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Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana

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Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana

Scott Bloomberg* & Robert A. Mikos**

Abstract

Over the past twenty-five years, states have developed elaborate regulatory systems to govern lawful marijuana markets. In designing these systems, states have assumed that the Dormant Commerce Clause (DCC) does not apply; Congress, after all, has banned all commerce in marijuana. However, the states' reprieve from the doctrine may soon come to an end. Congress seems poised to legalize marijuana federally, and once it does, it will unleash the DCC, with dire consequences for the states and the markets they now regulate. This Article serves as a wake-up call. It provides the most extensive analysis to date of the disruptions the DCC could cause for lawmakers and the marijuana industry. Among other things, the doctrine could spawn a race to the bottom among states as they compete for a newly mobile marijuana industry, undermine state efforts to boost participation by minorities in the legal marijuana industry, and abruptly make obsolete investments firms have made in existing state-based marijuana markets. But the Article also devises a novel

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solution to these problems. Taking a page from federal statutes designed to preserve state control over other markets, it shows how Congress could pursue legalization without disruption. Namely, Congress could suspend the DCC and thereby give state lawmakers and marijuana businesses time to prepare for the emergence of a national marijuana market. The Article also shows how Congress could make the suspension temporary to allay any concerns over authorizing state protectionism in the marijuana market.

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I. INTRODUCTION

Congress is poised to do something that would have been unthinkable even a decade ago: legalize marijuana federally. For the past fifty years, the federal government has criminalized the possession, cultivation, and distribution of the drug.¹ Even as a growing number of states reformed their own marijuana laws, Congress has left the federal ban on the books. In the past two years, however, lawmakers from across the political spectrum have drafted a host of competing bills that would, at long last, repeal that prohibition.² Given the overwhelming public support for legalization, it now seems almost inevitable that one of these measures (or something like them) will pass.³

The details of congressional reform proposals vary, but they all share one thing in common: each of them purports to preserve or even expand state regulatory authority over marijuana.⁴ In announcing a major new legalization proposal in summer 2021, for example, Senate Democratic leaders emphasized that the bill would “empower[] states to implement their own cannabis laws.”⁵ Although some proposals envision a federal role in regulating marijuana, federal lawmakers seem content—even eager—to let states take the

1. 21 U.S.C. §§ 841, 844. Marijuana is defined as “[c]annabis” plants and any products made therefrom that contain more than trace amounts of the psychoactive chemical delta-9 THC. *See id.* § 802(16). We recognize and sympathize with the movement to rechristen the drug *cannabis*. *See* Robert A. Mikos & Cindy D. Kam, *Has the ‘M’ Word Been Framed? Marijuana, Cannabis, and Public Opinion*, PLOS ONE, Oct. 2019, available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0224289> (discussing controversy and shift in the use of the terms). However, we continue to use the term *marijuana* because federal law and most state codes still use that term. *Id.* Furthermore, for our purposes, *marijuana* is more precise, since *cannabis* does not distinguish between varieties of the plant that contain psychoactive THC and those that do not, even though they are regulated differently. *See infra* notes 276–77 and accompanying text (discussing hemp regulations).

2. *See infra* Section II.B (discussing leading federal proposals).

3. *See* Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> (reporting that 68% of Americans and “[m]ajorities of most demographic subgroups” support legalizing marijuana for all adults).

4. *See infra* Section II.B.

5. SENATORS CORY BOOKER, RON WYDEN & CHUCK SCHUMER, CANNABIS ADMINISTRATION & OPPORTUNITY ACT DISCUSSION DRAFT 1 (2021), <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> [hereinafter *CAOA DISCUSSION DRAFT*]; *see also id.* at 1 (“The legislation preserves the integrity of state cannabis laws . . .”). Similar claims have been made about other legalization bills. *E.g.*, Press Release, Elizabeth Warren, U.S. Senator, U.S. Senate, Senators Warren and Gardner Reintroduce Bipartisan, Bicameral Legislation to Protect States’ Marijuana Policies (Apr. 4, 2019), <https://www.warren.senate.gov/newsroom/press-releases/senators-warren-and-gardner-reintroduce-bipartisan-bicameral-legislation-to-protect-states->

lead and regulate marijuana as they deem fit.

But lawmakers who believe that federal legalization would necessarily preserve state control over the marijuana market are in for a rude awakening. Legalization would impose a previously unnoticed but important constraint on state power not found in the text of any federal legislation: the Dormant Commerce Clause (DCC).⁶ The DCC is an implied doctrine of constitutional law that circumscribes the states' power to regulate interstate commerce.⁷ Even though it has largely escaped attention in debates over federal reforms, the doctrine could have enormous ramifications for the states' ability to regulate marijuana following federal legalization and to achieve the policy goals served by such regulation.⁸

To date, states have operated on the assumption that the DCC does not apply to the marijuana market because Congress has banned all commerce in marijuana.⁹ Pursuant to this assumption, they have imposed a variety of direct and indirect restraints on interstate commerce in marijuana, including, most notably, universal bans on all sales of marijuana across state lines.¹⁰ Because of such restrictions, there is currently no (lawful) interstate commerce in marijuana.¹¹ Rather than a single national market, we thus have thirty-nine (and counting) distinct state marijuana markets, each with its own set of state-licensed producers and distributors to supply local demand.¹² Once Congress legalizes marijuana, however, the DCC will bring a swift and unexpected end to these insular state-based marijuana markets.¹³

marijuana-policies (introducing STATES Act to “protect[] states, territories, and tribal nations as they implement their own marijuana laws without federal interference” as expressed by Senator Elizabeth Warren); *id.* (Statement of Senator Cory Gardner) (“The bipartisan, commonsense [STATES Act] ensures the federal government will . . . not interfere in any states’ legal marijuana industry.”).

6. *See infra* Part III (introducing the DCC and illuminating the ways in which the doctrine will impede state regulation of the marijuana market).

7. *See infra* Section III.A (discussing the DCC and its purposes).

8. *See infra* Section III.B.

9. *See infra* Section III.A.

10. *See infra* Section II.A (discussing state regulations and their effects on the marijuana market in detail).

11. *See* Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 862 (2021) (“States have directly restricted interstate commerce in cannabis in two main ways. First, every legalization state currently prohibits interstate sales of cannabis. . . . Second, most legalization states also limit the ability of nonresidents to own and operate local cannabis businesses.”).

12. *See id.* at 859 (noting that by 2020 over thirty states had legalized marijuana and that each state has its own local market).

13. *See infra* Sections III.A, III.B (explaining how the DCC would threaten existing state marijuana regulations and the insular markets they maintain).

It is difficult to overstate the ramifications this development would have for state regulators and extant marijuana markets.¹⁴ By unleashing the DCC upon the states and thereby exposing key state laws to legal challenge, Congress would inadvertently create gaps in the regulation of marijuana—situations in which there is no state or federal law governing key activities of the marijuana industry.¹⁵ By preventing states from restricting imports of marijuana, the DCC would also trigger a regulatory race to the bottom, as states begin to compete for a lucrative but suddenly mobile marijuana industry.¹⁶ The DCC would also threaten nascent social equity licensing programs states have adopted to boost minority participation in their marijuana markets.¹⁷ Such programs limit eligibility to residents of *local* communities disproportionately harmed by the war on drugs—a form of geographic discrimination the DCC plainly would not allow.¹⁸ And almost overnight, the DCC would make obsolete investments that thousands of firms have made in existing state regulatory systems and insular state markets.¹⁹ These are just some of the issues likely to arise if Congress legalizes marijuana and thereby suddenly unleashes the DCC upon unprepared state lawmakers and the insular marijuana markets they have heretofore maintained.

Unfortunately, the DCC has gotten little attention in burgeoning debates over the future of marijuana policy.²⁰ Although the doctrine has recently surfaced in a flurry of lawsuits challenging state residency requirements for marijuana business licenses,²¹ it has still not dawned on state or federal lawmakers that state laws will be jeopardized by this “arcane”²² doctrine the moment Congress legalizes marijuana.

This Article serves as a much-needed wake-up call. Building on previous

14. See *infra* Section III.B.

15. See *infra* Section III.B.1.

16. See *infra* Section III.B.2.

17. See *infra* Section III.B.3.

18. See *infra* Section III.B.3 (explaining why the DCC would invalidate state programs as presently designed, but also explaining why there may be no other way for states to pursue these programs).

19. See *infra* Section III.B.4.

20. A recent article that one of us authored is the lone exception. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11. Our work here builds on that article in several respects. For some earlier scholarship that has examined a related but distinct issue involving the DCC (whether states may regulate marijuana tourism by outsiders), see generally Brannon P. Denning, *One Toke over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279 (2014).

21. See *infra* note 98 (discussing cases).

22. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570 (1987) (observing that the DCC was once considered obscure and “arcane” but also noting a resurgence of interest in the doctrine).

scholarship that has only just begun to consider interstate commerce in marijuana, it provides the most detailed and extensive account to date of the problems that will be caused by legalizing marijuana federally and thereby unleashing the DCC on unsuspecting lawmakers and insular state marijuana markets.

Just as importantly, this is the first Article to offer a solution to the problems posed by the DCC—a way for Congress to legalize marijuana federally, without disrupting the regulatory systems created by states.²³ It is well-settled that Congress may suspend the DCC by authorizing state regulations that would otherwise run afoul of the doctrine.²⁴ We propose that Congress suspend the DCC in the marijuana market, at least for a limited period of time.²⁵ Borrowing statutory language Congress adopted to forestall disruptions in another market traditionally regulated by the states (insurance), we show exactly how this could be done for marijuana.

Suspending the DCC would not only help states and the marijuana industry prepare for the eventual emergence of a national marijuana market, but it would also help federal policymakers manage that transition as well.²⁶ Our proposal would not foreclose federal regulation of marijuana. Instead, it simply directs that regulation come from Congress or federal agencies, rather than judges applying an arcane constitutional doctrine that is ill-suited for the task. It would give federal policymakers time to craft regulations specifically tailored to the needs of the burgeoning marijuana market, without worrying about the chaos the DCC will cause while they deliberate.

Finally, we also include a sunset provision in our proposal, limiting the term of the DCC's suspension to seven years unless Congress extends it.²⁷ We explain why making the suspension presumptively temporary would ameliorate the classic concerns raised by state protectionism, including fears that it will spark friction among the states and sacrifice productive efficiency in the marijuana industry.

23. See *infra* Section III.C (proposing statutory language for Congress's consideration that would preserve state regulatory authority against the DCC).

24. E.g., S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984). For academic commentary on Congress's authority to turn off the DCC, see Norman R. Williams, *Why Congress May Not "Override" the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007); Noel T. Dowling, *Interstate Commerce and State Power-Revised Version*, 47 COLUM. L. REV. 547 (1947).

25. See *infra* Section III.C (detailing proposal).

26. See *infra* Section III.C.3.

27. See *infra* Section III.C.4.

The Article proceeds as follows: Part II begins by detailing state regulations and the current insular state-based marketplace system for marijuana. It then reviews the leading congressional proposals to legalize marijuana federally, focusing on how those proposals purport to preserve state authority over marijuana. Part III introduces the DCC and explains how that doctrine will threaten a broad array of extant state regulations and the state markets they maintain. It unpacks, in turn, several problems that would arise if Congress legalizes marijuana without suspending the DCC, as every congressional reform proposal would now do. It also introduces our proposed statutory language, and how the language would clearly authorize states to regulate marijuana outside the shadow of the DCC. Additionally, Part III explains how Congress could minimize any tradeoffs involved in allowing states to continue to restrict interstate commerce in marijuana. Part IV briefly concludes with an appeal to Congress to incorporate our proposed statutory language into the legalization bills it is now considering, while highlighting some of the issues that still need to be addressed in future scholarship.

II. THE MARIJUANA REGULATION LANDSCAPE

A. The Insular State-Based Marketplace System

It has now been over twenty-five years since California voters made their state the first in the nation to legalize marijuana for medical purposes.²⁸ That groundbreaking law, the Compassionate Use Act of 1996 (CUA), created a simple exception to the state's prohibitions on possessing and cultivating marijuana that applied to medical marijuana patients and their caregivers.²⁹ This narrow carve-out from criminal liability was the sole legal change brought on by the CUA. The Act did not authorize the state to license medical marijuana businesses, let alone establish regulations for such businesses.³⁰ Indeed, the CUA did not seem to anticipate that legalizing the personal use of medical marijuana would lead to a booming marijuana industry that would require careful regulation by the state.

Things have changed in the ensuing quarter-century. Today there are

28. See Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

29. *Id.* § 11362.5(d) (exempting patients and their caregivers from state criminal prohibitions on the possession or cultivation of marijuana “for the personal medical purposes of the patient”).

30. See Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 5 (2020) (emphasis in original) (noting that “before 2003, no state had formally authorized companies to supply marijuana to patients commercially”).

thirty-nine states (including Washington D.C.) where marijuana is legal for medical purposes.³¹ And, in nineteen of those states, marijuana is legal for recreational (adult) use as well.³² The marijuana reforms enacted in these states not only liberalize the states' criminal marijuana laws but also create and comprehensively regulate complex marijuana marketplaces. In each legalization state, a state agency—or sometimes multiple agencies—has the power to license different types of marijuana businesses and to promulgate regulations governing those businesses.³³ The licensing and regulatory choices made by the various states have shaped the character of their respective marijuana marketplaces, from big-picture issues regarding how marijuana businesses are structured and licensed, down to the minutiae of how those businesses operate on a day-to-day basis.

Take Colorado's marijuana marketplace as an example. The Marijuana Enforcement Division (MED) of Colorado's Department of Revenue has licensing and regulatory authority over more than 1,000 cultivators, 225 manufacturers, and 650 retail facilities, as well as six other categories of licensed marijuana businesses.³⁴ To govern this ever-evolving marketplace, the MED has engaged in dozens of rounds of rulemaking, including a substantial revision in 2019 that combined the state's (previously separate) medical and adult-use rules into one comprehensive set of marijuana regulations.³⁵ These regulations are highly detailed and complex. The 438 pages of rules include provisions governing business ownership and licensing,³⁶ a range of health and

31. See *Where Marijuana Is Legal in the United States*, MJBIZDAILY, <https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/> (last visited Feb. 18, 2022) (mapping the legal status of marijuana across the states).

32. *Id.* As of this writing, MJBizDaily lists South Dakota as having legalized marijuana for adult use. *Id.* However, the South Dakota Supreme Court recently invalidated the state's adult-use legalization measure on state constitutional grounds. *Thom v. Barnett*, 967 N.W.2d 261 (2021). Medical marijuana remains legal in the state. See generally S.D. CODIFIED LAWS § 34-20G (2021) (legalizing medical marijuana by voter-initiated statute).

33. See, e.g., WASH. REV. CODE § 69.50.325 (2020) (authorizing the Washington State Liquor and Cannabis Board to promulgate marijuana regulations and license marijuana businesses); MICH. COMP. LAWS § 333.27001 (2019) (empowering the Michigan Marijuana Regulatory Agency to regulate the industry and license marijuana businesses).

34. See *MED Licensed Facilities*, COLORADO DEP'T OF REVENUE, <https://sbg.colorado.gov/med-licensed-facilities> (last visited Feb. 16, 2022) (listing the Regulated Marijuana Business Licenses authorized by Colorado's state statute and further explaining that "[e]ach facility is authorized to engage only in the type of activity for which it is licensed").

35. See *Code of Colorado Regulations*, COLORADO SECRETARY OF STATE, <https://www.sos.state.co.us/CCR/NumericalCCRDList.do?deptID=19&agencyID=185> (last visited Feb. 16, 2022) (listing the MED's history of regulatory activity).

36. 1 COLO. CODE REGS. §§ 212-3-2-200 to 285 (2021).

safety regulations controlling everything from what pesticides can be used in cultivating marijuana, to how licensees must dispose of marijuana waste, to what security standards licensees must incorporate into their facilities;³⁷ and numerous product requirements involving labeling and packaging, testing, and storage.³⁸

While Colorado's marijuana regulations are demonstrative of the breadth and complexity involved in governing a marijuana marketplace, each state has meaningfully different marketplace structures and rules. From a structural perspective, states have made different decisions about whether to authorize a limited number of licenses through a competitive application process or to award licenses to any applicant that meets the state's minimum licensing requirements.³⁹ Moreover, some states have taken a middle road on this issue, declining to institute a statewide cap on marijuana business licenses but authorizing localities to create their own competitive licensing processes.⁴⁰ States similarly differ in whether they prohibit, permit, or require marijuana businesses to be vertically integrated.⁴¹ They have adopted different rules for how many businesses a single entity or individual may control.⁴² And, states have taken different approaches regarding whether and how to give socially disadvantaged applicants preference in awarding licenses.⁴³ All of these pol-

37. *E.g., id.* § 212-3-3-325 (identifying prohibited pesticides and other prohibited chemicals); *id.* § 212-3-3-230 (establishing procedures for disposing of marijuana waste); *id.* §§ 212-3-3-220 to 3-225 (creating requirements for security alarm systems and video surveillance systems).

38. *Id.* §§ 212-3-3-1000 to 3-1025 (Labeling, Packaging, & Product Safety); § 212-3-3-800 (Inventory Tracking Requirements); §§ 212-3-4-105 to 4-135 (Regulated Marijuana Testing Program); § 212-3-3-610 (establishing rules for off-premises storage facilities).

39. *Compare, e.g.,* UTAH CODE ANN. § 26-61a-305 (2021) (authorizing the Department of Health to award fifteen initial medical cannabis pharmacy licenses), *with* OR. REV. STAT. ANN. §§ 475B.040–.045 (2021) (establishing a licensing process without a license cap).

40. *See, e.g.,* COLO. REV. STAT. § 44-10-301(3) (2020) (authorizing localities to establish limits on the number of local retail marijuana business licensees); ME. REV. STAT. ANN. tit. 28-B, § 401(2) (2020) (same).

41. *See* WASH. REV. CODE § 69.50.328 (2012) (prohibiting marijuana producers from having any “direct or indirect financial interest” in a retailer); MASS. GEN. LAWS ch. 94G, § 16 (2017) (authorizing vertical integration); FLA. STAT. § 381.986(8)(e) (2021) (requiring vertical integration).

42. *E.g.,* MO. CONST. art. XIV, §§ 1(3)(8)–(10) (creating limits of three cultivation, five dispensary, and three manufacturing licenses); N.Y. CANNABIS LAW §§ 68–69, 72 (prohibiting ownership of multiple production licenses and prohibiting ownership of more than three retail licenses).

43. *Compare, e.g.,* 410 ILL. COMP. STAT. § 705/15-30(c)(5) (allocating fifty points in Illinois's competitive licensing process to “Social Equity Applicants”), *with* ME. REV. STAT. ANN. tit. 28-B, §§ 101–1102 (2018) (giving no preference to social equity applicants in Maine's adult-use marijuana licensing process).

icy choices combine to dictate how concentrated the state's marijuana marketplace will be, what barriers to entry will exist for new market participants, and correspondingly, how valuable marijuana business licenses will be to their holders.

The states have also made different policy choices regarding health, safety, and environmental rules, including how marijuana must be labeled, packaged, stored, tested, transported, marketed, and sold to the end user.⁴⁴ The policy decisions involved in establishing these rules are driven by each state's unique, local concerns, and the resulting policies correspondingly influence the character of the states' respective marijuana marketplaces.

Consider, for example, the differing state policies regarding pesticide use in cultivating marijuana. Some states greatly restrict the use of pesticides in marijuana cultivation, even banning EPA-regulated pesticides entirely in order to minimize consumer exposure to harmful chemical residues in marijuana products.⁴⁵ Restrictive pesticide policies make outdoor cultivation operations—which cannot control for pests and other contaminants as easily as indoor environments—particularly challenging.⁴⁶ Such policies are thus more palatable for states where outdoor growing conditions are naturally less hospitable, as most cultivators already operate indoor grow facilities.⁴⁷ However, in states with favorable outdoor growing conditions, restrictive pesticide policies could disrupt the cultivation market by increasing the cost of outdoor production and causing some shift to indoor operations.⁴⁸ States such as California and Oregon thus maintain more permissive pesticide policies.⁴⁹

44. See, e.g., Nate Seltenrich, *Into the Weeds: Regulating Pesticides in Cannabis*, 127 ENV'T HEALTH PERSPECTIVES 1, 2 (2019), available at <https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP5265>.

45. See, e.g., MASS. DEP'T OF AGRIC. RES., PESTICIDE USE ON CANNABIS ADVISORY (Oct. 16, 2018), <https://www.mass.gov/doc/pesticide-use-on-cannabis-advisory/download> (prohibiting use of any pesticide regulated by the EPA on marijuana).

46. See, e.g., Seltenrich, *supra* note 44, at 5 (describing how a blanket pesticide ban could “all but preclude the use of outdoor cultivation” and noting that indoor cultivation environments can “be more tightly controlled”).

47. See, e.g., Erin Cox, *The East Coast's First Outdoor, Commercial Cannabis Harvest Is Underway*, WASH. POST (Oct. 8, 2019), https://www.washingtonpost.com/local/maryland-news/east-coasts-first-outdoor-commercial-cannabis-harvest-underway/2019/10/07/80fff7f8-e52c-11e9-a331-2df12d56a80b_story.html.

48. See Seltenrich, *supra* note 44, at 5 (positing that Canada's approach of banning pesticide use would not work in California, given the state's ideal outdoor cultivation conditions).

49. See, e.g., CAL. DEP'T OF PESTICIDE REGUL., CANNABIS PESTICIDES THAT CANNOT BE USED (2018), https://www.cdpr.ca.gov/docs/cannabis/cannot_use_pesticide.pdf; CAL. DEP'T OF PESTICIDE REGUL., CANNABIS LEGAL PESTICIDE USE (2021), https://www.cdpr.ca.gov/docs/cannabis/can_use_pesticide.pdf (allowing California cultivators to use some pesticides that are approved for use on foods); OR. DEP'T OF AGRIC., GUIDE LIST FOR PESTICIDES AND CANNABIS (Aug. 3, 2021),

To make matters more complex, states must also grapple with other environmental considerations in formulating their pesticide rules. Indoor cultivation is incredibly energy intensive.⁵⁰ Should states adopt permissive pesticide policies to shift more production outdoors, thereby reducing energy consumption?⁵¹ On the other hand, outdoor cultivation can lead to deforestation, and it requires a tremendous amount of water.⁵² Should states therefore incentivize indoor cultivation, even if their local growing conditions would make outdoor cultivation more economical? It is no wonder that “no two states have come up with quite the same solution” regarding pesticide use on cannabis, let alone the host of other regulations governing their marijuana marketplaces.⁵³

Crucially, the thirty-nine states that have legalized marijuana not only have thirty-nine unique regulatory regimes, they also have thirty-nine insular marijuana marketplaces. That is to say, every state prohibits licensed marijuana businesses from importing or exporting marijuana.⁵⁴ Marijuana producers can only sell their crop to retailers licensed in their state, and retailers can only purchase their marijuana from producers licensed in their state.⁵⁵ This insular, state-based marketplace system makes marijuana a unique commodity in the United States. As we explain below, states ordinarily cannot restrict imports

<https://www.oregon.gov/oda/shared/Documents/Publications/PesticidesPARC/GuidelistPesticideCannabis.pdf> (compiling a twenty-page list of approved pesticides for marijuana in Oregon).

50. See, e.g., Ryan B. Stoa, *Marijuana Appellations: The Case for Cannabicultural Designations of Origin*, 11 HARV. L. & POL’Y REV. 513, 530 (2017) (noting that “the marijuana industry has come under intense scrutiny on account of the energy demands of indoor agriculture”); Gina S. Warren, *Regulating Pot To Save the Polar Bear: Energy and Climate Impacts of the Marijuana Industry*, 40 COLUM. J. ENV’T L. 385, 386 (2015) (describing the intensive energy demands involved in cultivating marijuana indoors).

51. See, e.g., Colin A. Young, *Indoor Cannabis Grow Centers Draining Electricity*, BERKSHIRE EAGLE (June 1, 2021), https://www.berkshireeagle.com/news/local/statehouse/indoor-cannabis-grow-centers-draining-electricity/article_496d8314-c315-11eb-ad41-8fb75b47eb5e.html.

52. See Warren, *supra* note 50, at 406–09 (describing the negative externalities of outdoor cultivation).

53. Seldenrich, *supra* note 44, at 2.

54. See, e.g., Scott Bloomberg, *Frenemy Federalism*, 56 U. RICH. L. REV. 367, 373–74 (2022) (describing how states prohibit interstate marijuana transactions and the resulting system of insular, state-based marijuana marketplaces); Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 862–63 (same).

55. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 863 (noting that licensed cannabis businesses “must conduct their business activities within the state’s borders” and that even when they hold licenses in multiple states, “they must operate separate production facilities in each of those states”).

and exports of goods from other states.⁵⁶

In addition to states' express import-export prohibitions, some states restrict non-residents from owning marijuana businesses.⁵⁷ These ownership restrictions can take the form of an absolute bar on non-resident ownership, or they can be structured as a preference whereby residents receive extra points in a competitive licensing process.⁵⁸

Resident ownership restrictions are also prevalent in states' social equity programs. Rectifying the inequities caused by the War on Drugs has been a major justification for state marijuana reforms.⁵⁹ To further that objective, many states give preference to marijuana business license applicants who belong to groups that were disproportionately harmed by their drug policies.⁶⁰ States base eligibility for this benefit on whether an applicant resides in a community *within the state* that was disproportionately impacted by the War on Drugs. Illinois, for example, gives "Social Equity Applicants" extra points in the state's competitive licensing process.⁶¹ The state defines that term, in relevant part, as an applicant controlled by individuals who "resided for at least 5 of the preceding 10 years in a Disproportionately Impacted Area," with such areas being limited to certain communities in Illinois.⁶²

There are three overlapping explanations for why we have this unique insular system for marijuana. The first is that states chose to restrict interstate marijuana transactions as a means of warding off federal interference in their marketplaces.⁶³ Indeed, a 2013 Department of Justice memo, known as the

56. See *infra* Section III.A.

57. See Bloomberg, *supra* note 54, at 374; Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 863; Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 591 (2015).

58. See Bloomberg, *supra* note 54, at 374–75 (providing examples for both types of residency rules).

59. See, e.g., 410 ILL. COMP. STAT. § 705/7-1 (2019) (listing legislative findings regarding the inequities created by drug laws).

60. See, e.g., *id.* § 705/15-30(c)(5) (awarding fifty points to license applicants who qualify as a "Social Equity Applicant").

61. *Id.*

62. *Id.* § 705/1-10 (defining "Social Equity Applicant" and "Disproportionately Impacted Area"); *Disproportionate Impacted Area Map*, ILL. DEP'T OF COMMERCE & ECON. OPPORTUNITY, <https://www2.illinois.gov/dceo/CannabisEquity/Pages/DisproportionateImpactedAreaMap.aspx> (last visited Feb. 18, 2022) (showing that qualifying Disproportionately Impacted Areas are all within Illinois).

63. See Bloomberg, *supra* note 54, at 393–95 (arguing that states depend on federal acquiescence regarding marijuana enforcement and have prohibited interstate marijuana transactions to obtain that acquiescence); Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 876 (noting that "some states have suggested that restricting interstate commerce is necessary to forestall a federal crackdown

Cole Memo, announced a hands-off enforcement policy regarding marijuana prohibition in states that “implement[ed] effective measures to prevent diversion of marijuana outside of the regulated system and to other states.”⁶⁴ The second explanation is that horizontal federalism concerns animated states’ restrictions on interstate commerce. States instituted these restrictions to reduce friction with states that had stricter marijuana rules or prohibited the substance entirely.⁶⁵ The third possibility sounds in pure protectionism: states restricted interstate commerce in marijuana to advantage their residents and to guard their fledgling marijuana industries from out-of-state competition.⁶⁶

In sum, whether motivated by federalism concerns or protectionism, each state in which marijuana is legal has established its own insular, intrastate marijuana marketplace. The states have achieved their insular marketplace structures by prohibiting marijuana imports and exports and, in some cases, by restricting non-resident ownership. Further, the states have each developed their own unique sets of regulations to govern their marketplaces. These unique regulatory regimes would have restrictive effects on interstate commerce even if the states lifted their import-export prohibitions and/or their restrictions on non-resident ownership. This system of insular state-based markets makes marijuana *sui generis* in the United States.

B. Federal Reforms on the Horizon

Notwithstanding the recent proliferation of state reforms, federal law has remained largely unchanged since the passage of the CSA in 1970.⁶⁷ That statute bans the production, possession, and distribution of marijuana in nearly all circumstances.⁶⁸

on their state-licensed cannabis industries”).

64. Memorandum from James M. Cole, Deputy Att’y Gen., DOJ, to All U.S. Att’ys 3 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo].

65. See generally Denning, *Vertical Federalism*, *supra* note 57 (analyzing the vertical and horizontal federalism issues involved with state marijuana legalization).

66. See, e.g., Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 865 (“Economic protectionism constitutes the most straightforward reason legalization states have restricted interstate commerce in cannabis.”).

67. See generally Mikos, *The Evolving Federal Response to State Marijuana Reforms*, *supra* note 30, at 3 (detailing changes to federal marijuana policy over the past twenty-five years). To be sure, the federal government has narrowed its definition of marijuana and adjusted its enforcement policies over time. *Id.* at 10. Despite these adjustments, however, federal law has continued to ban marijuana throughout the period of state reforms. *Id.* at 14.

68. 21 U.S.C. §§ 841, 844.

The success of state marijuana reform is all the more remarkable because it has happened in the shadow of this strict federal ban. Exploiting constraints on Congress's constitutional authority and practical limits on the federal government's ability to enforce its own ban, states have been able to find a way not just to legalize marijuana but to create a new, vibrant industry to supply the drug, along with robust regulatory systems to govern it.⁶⁹

But the federal ban has exacted a toll on these state-created systems. Because of the federal ban, the marijuana industry and the state lawmakers who regulate it have encountered a host of obstacles. Among other things, firms in the industry cannot easily obtain banking services,⁷⁰ they have to pay exorbitantly high federal tax rates,⁷¹ and they cannot access federal statutory protections for bankruptcy and trademarks.⁷² Likewise, state regulators have fretted about federal preemption of their regulations, they have eschewed some potentially advantageous policy proposals (like state-operated marijuana shops), and they have struggled to monitor the marijuana industry's cash-only transactions (which do not create paper trails for regulators to follow).⁷³

Prompted by large and growing public support for legalization, Congress is finally getting serious about removing these obstacles. Federal legalization now seems almost inevitable.

The details of federal reform still need to be worked out, but the leading

69. See generally Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009) (explaining how states were able to legalize marijuana notwithstanding the federal ban).

70. Julie Andersen Hill, *Banks, Marijuana, & Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015).

71. Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 526–27 (2014).

72. Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting A Fair Shake When Marijuana-Related Cases Are Dismissed*, 36 AM. BANKR. INST. J. (2017); Robert A. Mikos, *Unauthorized and Unwise: The Lawful Use Requirement in Trademark Law*, 75 VAND. L. REV. 161 (2022).

73. See Dan Adams & Felicia Gans, *State-Run Marijuana Stores? Proponents—Including Rhode Island's Governor—Say it's an Idea Worth Exploring*, BOSTON GLOBE (Jan. 24, 2020, 5:55 PM), <https://www.bostonglobe.com/news/marijuana/2020/01/24/state-run-marijuana-stores-proponents-including-rhode-island-governor-say-idea-worth-exploring/WGgxfp5b9zTTbTAFTI9bLM/story.html> (discussing benefits of state-run stores as well as federal obstacles standing in the way of establishing them); Hill, *supra* note 70, at 603 (“[C]ash businesses have opportunities and incentives to underreport taxes.”); Mikos, *On the Limits of Supremacy*, *supra* note 69, at 1440–43 (discussing examples of how preemption concerns have delayed or stifled state marijuana reforms).

proposals now on the table—including the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act)⁷⁴ and the Cannabis Administration and Opportunity Act (CAOA)⁷⁵—share a few features in common. Each of them would legalize marijuana by de-scheduling the drug under the CSA.⁷⁶ Marijuana is currently on Schedule I of the CSA, a classification that subjects the drug to outright criminal prohibition. Once removed from the ambit of the CSA, marijuana would no longer be subject to that prohibition; in fact, marijuana would not be subject to any of the regulations that apply to drugs on lower schedules (II–V) either.⁷⁷ In addition to eliminating the restrictions imposed directly by the CSA, de-scheduling would also eliminate most of the other obstacles mentioned earlier, as those obstacles are tied to marijuana’s current Schedule I status. For example, the federal tax code imposes harsh tax rules only on businesses that are “trafficking in controlled substances [] within the meaning of Schedule I and II” of the CSA.⁷⁸

Beyond repealing federal prohibition, all congressional reform proposals purport to leave the regulation of marijuana largely if not quite exclusively in the hands of the states. For example, the STATES Act envisions only two federal regulations that would apply if a state chose to legalize marijuana: it would ban the sale of recreational marijuana to anyone under twenty-one years old and it would ban the sale of marijuana at truck stops, both without regard to whether state law allowed such sales.⁷⁹

The CAO A would go a step further by authorizing some federal regulation of the marijuana industry.⁸⁰ Under this proposal, Congress would impose a new federal excise tax on all sales of marijuana, with the proceeds earmarked for individuals and communities “adversely impacted by the War on Drugs.”⁸¹

74. STATES Act, S. 3032, 115th Cong. (2018).

75. Cannabis Administration and Opportunity Act (CAOA), GAI21675 4LN, 117th Cong. (2021). The CAO A updates and expands upon a previously introduced proposal known as the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act). See Marijuana Opportunity Reinvestment and Expungement Act, S. 2227, 116th Cong. (2019).

76. See GAI21675 4LN § 101 (de-scheduling marijuana nationwide). The STATES Act would empower states to de-schedule (or reschedule) marijuana within their borders. See STATES Act, S. 3032 115th Cong. § 2 (2018).

77. Marijuana would thus be treated like alcohol or tobacco, both of which Congress expressly exempted from the CSA. 21 U.S.C. § 802(6).

78. 26 U.S.C. § 280E.

79. Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act*, MARIJUANA L., POL’Y, & AUTHORITY BLOG (June 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/>.

80. See, e.g., GAI21675 4LN, 117th Cong. § 111(a) (2021).

81. *Id.* § 3052.

Like the STATES Act, the CAO A would establish a federal minimum age for marijuana purchases, but it would also impose some (rather generous) limits on the size of all retail transactions and would ban the sale of products containing both marijuana and alcohol or nicotine.⁸² The proposal would also require some marijuana businesses to obtain a federal license, in addition to any license required by state or local government.⁸³ To be sure, the CAO A contemplates some additional federal regulations beyond these few measures.⁸⁴ But it leaves those regulations to be worked out another day.

Notwithstanding the federal regulation contemplated by the CAO A, the bill's sponsors—Senators Cory Booker, Ron Wyden, and Chuck Schumer—have pointedly emphasized that the bill would “empower[] states to implement their own cannabis laws.”⁸⁵ Consistent with that theme, the CAO A contains express language reaffirming state power over marijuana. States could regulate marijuana transported into the state “in the same manner as though the cannabis had been produced in that State,”⁸⁶ and could prohibit the transportation of marijuana into a state where it is “intended, by any person interested therein, to be received, possessed, sold, or in any manner used, . . . in violation of any law of that State.”⁸⁷

It is unclear which (if any) of the proposals now on the table will be adopted by Congress and when. But the growing prospect of federal legalization has gotten an enthusiastic reception from almost everyone apart from hold-out prohibitionists.⁸⁸ For its part, the marijuana industry and other com-

82. *Id.* § 502.

83. *Id.* § 511(301).

84. For example, the CAO A calls for various federal agencies to design a national tracking system and to promulgate “product standards that are appropriate for the protection of the public health.” *Id.* § 1106.

85. CAO A DISCUSSION DRAFT, *supra* note 5, at 1; *see also id.* (“The legislation preserves the integrity of state cannabis laws”); SENATORS CORY BOOKER, RON WYDEN & CHUCK SCHUMER, DISCUSSION DRAFT: CANNABIS ADMINISTRATION AND OPPORTUNITY ACT, <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Fact%20Sheet.pdf> (“[I]t’s time for lawmakers in Washington to respect the rights of states that have chosen to legalize cannabis.”). Notably, the CAO A contains only a single provision that expressly limits state authority over the marijuana market: Section 111(c) would bar a state from blocking shipments of marijuana that are merely passing through the state. *See* GAI21676 4LN § 111(c).

86. GAI21675 4LN § 111(a).

87. *Id.* § 111(b).

88. *See* Kyle Jaeger, *Senators Unveil Federal Marijuana Legalization Bill to Mixed Review, with White House Remaining Opposed*, MARIJUANA MOMENT (July 14, 2021), <https://www.marijuanamoment.net/watch-live-long-anticipated-federal-marijuana-legalization-bill-unveiled-by-schumer-wyden-and-booker/> (reporting that the Drug Policy Alliance, the Minority Cannabis Business

panies currently waiting in the wings look forward to being free of the obstacles now imposed by federal law.⁸⁹ Likewise, states look forward to having a freer hand to regulate the marijuana market, where they do not need to work around the federal ban. Under the conventional wisdom, then, federal legalization is a win-win scenario for the marijuana industry and for the states.

Unfortunately, these actors may be in for a rude awakening. Despite all the platitudes about preserving state power, extant proposals would silently unleash an obscure but important constitutional doctrine upon unsuspecting states and an unsuspecting marijuana market: The DCC. The next Part of this Article discusses the dramatic consequences the DCC could have for state regulations and the marijuana industry.

III. THE THREAT POSED BY THE DCC

Key portions of the comprehensive marijuana regulations that states have developed, tested, and refined will soon be threatened by the DCC. Once Congress legalizes marijuana, the DCC will invalidate states' import-export prohibitions and restrictions on non-resident ownership, along with an untold number of other state laws that burden interstate commerce in marijuana. In effect, the DCC will serve to replace the insular state markets we have today with a new national marijuana market. This abrupt shift will cause substantial disruptions for the marijuana industry and those who regulate it.

This Part discusses the DCC and explains why this constitutional doctrine poses an existential threat to state regulatory systems and the purposes served by them. But it also reveals a way that Congress can legalize marijuana without causing these disruptions. Specifically, we propose statutory language that would suspend the DCC's application to state marijuana laws, at least for long enough to ensure a smooth transition to a national marketplace. As we

Association, and the Marijuana Policy Project all generally support the CAOA, while President Biden, Senator Grassley, and the anti-legalization group Smart Approaches to Marijuana do not support it); *see also, e.g., Insa Announces Support for Federal Legislation To Legalize Cannabis*, BUS. WIRE (July 16, 2021, 9:13 AM), <https://www.businesswire.com/news/home/20210716005047/en/Insa-Announces-Support-for-Federal-Legislation-to-Legalize-Cannabis> (reporting that a multi-state operator, Insa, supports the CAOA); Global Alliance for Cannabis Commerce, *Statement on the Booker-Wyden-Schumer Cannabis Administration and Opportunity Act*, PR NEWswire (July 14, 2021, 8:10 AM), <https://www.prnewswire.com/news-releases/statement-on-the-booker-wyden-schumer-cannabis-administration-and-opportunity-act-301333129.html> (announcing CAOA endorsement).

89. *See, e.g.,* Dario Sabaghi, *Inside Amazon's Support To Legalize Marijuana at the Federal Level*, FORBES (Oct. 5, 2021, 6:00 AM), <https://www.forbes.com/sites/dariosabaghi/2021/10/05/inside-amazons-support-to-legalize-marijuana-at-the-federal-level/?sh=461f45075ea7> (reporting that Amazon's strong support for federal legalization could be motivated by a desire to enter the marijuana market).

establish below, Congress should include our proposal in any marijuana legalization bill.

A. *The DCC & Federal Legalization*

The DCC is a free trade principle implied by the Constitution's express grant of authority to Congress to regulate commerce among the several states. The doctrine is intended to foster a national common market unhindered by the trade rivalries that beset the states under the Articles of Confederation.⁹⁰ In a nutshell, the DCC prohibits state regulation that "discriminates against or unduly burdens interstate commerce."⁹¹

The DCC is especially hostile toward state laws that discriminate against outsiders, including laws that bar non-local firms from competing in local markets. Such laws will be upheld only if a state can demonstrate that its discriminatory policy is absolutely necessary to serve some legitimate, non-protectionist purpose.⁹² Not surprisingly, states have rarely been able to satisfy this test. Indeed, the Supreme Court has suggested that discriminatory state regulations face a "virtually *per se* rule of invalidity" under the DCC.⁹³

However, it is important to recognize that even non-discriminatory laws are threatened by the DCC. Under the governing test articulated by the Supreme Court in *Pike v. Bruce Church, Inc.*, neutral regulations violate the DCC if they impose a burden on interstate commerce that clearly exceeds the legitimate, non-protectionist purpose(s) they are designed to serve.⁹⁴ Although the *Pike* balancing test is more forgiving than the strict scrutiny test that applies to discriminatory state laws, it still has teeth. Courts applying

90. See, e.g., *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (observing that the DCC "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services"); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.").

91. *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

92. E.g., *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (holding that when a state law discriminates against interstate commerce "'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979))).

93. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (citation omitted).

94. 397 U.S. 137, 142 (1970).

Pike have invalidated a wide range of state regulations because, in their judgment, those regulations imposed undue burdens on interstate commerce, even if that was not necessarily their aim.⁹⁵

States have heretofore operated on the assumption that the DCC does not apply to their commercial marijuana regulations because (ironically) Congress has banned commerce in the drug.⁹⁶ Freed from the constraints imposed by the doctrine, the states have exerted remarkable influence over every stage of marijuana commerce, from the planting of seeds to the sale of finished products. As discussed above in Section II.A, states have used this influence to shape the demographics, structure, and operation of their local marijuana industries, seeking to boost ownership by racial minorities, limit industry consolidation, minimize carbon emissions, and inform and protect consumers, among other goals.

In previous work, we reached different conclusions about whether the federal marijuana ban currently suspends the DCC's application to state marijuana regulations.⁹⁷ The same issue is now before a handful of federal courts adjudicating recent challenges to state residency requirements for marijuana licensing.⁹⁸ Notwithstanding our disagreement over the present status of the doctrine, however, we agree that if Congress repeals the federal marijuana

95. *See, e.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529–30 (1959) (invalidating state law requiring use of contoured mudflaps on trucks); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 353–54 (1977) (invalidating state law limiting the types of labels affixed to apple crates); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671–75 (1981) (invalidating state law limiting truck length).

96. *See supra* notes 56–67 and accompanying text.

97. *Compare* Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 876–82 (arguing that the federal marijuana ban does not suspend the DCC), *with* Bloomberg, *supra* note 54, at 402–04 (arguing that in order to preserve the delicate “frenemy” relationship between the federal and state governments regarding marijuana, courts should presume that discriminatory state marijuana laws survive under the DCC).

98. A small but growing number of federal courts have ruled that the federal marijuana ban does not suspend the DCC and that state and local residency requirements for marijuana licenses are unconstitutional. *See, e.g.*, Preliminary Injunction Order at 6, *Toigo v. Dep't of Health & Senior Serv.*, No. 2:20-cv-04243 (W.D. Mo. June 21, 2021); Preliminary Injunction Order at 1, *Lowe v. City of Detroit*, No. 2:21-cv-10709 (E.D. Mich. June 17, 2021); *NPG, LLC v. City of Portland, Me.*, No. 2:20-cv-00208, 2020 WL 4741913, at *2 (D. Me. Aug. 14, 2020). Two other federal courts have dismissed DCC challenges without reaching the merits of the issue. One of these courts dismissed a DCC challenge to a state residency requirement by invoking the “unclean hands” doctrine because the plaintiff was planning to violate the federal ban. *See* Motion to Dismiss Order at 5–6, *Original Invest., LLC v. Oklahoma*, No. 5:20-cv-00820 (W.D. Okla. Mar. 17, 2021). The other court dismissed a DCC challenge and remanded the case to state court by invoking Pullman abstention. *See* Motion to Dismiss Order at 3, *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, No. C20-5661 (W.D. Wash. Oct. 5, 2020).

ban, as now seems inevitable, state marijuana regulations will surely be subject to the DCC. In other words, once Congress legalizes marijuana at the federal level, states will have to satisfy the DCC tests outlined above if they want to continue to ban or burden interstate commerce in marijuana.

It is difficult to overstate the ramifications this development would have for state regulators and marijuana markets. Existing state regulations that insulate local firms from outside competition, including ubiquitous import-export bans and residency preferences for marijuana licenses, plainly would not survive a DCC challenge.⁹⁹ The Supreme Court has previously invalidated nearly identical restrictions states have imposed on interstate commerce in other markets.¹⁰⁰ Left unchecked, the DCC “is likely to spell the demise of the strange, state-based cannabis markets we have today and the rise of a national cannabis market in which local firms must compete with out-of-state firms,”¹⁰¹ eroding the control states now wield over the marijuana industry—a troublesome development, for reasons discussed below.¹⁰²

Apart from dooming discriminatory state regulations, the DCC will also cast doubt upon a host of neutral state marijuana laws. As discussed earlier, states have adopted different rules regarding a variety of matters, including the use of pesticides; the testing, labeling, and packaging of marijuana products; and vertical integration in the marijuana industry.¹⁰³ Once states are forced to open their doors to imports and exports, these differences will begin to impede interstate commerce in marijuana.

To illustrate, consider state testing requirements. If one state requires marijuana to be tested for a contaminant (say, a chemical) that no other state bothers to screen, the state would raise the cost of selling marijuana in its market.¹⁰⁴ After all, producers would need to have their products specially tested, and possibly even re-tested, just for that state’s market. Unless the state can prove that the added testing actually improves the safety of marijuana products—for example, that the chemical of concern is actually hazardous

99. Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 864.

100. *Id.* at 865–75 (discussing DCC decisions invalidating analogous state laws).

101. *Id.* at 861.

102. *See infra* Section III.B.

103. *See supra* Section II.A.

104. *See* Brian MacIver, *UC Davis Releases Report on California Cannabis Testing Costs*, CANNABIS BUS. TIMES (Apr. 28, 2020), <https://www.cannabisbusinesstimes.com/article/uc-davis-california-cannabis-lab-testing-costs/> (“[H]igher testing costs ultimately [lead] to higher consumer prices.”).

to human health, a court might find that the burdens imposed by this regulation outweigh its benefits. The testing requirement, along with sundry other state regulations that increase the cost of doing business across state lines, could thus become unenforceable once Congress repeals the federal marijuana ban.¹⁰⁵ Moreover, even if only a fraction of them eventually prevail in court, challenges to neutral state regulations will still foster uncertainty about how states may regulate the marijuana market. The *Pike* balancing test is, after all, notoriously subjective, making it virtually impossible for anyone to predict with certainty which state regulations might survive litigation.¹⁰⁶

In short, by legalizing marijuana, Congress will instantly—and perhaps unwittingly—transform our current system of insular, state-based marijuana marketplaces into a national, interstate market that is no longer subject to the comprehensive state controls we have today. Notably, we suspect that few proponents recognize the degree to which federal legalization threatens the regulatory systems states have developed. While emphasizing the good that federal legalization will do the states, leading congressional reform proposals are conspicuously silent on the DCC and its implications for state regulations.¹⁰⁷

B. The Benefits of Suspending the DCC

Fortunately, there is a way that Congress can legalize marijuana without instantly destroying the insular state-based marketplace system. The Supreme Court has long held that Congress has the power to suspend the DCC and authorize states to restrict interstate commerce.¹⁰⁸ In this Section, we unpack

105. Indeed, states have already been deluged by a flood of DCC lawsuits challenging state residency preferences for marijuana licenses. *See supra* note 98.

106. Justice Scalia famously quipped that the balancing demanded by *Pike* was “like judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). *See also, e.g.*, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 422 (2008) (footnote omitted) (observing that the DCC’s “rules are easy to recite, but their application is notoriously difficult, resulting in cases with similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions”).

107. *See Mikos, Interstate Commerce in Cannabis, supra* note 11, at 876 (“None of the leading reform proposals Congress is now considering contemplates giving states the power to discriminate against interstate commerce in cannabis.”). The lone exception is the CAO, which does explicitly address state power over imported marijuana. However, as discussed more below, the limited authority conferred on the states by the CAO would leave many state marijuana regulations vulnerable to DCC challenge. *See infra* Section III.C.

108. *See infra* Section III.C.1.

the many benefits of suspending the DCC and authorizing states to continue restricting interstate commerce in marijuana.

1. Avoiding Regulatory Gaps

Congress should authorize states to restrict interstate commerce in marijuana to avoid inadvertently creating gaps in the regulation of the marijuana industry—namely, scenarios where there is effectively no state *or* federal law governing the industry. The sudden imposition of the DCC could create such regulatory gaps in two discrete ways.

First, courts might enjoin state regulations for which there is no federal counterpart. As discussed earlier, many state marijuana regulations will become vulnerable to DCC challenge once Congress legalizes marijuana at the federal level. These regulations include not only state laws that directly restrict interstate sales and investment in the marijuana industry but also state laws that indirectly burden such commerce, such as the idiosyncratic requirements states have adopted for testing, labeling, and packaging marijuana products.¹⁰⁹

If a court were to hold that any of these state regulations unduly burdens interstate commerce in marijuana, the law would instantly become unenforceable. In this regard, the DCC resembles congressional preemption of state law. Unlike preemption, however, the DCC can block state law even when there is no federal statute to take its place, i.e., even when there is no federal law regulating the same activity.¹¹⁰ Anytime the DCC blocks the enforcement of a state regulation for which there is no federal analog, it will create a new gap in the regulation of the marijuana industry.¹¹¹

Unfortunately, as yet, there are very few federal regulations on the books that could fill the resultant regulatory gaps. Since 1970, Congress has relied almost exclusively on the CSA to “regulate” marijuana. Even after states be-

109. *See supra* Section II.B.

110. To be sure, there are federal statutes that preempt state laws without also imposing a federal rule to take their place, but such statutes are “historically rare.” Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1015 (2010).

111. The DCC has created such regulatory gaps in a variety of other markets. *See, e.g.*, Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1, 5 & n.23 (2003) (discussing the gap created by a Supreme Court decision invalidating state regulation of groundwater exports); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 409 (2016) (discussing the gap created by a Supreme Court decision invalidating state regulation of interstate electricity sales).

gan to authorize the commercial production and distribution of the drug, Congress did not repeal, modify, or supplement the CSA; it left that prohibitory statute in place, but largely unenforced against the emergent marijuana industry.¹¹² Once Congress formally repeals the CSA as applied to marijuana, there will be little federal regulation left on the books to specifically govern many of the marijuana industry's activities.¹¹³

Until state or federal lawmakers are able to replace regulations blocked by the DCC, the interests served by those regulations would go unprotected. Consider, for example, what would happen if a court were to enjoin the type of state testing regime described above. In the wake of such a ruling, vendors could sell untested and potentially unsafe marijuana products while lawmakers scrambled to find a way to plug the gap created by the DCC.

The DCC could create regulatory gaps in a second way as well. Even when it does not invalidate state regulations, it will make enforcing those regulations far more difficult. For example, by requiring states to open their markets to new suppliers and imported marijuana, the DCC will doom the ingenious closed-loop systems states have heretofore relied upon to police their local marijuana industries. In these closed-loop systems, states require all participants—cultivators, processors, testers, wholesalers, and retailers—to obtain a license from the state, and they assiduously track every gram of marijuana as it moves through the supply chain.¹¹⁴ By providing states with detailed information about regulated activities, these closed-loop systems have greatly enhanced the states' ability to enforce their regulations on the marijuana market.¹¹⁵ For example, because every gram is accounted for, licensees cannot easily evade taxes levied on the sale of marijuana produced in this system.¹¹⁶

112. See generally Mikos, *The Evolving Federal Response to State Marijuana Reforms*, *supra* note 30 (detailing how Congress and the DOJ have reacted to state marijuana reforms across time).

113. The marijuana industry would be covered by federal statutes that apply to all industries, like the Sherman Antitrust Act and the Food Drug and Cosmetic Act (FDCA). See, e.g., Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823, 832–33 (2019) (illuminating FDCA regulations that would still apply to the state-licensed marijuana industry after federal legalization). However, even considered collectively, these federal statutes would fail to address a host of issues that states now regulate, including social equity, taxation, packaging, testing, and licensing, among others.

114. See *supra* Section II.A (describing state licensing and tracking systems).

115. E.g., Paul Monies, *Seed-to-Sale Delays Sow Confusion in Medical Marijuana Market*, OKLA. WATCH (June 23, 2021), <https://oklahomawatch.org/2021/06/23/seed-to-sale-delays-sow-confusion-in-medical-marijuana-market/> (reporting on problems stemming from temporary injunction against state-mandated marijuana tracking system).

116. See *id.* (noting that Oklahoma's marijuana tracking system is a hard system to cheat).

But the states will not be able to maintain these closed-loop systems as presently constructed because the systems exclude non-local firms and non-local marijuana. Once the DCC kicks in, of course, such exclusions will no longer be permissible. Because states will have to allow firms to introduce marijuana produced outside of these loops and the tracking systems states have developed, the DCC will greatly complicate enforcement of state regulations.

Just consider how the DCC could undermine the collection of state marijuana taxes. As of December 2021, the states had collected over \$10 billion in tax revenue from the adult-use market alone.¹¹⁷ The DCC will not (necessarily) bar states from taxing marijuana imported from other states. In theory, at least, states can lawfully tax all marijuana that is to be used in the state, regardless of where it was produced or sold. For example, states commonly impose use taxes on automobiles and other big-ticket items that are purchased elsewhere but brought into the state.¹¹⁸ But enforcing state taxes will become much more complicated once marijuana can be shipped across state lines and across state tracking systems. Among other reasons, a producer could claim that it sold products out-of-state in order to evade paying local sales taxes on that inventory. Unless the states quickly figure out how to coordinate their disparate tracking systems to monitor marijuana shipped across state lines—a monumental task—they will have a difficult time detecting such evasion.¹¹⁹

The challenges posed by the emergence of a national market are hardly unique to marijuana, but for other products, Congress has developed elaborate systems to assist states in enforcing their taxes and other regulations. For

117. See *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, MARIJUANA POL'Y PROJECT (Jan. 5, 2022), <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/>.

118. See Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEG. F. 223, 236–37 n.53 (discussing use taxes and the challenges states face enforcing them).

119. To be sure, there is already some evasion of state marijuana taxes even without considering the DCC. See Benjamin Hansen, Keaton Miller & Caroline Weber, *Drug Trafficking Under Partial Prohibition: Evidence from Recreational Marijuana* 24, (Nat'l Bureau of Econ. Rsch., Working Paper No. 23762, 2017), https://www.nber.org/system/files/working_papers/w23762/revision/w23762.rev1.pdf (estimating that between 7.5–11.9% of the marijuana sold legally in Washington is later trafficked outside of the state). But the DCC will exacerbate this problem by greatly complicating the task of collecting taxes from the licensed market. Ulrik Boesen, *Tax Foundation Comments to the Cannabis Administration and Opportunity Act*, TAX FOUNDATION (Sept. 2, 2021), <https://taxfoundation.org/federal-cannabis-administration-opportunity-act/> (“Interstate commerce will make [marijuana] tax collection more complicated for all states.”).

example, Congress has passed several statutes to assist states in collecting cigarette excise taxes. To that end, the Jenkins Act requires all vendors who sell cigarettes in interstate commerce to register with and report all of their sales to the taxation authority in every state where they ship cigarettes,¹²⁰ and the Contraband Cigarette Trafficking Act requires those who possess bulk quantities of cigarettes to carry evidence that all applicable state taxes have been paid on them.¹²¹ These statutes provide federal criminal penalties for violations and also authorize state officials to seek injunctive and other civil relief against violators.¹²² While no panacea, such federal assistance eases the burden states face in enforcing their taxes and other regulations on goods that are shipped across state lines.

The states will have no such luck with enforcing their taxes or other regulations on the suddenly national marijuana industry. There is no federal regulatory regime in place that will help them collect taxes once interstate sales of marijuana are allowed. Although one proposal (the CAO) would lend some assistance to the states, it is a far cry from the support Congress has lent in other markets.¹²³ Moreover, regulations authorized by the CAO (or any other federal legalization proposal) could take years to develop.¹²⁴ Turning off the DCC would give federal policymakers time to carefully craft those regulations while stable state rules governing the same subject matter remain in effect.

In short, the moment Congress legalizes marijuana federally, the DCC will disrupt the states' ability to enforce taxes and other regulations on the marijuana industry. To avoid this disruption, Congress should suspend the application of the doctrine, at least until lawmakers can plug the regulatory gaps that the DCC would create.

120. 15 U.S.C. §§ 375–378.

121. 18 U.S.C. §§ 2341–2343.

122. 15 U.S.C. §§ 377–378; 18 U.S.C. §§ 2345–2346.

123. The CAO would require proof that state taxes had been paid on bulk (more than ten pounds) quantities of marijuana, see GAI21675 4LN, 117th Cong. § 112 (2021). But it does not require vendors to register with and report all of their interstate sales to the relevant state taxation authorities, and it does not authorize state enforcement of its provisions.

124. For example, the CAO envisions the creation of a national marijuana tracking system. *See supra* note 84. But it would take time for regulators to work through several difficult issues involved in developing such a system, such as whether and how to integrate the system with existing state systems, and there is no guarantee one would ever be adopted in the first instance.

2. Forestalling a Race to the Bottom

Congress should also authorize states to limit interstate commerce in marijuana to forestall a race to the bottom in the regulation of the marijuana industry. As we describe above, the states have devised elaborate and comprehensive codes to regulate the structure and operation of their respective marijuana industries.¹²⁵ Through such regulations, states have been able to address a variety of concerns stemming from the legalization of marijuana, including fears of creating a powerful new industry (i.e., Big Marijuana), the diversion of marijuana to illicit markets, the equitable distribution of the economic benefits of marijuana legalization, and the environmental harms associated with marijuana cultivation.

But the extraordinary control that states now wield over the marijuana industry is fragile. More than anything else, it depends on states being able to protect their local marijuana industries from outside competition.¹²⁶ By mandating that all marijuana sold in local shops must be produced locally, states have been able to dictate how that marijuana is produced (e.g., without the use of pesticides) and by whom (e.g., businesses owned by residents of disproportionately impacted areas). At present, the only real constraint on the state's influence over the industry is a practical one: competition from the black market. States recognize that imposing overly burdensome regulations on the state-licensed industry could drive consumers into the arms of black-market suppliers.¹²⁷

If Congress legalizes marijuana and the states lose their ability to restrict imports of the drug, the states will lose much of the influence they now wield over the marijuana industry. Absent the congressional authorization we envision, a state will not be able to stop out-of-state producers from selling their wares in the local market, even if those producers play by a very different set of rules than the ones the state has imposed on local firms.¹²⁸ Under the Constitution, a state may not project its regulations beyond its own borders.¹²⁹

125. See *supra* Section II.A.

126. Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 893.

127. E.g., Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 232 (2019) ("If high taxes are imposed to prop up the price and limit the social harms of marijuana consumption, sophisticated consumers will look to the black market for what they desire.")

128. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 864 (explaining that the DCC will force legalization states to open their doors to cannabis imports and exports).

129. See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989) ("Generally speaking, the Com-

Although states do have some leeway to regulate the products that firms sell locally, they cannot necessarily regulate how out-of-state firms make those products or how out-of-state firms are structured.¹³⁰ For example, while Massachusetts could likely regulate the potency of all marijuana flower sold in the Bay State, it could not necessarily tell cultivators located in another state (say, Oregon) that they may not employ eighteen-year-olds to harvest their marijuana crops or that they may grow no more than 10,000 plants in a given year. Most issues involving the production of marijuana will fall under the jurisdiction of the state where the producer is located and the federal government. Thus, many of the regulations states have devised to govern marijuana production—regulations concerning firm size, ownership, vertical integration, pesticide use, energy consumption, employment practices, inventory tracking, and so on—can only be applied to firms physically located within the borders of the state.¹³¹

Once it becomes clear that the DCC applies, the states will face new pressure to relax many of the regulations they now impose on the marijuana industry.¹³² The reason is simple: the states will have to compete for marijuana businesses. Quite suddenly, and for the first time since the marijuana reform movement began, marijuana firms will have the right to relocate across state borders without sacrificing their access to the markets they leave behind. Firms will be able to use this right as leverage to push back against state regulations. Put more bluntly, firms could threaten to move their operations elsewhere if their current home state adopts (or maintains) regulations that are more onerous than the regulations adopted by another state.¹³³ Such threats

merce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right To Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (illuminating the limits on the states’ power to project their laws beyond their borders).

130. See, e.g., Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, 893–94 (“Under the Constitution, states have limited power to regulate how goods are produced outside their borders, even when those goods are sold in the state.”).

131. See *id.* at 894 n.184 (“To be clear, the states can still regulate the goods themselves—e.g., by dictating how cannabis is packaged or labeled when sold in state. But they likely cannot regulate the type of energy that was used to grow the cannabis or the age of the employees who trimmed the buds. Those matters are probably the exclusive dominion of the state where those production activities take place.”).

132. See *id.* at 893 (“[W]ith the advent of interstate commerce, producers will be able to move to the state that imposes the least onerous regulations on cannabis production. Ultimately, this dynamic could create a race to the bottom, with states competing to relax their controls and thereby attract (or keep) more cannabis jobs.”).

133. At least one major marijuana marketplace—Colorado—is already considering how it will need

would ring hollow today because a state can (presumably) ban a firm from selling locally if it dares to leave the state.¹³⁴ Once Congress legalizes marijuana, however, such a ban plainly will not survive DCC challenge.¹³⁵

To attract or keep production jobs local, states may be forced to sacrifice other policy goals they have been pursuing. For example, a state might be tempted to relax its minimum age requirement for workers employed in the marijuana industry. All legalization states have adopted such requirements, which are designed to limit youth exposure and access to marijuana.¹³⁶ However, relaxing this requirement would expand the size of the local labor pool and thereby give a state a competitive advantage in recruiting marijuana producers who are currently struggling with rising labor costs and worker shortages.¹³⁷ Because other states could not block the sale of marijuana produced elsewhere by, say, eighteen-year-olds, states will feel pressure to follow suit and drop their own age requirements, thereby setting in motion the proverbial race to the bottom.¹³⁸ For similar reasons, states will be tempted to relax the other regulations they now feel free to impose on marijuana producers, from size caps to pesticide restrictions to renewable energy mandates.

It is difficult to overstate the pressure that states will face to keep or attract marijuana firms. The marijuana industry is booming. Industry sales have

to modify its marijuana production regulations to remain competitive in a federal legalization environment. See COLO. REV. STAT. § 44-10-202(1)(h)(I) (2021) (creating a working group to “explore options on how the [state’s] existing [marijuana cultivation] rules and tax laws could be amended to better position businesses in the state to be competitive if marijuana is legalized under federal law”). Firms will, of course, also consider other factors when deciding whether to relocate. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 891–92 (discussing the climate and reputational advantages some states will enjoy when competing for marijuana businesses).

134. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 893 (explaining that states currently “have wide latitude to impose [a bevy of regulations on cannabis cultivators and processors] because producers cannot leave the state”).

135. See *supra* Section III.A.

136. See, e.g., MICH. COMP. LAWS ANN. § 333.27961(11)(e) (West 2018) (“No marihuana establishment may allow a person under 21 years of age to volunteer or work for the marihuana establishment.”).

137. See Beau Whitney, *Labor Supply Shortage Represents a Significant Risk to the Cannabis Industry in 2021*, NAT’L CANNABIS INDUS. ASS’N (June 8, 2021), <https://thecannabisindustry.org/labor-supply-shortages-represents-a-significant-risk-to-the-cannabis-industry-in-2021/>.

138. See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 408 (1997) (“The theory of the race to the bottom is that in enacting otherwise sensible regulations, states may disadvantage themselves by raising the cost of doing business in the state, thus driving the business to states that regulate less rigorously.”).

already reached \$17.5 billion and are expected to grow to more than \$41 billion by 2026.¹³⁹ In less than a decade, the industry has created more than 300,000 new full-time jobs across the country.¹⁴⁰ And while the industry is now highly fragmented—in large part because of state-imposed restrictions on cross-border sales and the size of individual producers—it is likely to become significantly more concentrated once firms are able to consolidate their operations and take advantage of economies of scale in the cultivation, harvesting, and processing of marijuana.¹⁴¹ This newly concentrated industry will be able to flex its muscle against state regulators much more effectively than it does today.¹⁴²

In the past, states did not have to worry about losing their slice of this growing economic pie to other states; rightly or wrongly, they believed they could hold the local marijuana industry captive. But once Congress legalizes marijuana and unleashes the DCC, states will no longer be able to prevent local firms from leaving their borders—or outside firms from taking business away from them.

To be sure, the competitive pressures exerted by the DCC are not wholly undesirable. The DCC could prompt the development of a more efficient marijuana industry, and it might force states to think twice before imposing burdensome regulations on the industry.¹⁴³ However, we believe that the policy tradeoffs spawned by the DCC need to be considered carefully and collectively. The stakes are high, and the choices made by individual states will reverberate throughout the nation. Unless Congress suspends the doctrine, the DCC will force states to make sudden uncoordinated changes to their policies, resulting in a body of regulations that will likely prove suboptimal from a

139. Will Yakowicz, *U.S. Cannabis Sales Hit Record \$17.5 Billion as Americans Consume More Marijuana Than Ever Before*, FORBES (Mar. 3, 2021, 3:43 PM), <https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=2e5b3d6d2bcf> (reporting data from BDSA).

140. BRUCE BARCOTT, BEAU WHITNEY & JANELLA BAILEY, LEAFY JOBS REPORT 2021 at 1 (2021), <https://leafly-cms-production.imgix.net/wp-content/uploads/2021/02/13180206/Leafly-JobsReport-2021-v14.pdf>.

141. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 889 (“Opening the doors to interstate commerce will likely spur consolidation of the cannabis industry.”).

142. See Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 70 (2014) (“Many of the factors that will lead to corporate exercises of political power are a function of, or correlated with, company size or market concentration.”); Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1216 (2008) (“[B]y fragmenting an industry, one can reduce that industry’s political advocacy to increase its market . . .”).

143. See *infra* Section III.D (discussing costs of state restrictions on interstate commerce).

societal perspective.

Given more time, we think Congress could defuse a race to the bottom by adopting some federal regulations to govern the marijuana industry.¹⁴⁴ Congress is the lone lawmaking body that represents all of the geographically dispersed stakeholders now vying for control over marijuana policy. It has the incentive to strike the optimal balance among the competing concerns over efficiency, equity, environmental harms, public health, and the like.¹⁴⁵ For example, if it finds that it is in the nation's collective interest, Congress could impose a federal minimum age requirement for employment in the marijuana industry. However, it will take federal lawmakers time to figure out how best to regulate marijuana production at the national level. In the meantime, we think Congress should do the next best thing and forestall a race to the bottom by authorizing states to maintain their limitations on interstate commerce in marijuana and the control such limitations now give the states over the industry.

3. Preserving States' Social Equity Programs

Authorizing states to continue restricting interstate commerce in marijuana is also critical for them to be able to continue their much-needed social equity programs. It is widely understood that the nation's War on Drugs created (and exacerbated) significant racial inequities in criminal justice systems.¹⁴⁶ Indeed, a 2013 report from the ACLU estimated that between the years 2001 and 2010, Black people were 3.73 times more likely than white

144. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 894 (“Congress could establish a floor of regulations that would apply to producers nationwide to forestall a race to the bottom among legalization states. But . . . extant federal reform proposals do not address issues like these that are likely to arise with the advent of interstate commerce in cannabis.”).

145. Similar factors favor state versus local control of marijuana policy at the subnational level. See Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 766 (2015) (“In light of the threat posed by marijuana smuggling and marijuana tourism, it seems reasonable to suppose that a large portion of a state's population might be more satisfied living under imperfect but effective state regulations than under more agreeable but ineffective local regulations.”).

146. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); ACLU, *A TALE OF TWO COUNTRIES* (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>; ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.

people to be arrested for marijuana possession, despite using the drug at similar rates.¹⁴⁷ Significant disparities exist for other minorities as well,¹⁴⁸ and they have not abated in the past decade, even as an ever-increasing number of states have pursued marijuana reform.¹⁴⁹

While the War on Drugs was (and is) supported by federal resources,¹⁵⁰ state and local law enforcement agencies account for the vast majority of the nation's drug arrests in general and marijuana arrests in particular.¹⁵¹ Given the central role they played in the War on Drugs, many states have concluded that legalization alone is insufficient to rectify the inequities they caused. These states have thus established comprehensive social equity programs, one of the main objectives of which is to increase the rate of minority ownership of marijuana businesses—literally building equity in the state's marijuana marketplace.¹⁵² Pursuant to these programs, many states give social equity applicants preference in marijuana business licensing—sometimes by awarding them extra points in a competitive licensing process and sometimes by making licensing opportunities exclusive to such applicants.¹⁵³ States give social equity applicants a range of other benefits as well, from exclusive funding programs, to fee waivers, to specialized training and educational opportunities.¹⁵⁴

147. THE WAR ON MARIJUANA IN BLACK AND WHITE, *supra* note 146, at 4.

148. See, e.g., Joseph E. Kennedy, Isaac Unah & Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 746 (2018) (“Blacks and Hispanics are arrested [for marijuana offenses] disproportionately in terms of their share of the overall population.”); Harry G. Levine, Jon B. Gettman & Loren Siegel, *240,000 Marijuana Arrests: Costs, Consequences, and Racial Disparities of Possession Arrests in Washington, 1986-2010*, MARIJUANA ARREST RSCH. PROJECT 3 (Oct. 2012), <https://drugpolicy.org/sites/default/files/240.000-Marijuana-Arrests-In-Washington.pdf> (finding that Native Americans were arrested for marijuana possession at “1.6 times the rate of whites” in Washington State).

149. A TALE OF TWO COUNTRIES, *supra* note 146, at 29.

150. See, e.g., ALEXANDER, *supra* note 146, 91–101 (describing the various ways in which the federal government supports state and local law enforcement in executing the War on Drugs).

151. See, e.g., Mikos, *On the Limits of Supremacy*, *supra* note 69, at 1464 (explaining that in 2007, federal law enforcement agencies accounted for only “1.6 percent of all drug arrests, and less than 1 percent of all marijuana arrests made in the United States”).

152. Dede Perkins, *Where Are We Now? Social Equity in the US Cannabis Industry*, CANNABIS INDUSTRY J. (Oct. 5, 2021), https://cannabisindustryjournal.com/feature_article/where-are-we-now-social-equity-in-the-us-cannabis-industry/ (“Out of the 19 states with adult-use cannabis, 13 have developed social equity programs to help marginalized people become cannabis leaders in their markets.”).

153. See, e.g., *supra* note 61 (describing Illinois’s policy of awarding extra points to social equity applicants); 935 MASS. CODE REGS. 500.050(10)–(11) (giving social equity applicants exclusivity in obtaining marijuana delivery licenses for at least three years).

154. See, e.g., 410 ILL. COMP. STAT. 705/7-10 (creating a fund for low-interest loans, grants, and

At the core of these social equity programs lies a law that facially discriminates against non-residents. States determine who qualifies as a social equity applicant based in part on whether they reside in an area that has been disproportionately impacted by the state's drug policies.¹⁵⁵ Since those disproportionate impact areas (DIAs) are invariably defined as communities *within the state*, it follows that social equity applicants necessarily must be residents of the state.

Limiting participation in social equity programs to state residents almost certainly violates the DCC, for the reasons we detailed above.¹⁵⁶ At the least, the programs will operate under a cloud of uncertainty if Congress legalizes marijuana without suspending the DCC. That would be a costly mistake on Congress's part, for three main reasons.

First, states do not have a good alternative to using DIAs within the state as the basis for determining who qualifies as a social equity applicant. The most obvious alternative would be to use race as a metric for determining social equity status, giving Black and other minority applicants preferential access to social equity benefits. But the use of explicit racial preferences would likely violate another constitutional provision: the Equal Protection Clause.¹⁵⁷ The Supreme Court has long held that all racial classifications are subject to strict scrutiny, even when the classification is designed to remedy the present effects of past discrimination.¹⁵⁸ In such cases, the Court has declared that the racial preference must be narrowly tailored to remediate a specific harm caused by the governmental unit enacting the policy, rather than ameliorating the effects of general social discrimination.¹⁵⁹

Strict scrutiny is almost always fatal, and the Court's test regarding reme-

training opportunities for social equity applicants); MICHIGAN MARIJUANA REGUL. AGENCY, SOCIAL EQUITY PROGRAM, https://www.michigan.gov/documents/mra/SE_Infographic_2020_692436_7.pdf (summarizing how Michigan reduces fees for social equity applicants).

155. See, e.g., *supra* notes 61–62 and accompanying text (discussing Illinois's criteria for qualifying as a social equity applicant); N.J. STAT. ANN. § 24:61-36(e) (2021) (defining “impact zones” within New Jersey and giving favorable treatment to license applicants who reside in such areas); N.Y. CANNABIS LAW § 87(5)(g) (2021) (defining “communities disproportionately impacted” in terms of communities within New York).

156. See *supra* Section III.A; see also *Lowe v. City of Detroit*, F. Supp. 3d 804, 815 (E.D. Mich. 2021) (finding that Detroit's residency-based social equity program likely violates the DCC).

157. U.S. CONST. amend. XIV, § 1.

158. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

159. See *J.A. Croson Co.*, 488 U.S. at 499–503 (finding that a remedial racial classification was not narrowly tailored because it was not proportionate to a discriminatory harm caused by the city).

dial racial classifications would almost certainly doom the use of racial preferences in marijuana licensing. In fact, one court has already invalidated an Ohio program that reserved 15% of the state's medical marijuana business licenses for certain minority groups.¹⁶⁰ The court reasoned that the state would have to show that it had a history of discriminating against the same minority groups *in the licensed marijuana market* in order to justify giving those groups preference in awarding licenses.¹⁶¹ Since the marijuana industry was brand new to the state, this was of course an impossible standard for it to meet. And, given the Supreme Court's standard for remedial racial classifications, the state could not rely on marijuana business licensing data from other states, racial disparities in marijuana arrest rates, or even the state's own history of discrimination in government procurement contracting.¹⁶²

The other alternative (aside from racial classifications) that states have is using nationwide DIAs instead of in-state DIAs for determining eligibility for social equity benefits. Because it is race and residency neutral, this approach would avoid Equal Protection and DCC problems.¹⁶³ However, the use of nationwide DIAs would be undesirable and impractical in several other respects. Most significantly, a state has little-to-no interest in rectifying the harms created by other states' discriminatory drug policies. We think it is exceedingly unlikely that the people of, say, Illinois, would make special grants, fee waivers, training opportunities, and other licensing benefits available to residents of, say, Florida, just because Florida enforced discriminatory drug policies.

Even if a state wanted to forge ahead with a social equity program to remediate the wrongs committed by other states, there is a thorny issue of how it would determine what constitutes a DIA in every other state. Within a given state, regulatory agencies identify DIAs based on a variety of metrics—the

160. *Pharmacann Ohio, LLC v. Williams*, No. 17-CV-010962, 2018 WL 7500067, at *6 (Ohio Com. Pl. Nov. 15, 2018).

161. *See id.* (citations omitted) (“The law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Although the Defendants try to explain away the fact that the medical marijuana industry is new, such newness necessarily demonstrates that there is no history of discrimination in this particular industry . . .”).

162. *Id.* at *4–*6 (rejecting the state's reliance on these factors).

163. Courts have upheld the use of geographic criteria in lieu of explicit race-based criteria in other state or local programs. *See, e.g., Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos.*, 996 F.3d 37, 48 (1st Cir. 2021) (concluding that a school committee's use of geographic criteria did not violate the Equal Protection Clause). *But see* Brian T. Fitzpatrick, *The Hidden Question in Fisher*, 10 N.Y.U. J.L. & LIBERTY 168 (2016) (arguing that strict scrutiny should apply to laws that use geography as proxy for race).

poverty rate; the unemployment rate; the percentage of children who participate in free lunch programs; the percentage of families who receive SNAP benefits; the overall crime rate; the historical arrest, conviction, and incarceration rates for marijuana offenses; and so on.¹⁶⁴ The metrics that one state uses might do a good job of identifying DIAs *within that state*, but even so, they might not work so well at identifying communities disproportionately impacted by another state’s drug policies.¹⁶⁵ Moreover, the effects of past discrimination vary considerably from state to state.¹⁶⁶ What type of benefits may be appropriate to remedy the effects of discrimination caused by one state may be insufficient (or excessive) to rectify the effects caused by another state.¹⁶⁷

Second, social equity applicants will have a far better chance of starting and growing a successful marijuana business if Congress suspends the DCC when it legalizes marijuana. Extant congressional reform programs would suddenly throw businesses owned by social equity licensees into a national market populated by large, well-capitalized producers that are able to leverage

164. See, e.g., 410 ILL. COMP. STAT. 705/1-10 (2021) (listing factors for determining whether an area is a DIA); N.J. STAT. ANN. § 24:61-36(e) (2021) (same).

165. See Mathew Swinburne & Kathleen Hoke, *State Efforts To Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 270–73 (2020) (describing the different standards that states use to determine whether an area is disproportionately impacted). Indeed, applying a state’s factors for identifying DIAs does not even necessarily work perfectly *within the state*. To illustrate, the Massachusetts Cannabis Control Commission’s (CCC) DIA formula identifies Amherst—a relatively wealthy, suburban college town—as a DIA. See MASS. CANNABIS CONTROL COMM’N, GUIDANCE FOR IDENTIFYING AREAS OF DISPROPORTIONATE IMPACT 1 (2018) (Apr. 2018), <https://mass-cannabis-control.com/wp-content/uploads/2018/04/Guidance-for-Identifying-Areas-of-Disproportionate-Impact.pdf> (listing Amherst as a DIA). A recent study commissioned by the CCC recommends removing Amherst from the state’s list of DIAs. See MASS. CANNABIS CONTROL COMM’N, IDENTIFYING DISPROPORTIONATELY IMPACTED AREAS BY DRUG PROHIBITION IN MASSACHUSETTS 17, 33 (2021), https://donahue.umass.edu/documents/MA_Cannabis_Control_Commission_Study_Report1_3-11-21_FINAL.pdf. Mistakes like this indicate that it might be asking too much of a state to consider broadening eligibility for social equity programs to include unfamiliar communities located outside of the state.

166. Cf. A TALE OF TWO COUNTRIES, *supra* note 146, at 30 (showing variability in racial disparities in marijuana possession arrest rates across states).

167. Eventually, the federal government may be able to alleviate some of the practical challenges by creating a national database of relevant criteria states could use when implementing their social equity programs. Cf. SHALEEN TITLE, FAIR AND SQUARE: HOW TO EFFECTIVELY INCORPORATE SOCIAL EQUITY INTO CANNABIS LAWS AND REGULATIONS 6, 7 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978766 (recommending that jurisdictions undertake an “impact study” to identify which communities should be included as disproportionate impact areas). But this work will take time, and until it is complete, we think Congress should allow extant state social equity programs to remain in place.

economies of scale.¹⁶⁸ The emergence of the national market would likely make it difficult for many smaller scale producers, including social equity applicants, to compete. If Congress suspends the DCC, social equity applicants would have a chance to grow and gain experience in an insular state-based market, and they would have more time to recoup investments already made under the current marketplace system.

Importantly, federal legalization would also remove one of the biggest obstacles standing in the way of minority ownership of marijuana businesses: lack of access to traditional sources of capital.¹⁶⁹ If Congress suspends the DCC when it removes this obstacle, it will give social equity entrepreneurs the opportunity to utilize their newfound capital while facing limited competition in insular state markets. Otherwise, Congress will immediately throw such entrepreneurs into a fiercely competitive national market, just as they are first beginning to gain access to the resources they need to compete.

The third reason Congress should not disrupt states' social equity programs is that the states' work in this area is still just beginning; they have not come close to achieving their goals of building social equity in their marijuana marketplaces. Simply put, marijuana businesses are still overwhelmingly owned by white people.¹⁷⁰ A January 2021 report reveals the depth of this problem.¹⁷¹ It estimates that Black Americans "represent only 1.2% to 1.7% of all cannabis company owners."¹⁷² Part of the problem is that many social equity programs have only just begun in earnest.¹⁷³ Were Congress to effectively end these programs at this early juncture—or, for current prohibition

168. See *supra* note 141 and accompanying text; see also Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 890 (observing that "consolidation could further dampen minority participation in the cannabis industry").

169. See, e.g., BARCOTT ET AL., *supra* note 140, at 13–14 (explaining how federal prohibition impedes minority ownership of marijuana businesses).

170. See, e.g., Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 403 & n.119 (2020) (citing studies showing that "[t]he overwhelming majority of persons who have founded or who own cannabis businesses identify as white"); Steven W. Bender, *The Colors of Cannabis: Reflections on the Racial Justice Implications of California's Proposition 64*, 50 U.C. DAVIS L. REV. ONLINE 11, 21 (2017) ("[L]ittle diversity exists in the legal marijuana industry, which thus far is dominated by white male entrepreneurs.").

171. See BARCOTT ET AL., *supra* note 140, at 13.

172. *Id.* at 13.

173. E.g., Raymon Troncoso, *Illinois Marijuana Equity Licensing Bill Heads to Governor's Desk*, MARIJUANA MOMENT (May 29, 2021), <https://www.marijuanamoment.net/illinois-marijuana-equity-licensing-bill-heads-to-governors-desk/> (discussing delays in launch of Illinois's social equity licensing program).

states, before those programs can even begin—it would derail the states’ nascent efforts to alleviate the ongoing inequities created by their decades-long prohibition policies.

We recognize that some federal legalization bills would address some social equity issues.¹⁷⁴ The CAOAs, for example, would provide some federal funding for states and localities that award marijuana business licenses to a narrow class of “individuals adversely impacted by the War on Drugs.”¹⁷⁵ The bill defines that term to mean individuals: (a) with incomes below 250% of the federal poverty level for 5 of the past 10 years; who (b) have either been convicted of a marijuana crime or who have an immediate family member that has been convicted of such a crime.¹⁷⁶

While we applaud the attention federal lawmakers are beginning to give to this issue, we believe these proposed measures would be more effective if they supplemented, rather than supplanted, the social equity licensing programs the states are now pursuing.¹⁷⁷ Unfortunately, unless Congress suspends the operation of the DCC when it legalizes marijuana, it will (perhaps inadvertently) put an end to these state programs. This would force state lawmakers to scramble to find new—and probably less ambitious—ways to rectify past injustices.¹⁷⁸

174. Of course, the passage of even such limited measures is far from guaranteed. Some congressional Republicans have voiced opposition to federal reform bills that use tax funds to support social equity programs. See, e.g., Kyle Jaeger, *Federal Marijuana Legalization Bill Clears House Committee*, FILTER (Oct. 1, 2021), <https://filtermag.org/federal-marijuana-legalization-bill/> (explaining that Republican Thomas Massie tried to remove the MORE Act’s social equity provisions and quoting Massie as indicating that the provisions render the bill “politically paralyzed”). If such programs are not included in federal reforms, it will be all the more important to preserve existing state social equity programs.

175. GAI21675 4LN, 117th Cong. § 3054(b)(3) (2021).

176. *Id.* § 3054(b)(1)(D).

177. Allowing states to continue restricting interstate commerce would also make the CAOAs’ microloan program more effective. That program would make businesses owned by certain social equity applicants eligible for Small Business Administration loans up to approximately \$10,000. See *id.* § 3054(b)(2) (making funds available through Section 7(m) of the Small Business Act, 15 U.S.C. § 636(m)); 15 U.S.C. § 636(m)(1)(A)(iii) (describing the program as providing loans “in amounts averaging not more than \$10,000”). For the reasons we explained above, the type of small, start-up businesses that would be eligible for these loans would have a greater chance of success in an insular state marketplace than in a national marketplace.

178. For example, if states decided to award licenses based on the CAOAs’ definition of “individuals adversely impacted by the War on Drugs,” rather than on the DIA-based criteria they now use, they would exclude many people who are now eligible for state social equity licenses, including residents of DIAs who were arrested for marijuana offenses but never convicted, convicted of drug offenses not involving marijuana, or related to (or otherwise dependent upon) such a resident. Compare sources cited *supra* note 155 (describing state eligibility criteria for social equity programs), with

4. Providing Transition Relief to Marijuana Producers

Congress should also suspend the DCC to provide “transition relief” to firms that have invested heavily in state-based marijuana markets. Broadly speaking, transition relief entails compensating or accommodating actors who are harmed by a change to a legal regime.¹⁷⁹ We believe that transition relief is warranted for the numerous businesses that invested in production licenses and facilities that will become uneconomical in a national marijuana marketplace. And, while there are many ways Congress could theoretically provide such relief—including delaying the effective date of federal legalization or making direct payments to producers hurt by the legal change—suspending the DCC constitutes a reasonable solution and perhaps the simplest one to pursue.¹⁸⁰

As we have explained, each state’s marijuana laws require producers to obtain a license from the state and construct an in-state facility in order to access the state’s marketplace.¹⁸¹ These requirements come at a significant cost. Just the process of obtaining a license can cost hundreds of thousands of dollars (or more). Depending on the state, companies may need to: (i) pay substantial up-front license application fees; (ii) retain expert assistance to draft a competitive license application, including lawyers, architects, and security experts; (iii) secure real estate for their facility; (iv) hire a lobbyist to help obtain local approval for their facility; and (v) maintain a minimum level of required capital reserves.¹⁸² Then there is the cost of building-out the physical production facility, which can easily run eight figures.¹⁸³ These costs are

GAI21675 4LN § 3054(b)(3) (describing federal eligibility criteria).

179. See, e.g., Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U. L. REV. 1581, 1582–83 (2011) (summarizing the concept of transition relief).

180. See, e.g., Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Process*, 13 J. CONTEMP. LEGAL ISSUES 211, 215 (2003) (“Transition relief can take a number of forms, from grandfather rules or phase-ins to direct compensation for transition losses.”). For a useful review of transition relief scholarship, see Revesz & Kong, *supra* note 179, at 1585–94.

181. See *supra* Section II.A.

182. See, e.g., Florence Shu-Acquaye, *Medical Marijuana: Implications of Evolving Trends in Regulation*, 46 U. DAYTON L. REV. 25, 40 (2020) (noting the costs and fees associated with marijuana business licensing and describing how applicants “may have to pay a lobbyist” to develop relationships with local politicians); Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69, 82 (2020) (estimating that cannabis business start-up costs are at least \$250,000 due in part to fees, licensure, real estate, and “atypical security and operating costs”); Swinburne & Hoke, *supra* note 165, at 255–56 (estimating start-up costs for retailers at a minimum of \$312,000 and noting that states additionally require businesses to maintain capital reserves).

183. See, e.g., Steve Pepple, *\$20M Marijuana Cultivation Facility Planned for Northern Oakland*

often well worth it in our current marketplace system, as states insulate producers from lower cost, out-of-state competition and may also restrict competition within the state by granting a limited number of production licenses.

If Congress replaces the current state-based system with a national marketplace, producers will no longer need to make these investments in every state in which they want to market their marijuana. Instead, they will be able to take advantage of economies of scale and will concentrate marijuana production in a small number of very large facilities.¹⁸⁴ These few facilities will likewise be concentrated in a small number of states: namely, those where environmental and regulatory conditions are most favorable.¹⁸⁵ And, from these large-scale facilities, producers will be allowed to distribute marijuana into other states across the country. This shift in production will render many marijuana businesses' existing investments in production licenses and facilities inefficient and uneconomical, virtually overnight.¹⁸⁶ Once firms are able to operate very large scale and/or outdoor facilities, firms stuck with existing, smaller scale (indoor) facilities may find themselves unable to compete in the national market.

Importantly, existing facilities that will become uneconomical in a national marketplace cannot just be chalked up to bad investment decisions. As a consequence of federal prohibition, state regulatory regimes have *required* businesses to make these investments in order to access their marketplaces. Businesses now must either make the requisite investments to construct (or

County, DETROIT FREE PRESS (Oct. 19, 2020, 8:04 PM), <https://www.freep.com/story/news/local/michigan/oakland/2020/10/19/natrabis-marijuana-cultivation-center-oakland-county-lake-orion-natrabis/5983070002/>; Chris McKenna, *Marijuana Maker Plans Big Expansion of Orange County Facility To Serve Recreational Users*, TIMES HERALD-RECORD (June 16, 2021, 11:07 AM), <https://www.recordonline.com/story/news/local/2021/06/16/eyeing-recreational-pot-hamptonburgh-grower-plans-big-expansion/7695941002/> (reporting that PharmaCann is investing \$20 to \$40 million to add 75,000 square feet of grow space to an existing 180,000-square-foot facility in Hamptonburgh, New York).

184. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 889 (“[The] national market will likely favor larger producers that can take full advantage of economies of scale in the cultivation and processing of cannabis.”).

185. *Id.* at 891 (noting that “the climate in a small number of states is ideally suited for outdoor cultivation of cannabis,” allowing “producers in these states to avoid some of the costs peculiar to indoor cultivation”); *id.* at 893 (“[W]ith the advent of interstate commerce, producers will be able to move to the state that imposes the least onerous regulations on cannabis production.”).

186. See, e.g., Alan Brochstein, *Interstate Cannabis Commerce Is an Overblown Concern for Now*, NEW CANNABIS VENTURES (July 11, 2021, 10:56 AM), <https://www.newcannabisventures.com/interstate-cannabis-commerce-is-an-overblown-concern-for-now/> (opining that “[a] lot of cultivation assets would become unnecessary overnight should true interstate commerce open up”).

acquire) an in-state production facility or else forgo the opportunity to participate in the local marketplace.

This regulatory requirement makes transition relief appropriate. Indeed, transition relief may be particularly warranted where an actor makes “durable investments”—that is, fixed, long-term investments—pursuant to an extant regulatory requirement.¹⁸⁷ Existing marijuana producers have made such investments in the current insular state-based marketplace system. Further, without these investments, the marijuana legalization movement likely would have stalled; at the very least, we would likely not be having discussions about federal legalization today. The firms that made these durable investments in state reforms should not see those investments undermined because of federal legalization they helped to make possible.

Instead of abolishing the insular state-based marketplace system overnight, Congress can provide transition relief by suspending the DCC and, effectively, phasing in a national marketplace. Doing so will give producers who constructed otherwise uneconomical facilities more time to recover their investments and to prepare for the emergence of a national market. For social equity applicants and other smaller scale producers, suspending the DCC will provide a particularly valuable form of transition relief. As noted in Section III.B.3, it will give them an opportunity to access capital from traditional sources *before* they are subject to interstate competition, which will improve their odds of surviving once a national marketplace eventually arises.

As a final reason to provide transition relief, suspending the DCC may increase the likelihood of federal legalization by reducing opposition from actors who would be adversely affected by abrupt nationalization.¹⁸⁸ Indeed, there is some evidence that providing transition relief has already spurred reform in marijuana law: every state that has transitioned from medical-marijuana-only to medical-marijuana-plus-adult-use has provided some form of relief to existing medical marijuana businesses that could be hurt by that transition.¹⁸⁹ In the case of federal legalization, transition relief may be particularly important to passing legislation. The actors who would be adversely

187. Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 69 (2008) (asserting that the existence of durable investment made to comply with regulations often counsels for stability in the law); *see also* Revesz & Kong, *supra* note 179, at 1584 (agreeing with Shavell’s position).

188. *See* Revesz & Kong, *supra* note 179, at 1621 (“Many scholars have argued in favor of transition relief because it increases the likelihood that socially desirable legal changes will be enacted.”). Although Revesz and Kong critique the public-choice function of transition relief, they do so on grounds not applicable to our argument here. *See id.* at 1626–28.

189. *See, e.g.*, BARBARA BROHL & JACK FINLAW, TASK FORCE REPORT ON THE IMPLEMENTATION

affected by abrupt nationalization include not only the aforementioned marijuana producers but also the many states that would see their production industries (and the jobs generated thereby) decline in a national marketplace.

One possible counterargument to providing marijuana producers with transition relief is that producers should be acting in anticipation of a nationalized market. That is, producers should know that federal legalization is coming and that it will necessarily result in interstate commerce, and they should act accordingly.¹⁹⁰ Indeed, the argument that private actors should be responsible for anticipating legal changes (rather than blindly relying on the status quo or assuming that future legal changes will be accompanied by transition relief) is common in legal transitions literature.¹⁹¹ We do not believe that argument has great force here. It seems unrealistic to expect that most producers in the market today, many of whom likely do not have access to sophisticated counsel, can anticipate the timing and nature of federal legalization, let alone appreciate how the DCC's interaction with the various federal legalization proposals might affect their businesses.¹⁹²

5. Avoiding Federalism-Related Concerns

Legalizing marijuana without suspending the DCC would also raise two types of federalism-related concerns. First, abruptly nationalizing the marijuana market would be inequitable both to states that have already legalized marijuana and to states that have not yet done so. Second, transitioning immediately from state-based markets to a national market would prematurely

OF AMENDMENT 64, at 7–8 (2013), https://www.colorado.gov/pacific/sites/default/files/A64Task-ForceFinalReport%5B1%5D_1.pdf (recommending that in the “first year of licensing, only entities with valid medical marijuana licenses . . . should [be] able to obtain licenses to grow, process and sell adult-use marijuana”); 410 ILL. COMP. STAT. 705/15-15 (2021) (giving existing medical marijuana dispensaries priority in licensing adult-use dispensaries); N.Y. CANNABIS LAW §§ 68-a, 68-b (McKinney 2021) (creating special license types to allow medical marijuana businesses to deal in adult-use marijuana).

190. See, e.g., Logue, *supra* note 180, at 224 (describing the anticipation argument).

191. See, e.g., Revesz & Kong, *supra* note 179, at 1583 (“What is now referred to as the ‘new view’ argues against transition relief on the ground that it can discourage actors from anticipating socially desirable legal changes.”).

192. For instance, a layman or even a lawyer may reasonably take at face value the CAO Discussion Draft’s promises to “preserve[] the integrity of state cannabis laws” and to “recognize state law as controlling the possession, production, or distribution of cannabis” and incorrectly conclude that the insular state-marketplace system would continue under the CAO. CAO DISCUSSION DRAFT, *supra* note 5, at 1, 6.

terminate state experimentation with different approaches to regulating marijuana.

For states that have legalized marijuana, our fairness concern derives from the fact that federal legalization could cause marijuana production to migrate en masse to a handful of producer-friendly states. As we explained above, the introduction of interstate commerce is likely to spur migration of the industry as firms consolidate and relocate their operations to states with the most hospitable environmental or regulatory conditions.¹⁹³ This migration will be an economic boon for those select states that land the industry, but it will also cause immense disruption and economic losses for the rest of the legalization states.¹⁹⁴

We recognize that the transformation of the industry would generate some efficiency benefits as well,¹⁹⁵ but we do not think that it would be particularly fair to the states to transition to a national market just yet. Each state that has already legalized marijuana has invested considerable time and resources into developing a well-regulated marijuana marketplace. They have established regulatory agencies; staffed those agencies with commissioners, lawyers, investigators, researchers, finance experts, and public health experts; and those personnel have then invested countless hours in developing, implementing, and enforcing complex regulatory schemes. Importantly, states undertook these monumental efforts at the DOJ's insistence that they establish "strong and effective regulatory and enforcement systems" as a condition for not enforcing the federal marijuana ban.¹⁹⁶ In developing these systems, the DOJ also (arguably) required the states to adopt measures that restrict interstate commerce in marijuana.¹⁹⁷ The industries that arose under these state restrictions now produce billions in tax revenues and create thousands of jobs for states, with marijuana production playing a central role in driving these figures.¹⁹⁸ Indeed, generating new jobs and revenues were major reasons why

193. See *supra* Sections III.A, III.B.2.

194. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, 891–94 (discussing the economic disruption production migration would cause).

195. See *infra* Section III.D (discussing potential tradeoffs entailed by suspending the DCC).

196. See Cole Memo, *supra* note 64, at 2.

197. See *id.* at 3 (requiring states to "implement[] effective measures to prevent diversion of marijuana outside of the regulated system and to other states").

198. BARCOTT ET AL., *supra* note 140, at 8–9 (showing that legal cannabis supported 321,000 full-time equivalent jobs as of January 2021 and reporting specific job numbers from the top ten states); *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, *supra* note 117 (reporting that states had already collected over \$10.4 billion in tax revenues from sale of adult-use marijuana).

so many states legalized marijuana in the first place.¹⁹⁹ The economic losses some states would suffer as a result of federal legalization—losses that Congress might not anticipate—could be staggering.

Given these consequences, it seems unfair that Congress would suddenly change the terms of the DOJ's bargain, pulling the rug out from under the states by forcing them to accept interstate commerce in marijuana. At the very least, it seems inconsistent with claims that congressional legalization proposals will preserve state primacy in this field. Thus, while competition among states in marijuana production may eventually prove desirable, for now, states deserve more time to realize the benefits of the industry that their pioneering and persistent efforts made possible.²⁰⁰

Instantly nationalizing the marijuana marketplace may also be inequitable to states that have yet to legalize marijuana. Arguably, these states have shown fidelity to federal policy by maintaining their prohibitionist marijuana laws.²⁰¹ Once Congress legalizes marijuana at the federal level, these states may want to follow suit. However, if Congress does not turn off the DCC, these late-moving states will likely reap few of the economic benefits of legalization.²⁰² They will instead be thrown into a competitive national marketplace full of states with existing marijuana industries. Established firms in those states will have a first-mover advantage; that is, by setting up their operations before the repeal of the federal ban, they will have gained an advantage against firms located in late-moving states once they are all forced to compete for a share of the national market.²⁰³ The resulting market dynamics would arguably be perverse: states that flouted federal policy would gain a first-mover advantage at the expense of states that remained faithful to federal

199. See, e.g., Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 866 (stating that “[l]egalization is commonly touted as a means of creating new jobs and economic opportunities within a state”).

200. This is particularly true for states that have recently legalized marijuana. These states will have made the same investments as other states in creating and regulating their marijuana production industries only to see those industries dissolve before the benefits can be fully realized.

201. We recognize, of course, that states have no constitutional obligation to ban marijuana, just because Congress does so. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (“Congress cannot compel the States to enact or enforce a federal regulatory program.”). Rather, we simply point out that some states have chosen to cooperate with the federal government in pursuing a common marijuana policy (even a disagreeable one), while other states have chosen to forge a new path.

202. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 893 (suggesting that states would have “missed the boat on creating a viable, local cannabis industry and the jobs associated therewith” if they did not legalize marijuana before the DCC created a national market).

203. See generally Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41 (1988) (describing first-mover advantage).

policy.²⁰⁴ At the least, current prohibition states may feel that this outcome would be unjust.

Our second federalism-related concern pertains to the value states provide to our federalist system as laboratories of democracy. The idea is that states can test different public policies and thereby inform federal policymakers about the merits and demerits of different regulatory options.²⁰⁵ This, in theory, allows federal policymakers (and policymakers in other states, for that matter) to learn from state experimentation, resulting in better national policy than if those policymakers were to write on a blank slate. Indeed, there are few areas of law where this model of federalism has proven more successful than in marijuana law. In the shadow of federal prohibition, our country's state-level experiments in legalizing marijuana have, over time, proved to be incredibly popular. Electorates in our most conservative states have voted to legalize the substance, and federal legalization seems inevitable.²⁰⁶ State experimentation has allowed the proponents of reforms the opportunity to make their case to the nation.

While state experimentation in *whether to legalize* marijuana appears to have produced a consensus winner, experimentation in *how to regulate* marijuana once it is legalized remains unfinished. We described some of the extant variations in state regulation above, including differences in pesticide policies, testing, packaging, and labeling requirements, and licensing structures.²⁰⁷ There are ongoing efforts to harmonize these (and other) areas of regulation across states, but those efforts remain nascent.²⁰⁸ The federal government (and the states) could benefit from allowing these regulatory experiments to play out. The lessons learned could help inform lawmakers about how best to regulate a national marketplace.

204. A similar argument applies to states that have legalized marijuana only for medical use so far. If they choose to legalize adult-use marijuana after the federal ban is lifted, they will find themselves at a competitive disadvantage vis-a-vis current adult-use states in the new national marketplace.

205. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (famously declaring that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

206. For instance, voters in the Republican strongholds of Mississippi, South Dakota, and Montana voted to legalize medical or even adult-use marijuana during the 2020 election. See *2020 Marijuana Legalization and Marijuana-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2020_marijuana_legalization_and_marijuana-related_ballot_measures (last visited Feb. 19, 2022).

207. See *supra* Section II.A (discussing variations in state regulation).

208. See, e.g., Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 887 & n.151.

The federal government could further benefit from seeing how states regulate their marketplaces once marijuana is federally legal. As a result of federal prohibition, the states' marijuana experiments have heretofore been conducted under less-than-ideal conditions.²⁰⁹ Originally, state experimentation was drastically limited by aggressive enforcement of the federal marijuana ban. Under this environment, early medical marijuana legalization states were reluctant to authorize marijuana businesses at all and instead expected patients to grow their own marijuana or obtain it (free of charge) from a caregiver.²¹⁰ As federal enforcement policy liberalized, states began to experiment with licensing and regulating marijuana businesses.²¹¹ However, even this less hostile environment has cabined state experimentation. For instance, states have been unable to experiment in an environment where entrepreneurs have adequate access to traditional sources of capital, where they can utilize traditional electronic payment systems, and of course, where interstate commerce is permitted (though not necessarily required).

Before the federal government attempts to regulate a national marijuana marketplace, it would benefit from seeing how states regulate their marketplaces in a federal-legalization environment. For instance, as explained below in Section III.C, our proposal would leave states the option to engage in interstate commerce, should they so choose. We believe some states would almost certainly pursue this option by forming interstate compacts with other like-minded states.²¹² In the course of negotiating and implementing these compacts, states will have to establish new rules to govern interstate commerce in marijuana and to coordinate their disparate track-and-trace programs, testing requirements, packaging and labeling standards, tax regimes, and so on. It would certainly be advantageous for the federal government to observe how even a small number of states attempt to solve such regulatory challenges before trying to condense thirty-nine-plus disparate state regulatory regimes into a coherent federal regulatory policy. Indeed, the CAO discussion draft seeks input on how to “[d]esign . . . the track and trace regime to prevent cannabis diversion while minimizing compliance burdens,” and on “[w]hether and how a single federal track and trace regime could replace the various, complex,

209. See *supra* Section II.B (discussing obstacles imposed by the federal marijuana ban).

210. See, e.g., Mikos, *The Evolving Federal Response to State Marijuana Reforms*, *supra* note 30, at 5.

211. *Id.*

212. Oregon, for example, has already passed a law that contemplates interstate trade agreements once marijuana is federally legal. See OR. REV. STAT. § 475B.010–475B.545 (2019).

state-based seed-to-sale tracking systems.”²¹³ We think the best answers to these difficult questions, and others like them, would be found by observing state experimentation in a federal-legalization environment. Suspending the DCC so that states may conduct such experiments would give the federal government this opportunity to learn.

C. How Congress Could Legalize Without Disruption

In the prior Section, we laid out several reasons why Congress should authorize states to regulate their marijuana markets free of the constraints normally imposed by the DCC. In this Section, we explain how Congress could confer such authorization on the states, while also minimizing the possible costs associated with state protectionism.

1. The Proposal

It is well-settled that Congress may override the default rules of the DCC and authorize states to restrict interstate commerce.²¹⁴ To do so, however, Congress’s authorization “must be unmistakably clear.”²¹⁵ It can leave no doubts about its intention to suspend the DCC’s default rules limiting state power over interstate commerce.

Even though existing congressional reform proposals claim to preserve state authority over the marijuana industry, they would not satisfy this demanding test. All of them are preoccupied with preserving state authority against congressional regulation (e.g., the CSA). Most of them would do nothing to preserve state regulations against DCC challenge.²¹⁶ The STATES Act, for example, utterly fails to address the states’ power to regulate interstate commerce in marijuana following federal legalization.²¹⁷

The CAO would impose only a minor limitation on the DCC’s application to state marijuana regulations. In relevant part, the CAO would authorize each state to regulate marijuana transported into the state “in the same manner as though the cannabis had been produced in that State,” and it would also prohibit the transportation of marijuana into a state where it is “intended,

213. CAO DISCUSSION DRAFT, *supra* note 5, at 28.

214. *See supra* note 24.

215. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

216. *See, e.g., Mikos, Interstate Commerce in Cannabis, supra* note 11, at 884.

217. *See id.* (“[T]he STATES Act does not . . . empower the states to protect their local cannabis industries from interstate competition if they choose to legalize intrastate commerce in cannabis.”).

by any person interested therein, to be received, possessed, sold, or in any manner used, . . . in violation of any law of that State.”²¹⁸

This legislation would allow states to decide whether and to what extent (i.e., medical or adult-use) marijuana is legal within the state, but it would not insulate key state marijuana regulations from DCC challenge. The quoted language is copied almost verbatim from the Wilson Act of 1890 and the Webb-Kenyon Act of 1913,²¹⁹ two Prohibition-era congressional statutes that give states only limited leeway to regulate interstate commerce in alcohol. Most notably, the Supreme Court has previously held that these statutes do not authorize states to discriminate against out-of-state economic interests.²²⁰ Thus, even if Congress enacted the CAO, the DCC would still prevent legalization states from banning imported marijuana or giving local residents preference in awarding marijuana licenses (say, as part of a social equity program). In fact, the Wilson and Webb-Kenyon Acts do not even shield neutral state regulations from DCC scrutiny.²²¹ In applying the two statutes, the Court has held that states are still required to prove to a judge that such regulations actually achieve some legitimate, non-protectionist purpose—“mere speculation” and “unsupported assertions” about the effects of a regulation will not suffice to sustain it.²²²

In short, while the CAO would “give[] the States regulatory authority that they would not otherwise enjoy,”²²³ the power bestowed on them may prove vanishingly small.²²⁴ It would fail to forestall many of the problems

218. GAI21675 4LN, 117th Cong. § 111(a)–(b) (2021). As noted earlier, the CAO would also expressly limit state power over interstate commerce by barring states from blocking shipments of marijuana that are just passing through a state. *Id.* § 111(c).

219. The Wilson Act declared that a state could regulate liquor transported into the state “in the same manner as though such . . . liquors had been produced in such State.” 27 U.S.C. § 121. The Webb-Kenyon Act prohibited the transportation of liquor into a state where it was “intended, by any person interested therein, to be received, possessed, sold, or in any manner used, . . . in violation of any law of such State.” 27 U.S.C. § 122. Because the text of Section 2 of the 21st Amendment to the Constitution closely resembles the language of the Webb-Kenyon Act, it is understood “to have a similar meaning.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2468 (2019).

220. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 482 (2005) (“[T]he Webb-Kenyon Act expresses no clear congressional intent to depart from the principle . . . that discrimination against out-of-state goods is disfavored”); *see also, e.g., Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2469 (“Although some Justices have argued that [Section] 2 [of the 21st Amendment] shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine, the Court’s modern [Section] 2 precedents have repeatedly rejected that view.”).

221. *See Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474.

222. *Id.* (citing *Granholm*, 544 U.S. at 490).

223. *Id.*

224. *E.g., id.* at 2483 (Gorsuch, J., dissenting) (remarking that “it’s hard not to wonder what’s left

that would stem from the sudden application of the DCC to state marijuana regulations.

To suspend the application of the DCC and to avoid leaving any doubts about Congress's intentions, we propose statutory language that would clearly preserve state regulatory authority against the DCC. We have modeled the language of our proposal on the McCarran-Ferguson Act of 1945 (MFA),²²⁵ one of the few statutes the Court has found to completely suspend the DCC.²²⁶

Congress passed the MFA in response to the Supreme Court's 1944 decision in *United States v. South-Eastern Underwriters Ass'n*, which, for the first time in the nation's history, held that "insurance" is "commerce" and thus subject to the protections afforded by the DCC.²²⁷ The sudden change in the Court's Commerce Clause jurisprudence threatened to undermine the elaborate insurance codes states had developed and refined over the prior seventy-five years.²²⁸ Indeed, *South-Eastern Underwriters* immediately spawned a host of DCC lawsuits challenging those state regulations; it was feared that if those lawsuits were allowed to proceed, the DCC would disrupt the insurance market, just as we believe the DCC would disrupt the marijuana market if Congress does not suspend the doctrine following federal legalization.²²⁹

To avert this threatened disruption, Congress enacted the MFA. The short statute preserved state regulatory authority against the DCC.²³⁰ In relevant

of Webb-Kenyon" following judicial decisions narrowly construing the statute).

225. See 15 U.S.C. §§ 1011–1015.

226. See, e.g., *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655 (1981) ("[T]he McCarran-Ferguson Act removes entirely any Commerce Clause restriction upon California's power to tax the insurance business.").

227. 322 U.S. 533, 553 (1944), *superseded by statute*, McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015, *as recognized in* *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). The history of the MFA is discussed at length in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 411–16 (1946).

228. See, e.g., *Se. Underwriters Ass'n*, 322 U.S. at 590–91 (Jackson, J., dissenting in part) (suggesting that the majority's decision at the "very least will require an extensive overhauling of state legislation"); James B. Donovan, *Regulation of Insurance Under the McCarran Act*, 15 LAW & CONTEMP. PROBS. 473, 476 (1950) ("[M]any state officials and insurance executives feared that the foundations of state regulation and taxation had been shaken [by *South-Eastern Underwriters*]."); Charles D. Weller, *McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 590 (noting the decision "precipitated widespread controversy and dismay" and that "[c]haos was freely predicted" to follow from it) (quoting NEW YORK INSURANCE DEPARTMENT REPORT 71 (1969)).

229. See, e.g., *Se. Underwriters Ass'n*, 322 U.S. at 590–91 (Jackson, J., dissenting in part) (accusing the majority of "recklessness" because "Congress has not one line of legislation deliberately designed" to replace state laws that could be invalidated by the DCC); Weller, *supra* note 228, at 590–91 (discussing litigation spawned by *South-Eastern Underwriters*).

230. See 15 U.S.C. § 1011–1015. The MFA also included a separate provision that shielded state

part, it declared that “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States.”²³¹ Soon after Congress passed the MFA, the Court interpreted this language to suspend application of the DCC to state insurance regulations.²³²

While not necessarily an exemplar of statutory drafting, the MFA has successfully preserved state regulatory authority over the business of insurance for more than seventy-five years. Parroting the language used in the MFA would leave no doubt about Congress’s intention to completely suspend application of the DCC and preserve state regulatory authority over the business of marijuana.²³³ For reasons we explain below, we also include a sunset clause in the proposal, which would force Congress to reconsider the grant of authority after seven years.

In full, here is the language of our proposal:

Declaration of Policy

(A) Congress hereby declares that the continued regulation and taxation by the several States of the business of marijuana is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

(B) Section A shall expire seven (7) years after this Bill becomes law, unless renewed by Congress.

Congress could easily insert this provision into any of the legalization bills now under consideration without necessitating further changes to those measures. Our proposal could also be adopted as a stand-alone measure before Congress legalizes marijuana, to address claims that the DCC might already apply to marijuana commerce.²³⁴

regulations from preemption under congressional statutes that had suddenly become applicable to the business of insurance because of the Court’s decision. *Id.* § 1012(b).

231. *Id.* § 1011.

232. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427–36 (1946) (finding that the MFA authorized discriminatory state tax imposed on out-of-state insurance firms).

233. Utilizing the MFA’s language is particularly important to convey Congress’s intent to turn off the DCC because the Supreme Court presumes that “when Congress enacts statutes, it is aware of relevant judicial precedent.” *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010).

234. *See supra* note 98 and accompanying text (discussing claims and nascent litigation over them). If Congress suspended the DCC before legalizing marijuana, it could stipulate that the clock would

2. Forestalling the Disruptions Caused by Federal Legalization

Our proposal would forestall the disruption threatened by the sudden and unanticipated application of the DCC to marijuana commerce, just like the MFA helped forestall the disruption threatened by the doctrine's sudden application to insurance markets. By authorizing states to limit interstate commerce in marijuana, Section A of the proposal would address the issues we identify above. It would (1) preserve state regulations that burden interstate commerce and thereby prevent federal legalization from creating dangerous gaps in the regulation of marijuana markets; (2) preempt a race to the bottom among states competing for a suddenly mobile marijuana industry; (3) preserve existing state social equity programs; (4) provide "transition relief" to marijuana producers—including, perhaps most significantly, businesses owned by social equity applicants; and (5) avoid the federalism-related concerns raised by nationalizing the marijuana marketplace and stunting the ongoing state experiments in regulating marijuana.

Of course, there are other ways that Congress could defuse the problems we have identified. To avert a race to the bottom and plug regulatory gaps, for example, Congress could pass a body of new regulations to govern the marijuana industry, establishing a federal floor for labor and employment practices, energy and water consumption, the tracking of marijuana products, and sundry other matters. To promote the equitable distribution of economic gains from the freshly legalized marijuana market, Congress could try to devise a new federal social equity licensing program.²³⁵ And to compensate them for investments already made in soon-to-be defunct state regulatory regimes, Congress could issue payments to existing marijuana businesses.

Realistically, however, federal policymakers need time to study, devise, promulgate, and implement the regulations that would be needed to address these (and other) issues.²³⁶ The few regulations contemplated by the CAO A are a start, but as presently written, the bill only begins to address the concerns that would be triggered by the DCC and the sudden emergence of a national

not start running on the time period specified by the sunset clause in Section B of our proposal until Congress did legalize marijuana.

235. Although Congress could always try to create a federal social equity license, we are skeptical that any such program would constitute a satisfactory replacement for state-run social equity licenses invalidated by the DCC. *See supra* Section III.B.3.

236. Moreover, lawmakers would benefit from studying how marijuana markets function in a federal legalization environment before they attempt to establish national policies. *See supra* Section III.B.5 (noting that state lawmakers have not yet had the opportunity to develop and test regulations without having to consider the constraints imposed by the federal marijuana ban).

marijuana market. Until Congress and federal agencies can devise a more comprehensive code of federal regulations to plug regulatory gaps, forestall a race to the bottom, promote social equity in licensing, and compensate firms that have invested in state-based regulatory systems, among other things, Congress should preserve state control of the marijuana market, and that requires suspending the DCC, not just legalizing marijuana.

3. Accommodating Federal Regulation of the Marijuana Market

Importantly, Section A of the proposal leaves the door open for *Congress* to regulate the marijuana market. It preserves state power only against the generic judge-made default rules of the DCC—namely, only in the face of congressional “*silence*” and not against congressional regulation designed to govern the marijuana market. By suspending the application of the DCC, our proposal would simply give Congress and federal agencies time to promulgate any necessary federal regulations, without having to worry that the DCC would wreak havoc on marijuana markets before they could do so.

Section A would also leave the door open for states to allow interstate commerce in marijuana if they so desire. For example, a state could choose to permit non-residents to invest in its local marijuana industry, or it could permit firms to import and export marijuana. Notwithstanding the challenges raised by interstate commerce in marijuana, we believe that some states would welcome it, at least to a limited degree. Some producer states, for example, might seek to open new export markets for their local producers, and some consumer states might welcome imports to boost access to marijuana for their local consumers. In fact, a handful of states have already toyed with the idea of permitting interstate commerce in marijuana.²³⁷ Nothing in our proposal would prevent like-minded states from pursuing interstate sales and/or investments, say, through an interstate compact, or from standardizing the rules they impose on marijuana products. As we explained in Section III.B, this state experiment with interstate commerce would benefit federal lawmakers as they contemplate rules for a national marketplace.

In similar fashion, states have eventually welcomed interstate commerce in other markets Congress has authorized them to regulate free of the DCC. The experience following passage of the Douglas Amendment to the Bank Holding Companies Act (BHCA), which suspended application of the DCC

237. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 869–70 (discussing state proposals to buy and sell marijuana across state lines).

to interstate branch banking, provides a prime example.²³⁸

Prior to the 1950s, federal and state law restricted banks from engaging in interstate branch banking.²³⁹ However, inventive bankers began to circumvent this prohibition by utilizing entities known as bank holding companies.²⁴⁰ The holding companies would purchase subsidiary banks across multiple states and would operate those banks “in a unitary fashion similar to branches.”²⁴¹ Proponents of decentralized banking in Congress sought to ban this practice, believing that the interstate companies undermined the control states had traditionally exercised over branch banking within their borders and that interstate banking would lead to problematic levels of market concentration along with other economic harms.²⁴² However, rather than banning interstate bank holding companies entirely, Congress decided to give the states the power to approve or reject interstate bank acquisitions.²⁴³ The Douglas Amendment thus prohibits any acquisition unless “specifically authorized by the statute laws of the State in which [the acquired] bank is located.”²⁴⁴ The Supreme Court subsequently interpreted the Amendment as removing any DCC objection to state restrictions on such acquisitions.²⁴⁵ Notably, although

238. Bank Holding Company Act of 1956, 84 Pub. L. No. 511, 70 Stat. 133, § 3(d) (codified as amended at 12 U.S.C. § 1842(d)).

239. See, e.g., Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 972–75 (1992) (summarizing the history of branch banking regulation from the early 1900s through the early 1950s).

240. Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States*, 31 REV. BANKING & FIN L. 113, 121 (2011) (“[B]anks could form or reincorporate themselves as holding companies and hold separately incorporated banks in different states to engage in interstate banking, without running afoul of the then-ubiquitous interstate banking restrictions.”).

241. Wilmarth, *supra* note 239, at 975; see also *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 472 U.S. 159, 169 (1985) (noting that federal law prohibited interstate branch banking and that “[t]he bank holding company device . . . had been created to get around this restriction”).

242. See, e.g., H.R. REP. No. 84-609, at 2–6 (1955) (listing justifications for prohibiting interstate bank acquisitions, including that bank holding companies undermine state banking laws and hurt economic development); 102 CONG. REC. 6856–60 (1956) (remarks of Senator Douglas warning about the dangers of market concentration in banking).

243. 102 CONG. REC. at 6862 (remarks of Senator Payne, co-sponsor of Douglas Amendment, declaring that “the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion”); *Ne. Bancorp*, 472 U.S. at 172 (describing the broad purpose of the BHCA and the Douglas Amendment as being to “retain local, community-based control over banking”).

244. Bank Holding Company Act of 1956, 84 Pub. L. No. 511, 70 Stat. 133, § 3(d) (codified as amended at 12 U.S.C. § 1842(d)).

245. *Ne. Bancorp, Inc.*, 472 U.S. at 166.

many states initially eschewed interstate banking, they slowly came to welcome it as economic conditions evolved.²⁴⁶ The example of branch banking demonstrates that some states might welcome interstate commerce in marijuana, even if Congress gave them the power to ban it.

4. Limiting the Risk of Entrenchment

Although we recommend suspending application of the DCC, we also think it wise for Congress to limit the duration of the authority conferred by Section A. Thus, we have included a sunset clause in our proposal. Section B specifies that the authority conferred by Section A would expire after seven years. Congress could always renew Section A if it so desired, but doing so would require the passage of new legislation—i.e., the provision would not extend automatically. If Section A lapsed without being renewed, the default rules of the DCC would then apply to the business of marijuana, in the same way the DCC applies to (most) other businesses.

Including this sunset clause would help to limit the potential costs of suspending the DCC without necessarily sacrificing the benefits we foresee.²⁴⁷ Most, if not all, of those benefits could be obtained in a modest amount of time. For present purposes, we believe a period of seven years would be long enough for federal and state lawmakers and existing marijuana businesses to defuse the harms that the immediate application of the DCC would otherwise inflict. This period could be lengthened (or shortened), but we are not yet convinced that the states or marijuana businesses need a permanent reprieve from the DCC. Lawmakers just need enough time to complete their novel experiments in marijuana governance; to replace state laws that will be threatened by the DCC; to establish some ground rules (e.g., a federal regulatory floor) for when states compete for marijuana jobs and investments; and to consider launching new marijuana markets in states that have previously eschewed them. Likewise, existing marijuana businesses just need enough time to recoup the investments they have made in state markets and to prepare for the onset of national competition. To be sure, no single time period will be ideal for all of these purposes. But even a sunset clause with a relatively short fuse should help lawmakers and businesses prepare for the challenges posed

246. See *id.* at 163–65; Wilmarth, *supra* note 239, at 964, 977.

247. For illuminating discussions of the purposes served by sunset clauses, see generally John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442 (2010) and Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

by the DCC.

By contrast, the potential costs associated with state restrictions on interstate commerce will not necessarily diminish over time.²⁴⁸ For example, state restrictions on interstate commerce will sacrifice some productive efficiency in the marijuana market. As we explained in Section III.B, in a national market, firms could achieve greater economies of scale by consolidating their production, and they could lower the cost of growing marijuana by relocating to states with climates more conducive to outdoor cultivation (e.g., California rather than New Jersey). To be sure, we do not believe that these efficiencies justify opening a national market right now, given the heavy tradeoffs involved—the race to the bottom, regulatory gaps, demise of social equity programs, loss of heavy investment in state-based systems, and so on. But once lawmakers and businesses are able to reduce some of these tradeoffs, the balance may tip in favor of a national market protected *by* the DCC rather than state markets protected *from* the DCC.

The sunset clause lessens the chance that the authority conferred by Section A will linger on after the burdens of that authority have begun to exceed its benefits.²⁴⁹ Of course, even without a sunset clause, Congress could always repeal Section A if it came to believe the provision had outlived its usefulness.²⁵⁰ But as experience with the CSA has demonstrated, it can be difficult to repeal a federal statutory provision—even a wildly unpopular one—once it is on the books. The very hurdles that make passage of federal legislation difficult in the first instance also (ironically) make it difficult to repeal federal laws that have outlived their utility.²⁵¹ The sunset clause simply requires the proponents of state authority to convince a later Congress that the benefits of suspending the DCC continue to outweigh the costs. And it puts the onus on those proponents—rather than the opponents of state authority—because, as

248. We discuss these potential costs below in Section III.D.

249. Put another way, there is a danger that Section A would become entrenched without the inclusion of a sunset clause. For competing views on the vices (and possible virtues) of entrenchment, see, e.g., Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665 (2002) and John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *CAL. L. REV.* 1773 (2003).

250. See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors . . .”).

251. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *TEX. L. REV.* 1321 (2001) (discussing features of the national lawmaking process that make the passage of federal legislation difficult); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 *DENV. U. L. REV.* 997, 1001–02 (2012) (“[T]he same forces that originally failed to block adoption of the federal marijuana ban now work to entrench it.”).

just explained, the benefits of state authority are likely to wane over time while the burdens are not.

D. The Tradeoffs Involved

For the reasons we have explained, abruptly replacing the insular state-based marketplace system with a national marketplace would create a number of negative consequences that Congress can avoid by incorporating our proposed statutory language in any legalization bill that it enacts. Despite the merits of suspending the DCC for state marijuana laws, we expect some opposition to the proposal. Indeed, proposing that states be allowed to maintain protectionist laws in virtually any industry is likely to garner pushback for two primary reasons.

The first reason is that allowing protectionism could spark hostilities among the states. Indeed, “removing state trade barriers” of the sort that states “notoriously” maintained under the Articles of Confederation was “a principal reason for the adoption of the Constitution.”²⁵² If we allow states to enact protectionist measures, the argument goes, we might suddenly see the states engaging in tit-for-tat economic retaliation.²⁵³ The interstate retaliation and the resentment it breeds would be inconsistent with the very notion of a single union; at the extreme, it could “eventually imperil[] the political viability of the union itself.”²⁵⁴

The second objection to state protectionism is that it blocks the development of a more efficient national market. If states restrict the flow of goods from other states, their restrictions will “divert[] business away from presumptively low-cost producers without any colorable justification.”²⁵⁵ In other words, under this objection to protectionism, “economic efficiency is the essential national value arrayed against state autonomy” under the DCC.²⁵⁶

252. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019).

253. Justice Jackson famously explained the problem in *H.P. Hood & Sons Inc. v. Du Mond* by wondering aloud what would happen if “each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority,” or if Michigan and Ohio entered a trade conflict over their automobile and rubber-tire industries. 336 U.S. 525, 538–39 (1949).

254. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 (1986) (describing how the “resentment/retaliation[]” created by state protectionism could undermine the political viability of the union).

255. *Id.* at 1117.

256. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 63 (1988).

Neither objection to protectionism, if levied against our proposal, would carry much weight. As a threshold matter, the inclusion of a sunset clause in our proposed statutory language dissipates whatever merit these objections would otherwise have. If our proposal does, in fact, spark new hostilities among the states, or if it needlessly saddles the market with inefficiencies, Congress need do nothing to eliminate these problems; the DCC would automatically put a stop to state protectionism at the expiration of the sunset clause. Before time runs out on the clause, proponents of continued protectionism would have to catalyze legislative action—to convince Congress that the benefits of preserving state authority continued to outweigh the costs, always a tall task, to be sure. We thus anticipate that our proposal would most likely serve as a temporary—but crucial—tool to smooth the transition to a national marketplace. Any resentment between states and any market inefficiencies that result from suspending the DCC would likely be short-lived.²⁵⁷

This threshold matter aside, we do not believe that suspending the DCC would necessarily lead to more resentment and retaliation between the states. First, experience with the adoption of the MFA demonstrates that authorizing state protectionism does not always trigger hostilities that threaten the very fabric of the union. Since the MFA was passed more than seventy-five years ago, states have pursued sundry policies that would violate the DCC absent the MFA without causing rampant discord.²⁵⁸ Rancor and retaliation, in short, do not inevitably flow from the authorization we propose, especially when there are good countervailing reasons for conferring such authorization on the states (as we have shown).

Second, states have already been engaging in rampant protectionism in the marijuana market without sparking hostilities. Working under the assumption that Congress has already authorized them to ignore the DCC, they have imposed outright bans on imports and exports of marijuana and the licensing of non-resident firms and investors.²⁵⁹ Importantly, these restrictions

257. We also note that both objections to state protectionism in the abstract have less force when applied in the specific context of congressionally authorized protectionism. In such situations, a majority of the states' federal representatives will have agreed that protectionism is, in the particular context involved, beneficial to their states. The Supreme Court has long reasoned that the interstate commerce clause "did not secure absolute freedom [for the states] in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to [C]ongress." *Wilkerson v. Rahrer*, 140 U.S. 545, 561 (1891).

258. *See supra* Section III.C (discussing the MFA).

259. *See supra* Sections II.A, II.B.

have not led to the resentment and retaliation hypothesized by some champions of the DCC, let alone a threat to the states' political union.²⁶⁰ There is no reason to think that sentiments would suddenly change if Congress were to expressly authorize the states to do what they have already been doing for more than a decade. In any event, our proposal would not forestall interstate cooperation. As noted above, given time, states might form interstate compacts, through which they could unwind some of the restrictions they now impose on interstate commerce in marijuana and thereby foster interstate harmony, rather than resentment and retaliation.²⁶¹

To be sure, state marijuana reforms have generated some friction among the states. A handful of prohibition states have complained loudly that legalization states are causing rampant spillover effects. In one notable lawsuit challenging Colorado's pioneering adult-use legalization measure, the states of Nebraska and Oklahoma claimed that they were being deluged with marijuana purchased (legally) in Colorado's new market and smuggled across state lines into their jurisdictions.²⁶² Even legalization states arguably have an axe to grind against other legalization states. For example, differences in marijuana taxation have driven some consumers to smuggle marijuana from low-tax states to high-tax states.²⁶³

However, these frictions have arisen because of differences in state marijuana policies and not because of state protectionism (the core concern of the DCC). With or without the addition of our statutory language, existing federal proposals would do little to resolve these frictions. There would still be spillovers between prohibition states and legalization states and between states that adopt different approaches to legalization.²⁶⁴ Suspending the DCC is unlikely to exacerbate these horizontal federalism tensions; in fact, it might help *reduce* these tensions because it would enable legalization states to combat

260. Although a handful of private parties have recently challenged state residency requirements on DCC grounds, the restrictions states have imposed on their marijuana markets have generated little controversy to date. *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 11, at 861.

261. In similar fashion, states began forming interstate compacts after the passage of the Douglas Amendment, gradually easing the path toward interstate branch banking. *See* sources cited *supra* note 241.

262. *Nebraska v. Colorado*, 577 U.S. 1211 (2016) (denying plaintiffs' motion for leave to file a complaint under the Court's Original Jurisdiction); *see also* Mikos, *Marijuana Localism*, *supra* note 145, at 737–50 (discussing spillover effects of local marijuana laws).

263. *See* Hansen et al., *supra* note 119, at 3; *see also* Mikos, *Marijuana Localism*, *supra* note 145, at 744 (“[T]he threat of smuggling likely imposes a ceiling on the effective tax rate that any local community can realistically expect to collect on marijuana.”).

264. *See supra* Section II.B (discussing leading reform proposals); Section III.C (analyzing the CAOAs' attempt at preserving state authority over marijuana).

spillovers in ways the DCC would not otherwise permit.²⁶⁵ One possibility, for example, is that a legalization state could restrict the amount of marijuana that non-residents can purchase.²⁶⁶ This gesture, which would plainly violate the DCC once the federal government legalizes marijuana,²⁶⁷ would help reduce the spillover effects that some legalization states have on prohibition states and other legalization states that impose higher taxes and other regulatory burdens.

A market efficiency objection to our proposal would fare no better than the resentment and retaliation objection.²⁶⁸ True enough, a national marketplace would allow marijuana producers to take advantage of economies of scale and more cost-efficient methods of cultivating marijuana (e.g., growing it outdoors rather than indoors). Simply put, the costs of producing marijuana, and thus, the price that consumers pay for the drug, would be lower in a consolidated national market compared to the insulated state markets we have today.

But the efficiency gains are only part of the story. For one thing, the sudden shift to a more efficient national marijuana market also comes with significant costs: the erosion of regulatory controls on the industry, the premature termination of state regulatory experiments, the demise of social equity programs, and so on.²⁶⁹ In the near term, at least, we believe these societal costs far eclipse any gains that might follow from increasing productive efficiency.²⁷⁰

265. See Denning, *Vertical Federalism*, *supra* note 57, at 594 (suggesting that suspending the DCC could improve relations between legalization states and their prohibitionist neighbors).

266. A handful of states have previously imposed such discriminatory purchase restrictions to assuage the concerns of neighboring states. See *id.* (describing how Colorado restricted the amount of marijuana non-residents could purchase and positing that suspending the DCC would help states reduce spillovers as a matter of comity to their neighbors).

267. See generally Denning, *One Toke*, *supra* note 20.

268. Although wading into scholarly debates regarding the DCC's general merits is outside the scope of this paper, we do note that several leading scholars have criticized the market efficiency objection to state protectionism from a constitutional standpoint. See Regan, *supra* note 254, at 1124 (opining that "even though [the efficiency objection] would occur first to many constitutional scholars . . . it deserves to be downplayed" in part because it "was not primary in the framers' thinking"); Collins, *supra* note 256, at 64 (explaining that "efficiency is not the central national value served" by the DCC); Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, *supra* note 106, at 480–81 (casting doubt on the economic efficiency rationale for the DCC).

269. Cf. Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 234–47 (arguing that protectionist state laws may actually be more efficient (in some sense of the word) than a free-market policy when a complete picture of costs and benefits is taken into account).

270. In particular, we believe that harms to state social equity programs deserve special weight in debates over marijuana policy, as marijuana reforms have been designed in large part to redress the

But perhaps less obviously, we also question whether drastically reducing the cost of marijuana is a goal lawmakers should be pursuing in the short run.²⁷¹ For decades, prohibition has artificially inflated the retail price of marijuana. Once marijuana is legalized at both the federal and state levels, the price of the drug is likely to plummet, making it “far and away the cheapest intoxicant on a per-hour basis.”²⁷² As several prominent marijuana policy experts have surmised, it is “hard to imagine that such a dramatic price drop wouldn’t affect patterns of use.”²⁷³ Put more bluntly, a precipitous decline in the price of marijuana is likely to dramatically boost consumption of the drug, and even many proponents of legalization would acknowledge that is not necessarily a good thing.

We recognize that there may be better ways to prevent a collapse in the price of marijuana in the long run. Most obviously, excise taxes raise the effective price consumers pay, but they do so without sacrificing productive efficiency, and they also generate revenues that can be put to good use. In the near term, however, the DCC would hamper state efforts to prevent a collapse in the price of marijuana. For instance, if a state attempted to impose a heavy excise tax to curb consumption, it may soon find consumers flocking to other states to purchase their marijuana.²⁷⁴ Thus, until state or federal lawmakers can pass effective regulatory measures that will withstand scrutiny under the DCC, the best course of action may be to tolerate the inefficiencies of the insular state-based marketplace system and authorize states to continue to restrict interstate commerce in marijuana.²⁷⁵

disparate harms that marijuana prohibition inflicted upon certain communities (especially communities of color). Policy choices that disrupt efforts to achieve restorative justice should be disfavored.

271. *Cf.* *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2481 (2019) (Gorsuch, J., dissenting) (describing how during and after alcohol prohibition, “robust competition in the liquor industry was far from universally considered an unalloyed good; lower prices enabled higher consumption and invited social problems along the way”).

272. JONATHAN P. CAULKINS, BEAU KILMER & MARK A. R. KLEIMAN, *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 144 (2d Ed. 2016) (estimating that federal legalization “might allow a user to buy an hour’s marijuana intoxication for dimes rather than dollars”).

273. *Id.*

274. *See supra* Section III.B (highlighting difficulties states will face in collecting taxes in a national marketplace).

275. Some skeptics of our proposal posit that suspending the DCC would benefit large multi-state operators (MSO) at the expense of social equity businesses. They reason that MSOs benefit from some states’ restrictive licensing systems, which limit competition and create barriers to entry. They suggest that allowing states to restrict interstate commerce in marijuana—even temporarily—will perpetuate this unfair market structure in the states that have adopted restrictive licensing systems.

We agree that restrictive licensing can create problematic market structures, but we reject the

IV. CONCLUSION

As momentum for legalizing marijuana continues to build, the era of federal prohibition appears set to meet its long-overdue demise. While this would be a welcome development for the marijuana industry, the details of how Congress legalizes marijuana will have enormous consequences for that industry and the states that currently regulate it. In this Article, we shed light on a critical detail that Congress and other stakeholders have overlooked: The leading legalization bills would unleash the DCC on state marijuana laws, disrupting extant state-based markets and quickly replacing them with a national marijuana market. This abrupt transformation would create numerous problems. As we explain, it would produce troublesome regulatory gaps, spur a race to the bottom among states, undermine state social equity programs, create inequities for marijuana producers, and raise important federalism concerns.

This Article provides Congress with a much-needed solution to avoid these disruptions and smooth the transition to a national marijuana market. We propose specific statutory language that would suspend application of the DCC to states' marijuana laws, giving businesses and state regulators time to prepare for a national market and giving federal policymakers time to craft rules that will be needed once that market emerges. Our proposal also recognizes that the benefits of suspending the DCC are likely to fade over time. Accordingly, we include a sunset clause to ensure that a transition measure

idea that unleashing the DCC is the best way to address the problem. For the reasons we have discussed throughout this paper, we doubt that social equity businesses and other small businesses would benefit from an abrupt transition to a national market. In general, we suspect that larger businesses would be far better positioned to exploit the economic opportunities created by the DCC. In this vein, we note that after we made an earlier draft of this Article publicly available, a variety of industry groups and reform groups—including social-equity-oriented groups—expressed support for suspending the DCC in letters to lawmakers. *See, e.g.*, MARIJUANA POL'Y PROJECT, CANNABIS OPPORTUNITY AND ADMINISTRATION ACT—DISCUSSION DRAFT MARIJUANA POLICY PROJECT FEEDBACK 6 (2021), <https://www.mpp.org/assets/pdf/policy/federal/MPP-CAO-Act-Comments.pdf>; PARABOLA CTR., CAO COMMENT 6 (2021), <https://www.parabolacenter.com/pdf/Parabola%20Center%20CAOA%20Comments%208-31-21.pdf>; MINORITY CANNABIS BUS. ASS'N, COMMENTS ON BEHALF OF THE MINORITY CANNABIS BUSINESS ASSOCIATION REGARDING THE CANNABIS ADMINISTRATION OPPORTUNITY ACT DISCUSSION DRAFT 9–11 (2021), <https://minoritycannabis.org/wp-content/uploads/2021/09/Minority-Cannabis-Business-Assoc-CAO-Act-Comments-Final.pdf>. Support from groups like the Marijuana Policy Project, the Parabola Center, and the Minority Cannabis Business Association casts significant doubt on the proposition that our proposal would somehow hurt social equity businesses. In any event, unleashing the DCC is a very blunt way to address problematic licensing programs. A more straightforward solution would be to *change those licensing programs directly*—for example, by lifting the artificial caps some states have imposed on the number of marijuana licenses they will issue. Such a change could be made without inflicting the DCC (and the collateral damage it would cause) on the states.

does not become entrenched—unless, of course, Congress decides that continued suspension of the DCC is in the nation’s best interest.

While the Article makes a valuable contribution, the work on managing the transition from federal prohibition to legalization has only just begun. Here we briefly highlight just a sampling of questions that warrant further study.

First, we believe policymakers should consider whether to broaden our proposal to include state laws regulating the “business of hemp.” Hemp and marijuana are both cannabis; the only material difference is that hemp contains no more than trace amounts of the psychoactive cannabinoid delta-9 THC.²⁷⁶ Notwithstanding this difference, there is some overlap between the current marijuana and hemp markets. For example, the non-psychoactive cannabinoid CBD can be extracted from both hemp and marijuana, making hemp a suitable substitute for marijuana for some purposes.²⁷⁷ Given the market overlap, there may be reasons to authorize states to restrict interstate commerce in the business of both forms of cannabis.

Second, while this Article focuses on commerce among the states, policymakers also need to consider international trade in marijuana. At least one leading legalization proposal already contemplates such trade,²⁷⁸ but we think policymakers need to carefully weigh the consequences of opening international trade in marijuana too quickly. Most obviously, the sudden introduction of large quantities of inexpensive, imported marijuana could decimate U.S. marijuana producers, especially smaller scale producers like social equity applicants.

Finally, we believe lawmakers should carefully consider the scope of federal preemption in any legalization bill. The CSA contains a provision, § 903, that disclaims Congress’s intent to preempt states’ drug laws except in narrow circumstances.²⁷⁹ If Congress de-schedules marijuana from the CSA, § 903 will no longer apply to marijuana. Going forward, Congress will need to specify the extent to which new federal marijuana regulations (if any) will preempt

276. See 7 U.S.C. § 1639o(1) (defining hemp, in relevant part, as having less than 0.3% delta-9 THC). Until Congress legalized hemp in 2018, federal law made no legal distinction between psychoactive cannabis and non-psychoactive cannabis—both were forbidden. See Agricultural Improvement Act of 2018, Pub. L. No. 115-334, §§ 10113–10114, 132 Stat. 4490, 4908–4914 (legalizing hemp at the federal level).

277. See, e.g., Emma Stone, *What’s the Difference Between CBD Derived from Hemp and Cannabis?*, LEAFLY (Nov. 22, 2019), <https://www.leafly.com/news/cannabis-101/hemp-vs-cannabis-derived-cbd-whats-the-difference>.

278. See GAI21675 4LN § 401.

279. 21 U.S.C. § 903.

state regulations. We did not focus on preemption in this Article because the topic has historically received significant attention (in contrast to the DCC),²⁸⁰ but we think congressional reform proposals need to squarely address the preemption issue because it will also play an important role in shaping the marijuana market in the future.

While these issues plainly deserve attention, the most pressing matter is ensuring that Congress suspends the DCC when it repeals the federal marijuana ban. Only by doing so will it achieve legalization without disruption.

280. See, e.g., Mikos, *On the Limits of Supremacy*, *supra* note 69 (discussing limits on Congress's authority to preempt state marijuana reforms); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013) (analyzing the scope of § 903 in depth); Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 104–07 (2015) (discussing the modest scope of preemption under § 903).