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Senators Booker, Wyden, & Schumer:

We are professors at Vanderbilt University Law School and the University of Maine School of Law who research, write, and teach about cannabis law.[1] We thank you for the opportunity to submit comments on the proposed Cannabis Administration and Opportunity Act ("CAOA"). Both of us are strong proponents of ending federal cannabis prohibition and believe that the CAOA would be a monumental step in the right direction for our nation's drug policy.

We write, however, to apprise the Sponsoring Offices of an overlooked threat the CAOA poses to the states' regulatory authority and to the entrepreneurs now operating in state-regulated cannabis markets, especially social equity license-holders. The threat is not found in the express text of the CAOA itself; rather, it stems from a constitutional doctrine that the CAOA would suddenly activate: the Dormant Commerce Clause ("DCC"). In a nutshell, the DCC bars the states from unduly restricting interstate commerce in any given market. For the last 25 years, the states that have pursued reforms have operated under the assumption that the DCC does not apply to their cannabis regulations because Congress has forbidden interstate commerce in cannabis. Pursuant to this assumption, states have adopted a variety of regulations that directly or indirectly restrict interstate commerce in cannabis, including, most notably, bans on interstate sales of cannabis and limits on out-of-state investment in local cannabis businesses. These restrictions have helped the states to control the operation and structure of their respective cannabis markets to safeguard public health, promote social equity, and pursue other important policy goals.

Once Congress repeals the federal prohibition on cannabis, however, the assumption underlying these state regulatory regimes will no longer hold. The DCC will be unleashed upon the states, threatening to invalidate a wide range of state regulations and the policies they serve. Indeed, it is difficult to overstate the ramifications this development would have for state regulators and the companies that have built their businesses around existing state regulatory programs. In our forthcoming law review article, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*,[2] we identify five ways in which the DCC would negatively disrupt existing state cannabis programs:

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[2] A copy of the article is attached to this comment. It is also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909972.

- ***The DCC would eviscerate a key component of state social equity programs.*** The DCC would threaten the nascent social equity licensing programs states have adopted to boost minority participation in their cannabis markets. Such programs favor residents of *local* communities that have been disproportionately harmed by the war on drugs—a form of geographic discrimination the DCC plainly would not allow. While we applaud the Sponsoring Offices' decision to provide funds for state social equity programs in the CAOA, we believe that funding would prove more effective if states were allowed to continue to award cannabis business licenses to in-state residents who have been disproportionately harmed by cannabis prohibitions in the past.
- ***The DCC would create dangerous gaps in the regulation of the cannabis industry.*** The DCC could be used to challenge a wide range of state cannabis regulations that directly or indirectly burden interstate commerce, from licensing rules to labeling requirements. When those challenges prove successful, the DCC could create regulatory gaps, namely, situations in which there are no state or federal laws governing key activities of the cannabis industry. Although the CAOA would eventually plug some of these gaps, it will take time for federal agencies to study, draft, and promulgate new federal regulations to govern the cannabis industry.
- ***The DCC would trigger a race to the bottom among the states.*** By opening the door to interstate commerce in cannabis, the DCC will suddenly force states to compete for cannabis businesses. To attract the cannabis industry and the jobs and tax revenues the industry creates, states will be tempted to loosen the regulations they have previously imposed on the industry, setting in motion a race to the bottom where health, safety, environmental and other objectives are sacrificed.
- ***The DCC would greatly diminish the value of investments entrepreneurs have made in existing state cannabis programs.*** The DCC could suddenly make obsolete investments that thousands of entrepreneurs have made in existing state regulatory systems. For example, some states have required licensees to construct expensive indoor-grow facilities to participate in their local cannabis markets. Once the DCC is unleashed, however, states will no longer be able to block companies from producing cannabis elsewhere, under very different rules. Thus, a business that spent tens-of-millions of dollars to build an indoor cannabis production facility in a state may suddenly see the value of its investment plummet, as firms from other states where cannabis can be produced more cheaply outdoors start to ship their wares into the state.
- ***The DCC would prematurely end ongoing experiments states are conducting in the regulation of cannabis markets.*** The DCC could pressure states to abandon novel approaches to regulating the cannabis market, because courts may find that such novelty imposes an undue burden on interstate commerce in cannabis. As is perhaps most relevant to the CAOA, the pressure to harmonize state regulations would deprive federal policymakers of the benefit states now provide as laboratories of democracy. Indeed, the CAOA 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, state-based

seed-to-sale tracking systems."[3] We think the best answers to these difficult questions, and others like them, would be found by allowing states to continue their regulatory experiments following federal legalization.

Our article discusses each of these concerns in much more detail, but it also provides a simple and well-tested way for Congress to forestall these disruptions. Congress has the authority to suspend application of the DCC. And while Congress has exercised this authority sparingly, it has not hesitated to do so when a change in federal law threatens to disrupt an industry that has traditionally been regulated by the states. Most significantly, in the McCarran Ferguson Act of 1945 ("MFA"),[4] Congress suspended the DCC's application to state regulation of "the business of insurance" after the Supreme Court reversed long-standing precedent and held that insurance was a form of interstate commerce and was thus suddenly subject to the DCC.

We recommend that Congress do the same for "the business of cannabis"[5] in the CAOA. Specifically, drawing from the language of the MFA, we recommend adding the following provision to the CAOA:

> *Declaration of Policy*
>
> *(A) Congress hereby declares that the continued regulation and taxation by the several States of the business of cannabis 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.*

Section (A) of our proposal contains language that the Supreme Court has previously interpreted as fully suspending the application of the DCC to state regulations of a given market. The inclusion of this language would leave no doubt about Congress's intention to preserve state regulatory authority in this policy domain.[6]

While we believe that suspending the DCC is necessary to forestall the disruptions noted above, we also believe that state and federal lawmakers and cannabis businesses could successfully adapt to interstate commerce if given the time to do so. For this reason, Section (B) limits the duration of the authority conferred by Section (A). Thus, our proposal would not foreclose interstate commerce in cannabis. Instead, our proposal would give state, federal, and private actors time to prepare for interstate commerce and would thereby foster a more orderly transition to a national

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[3] CAOA Discussion Draft, p. 28.

[4] The MFA is codified at 15 U.S.C. § 1011-1015.

[5] We use the term "business of cannabis" here, rather than "business of marijuana," which we use in our article, because the CAOA defines "cannabis" to exclude hemp, making the terms "marijuana" and "cannabis" interchangeable.

[6] Importantly, Section 111 of the CAOA would not suspend the DCC altogether. That section 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 fail to insulate key state marijuana regulations from DCC challenge. *See* Bloomberg & Mikos, *Legalization Without Disruption*, at 41-42.

marketplace.[7] Congress could, of course, renew or extend the suspension of the DCC, but by including a sunset clause, our proposal would put the onus on champions of state-based cannabis markets to convince Congress that it should continue to suspend the DCC after 7 years (or whatever time period Congress selects).[8]

Importantly, Congress could easily insert this provision into the CAOA as presently written, without making further changes to the bill.

* * *

In sum, we urge the Sponsoring Offices to include our proposed statutory language in the CAOA (or other reform legislation) to ensure that federal cannabis legalization does not inadvertently disrupt the cannabis reform programs states have pioneered. If you have any questions about our proposal, please do not hesitate to contact us.

Respectfully,

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[7] Importantly, our proposal would allow states to pursue interstate commerce in cannabis even before the expiration of the sunset clause (e.g., through interstate compacts), but only if the states consented. *See* Bloomberg and Mikos, *Legalization Without Disruption*, pp. 46-47. In other words, our proposal would leave the decision of whether to participate in interstate commerce in the hands of the states.

[8] The sunset clause also ensures that our proposed language does not render Section 111 of the CAOA surplusage. If and when our provision sunsets, Section 111 will ensure that states can continue prohibiting marijuana, should they so choose.

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[**]

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 is on the verge of legalizing 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 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 on the verge of doing something that would have been unthinkable even a decade ago: legalizing 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

[1] 21 U.S.C. § 841, 844 (2021). "Marijuana" is defined as "cannabis" plants and any products made therefrom that contain more than trace amounts of the psychoactive chemical delta-9 THC. *Id.* at § 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 14(10): e0224289 (Oct. 2019) (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

reformed their own marijuana laws, Congress 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 this summer, for example, Senate Democratic leaders emphasized that the bill would "empower[] states to implement their own cannabis laws."[5] Consistent with this deference toward states' rights, these measures propose few (if any) federal regulations to take the place of outright prohibition.[6] Federal lawmakers seem content—even eager—to get out of the way and let states 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"). The DCC is an implied doctrine of constitutional law that circumscribes the states' power to regulate interstate

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not, even though they are regulated differently. *See infra* notes 245-**Error! Bookmark not defined.** and accompanying text (discussing hemp regulations).

[2] *See infra* Part 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* Part II.B.

[5] Senators Corey Booker, Ron Wyden, & Chuck Schumer, *Cannabis Administration & Opportunity Act Discussion Draft* (July 14, 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.*, *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-marijuana-policies (introducing STATES Act to "protect[] states, territories, and tribal nations as they implement their own marijuana laws without federal interference") (Sen. Elizabeth Warren); ("The bipartisan, commonsense [STATES Act] ensures the federal government will . . . not interfere in any states' legal marijuana industry.") (Sen. Cory Gardner).

Congressional reform proposals are discussed in more detail *infra* Part II.B.

[6] *See infra* Part II.B.

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. Rather than a single national market, we thus have thirty-seven (and counting) distinct state marijuana markets, each with its own set of state-licensed producers and distributors to supply local demand. Once Congress legalizes marijuana, however, the DCC will bring a swift and unexpected end to these insular state-based marijuana markets.[11]

It is difficult to overstate the ramifications this development would have for state regulators and extant marijuana markets. 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.[12] 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.[13] The DCC would also threaten nascent social equity licensing programs states have adopted to boost minority participation in their marijuana markets.[14] 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.[15] And almost overnight, the DCC would make obsolete investments that thousands of firms have made in existing state regulatory systems and insular state markets.[16]

[7] *See infra* Part III.A (discussing the DCC).

[8] *See infra* Part III.B.

[9] *Id.*

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

[11] *See infra* Part III.A-B (explaining how the DCC would threaten existing state marijuana regulations and the insular markets they maintain).

[12] *See infra* Part III.B.1.

[13] *See infra* Part III.B.2.

[14] *See infra* Part III.B.3.

[15] *Id.* (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).

[16] *See infra* Part III.B.4.

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.[17]

Unfortunately, the DCC has gotten little attention in burgeoning debates over the future of marijuana policy.[18] Although the doctrine has recently surfaced in a flurry of lawsuits challenging state residency requirements for marijuana business licenses,[19] it has still not dawned on state or federal lawmakers that state laws will be jeopardized by this "arcane"[20] doctrine the moment Congress legalizes marijuana.

This Article serves as a much-needed wake-up call. Building on previous 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. It is well-settled that Congress may suspend the DCC by authorizing state regulations that would otherwise run afoul of the doctrine.[21] We propose that Congress suspend the DCC in the marijuana market, at least for a limited period of time.[22] Borrowing statutory language Congress adopted to forestall

[17] We discuss the probable consequences of abruptly nationalizing the marijuana marketplace in Part III of this Article.

[18] The lone exception is a recent article that one of us authored, which addresses some consequences of creating a national marijuana marketplace. *See* Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857 (2021). Our work here builds on that article in several respects. Some earlier scholarship 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).

[19] *See infra* note 85 (discussing cases).

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

[21] *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 "Overrule" the Dormant Commerce Clause*, 53 U.C.L.A. 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*, 47 COLUM. L. REV. 547 (1947).

[22] *See infra* Part III.C (detailing proposal).

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, it would help federal policymakers manage that transition as well. Our proposal would not foreclose federal regulation of marijuana. Instead, it simply directs that regulation come from Congress or federal agencies, rather than judges. 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. 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.

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 reform proposals for legalizing marijuana, 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 it would clearly authorize states to regulate marijuana outside the shadow of the DCC. It also explains how Congress could minimize the 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 25 years since California voters made their state the first in the nation to legalize marijuana for medical purposes.[23] That groundbreaking law, the Compassionate Use Act of 1996 ("CUA"), created a simple exception to the state's prohibitions on possessing and cultivating

[23] *See* Proposition 215, Compassionate Use Act of 1996 (codified at CAL. HEALTH & SAFETY CODE § 11362.5).

marijuana that applied to medical marijuana patients and their caregivers.[24] 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. 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 thirty-seven states (including Washington D.C.) where marijuana is legal for medical purposes. And, in nineteen of those states, marijuana is legal for recreational (adult) use as well.[25] The marijuana reforms enacted in these states not only liberalize the states' criminal marijuana laws, they 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.[26] 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 for example. The Marijuana Enforcement Division ("MED") of Colorado's Department of Revenue has licensing and regulatory authority over more than 450 cultivators, 225 manufacturers, and 425 retail facilities, as well as six other categories of licensed marijuana businesses.[27] 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

[24] *Id.* at § (d) (exempting patients and their caregivers who possess or cultivate marijuana "for the personal medical purposes of the patient").

[25] *See, e.g.*, Elisabeth Garber-Paul & Ryan Bort, *The United States of Weed*, ROLLING STONE (Apr. 22, 2021), https://www.rollingstone.com/feature/cannabis-legalization-states-map-831885/ (mapping the legal status of marijuana across the states). The map depicted here lists Mississippi as a medical marijuana state. However, since that map's publication, the Mississippi Supreme Court invalidated the state's legalization measure, making the substance illegal once again. *See In re Initiative Measure No. 65*, No. 2020-IA-01199-SCT, 2021 WL 1940821 (Miss. May 14, 2021).

[26] *See, e.g.*, REV. CODE WASH. §§ 69.50.325, 59.50.342 (authorizing the Washington State Liquor and Cannabis Board to promulgate marijuana regulations and license marijuana businesses); M.C.L.S § 33.27001 (empowering the Michigan Marijuana Regulatory Agency to regulate the industry and license marijuana businesses).

[27] *See MED Licensed Facilities*, MED, https://sbg.colorado.gov/med-licensed-facilities (last visited June 23, 2021) (listing licensed marijuana businesses).

regulations.[28] These regulations are highly detailed and complex. The 438 pages of rules include provisions governing business ownership and licensing;[29] a range of health and 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;[30] and numerous product requirements involving labeling and packaging, inventorying, testing, and storage.[31]

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.[32] 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.[33] States similarly differ in whether they prohibit, permit, or require marijuana businesses to be vertically integrated.[34] They have adopted different rules for how many businesses a single entity or individual may control.[35] And, states have taken different approaches regarding whether and how to give socially

[28] *See* COLO. SEC. OF STATE, MED CODE OF COLO. REGS., https://www.sos.state.co.us/CCR/NumericalCCRDocList.do?deptID=19&agencyID=185 (last visited June 23, 2021) (click links to 1 COLO. CODE REGS. 212-1, 1 COLO. CODE REGS. 212-2, & 1 COLO. CODE REGS. 212-3 to see the MED's history of regulatory activity); 1 COLO. CODE REGS. 212-3 (combining prior rules into a single set of marijuana regulations).

[29] 1 COLO. CODE REGS. 212-3 §§ 2-200-.285.

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

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

[32] *Compare, e.g.*, UTAH CODE ANN. § 26-61a-305 (authorizing the Department of Health to award 15 initial medical cannabis pharmacy licenses), *with* OR. REV. STAT. §§ 475B.040-.045 (establishing a licensing process without a license cap).

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

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

[35] *E.g.*, MO. CONST. art. XIV, §§ 1(3)(8)-(1) (creating limits of 3 cultivation, 5 dispensary, and 3 manufacturing licenses); N.Y. CANNABIS LAW §§ 68, 69, & 72 (prohibiting ownership of multiple production licenses and prohibiting ownership of more than 3 retail licenses).

disadvantaged applicants preference in awarding licenses.[36] All of these policy choices combine to dictate how concentrated the state's marijuana marketplace will be, what barriers of 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. 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.[37] Restrictive pesticide policies make outdoor cultivation operations—which cannot control for pests and other contaminants as easily as indoor environments—particularly challenging.[38] Such policies are thus more palatable for states where outdoor growing conditions are naturally less hospitable, as most cultivators already operate indoor grow facilities.[39] 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.[40] States such as California and Oregon thus maintain more permissive pesticide policies.[41]

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[36] *Compare, e.g.*, 410 ILL. COMP. STAT. § 705/15-30 (allocating 50 points in Illinois' competitive licensing process to "Social Equity Applicants"), *with* ME. REV. STAT. ANN. tit. 28-B, §§ 101-1102 (giving no preference to social equity applicants in Maine's adult-use marijuana licensing process).

[37] *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).

[38] *See, e.g.*, Nate Seltenrich, *Into the Weeds: Regulating Pesticides in Cannabis*, 127(4) ENVT'L HEALTH PERSPECTIVES 5 (2019) (describing how a blanket pesticide ban could "all but preclude the use of outdoor cultivation" and noting that indoor cultivations environments can "be more tightly controlled").

[39] *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.

[40] *See* Seltenrich, *supra* note 38, at 5 (positing that Canada's approach of banning pesticide use would not work in California, given the state's ideal outdoor cultivation conditions).

[41] *See, e.g.*, CAL. DEP'T OF PESTICIDE REGULATION, *Cannabis Pesticides that Cannot be Used*, https://www.cdpr.ca.gov/docs/cannabis/cannot_use_pesticide.pdf, *and* CAL. DEP'T OF PESTICIDE REGULATION, *Cannabis Legal Pesticide Use*,

To make matters more complex, states must grapple with energy and environmental considerations in determining whether their pesticide rules (and other cultivation rules) should incentivize indoor or outdoor cultivation. Indoor cultivation is incredibly energy intensive.[42] Should states adopt permissive pesticide policies to shift more production outdoors, thereby reducing energy consumption?[43] On the other hand, outdoor cultivation can lead to deforestation and it requires a tremendous amount of water.[44] 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.[45]

Crucially, the thirty-seven states that have legalized marijuana not only have thirty-seven unique regulatory regimes, they also have thirty-seven insular marijuana marketplaces. That is to say, every state prohibits licensed marijuana businesses from importing or exporting marijuana.[46] Marijuana producers may sell their crop only to retailers licensed in their state, and retailers may purchase their marijuana only from producers licensed in their state. This insular, state-based marketplace system makes marijuana a unique

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* (Mar. 15, 2021), https://www.oregon.gov/oda/shared/Documents/Publications/PesticidesPARC/GuidelistPesticideCannabis.pdf (compiling a 24-page list of approved pesticides for marijuana in Oregon).

[42] *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. ENVTL. L. 385, 403 (2015) (describing the intensive energy demands involved in cultivating marijuana indoors).

[43] *See, e.g.*, Colin A. Young, *Indoor cannabis grow centers draining electricity*, BERKSHIRE EAGLE (Jun. 1, 2021), https://www.berkshireeagle.com/news/local/statehouse/indoor-cannabis-grow-centers-draining-electricity/article_496d8314-c315-11eb-ad41-8fb75b47eb5e.html.

[44] *See* Warren, *supra* note 42, at 406-408 (describing the negative externalities of outdoor cultivation).

[45] Seltenrich, *supra* note 38, at 2.

[46] *See, e.g.*, Scott Bloomberg, *Frenemy Federalism*, 56 U. RICH. L. REV. ___ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3890328 (describing how states prohibit interstate marijuana transactions and the resulting system of insular, state-based marijuana marketplaces); Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 862-63 (same).

commodity in the United States. As we explain below, states ordinarily cannot restrict imports and exports of goods from other states.[47]

In addition to states' express import-export prohibitions, some states restrict non-residents from owning marijuana businesses.[48] 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.[49]

Resident ownership restrictions are also prevalent in states' social equity programs. Rectifying the inequities caused by the War on Drugs was a major justification for state marijuana reforms.[50] 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.[51] 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.[52] 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.[53]

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.[54] Indeed, a 2013 Department of Justice memo, known as the

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[47] *See infra* Part III.A.

[48] *See* Bloomberg, *supra* note 46, at ___; Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at ____; Brannon P. Denning, *Marijuana, Federal Power, and the States: Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. 567 (2015).

[49] *See* Bloomberg, *supra* note 46, at ____ (providing examples for both types of residency rules).

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

[51] *See, e.g.*, *id.* at § 705/15-30(c)(5) (awarding 50 points to license applicants who qualifiy as a "Social Equity Applicant").

[52] *Id*.

[53] *Id.* at § 705/1-10 (defining "Social Equity Applicant" and "Disproportionately Impacted Area"); ILL. DEP'T OF COMMERCE & ECON. OPPORTUNITY, *Disproportionate Impacted Area Map*, https://www2.illinois.gov/dceo/CannabisEquity/Pages/DisproportionateImpactedAreaMap.aspx (last visited June 25, 2021) (showing that qualifying Disproportionately Impacted Areas are all within Illinois).

[54] *See* Bloomberg, *supra* note 46, at ___ (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 18, at ___ (explaining how "some states have suggested that restricting interstate

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."[55] 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.[56] 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.[57]

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. 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.[58] That statute bans the production, possession, and distribution of marijuana in nearly all circumstances.[59]

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commerce is necessary to forestall a federal crackdown on their state-licensed cannabis industries").

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

[56] *See generally* Denning, *Marijuana, Federal Power, and the States, supra* note 48 (analyzing the vertical and horizontal federalism issues involved with state marijuana legalization).

[57] *See, e.g.*, Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 865 ("Economic protectionism constitutes the most straightforward reason legalization states have restricted interstate commerce in cannabis.").

[58] To be sure, the federal government has narrowed its definition of marijuana and adjusted its enforcement policies over time. *See generally* Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1 (2020) (detailing changes to federal marijuana policy over the past 25 years). Despite these adjustments, however, federal law has continued to ban marijuana throughout the period of state reforms.

[59] 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,[60] 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.

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,[61] they have to pay exorbitantly high federal tax rates,[62] and they cannot access federal statutory protections for bankruptcy and trademarks.[63] Likewise, state regulators have fretted about federal preemption of their regulations, they have eschewed some policy proposals—including state-owned distribution systems like those used to ease the path out of alcohol prohibition, and they have struggled to monitor financial transactions in the industry, given that its cash payments model does not create paper trails for regulators to follow.[64]

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 proposals now on the table—including the Strengthening the Tenth Amendment Through Entrusting States Act ("STATES Act")[65] and the

[60] *See* 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).

[61] Julie Andersen Hill, *Banks, Marijuana & Federalism*, 65 CASE W. RES. 597, 600 (2015).

[62] Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 526-27 (2014).

[63] Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting A Fair Shake When Marijuana-Related Cases Are Dismissed*, AM. BANKR. INST.J. 24 (Sept. 2017); Robert A. Mikos, *Unauthorized and Unwise: The Lawful Use Requirement in Trademark Law*, 75 VAND. L. REV. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3862859.

[64] *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), 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 61, at 603 ("[C]ash businesses have opportunities and incentives to underreport taxes."); Mikos, *On the Limits of Supremacy*, supra note 60, at 1440-43 (discussing examples of how preemption concerns have delayed or stifled state marijuana reforms).

[65] H.R. 2093, 116th Cong. (2019).

Cannabis Administration and Opportunity Act ("CAOA")[66]—share a few features in common. Each of them would legalize marijuana by descheduling the drug under the CSA.[67] 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.[68] In addition to eliminating the restrictions imposed directly by the CSA, descheduling 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 controlled substances [] within the meaning of Schedule I and II" of the CSA.[69]

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 CAOA contains express language reaffirming state power to regulate marijuana transported into the state "in the same manner as though the cannabis had been produced in that State,"[70] as well as language prohibiting 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."[71] In a press release announcing the proposal, its sponsors—Senators Cory Booker, Ron Wyden, and Chuck Schumer—pointedly emphasized that it would "empower[] states to implement their own cannabis laws."[72]

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[66] GAI21675 4LN, 117th Cong. (2021). The CAOA updates and expands upon a previously introduced proposal known as the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act"). S. 2227, 116th Cong. (2019).

[67] The CAOA would do this directly, nationwide. *See* GAI21675 4LN at § 101. The STATES would empower states to de-schedule (or reschedule) marijuana within their borders. *See* H.R. 2093 at § 2.

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

[69] 26 U.S.C. § 280E.

[70] GAI21675 4LN at § 111(a).

[71] *Id.* at § 111(b).

[72] CAOA Discussion Draft, *supra* note 5. *See also id.* ("The legislation preserves the integrity of state cannabis laws."); CAOA Fact Sheet (undated), 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 CAOA contains only a single provision that expressly limits state authority over the marijuana market. Namely, Section 111(c) would bar a state from blocking shipments of marijuana that are merely passing through the state.

Consistent with that theme, the CAOA and other proposals would impose few new federal regulations on the marijuana market that might impinge upon state regulatory authority. The STATES Act, for example, 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 21 years old and it would ban the sale of marijuana at truck stops, both without regard to whether state law allowed such sales.[73]

The CAOA would go a step further, but it still includes only a handful of new federal regulations. 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."[74] Like the STATES Act, it 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 ban the sale of products containing both marijuana and alcohol or nicotine.[75] The proposal would also require some marijuana businesses to obtain a federal license, in addition to any license required by state or local government. To be sure, the CAOA contemplates some additional federal regulations beyond these few measures.[76] But it leaves those regulations to be worked out another day.

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.[77] For its part, the marijuana industry looks

[73] Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 7, 2018), https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/.

[74] GAI21675 4LN at §§ 110.

[75] GAI21675 4LN at § 502.

[76] For example, the CAOA calls for various federal agencies to design a national tracking system and to promulgate "product standards that are appropriate for the protection of public health." *Id.*

[77] *See* Kyle Jaeger, *Senators Unveil Federal Marijuana Legalization Bill To Mixed Reviews, 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 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*, BUSINESS WIRE (July 16, 2021), 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), https://www.prnewswire.com/news-releases/statement-on-the-booker-wyden-

forward to being free of the obstacles now imposed by federal law. 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 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 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.[78]

schumer-cannabis-administration-and-opportunity-act-301333129.html (announcing CAOA endorsement).

[78] *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

In a nutshell, the DCC blocks the states from imposing undue burdens on the interstate flow of goods, services, and capital.

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.[79] 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.[80]

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.[81] 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 *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.[82]

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.[83] 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 Part 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.

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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.").

[79] *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))).

[80] City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

[81] 397 U.S. 137, 142 (1970).

[82] *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959) (invaliding state law requiring use of contoured mudflaps on trucks); Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 353 (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).

[83] *See supra* notes 46-57 and accompanying text.

In previous work, we reached different conclusions about whether the federal marijuana ban currently suspends the DCC's application to state marijuana regulations.[84] The same issue is now before a handful of federal courts adjudicating recent challenges to state residency requirements for marijuana licensing.[85] Notwithstanding our disagreement over the present status of the doctrine, however, we agree that if Congress repeals the federal marijuana 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 import-export bans and residency preferences for marijuana licenses, plainly would not survive DCC challenge. The Supreme Court has previously invalidated nearly identical restrictions states have imposed on interstate commerce in other markets.[86] 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,"[87] eroding the control states now wield over the marijuana industry—a troublesome development, for reasons discussed below.[88]

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[84] *Compare* Robert A. Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 876-882 (arguing that the federal marijuana ban does not suspend the DCC), *with* Bloomberg, *supra* note 46, at __ (arguing that in order to preserve the delicate "frenemy" relationship between the federal and state governments regarding marijuana, courts should presume that protectionist state marijuana laws survive under the DCC).

[85] 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* Preliminary Injunction Order, Toigo v. Dep't of Health & Senior Svcs., No. 2:20-cv-04243 (W.D. Mo. June 21, 2021); Preliminary Injunction Order, Lowe v. City of Detroit, No. 2:21-cv-10709 (E.D. Mich. June 17, 2021); NPG, LLC v. City of Portland, 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 court 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, Original Investments v. Oklahoma, No. 5:20-cv-00820 (W.D. Okla. June 4, 2021). Another court dismissed a DCC challenge and remanded the case to state court by invoking *Pullman* abstention. Motion to Dismiss Order, Brinkmeyer v. Washington, No. 3:20-vs-5661 (W.D. Wash. Oct. 5, 2020).

[86] Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 865-75 (discussing DCC decisions invalidating analogous state laws).

[87] *See id.* at 861.

[88] See *infra* Part III.B.

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.[89] 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. 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 to a court that the added testing actually improves the safety of marijuana products—for example, that the chemical of concern is actually hazardous 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.[90] 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.[91]

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

[89] See *supra* Part II.A.

[90] Indeed, states have already been deluged by a flood of recent lawsuits challenging state residency preferences for marijuana licenses. *See supra* note 85.

[91] Justice Scalia once 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 Enterprises, 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, 417 (2008) (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").

are conspicuously silent on the DCC and its implications for state regulations.[92]

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.[93] In this Section, we unpack 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.[94]

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.[95] Anytime the DCC blocks the

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[92] *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, 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 CAOA, which does explicitly address state power over imported marijuana. However, as discussed more below in Part III.C, the limited authority conferred on the states by CAOA would leave many state marijuana regulations vulnerable to DCC challenge.

[93] *See infra* Part III.C.1.

[94] *See supra* Part II.B.

[95] 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).

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.[96]

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 began 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.[97] 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.[98]

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.[99] By providing states with detailed information about regulated activities, these closed-loop systems

[96] 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. L. REV. 1, 5 (2003) (discussing gap created by Supreme Court decision invalidating state regulation of groundwater exports); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 407 (2016) (discussing gap created by Supreme Court decision invalidating state regulation of interstate electricity sales).

[97] *See generally* Robert A. Mikos, *The Evolving Federal Response*, *supra* note 58 (detailing how Congress and the DOJ have reacted to state marijuana reforms across time).

[98] 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 (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.

[99] *See supra* Part II.A (describing state licensing and tracking systems).

have greatly enhanced the states' ability to enforce their regulations on the marijuana market.[100] For example, because every gram is accounted for, licensees cannot easily evade taxes levied on the sale of marijuana produced in this system.

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 May 2021, the states had collected nearly $8 billion in tax revenue from the adult-use market alone.[101] 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.[102] 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.[103]

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[100] *E.g.*, Paul Monies, *Seed-to-Sale Delays Sow Confusion in Medical Marijuana Market*, OKLAHOMA 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).

[101] *See* MARIJUANA POLICY PROJECT, *Marijuana Tax Revenue in States that Regulate Marijuana for Adult Use* (May 2021), https://www.mpp.org/issues/legalization/marijuana-tax-revenue-states-regulate-marijuana-adult-use/.

[102] *See* Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEG. FORUM 221, 234, n.53 (discussing use taxes and the challenges states face enforcing them).

[103] Of course, some evasion already exists because of the black market. *See* Benjamin Hansen et al., *Drug Trafficking Under Partial Prohibition: Evidence from Recreational Marijuana*, NBER Working Paper 23762 (Oct. 2017), https://www.nber.org/system/files/working_papers/w23762/revisions/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.

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 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,[104] 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.[105] These statutes provide federal criminal penalties for violations and also authorize state officials to seek injunctive and other civil relief against violators.[106] 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 newly 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 CAOA) would lend some assistance to the states, it is a far cry from the support Congress has leant in other markets.[107] Moreover, regulations authorized by the CAOA (or any other federal legalization proposal) could take years to develop.[108] 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.

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[104] 15 U.S.C. §§ 375-78.

[105] 18 U.S.C. §§ 2341-43.

[106] 15 U.S.C. §§ 377-378; 18 U.S.C. §§ 2345-46.

[107] The proposed CAOA would require proof that state taxes had been paid on bulk (more than ten pounds) quantities of marijuana, see GAI21675 4LN § 112, 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.

[108] For example, the CAOA envisions the creation of a national marijuana tracking system, see supra note 76. 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.[109] 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. 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.[110]

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. Under the Constitution, a state may not project its regulations beyond its own borders.[111] Although states do have some leeway to regulate the products that firms sell locally, they cannot necessarily regulate how out-of-state firms

[109] For a more in-depth discussion of state marijuana regulations, see supra Part II.A.

[110] *E.g.*, Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DEN. 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.").

[111] *See generally* 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).

make those products or how they are structured.[112] 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 18 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.

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. 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.[113] Such threats would ring hollow today, because a state can (presumably) ban a firm from selling locally if it dares to leave the state. Once Congress legalizes marijuana, however, such a ban plainly will not survive DCC challenge.[114]

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.[115] However, relaxing this requirement would expand the size of the local labor pool and thereby give a state a competitive advantage in recruiting marijuana

[112] *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 336–37 (1989) ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.").

[113] Firms will, of course, also consider other factors when deciding whether to relocate. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 891-92 (discussing the climate and reputational advantages some states will enjoy when competing for marijuana businesses).

[114] *See supra* Part III.A.

[115] *See, e.g.*, MICH. COMP. LAWS ANN. § 333.27961(11)(e) (2021) ("No marihuana establishment may allow a person under 21 years of age to volunteer or work for the marihuana establishment.").

producers who are currently struggling with rising labor costs and worker shortages.[116] Because other states could not block the sale of marijuana produced 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.[117] 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 already reached $17.5 billion and are expected to grow to more than $41 billion by 2026.[118] In less than a decade, the industry has created more than 300,000 new full-time jobs across the country.[119] 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.[120] This newly concentrated industry will be able to flex its muscle against state regulators much more effectively than it does today.[121]

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

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[116] *See* Beau Whitney, *Labor Supply Shortage Represents a Significant Risk to the Cannabis Industry in 2021*, NATIONAL CANNABIS INDUSTRY ASSOCIATION (June 8, 2021), https://thecannabisindustry.org/labor-supply-shortages-represents-a-significant-risk-to-the-cannabis-industry-in-2021/.

[117] *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.").

[118] Will Yakowicz, *U.S. Cannabis Sales Hit Record $17.5 Billion as Americans Consume More Marijuana Than Ever Before*, FORBES.COM (Mar. 3, 2021), 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).

[119] Bruce Barcott et al., *Jobs Report 2021*, LEAFLY.COM (2021), https://leafly-cms-production.imgix.net/wp-content/uploads/2021/02/13180206/Leafly-JobsReport-2021-v14.pdf.

[120] *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 889 ("Opening the doors to interstate commerce will likely spur consolidation of the cannabis industry.").

[121] See Zephyr Teachout & Lina 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.").

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.[122] 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 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. Congress is the lone lawmaking body that represents all of the geographic interests 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.[123] 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.

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 popular social equity programs. It is widely understood that the nation's War on Drugs created (and exacerbated) significant racial inequities.[124] Indeed, a 2013

[122] *See infra* Part III.D (discussing costs of state restrictions on interstate commerce).

[123] Similar factors favor state versus local control of marijuana policy at the sub-national 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.").

[124] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2020); *ACLU Research Report, A Tale of Two Countries* (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-

report from the ACLU estimated that between the years 2001 and 2010, Black people were 3.73 times more likely than White people to be arrested for marijuana possession, despite using the drug at similar rates.[125] Significant disparities exist for other minorities as well,[126] and they have not abated in the past decade, even as an ever-increasing number of states have pursued marijuana reform.[127]

While the War on Drugs was (and is) supported by federal resources,[128] state and local law enforcement agencies account for the vast majority of the nation's drug arrests in general and marijuana arrests in particular.[129] 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. 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.[130] 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.[131]

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arrests-era-marijuana-reform; *ACLU Research Report, The War on Marijuana in Black and White* (June 2013), https://www.aclu.org/report/report-war-marijuana-black-and-white.

[125] *The War on Marijuana in Black and White*, *supra* note 124, at 4.

[126] *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, et al., *240,000 Marijuana Arrests: Costs, Consequences, and Racial Disparities of Possession Arrests in Washington, 1986-2010*, MARIJUANA ARREST RESEARCH PROJECT (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).

[127] *A Tale of Two Countries*, *supra* note 124, at 29.

[128] *See, e.g.*, ALEXANDER, *supra* note 124, 91-101 (describing the various ways in which the federal government supports state and local law enforcement in executing the War on Drugs).

[129] *See, e.g.*, Mikos, *On the Limits of Supremacy*, *supra* note 60, 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").

[130] *See, e.g.*, *supra* note 36 (describing Illinois' 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).

[131] *See, e.g.*, 410 ILL. COMP. STAT. 705/7-10 (creating a fund for low-interest loans, grants, and training opportunities for social equity applicants); *Social Equity Program*,

At the core of each 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.[132] 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.[133] 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' 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 access to social equity benefits. But the use of explicit racial preferences would likely violate another constitutional provision: the Equal Protection Clause.[134] 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.[135] 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.[136]

Strict scrutiny is almost always fatal, and the Court's test regarding remedial racial classifications would almost certainly doom the use of racial preferences in marijuana licensing. In fact, a court has already invalidated

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MICHIGAN MARIJUANA REGULATORY AGENCY, https://www.michigan.gov/documents/mra/SE_Infographic_2020_692436_7.pdf (summarizing how Michigan reduces fees for social equity applicants).

[132] *See, e.g.*, *supra* notes 52-53 and accompanying text (discussing Illinois' criteria for qualifying as a social equity applicant); N.J. STAT. ANN. § 24:6I-36(e) (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) (defining "communities disproportionately impacted" in terms of communities within New York).

[133] *See supra* Part III.A. *See also* Lowe v. City of Detroit, No. 21-CV-10709, 2021 U.S. Dist. LEXIS 113444 (E.D. Mich. June 17, 2021) (finding that Detroit's residency-based social equity program likely violates the DCC).

[134] U.S. CONST. amend. XIV, § 1.

[135] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[136] *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).

one program that reserved 15% of a state's medical marijuana business licenses for certain minority groups.[137] 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.[138] 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.[139]

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.[140] 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 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

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

[138] *See id.* ("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 . . . .").

[139] *Id.* at *4-*6 (rejecting the state's reliance on these factors).

[140] Courts have upheld the use of geographic criteria in lieu of explicit race-based criteria in other state or local programs. *See, e.g.*, Boston Parent Coal. for Academic Excellence Corp. v. Sch. Comm. of Boston, ___ F. Supp. 3d __, 2021 U.S. App. LEXIS 12692, *48 (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).

incarceration rates for marijuana offenses; and so on.[141] 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.[142] Moreover, the effects of past discrimination vary considerably from state to state.[143] 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.

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 economies of scale.[144] 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.

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.[145] If Congress suspends the DCC when it removes this obstacle, it will give social equity entrepreneurs

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[141] *See, e.g.*, 410 ILL. COMP. STAT. 705/1-10 (listing factors for determining whether an area is a DIA); N.J. STAT. ANN. § 24:6I-36(e) (same).

[142] 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 Guidance for Identifying Areas of Disproportionate Impact*, MASSACHUSETTS CCC (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* Jennifer M. Whitehall & Mark Melnik, *Identifying Disproportionately Impacted Areas by Drug Prohibition in Massachusetts*, 17, 33 (Mar. 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 communities located outside of the state.

[143] *Cf. A Tale of Two Countries*, *supra* note 124, at 30 (showing variability in racial disparities in marijuana possession arrest rates across states).

[144] *See supra* n. 120 and accompanying text. *See also* Mikos, *Interstate Commerce in Cannabis*, supra note18, at 890 (observing that "consolidation could further dampen minority participation in the cannabis industry").

[145] *See, e.g.*, Bruce Barcott et al., *supra* note 119, at 13-14 (explaining how federal prohibition impedes minority ownership of marijuana businesses).

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.[146] A January 2021 report reveals the depth of this problem.[147] It estimates that Black Americans "represent only 1.2% to 1.7% of all cannabis company owners."[148] Part of the problem is that many social equity programs have only just begun in earnest.[149] Were Congress to effectively end these programs at this early juncture—or, for current prohibition 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 address some social equity issues. The CAOA, 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."[150] 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.[151]

While we applaud the attention federal lawmakers have given to this issue, we believe these proposed measures would be more effective if they supplemented, rather than supplanted, the social equity licensing programs

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[146] *See, e.g.*, Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 10 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.").

[147] Bruce Barcott et al., *supra* note 119.

[148] *Id.* at 13.

[149] *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).

[150] GAI21675 4LN, § 301(b)(3).

[151] *Id.* § 301(b)(1)(D).

the states are now pursuing.[152] 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.[153]

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.[154] 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.[155]

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.[156] These requirements come at a significant

[152] Allowing states to continue restricting interstate commerce would also make the CAOA's 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.* § 301(b)(2) (making funds available through Section 7(m) of the Small Business Act, 15 U.S.C. § 363(m)); 15 U.S.C. § 363(m)(1)(A)(3) (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.

[153] For example, if states decided to award licenses based on the CAOA's 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 DIA's 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.

[154] *See, e.g.*, Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U.L. REV. 1581, 1582-1583 (2011) (summarizing the concept of transition relief).

[155] *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 154, at 1585-1594.

[156] *See supra* Part II.A.

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.[157] Then there is the cost of building-out the physical production facility, which can easily run eight figures.[158] These costs are 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.[159] These few facilities will likewise be concentrated in a small number of states; namely, those where environmental and regulatory conditions are most favorable.[160]

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[157] *See, e.g.*, Florence Shu-Acquaye, *Medical Marijuana: Implications of Evolving Trends in Regulation*, 46 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"); Matthew 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, 255-256 (2020) (estimating start-up costs for retailers at a minimum of $312,000 and noting that states additionally require businesses to maintain capital reserves).

[158] *See, e.g.*, Steve Pepple, *$20M marijuana cultivation facility planned for northern Oakland County*, DETROIT FREE PRESS (Oct. 19, 2020), 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*, THE TIMES HERALD-RECORD (Jun. 16, 2021), 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).

[159] *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, 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.").

[160] *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,

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.[161] 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 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.[162] 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 as a consequence of federal legalization.

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 Part III.B.3, it will give them an opportunity to access capital from traditional

producers will be able to move to the state that imposes the least onerous regulations on cannabis production.").

[161] *See, e.g.*, Alan Brochstein, *Interstate Cannabis Commerce Is an Overblown Concern For Now*, NEW CANNABIS VENTURES (July 11, 2021), 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").

[162] Steven Shavell, *On Optimal 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 154, at 1584 (agreeing with Shavell's position).

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.[163] 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.[164] In the case of federal legalization, transition relief may be particularly important to passing legislation. The actors who would be adversely 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.[165] 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.[166] 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

[163] *See* Revesz & Kong, *supra* note 154, 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 & Kong critique the public-choice function of transition relief, they do so on grounds not applicable to our argument here. *See id.* at 1626-1628.

[164] See, e.g., Barbara Brohl & Jack Finlaw, *Task Force Report on the Implementation of Amendment 64* 7-8 (2013), https://www.colorado.gov/pacific/sites/default/files/A64TaskForceFinalReport%5B1%5D_1.pdf (recommending that in the "first year of licensing, only entities with valid medical marijuana licenses . . . should 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 (creating special license types to allow medical marijuana businesses to deal in adult-use marijuana).

[165] *See, e.g.*, Logue, *supra* note 155, at 224 (describing the anticipation argument).

[166] *See, e.g.*, Revesz & Kong, *supra* note 154, 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.").

legalization, let alone appreciate how the DCC's interaction with the various federal legalization proposals might affect their businesses.[167]

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 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.[168] 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.

We recognize that the transformation of industry would generate some efficiency benefits as well,[169] 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.[170] In developing these systems, the DOJ also (arguably) required the states to adopt measures that

[167] For instance, a layman or even a lawyer may reasonably take at face value the CAOA 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 CAOA. CAOA Discussion Draft, *supra* note 5, at 1.

[168] *See supra* Parts III.A & III.B.2.

[169] *See infra* Part III.D (discussing potential tradeoffs entailed by suspending the DCC).

[170] *See* Cole Memo, *supra* note 55, at 2.

restrict interstate commerce in marijuana.[171] 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.[172] (Indeed, generating new jobs and revenues were major reasons why so many states legalized marijuana in the first place.[173]) 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.[174]

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.[175] Once Congress legalizes marijuana at the federal level, these states may now 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.[176] They will instead be thrown into a competitive national

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

[172] Bruce Barcott, et al., *supra* note 119 (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); Marijuana Policy Project, *supra* note 101 (reporting that states had already collected nearly $8 billion in tax revenues from sale of adult-use marijuana).

[173] *See, e.g.*, Mikos, *Interstate Commerce in Cannabis*, supra note 18, at 866 (stating that "[l]egalization is commonly touted as a means of creating new jobs and economic opportunities within a state").

[174] 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.

[175] 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 (1995) ("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.

[176] *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 893 (suggesting that states would have "missed the boat on creating a viable, local cannabis industry and the jobs

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.[177] 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 policy.[178] 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.[179] 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.[180] 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 describe some of the extant variations in state regulation above, including differences in taxation,

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associated therewith" if they did not legalize marijuana before the DCC created a national market).

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

[178] 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 would find themselves at a competitive disadvantage vis-a-vis current adult-use states in the new national marketplace.

[179] *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").

[180] For instance, voters in the Republican strongholds of Mississippi, South Dakota, and Montana voted to legalize marijuana during the 2020 election. *See* Mississippi Ballot Measure 1 (2020) (legalizing medical marijuana); South Dakota Constitutional Amendment A (2020) (legalizing adult-use marijuana); Montana Initiative 190 (2020) (legalizing adult-use marijuana).

pesticide policies, testing, packaging, and labeling requirements, and licensing structures.[181] There are ongoing efforts to harmonize these (and other) areas of regulation across states, but those efforts remain nascent.[182] 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.

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.[183] 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.[184] As federal enforcement policy liberalized, states began to experiment with licensing and regulating marijuana businesses.[185] 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.[186] 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 37-plus disparate

[181] *See supra* Part II.A (discussing variations in state regulation).

[182] *See, e.g.*, Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 887 & n. 151.

[183] *See supra* Part II.B (discussing obstacles imposed by the federal marijuana ban).

[184] *See, e.g.*, Mikos, *The Evolving Federal Response*, *supra* note 58, at 5.

[185] *Id.*

[186] Oregon, for example, has already passed a law that contemplates interstate trade agreements once marijuana is federally legal. 2019 Or. Legis. Serv. 464 (West).

state regulatory regimes into a coherent federal regulatory policy. Indeed, the CAOA 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, state-based seed-to-sale tracking systems."[187] 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.[188] To do so, however, Congress's authorization "must be unmistakably clear."[189] 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. The STATES Act, for example, utterly fails to address the states' power to regulate interstate commerce in marijuana following federal legalization.[190]

The CAOA is the only congressional proposal that would impose any limit on the DCC's application to state marijuana regulations. In relevant part, the CAOA 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, by any person interested therein, to be received,

[187] CAOA Discussion Draft, *supra* note 5, at 29.

[188] *See supra* note 21.

[189] *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 91.

[190] See Mikos, *Interstate Commerce in Cannabis*, supra note 18, at 884 ("[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.").

possessed, sold, or in any manner used, . . . in violation of any law of that State."[191]

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,[192] two Prohibition-era congressional statutes that give states only limited leeway to regulate interstate commerce in alcohol. Most notably, these statutes do not authorize states to discriminate against out-of-state economic interests.[193] Thus, even if Congress enacted the CAOA, the DCC would still block 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. 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.[194]

In short, while the CAOA would "give[] the States regulatory authority that they would not otherwise enjoy,"[195] the power bestowed on them may prove vanishingly small.[196] It would fail to forestall many of the problems that would stem from the sudden application of the DCC to state marijuana regulations.

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[191] GAI21675 4LN, 117th Cong. § 111(a)-(b) (2021). As noted earlier, the CAOA 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.* at § 111(c).

[192] 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).

[193] *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.*, Tennessee Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474 ("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..").

[194] *Tennessee Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2474.

[195] *Id.*

[196] *E.g., id.* at 2483 (Gorsuch, J., dissenting) (remarking that "it's hard not to wonder what's left of Webb-Kenyon" following judicial decisions narrowly construing the statute).

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"),[197] one of the few statutes the Court has found to completely suspend the DCC.

Congress passed the MFA in response to the Supreme Court's 1944 decision in *United States v. South-eastern Underwriters*, 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.[198] 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 75 years.[199] 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.[200]

To avert this threatened disruption, Congress enacted the MFA. The short statute preserved state regulatory authority against the DCC.[201] In relevant 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."[202] Soon after Congress passed the MFA,

[197] *See* 15 U.S.C. §§ 1011-1015.

[198] 322 U.S. 533, 553 (1944). The history of the MFA is discussed at length in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 411-16 (1946).

[199] *See, e.g.*, *Se. Underwriters Ass'n*, 322 U.S. at 590-91 (Jackson, J., dissenting) (suggesting that the majority's decision "at very least will require an extensive overhauling of state legislation"); James B. Donovan, *Regulation of Insurance Under the McCarran Act*, 15 L. & CONT. PROB. 473 (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 "'Chaos was freely predicted'" to follow from it) (quoting New York Insurance Department Report 71 (1969)).

[200] *See, e.g.*, Se. Underwriters Ass'n, 322 U.S. at 590-91 (Jackson, J., dissenting) (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 199, at 591 (discussing litigation spawned by *South-eastern Underwriters*).

[201] The MFA also included a separate provision that shielded state regulations from preemption under congressional statutes that had suddenly become applicable to the business of insurance because of the Court's decision. 15 U.S.C. § 1012(b).

[202] *Id.* at § 1011.

the Court interpreted this language to suspend application of the DCC to state insurance regulations.[203]

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.[204] For reasons we explain below, we also include a sunset clause in the proposal, which would force Congress to re-consider 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.[205]

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

[203] See *Prudential Ins. Co.*, 328 U.S. at 427-36 (finding that the MFA authorized discriminatory state tax imposed on out-of-state insurance firms).

[204] 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).

[205] *See supra*, note 85 (discussing claims and nascent litigation over them). If Congress suspended the DCC before legalizing marijuana, it could stipulate that the clock would not start running on the time period specified by the sunset clause in section B of our proposal until Congress did legalize marijuana.

we identify above. It would: (1) 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, 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.[206] 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.[207] The few regulations contemplated by the CAOA 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 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, 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

[206] Although Congress could 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.

[207] Moreover, lawmakers would benefit from studying how marijuana markets function in a federal legalization environment before they attempt to establish national policies. *See supra* Part 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).

govern the marijuana market. By suspending the application of the DCC, our proposal would simply give Congress and federal agencies time to promulgate the 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.[208] 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 to interstate branch banking, provides a prime example.[209]

Prior to the 1950s, federal and state law restricted banks from engaging in interstate branch banking.[210] However, inventive bankers began to circumvent this prohibition by utilizing entities known as bank holding companies. The holding companies would purchase subsidiary banks across multiple states and would operate those banks "in a unitary fashion similar to branches."[211] 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

[208] *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 18, at 869-70 (discussing state proposals to buy and sell marijuana across state lines).

[209] Bank Holding Company Act of 1956, 84 P.L. 511, 70 Stat. 133, § 3(d), codified as amended at 12 U.S.C. § 1842.

[210] *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, 972-975 (1992) (summarizing the history of branch banking regulation from the early 1900s through the early 1950s).

[211] *Id.* at 975. *See also* Northeast Bancorp v. Bd. Of Governors of Fed. Reserve 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").

and that interstate banking would lead to problematic levels of market concentration along with other economic harms.[212] However, rather than banning interstate bank holding companies entirely, Congress decided to give the states the power to approve or reject interstate bank acquisitions.[213] The Douglas Amendment thus prohibits any acquisition unless "specifically authorized by the statute laws of the State in which [the acquired] bank is located."[214] The Supreme Court subsequently interpreted the Amendment as removing any dormant commerce clause objection to state restrictions on such acquisitions.[215] Notably, although many states initially eschewed interstate banking, they slowly came to welcome it as economic conditions evolved.[216]

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.[217] 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

[212] *See, e.g.*, H.R. REP. No. 609, 84th Cong., 1st Sess., 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. 6856-6860 (1956) (remarks of Sen. Douglas) (warning about the dangers of market concentration in banking).

[213] 102 CONG. REC. at 6861 (remarks of Sen. 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"); *Northeast 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").

[214] 12 U.S.C. § 1842(a).

[215] *Northeast Bancorp*, 472 U.S. at 166 (quoting 70 Fed. Res. Bull. at 380).

[216] *See id*, at 163-65; Wilmarth, *supra* note 210, at 964 & 977.

[217] 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).

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 by the DCC.

By contrast, the potential costs associated with state restrictions on interstate commerce will not necessarily diminish over time.[218] 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, 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.[219] Of course, even without a sunset clause, Congress could always repeal Section A, if it came to believe the provision had outlived its usefulness.[220] But as experience with the CSA has demonstrated, it can be

[218] We discuss these potential costs below in Part III.D.

[219] 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).

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

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.[221] 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 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 push back 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."[222] If we allow states to enact protectionist measures, the argument goes, we might suddenly see the states engaging in tit-for-tat economic retaliation.[223] 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."[224]

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[221] 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.").

[222] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2460.

[223] 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, 538-539 (1949).

[224] Don 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/retaliate" created by state protectionism could undermine the political viability of the union).

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."[225] In other words, under this objection to protectionism, "economic efficiency is the essential national value arrayed against state autonomy" under the DCC.[226]

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.[227]

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.[228] 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).

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[225] *Id.* at 1118.

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

[227] 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. Indeed, 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 Congress." *In re Rahrer*, 140 U.S. 545, 561 (1891).

[228] *See supra* Part III.C (discussing the MFA).

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.[229] Importantly, these restrictions have not led to the resentment and retaliation hypothesized by some champions of the DCC, let alone a threat to the states' political union.[230] 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.[231]

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, Oklahoma, and Kansas claimed that they were being deluged with marijuana purchased (legally) in Colorado's new market and smuggled across state lines into their jurisdictions.[232] 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.[233]

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

[229] *See supra* Parts II.A & B.

[230] 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.

[231] 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 216.

[232] Nebraska & Oklahoma v. Colorado, No. 220144 ORG, 6 (U.S. docketed Dec. 18, 2014), Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (denying plaintiffs' motion for leave to file a complaint under the Court's Original Jurisdiction). *See also* Mikos, *Marijuana Localism*, *supra* note 123, at 737-750 (discussing spillover effects of local marijuana laws).

[233] See *Hansen et al.*, *supra* note 103. *See also* Mikos, *Marijuana Localism*, *supra* note 123, 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.").

states that adopt different approaches to legalization.[234] 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 spillovers in ways the DCC would not otherwise permit.[235] One possibility, for example, is that a legalization state could restrict the amount of marijuana that non-residents can purchase.[236] This gesture, which would plainly violate the DCC once the federal government legalizes marijuana,[237] 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.[238] 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.[239] In the near term, at least, we believe these

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[234] *See supra* Part II.B (discussing leading reform proposals); Part III.C (analyzing the CAOA's attempt at preserving state authority over marijuana).

[235] See Denning, *Marijuana, Federal Power, and the States*, *supra* note 48, at 594 (suggesting that suspending the DCC could improve relations between legalization states and their prohibitionist neighbors).

[236] 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).

[237] *See generally* Denning, *One Toke Over the (State) Line*, *supra* note 18.

[238] 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 224, 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 226, at 64 (explaining that "efficiency is not the central national value served" by the DCC); Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, *supra* note 91, at 480-81 (casting doubt on the economic efficiency rationale for the DCC).

[239] *Cf.* Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 234-247 (arguing that protectionist state laws may actually be more efficient (in some sense of

societal costs far eclipse any gains that might follow from increasing productive efficiency.[240]

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.[241] 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."[242] 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."[243] 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 also 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.[244] 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.

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the word) than a free market policy when a complete picture of costs and benefits is taken into account).

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

[241] *Cf. Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2481 (Gorusch, 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").

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

[243] *Id.*

[244] *See supra*, Part III.B (highlighting difficulties states will face in collecting taxes in a national marketplace).

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 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.[245] 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

[245] *See* 7 U.S.C. § 1639o(1) (defining hemp, in relevant part, as having less than 0.3 percent 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* 2018 Farm Bill, Pub. L. No. 115-334, §§ 10113-10114, 132 Stat. 4908, 4908-14 (legalizing hemp at the federal level).

hemp a suitable substitute for marijuana for some purposes.[246] 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,[247] 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, Section 903, that disclaims Congress's intent to preempt states' drug laws except in narrow circumstances.[248] If Congress de-schedules marijuana from the CSA, Section 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 state regulations. We did not focus on preemption in this Article because the topic has historically received significant attention (in contrast to the DCC),[249] 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.

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[246] *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.

[247] *See* GAI21675 4LN, § 401.

[248] 21 U.S.C. § 903.

[249] *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy*, *supra* note 60 (discussing Congress's preemption authority in the context of medical marijuana); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 104-107 (2015) (discussing the modest scope of preemption under § 903).