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# REGULATING VICE: WHAT THE U.S. MARIJUANA INDUSTRY CAN LEARN FROM STATE GOVERNANCE OF SPORTS GAMBLING

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*The United States has long been a country of prohibitions, with the most memorable prohibition in American history being the ban on alcohol sales in 1920, which lasted until the ratification of the 21st Amendment to the U.S. Constitution. While the federal ban on alcohol has long since been abolished, the United States has continued to maintain the rudiments of its federal bans on both marijuana and sports betting—even though the primary beneficiaries of both of these bans have been organized criminal syndicates that have garnered near monopolies over these industries.*

*While somewhat different from the alcohol ban of the 1920s, there are many similarities between today's bans of both marijuana and sports betting. For instance, the U.S. Supreme Court's decision in *Murphy v. National Collegiate Athletic Association*—which allowed states to legalize and regulate sports betting—catapulted the regulation of sports betting into the national spotlight, alongside marijuana. At the same time, however, there are also a few important distinctions—most notably that the federal Controlled Substances Act (“CSA”) classifies marijuana as a prohibited substance, whereas federal law classifies sports betting somewhat less harshly.*

*Since the U.S. Supreme Court's May 2018 *Murphy* decision, more than thirty-five states have introduced legislation to legalize sports betting, with nineteen states successfully passing laws in the first eighteen months since the Court's *Murphy* decision. Likewise, medical marijuana is currently legal in thirty-three states, and recreational marijuana is permitted in eleven states. Nevertheless, despite the growing state-level legality of*

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*both marijuana and sports gambling, the exuberance for sports gambling by entities like banks and institutional investors has surpassed the marijuana industry despite the marijuana industry having a significant head start. This Article explores why sports gambling has been widely accepted and has led banks and financial institutions to take risks that they have not been willing to take for the marijuana industry. It also explores best practices adopted by the sports gambling industry that the marijuana industry may be able to emulate to garner broader legal acceptance.*

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## I. INTRODUCTION

The first state laws to ban the purchase, sale, and use of marijuana in the United States emerged in 1919,<sup>1</sup> right around the time when the federal ban on alcohol began to fall apart.<sup>2</sup> The instigator behind this first marijuana ban was the head of what would become the Drug Enforcement Administration, Harry Anslinger, whom President Herbert Hoover had tasked with heading up the Federal Bureau of Narcotics.<sup>3</sup> Anslinger initially pushed for a state-level ban on marijuana, fearing a federal ban would be too difficult to enforce.<sup>4</sup> Under the guidance of Anslinger, by 1937, forty-eight states had adopted model legislation to outlaw marijuana.<sup>5</sup>

Following the release of the film *Reefer Madness*,<sup>6</sup> Congress then decided to attempt a more direct approach to stopping the growth of marijuana use—passing the Marihuana Tax Act, which on a national level prohibited the sale and possession of marijuana.<sup>7</sup> Since then, the illegal purchase and sale of marijuana has only continued to grow, with sellers of the drug making large sums of money on the black market.<sup>8</sup> With a number of states recently having attempted to relegalize marijuana within their borders, the purchase and sale of marijuana—at least as a technical matter—remains illegal at the federal level by virtue of the 1970 Controlled Substances Act (“CSA”), which was signed into law by President Nixon.<sup>9</sup> Nevertheless, a number of states notwithstanding the CSA seek to legalize, tax, and regulate the drug.<sup>10</sup>

While the current legal status of marijuana may, at first, seem like an “exception, anomaly, and aberration” in terms of its legal treatment under both federal and state law, the United States’ iconoclastic legal treatment of marijuana

1. Stephen Siff, *The Illegalization of Marijuana: A Brief History*, 7 ORIGINS: CURRENT EVENTS IN HIST. PERSP. (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history> [https://perma.cc/3L4V-AVRF].

2. Cydney Adam, *The Man Behind the Marijuana Ban for All the Wrong Reasons*, CBS NEWS (Nov. 17, 2016, 5:45 PM), <https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/> [https://perma.cc/2SAN-2FQS].

3. John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962*, 113 PA. MAG. HIST. & BIOGRAPHY 207, 216 (1989).

4. See Siff, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.* It is worth noting in light of dozens of states legalizing medical marijuana that the American Medical Association was the only witness to testify against the Marihuana Tax Act. *Id.* For a list of states that have legalized medical marijuana, see *What U.S. States Have Legalized Medical Marijuana?*, WEBMD, <https://www.webmd.com/a-to-z-guides/qa/what-us-states-have-legalized-medical-marijuana> (Aug. 20, 2020) [https://perma.cc/2XAT-ENPQ].

8. NAT’L RSCH. COUNCIL, AN ANALYSIS OF MARIJUANA POL’Y 1 (1982), <https://www.ncbi.nlm.nih.gov/books/NBK217612/> [https://perma.cc/6JL7-FV43]; GEOFF LAWRENCE & SPENCE PURNELL, REASON FOUND., MARIJUANA TAXATION AND BLACK MARKET CROWD-OUT 1 (2020), <https://reason.org/wp-content/uploads/marijuana-taxation-black-market-crowd-out.pdf> [https://perma.cc/NZ3F-2MJM].

9. Lori Moore, *Milestones in U.S. Marijuana Laws*, N.Y. TIMES (Oct. 26, 2013), [https://archive.nytimes.com/www.nytimes.com/interactive/2013/10/27/us/marijuana-legalization-timeline.html/#time283\\_8130](https://archive.nytimes.com/www.nytimes.com/interactive/2013/10/27/us/marijuana-legalization-timeline.html/#time283_8130) [https://perma.cc/BW5K-THMM].

10. *Id.*

has closely mirrored one other large, gray-market industry—sports gambling.<sup>11</sup> Like marijuana, sports gambling is likely one of the top-twenty industries in terms of gross domestic product in the United States, even despite its historic gray-market status, if not illegality.<sup>12</sup> Also like marijuana, sports gambling was once relatively unregulated in the United States, then became regulated at the state level, then became regulated at the federal level, and only most recently became a candidate for (re)legalization and regulation by states.<sup>13</sup> Nevertheless, the primary difference between the current U.S. treatment of marijuana and sports gambling is that while the CSA technically remains good law in the U.S. today, a 2018 U.S. Supreme Court decision, *Murphy v. NCAA*, struck down the Professional and Amateur Sports Protection Act, which was the federal government's leading anti-sports-gambling bill, and, in doing so, ushered in the era of some states legalizing and regulating sports gambling.<sup>14</sup>

This Article explores the recent legislative efforts to (re)legalize the purchase, sale, and use of marijuana in the United States, and it explores lessons that state governments can learn from their recent efforts to similarly legalize and regulate sports gambling in the scope of a changing legal environment. Part II of this Article discusses the rise of the legal marijuana industry. Part III analyzes the impact of the *Murphy* decision on federal preemption of state law and discusses the emergent sports betting industry. Part IV evaluates current threats and challenges facing the marijuana industry. Finally, Part V examines the best practices that have been implemented in the sports betting industry and discusses how the adoption of similar practices and regulatory models could open new doors for legitimization of the legal cannabis industry.

## II. EVOLUTION OF THE MARIJUANA INDUSTRY

Marijuana, which is sometimes known by its more scientific name of cannabis, has a long and interesting legal history in the United States.<sup>15</sup> Before the plant was outlawed on both the state and national level, Americans embraced marijuana—so much so that the Virginia Assembly even *required* every farmer to grow it as a commodity in 1619.<sup>16</sup> During the late 1800s, the plant became a fixture in medicines for the treatment of migraines, rheumatism, and insomnia.<sup>17</sup>

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11. See *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978).

12. *Economic Impact of Legalized Sports Betting*, AM. GAMING ASS'N (June 1, 2017), <https://www.americangaming.org/resources/economic-impact-of-legalized-sports-betting/#:~:text=Legal%20sports%20betting%20is%20expected,expected%20to%20total%20%248.4%20billion> [https://perma.cc/C3V6-B9WL].

13. Brett Smiley, *Sports Betting and Booze: A Tale of Two Prohibitions*, Sports Handle (May 22, 2018), <https://sportshandle.com/sports-betting-and-booze-a-tale-of-two-prohibitions/> [https://perma.cc/2C6S-Z83D]; see also John T. Holden, *Regulating Sport Wagering*, 105 IOWA L. REV. 575, 577 (2020).

14. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

15. See Matt Thompson, *The Mysterious History of 'Marijuana'*, NPR (July 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana> [https://perma.cc/UHS6-5HZK].

16. Eric Schlosser, *Reefer Madness*, ATL. (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476> [https://perma.cc/W6RU-B8Y5].

17. *Id.*

To many, marijuana was seen as a product with many important and healing properties.<sup>18</sup>

Nevertheless, the view toward marijuana in the United States changed rapidly in the early 1900s due to a series of factors, including both concerns about the drug's misuse and a sense of xenophobia and ethnocentrism.<sup>19</sup> Most notably, Texas police officers came to believe that Mexican immigrants who were allegedly crossing into U.S. territory with increasing frequency were using marijuana primarily as a means of intoxication.<sup>20</sup> Similar ethnic hysteria over the use of marijuana also appeared in New Orleans newspapers, which had come to associate marijuana use with African Americans and illicit activity.<sup>21</sup>

The fears surrounding the use of marijuana in the United States would contribute to the beginning of America's War on Drugs and the Harrison Narcotics Act of 1914.<sup>22</sup> Although the federal government left out marijuana in the initial federal narcotics ban, state and local officials began to increasingly target marijuana during the years that immediately followed.<sup>23</sup> Specifically, in the period from 1914 to 1931, twenty-nine states banned marijuana.<sup>24</sup> Meanwhile, at around the same time, the mass commercialization and sale of a somewhat similar crop, tobacco, began to thrive relatively unregulated.<sup>25</sup>

A. *The Federal Bureau of Narcotics and the Passage of the Marihuana Tax Act*

Between 1931 and 1937, a combination of state drug laws and the mass commercialization of tobacco led U.S. tobacco use (including cigarette sales) to skyrocket; meanwhile, marijuana use was minimal.<sup>26</sup> Marijuana was more popular in some regions of the country than others, but the majority of people in the U.S. were entirely unfamiliar with the drug.<sup>27</sup> Indeed, it was not until the mid-1930s that there was any significant coverage of marijuana by major media outlets.<sup>28</sup> And even then, much of the media coverage during that period appeared to link marijuana to crimes committed by immigrants.<sup>29</sup> Richard J. Bonnie and

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18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. REV. 509, 509 (2016), [https://www.independent.org/pdf/tir/tir\\_20\\_04\\_02\\_redford-powell.pdf](https://www.independent.org/pdf/tir/tir_20_04_02_redford-powell.pdf) [<https://perma.cc/TR4Q-AYEV>].

23. Schlosser, *supra* note 16.

24. *Id.*

25. *See, e.g.,* W.W. Yeargin, *Tobacco*, NCPEDIA, <https://www.ncpedia.org/tobacco-part-3-rise-big-tobacco> (last visited Mar. 17, 2021) [<https://perma.cc/32KC-4463>].

26. *See* Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1036 (1970).

27. *Id.*

28. *Id.*

29. *Id.* at 1037 (citing a letter submitted by a Colorado newspaper editor in testimony from Federal Bureau of Narcotics Commissioner Anslinger, which stated, "I wish I could show you what a small marijuana cigaret [sic] can do to one of our degenerate Spanish-speaking residents. That's why our problem is so great; the greatest

Charles H. Whitebread discussed the coverage of marijuana in the 1930s in their seminal 1970 *Virginia Law Review* article, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, which stated that “not only did few middle-class Americans know about marijuana and its use, but also what little ‘information’ was available provoked an automatic adverse association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos.”<sup>30</sup> The growing coverage of the marijuana industry in a negative light accompanied the rise of the Federal Bureau of Narcotics.<sup>31</sup>

Many have credited the Federal Bureau of Narcotics with driving the federal ban on marijuana.<sup>32</sup> The Drug Enforcement Administration (“DEA”) predecessor was a factor, but states had already begun pushing to criminalize the drug.<sup>33</sup> The Bureau oversaw the passage of state narcotics laws “as one of its primary objectives.”<sup>34</sup> The Bureau of Narcotics itself played a role in designing the Uniform Narcotic Drug Act, expending significant resources in a media campaign to boost awareness of the uniform law.<sup>35</sup> The advertising campaign was, however, a failure, and virtually no one outside of statehouses knew that the Uniform Act existed.<sup>36</sup> The Act, however, passed almost everywhere, with little pushback in most states despite the absence of any scientific support or justification.<sup>37</sup>

In 1937, Congress took control via the Marihuana Tax Act.<sup>38</sup> This act did not federally criminalize marijuana; rather, it made it a crime to acquire marijuana without paying a federal excise tax.<sup>39</sup> The marijuana excise tax, set at \$100 per ounce, was prohibitive.<sup>40</sup> Perhaps more intrusive than the tax itself, however, was the requirement that users supply the Internal Revenue Service with the details of marijuana transactions—potentially exposing the user to prosecution under various state laws.<sup>41</sup>

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percentage of our population is composed of Spanish-speaking persons, most of whom are low mentally, because of social and racial conditions.”).

30. *Id.*

31. *Id.* at 1037–38.

32. *Id.* at 1038.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Jonathan Sobeloff, *The Marihuana Tax Act*, 3 SUFFOLK U. L. REV. 101, 104, 108 (1968).

39. *Id.* at 102. Indeed, sports gambling wagers were similarly regulated using an excise tax. Beginning in 1951, the federal government placed a 10% excise tax on the total amount wagered, as a result of the economics of bookmaking, this tax effectively eliminated the ability for bookmakers to make a living. During the 1970s, with the rise of legal sports betting, the tax was lowered to two percent of the total amount wagered. Congress would eventually lower the amount to 0.25% of the total amount wagered, where it remains today. See Eric Ramsey, *Nevada Congresswoman Calls for End to Federal Sports Betting Handle Tax*, LEGAL SPORTS REP. (Dec. 13, 2017), <https://www.legalsportsreport.com/16955/federal-sports-betting-handle-tax/> [https://perma.cc/K5T9-T4KT].

40. Sobeloff, *supra* note 38, at 102.

41. *Id.*

The Marihuana Tax Act remained in place until 1969 when the Supreme Court decided *Leary v. United States*.<sup>42</sup> Following a trip to Mexico, Dr. Timothy Leary was found in possession of marijuana seeds.<sup>43</sup> A jury found Leary guilty of two counts, including a Marihuana Tax Act violation.<sup>44</sup> Leary appealed, alleging that the Marihuana Tax Act violated his Fifth Amendment privilege against self-incrimination.<sup>45</sup> Justice Harlan stated: “Petitioner had ample reason to fear that transmittal to such official of the fact that he was a recent, unregistered transferee of marihuana ‘would surely prove a significant ‘link in a chain’ of evidence tending to establish his guilt’ under the state marihuana laws then in effect.”<sup>46</sup> The Supreme Court’s reversal of Leary’s conviction on Fifth Amendment grounds<sup>47</sup> would effectively spell the end for the Marihuana Tax Act as a means of federalizing a prohibition on marijuana.<sup>48</sup> The government, however, would remain committed to deterring the possession, use, and sale of marijuana, with a second effort backed by the full strength of the federal government as opposed to only the Internal Revenue Service.<sup>49</sup>

*B. The Emergence of the Controlled Substances Act and the War on Drugs*

Following the Supreme Court’s decision in *Leary*, Congress repealed most of the country’s existing drug laws and replaced them with an omnibus law known as the Controlled Substances Act.<sup>50</sup> Passed under the Commerce Clause power, the CSA classified drugs according to five separate schedules.<sup>51</sup> Schedule I drugs were deemed to be those drugs “with no currently accepted medical use and a high potential for abuse”<sup>52</sup> such as heroin and LSD.<sup>53</sup> To the dismay of some, however, Schedule I also included marijuana.<sup>54</sup>

42. See *Leary v. United States*, 395 U.S. 6, 12 (1969).

43. *Id.* at 9–10.

44. *Id.* at 11.

45. *Id.* at 11–12.

46. *Id.* at 16. The Supreme Court distanced itself from other excise tax cases, challenged on Fifth Amendment grounds, including a challenge to the wagering excise tax, where the Acts could be saved by placing restrictions on the use of the collected information. *Id.* at 26 (distinguishing their present case from *Grosso v. United States*, 390 U.S. 92 (1968), *Haynes v. United States*, 390 U.S. 85 (1968), and *Marchetti v. United States*, 390 U.S. 39 (1968)).

47. *Id.* at 29.

48. See German Lopez, *The Federal Drug Scheduling System, Explained*, VOX (Aug. 11, 2016, 9:05 AM), <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> [<https://perma.cc/2J4P-RHJP>].

49. See *id.*

50. Matthew B. Hodroff, *The Controlled Substances Act: Time to Reevaluate Marijuana*, 36 WHITTIER L. REV. 117, 121 (2014).

51. Thu Pham, *High Time for Medical Marijuana or Buzz-Kill?: The Controlled Substances Act and the Sherman Antitrust Act May Cause Florida’s Compassionate Medical Cannabis Act to Go Up in Smoke*, 10 FLA. A & M U. L. REV. 109, 113 (2014).

52. *Drug Scheduling*, DEA.GOV, <https://www.dea.gov/drug-scheduling> (last visited Mar. 17, 2021) [<https://perma.cc/7W3E-7AZ8>].

53. Controlled Substances Act (CSA), 21 U.S.C. § 812(c) (1970) (listing the schedules and drugs).

54. *Id.* (listing the schedules and drugs). The lone exception to the CSA’s prohibitions for schedule I drugs was for government-approved research projects. The Attorney General has the power, designated by statute, to remove any drug or re-schedule drugs if she finds that the substance does not satisfy the requirements any longer. Pham, *supra* note 51, at 113.

Thereafter, the CSA emerged as the single, comprehensive anti-drug statute, around which the War on Drugs would be fought.<sup>55</sup> In 1973, President Nixon then created the DEA, with the singular mission to enforce the CSA.<sup>56</sup> In its inaugural year, the DEA hired more than 1,400 special agents and had an operating budget of nearly \$75 million.<sup>57</sup> By 1975, the agency had expanded to 2,135 special agents and a budget of nearly \$150 million.<sup>58</sup> While the DEA focused much of its attention in the 1980s on the growing crack cocaine epidemic, the high-profile nature of DEA enforcement meant that by the end of the 1980s, approximately 27% of Americans saw drugs and drug abuse as the most important problem facing the nation.<sup>59</sup>

President Reagan also pushed for strong enforcement of drug laws, and between 1980 and 1986, the number of convictions for federal drug crimes more than doubled.<sup>60</sup> In 1984, Congress passed the Comprehensive Crime Control Act, which enhanced penalties for violations of the CSA.<sup>61</sup> Following passage of the 1984 statute, Congress passed additional federal laws expanding the reach of federal drug laws, as well as introduced mandatory minimum sentences for certain drug offenses.<sup>62</sup> The 1990s, however, would bring about a significant change, at least in regards to how states were dealing with marijuana. As states began to explore the legalization of cannabis for medical use and subsequently recreational use, the federal government also downgraded marijuana in its list of prosecutorial priorities during the Obama administration.<sup>63</sup>

### C. California Sets Things in Motion

While the State of Oregon was the first to decriminalize marijuana within its borders, California was the first state to attempt to outright legalize it, when it placed Proposition 215 on the ballot.<sup>64</sup> California's efforts to legalize marijuana received some strong bipartisan criticism, as President Bill Clinton described California's efforts to legalize marijuana as a "cynical hoax"; meanwhile, republican presidential candidate Bob Dole described it as "dangerous."<sup>65</sup> Nevertheless, the bill aimed to legalize marijuana for people with specific medical conditions, including AIDS and cancer—a proposal that had the backing of some leaders within the medical community.<sup>66</sup>

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55. LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 5–6 (2014), <https://fas.org/sgp/crs/misc/R43749.pdf> [<https://perma.cc/TE7E-DD7F>].

56. *Id.* at 6.

57. *Id.* at 7.

58. *Id.*

59. *Id.* at 7–8.

60. *Id.* at 8.

61. *Id.*

62. *Id.* at 9.

63. *See id.* at 14–15.

64. Carey Goldberg, *Medical Marijuana Use Winning Backing*, N.Y. TIMES (Oct. 30, 1996), <https://www.nytimes.com/1996/10/30/us/medical-marijuana-use-winning-backing.html> [<https://perma.cc/UF5N-4XGP>].

65. *Id.*

66. *Id.*



Ultimately, despite strong federal government opposition, California's Proposition 215 passed in November of 1996.<sup>67</sup> Thereafter, Arizona voted to legalize medicinal marijuana that same year.<sup>68</sup> The vote was invalidated, however, as a result of additions from the legislature.<sup>69</sup> By the end of the 1990s, four other states had joined California in legalizing medical marijuana: Oregon (which had previously decriminalized such use), Washington, Alaska, and Maine.<sup>70</sup>

Thereafter, the first decade of the twenty-first century would see eight additional states legalize medical marijuana<sup>71</sup> and a showdown at the Supreme Court between California's medical marijuana law and the federal government.<sup>72</sup> The question facing the Supreme Court was "whether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."<sup>73</sup> The two respondents were California residents suffering from medical conditions who had gained access to medical marijuana under the state's 1996 Compassionate Use Act.<sup>74</sup> Respondent Monson cultivated marijuana for consumption by smoking and vaporizing, whereas Respondent Raich was unable to cultivate her own marijuana and thus relied on caregivers to supply her with marijuana, which she processed in "oils, balms, and foods for consumption."<sup>75</sup> In August of 2002, county deputy sheriffs and members of the DEA showed up at Monson's home, confirmed that her marijuana use was lawful under California law, and nonetheless destroyed her six cannabis plants.<sup>76</sup> The respondents sought an injunction and declaratory relief that prohibited enforcement of the CSA and protected their cultivation and consumption of marijuana for personal use.<sup>77</sup>

The Supreme Court noted that the passage of the CSA was well within Congress's Commerce Clause power, and the Respondents conceded that fact.<sup>78</sup>

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67. Michael Pollan, *The Pot Proposition: Living with Medical Marijuana*, N.Y. TIMES (July 20, 1997), <https://www.nytimes.com/1997/07/20/magazine/living-with-medical-marijuana.html> [<https://perma.cc/CX56-LRQJ>] (describing the ballot question as being a messy way to legalize marijuana as there were so many questions about how to regulate the substance, such as where it can be consumed, as well as how, and how much can be transported).

68. *Id.*

69. Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 ARIZ. ST. L.J. 391, 393 (2015) (noting that the Arizona state legislature rendered the law inoperative by adding prescription and research requirements that ran afoul of federal law).

70. Leslie Shapiro & Katie Mettler, *U.S. Marijuana Laws: A History*, WASH. POST, <https://www.washingtonpost.com/graphics/health/marijuana-laws-timeline/> (last visited Mar 17, 2021) [<https://perma.cc/P9QD-HRX5>].

71. *Id.*

72. *See Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

73. *Id.*

74. *Id.* at 6–7.

75. *Id.* at 7.

76. *Id.*

77. *Id.* The respondents argued that the enforcement violated the Commerce Clause, as well as the Fifth Amendment, Ninth Amendment, and the Tenth Amendment, as well as the doctrine of medical necessity. *Id.* at 8.

78. *Id.* at 15.

Justice Stevens, in his decision, noted that the congressional findings contained within the CSA supported the suggestion that Congress intended the statute to cover local activities within its scope.<sup>79</sup> The respondents relied on the Supreme Court's decisions in *United States v. Lopez*<sup>80</sup> and *United States v. Morrison*<sup>81</sup> to argue that the government was exceeding its Commerce Clause power.<sup>82</sup> But, the Supreme Court held that those cases could be distinguished because their statutory schemes were defective, a matter not present with the CSA.<sup>83</sup> The Supreme Court held that the cumulative effect of medical marijuana consumption would have a significant effect on the national market and the CSA was, therefore, within Congress's Commerce Clause powers.<sup>84</sup>

The *Raich* decision would not stall the expansion of medical marijuana across the country.<sup>85</sup> The year after the ruling that effectively upheld the federal government's ability to enforce the CSA against individual medical marijuana users, Rhode Island legalized medicinal marijuana, followed by New Mexico in 2007, Michigan in 2008, and Arizona, New Jersey, and Washington, D.C. in 2010.<sup>86</sup>

On the coattails of the legalization of medicinal marijuana then came efforts to legalize the sale of marijuana for recreational purposes.<sup>87</sup> In 2012, voters in Washington and Colorado would be the first to approve legalizing the recreational sale of marijuana.<sup>88</sup> Indeed, as momentum was building for the legalization of recreational marijuana in Washington and Colorado, the federal government was planning action against property owners who leased their properties to

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79. *Id.* at 20.

80. *See* *United States v. Lopez*, 514 U.S. 549, 566–68 (1995) (holding that the Gun-Free School Zones Act of 1990 did not regulate commercial activity, nor did it have any connection to interstate activity, and thus, exceeded Congress's power under the Commerce Clause).

81. *See* *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act of 1994 exceeded Congress's Commerce Clause powers).

82. *Raich*, 545 U.S. at 23.

83. *Id.* at 25–26 (“The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”).

84. *Id.* at 24. “[T]he regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.” *Id.* at 19.

85. *See* Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (Apr. 19, 2017), <https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> [<https://perma.cc/HZ85-GDUN>].

86. *Id.*

87. *See, e.g.*, Marc Lacey, *California Rejects Marijuana Legalization*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2010/11/03/us/politics/03ballot.html> [<https://perma.cc/B8C3-8JJX>] (noting an initial effort to legalize recreational marijuana was unsuccessful).

88. *See* Dan Frosch, *In Colorado, Getting Down to Business of Marijuana*, N.Y. TIMES (Dec. 17, 2012), <https://www.nytimes.com/2012/12/18/us/task-force-created-to-regulate-legalized-marijuana-in-colorado.html> [<https://perma.cc/7K88-RK7N>].

medical marijuana dispensaries, setting up another judicial showdown between the federal government and state-authorized activities.<sup>89</sup>

*D. Enforcing the Supremacy Clause?*

In the early 2010s, as California and Colorado voters were wrestling with whether to legalize recreational marijuana, nine former heads of the DEA urged Attorney General Eric Holder to consider that “[t]o continue to remain silent conveys to the American public and the global community a tacit acceptance of these dangerous initiatives.”<sup>90</sup> The assertions, made in the letters from the former heads of the DEA, however, addressed something that no federal court had yet decided—whether the CSA preempted state law.<sup>91</sup> The Supreme Court’s decision in *Raich* was not a determination on the preemptive effect of the CSA.<sup>92</sup> Instead, it was only a ruling on whether the statute was a valid exercise of Congress’s power under the Commerce Clause.<sup>93</sup> Indeed, *Raich* had little effect on the enthusiasm for medical marijuana legalization across the country.<sup>94</sup>

Professor Robert Mikos argued in a 2009 law review article that despite the *Raich* decision, the states “retain both *de jure* and *de facto* power to exempt medical marijuana from criminal sanctions.”<sup>95</sup> In reaching this conclusion, Mikos contended that there was an apparent conflict between states and the federal government, as states want some residents (in the case of medical marijuana) to have access to a substance that the federal government outlaws entirely.<sup>96</sup> A Ninth Circuit case supports Professor Mikos’s general position. This case, *Conant v. Walters*,<sup>97</sup> pre-dates the *Raich* decision by several years. It focused on the federal government’s ability to revoke a physician’s license to prescribe controlled substances where the basis for the investigation or revocation is predicated on the physician’s recommendation of the use of medical marijuana.<sup>98</sup> The trial court held that enforcement by the government would intrude on protected First Amendment expression.<sup>99</sup> While the majority focused on the First Amendment,

89. See Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES (Oct. 7, 2011), <https://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html> [<https://perma.cc/8D4C-6Y6V>].

90. Alex Dobuzinkis, *Former DEA Heads Urge Holder to Speak Out Against Pot Ballots*, REUTERS (Sep. 7, 2012, 5:10 PM), <https://fr.reuters.com/article/us-usa-marijuana-holder-idUSBRE8861CI20120907> [<https://perma.cc/F3ZL-LM6H>]. In 2010, a similar letter was sent to Attorney General Holder urging him to “uphold the Supremacy Clause of the U.S. Constitution and the preemption provision of the CSA to prevent Proposition 19 from becoming law.” Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. REV. 74, 100 (2015).

91. Chemerinsky et al., *supra* note 90, at 100–102.

92. *Id.* at 101, 103 n.104.

93. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1422–23 (2009).

94. *Id.* at 1423.

95. *Id.* at 1423–24.

96. *Id.* at 1424.

97. 309 F. 3d 629, 632 (9th Cir. 2002); see also Mikos, *supra* note 93, at 1424 n.89.

98. *Conant*, 309 F. 3d at 632.

99. *Id.* It is worth noting that the doctor was merely recommending the use of medical marijuana, though the government contended that this was akin to prescribing medical marijuana. *Id.*

Judge Kozinski went further in concurrence, proffering that the federal policy undermines state authority to dictate what is legal or illegal under state law.<sup>100</sup>

Judge Kozinski stated, citing *United States v. Printz*:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. Applied to our situation, this means that much as the federal government may prefer that California keep medical marijuana illegal it cannot force the state to do so. Yet, the effect of the federal government's policy is precisely that: By precluding doctors, on pain of losing their DEA registration, from making a recommendation that would legalize the patients' conduct under state law, the federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal. But preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.<sup>101</sup>

While the Ninth Circuit's decision provided some clarity, states across the country that legalized marijuana were still left without a Supreme Court decision to guide them as to the scope of the federal government's power—a limitation that remains true to this day.

### III. SPORTS BETTING AND THE LIMITS OF FEDERAL PREEMPTION

The marijuana industry's much-needed guidance regarding the preemptive nature of the CSA would come not in the form of a Supreme Court decision directly addressing the legality of marijuana, but instead from a case about sports betting—a result that further intertwined the recent fate of these two somewhat related industries.<sup>102</sup> Beginning in 2011, the State of New Jersey undertook efforts to authorize sports betting, in part to prop up the flagging Atlantic City casino industry.<sup>103</sup> In a nonbinding referendum in November 2011, by a vote of two to one, New Jersey residents passed an initiative in favor of authorizing sports betting.<sup>104</sup> In May of 2012, the New Jersey Governor then signed a bill allowing sports gambling at New Jersey racetracks and casinos<sup>105</sup> in direct violation of federal law.<sup>106</sup> The then-Governor's signature would set in motion

100. *Id.* at 645.

101. *Id.* at 645–46.

102. *See* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1468 (2018).

103. *See* Sarah Coffey, *N.J. Moves Towards Legal Sports Betting This Fall, in Time for NFL Season*, NAT'L L. REV. (May 25, 2012), <https://www.natlawreview.com/article/nj-moves-towards-legal-sports-betting-fall-time-nfl-season> [<https://perma.cc/862P-CAT4>].

104. *Id.*

105. *See* Stacy Proebstle, *Sports Betting Coming to NJ Despite Fed Ban, Christie Says*, N.J. 101.5 (May 25, 2012), <https://nj1015.com/sports-betting-coming-to-nj-despite-fed-ban-christie-says/> [<https://perma.cc/7MMV-4DCE>].

106. *See* 28 U.S.C. § 3702(1) (1992).

nearly six years of litigation, culminating in significant decisions for not only sports gambling but also constitutional law.<sup>107</sup>

*A. How New Jersey Ended Up at the Supreme Court*

The federal law in question, known as the Professional and Amateur Sports Protection Act (“PASPA”), required that states keep their sports gambling offerings as they were in 1992, the year in which the law was passed.<sup>108</sup> The statute had several unusual provisions, including a perpetual grandfathering clause that enabled Nevada to maintain its near-monopoly on sportsbook-style wagering.<sup>109</sup> The statute also had a carve out<sup>110</sup>—one that only Atlantic City, New Jersey could satisfy in 1992—allowing New Jersey one year to legalize sports betting.<sup>111</sup> The State failed to take action within the one-year window, confining legal sportsbook-style wagering to Nevada for more than twenty-five years.<sup>112</sup> When Governor Chris Christie signed the New Jersey bill into law in May 2012, an oddity of PASPA would be revealed: a provision allowing private sports leagues to enforce the statute with the same standing as the Attorney General.<sup>113</sup> The four major American professional sports leagues and the National Collegiate Athletic Association (“NCAA”) brought suit against the New Jersey Governor, seeking an injunction stopping the implementation of the law.<sup>114</sup> The New Jersey Governor defended the suit, arguing that PASPA infringed on New Jersey’s rights via several constitutional grounds, including a violation of the anti-commandeering principle.<sup>115</sup> Judge Shipp of the U.S. District Court for the Northern District of New Jersey dismissed that argument, however, along with the other arguments raised on behalf of the State, granting a permanent injunction to the sports league plaintiffs.<sup>116</sup>

107. See *Murphy*, 138 S. Ct. at 1468, 1481.

108. See *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208, 216 (3d Cir. 2013).

109. John T. Holden et al., *Sports Gambling Regulation and Your Grandfather (Clause)*, 26 STAN. L. & POL’Y REV. ONLINE 1, 3 (2014).

110. See 28 U.S.C. § 3704(3) (1992) (allowing a municipality with a casino industry that had been in existence for ten years a one-year window to authorize and launch sports betting).

111. Joseph F. Sullivan, *How Politics Nipped a Sports Betting Bill*, N.Y. TIMES (Jan. 2, 1994), <http://www.nytimes.com/1994/01/02/nyregion/how-politics-nipped-a-sports-betting-bill.html> [<https://perma.cc/4Y5F-5LNG>].

112. *Id.*; see also Martin Derbyshire, *What the SCOTUS Sports Betting Decision Means for Nevada*, PLAY NEVADA (May 15, 2018), <https://www.playnevada.com/2913/sports-betting-ban-nevada/> [<https://perma.cc/897R-V3XG>].

113. 28 U.S.C. § 3703 (1992). The issue with allowing the sports leagues to enforce PASPA is that the sports leagues do not have a protected right to the information used by bookmakers to offer sports gambling propositions. As such, PASPA’s use of the word ‘whose,’ to describe the sports leagues’ relationship to sporting events, incorrectly implied they had a property right in the games. See Ryan M. Rodenberg et al., “*Whose Game Is It? Sports-Wagering and Intellectual Property*,” 60 VILL. L. REV. ONLINE: TOLLE LEGE 1, 1 (2014); see also Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J.L. & BUS. 1, 3, 15 (2018); Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 83, 101 (2015).

114. *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F.Supp. 2d 551, 553 (D.N.J. 2013).

115. *Id.* at 561–62.

116. *Id.* at 579.

The New Jersey Governor then appealed immediately for review to the Third Circuit.<sup>117</sup> Like the District Court below, the Third Circuit held that PASPA was a valid exercise of Congress's Commerce Clause powers, and that the statute did not unconstitutionally regulate "purely local activities."<sup>118</sup> The New Jersey Governor then requested and was granted an *en banc* review of this decision by the full U.S. Court of Appeals for the Third Circuit.<sup>119</sup> But this time the court was split with Judge Vanaskie dissenting based on his view that PASPA imposes a burden on states and an unconstitutional restriction on states' abilities to govern, in conflict with the anti-commandeering doctrine.<sup>120</sup> After a failed petition to the Supreme Court, it appeared New Jersey's luck had run out.<sup>121</sup> There remained, however, one option left—one created by the language of the Third Circuit's decision—an option dubbed the "nuclear option."<sup>122</sup>

The nuclear option was so-named because it would involve New Jersey entirely repealing their laws regulating sports betting.<sup>123</sup> The Third Circuit's majority opinion planted the idea for the nuclear option when it stated, "under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official."<sup>124</sup> New Jersey would not use the full nuclear option, but instead, a more precision weapon, choosing to repeal laws regarding sports betting as they pertained to casinos and racetracks, while leaving other laws in place that prohibited sports betting more broadly, creating a partial repeal.<sup>125</sup> New Jersey's clever couching of the partial repeal as within the guidance provided by the Third Circuit did not sway Judge Shipp, of the District Court of New Jersey, who held for the second time that PASPA preempted New Jersey's efforts to conduct sports betting.<sup>126</sup> The Third Circuit—with a different panel from the challenge to the 2012 law—ruled again in favor of the state but subsequently vacated that decision, choosing to sit *en banc*, before again upholding the permanent injunction.<sup>127</sup> The *en banc* decision, however, resulted in two of the three judges from the Third Circuit ruling over the 2012 law dissenting, including Judge Fuentes, who authored the

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117. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (June 23, 2014) (No. 13–967).

118. *Id.* at 224–26.

119. *See id.* at 212–14.

120. *See id.* at 251 (Vanaskie J., dissenting) ("Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court 'has been explicit' that 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

121. *See Christie v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931, 931 (2014).

122. *See* Dustin Gouker, *Can We Just Forget About the 'Nuclear Option' for NJ Sports Betting?*, LEGAL SPORTS REP. (Oct. 12, 2016), <https://www.legalsportsreport.com/11799/nj-sports-betting-scenarios/> [<https://perma.cc/4PYU-5ZWR>].

123. *See id.*

124. *Governor of N.J.*, 730 F.3d at 233.

125. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 488, 491–92 (D.N.J. 2014).

126. *See generally id.*

127. *Nat'l Collegiate Athletic Ass'n v. Christie*, 832 F.3d 389, 398–99 (3d Cir. 2016).

majority opinion.<sup>128</sup> He noted that New Jersey could repeal its laws without offending the PASPA.<sup>129</sup> The Appellants would again seek review at the Supreme Court.<sup>130</sup>

*B. The Murphy Decision and a New Boundary of Preemption*

With a new caption reflecting the election of Governor Phil Murphy, the Supreme Court issued its decision in the *Murphy* case on May 14, 2018.<sup>131</sup> Justice Alito, who authored the majority opinion for the Court, framed the question that the Court needed to resolve as follows:

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to “authorize” sports gambling schemes. 28 U.S.C. § 3702(1). We must decide whether this provision is compatible with the system of “dual sovereignty” embodied in the Constitution.<sup>132</sup>

Alito’s opinion commenced by examining whether the partial repeal, initiated by New Jersey, fell within the scope of the term “authorize,” as used within PASPA.<sup>133</sup> The Supreme Court adopted the view of the sports leagues—that a partial repeal (or a complete repeal) of the state’s gambling laws was akin to an authorization.<sup>134</sup> This determination does not, however, save the statute from the anti-commandeering doctrine.<sup>135</sup> The rationale behind the anti-commandeering doctrine is that the nation’s founders established the United States based on dual sovereignty, and that one of the core tenets of this shared system is that neither the federal government nor state governments can coerce the other to act.<sup>136</sup> Alito noted that the powers of federal government are immense, but they are not unlimited, and the federal government cannot legislate directly how states regulate.<sup>137</sup>

The anti-commandeering doctrine is a relatively modern incarnation of the Supreme Court, being found affirmatively in only two high-court cases prior to the *Murphy* decision.<sup>138</sup> In *New York v. United States*, the Supreme Court held

128. *Id.* at 403–05.

129. *Id.* at 403.

130. See Brent Johnson & Jonathan D. Salant, *U.S. Supreme Court Agrees to Hear N.J. Sports Betting Case*, NJ.COM (Jan. 16, 2019), [https://www.nj.com/politics/2017/06/supreme\\_court\\_agrees\\_to\\_hear\\_nj\\_sports\\_betting\\_case.html](https://www.nj.com/politics/2017/06/supreme_court_agrees_to_hear_nj_sports_betting_case.html) [<https://perma.cc/LMQ8-9LRR>].

131. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1461 (2018).

132. *Id.* at 1468.

133. See *id.* at 1473–75.

134. *Id.* at 1474.

135. See *id.* at 1475.

136. See *id.*

137. See *id.* at 1476 (“The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.”).

138. See *New York v. United States*, 505 U.S. 144, 145 (1992); see also *Printz v. United States*, 521 U.S. 898, 916 (1997).

that a federal law requiring the State of New York to either take title of certain amounts of low-level radioactive waste or follow Congress's instruction in regulating waste violated the anti-commandeering principle.<sup>139</sup> In the other case, *Printz v. United States*, the Court held that certain provisions of the Brady Handgun Bill requiring local law enforcement officials to act violated the anti-commandeering clause and were unconstitutional.<sup>140</sup> The Supreme Court held that the federal government could not force states to enact a law or require state officials to enforce federal law.<sup>141</sup> Based on the decisions in *New York* and *Printz*, Justice Alito declared "[t]he PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anti-commandeering rule."<sup>142</sup>

The decision rejected arguments that PASPA had a preemptive effect on state law, finding that the statute did not satisfy the tests for conflict, express, or field preemption.<sup>143</sup> The Court gave a detailed lesson on three types of recognized preemption.<sup>144</sup> The Court has acknowledged that the federal government can preempt state laws through one of three manners.<sup>145</sup> The first manner is conflict preemption.<sup>146</sup> Conflict preemption occurs when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>147</sup> The second form of preemption, discussed by Justice Alito, is express preemption.<sup>148</sup> Express preemption is the cleanest way for Congress to alleviate any doubt as to the intent of the statute; it is an express statement as to preemptive intent of a statute.<sup>149</sup> Citing the Airline Deregulation Act as an example, the Court explained that there are no magic words, but express preemption makes clear, via a statement, that federal law supersedes state law.<sup>150</sup> Finally, the Court discussed field preemption.<sup>151</sup> Field preemption occurs when Congress has created a federal regulatory scheme "so comprehensively that it has left no room for supplementary state regulation."<sup>152</sup> PASPA, however, did not follow any recognized means of preemption.<sup>153</sup> PASPA required states to maintain prohibitions they no longer desired, a command that conflicts with the

139. See *New York*, 505 U.S. at 175.

140. *Printz*, 521 U.S. at 935.

141. See *id.* at 912.

142. *Murphy*, 138 S. Ct. at 1478.

143. See *id.* at 1479.

144. See *id.* 1480–81.

145. See *id.*

146. See *id.* at 1480.

147. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

148. *Murphy*, 138 S. Ct. at 1480.

149. See *id.*

150. *Id.* (citing the language of the Airline Deregulation Act as an example: "No State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier . . . ." (quoting 49 U.S.C. App. § 1305(a)(1))).

151. *Id.*

152. *Id.* (quoting *R.J. Reynolds Tobacco Co., v. Durham County*, 479 U.S. 130, 140 (1986)).

153. See *id.* at 1481 ("[I]t is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors.").



Tenth Amendment.<sup>154</sup> The federal government's view of PASPA, which the Supreme Court rejected, is similar to how the federal government has implied the CSA operates concerning governing state regulation of marijuana.<sup>155</sup>

### C. *The Murphy Decision's Implications for the Marijuana Industry*

The *Murphy* decision provides clarity for states looking to legalize recreational or medical marijuana.<sup>156</sup> As Professor Mikos astutely argues, “The *Murphy* decision will provide states with the clear precedent they need to debunk lingering claims that their marijuana reforms are preempted because they ‘authorize’ drug activities federal law forbids.”<sup>157</sup> Indeed, in 2016, the Supreme Court declined to exert original jurisdiction over a lawsuit filed by Nebraska and Oklahoma against Colorado.<sup>158</sup> The *Murphy* decision provides clarity as to how states may authorize and license sports gambling, and, by analogy, marijuana; nevertheless, the Court did not provide guidance as to how sports gambling, and consequently marijuana, are to be regulated.<sup>159</sup> One of the key distinctions between the PASPA and the CSA is that the CSA does not contain the private enforcement provision contained within the PASPA's § 3703.<sup>160</sup> This is significant because the federal government lacks the resources to enforce the CSA, particularly against marijuana-based offenses.<sup>161</sup> The inability to enforce the statute on a nation-wide basis provides some degree of certainty for marijuana businesses, especially considering that the *Murphy* decision was exclusive to PASPA and did not explicitly consider the CSA.<sup>162</sup>

Another point of concern is that the CSA imposes a regulatory apparatus that PASPA did not.<sup>163</sup> The CSA, however, is only as virulent as the will to enforce it, which in the context of marijuana-based offenses appears nearly nonexistent.<sup>164</sup> The CSA addresses the matter of preemption, stating that no provision “shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates.”<sup>165</sup> Additionally, § 903 of the

154. *Id.* at 1476, 1481.

155. Robert A. Mikos, *The Implications of Murphy v. NCAA for State Marijuana Reforms*, MARIJUANA L., POL'Y, & AUTH. (May 17, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/05/the-implications-of-murphy-v-ncaa-for-state-marijuana-reforms/> [https://perma.cc/M7Y3-E57H].

156. *See id.*

157. *Id.*

158. *See Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (mem.) (2016). Justice Thomas and Justice Alito dissented from the denial of the motion for leave to file a bill of complaint. The dissenting Justices stated, “Because our discretionary approach to exercising our original jurisdiction is questionable, and because the plaintiff States have made a reasonable case that this dispute falls within our original and exclusive jurisdiction, I would grant the plaintiff States leave to file their complaint.” *Id.* at 1034 (Thomas, J., dissenting).

159. *See Mikos, supra* note 155 (noting that this is not a new position but does put the Supreme Court's “imprimatur” on states abilities to repeal laws).

160. *See id.*; *see also* 28 U.S.C. § 3703 (1992).

161. Mikos, *supra* note 93, at 1424.

162. *See id.*

163. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2017) (Nos. 16-476, 16-477).

164. *See Mikos, supra* note 93, at 1423.

165. 21 U.S.C. § 903 (1970).

CSA notes that the statute preempts state law if it is impossible for the two laws to “stand together.”<sup>166</sup> Given the nearly twenty-five years that have passed since California first permitted medical marijuana and the lack of federal challenge to state laws in that time, conventional wisdom would dictate that state marijuana laws can co-exist with the CSA.<sup>167</sup> Beginning in 2013, federal prosecutors began operating under the guidance of the so-called Cole Memo.<sup>168</sup> The Cole Memo was not a total moratorium on the enforcement of the CSA against marijuana-based offenses, but instead, a memorialization of a practice already in place, directing limited resources towards “the illegal distribution and sale of marijuana” in its connection to being “a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.”<sup>169</sup> The memorandum noted that there had been a long-standing prosecutorial position that any prosecution of personal possession on private property was a matter for local authorities.<sup>170</sup> The memorandum further directed prosecutors to look beyond the size of a for-profit marijuana business and to see if it was associated with other Department priorities like gangs, before deciding to bring trafficking charges.<sup>171</sup>

The Cole Memo is frequently held up as a turning point of the federal government’s position on marijuana.<sup>172</sup> It follows, however, at least two previous memos that began the momentum against the prosecution of state-authorized marijuana activity.<sup>173</sup> From 2014 to January 2018, Congress had accompanied appropriations bills with a note that the DEA cannot use those funds to combat state rollouts of medical marijuana initiatives.<sup>174</sup> Nevertheless, in January 2018, Attorney General Jeff Sessions announced that the Department of Justice had rescinded the Cole Memo and re-prioritized the enforcement of federal anti-marijuana laws.<sup>175</sup> The decision to rescind the Memo came after the Attorney General

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166. See *id.* (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”).

167. See *State Marijuana Regulation Laws Are Not Preempted by Federal Law*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/issues/legalization/state-marijuana-regulation-laws-are-not-preempted-by-federal-law/> [https://perma.cc/D6GV-JHWY].

168. See Memorandum from James M. Cole, Deputy Att’y Gen., to all United States Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/K2SD-V5HC].

169. *Id.*

170. *Id.* at 2.

171. *Id.* at 3.

172. See Sarah Trumble & Nathan Kasai, *America’s Marijuana Evolution*, THIRD WAY (Aug. 24, 2017), <https://www.thirdway.org/report/americas-marijuana-evolution> [https://perma.cc/WY4F-ZS8G].

173. See Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected United States Attorneys (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [https://perma.cc/D6D5-UMRE] (advising prosecutors it is likely not an efficient use of resources to target medical marijuana users).

174. See *State Marijuana Regulation Laws Are Not Preempted by Federal Law*, *supra* note 167.

175. See Jonathan Blanks, *AG Sessions Threatens Legal Marijuana Businesses*, CATO INST. (Jan. 4, 2018, 2:58 PM), [https://www.cato.org/blog/ag-sessions-threatens-legal-marijuana-businesses?gclid=Cj0KCQiA4NTxBRDxARIsAHyp6gA0ftw-KRgpxiaWaB0WMFqUyXrl9tqlRzs2flmVBLdHEaV2EeynLEaAuQbEALw\\_wcB](https://www.cato.org/blog/ag-sessions-threatens-legal-marijuana-businesses?gclid=Cj0KCQiA4NTxBRDxARIsAHyp6gA0ftw-KRgpxiaWaB0WMFqUyXrl9tqlRzs2flmVBLdHEaV2EeynLEaAuQbEALw_wcB)

compared marijuana to heroin and associated it with spikes in violence.<sup>176</sup> In June 2019, the House of Representatives passed a bipartisan bill protecting state-authorized cannabis businesses “from interference by the U.S. Department of Justice.”<sup>177</sup> The Senate, however, has stalled in taking action on any bills providing clarity and protection to state-authorized marijuana businesses, which face some level of uncertainty given the dissolution of the Cole Memo’s guidance.<sup>178</sup> Despite the absence of the shelter provided by the Cole Memo, marijuana businesses can find some solace in the fact that there is growing public support for legalized marijuana, and the Department of Justice does not appear to have redirected resources for enforcing the CSA against state-sanctioned marijuana operations.<sup>179</sup>

The *Murphy* decision has provided some clarity for the legal marijuana industry, at least against the threat of the federal government seeking to argue that the CSA preempts state laws.<sup>180</sup> But even with the ruling in the sports betting case and the similarities in some aspects of society’s treatment of marijuana and sports betting, the marijuana industry’s growth has been sluggish. Despite the promise of converting the illegal market to the legal market, there have been several obstacles that have kept the marijuana industry from reaching the economic valuations that some predicted.<sup>181</sup>

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[<https://perma.cc/VP29-PJMZ>]. It is worth noting, that in 2018, the Department of Justice also rescinded guidance regarding the scope of the federal Wire Act, which had long been considered to only to apply to a ban on interstate sports wagering, but was reconfigured, via executive-initiative, to encapsulate all forms of online gambling. See *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 OP. O.L.C. 1 (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download> [<https://perma.cc/AH6Z-JJVV>].

176. Christopher Ingraham, *Two Years After the DEA Admitted Marijuana is Less Dangerous than Heroin, Jeff Sessions Would Like to Reconsider*, WASH. POST: ECON. POL’Y (Mar. 15, 2017, 1:58 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/03/15/two-years-after-the-dea-admitted-marijuana-is-less-dangerous-than-heroin-jeff-sessions-would-like-to-reconsider/> [<https://perma.cc/CGU5-SKAF>].

177. Sun Ah Park, *U.S. House Votes to Approve Measure Blocking Feds from Interfering with State Cannabis Laws*, NAT’L L. REV. (June 25, 2019), <https://www.natlawreview.com/article/us-house-votes-to-approve-measure-blocking-feds-interfering-state-cannabis-laws> [<https://perma.cc/76ZU-6UMV>].

178. See Blake Dodge, *Congress Silently Killed Several Cannabis Reforms this Month Despite Mounting Public Support*, NEWSWEEK (Dec. 24, 2019, 2:52 PM), <https://www.newsweek.com/congress-silently-killed-several-cannabis-reforms-this-month-despite-public-support-1479114> [<https://perma.cc/QS56-YZKF>].

179. Sixty-six percent of Americans supported legalizing marijuana in 2019. See Jeffrey M. Jones, *U.S. Support for Legal Marijuana Steady in Past Year*, GALLUP (Oct. 23, 2019), <https://news.gallup.com/poll/267698/support-legal-marijuana-steady-past-year.aspx> [<https://perma.cc/8HZW-6NXX>].

180. See Ilya Somin, *What Supreme Court Victory for Sports Gambling Means for Marijuana, Sanctuary Cities*, USA TODAY (May 15, 2018, 7:34 PM), <https://www.usatoday.com/story/opinion/2018/05/15/sports-gambling-supreme-court-federalism-marijuana-sanctuary-cities-column/610876002/> [<https://perma.cc/N4Z6-GG4Y>].

181. See Julie Johnson, *California’s Sluggish Legal Cannabis Industry Could Get Jump-Start with Tax Cuts*, N. BAY BUS. J. (Jan. 29, 2019), <https://www.northbaybusinessjournal.com/northbay/sonomacounty/9224250-181/california-cannabis-business-taxes> [<https://perma.cc/NYU6-YDFA>]; see also Lester Black, *Legal Weed Isn’t the Boon Small Businesses Thought it Would Be*, FIFTYTHREEEIGHT (Dec. 29, 2017, 6:00 AM), <https://fivethirtyeight.com/features/legal-weed-isnt-the-boon-small-businesses-thought-it-would-be/> [<https://perma.cc/DW7H-S9NS>]; Max A. Cherney, *Marijuana Companies Are Bad at Forecasting, Analyst Says*, MARKETWATCH (Jan. 14, 2020, 8:47 AM), <https://www.marketwatch.com/story/marijuana-companies-are-bad-at-forecasting-analyst-says-2020-01-13?mod=cannabis-watch> [<https://perma.cc/ZN5Q-Q3BS>]; Thomas Fuller, *‘Getting Worse, Not Better’: Illegal Pot Market Booming in California Despite Legalization*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/marijuana-california-legalization.html> [<https://perma.cc/BEQ3-FCNL>].

## IV. CURRENT CHALLENGES FACING THE MARIJUANA INDUSTRY

The legal marijuana industry in the United States is operational in thirty-three states that have regulations governing medicinal access, possession, and use, and in eleven states that allow recreational production, sale, and consumption.<sup>182</sup> All states impose regulations on the sale of medical marijuana, including age restrictions, access controls, identification requirements, as well as guidelines for retailers and producers.<sup>183</sup> Likewise, every state that allows for legalized recreational marijuana has imposed its own sets of regulations, dictating requirements on matters such as how to license businesses, tax rates, and age requirements for buyers.<sup>184</sup> As a result of each state having its own regulatory regime, operators in each state may face some local challenges. Nevertheless, the following section examines the challenges facing the marijuana industry more generally.

A. *The Banking Problem*

One important legal challenge facing the marijuana industry overall is problems in using the banking industry. The divergent nature of state and federal marijuana policies has made banking—one of the most fundamental aspects of operating a business—nearly impossible in some jurisdictions.<sup>185</sup> The problem for banks is that many of them operate in more than one state and are subject to federal laws.<sup>186</sup> This poses a problem for the processing of transactions related to marijuana, as their federal compliance standards conflict with state-regulated marijuana transactions.<sup>187</sup> Indeed, many national banks will shut down a user's account if they find that a user deposited funds tied to marijuana transactions.<sup>188</sup> The challenge facing banks is that they face federal exposure to money laundering regulations and the steep forfeiture penalties contained in the CSA.<sup>189</sup> The absence of access to the national banking industry is more than a safety hazard for businesses that must hold tens of thousands of dollars (or more) in cash at any given time.<sup>190</sup> Even when marijuana businesses can use the Automated Clearing House ("ACH") system to allow for the direct transfers of funds, those

182. Jeremy Berke & Skye Gould, *Legal Marijuana Goes on Sale in Illinois. Here Are All the States Where Cannabis Is Legal*, BUS. INSIDER (Jan. 1, 2020), <https://www.businessinsider.nl/legal-marijuana-states-2018-1/> [https://perma.cc/XQP7-6R6M].

183. See *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [perma.cc/CS6V-66FS].

184. *How Do Marijuana Taxes Work?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work> (last visited Mar. 17, 2021) [perma.cc/X76J-7JCF].

185. See Chemerinsky et al., *supra* note 90, at 91.

186. *Id.*

187. Robb Mandelbaum, *Where Pot Entrepreneurs Go When the Banks Just Say No*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html> [https://perma.cc/2JHF-3YKN].

188. *Id.*

189. Chemerinsky et al., *supra* note 90, at 91–93.

190. Ellen Sheng, *Underbanked Cannabis Industry Struggles to Finance Double-Digit Growth, Leaving Business Owners Empty-Handed*, CNBC (Oct. 1, 2019, 10:28 AM), <https://www.cnbc.com/2019/10/01/underbanked-cannabis-industry-struggles-to-finance-double-digit-growth.html> [perma.cc/T5CP-PYLU].

transactions are cleared through the Federal Reserve and can be slow and require personal details to execute.<sup>191</sup> The solution for many marijuana businesses is to use small, local credit unions.<sup>192</sup> There has been a slight increase in the number of banks and credit unions accepting marijuana business clients as customers over the last several years.<sup>193</sup> The increase has been gradual, however, with only 723 depository institutions across the country accepting funds from marijuana businesses as of September 2019.<sup>194</sup>

Moreover, even many of the banks that are taking on marijuana business clients are not doing so as they would with an ordinary business client. Instead, many banks are saddling the cannabis industry with thousands of dollars in additional fees every month.<sup>195</sup> While some states have considered legislation in an attempt to ease these burdens, legislative progress has not kept up with the growth of the industry.<sup>196</sup> Federal regulations, however, could allow for such growth.<sup>197</sup> Despite overwhelming bipartisan support for the SAFE Banking Act in the House of Representatives, a federal bill that would have provided a safe harbor for banks to provide basic banking services to marijuana businesses, the Bill appeared doomed in the Senate.<sup>198</sup> In 2018, only 30% of marijuana businesses had a bank account, or in other words, this could mean that the \$9 billion industry was holding more than \$6 billion in physical cash.<sup>199</sup> The challenge facing the banks is that there remains federal exposure to money laundering regulations as well as the steep forfeiture penalties contained in the CSA.<sup>200</sup> Nonetheless, federal banking laws are but one obstacle facing the booming marijuana industry.

191. *Direct ACH: A Poor Cash Replacement*, ALT THIRTY-SIX, (Apr. 29, 2019), <https://www.alt36.com/blog/cannabis-direct-ach-why-it-cant-beat-cash> [https://perma.cc/FG8X-V4F8].

192. Sheng, *supra* note 190.

193. *Id.*

194. Sean Williams, *Here's How Many Banks Provide Financial Services to the U.S. Marijuana Industry*, MOTLEY FOOL (Dec. 8, 2019, 11:41 AM), <https://www.fool.com/investing/2019/12/08/heres-how-many-banks-provide-financial-services-to.aspx> [https://perma.cc/X3WR-Z4ND].

195. Courtenay Brown, *Dude, Where's My Cash?*, AXIOS (June 22, 2019), <https://www.axios.com/banks-marijuana-financing-c3feb8c1-f731-4f51-af02-d6e89acd5e06.html> [https://perma.cc/K4V3-LBJQ].

196. *Id.* (noting California lawmakers considered a bill that would have created “state-sponsored, marijuana-friendly banks.”).

197. See Sean Williams, *The SAFE Banking Act Passes the House in a Landslide—Here's What Happens Next*, MOTLEY FOOL (Sept. 28, 2019, 12:21 PM), <https://www.fool.com/investing/2019/09/28/the-safe-banking-act-passes-the-house-in-a-landsli.aspx> [https://perma.cc/6ZWP-WCRQ] (noting the passage of the SAFE Banking Act in the House of Representatives, which would have protected banks that offered basic services to marijuana businesses if it became law).

198. David Jagielski, *Is the SAFE Banking Act Doomed?*, MOTLEY FOOL (Jan. 4, 2020, 11:00 AM), <https://www.fool.com/investing/2020/01/04/is-the-safe-banking-act-doomed.aspx> [https://perma.cc/L7JJ-7XNV]. It is worth noting that Senator Cory Gardner believed that the bill could pass the whole Senate, but instead faced its staunchest opposition in the Senate Banking Committee. See Thomas Mitchell, *Gardner: Marijuana Banking Would Pass Senate if Vote Were Held*, WESTWORD (June 4, 2020, 12:18 PM), <https://www.westword.com/marijuana/senate-would-pass-safe-banking-act-cory-gardner-says-11722306> [https://perma.cc/8FZU-Q845].

199. Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES (Sept. 6, 2018, 10:07 AM), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#3f9d2d8c3c68> [https://perma.cc/96AY-GGGX].

200. Chemerinsky et al., *supra* note 90, at 91–93.

### B. *The Federal Tax Problem*

A second challenge facing the marijuana industry stems from the Internal Revenue Code. The Internal Revenue Service has promulgated a rule that penalizes both legal and illegal drug businesses equally.<sup>201</sup> Federal Tax Rule 280E, which only applies to federal drug laws, requires any trade or business operating in violation of federal drug laws to pay federal income tax on what can only be considered as disadvantageous terms.<sup>202</sup> The Rule prohibits the deduction of any business expenses associated with a “trade or business” involving the trafficking of substances classified in Schedule I or Schedule II of the CSA.<sup>203</sup> Unlike other branches of the federal government that had abided by a moratorium of sorts on enforcement against marijuana businesses, the Internal Revenue Service, in 2011, targeted California’s largest medical marijuana dispensary for millions of dollars owed in back taxes by virtue of Rule 280E.<sup>204</sup> Rule 280E imposes a significant obstacle to the operation of marijuana businesses, even in states where their activities are legal.<sup>205</sup> While there are some potential solutions for businesses willing to be creative, these tax burdens threaten the viability of the marijuana industry, and as burdens mount, costs are likely to be passed on to consumers, which will translate into a black market.<sup>206</sup> Federal laws place a significant burden on marijuana businesses, but problems remain at the state level as well.

### C. *The Licensing Inconsistencies*

There also has been a growing problem with licensing marijuana distributors amid nation-wide legalization of the substance.<sup>207</sup> For example, the recent legalization of medicinal marijuana in Florida has highlighted a problem.<sup>208</sup> Out of twenty-two license holders, seventeen of them obtained their licenses through legal challenges, instead of having their original applications approved.<sup>209</sup> The lawsuits stemmed from a belief that the underlying scoring process was “biased or corrupt.”<sup>210</sup> Florida appears far from an outlier in states experiencing problems with licensing the industry.<sup>211</sup> Missouri’s rollout of marijuana licenses has faced

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201. *Id.* at 94.

202. *Id.*

203. 26 U.S.C. § 280E (1982).

204. Chemerinsky et al., *supra* note 90, at 94.

205. Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 534 (2014).

206. *Id.* (noting that marijuana businesses could seek a tax-exempt status to avoid federal income taxes).

207. See Courtney DuChene, *Here’s How State Regulations Are Creating Inconsistency, Confusion in Medical Marijuana Use*, RISK & INS. (Aug. 16, 2019), <https://riskandinsurance.com/heres-how-state-regulations-are-impacting-medical-marijuana-use-for-now/> [https://perma.cc/7P5E-MAV8].

208. See Jeff Smith, *Marijuana Businesses Increasingly Plan to Sue if Regulators Fail to Award Them a Business License*, MARIJUANA BUS. DAILY (Oct. 21, 2019), <https://mjbizdaily.com/cannabis-licensing-decisions-challenged-by-marijuana-firms/> [https://perma.cc/Z27M-YDMU].

209. *Id.*

210. *Id.*

211. *Id.*

similar criticism, with some applicants having submitted multiple identical applications and receiving different scores.<sup>212</sup> Complaints alleged that bonus points were awarded to some applications on a highly subjective basis in Missouri.<sup>213</sup> While license denials are one side of the coin, other jurisdictions appear to be flooding the market. The city of Stillwater, Oklahoma, for example, approved seventeen marijuana dispensaries for a city of approximately 50,000 residents in a state with slightly more than 65,000 medical marijuana users.<sup>214</sup> The approval of this number of dispensaries in such a concentrated area is likely to be unsustainable, which could precipitate a negative economic impact on the region as businesses go under.<sup>215</sup> The lack of uniformity in licensing and difficulties for doctors, with federal law prohibiting prescription of non-FDA approved drugs, means that there is an increased reliance on dispensary workers to serve as experts, a situation that lacks standardization.<sup>216</sup> There is also a lack of standardization in measuring and ensuring the levels of tetrahydrocannabinol (“THC”)<sup>217</sup> within marijuana and derivative products, effectively meaning that patients or consumers may receive quality product on one occasion, but not another.<sup>218</sup> The lack of standardization and the reliance on licensing as an accounting system, as opposed to a consumer protection mechanism, has created something of a “wild west” in some states.<sup>219</sup>

#### D. A Nascent Legal Supply Chain

Another challenge facing the growth of the marijuana industry involves the obstacles and inefficiencies of replicating supply chains. As more states have legalized marijuana, an interstate supply chain of growers, distributors, and sellers is beginning to form, particularly on the West Coast, where contiguous travel is possible between states where recreational use laws exist.<sup>220</sup> The absence of federal legalization, of course, makes interstate marijuana businesses risky, even in states permitting recreational possession, as there would be little

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212. Nassim Benchaabane, *Fumbled Numbers? Rejected Pot Applicants in Missouri Point to Scoring Flaws*, ST. LOUIS POST-DISPATCH (Jan. 20, 2020), [https://www.stltoday.com/news/local/marijuana/fumbled-numbers-rejected-pot-applicants-in-missouri-point-to-scoring/article\\_e974e7c4-8654-5f15-a66e-e594262c5b32.html](https://www.stltoday.com/news/local/marijuana/fumbled-numbers-rejected-pot-applicants-in-missouri-point-to-scoring/article_e974e7c4-8654-5f15-a66e-e594262c5b32.html) [https://perma.cc/HM6W-25WB].

213. *Id.*

214. Michelle Charles, *New Marijuana Dispensaries Enter a Crowded Field in Stillwater*, STILLWATER NEWS PRESS (June 4, 2019), [https://www.stwnewspress.com/news/local\\_news/new-marijuana-dispensaries-enter-a-crowded-field-in-stillwater/article\\_25a28931-0d5b-52d1-8709-c7867e856e7a.html](https://www.stwnewspress.com/news/local_news/new-marijuana-dispensaries-enter-a-crowded-field-in-stillwater/article_25a28931-0d5b-52d1-8709-c7867e856e7a.html) [https://perma.cc/YMB3-5B3X]. The city of Stillwater has a population of approximately 50,000 people. *Id.*

215. *Id.*

216. DuChene, *supra* note 207.

217. THC is the psychoactive component in cannabis. See Rae Lland, *What Is THC (Tetrahydrocannabinol)?*, LEAFLY (Dec. 2, 2016), <https://www.leafly.com/news/cannabis-101/what-is-tetrahydrocannabinol> [https://perma.cc/2AMD-Y6ZC].

218. DuChene, *supra* note 207.

219. This is a broad statement, and the authors acknowledge that some states have done a better job of rolling out licensing mechanisms than others. *Id.*

220. See Erica E. Phillips, *Cannabis Supply Chains Coming Out of the Shadows*, WALL ST. J. (Aug. 23, 2018, 5:30 AM), <https://www.wsj.com/articles/cannabis-supply-chains-coming-out-of-the-shadows-1535016610> [https://perma.cc/3M8R-WSGF].

chance of constructing an argument that interstate transportation was not within Congress's Commerce Clause power.<sup>221</sup> In addition to federal restrictions facing the cannabis supply chain, there is the fact that the industry operates mostly in cash, and there is an industry resistance to large-scale industrialization.<sup>222</sup> The marijuana supply chain, in theory, is not unlike other agricultural products, beginning with a seed, before reaching a finishing process, then going to a distributor and then an end retailer.<sup>223</sup> But, cannabis is unlike any other agricultural product because of its federal classifications, and the risks facing the suppliers and distributors are greater than those faced by the banana supply chain, for example.<sup>224</sup> As a result of the immaturity and the resistance from mainstream agricultural supply chain entities, marijuana businesses must build distribution networks from scratch.<sup>225</sup>

### E. *The Overregulation Problem*

Finally, the regulated marijuana industry faces substantial obstacles in the form of overregulation. In three years, marijuana became the largest cash crop in California, with a value of more than \$11 billion.<sup>226</sup> Despite all that value, those in the supply chain have found themselves earning a fraction of what they thought they would make.<sup>227</sup> There are essentially five reasons why: (1) when California legalized recreational marijuana, the state provided municipal and local governments the ability to opt-out of allowing retail dispensaries;<sup>228</sup> (2) California's laws restrict cultivators to selling exclusively in the state;<sup>229</sup> (3) some have criticized California's marijuana regulations because of the barriers to entry and the requirements that do not make sense to those with knowledge of the marijuana industry;<sup>230</sup> (4) California has delegated authority to local governments to decide not only where dispensaries will be, but also where plants can be grown;<sup>231</sup> those who grow plants outside of permissible localities must decide to either move their cultivation to a permissible region, cease to grow marijuana, or

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221. This presupposes that there are some creative means in which a cannabis possessor could avoid the scope of *Raich*. See *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

222. Phillips, *supra* note 220.

223. Steve Banker, *The Marijuana Supply Chain: Is Home Delivery Next?*, FORBES (July 18, 2019, 8:40 AM), <https://www.forbes.com/sites/stevebanker/2019/07/18/the-marijuana-supply-chain-is-home-delivery-next/#3baa98ff582e> [<https://perma.cc/8ZMN-Q3XW>].

224. See *id.*

225. Sharyn Alfonsi, *How Red Tape and Black Market Weed Are Buzzkills for California's Legal Marijuana Industry*, CBS NEWS (Oct. 27, 2019), <https://www.cbsnews.com/news/marijuana-in-california-black-market-weed-buzzkills-for-california-legal-weed-industry-60-minutes-2019-10-27/> [<https://perma.cc/YAX2-7DB2>].

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* For instance, California requires growers to weigh marijuana leaves that fall off the plant, even though the fallen leaves are not a consumable part of the plant. *Id.*

231. *Id.*



grow it illegally;<sup>232</sup> and, most prominently, (5) for many who have been unable to gain licenses, the gray market remains a viable alternative.<sup>233</sup>

In the first year of legal recreational marijuana in California, the state gave out 547 licenses, which is far fewer than the 6,000 licenses it had anticipated issuing.<sup>234</sup> Over-taxation has left businesses unable to compete against the illegal or gray market, and bureaucratic red tape has caused bottlenecks, as businesses must wait for the government to promulgate rules.<sup>235</sup> Colorado has faced problems as well. For instance, legalized marijuana failed to stamp out the illegal production, with some arguing that the illegal marijuana problem has only become worse since the state allowed the sale of recreational marijuana in 2014.<sup>236</sup> Washington's regulation of recreational and medical marijuana created a system that led to small producers not being permitted to produce enough to develop a brand and build customer loyalty.<sup>237</sup> It has also resulted in marijuana businesses having an underrepresentation of ethnic-minority business owners.<sup>238</sup> The over-regulation, in conjunction with its other challenges, has prevented the marijuana industry from being able to fully capture the growth generating investment that the sports betting industry has realized in a much shorter period.<sup>239</sup>

The greatest threat to the marijuana industry, however, remains federal enforcement of the CSA.<sup>240</sup> But, the likelihood of enforcement remains small, and it appears that the legal marijuana industry may be most threatened by a death by a thousand cuts.<sup>241</sup> The announcement made by former Attorney General Sessions revoking the Cole Memo sent market advisors into a warning mode, indicating the power of the federal government<sup>242</sup> and causing some investors to fear

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232. Brooke Staggs, *Legalizing Marijuana Was Supposed to Slow Illegal Activity in California. It Hasn't*, ORANGE CNTY. REG. (Dec. 4, 2018, 8:36 PM), <https://www.ocregister.com/2018/11/30/has-legal-weed-boosted-californias-illicit-operators-so-far-yes/> [https://perma.cc/LDF9-K66M].

233. *Id.*

234. Jacob Sullum, *Thanks to Heavy Taxes and Regulations, California's Legal Cannabis Sales Fell After Recreational Stores Opened*, REASON (Jan. 4, 2019, 1:15 PM), <https://reason.com/2019/01/04/thanks-to-heavy-taxes-and-regulations-ca/> [https://perma.cc/3ALC-7Q23].

235. *Id.* For example, the regulatory authority was supposed to decide whether delivery services could deliver in locations where dispensaries were not permitted but failed to do so within the first year. *See id.*

236. Jack Healy, *Reefer Madness or Pot Paradise? The Surprising Legacy of the Place Where Legal Weed Began*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/us/marijuana-colorado-legalization.html> [https://perma.cc/A97S-9ZY7].

237. Associated Press, *5 Years In, Washington Considers Overhaul of Pot Regulation*, Q13 FOX (Aug. 27, 2019), <https://www.q13fox.com/news/5-years-in-washington-considers-overhaul-of-pot-regulation> [https://perma.cc/MYE3-94NN].

238. *Id.*

239. *See* Kristi Dosh, *As the Sports-Betting Industry Transforms, Entrepreneurs May Find it Hard to Get in on Gambling Profits—But Related Businesses Will Thrive*, ENTREPRENEUR (May 21, 2018), <https://www.entrepreneur.com/article/313685> [https://perma.cc/KDF5-FZWT].

240. *See* Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 642 (2016).

241. *See id.*

242. *See* Dan Ahrens, *Investing in Marijuana Stocks? Be Afraid. Be Very, Very Afraid*, SEEKING ALPHA (Jan. 18, 2018, 8:32 AM), <https://seekingalpha.com/article/4138316-investing-in-marijuana-stocks-be-afraid-be-afraid> [https://perma.cc/KY49-824Y].

that they could be charged with conspiracy if they invested in marijuana businesses.<sup>243</sup> Beyond the federal government threats, which also threaten the nascent legal sports betting industry, marijuana businesses have struggled to reach profitability.<sup>244</sup> As a result, both institutional and casual investors are steering clear, which threatens to derail sustained growth.<sup>245</sup> In the following Part, we describe the growth of the nascent legal sports betting market and discuss what lessons could translate well and provide an improved blueprint for growth.

## V. THE LEGAL U.S. SPORTS BETTING INDUSTRY AS A MODEL?

At present, both marijuana and the infrastructure to operate an interstate sports gambling business remain illegal at the federal level.<sup>246</sup> Despite this, the two industries appear to be on different trajectories in regard to capitalizing on their market potential.<sup>247</sup> Indeed, the sports betting industry is drawing investments from all varieties of mainstream investors looking to get a piece of the industry, including telecom giant Verizon.<sup>248</sup> While the sports betting industry may not be operating perfectly and may share certain challenges faced by the marijuana industry, the sports betting industry as a whole continues to expand with great enthusiasm and may provide some lessons for both cannabis businesses and regulators.<sup>249</sup>

Since the *Murphy* decision in May of 2018, more than thirty-five states have introduced sports gambling legislation.<sup>250</sup> As of the end of 2019, twenty

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243. Erin Fuchs, *The Legal Risk of Investing in Weed is 'Remote' and 'Theoretical'*, YAHOO! FIN. (Nov. 3, 2018), <https://finance.yahoo.com/news/legal-risk-investing-weed-remote-theoretical-201701838.html> [<https://perma.cc/4R85-UCM2>].

244. Alex Berenson, *Cannabis Retailer MedMen's Financial Troubles Are a Warning for the Marijuana Industry*, CNBC, <https://www.cnbc.com/2019/03/28/medmens-financial-troubles-are-a-warning-for-the-marijuana-industry.html> [<https://perma.cc/7PAB-U5RY>] (Mar. 28, 2019, 6:53 PM).

245. *See id.*

246. For example, the placement of wagers across state lines is a violation of the Wire Act, as is information assisting in the placing of bets or wagers. This prohibition, like those contained in the UIGEA, as well as the Illegal Gambling Business Act, form a cobweb providing the federal government substantial authority to shut down gambling businesses. *See* 18 U.S.C. § 1084 (1994); *see also* 31 U.S.C. §§ 5361–5367 (2006); 18 U.S.C. § 1955 (2012). Some ancillary industries to the sports betting industry operating across state lines, including payment processors and any banks processing transactions, could face exposure to the Wire Act either as direct violators or as aiders and abettors. *See* John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 683 (2020).

247. *See* Kristi Dosh, *As the Sports-Betting Industry Transforms, Entrepreneurs May Find It Hard to Get in on Gambling Profits—but Related Businesses Will Thrive*, ENTREPRENEUR (May 21, 2018), <https://www.entrepreneur.com/article/313685> [<https://perma.cc/KDF5-FZWT>]; *cf.* Kristine O'ram, *Investors Run Out of Patience on Pot Profits: Cannabis Weekly*, BLOOMBERG (Aug. 12, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-08-11/investors-run-out-of-patience-on-pot-profits-cannabis-weekly> [<https://perma.cc/2QLF-NSE6>].

248. Scott Moritz & Edward Ludlow, *Verizon to Expand Sports Betting Venture to Five More States*, BLOOMBERG (Jan. 8, 2020, 4:03 PM), <https://www.bloomberg.com/news/articles/2020-01-08/verizon-to-expand-sports-betting-venture-to-five-more-states> [<https://perma.cc/W7CR-NR4D>].

249. For instance, several states have set excessive licensing or tax rates, which threaten the viability of the market and may stifle commercial feasibility. *See* Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 509–10 (2020).

250. *See* Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (Jan. 11, 2020) [<https://perma.cc/449B-D76L>].

jurisdictions had legalized sports betting, with more than a dozen of these jurisdictions currently operating and accepting wagers.<sup>251</sup> So far, each state that has legalized sports wagering has done so without the assistance of model legislation, choosing to craft individualized regulatory systems.<sup>252</sup>

There have been a variety of different regulatory models adopted by states, each with similarities and differences. The models, however, have typically fallen into three broad categories: the gaming control board model, the lottery or state-monopoly model, and the tribal gaming model.<sup>253</sup> The U.S. sports betting market has been dominated in its early months by transplanted British bookmaking companies such as William Hill PC, which was recently acquired by Caesars Entertainment,<sup>254</sup> and daily fantasy sports companies like FanDuel and DraftKings, which had spent years building brands and customer lists while operating as quasi-gambling businesses.<sup>255</sup>

Despite this domination, there have been a few lesser-known companies and leveraged startups that have shown promise of becoming household names in the gaming industry, like PointsBet, which has sought to expand their market reach across the United States.<sup>256</sup> Each state that has authorized sports betting has taken a different approach to regulation, and not all states have set up their markets so that the businesses are guaranteed to succeed.<sup>257</sup> The sports betting market's ability to continue attracting interest has its market projection headed in a different direction than the marijuana market.<sup>258</sup> Some of these lessons emerge from the efforts to legalize sports betting that were handled correctly, while others derive from legislative missteps that the marijuana lobby should avoid repeating.

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251. David Fucillo, *The State of Sports Betting*, SB NATION, <https://www.sbnation.com/a/sports-betting-gambling-state-legislation-tracker> (last visited Mar. 17, 2021) [<https://perma.cc/8PH3-44H3>].

252. Entities associated with major professional sports leagues have drafted and circulated model legislation, but no state has adopted it. See John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31, 40 (2019).

253. John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575 (2020).

254. Alex Weldon, *What Caesars Stands to Gain from Its \$3.7 Billion Acquisition of William Hill*, ONLINE POKER REP. (Sept. 30, 2020), <https://www.onlinepokerreport.com/44633/caesars-william-hill-acquisition-accepted/> [<https://perma.cc/L573-M7QR>].

255. See John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 114 (2020).

256. Kelsey McCarson, *PointsBet Aims to Raise \$84M to Expand U.S. Betting Presence*, GAMBLING.COM (Oct. 29, 2019), <https://www.gambling.com/news/pointsbet-aims-to-raise-84m-to-expand-us-betting-presence-2129400> [<https://perma.cc/FH8L-U8C3>]. For purposes of full disclosure, one of the authors of this article, Marc Edelman, has provided legal consulting services to PointsBet entities on various matters.

257. See Holden, *supra* note 253.

258. Illinois, for instance, has set up a one-time license fee of \$10 million for each brick-and-mortar license and then subjecting the businesses to a 15% tax rate. Mobile operators must pay a \$20 million licensing fee. See Michael Armentrout, *Illinois Sportsbooks to Get License Applications in Next Six Weeks—But Still No Timetable for Launch*, CHI. SUN-TIMES (Nov. 7, 2019, 11:44 AM), <https://chicago.suntimes.com/2019/11/7/20953578/illinois-sports-betting-license-applications-gaming-board-launch> [<https://perma.cc/6FFM-YPQM>].

A. *Challenges of Scope and Feasibility of Multijurisdictional Compacts*

As businesses that remain illegal on an interstate basis but at least arguably legal (or decriminalized) in some states, both the sports gambling industry and the marijuana industry currently must operate on an intrastate basis—forestalling the ability for companies in either industry to achieve economies of scale. In gambling markets (other than sports gambling), some states, including Delaware, Nevada, and New Jersey, have signed multi-jurisdictional compacts to allow, under state law, for state-licensed gaming operators to offer a single competitive prize pool that includes users of many states.<sup>259</sup> In theory, at least, one could make the argument that gambling companies that operate multi-jurisdictional prize pools operate in a manner that violates the DOJ's current interpretation of the Wire Act.<sup>260</sup>

Yet, even though the DOJ issued a memorandum in 2018 that opined the Wire Act applies to all forms of online gambling and not just sports gambling,<sup>261</sup> the DOJ still has not as of yet brought a criminal challenge against any company that operates an interstate poker website that does business exclusively within states that are part of a multijurisdictional compact.<sup>262</sup> Such a legal challenge seems even less likely under the Biden administration.<sup>263</sup> Meanwhile, to date, no state has attempted to sign a multijurisdictional sports betting compact, even though some of the large sports gambling operators seem to be lobbying for the federal legalization and regulation of sports gambling markets with the hope of achieving that result.<sup>264</sup>

It is possible, if not likely, that companies operating in the marijuana industry similarly will seek approval for multijurisdictional compacts to try to facilitate the establishment of an interstate market for marijuana while avoiding those states that have not legalized or decriminalized the product.<sup>265</sup> The strongest likely advocates for such compacts will likely include large companies that already mass manufacture vice goods such as the cigarette manufacturer Phillip Morris, which already has a supply chain in place. Nevertheless, the push for

259. See Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 334 (2018).

260. See Holden, *supra* note 246, at 727; cf. N.H. Lottery Comm'n v. Rosen, 986 F.3d 38 (1st Cir. 2021) (holding that the Wire Act applies only to sports wagers and not gambling activities more broadly).

261. *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, *supra* note 177.

262. Cf. Edelman, *supra* note 259, at 334 (“Whether the Interstate Wire Act disallows sports gambling activities that cross state lines where there is no underlying violation of state law constitutes a complex question that perhaps warrants a separate law review article.”).

263. See John Holden, *Opinion: Five Sports Betting Stories to Watch In 2021*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/46734/2021-sports-betting-stories/> [<https://perma.cc/S2AG-43ZQ>] (Feb. 4, 2021) (noting the possibility that the Biden administration returns to the Obama administration's guidance on the Wire Act).

264. See Nicholas Garcia, *Interstate Sports Betting Compacts? Ohio Lawmaker Pitches Them at DC Summit*, LEGAL SPORTS REP. (Nov. 15, 2018), <https://www.legalsportsreport.com/25941/awmaker-suggest-interstate-sports-betting-compacts/> [<https://perma.cc/QFA6-ZWKC>].

265. See, e.g., Bethany Moore, *Historic Legislation Paving the Way for Legal Interstate Cannabis Commerce Introduced in Congress*, CANNABIS INDUS. (June 27, 2019), <https://thecannabisindustry.org/press-releases/historic-legislation-paving-the-way-for-legal-interstate-cannabis-commerce-introduced-in-congress/> [<https://perma.cc/B866-XR2Q>].

multijurisdictional compacts for the manufacture and sale of marijuana will likely prove as risky, if not riskier, than the attempt to create multistate compacts in gambling markets.<sup>266</sup> Much as the U.S. federal government has argued that operating gambling businesses exclusively in states where legal would not override the DOJ's power to prosecute companies that engage in interstate gambling activity,<sup>267</sup> the federal government will likely be able to argue as persuasively, if not even more so, that the CSA allows prosecuting companies involved in the interstate sale of marijuana, even where the federal government has not challenged the same practices when occurring entirely within a given state.<sup>268</sup>

### B. Mitigating the Banking Problem

Much like in the case of online sports gambling, the growth of the marijuana industry also is stymied by a "banking problem" where national banks, which have the legal incentive to act in a risk-averse manner, are more reluctant than the vice product manufacturers themselves to engage in transactions involving the vice market.<sup>269</sup> Whereas banks are concerned about transacting business with marijuana companies in part because of federal filing requirements regarding certain types of transactions,<sup>270</sup> banks have historically feared engagement in transactions with online gambling operators under the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), which held banks liable under federal gambling laws for processing funds for illegal gambling transactions.<sup>271</sup>

For a period in online sports gaming, banks' greater fear of liability led to a shortage of access to payment processing for online gaming operators and to a push of even some online gaming operators that attempted to comply with state law to seek underground payment processors.<sup>272</sup> In recent years, however, many large payment-processing companies have struck a middle-ground solution to the "banking problem." They have agreed to process payments from online gaming operators as long as they have received what they deem to be a reputable legal

266. See Katie Galioto, *Colorado Governor: Federal Crackdown Would Be 'Existential Threat' to Marijuana Industry*, POLITICO (Feb. 22, 2019, 12:02 PM), <https://www.politico.com/story/2019/02/22/colorado-marijuana-jared-polis-1180095> [<https://perma.cc/JKD5-S8AJ>].

267. See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, *supra* note 175, at 22.

268. See Todd B. Tatelman, *Gonzales v. Raich: Congress's Power Under the Commerce Clause to Regulate Medical Marijuana*, CONG. RES. SERV. (June 17, 2005), [https://www.everycrsreport.com/files/20050617\\_RS22167\\_0bf61ca508888acd09ab611dceab9060446ad609.pdf](https://www.everycrsreport.com/files/20050617_RS22167_0bf61ca508888acd09ab611dceab9060446ad609.pdf) [<https://perma.cc/5FZR-Q97J>].

269. See, e.g., Kevin Wack, *Bankshot Sports Gambling is Next Hot-Button Issue for Banks*, AM. BANKER (May 15, 2018, 2:10 PM), <https://www.americanbanker.com/opinion/just-what-banks-need-another-hot-button-issue-in-sports-gambling> [<https://perma.cc/53NY-DLBG>]; see also B. S., *Why Marijuana Retailers Can't Use Banks*, ECONOMIST (Jan. 22, 2018), <https://www.economist.com/the-economist-explains/2018/01/22/why-marijuana-retailers-cant-use-banks> [<https://perma.cc/Q8H2-G24U>].

270. John Hudak & Aaron Klein, *Banks Don't Want to Work with Marijuana Companies. It's Time for That to Change*, CNN (Mar. 14, 2018, 1:09 PM), <https://www.cnn.com/2019/03/14/perspectives/cannabis-businesses-banking/index.html> [<https://perma.cc/ULL4-2ZNM>].

271. See FEDERAL DEPOSIT INSURANCE CORPORATION, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT EXAMINATION GUIDANCE AND PROCEDURES FIL-35-2010 (June 30, 2010), <https://www.fdic.gov/news/news/financial/2010/fil10035.html> [<https://perma.cc/G3J6-C7ND>].

272. See *Offshore vs. Legal Sportsbooks and Casinos*, PLAY USA, <https://www.playusa.com/sports-betting/offshore-vs-regulated-sportsbooks/> (Sept. 18, 2019) [<https://perma.cc/MZ9F-ATS6>].

opinion that concludes the underlying activity of the gaming business comports with state and federal law in all states in which the business operates.<sup>273</sup> For the marijuana industry, the similar emergence of a market for the production of legal opinion letters explaining the permissibility of certain monetary transactions could open the door for more than just the current banks and credit unions accepting funds from marijuana businesses.<sup>274</sup> As banks begin to feel more comfortable relying on legal opinion letters, it could lead to increased competition among banks to secure marijuana-related businesses as clients and thus disincentivize the charging of thousands of dollars in additional fees to these customers each month.<sup>275</sup>

### C. Health Risks of Legalized Vice

Another *bona fide* issue pertaining to the legalization of both vices (gambling and marijuana) relate to how society should handle the physical and emotional health risks that emerge from the vice. Concerning the legalization of sports gambling (as well as other forms of gambling), one of the common objections has related to the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) recognition of “pathological gambling”—a condition that affects “approximately 0.4% to 3.4% of the adult population” and an even greater share of adolescents and college students.<sup>276</sup> States that have legalized and regulated sports gambling have attempted to mitigate the risks of individuals suffering from pathological gambling addictions by including, on all websites, gambling addiction helplines, means of opting out from correspondence with gambling websites, a do-not-enter list for casino gambling, and, in some states, a minimum age for gambling of 21.<sup>277</sup> One can reasonably question whether any of these approaches help to protect those predisposed to pathological gambling addiction. At the same time, however, one can also question whether those who are predisposed to addiction are any more likely to engage in a vice where legal than where it is obtainable through the black market.

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273. See *Daily Fantasy Sports: Industry Trends, Legal and Regulatory Issues, and Policy Options*, CONG. RES. SERV. (Feb. 24, 2016), [https://www.everysreport.com/files/20160224\\_R44398\\_1429af2af1dea658b69ad911c3aa3da6ad72393f.pdf](https://www.everysreport.com/files/20160224_R44398_1429af2af1dea658b69ad911c3aa3da6ad72393f.pdf) [https://perma.cc/F8P5-EVFM].

274. See Sean Williams, *Here's How Many Banks Provide Financial Services to the U.S. Marijuana Industry*, MOTLEY FOOL (Dec. 8, 2019, 11:41 AM), <https://www.fool.com/investing/2019/12/08/heres-how-many-banks-provide-financial-services-to.aspx> [https://perma.cc/X3WR-Z4ND]; see also Tom Angell, *More Banks Working with Marijuana Businesses, Despite Federal Moves*, FORBES (June 14, 2018, 9:31 AM), <https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#237b1cc31b1b> [https://perma.cc/9B2G-3B2J].

275. Brown, *supra* note 195.

276. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 968 (2020).

277. *Id.* at 968–970.

In some ways, the United States' history of protecting individuals from health risks related to smoked vice is far worse than its record regarding gambling products.<sup>278</sup> For example, cigarettes are not only addictive but are notoriously dangerous to one's lungs, causing diseases that include mouth cancer, lung cancer, and emphysema.<sup>279</sup> Yet, the U.S. Surgeon General maintains relatively innocuous warnings on cigarette labels that pale in comparison to the direct and vivid imagery required on cigarette labels in many other countries.<sup>280</sup> One could reasonably argue the way that the United States handles these warnings is poor and caters to the demands of big tobacco rather than the medical community.<sup>281</sup> For states that seek to legalize marijuana, there is a real opportunity to at least increase the level of consumer protection mechanisms to levels more aligned with those in the sports gambling industry. At the same time that states implement robust warnings on marijuana packaging, means of opting out of a purchase and mandatory information to assist people in quitting the use of these products, states may even reasonably seek to impose similar, if not identical, requirements as on tobacco products.

#### *D. The Importance of Free Market Competition*

Finally, there are real similarities between the legalization of marijuana and sports gambling in that both industries still deal with entrenched illegal markets for the same products, and that the coupling of high taxation and poor regulations have limited the number of law-abiding competitors to below a free market rate.<sup>282</sup> In both cases, customers who used these products prior to legalization have enjoyed large and entrenched relationships with these illegal (or at least unlicensed) operators. In the sports gambling market, some of the challenges in eradicating longstanding customer relationships with illegal operators include: high tax rates that allow illegal operators to remain the low-cost provider, restraints on the variety of bets that legal operators are allowed to take (e.g., no betting on local college sports teams), and the limited number of licensed providers which limits the variety of product offerings.<sup>283</sup> To avoid the same problem in the marijuana marketplace, states will need to keep tax rates sufficiently moderate to avoid significant price discrepancies between the legal and illegal markets.<sup>284</sup>

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278. See generally Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUB. HEALTH 63 (2012).

279. See *id.* at 63.

280. Associated Press, *FDA Makes New Push for Graphic Warning Labels on Cigarettes*, STAT NEWS (Aug. 15, 2019), <https://www.statnews.com/2019/08/15/fda-new-push-graphic-warning-labels-cigarettes/> [<https://perma.cc/FQ3W-F336>].

281. *Id.*

282. See Holden & Edelman, *supra* note 276.

283. See Holden, *supra* note 253, at 597.

284. See Mike Adams, *High Marijuana Taxes: Be Careful What You Wish for, You Just Might Get It*, FORBES (Jan. 12, 2020, 2:40 PM), <https://www.forbes.com/sites/mikeadams/2020/01/12/high-marijuana-taxes-be-careful-what-you-wish-for-you-just-might-get-it/#71183554600c> [<https://perma.cc/57TB-BU88>].

States also must avoid disallowing the forms of marijuana that are most desirable to users, while requiring reasonable health code monitoring and creating a marketplace with a robust number of competitors, such that state-licensed marijuana providers have the incentive to charge “free market” prices, innovate their products and marketing, and truly compete against one another in developing product qualities that are most desirable for users. Another one of the real concerns arising from the recent efforts to legalize and regulate marijuana in certain states is the fear that the large tobacco companies such as Phillip Morris and British American Tobacco may become able to leverage their market power over the production and distribution of cigarettes to gain control over a newly legalized and regulated market for marijuana, much as how large daily fantasy sports companies such as FanDuel and DraftKings have gained strong power over certain online sports betting markets.<sup>285</sup>

According to multiple sources, the largest cigarette manufacturing companies in the world have already begun to purchase stakes in leading marijuana startups with the hopes of gaining an early foothold into emerging marijuana markets.<sup>286</sup> Based on this development, it is reasonably likely that the large cigarette companies, much like the daily fantasy sports companies, will soon lobby state legislatures to impose barriers to entry such as high regulatory costs as a means to keep away potential competition in the form of smaller entrepreneurial companies.<sup>287</sup> For this reason, it is critical that states seeking to legalize and regulate marijuana make sure to consider the effects of regulatory fees on marketplace competition and ensure licensing and regulatory mechanisms that make market entry feasible to startup marijuana companies with no tie to big tobacco.

Even beyond protecting small businesses and consumers, there are still other reasons why it is critical for states to ensure that large tobacco companies are not able to secure a shared monopoly over the emerging state markets for marijuana.<sup>288</sup> Among them, as a practical matter one could reasonably expect that the creation of an oligopolistic market for the purchase of marijuana would not only lead to consumers paying more than free market rates (as is classically the case in the context of oligopoly), but also that a reasonable number of long-standing marijuana consumers will not transition to buying their marijuana in the legal and regulated market—thus undermining many of the aims of state legalization.<sup>289</sup> To avoid this outcome, states again may reasonably seek to avoid high licensing fees to enter the marijuana marketplace—a mistake that many states

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285. See Thor Benson, *Big Tobacco Is Already Eying Pot*, ROLLING STONE, (Sept. 25, 2018, 3:45 PM), <https://www.rollingstone.com/culture/culture-features/big-tobacco-pot-weed-cannabis-industry-727407/> [https://perma.cc/3DQE-PUQP].

286. See *id.* (discussing Phillip Morris’s attempt to enter the marijuana industry, including through the investment in an Israeli startup); Rachel Ann Barry et. al., *Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legislation*, MILBANK Q. (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4089369> (last visited Mar. 17, 2021) [https://perma.cc/8BTC-XNZG] (discussing numerous large cigarette companies’ investment and interest in the marijuana industry).

287. See generally Barry, *supra* note 286 (discussing the general efforts of large, corporate cigarette companies to gain control over the marijuana industry).

288. See Holden & Edelman, *supra* note 276, at 972.

289. See *id.*



have made in the sports gambling sector that has essentially frozen out smaller, entrepreneurial competitors.

## VI. CONCLUSION

Much like the illegal market for sports gambling before the U.S. Supreme Court's *Murphy* decision, the market for the illegal purchase of marijuana in the United States is approaching \$50 billion per year.<sup>290</sup> Additionally, just like the historically illegal market for sports betting, the illegal market for the production and sale of marijuana remains largely maintained by "bad actors."<sup>291</sup> At worst, these bad actors are members of organized crime schemes.<sup>292</sup> At best, they are simple gun-jumpers who are indifferent to playing by the rules that apply to other members of society.<sup>293</sup> Thus, the benefit of legalizing and licensing the sale of marijuana at the state level (much like the legalization of state-sponsored sports gambling) is twofold: the promotion of libertarian ideals of individual freedom, and the transition of "a lucrative black market" into an open market with documented, taxable, business transactions.<sup>294</sup>

While there are some real, fundamental differences in federal law between the current legal treatment of marijuana and the treatment of sports gambling (the most notable difference being the CSA), there are strong and notable similarities. Among these similarities is the parallel desire of states to legalize and regulate both forms of vice as a means to eradicate black markets and secure additional tax revenue, as well as to meet citizens' desire for greater freedoms from government interference.<sup>295</sup> In this vein, both the legalization of sports gambling and marijuana should find an interesting alliance in support among libertarians, entrepreneurs, and those seeking to reduce the national deficit.<sup>296</sup> As such, the slightly advanced state of legalizing online gaming (and especially sports gambling) in the United States provides a roadmap of opportunities and pitfalls that advocates for legal marijuana should follow.

Among the many lessons learned from the efforts to create free markets for gambling that may bear relevance on the future course of the growth of state-regulated marijuana transactions include four matters of particular note. First, to create economies of scale, it would be advantageous for the marijuana industry to attempt to convince states to allow for multijurisdictional compacts pertaining to the manufacture and sale of marijuana in manners that are unlikely to create

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290. See Will Yakowicz, *Illegal Pot Sales Topped \$46.4 Billion in 2016, and That's Good News for Marijuana Entrepreneurs*, INC. (Jan. 17, 2017), <https://www.inc.com/will-yakowicz/marijuana-sales-2016-50-billion.html> [<https://perma.cc/6FCE-E62A>].

291. See Elliot Smith, *Legalization of Drugs Is the Way to Combat Cartels, Former Mexican President Says*, CNBC (Oct. 23, 2019, 7:09 PM), <https://www.cnbc.com/2019/10/22/vicente-fox-legalizing-drugs-is-the-way-to-combat-cartels.html> [<https://perma.cc/7DX5-QFJ8>].

292. See *id.*

293. See *id.*

294. See Holden & Edelman, *supra* note 276, at 909.

295. See Adams, *supra* note 284.

296. See Holden & Edelman, *supra* note 276.

policy disputes under the CSA.<sup>297</sup> Second, marijuana businesses should seek to convince banks to accept legal opinion letters as a prophylactic that would make them more willing to process their payments much like the daily fantasy sports industry and, more recently, the sports gambling industry has increasingly convinced banks to do.<sup>298</sup> Third, legislators that support the legalization and sale of marijuana cannot ignore the physical and mental health risks related to either marijuana or tobacco and need to take a reasonably proactive approach to ensure that on-package health warnings and other ways of protecting citizens adequately address the social risks that emerge from legalization.<sup>299</sup> Finally, whereas the legalization of sports gambling has mostly failed to provide market opportunities for smaller entrepreneurs and American companies that had complied with the law in the preexisting legal environment, it is vital that state laws that license and regulate the sale of marijuana facilitate opportunities for new, small businesses, minority-owned businesses, to enter the marketplace.<sup>300</sup> In this vein, new state marijuana laws must not grant shared monopolies over marijuana to marketplace giants or companies that were indifferent to the historic illegality of engaging in the sale of marijuana.

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297. See discussion *supra* Section V.A.

298. See Williams, *supra* note 274.

299. See discussion *supra* Section V.C.

300. See Holden & Edelman, *supra* note 276, at 942.