costs onto a new cannabis business. Any new cannabis business has increasingly high operations costs through these regulations and few viable solutions to try and turn a profit.

The consequences of not complying have significant risks. If a cannabis business is not properly licensed, then the individuals involved are committing a felony.⁴⁴¹ Moreover, the penalty ranges from a fine to potential jail time.⁴⁴² Most cannabis businesses thus have little choice then to follow each of these costly compliance measures, knowing they could have detrimental impacts on their business's profitability.

B. The Various Taxes Further Impede Cannabis Businesses from Surviving

Licensing and compliance requirements present a variety of startup costs and operational costs, but cannabis businesses have to also pay high taxes, which limit overall profits and the chance of business success. Taxes are recognized as “the biggest barrier to making money . . . because [cannabis companies are] treated like illegal narcotics traffickers under the federal tax code.”⁴⁴³ Many other industries do not have to navigate a tax landscape nearly as complex as it is for the cannabis industry.

⁴³⁵ See Narishkin et al., *supra* note 420.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.* (discussing how the federal prohibition on cannabis requires cannabis businesses to only use sources in each state).

⁴³⁹ See OR. REV. STAT. § 475C.269(1) (Westlaw through 2023 legislation).

⁴⁴⁰ CAL. CODE REGS. tit. 4, § 15002 (2023).

⁴⁴¹ See Narishkin et al., *supra* note 420.

⁴⁴² *Id.*

⁴⁴³ See Demko, *supra* note 428.

Part of the issue with taxes is that a state and its local municipalities have multiple taxes and fees on cannabis businesses. In California, “[i]n some regions of the state, one pound of cannabis is subjected to as many as five separate taxes, some based on weight and others on sales.”⁴⁴⁴ Recall that these taxes can range greatly in how high they are.⁴⁴⁵ Thus, cannabis business owners have to carefully select where they want to operate to know the tax implications on their business.

Another issue with cannabis taxes is how it impacts business operations. Some states base taxes by weight,⁴⁴⁶ which can influence how much cannabis a cannabis business may want to produce. With the rise in potency-based taxes,⁴⁴⁷ some cannabis companies have to evaluate how they will want to produce their overall product—determining if they want a more potent product or not. A potency tax may then limit the market to lower potent cannabis solely for the purpose of avoiding excessive taxes. Or the market could force cannabis businesses into making a more potent, but higher taxed, cannabis product. Either way, under both taxing schemes, cannabis businesses lose control of how they want to operate and can suffer from that lack of control.

Similar to regulations, the tax environment is ever changing. In Illinois, the state legislature enacted a new potency tax in January 2020, resulting in a 10 percent excise tax on “products with less than 35% THC, and a tax of 25% is imposed on products with higher doses.”⁴⁴⁸ States also adopt new taxing structures that will likely have negative effects on the cannabis industry. New York, which recently legalized adult-use cannabis, will impose a 4 percent local tax on retail products and then tax wholesale cannabis sales between growers and distributors on a potency tax.⁴⁴⁹

More troubling is that cannabis is taxed at a far higher rate than other products that are considered more dangerous. Notably, “Americans still drink far more alcohol than they use cannabis—almost eight times as many Americans binge drink than smoke weed just once a month.”⁴⁵⁰ The data shows 55 percent of Americans drink once a month, 25.8 percent of Americans binge drink,⁴⁵¹ while, at least in Colorado, only 16.6 percent of individ-

⁴⁴⁴ See Wilson, *supra* note 418.

⁴⁴⁵ See *supra* Section III.A.2.

⁴⁴⁶ See Boesen, *supra* note 223.

⁴⁴⁷ See HANSEN ET AL., *supra* note 232, at 13.

⁴⁴⁸ See WEISZ, *supra* note 192, at 8.

⁴⁴⁹ *Id.* at 14.

⁴⁵⁰ Chris Roberts, *Marijuana Taxes Far Exceed Alcohol Taxes—And That Could Kill Legalization*, FORBES (Jan. 26, 2022, 3:56 PM), <https://www.forbes.com/sites/chrisroberts/2022/01/26/marijuana-taxes-far-exceed-alcohol-taxes-why-thats-bad-and-could-kill-legalization/?sh=6e60a7a55080> [<https://perma.cc/B29Y-N6KJ>].

⁴⁵¹ *Id.* (Stating that binge drinking can be defined “as consuming five or more drinks in a sitting for men and four drinks or more for women.”).

uals reported using cannabis over the past month.⁴⁵² However, tax revenues between alcohol and cannabis vary. Massachusetts brought in “\$74 million in cannabis excise taxes, compared to \$51 million in alcohol excise taxes” for the 2021-2022 fiscal year. This discrepancy comes from Massachusetts imposing a 10.75 percent excise tax on cannabis while hard liquor is taxed at a few dollars per gallon and ciders are taxed at even less.⁴⁵³

Massachusetts is far from an outlier, but part of the norm. Washington, which has the largest cannabis and alcohol taxes, brought in \$473.9 million in cannabis tax revenue and only \$244.5 million in alcohol taxes in 2020.⁴⁵⁴ California brought in \$405 million in alcohol tax revenues for the 2020–2021 fiscal year, while cannabis tax revenues brought in \$1 billion in 2020.⁴⁵⁵ These high taxes start to impact sales, as Colorado saw a decrease in sales in recreational and medical cannabis sales with the state reporting \$154 million in July 2022 cannabis sales compared to \$203 million in July 2021.⁴⁵⁶ These high taxes force a high price onto customers, thus pricing out potential new customers. Without a growing customer base, cannabis businesses will continue to have a hard time competing and operating.

The various taxes also create a negative trickledown effect that force cannabis companies to sell cannabis at a higher price or eat the costs of their own taxes. First, cannabis companies may be taxed as a grower or as a distributor,⁴⁵⁷ so either the grower or distributor will factor the tax into their selling price. Second, a cannabis company may have to pay taxes on the potency or weight of cannabis they choose to sell,⁴⁵⁸ which can then be factored into the cost passed on to the customer. Not only do customers have to pay a high sales tax, but also the increased prices from the other taxes the cannabis companies have to pay. Cannabis companies are thus put in a bind to decide how much of their own taxes they want to factor into their price to bring in customers while also trying to earn a profit.

At a federal level, cannabis companies also suffer significantly. Cannabis companies have to pay federal taxes under Section 280E of the tax code because cannabis is still a Schedule I drug.⁴⁵⁹ While most business can find

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ Megan Ulu-Lani Boyanton, *Colorado’s Medical Marijuana Sales Hit Lowest Point Since Legalization*, DENVER POST (Sept. 13, 2022, 4:36 PM), <https://www.denverpost.com/2022/09/13/colorado-marijuana-sales-july-lowest-single-legalization/> [https://perma.cc/FG8S-F28E].

⁴⁵⁷ See WEISZ, *supra* note 192, at 4.

⁴⁵⁸ See HANSEN ET AL., *supra* note 232, at 13.

⁴⁵⁹ Will Yakowicz, *Legal Cannabis Companies Pay Insane Tax Rates Thanks to a Minnesota Speed Dealer*, FORBES (Apr. 30, 2021, 2:58 PM), <https://www.forbes.com/sites/willyakowicz/2021/04/30/state-legal-cannabis-companies-pays-insane-tax-rates-thanks-to-a-minnesota-speed-dealer/?sh=5c7f24b01008> [https://perma.cc/26AS-BVKV].

workarounds to reduce their taxes, it is best not to try and find a work-around for 280Es.⁴⁶⁰ Moreover, cannabis companies cannot write off any business expenses such as salaries and benefits, so cannabis companies have to pay taxes in full.⁴⁶¹ The IRS is also choosing to focus more on auditing 280Es.⁴⁶² Therefore, cannabis companies should expect to pay high federal taxes along with the various state and local taxes. These various taxes cut deeply into existing cannabis business's profits, preventing little chance of success.

C. Until the Regulatory and Tax Landscape Changes, Cannabis Companies will Continue to Fail

1. The Reality of the Cannabis Industry Today and Why It Fails Cannabis Companies

The cannabis industry was originally viewed as a goldmine and a chance to earn high profits.⁴⁶³ In California, a cannabis farmer could originally make four thousand dollars for one pound of cannabis.⁴⁶⁴ It made sense for people to have such an interest in entering the cannabis industry. However, the cannabis market today poses many challenges and little chance of success.

Today, the cannabis industry presents a false picture of success that the industry was once at. Cannabis sales were continuing to rise.⁴⁶⁵ However, there have been some recent dips in sales.⁴⁶⁶ In California today, a cannabis farmer can only make one hundred dollars for a pound of cannabis.⁴⁶⁷ Colorado has seen a decrease in sales across the state.⁴⁶⁸ Three different, predominant cannabis stocks, Curaleaf Holdings, Green Thumb Industries, and Trulieve Cannabis, have had their shares decline over 30 percent in 2022.⁴⁶⁹ Some call what cannabis companies are facing today a “regulatory recession” due to stocks trading “at low multiples to their earnings, and many compa-

⁴⁶⁰ *Id.*

⁴⁶¹ See Demko, *supra* note 428.

⁴⁶² See Yakowicz, *supra* note 459.

⁴⁶³ See Boyanton, *supra* note 456.

⁴⁶⁴ See Wilson, *supra* note 418.

⁴⁶⁵ See Jon Jackson, *Marijuana Sales Drop Drastically as U.S. Eases Back Pandemic Rules*, NEWSWEEK (Mar. 17, 2022, 12:56 PM), <https://www.newsweek.com/marijuana-sales-drop-drastically-us-eases-back-pandemic-rules-1689081> [<https://perma.cc/REL2-FWN2>].

⁴⁶⁶ *Id.* (“2022’s sales [are] off to a slow start . . .”).

⁴⁶⁷ See Wilson, *supra* note 418; see also Ryan, *supra* note 1.

⁴⁶⁸ See Washington Post, *supra* note 238.

⁴⁶⁹ Matthew Townsend & Tiffany Kary, *Amid Federal Delays, Can Marijuana Companies Break Their Slump?*, BLOOMBERG (May 2, 2022, 4:00 AM), <https://www.bloomberg.com/news/newsletters/2022-05-02/is-marijuana-s-stock-slump-nearing-its-end-one-analyst-says-yes> [<https://perma.cc/759Z-CLSU>].

nies have seen growth rates of 60%.⁴⁷⁰ Ultimately, the high regulations and taxes are to blame.⁴⁷¹

Even more, a pertinent issue in today's cannabis market is the black market. One of the main drivers for the black market are the various state regulations and taxes.⁴⁷² California's licensing regime's arduous process has allowed the cannabis black market to flourish.⁴⁷³ It becomes difficult to compete with the black market because illegal sellers avoid paying taxes and licensing fees.⁴⁷⁴ Illegal sellers can sell cannabis at a much lower price because of this avoidance. Those who do comply with a state's regulations and taxes are at an inherent disadvantage compared to the black market. With this current recession, decrease in profits, and competition with the black market in mind, this Article will detail why someone should not start a cannabis business.

To start, just entering the cannabis market is challenging. Depending on the state, someone may need to know what type of cannabis you want to sell and may be limited in selling only one type of cannabis.⁴⁷⁵ Once someone knows what license they want, they have to ensure they meet the state licensing regime's specific requirements and pay the high costs.⁴⁷⁶ These initial startup costs can near one million dollars.⁴⁷⁷ There is a good chance as well that the individual will have little bank financing to cover the startup costs.⁴⁷⁸ Along with these costs, someone wanting to start a cannabis company has to consider how saturated the market may be, whether the type of cannabis they get a license for is profitable, and know if there are any other regulatory restrictions on selling that type of cannabis.⁴⁷⁹

Once someone gets past the first financial hurdle of obtaining a license, then the cannabis business has to finance complying with state regulations. For some, it can cost around nine-hundred thousand dollars to comply with both state and local regulations.⁴⁸⁰ This could be maintaining seed tags to making sure your cannabis has the correct dosage amount to ensuring your packaging complies.⁴⁸¹ These regulations can limit the type of product a cannabis business wants to sell or make it difficult for them to differentiate themselves in the market. Moreover, a cannabis business has to hope the

⁴⁷⁰ *Id.*

⁴⁷¹ *See* Wilson, *supra* note 418.

⁴⁷² *Id.*

⁴⁷³ *See* McGreevy, *supra* note 430.

⁴⁷⁴ *See* Demko, *supra* note 428.

⁴⁷⁵ *See* Narishkin et al., *supra* note 420.

⁴⁷⁶ *See supra* Section IV.A.

⁴⁷⁷ *See* Narishkin et al., *supra* note 420.

⁴⁷⁸ *See* Demko, *supra* note 428.

⁴⁷⁹ *See* WEISZ, *supra* note 192, at 2.

⁴⁸⁰ *See* McGreevy, *supra* note 430.

⁴⁸¹ *See* Narishkin et al., *supra* note 420.

regulations do not change, especially drastically,⁴⁸² or else the business owner will have to find the funds to become compliant again. This will require a cannabis company to seek legal advice or await clarification from a government agency.

Similarly, cannabis businesses might be constrained by other aspects of the cannabis market. If someone has a cannabis retail store (“Store R”) in a vertical integration licensing state, then that store will be dependent on those who cultivate cannabis (“Store C”) and those who distribute cannabis (“Store D”).⁴⁸³ Under this scheme, Store C will have its own licensing costs, regulatory compliance, and taxes that it will consider as fixed costs for its business.⁴⁸⁴ Store C will factor some of these fixed costs into the cannabis it eventually sells to Store D in order to earn a profit. Same as Store C with licensing, regulatory and tax fixed costs,⁴⁸⁵ Store D will then factor in these fixed costs along with Store C’s higher prices when Store D sells cannabis to Store R in order to earn a profit. Store R is now in a precarious position. To try and turn any profit from high priced cannabis Store R eventually received, Store R will have to factor into its pricing its licensing fees, regulatory compliance costs, taxes, and costs of Store D’s cannabis.⁴⁸⁶ However, unique to Store R,⁴⁸⁷ consumers then have to feel Store R offers reasonably priced cannabis such that the sales tax on the cannabis does not dissuade them from buying from Store R.

Lastly, after paying for all of the licensing and compliance requirements, a cannabis store should expect to pay high federal taxes. Saying a cannabis business turns a profit, most of that profit will go to their 280E.⁴⁸⁸ There are then the state and local taxes as well, which can vary depending on the weight, potency, or sales of cannabis.⁴⁸⁹ Cannabis companies are left with little, if anything at all, once they factor in their taxes. Even if sales are high, the actual profits a cannabis company makes are minimal at best.

⁴⁸² See WEISZ, *supra* note 192, at 3 (discussing California passing CEQA which requires cannabis companies to start to comply with CEQA to maintain their licenses).

⁴⁸³ See *supra* Section III.A.1.

⁴⁸⁴ See *supra* Sections IV.A & IV.B.

⁴⁸⁵ See *supra* Sections IV.A & IV.B.

⁴⁸⁶ See *supra* Sections IV.A & IV.B. Store R would also have to consider trying to cover the initial start-up costs, such as the capital raised to pay for the retail license and property, in its cannabis pricing.

⁴⁸⁷ This is primarily unique to Store R because there are a finite amount of cannabis cultivators and distributors whom a retailer can purchase from. Cannabis users have more options to shop for the best priced cannabis or cannabis that they prefer. See McGreevy, *supra* note 430 (“Proposition 64 ushered in high taxes and fees that can add 40% to the retail cost of cannabis . . .”).

⁴⁸⁸ See Yakowicz, *supra* note 459.

⁴⁸⁹ See *supra* Section V.B.

If a cannabis business ends up failing, there are few protections for them. When most businesses fail, they can file for bankruptcy.⁴⁹⁰ However, due to cannabis's Schedule I status, a failing cannabis business is not given federal bankruptcy protections.⁴⁹¹ Filing for federal bankruptcy can allow a cannabis company to reorganize while remaining in possession of its property and staying any actions from creditors.⁴⁹² New cannabis business owners have a greater chance of going bankrupt due to the myriad of costs of operating a cannabis business. Without these protections, cannabis business owners face a greater financial risk.⁴⁹³ Thus, starting a new cannabis business has many financial and regulatory hurdles with few protections if one fails. Because of this, cannabis licensing, regulation, and taxation need reform before there is the promise of cannabis companies being profitable entities.

2. *Unlikely Reforms that are Needed that Would Allow Cannabis Companies to Become Profitable*

Reforms at the federal, state, and local level are needed before most cannabis companies can become profitable. Getting rid of license caps will allow greater access to starting a cannabis business and drive more market competition.⁴⁹⁴ Moreover, states must ease licensing requirements and fees, such as not needing property or a certain amount of capital.⁴⁹⁵ Without these costly startup costs⁴⁹⁶ and having greater access to obtaining a license, a new cannabis company can have a chance to open and have more competitive prices to those more established cannabis businesses.

Along with eliminating licensing caps, changes in taxes can help new cannabis companies compete. States and local municipalities should look at reducing and putting caps on taxes. In Oregon, for example, cities cannot impose a tax greater than 3 percent on cannabis.⁴⁹⁷ Capping taxes at a lower amount and having fewer taxes will allow new cannabis companies to have lower product prices and have consumers not worry about the excessive taxes when purchasing cannabis. States could also follow Uruguay's model

⁴⁹⁰ See Edward S. Adams, *When Cannabis Businesses Fail: Assignment for the Benefit of Creditors as an Alternative to Bankruptcy*, 2022 UTAH L. REV. 967, 974 (2022).

⁴⁹¹ *Id.* at 968.

⁴⁹² *Id.* at 975.

⁴⁹³ *But see id.* at 1007–13 (discussing cannabis companies using Assignment for the Benefit of Creditors as an alternative to bankruptcy).

⁴⁹⁴ See Demko, *supra* note 427 (“[M]arkets like California and Oklahoma that have unlimited business licenses have had greater success in creating racially diverse markets than their counterparts in most other states, where there are typically strict limits.”).

⁴⁹⁵ See Narishkin et al., *supra* note 420.

⁴⁹⁶ See *id.* (discussing start-up costs being around \$1 million).

⁴⁹⁷ See McGreevy, *supra* note 430.

of a variable tax.⁴⁹⁸ With a variable tax, the state can reduce black market sales of cannabis as a variable tax can allow stores to keep a competitive price against the black market.⁴⁹⁹ This can allow new cannabis companies to remain in operation as they can make an actual profit and not compete as heavily against the black market. Moreover, having more licensed and legal operations are beneficial for customers as well, since they can receive a safer product.⁵⁰⁰ Thus, capping and lowering taxes on cannabis can benefit the entire cannabis industry and market.

Lastly, federal deregulation and legalization can help new cannabis businesses on various fronts. First, declassifying cannabis as a Schedule I drug⁵⁰¹ and legalizing cannabis can reduce taxes and help with cannabis business operations. Cannabis companies can avoid paying the 280E tax that cannabis companies must pay.⁵⁰² Additionally, with federal legalization cannabis companies can sell cannabis across state lines.⁵⁰³ Both of these reforms will be substantial costs retained by new cannabis businesses, as cannabis companies can then write off certain business expenses, retain more profits, and align operations across state lines. Second, federal legalization or deregulation can allow banks to issue capital to the new cannabis businesses.⁵⁰⁴ With the ability to get financing, more people wanting to start a cannabis business can have a chance to enter the cannabis market. The barriers concerning licensing fees and regulatory requirements lessen as new cannabis business owners can have some additional capital to pay for those costs. Lastly, federal legalization can allow a cannabis company that may fail to file for bankruptcy.⁵⁰⁵ This would grant new cannabis companies a better sense of security by having federal bankruptcy protections that other businesses rely on.

The reality is, though, that these reforms are unlikely to happen soon. Medicinal and recreational cannabis legalization passed in part because local

⁴⁹⁸ See WALSH & RAMSEY, *supra* note 234, at 9.

⁴⁹⁹ *Id.* at 10, 12.

⁵⁰⁰ See McGreevy, *supra* note 430 (“[W]ithout licensed shops, residents are more likely to buy untested marijuana from illegal operations, which include those run by organized crime groups.”).

⁵⁰¹ President Biden is currently asking the Department of Health and Human Services and the Justice Department whether cannabis should be classified as a Schedule I drug or not, which holds some promise. See Ximena Bustillo, *Biden to Pardon Simple Federal Marijuana Possession Convictions*, NPR (Oct. 6, 2022, 4:04 PM), <https://www.npr.org/2022/10/06/1127302410/biden-pardon-marijuana-possession-convictions> [<https://perma.cc/5RDV-XSZZ>].

⁵⁰² See Yakowicz, *supra* note 459.

⁵⁰³ See Narishkin et al., *supra* note 420.

⁵⁰⁴ See Brendan Pedersen, *Four Ways Cannabis Banking Could Cross the Finish Line in 2022*, AM. BANKER (May 15, 2022, 10:26 PM), <https://www.americanbanker.com/payments/list/four-ways-cannabis-banking-could-cross-the-finish-line-in-2022> [<https://perma.cc/9C3J-XGEY>].

⁵⁰⁵ See Adams, *supra* note 490, at 968.

municipalities could still regulate cannabis.⁵⁰⁶ Part of licensing is for states to better control and track cannabis.⁵⁰⁷ State and local municipalities have little reason to decrease taxes because taxing cannabis is an important source of revenue.⁵⁰⁸ While federal deregulation or legalization will provide some relief, there are still problems with current federal cannabis legislation. Notably, most of the bills Congress has drafted include “impos[ing] a federal excise tax of 3 percent to 10 percent on weed products—on top of existing state and local levies.”⁵⁰⁹ These additional taxes will only contribute to the problem that cannabis companies face. Thus, those wanting to start a cannabis business should wait until the political landscape concerning cannabis changes and meaningful reforms happen.

CONCLUSION

Cannabis has experienced positive and negative treatment throughout US history.⁵¹⁰ Originally, there was little regulation on cannabis.⁵¹¹ However, as misinformation about cannabis began to spread and the US government took direct aim at cannabis, many states started to prohibit cannabis and strongly regulated it.⁵¹² This stigma around cannabis is still pervasive and plays a significant role in cannabis legalization today.⁵¹³ Because there is this misconception about cannabis, many states heavily regulate legal cannabis.⁵¹⁴ There are strict licensing requirements, pervasive regulations, and high federal, state, and local taxes.⁵¹⁵ All of these measures have harmful consequences on cannabis businesses, making a cannabis business costly and barely profitable.⁵¹⁶

While the cannabis industry is thought to offer a promising business venture, the reality is far from that. There needs to be significantly fewer regulations and taxes on cannabis to allow new cannabis businesses a chance to succeed in the market. With more businesses in the market, cannabis businesses can deliver better products to customers, some of whom are in need of cannabis. Until the regulatory and tax landscape changes, existing cannabis companies will continue to fail and those wanting to start their own cannabis company should heed this simple message: Just don’t do it.

⁵⁰⁶ See, e.g., Nolon, *supra* note 257, at 843–45.

⁵⁰⁷ See Stoa, *supra* note 200, at 323.

⁵⁰⁸ See Roberts, *supra* note 450.

⁵⁰⁹ See *id.*

⁵¹⁰ See *supra* Part I.

⁵¹¹ See *supra* Section I.A.

⁵¹² See *supra* Introduction & Section I.A.

⁵¹³ See *supra* Part II.

⁵¹⁴ See *supra* Part III.

⁵¹⁵ See *supra* Part III.

⁵¹⁶ See *supra* Part V.