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Medical Marijuana: Implication of Evolving Trends in Regulation

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Cover Page Footnote

I would like to thank my Research Assistants, Reginald Jackson for his research assistance, and Richard Sena for his editing of the footnotes to the Bluebook format.

MEDICAL MARIJUANA: IMPLICATIONS OF EVOLVING TRENDS IN REGULATION

*Florence Shu-Acquaye**

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I. INTRODUCTION

Legalizing medical marijuana is an increasing trend. Most states have enacted medical marijuana laws that allow for the growth, use, and distribution of marijuana for medical purposes.¹ Of the fifty states in the Union, thirty-three of them and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have approved comprehensive public medical marijuana or cannabis programs.² Although apparently legal to possess and use marijuana under these laws, they still in conflict with and, therefore, illegal under federal law.³ Congress classified marijuana in Schedule I of the Controlled Substance Act (“CSA”) because it is considered to have “no currently accepted medical use”⁴ However, medical research on the positive effects of marijuana, and the current trend of recognizing and embracing these positive effects, has certainly opened the floodgates for states wishing to legalize marijuana for medical use.⁵ These medical marijuana laws differ considerably in their scope and implementation, including the regulation of dispensaries. For example, some states only allow access to marijuana use to terminally ill patients, while others are much less restrictive.⁶

The focus of this Article will be on how states regulate legalized medical marijuana, and the impact that regulation has had on social justice. Evidence suggests that medical marijuana legalization and regulation is essentially successful and now overwhelmingly supported by 64% of Americans.⁷ This Article also explores what is, or should be, the optimal structure for medical marijuana regulation. Several other questions remain unanswered. Should a state allow one person or organization to produce, process, and sell marijuana? Should vertical integration—meaning those who wish to sell marijuana must also grow it, and those who wish to grow marijuana must also sell it—be optional; a mandatory requirement; or even be a part of a hybrid regulatory scheme?⁸

¹ See *State Medical Marijuana Laws*, NCSL (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

² *Id.* Eleven states—Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington—plus the District of Columbia have passed laws that permit recreational sales of marijuana. See *id.* In the same vein, twenty-one states allow for some form of medical marijuana, while sixteen states allow for a lesser type of medical marijuana extract. Ryan Struyk, *Marijuana Legalization by the Numbers*, CNN (Mar. 30, 2018, 1:35 PM), <https://www.cnn.com/2018/01/04/politics/marijuana-legalization-by-the-numbers/index.html>.

³ See Struyk, *supra* note 2.

⁴ 21 U.S.C. § 812(b)(1)(B), (c). This means the CSA criminalizes marijuana as a controlled substance and, consequently, it is illegal to sell, manufacture, distribute or dispense the drug in any form. See 21 U.S.C. § 812(c); 21 U.S.C. § 841(a)(1).

⁵ See Florence Shu-Acquaye, *Rohrabacher-Blumenauer Amendment, Case Law and the Department of Justice: Who Prevails in the Medical Marijuana Legalization Debate*, 54 GONZ. L. REV. 127, 128 (2018).

⁶ See *State Medical Marijuana Laws*, *supra* note 1.

⁷ Struyk, *supra* note 2.

⁸ Will Kenton, *Vertical Integration*, INVESTOPEDIA, <https://www.investopedia.com/terms/v/vertical-integration.asp> (June 14, 2020); Lael Henterly, *The Vertical Integration Debate*, MARIJUANA VENTURE (April 18, 2016), <https://www.marijuanaventure.com/vertical-integration-debate/>.

It has been suggested that “[s]tates should keep the production and retail sales of marijuana separate to ensure that the industry does not evolve into a group of politically and financially powerful vertically integrated businesses.”⁹ The vertical model is widely criticized, as it could be very expensive and challenging to open many operations at the same time.¹⁰ Likewise, the different operational facets would require different skill sets, which itself could be challenging.¹¹ Even if a business were in a position to expand under the vertical approach, it would likely affect the “mom-and-pop” businesses by putting them out of business, as they will be at a competitive disadvantage.¹²

States employ a variety of regulations and license structures, each one different from the next and stands out in its own way. Although these regulations are still relatively new, as marijuana legalization is a recent phenomenon, this Article will examine all the different regulations as a whole to see the likely effectiveness and rationale for them. Examining and analyzing these regulations could be helpful in understanding the likely impact they could have over the years.¹³

This Article will examine the strengths and shortcomings the different regulatory systems may engender and what lessons can be learned from the states that have implemented one form or the other. Florida’s system is vertically integrated, but Colorado dropped a similar system shortly after implementing it.¹⁴ Therefore, it was not surprising that Florida lawmakers solicited help from Colorado lawmakers to understand vertical integration and the lessons they learned from implementing it.¹⁵ For this reason, this Article is placed in the context of marijuana law in Florida and will delve into the issue of whether a 2017 law that banned patients from smoking medical marijuana runs against a 2016 constitutional amendment that broadly legalized marijuana.¹⁶ This Article will closely examine the burning issues in Florida’s medical marijuana legalization, namely those surrounding who gets to grow and sell marijuana. Lawmakers approved a limited number of companies to do so, supposedly for security reasons, but this has been criticized in that the state licensed growers are now seen as more of a cartel,

⁹ Vikas Bajaj, *Rules for the Marijuana Market*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/opinion/high-time-rules-for-the-marijuana-market.html?auth=login-email&login=email>.

¹⁰ See Henterly, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ *See id.*

¹⁴ Nick Evans, *FL House Lawmakers Seek Advice from Colorado on Cannabis*, WFSU PUB. MEDIA (Jan. 25, 2017, 6:00 PM), <http://news.wfsu.org/post/fl-house-lawmakers-seek-advice-colorado-cannabis>.

¹⁵ *See id.*

¹⁶ Dara Kam, *Repeal of Florida’s Ban on Smokable Medical Marijuana Heads to the Governor’s Desk*, ORLANDO WKLY. (Mar. 14, 2019, 10:45 AM), <https://www.orlandoweekly.com/Blogs/archives/2019/03/14/repeal-of-floridas-ban-on-smokable-medical-marijuana-heads-to-the-governors-desk>.

rather than a state approved entity.¹⁷

II. OVERVIEW OF MARIJUANA REGULATION

Although once legal to grow and use marijuana under state and federal law, American regulation started in the 1910s when some states took the initiative to criminalize marijuana.¹⁸ This period ushered in strong feelings against the acceptance of marijuana in America.¹⁹ As a result, states started to pass laws prohibiting marijuana use.²⁰ Utah was the first to do so, and nine others quickly followed suit.²¹ Between 1920 and 1930, marijuana was heavily associated with crime by Black and Latino migrant workers.²² As these individuals moved across the country, so too did the spread of prohibiting marijuana.²³

Federal regulation of marijuana soon followed the state's efforts to regulate marijuana. In 1915, President Woodrow Wilson signed the Harrison Act, and it became a model for future drug regulations.²⁴ The Harrison Act implemented a system for placing serial numbers on medications and required physicians who wanted to prescribe opiates to register with the federal government.²⁵ The Harrison Act became the basis for the federal government's first marijuana regulation: The Marijuana Tax Act of 1937 ("Marijuana Tax Act").²⁶

The Marijuana Tax Act made it illegal to possess marijuana in the United States, except for medical or industrial use, and was passed to curtail

¹⁷ Evans, *supra* note 14.

¹⁸ Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81 (2015).

¹⁹ See Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 237 (1999).

²⁰ Chemerinsky et al., *supra* note 18, at 81.

²¹ Florence Shu-Acquaye, *The Role of States in Shaping the Legal Debate on Medical Marijuana*, 42 MITCHELL HAMLINE L. REV. 697, 705 (2016); see also Pete Guither, *Why is Marijuana Illegal?*, DRUG WAR RANT, <http://www.drugwarrant.com/articles/why-is-marijuana-illegal> (last visited Dec. 2, 2020) ("[I]ncluding Wyoming (1915), Texas (1919), Iowa (1923), Nevada (1923), Oregon (1923), Washington (1923), Arkansas (1923), and Nebraska (1927).").

²² Chemerinsky et al., *supra* note 18, at 81.

²³ *Id.* at 82. Criminalization of marijuana, like with cocaine and opiates, was a result of "racialized perceptions" that users of color endangered public safety. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 UCLA L. REV. 689, 690 (2016) [hereinafter Bender, *The Colors of Cannabis*]. Consequently, state and local governments proceeded to ban its usage, especially in states with heavy Mexican populations. *Id.* In fact, this racialized profiling is evidenced by a statement made in the early 1900s in the Texas Senate that "[a]ll Mexicans are crazy, and this [marijuana] is what makes them crazy." *Id.* (quoting 1927 *New York Times* article). While in Southern states, where there are high black populations, marijuana laws were also propelled by prejudice, as marijuana was considered the catalyst for "murder, rape, and mayhem amongst blacks." Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 362 (2013).

²⁴ Shu-Acquaye, *supra* note 21, at 705.

²⁵ *Id.* at 705–06.

²⁶ *Id.* at 706–07.

marijuana trafficking by implementing high taxes.²⁷ So, although the Marijuana Tax Act did not make the use of medical marijuana illegal, the high taxes made it expensive.²⁸ Finally, the Marijuana Tax Act also led to removing marijuana from pharmacopeias because it was now considered harmful, addictive, and cause disruptive mental behaviors.²⁹ This was the beginning of the fall of accessibility to medical marijuana.³⁰

The 1960s marked an increase in the use of marijuana by youths, resulting in President Richard Nixon's appeal to Congress to pass rigorous legislation to fight drug use in the country.³¹ In response, Congress passed the CSA in 1970, which prohibited the possession, cultivation, and distribution of marijuana.³² The CSA divided drugs into five schedules, and marijuana was placed in Schedule I, a restrictive classification reserved for drugs that have a high likelihood for abuse and no accepted medical use.³³

There have been many efforts to reclassify marijuana under the CSA. For example, in 1972, the National Organization for the Reform of Marijuana Legislation ("NORML") argued that because marijuana is less harmful than other medicines and therapeutic for many diseases, it should be reclassified from Schedule I to Schedule II of the CSA.³⁴ Unfortunately, this and all other attempts have been unsuccessful.

The Supreme Court has also affirmed Congress's power to regulate marijuana under the Commerce Clause in the 2005 case of *Gonzales v. Raich* ("Gonzales").³⁵ In *Gonzales*, the Court opined that it is illegal to use, sell, or possess marijuana for medical use, even if the medical use complies with state law.³⁶ Thus, the federal classification of marijuana, regardless of whether for medical or recreational use, is still a Schedule I substance under the CSA.³⁷

²⁷ Michael J. Aurit, *Reefer Sadness: How Patients Will Suffer if Arizona Refuses to Implement Its Own Medical Marijuana Law*, 5 PHOENIX L. REV. 543, 549 (2012); Kenneth Seligson, Note, *A Job for Congress: Medical Marijuana Patients' Fight for Second Amendments Rights*, 48 GOLDEN GATE U. L. REV. 63, 72 (2018).

²⁸ See Seligson, *supra* note 27, at 72.

²⁹ See Aurit, *supra* note 27 at 559; Seligson, *supra* note 27, at 72 n.70. Pharmacopeias are books that list and describe drugs, usually defining their use and any effects. See *Pharmacopeias*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/pharmacopoeia> (last visited dec. 2, 2020).

³⁰ See Aurit, *supra* note 27, at 549.

³¹ *Id.*

³² *Id.*

³³ *Id.*; MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 16–17 (Jane E. Joy et al., eds., 1999). "[A]s a schedule I narcotic . . . [marijuana] cannot be prescribed by any physician . . . [and] its distribution or manufacture [i]s a serious felony." Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 152 (2012).

³⁴ MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, *supra* note 33, at 17.

³⁵ See generally 545 U.S. 1 (2005). The Court's ruling in *Gonzales* is consistent with its earlier decision in *United States v. Oakland Cannabis Buyers' Cooperative*, which held that, under the CSA, the balance had been reached "against a medical necessity exception" to the CSA's prohibitions on marijuana. See 532 U.S. 483, 499 (2001).

³⁶ See *Gonzales*, 545 U.S. at 27–30.

³⁷ See Shu-Acquaye, *supra* note 5, at 128.

Medical research surrounding the positive effects of marijuana, and the continuing shift towards its social acceptance, opened the floodgates for implementing programs that legalize medical marijuana use.³⁸ As a result, most states have passed medical marijuana laws to regulate its cultivation, use, distribution, and the granting of licenses to patients wishing to buy marijuana for medical use.³⁹ Additionally, recreational marijuana has also been approved in some states.⁴⁰ This growth and expansion of the marijuana industry is perhaps the needed impetus for regulation at both the state and federal levels.

III. THE REGULATION OF MARIJUANA AS AN EVOLVING TREND

A. Federalization Proposal

In 2019 Representative Jerry Nadler and then-Senator Kamala Harris introduced the Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”), and it is considered “the most sweeping marijuana reform bill ever”⁴¹ If passed, the MORE Act would remove marijuana from the CSA, as well as promote reparative justice and equity within the industry.⁴² Under the MORE Act, several measures would be implemented. First, marijuana would be rescheduled at the federal level; thus, the MORE Act would allow states to enact their own policies without any federal government intervention.⁴³

Second, the MORE Act would implement several measures aimed at repairing the deep-rooted injustices experienced by communities of color at the hands of biased enforcement of drug laws. First among these measures

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Marijuana Legalization and Regulation*, DRUG POL’Y ALL., <http://www.drugpolicy.org/issues/marijuana-legalization-and-regulation> (last visited Dec. 2, 2020). Eleven states and the District of Columbia have now legalized marijuana for recreational use for adults over twenty-one. *Id.*

⁴¹ *Id.*; see Marijuana Opportunity Reinvestment and Expungement Act of 2019, S. 2227, 116th Cong. (2019). Another bill aimed at decriminalizing marijuana was the Marijuana Justice Act of 2017, introduced by Senator Cory Booker. See Marijuana Justice Act of 2017, S. 1689, 115th Cong. (2017). However, a defect of the Marijuana Justice Act is that it failed to address some of racial and economic harms that have plagued marijuana legislation and prohibitions. See Shu-Acquaye, *supra* note 5, at 145–47. A Harvard article nicely summarized this point stating:

Racial inequality remains a pernicious reality of current legalization efforts around the country. Black and Latino victims of the drug war are noticeably absent from current legal marijuana markets. . . . After a long history of pervasive discrimination in employment and education, Black and Latino Americans are far less likely to be able to raise the money necessary to start a marijuana business.

Drug Policy—Marijuana Justice Act of 2017—Senator Cory Booker Introduces Act to Repair the Harms Exacted by Marijuana Prohibition.—Marijuana Justice Act of 2017, S. 1689, 115th Cong., 131 HARV. L. REV. 926, 931 (2018).

⁴² *House Judiciary Chairman Jerry Nadler and Senator Kamala Harris Introduce Sweeping Marijuana Reform Bill*, DRUG POL’Y ALL. (July 23, 2019), <https://www.drugpolicy.org/press-release/2019/07/house-judiciary-chairman-jerry-nadler-and-senator-kamala-harris-introduce>.

⁴³ *Marijuana Legalization and Regulation*, *supra* note 40.

includes requiring that previous marijuana convictions be expunged.⁴⁴ Next, the MORE Act would make it possible for those convicted of marijuana violations to petition for resentencing and expungement.⁴⁵ In the same vein, the MORE Act would require that immigrants are not deported or refused citizenship because of a marijuana law violation.⁴⁶ The MORE Act would also require the adoption of legislation that “prevent[s] the government from denying an individual federal benefits, student financial aid, or security clearances needed to obtain government jobs because of marijuana use.”⁴⁷

Finally, the MORE Act calls for the creation of a federal tax. The tax would assist the communities and people who have suffered harm because of marijuana prohibition by providing the funds for services like substance use treatment, job training, and business licensing for cannabis.⁴⁸ The goal of the tax is to encourage people who have been “socially and economically disadvantaged to enter the cannabis industry.”⁴⁹ While marijuana criminalization resulted in disparate enforcement and its ultimate negative and disproportionate impact on minority communities, the trend is towards advocating for social justice from revenue derived from the legalization of marijuana in those communities.⁵⁰

Although it is easy to think of the business opportunities that come with legalization, one must remember that this industry is simply replacing two things that were already in existence: an illicit market where many people have made a livelihood and a system of prohibition that punished the same thing that people are now able to get a license to do.⁵¹ Therefore, it is imperative to consider whether the new marijuana industry’s structure repairs the all the harms caused by marijuana laws of the past or simply prolongs them.⁵²

B. Social Justice as a Changing Trend

1. New York

The Drug Policy Alliance, a New York City non-profit organization, does not believe that simply decriminalizing marijuana alone would be

⁴⁴ *Id.*

⁴⁵ *House Judiciary Chairman Jerry Nadler and Senator Kamala Harris Introduce Sweeping Marijuana Reform Bill*, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Marijuana Legalization and Regulation*, *supra* note 40.

⁴⁹ *House Judiciary Chairman Jerry Nadler and Senator Kamala Harris Introduce Sweeping Marijuana Reform Bill*, *supra* note 42.

⁵⁰ *Id.*

⁵¹ Shaleen Title, *How Insidious Laws are Keeping Many from Participating in the Promising Legal Marijuana Economy*, ALTERNET (July 6, 2016), <http://www.alternet.org/2016/07/most-laws-barring-people-felonies-marijuana-business-pure-hypocrisy>.

⁵² *Id.*

enough to right the wrongs of injustice in marijuana enforcement.⁵³ Instead, New York's legalization campaign centers on racial and economic justice by employing "smart regulation," which is a type of regulation that supports and strengthens communities that have been greatly affected by marijuana criminalization while simultaneously ensuring a diverse and socially equitable industry.⁵⁴

Although New York decriminalized the possession of small amounts of marijuana in 1977, more than 800,000 arrests have been made for low-level marijuana possession have occurred over the last twenty years.⁵⁵ Similar arrests continue to happen even after a new marijuana decriminalization bill was enacted in 2019.⁵⁶ This buttresses the fact that more must be done beyond decriminalization, especially given that the mere "alleged odor of marijuana can still be used by law enforcement to justify a stop and search—even with no concrete evidence."⁵⁷ In 2018, although youth twenty-five and younger comprised only approximately 40% of the state population, they accounted for 58% of all low-level marijuana arrests.⁵⁸ In the first half of 2019, 75% of those arrested for low-level marijuana offenses were Black and Latino, even though they made up approximately a third of the state's population.⁵⁹

Those opposed to marijuana prohibition argue that criminalization efforts have been ineffective and, in fact, misses out on the goal of cutting back on marijuana use across New York.⁶⁰ Instead, they say that prohibition has been imprudent and promoted the expansion of an illegal industry.⁶¹ As already stated, marijuana prohibition has been disproportionately enforced, with almost 85% of annual arrests being people of color.⁶² For these communities, marijuana criminalization and prohibition created a tense and difficult relationship with law enforcement, especially given the tendency towards invasive police presence in these communities.⁶³ This resulted in a "violent underground economy" that is difficult to govern, either by the rule

⁵³ See *Marijuana Reform in New York*, DRUG POL'Y ALL., <http://www.drugpolicy.org/new-york/marijuana-reform> (last visited Dec. 2, 2020).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See DRUG POL'Y ALL., ENDING MARIJUANA PROHIBITION IN NEW YORK: SUMMARY OF THE MARIJUANA REGULATION AND TAXATION ACT 1 (2017), http://smart-ny.com/wp-content/uploads/2017/06/StartSMART_DPA_MRTA-Bill-Summary_09.14.2017.pdf.

⁶¹ *Id.*

⁶² Tyler McFadden, *New York: The Marijuana Regulation and Taxation Act (MRTA)*, NORML (Mar. 18, 2019), <http://blog.norml.org/2019/03/18/new-york-the-marijuana-regulation-and-taxation-act-mrta/>; see also DRUG POL'Y ALL., *supra* note 60, at 1.

⁶³ Andrea Ó Súilleabháin, *Advancing Racial Equity and Public Health: Smarter Marijuana Laws in Western New York*, CORNELL UNIV. ILR SCH., 6 (2017), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1352&context=buffalocommons>.

of law or regulation.⁶⁴

In seeking to end marijuana prohibition, some New York legalization groups are working to pass the Marijuana Regulation and Taxation Act (“MRTA”).⁶⁵ Consequently, the MRTA is intended to deal with the negative impacts of the unsuccessful policy of marijuana prohibition by instead forming a responsible and well-regulated industry that strengthens the state’s economy and supports communities that have been most damaged by marijuana prohibition.⁶⁶

There are several potential justice enhancing benefits that would result from passing the MRTA. First, the MRTA aims to promote social justice. It is thought that legalizing marijuana would reduce low-level drug arrests, which in itself would lower and positively impact the discrepancies in the total arrest numbers, and communities of color would likely benefit from the decriminalization, as it would be progress towards curtailing the racial arrest numbers.⁶⁷ What makes the MRTA even more attractive is that previous convictions for marijuana crimes could be reduced or sealed.⁶⁸

Second, the MRTA would promote community reinvestment. One study found that, if regulated, the tax revenue from marijuana sales in New York City alone could be over \$400 million.⁶⁹ This money can be used to address projects in communities that have been the most harmed by the war on drugs. For example, the MRTA allocated tax revenue as follows: 50% would fund things like education, job training, and after school programs; 25% to drug treatment programs; and the remaining 25% to state programs aimed at helping to address substance misuse by youths.⁷⁰

Third, MRTA would positively impact public health and youth access. As seen from data in other states, legalization and regulation tends to deter and limit youth access to marijuana.⁷¹ For example, the MRTA would prohibit marijuana sales near schools and youth centers, as well as ban

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 7. The MRTA takes other steps to ensure racial justice. First the MRTA calls for “[c]reating a micro-licensing structure, similar to New York’s rapidly growing craft wine and beer industry, which allows small-scale production and sale plus delivery to reduce barriers to entry for people with less access to capital and traditional avenues of financing.” McFadden, *supra* note 62. Second, the MRTA would “[e]stablish[] the Community Grants Reinvestment Fund, which will invest in communities that have been disproportionately impacted by the drug war through job training, economic empowerment, and youth development programming.” *Id.* Finally, the MRTA would seek to “[e]nsur[e] diversity in New York’s marijuana industry by removing barriers to access like capital requirements and building inclusivity by allowing licensing to people with prior drug convictions. Only people with business-related convictions (such as fraud or tax evasion) will be explicitly barred from receiving licenses.” *Id.*

⁶⁷ Ó Súilleabháin, *supra* note 63, at 7.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 6.

advertising to minors.⁷² Additionally, the MRTA requires that retail businesses check IDs when making sales, and if they fail to adhere to this rule, they may be required to forfeit their licenses.⁷³ Although the MRTA failed to pass in 2019, New York is on the path to restoring social justice and strengthening marijuana laws and regulations.⁷⁴ Activists are hopeful the New York will set a precedent for others.⁷⁵

2. New Mexico

Unlike in New York, New Mexico's current marijuana policies are characterized by prohibition, which is simply the absence of control and no legal oversight.⁷⁶ This invariably means that people of color and other vulnerable populations who are more prone to involvement with marijuana are more likely to be affected by the criminalization of marijuana.⁷⁷ Nevertheless, 63% of New Mexico adults support the legalization and sale of cannabis to adults older than twenty-one.⁷⁸ Proponents for legalization believe New Mexico needs to (1) address the collateral consequences of marijuana criminalization; (2) come up with ways to create and encourage inclusion and diversity within the industry; and (3) use any revenue generated from legalization to "reinvest in communities that have been impacted by prohibition."⁷⁹ Marijuana legalization is a positive pathway to prosperity for New Mexico, given that can increase tax revenue, generate commerce, and enhance agricultural economies.⁸⁰

3. States Progressively Allocating Marijuana Revenues for Social Good

As the wave for marijuana legalization is growing steadily across the states, so too are the number of Americans in favor of legalization. Currently, 64% of Americans support marijuana legalization, and 62% reside in a state that has legalized marijuana for medical use.⁸¹ The growth in support of

⁷² *Id.* at 6–7.

⁷³ *Id.* at 7.

⁷⁴ Anna Laffey, *Lawmakers 'Ran Out of Time' to Legalize Marijuana in New York*, CNN (June 19, 2019, 9:26 PM), <https://www.cnn.com/2019/06/19/politics/new-york-marijuana-legalization-bill-fails/index.html>.

⁷⁵ See *As Marijuana Legalization Trend Continues, Social Equity Becomes a Key Question*, COLO. PUB. RADIO: NEWS (May 19, 2019), <http://www.cpr.org/2019/05/19/as-marijuana-legalization-trend-continues-social-equity-becomes-a-key-question/> (noting that New York is a leading state in the push for legalizing marijuana on social equity grounds).

⁷⁶ *Grow New Mexico*, DRUG POL'Y ALL., <https://www.drugpolicy.org/new-mexico/campaigns/marijuana-legalization> (last visited Dec. 2, 2020).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ DRUG POL'Y ALL., *FROM PROHIBITION TO PROGRESS: A STATUS REPORT ON MARIJUANA LEGALIZATION* 4 (2018), https://drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf.

legalization is also seen in voting attitudes, as 75% of voters do not support the federal government's enforcement federal marijuana laws in states where marijuana has been legalized for either medical or adult use.⁸²

The pertinent question is whether, with this growth in legalization, there is a concomitant measurable growth in social good from all the gains resulting from state marijuana legalization. Regardless of what use the revenue is put to, there appears to be a general drop in marijuana arrests and court filings in jurisdictions that have legalized marijuana, resulting in saved costs from enforcement and criminalization of thousands of people.⁸³ For example, in Alaska, marijuana-related arrests declined by 93% between 2013 and 2015; in Colorado, by 49% between 2012 and 2013; and in Oregon, by 96% between 2013 and 2016.⁸⁴

Likewise, the number of marijuana court filings dropped by 81% in Colorado between 2012 and 2015 and by 98% in Washington between 2011 and 2015.⁸⁵ Additionally, in Washington, convictions for marijuana possession declined by 76% between 2011 and 2015.⁸⁶ The savings from the decline in arrests and enforcement could be substantial because, as shown in Washington, over \$200 million was spent on marijuana-related arrests and enforcement between 2000 and 2010.⁸⁷

In the same vein, substantial tax revenue is generated from these jurisdictions, and many use the money to offset the costs incurred by regulatory agencies' oversight of marijuana sales.⁸⁸ The revenue is also used to assist education and public health agencies by providing funds for substance abuse treatment and drug use prevention programs.⁸⁹

Some states' statistics clearly reveal how revenues from marijuana are put to social use and are worth examining. For example, schools are one of biggest beneficiaries of revenue generated by legalized marijuana sales. Since legalized marijuana sales began in January 2014, Colorado has generated approximately \$600 million in tax revenue from marijuana sales.⁹⁰ Of that revenue, \$230 million has been distributed to the Colorado Department of Education to finance many school programs.⁹¹ Similarly, Oregon designates 40% of its marijuana tax revenue to its state school fund,

⁸² *Id.*

⁸³ *Id.* at 5.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* The tax revenues can be astonishing. For example, in Washington, between 2016 and 2017 alone, marijuana tax revenues generated \$315 million. Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 100, 118 (2018). In the same period, Oregon generated \$70 million, which is double than the initial forecasts. *Id.* at 118–19.

⁸⁹ DRUG POL'Y ALL., *supra* note 81, at 6.; *see also Marijuana Reform in New York*, *supra* note 53.

⁹⁰ DRUG POL'Y ALL., *supra* note 81, at 6.

⁹¹ *Id.*

and Nevada's projected two-year revenue of \$56 million is also going to fund state schools.⁹²

Community repairment is another project that many states fund with their marijuana tax revenue. For example, Alaska's estimated annual \$12 million is going to fund drug treatment programs and community residential centers.⁹³ Massachusetts and California use part of their tax revenue to repair communities that have suffered the most from drug arrests and imprisonment, substantially those communities devastated by racial drug enforcement.⁹⁴

All of the programs mentioned above have resulted in job creation and, therefore, enhanced the economy of the state.⁹⁵ Early estimates suggest that the legal marijuana market resulted in the creation of 165,000—230,000 jobs across the country, numbers that are likely to increase exponentially as states continue to indulge in legalization and regulation.⁹⁶

Ancillary benefits from marijuana legalization, as indicated by evolving research, are correlated with reduced opioid overdose deaths and opioid use disorder.⁹⁷ For instance, in states that allow legal access to medicinal marijuana, there has been a 25% reduction in overdose deaths compared to states without legal access.⁹⁸ After legalization in Colorado, an examination of opioid overdose deaths showed a 0.7 death reduction per month, as well as a downward trend of overdoses after 2014.⁹⁹

Hence, while the benefits from legalization appear to be many and varied, the question remains: How have these benefits been reflected in the face of the business industry participants? Given the decades long practice of marijuana prohibition and criminalization, with communities of color bearing the brunt of the law, these individuals are stifled by their past and face enormous challenges in the new world of legalization, including participating and thriving in the marijuana industry.

IV. WHY LEGALIZATION DOES NOT SOLVE THE COLOR BIAS IN THE MARIJUANA INDUSTRY

Despite the boom in the legalization of the medical and recreational marijuana businesses, minorities are disproportionately prevented from benefiting from this boom.¹⁰⁰ White users and businesses, on the other hand,

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* Revenues in California and Massachusetts are designed to support restorative justice, diversion from jail, vocational training, economic development, mental health treatment, legal services, and accessibility to medical care. *Id.*

⁹⁵ DRUG POL'Y ALL., *supra* note 81, at 24.

⁹⁶ *Id.*

⁹⁷ Todd, *supra* note 88, at 118.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Bender, *The Colors of Cannabis*, *supra* note 23, at 690.

are reaping the benefits of legalization.¹⁰¹ This troubling irony and experience in the post-legalization world where white people dominate the industry over people of color, namely Blacks, is aptly reflected in the following statement by Professor Michelle Alexander:

Here are white men poised to run big marijuana businesses, dreaming of cashing in big—big money, big businesses selling weed—after 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed. Now, white men are planning to get rich doing precisely the same thing?¹⁰²

Professor Alexander further underscores the point in her book, *The New Jim Crow*, which explores how the “war on drugs has perpetuated the worst aspects of racial segregation.”¹⁰³ So, besides the racial disparity in law enforcement and criminalization of marijuana, why the disparity and lack of diversity in the cannabis market? Some factors that account for this disparity are discussed in the following sections.

A. Clean Criminal Record Requirement for Marijuana Retailers

Many state marijuana laws have felony exclusion requirements which prohibit those who have been convicted of certain crimes from entering the marijuana business.¹⁰⁴ The regulatory requirement that marijuana retailers have a clean criminal record, apparently for security reasons, obviously disproportionately impacts minorities who, as discussed previously, were already disfavored by marijuana prohibition and other related crimes.¹⁰⁵

In any other industry, years of work experience would normally benefit a person searching for a job; however, that is not the case in the legal marijuana market because favorable treatment or acceptance in this industry depends, largely, on where you are from.¹⁰⁶ Based on the disparities in

¹⁰¹ *Id.*

¹⁰² April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), <https://www.alternet.org/2014/03/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison/> (quoting Interview by Asha Bandele with Michelle Alexander, Assoc. Professor of L., Ohio State Univ. (Mar. 6, 2014)). Also aptly questioned by Tracy Jarrett is the following: “[i]f getting rich by rolling up is no longer restricted to underground drug lords, why is it that the people who are disproportionately affected by the war on drugs are not the ones benefiting from the economics of legalization?” Tracy Jarrett, *Six Reasons African Americans Aren’t Breaking Into Cannabis Industry*, NBC NEWS (Apr. 19, 2015, 8:29 PM), <http://www.nbcnews.com/news/nbcbk/6-reasons-african-americans-cant-break-cannabis-industry-n344486>.

¹⁰³ See Morning Edition, *The Legal Business of Marijuana Is Growing but the Industry Lacks Diversity*, NPR, at 1:27 (July 3, 2015, 5:06 AM), <http://www.npr.org/2015/07/03/419692413/the-legal-business-of-marijuana-is-growing-but-the-industry-lacks-diversity>; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97–139 (2010) (highlighting the various ways that the war on drugs has been racially motivated).

¹⁰⁴ Title, *supra* note 51.

¹⁰⁵ *Id.*; Bender, *The Colors of Cannabis*, *supra* note 23, at 697; see also *supra* Part III.

¹⁰⁶ Title, *supra* note 51.

enforcement, if one is from a community that is over-policed, then they are much more likely to have a drug conviction than someone from another community who engages in the same action or behavior.¹⁰⁷ Why should the person with a conviction be precluded, while the person who was less likely to be confronted by the police—and maybe more able to afford a lawyer—have easier access to the marijuana business? Principles of fairness, justice, and equity suggest that those who have already paid the price for the war on drugs should not be punished even more. If indeed the belief is that ex-prisoners be given a second chance and opportunity to build a career, then having a marijuana business should be treated like any other similar business.¹⁰⁸ Yet, most legalization laws do not wipe prior marijuana convictions even though the conduct is now legal.¹⁰⁹ Given that there is still federal prohibition, the confusing and conflicting uncertainty between state and federal laws makes vulnerable minorities even more uneasy about exposing themselves to enforcement scrutiny.¹¹⁰ It is “undoubtedly unfair to double-punish someone who has served their time” by withholding a business license. Nevertheless, one would agree that if someone has committed certain felonies, like embezzlement for example, that person could also fairly be prohibited from owning a marijuana business.¹¹¹

Marijuana exclusion laws vary from state to state, and looking at some of the existing felony-exclusion laws, one can use them as “a starting point to draft exclusion policies that [could] only apply to crimes that might [justifiably] prevent a person from working in or owning a marijuana business”¹¹² This could be done while simultaneously minimizing discrimination.¹¹³

In some states, crimes are considered for exclusion if they happened within a certain period immediately preceding the application date.¹¹⁴ For example, in Alaska, if someone has been found guilty of even a misdemeanor involving a controlled substance, that person cannot apply for a retail license for five years.¹¹⁵ However, in other states a marijuana-related conviction is a completely bars a person from applying for a license. For instance, Colorado

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Bender, *The Colors of Cannabis*, *supra* note 23, at 697.

¹¹⁰ *Id.* As was aptly stated by the Director of the Drug Policy Alliance:

African Americans know that whenever something is in a gray area of the law they will feel more vulnerable, and for good reason since statistically minorities are more likely to be targeted or seen as suspects It may be that the general element of racism and racial disproportionality in law enforcement around drugs can make minorities queasy about entering an area which is not fully legal.

Jarrett, *supra* note 102 (quoting Interview with Ethan Nadelmann, Director of the Drug Policy Alliance).

¹¹¹ Title, *supra* note 51.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

bars those with a felony conviction for a controlled substance from applying for a medical dispensary license.¹¹⁶ Additionally, in some states, like Hawaii, people convicted of a felony drug offense are prohibited from applying for a medical marijuana dispensary license and are banned from working in any capacity at marijuana dispensaries.¹¹⁷ Thus, those with records connected to the war on drugs, have a tougher time applying for a license, as they are more likely to be weeded out after scrutiny of their documents. This, again, greatly impacts people of color and explains how regulation may be biased against them, even if inadvertently.¹¹⁸

B. *The Banking Conundrum for Marijuana Businesses*

Due to the continuing illegality of marijuana on the federal level, banks across the country are hesitant to accept money derived from marijuana sales or offer banking services to marijuana businesses for fear of being shut down by the federal government.¹¹⁹ According to longstanding federal law, any bank that provides marijuana-related businesses with a checking account, debit or credit card, a small business loan, or any other service could be found guilty of money laundering or conspiracy.¹²⁰ As a result, marijuana entrepreneurs must self-fund or borrow money from their friends, family, or other sources.¹²¹ This undoubtedly has a disparate effect on minorities, given the inherent gaps in wealth, ownership, and credit building.¹²²

Also, given the high costs involved in starting a marijuana business, white people are more likely to obtain bank loans or be supported by wealthy parents, who may previously have faulted their kids for smoking marijuana but would not be reluctant in supporting a legitimate, legal, and potentially profitable business endeavor.¹²³ Given that most minorities cannot get loans

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Jarrett, *supra* note 102.

¹¹⁹ See Jeffrey Stinson, *States Find You Can't Take Legal Marijuana Money to the Bank*, PEW (Jan. 5, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/5/states-find-you-cant-take-legal-marijuana-money-to-the-bank>. “[M]ost banks [do not] want to put themselves in jeopardy by opening accounts or receiving money . . . from the sale of marijuana for fear of violating drug laundering laws and being shut down.” *Id.* Likewise, “[b]y providing [a] loan and placing the proceeds in [a] checking account, [the banking] institution would be conspiring to distribute marijuana.” Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RESV. L. REV. 597, 608 (2015). Also, marijuana businesses must “worry about offending federal regulators with the power to impose millions of dollars in fines or sentence a bank to death by revoking its deposit insurance.” Jacob Sullum, *Marijuana Money is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014, 5:42 PM), <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants>.

¹²⁰ See *Cannabis Banking, Bridging the Gap Between State and Federal Law*, AM. BANKERS ASS’N, <https://www.aba.com/advocacy/our-issues/cannabis> (last visited Sep. 20, 2020); Anderson Hill, *supra* note 122, at 608; Stinson, *supra* note 119.

¹²¹ Bender, *The Colors of Cannabis*, *supra* note 23, at 696; see also Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES (Jan. 11, 2014), <https://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html> (describing other alternative financing measures that owners of marijuana dispensaries have taken in response to bank opposition to funding).

¹²² Bender, *The Colors of Cannabis*, *supra* note 23, at 696–97.

¹²³ *Id.*

or other startup money to enter the cannabis industry and that they have to rely on other groups to give them money, that is where one can see the “subtle but real barriers of entry for people of color.”¹²⁴

C. *The Application Process for a License*

The application process for a marijuana dispensary license is not for the faint of heart. In addition to the very high fees and costs associated with applying for a license, the applicant should also be very savvy and experienced in applying for government business licenses and dealing with government regulators.¹²⁵ The process is not “overwhelmingly transparent and open,” nor easy to traverse.¹²⁶ One needs not only to be politically connected but must also understand how to navigate a politicized process. For example, one must have formed great relationships with local politicians and others who make the laws.¹²⁷ If one cannot establish these relationships on their own, they may have to pay a lobbyist to develop them—bringing the conversation back to money, power, and influence.¹²⁸ Given the history of the war on drugs, one can only imagine what money and influence most of these minorities would have had or established.

D. *Business Location and Public Perceptions*

According to Ethan Nadelmann, Director of the Drug Policy Alliance, in many states that have legalized marijuana, there already is a disproportionate number of Blacks, so this invariably affects the numbers entering the marijuana industry.¹²⁹ According to Nadelmann, marijuana legalization in Southern states could change the industry’s demographics.¹³⁰ For example, in Georgia, where there is a high population of middle-class Black entrepreneurs, legalization may eventually result in a shift in the

¹²⁴ See Jarrett, *supra* note 102.

¹²⁵ See Gary Cohen, *Member Blog: How Much Does it Actually Cost to Open a Dispensary?*, NAT’L CANNABIS INDUS. ASS’N (Sept. 25, 2018), <http://www.thecannabisindustry.org/member-blog-how-much-does-it-actually-cost-to-open-a-dispensary/>. Startup costs range from \$250,000 to \$750,000, making the “financial reality of opening a dispensary difficult for a lot of [promising] entrepreneurs.” *Id.* Getting a license, which is the first step in opening a marijuana dispensary, is an “*extensive and expensive*” process, despite the varied ways of obtaining such licenses. *Id.* (emphasis added). Licensing fees cost, at minimum, \$5,000. *Id.* In some states, like Washington, the number of licenses the state grant is limited, and, therefore, may only be available if purchased from a current licensee, a process that could cost up to \$25,000 plus legal fees. *Id.* In Florida, the application fee is \$60,830. Noelle Skodzinski, *Your State-by-State Guide to Cannabis Cultivation Business Application and Licensing Fees*, CANNABIS BUS. TIMES (Feb. 28, 2019), <http://www.cannabisbusinesstimes.com/article/state-state-guide-marijuana-application-licensing-fees/>. There, “medical marijuana treatment centers . . . are authorized to cultivate, process, transport and dispense medical marijuana.” *Id.* In 2018, a “supplemental licensing fee” of \$174,844 was repealed. *Id.*

¹²⁶ See Jarrett, *supra* note 102 (quoting Interview with Dr. Malik Burnett, a policy manager at the Drug Policy Alliance).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

marijuana business demographics.¹³¹

Additional concerns that may also exacerbate minority participation in the industry are the location of the business and the prevailing cultural bias in the community. For example, to open and operate a successful dispensary in any neighborhood, one has to get approval from community leaders.¹³² This may be even tougher if you have to navigate the business location with church leaders, for instance. Nadelmann captured the issue when he stated: “It could be that many African American business [people] live in a world where the African American church is still quite strong and maybe there is a concern about not being accepted by the community or letting other people down, maybe there is a cultural resistance.”¹³³ Consequently, the stigma surrounding these same neighborhoods’ past is hard to overcome.

The same neighborhoods that were flooded with liquor stores are likely to now be flooded by marijuana retail stores—the very thing these communities have paid a price for in the war on drugs. The question that should be presented to these leaders, and others in the community, should be whether they really want these stores in their neighborhoods. No doubt, a pastor in a gentrified neighborhood in Seattle’s Central District, where a white-owned marijuana outlet—Uncle Ike’s pot shop—opened near a Black church and teen’s center, would not appreciate the shop being in the area.¹³⁴ Highlighting a seeming double standard, the pastor expressed his concern that if a white-owned marijuana outlet is located at the same place where Black people were often arrested for selling marijuana, then the mayor of Seattle has to “let all the brothers and sisters go who are incarcerated for marijuana.”¹³⁵ Protesters on the street chanted, “[n]o justice, no weed’ and ‘Uncle Ike’s has got to go,” further exhibiting the community’s frustration with the presence of the pot shop.¹³⁶

V. THE REGULATION OF MARIJUANA: THE EVOLVING TREND OF VERTICAL INTEGRATION

For a horizontally integrated business, all parts of the process like manufacturing, testing, and distribution are all regarded as distinct business activities.¹³⁷ By contrast, when a company controls every stage of its

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (quoting statement by Ethan Nadelmann, Director of the Drug Policy Alliance).

¹³⁴ Bob Young, *Protesters March on Seattle’s Uncle Ike’s Pot Shop*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/marijuana/protesters-march-on-seattles-uncle-ikes-pot-shop/> (Apr. 25, 2016, 3:10 PM).

¹³⁵ *Id.* (quoting Reggie Witherspoon, Pastor, Mount Calvary Christian Center Church).

¹³⁶ *Id.* (quoting chants of protesters).

¹³⁷ Jason Perlow, *How the Marijuana Industry is Organized in Legal States*, ZDNET (Nov. 16, 2018, 4:20 AM), <http://www.zdnet.com/article/how-the-marijuana-industry-is-organized-in-legal-states/>.

business, it is said to be vertically integrated.¹³⁸ So, in cannabis parlance, a company is vertically integrated when the different steps in the production of cannabis are merged into one.¹³⁹ For example, the growing, processing, and distribution of cannabis can be placed into the hands of one company, thus allowing that company to oversee every aspect of the manufacturing and supply line.¹⁴⁰ A vertically integrated cannabis company secures value through total control of the production chain and, therefore, can maximize efficiency and reliability.¹⁴¹ Vertically integrated programs are generally licensed and regulated by state health departments or a comparable agency.¹⁴² There are advantages and disadvantages of vertical integration in the cannabis industry, both discussed in the following sections.

A. Advantages of Vertical Integration

There are several advantages to vertical integration. First, vertical integration allows for superior control over the product's quality because businesses are in a better position to adjust production and supply based on changing market conditions.¹⁴³ Second, vertical integration could be good for the state because it can control the marijuana licenses in operation, and therefore regulate the supply from the "seed to sale."¹⁴⁴ Third, because a vertically integrated company's supply is free from third parties, operating is less expensive than it would otherwise be and reduces potential liability from such third parties.¹⁴⁵ Fourth, vertical integration enables internal cost savings for cannabis companies through lower transaction costs and increased product reliability.¹⁴⁶ Fifth, vertically integrated businesses tend to be more responsive to consumer needs and can quickly take advantage of market trends.¹⁴⁷ Sixth, a vertically integrated company can easily leverage economies of scale.¹⁴⁸ Seventh, vertically integrated businesses enjoy assurance in their transactions.¹⁴⁹ This means that producers can confident that there is a market for their product, and end-users can count on a constant

¹³⁸ See, e.g., *id.*; Anne van Leynseele, *Washington: Vertical Integration: What It is and Why It Matters to Cannabis*, CANNABIS L.J. (2017), <http://journal.cannabislaw.report/washington-vertical-integration-what-it-is-and-why-it-matters-to-cannabis/>.

¹³⁹ See van Leynseele, *supra* note 138.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Perlow, *supra* note 137.

¹⁴³ *The Value of Vertical Integration in an Evolving Cannabis Industry*, CANNABIS INVESTING NEWS (Sept. 3, 2018), <http://www.investingnews.com/innspired/evolving-vertical-integration-cannabis-industry/>.

¹⁴⁴ *Id.*; see also Sean Williams, *This One-of-a-Kind Marijuana Business Model is Evolving Before Our Eyes*, MOTLEY FOOL (May 25, 2018, 8:21 AM), <https://www.fool.com/investing/2018/05/25/this-one-of-a-kind-marijuana-business-model-is-evo.aspx>.

¹⁴⁵ *The Value of Vertical Integration in an Evolving Cannabis Industry*, *supra* note 143.

¹⁴⁶ van Leynseele, *supra* note 138.

¹⁴⁷ Joey Peña, *Jack of All Trades . . . or Master of One?*, MARIJUANA BUS. MAG., Mar. 2019, at 77, 78.

¹⁴⁸ *Id.*

¹⁴⁹ *The Value of Vertical Integration in an Evolving Cannabis Industry*, *supra* note 143.

flow of that product.¹⁵⁰ Finally, proponents of vertical integration say that vertically integrated businesses can avoid some federal tax problems because marijuana businesses are not allowed to deduct regular business expenses under section 280E of the Federal Income Tax Code.¹⁵¹ Consequently, this could result in cost savings that could translate to lower prices and maximum profits.¹⁵²

B. Disadvantages of Vertical Integration

Despite the many advantages of vertical integration, it not without its disadvantages. First, given the necessity to bring multiple business together—or the need to create a second or third branch of an existing business—so that only one business controls the operation, vertical integration requires huge initial capital.¹⁵³ Second, vertical integration may require less flexibility and increased cost to manage and have the necessary oversight to operate the enlarged business.¹⁵⁴ Finally, opponents of vertical integration argue it is harmful to the cannabis industry and the consumer because it generates marijuana monopolies, suppresses the market, results in lower product quality, and, more importantly, is an impediment to small business owners.¹⁵⁵ However, if a company has the capital and organizational skills to bring it to fruition, vertical integration could be paramount to dominance in the cannabis industry.¹⁵⁶

C. Types of Vertical Integration

States employ a variety of regulations and license structures and each one is unique. Although regulating the marijuana industry is still a relatively new phenomenon, these regulations could enlighten and clarify their likely impact, as their effectiveness over the years would be tested only after sufficient evidence has been gathered.¹⁵⁷ Vertical integration generally falls under three categories: allowed, required, and prohibited.¹⁵⁸

¹⁵⁰ *Id.*

¹⁵¹ van Leynseele, *supra* note 138; *see also* 26 U.S.C. § 280E (“No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any . . . business if such . . . business . . . consists of trafficking in controlled substances . . .”).

¹⁵² Van Leynseele, *supra* note 138.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *The Value of Vertical Integration in an Evolving Cannabis Industry*, *supra* note 143.

¹⁵⁷ van Leynseele, *supra* note 138.

¹⁵⁸ *Id.* Although a few states are unregulated, or are in the process of framing their regulations, vertical integration appears to be common among those states that have legalized medical marijuana. *See* Peña, *supra* note 147 at 79. Again, under horizontal integration on the other hand, the “manufacturing, testing, dispensing, distribution, and transportation are all considered separate business activities.” Perlow, *supra* note 140. States that allow for vertical integration includes Alaska, Arizona, Colorado, Maryland, Nevada, Oregon, and Washington D.C. *Id.* States that require vertical integration includes Connecticut, Delaware, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont. *Id.* States that prohibit integration are California, Illinois, and Washington. *Id.*

1. Required Vertical Integration

Where states require vertical integration, only vertically integrated businesses may apply for a state license, which would allow for the business to engage in manufacturing, processing, and distribution activities.¹⁵⁹ Third party manufacturing or cultivation is strictly prohibited in these states.¹⁶⁰ States that require vertical integration require that a minimum percentage of business functions be performed by one entity before the business can be considered a “vertically integrated marijuana business.”¹⁶¹ For example, Colorado’s 70/30 rule requires that retailers grow a minimum of 70% of their retail products.¹⁶² However, starting in July 2018, Colorado began to phase out the 70/30 rule and, as of July 1, 2019, vertical integration was no longer required for medical marijuana.¹⁶³ Thus, this change is helpful to cultivators who can now concentrate on growing the utmost quality of cannabis without the pressure of handling processing and retailing operations.¹⁶⁴

2. Allowed Vertical Integration

States like Nevada and Oregon allow—but do not require—vertical integration, and therefore are said to provide the utmost economic freedom in the industry.¹⁶⁵ That is, once producers and processors have the proper state license, they have the option to sell their own products or act as wholesalers.¹⁶⁶ In Nevada, for example, vertically integrated businesses can have up to three license types: a cultivation, production, or retail license.¹⁶⁷ Therefore, it would be legal for a cultivator, who decides to get a production license, to infuse marijuana products and sell to retailers at a wholesale price.¹⁶⁸

3. Limited or Prohibited Vertical Integration

Limited or prohibited vertical integration is prevalent in California, Washington, and Illinois.¹⁶⁹ Under this regulatory standard, states separate the production and retail aspects of the marijuana process.¹⁷⁰ So, businesses

¹⁵⁹ van Leynseele, *supra* note 138.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* Rules requiring vertical integration were intended to prevent licensed retail stores from buying cheap products from the black market. *Id.* Instead, required vertical integration has been said to stifle the growth of small businesses, as they are unable to muster the expertise and capital necessary even to enter the market. *Id.*

¹⁶³ Fred Hernandez, *Horizontal and Vertical Integration Affect the Cannabis Industry*, LEAFBUYER (Oct. 17, 2018), <https://www.leafbuyer.com/blog/horizontal-vertical-integration/>.

¹⁶⁴ *Id.*

¹⁶⁵ van Leynseele, *supra* note 138.

¹⁶⁶ *Id.* The retailers in these states are not subjected to the Colorado type of 70/30 rule and can, therefore, still run a retail business without necessarily producing their own products. *Id.*

¹⁶⁷ Hernandez, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ van Leynseele, *supra* note 138.

¹⁷⁰ *Id.*

operating in these states are allowed restricted vertical integration, although increasingly, states with clear prohibitions against vertical integration are trying to get away from any permissive vertical integration.¹⁷¹ Looking at Washington and California, they permit business owners to hold two types of licenses: a manufacturer/producer and a processor license.¹⁷² However, these licensees are not allowed to have any interest, direct or indirect, in any retail business.¹⁷³ This is exemplified in a Washington statute which bars licensed marijuana producers and processors from having any financial interest, direct or indirect, in a licensed marijuana retailer.¹⁷⁴

All these different types of marijuana business regulation models have advantages and risks. However, marijuana business owners and investors must understand the pros and cons of vertical integration in their respective states, especially since it could take years to gather enough evidence to determine whether vertical integration is indeed effective.¹⁷⁵

VI. THE REGULATION OF MARIJUANA AS AN EVOLVING TREND: THE CASE OF FLORIDA

A. Historical Background

In Florida, marijuana policy reforms started in 1978 when the Florida legislature passed the Therapeutic Research Program, which never became effective and was repealed in 1984.¹⁷⁶ The program's purpose was to provide marijuana to cancer and glaucoma patients.¹⁷⁷ Florida courts also started to consider marijuana for its health benefits in the early 1990s. In 1991, the First District Court of Appeals held in *Jenks v. State* that patients with HIV/AIDS had successfully raised the medical necessity defense in response to marijuana cultivation and paraphernalia charges.¹⁷⁸ In 1998, the First District Court of Appeals again upheld the medical necessity defense in *Sowell v. State*.¹⁷⁹ These early state actions regarding the use of medical marijuana set the stage for legislative advancement in the 2000s.

In 2012, the first bills proposing a constitutional amendment to allow medical marijuana were introduced.¹⁸⁰ In 2014, the Compassionate Medical

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* California has indicated, in the Medical Marijuana Regulation and Safety Act of 2015, that once the cannabis market has grown and developed the State is going to move towards a blanket prohibition of vertical integration after January 2026. *Id.*

¹⁷⁴ WASH. REV. CODE § 69.50.328 (2012).

¹⁷⁵ van Leynseele, *supra* note 138.

¹⁷⁶ Florida, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/states/florida> (Aug. 31, 2020).

¹⁷⁷ *Id.*

¹⁷⁸ 582 So. 2d 676, 679–80 (Fla. Dist. Ct. App. 1991).

¹⁷⁹ See 738 So. 2d 333, 334 (Fla. Dist. Ct. App. 1998).

¹⁸⁰ See, e.g., H.R.J. Res. 353, 2012 Leg., Reg. Sess. (Fla. 2012); S.J. Res. 1028, 2012 Leg., Reg. Sess. (Fla. 2012).

Cannabis Act (“Medical Cannabis Act”) was passed, which permitted physicians to prescribe low-THC cannabis to some patients.¹⁸¹ The Medical Cannabis Act required the Florida Department of Health (“DOH”) to establish a patient registry and gave them the ability to approve five organizations to grow and distribute cannabis.¹⁸² Although proponents of a constitutional amendment were successful in getting the Medical Cannabis Act on the 2014 ballot, it failed to pass, only receiving about 57% instead of the required 60% vote.¹⁸³

Fortunately, in 2016, Amendment 2 passed with 71% of the vote and established a medical marijuana program, thus changing the landscape of medical marijuana in Florida State.¹⁸⁴ In 2017, during a special legislative session, Senate Bill 8A was passed to implement Amendment 2.¹⁸⁵

The Florida Constitution, as amended in the 2016, refers to marijuana dispensaries as “medical marijuana treatment centers” which are defined to mean any “entity that acquires, cultivates, possesses, processes . . . transports, sells, distributes, dispenses, *or* administers” medical cannabis.¹⁸⁶ However, the implementing legislation defined treatment centers as entities that “cultivate, process, transport, *and* dispense medical marijuana.”¹⁸⁷ The statute’s use of the word “and” instead of “or” appears to violate the constitutional amendment, as it seems to require marijuana businesses to vertically integrate, where the constitution does not.¹⁸⁸ Consequently, a case was filed by the Florigrown Company (“Florigrown”) who argued that requiring Florida treatment centers to be vertically integrated is in direct conflict with the state constitution.¹⁸⁹ Examining the case would be illuminating.

B. *The Case of Florida Department of Health v. Florigrown, LLC*

Two weeks after the constitutional amendment went into effect, Florigrown sent a letter to the DOH requesting registration as a medical marijuana treatment center (“MMTC”).¹⁹⁰ The request was denied.¹⁹¹ In June 2017, the governor signed a bill which set the statutory framework regarding

¹⁸¹ *Florida*, *supra* note 176; *see also* S.B. 1030, 2014 Leg., Reg. Sess. (Fla. 2014).

¹⁸² Fla. S.B. 1030.

¹⁸³ *Florida*, *supra* note 176.

¹⁸⁴ *Id.*; *see also* FLA. CONST. art. X, § 29.

¹⁸⁵ *Florida*, *supra* note 176; *see also* S.B. 8-A, 2017 Leg., Reg. Sess. (Fla. 2017).

¹⁸⁶ FLA. CONST. art. X, § 29(b)(5) (emphasis added).

¹⁸⁷ FLA. STAT. § 381.986(8)(e) (2017) (emphasis added).

¹⁸⁸ *Compare* FLA. CONST. art. X, § 29(b)(5) *with* FLA. STAT. § 381.986(8)(e). *See also Progress on the State of Medical Marijuana Licensing in Florida*, MARIJUANA DOCTOR (Sept. 30, 2019), <https://www.marijuanadoctor.com/blog/progress-state-medical-marijuana-licensing-florida>.

¹⁸⁹ *See generally* Fla. Dep’t of Health v. Florigrown L.L.C., No. 1D18-4471, 2019 Fla. App. LEXIS 10705 (Fla. Dist. Ct. App. July 9, 2019).

¹⁹⁰ *Id.* at *3.

¹⁹¹ *Id.*

MMTC registration.¹⁹² In response, Florigrown filed a lawsuit requesting a declaratory judgment and injunctive relief.¹⁹³ Specifically, Florigrown argued that these statutory provisions were unconstitutional and again requested to be registered as an MMTC by the DOH.¹⁹⁴

The trial court initially denied injunctive relief finding that, although Florigrown had a substantial likelihood of success on the merits, they “could not prove irreparable harm or that a temporary injunction would be in the public’s best interests.”¹⁹⁵ Three months later, Florigrown filed a request for another temporary injunction.¹⁹⁶ This time, the trial court granted the motion finding that the DOH’s “unwillingness to [create] rules for registering MMTCs” in accordance with the constitutional amendment required a different result.¹⁹⁷

On appeal, the DOH challenged the trial court’s decision to enter the temporary injunction.¹⁹⁸ There, the court affirmed the principle that the legislature may not enact a statute that will restrict a right granted under the constitution.¹⁹⁹ In its analysis, the court found that the statute required licenses to be vertically integrated; yet, the constitutional amendment did not.²⁰⁰ Specifically, the court noted that while vertical integration requires a licensee to perform all aspects related to the production and sale of marijuana, the constitutional amendment permits MMTCs to perform any—but not necessarily all—of the activities authorized by the amendment.²⁰¹ As a result, the court found the language of the statute to be in conflict with the constitutional amendment, and upheld the injunction.²⁰² The court’s decision required the DOH to at least consider Florigrown’s application and to register MMTCs without abiding by the unconstitutional statutory provisions.²⁰³

C. *The Status of Vertical Integration in Florida*

The Court of Appeals determined that the vertically integrated model presented in the statute was unconstitutional because it restricts licenses and permits a select number of companies to have a monopoly on the marijuana

¹⁹² *Id.*

¹⁹³ *Id.* at *4.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at *5.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *1.

¹⁹⁹ *Id.* at *6.

²⁰⁰ *See id.* at *7; Benjamin Stearns & Jennifer Tschetter, *Florigrown v. DOH: Florida’s Vertical Integration Requirement for Medical Marijuana Licensees Held Unconstitutional*, JD SUPRA (July 11, 2019), <http://www.jdsupra.com/legalnews/florigrown-v-doh-florida-s-vertical-89856/>.

²⁰¹ *See Florigrown*, 2019 Fla. App. LEXIS 10705, at *7.

²⁰² *Id.* at *7, *11.

²⁰³ *Id.* at *2, *11.

supply chain.²⁰⁴ That is, these companies must cultivate, process, package, and sell medical marijuana without inviting other businesses to deal with the different aspects of the marijuana path.²⁰⁵

The appellate court's crucial decision raised important questions about the current structure for regulating medical marijuana licenses and if it will remain intact.²⁰⁶ After the ruling, there was speculation that Florida will wind up with a hybrid system of vertical licenses "that will grandfather in the existing [twenty-two] vertical licenses."²⁰⁷ If the state does develop a hybrid system, it will have to issue cultivation and dispensary permits.²⁰⁸ It is also suggested that the legislature may also have to embrace horizontal licenses, while avoiding product diversion.²⁰⁹ However, Florida policymakers have historically disfavored a marketplace where many companies partake in the product-making from seed to sale.²¹⁰ Thus, should the state indulge in horizontal licenses, they would likely be restrictive and highly regulated.²¹¹ Ultimately, state officials believe the appellate court's ruling in *Florigrown* infused confusion and uncertainty into Florida's medical marijuana industry.²¹²

The DOH appealed the appellate court's ruling to the Florida Supreme Court, confirming speculation that *Florigrown* would conclude in the state's highest court.²¹³ In May 2020, the Florida Supreme Court heard arguments, but in an unusual and extraordinary move it "ordered a new round of arguments based on whether the statute equates to an unconstitutional 'special law.'"²¹⁴ This diagnosis as a special law is even more paramount, given that the Florida Constitution generally bars "special" laws, which are laws that are intended to benefit specific entities.²¹⁵ That is, a special law tends to unfairly favor a particular category of businesses.

Hence the crux of the matter is whether under the vertical integration

²⁰⁴ Sara Brittany Somerset, *Florida Court Rules Vertical Integration Is Unconstitutional—Are Big Changes Coming to the Sunshine State's Cannabis Industry or Will Big Marijuana Prevail*, FORBES (July 26, 2019, 5:06 AM), <https://www.forbes.com/sites/sarabrittanysomerset/2019/07/26/florida-court-rules-vertical-integration-is-unconstitutional--are-big-changes-coming-to-the-sunshine-states-cannabis-industry-or-will-big-marijuana-prevail/#13101e4f4fb2>.

²⁰⁵ *Id.*

²⁰⁶ Sara Brittany Somerset, *Florida Governor Wants to Modify Marijuana Market*, FORBES (Jan. 25, 2019, 7:24 AM), <http://www.forbes.com/sites/sarabrittanysomerset/2019/01/25/florida-cannabis-market-is-getting-rid-of-vertical-integration/#345c02edcd3c>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* This kind of uncertainty was reflected in Governor Ron DeSantis's initial aversion to vertical integration then a subsequent change of heart, although his change has been attributed to pressure from lobbyists. *Id.*

²¹³ See Fla. Dep't of Health v. *Florigrown*, No. SC19-1464, 2019 Fla. LEXIS 1829 (Fla. Oct. 16, 2019).

²¹⁴ See Dara Kam, *Florida Supreme Court Gets Another Dose of Medical Marijuana*, MIAMI HERALD (Oct. 7, 2020, 04:50 PM), <https://www.miamiherald.com/news/local/marijuana/article246291285.html>.

²¹⁵ FLA. CONST. art. 3, § 10; Kam, *supra* note 214.

model as propounded under the 2017 legislation grants rights to particular companies but not to other companies, generally.²¹⁶ The argument made by DOH counsel was that the 2017 law permits “applicants that meet certain criteria to vie for highly coveted medical-marijuana licenses.”²¹⁷ The DOH contends that the law permits certain classes of businesses to receive particular treatment, not just specific businesses.²¹⁸ Simply put, the DOH’s argument is that the law is not a special law but a general one that applies to all.²¹⁹ However, this argument was rebutted by counsel for Florigrown, who denounced the practice established in the statute as one that limits the free market, creates a monopoly for a few entities, and is inappropriate and arbitrary.²²⁰ Florigrown contends that the statute is obviously a special law, and not a general one, as it results in a different treatment of any company that was not already in possession of a license and seeking to obtain one.²²¹ Consequently, even though Florigrown paid the licensing application fees, it was not granted a license but rather placed on a wait list with other companies.²²² In fact, Florigrown, in spite of all its efforts, to this day has not been able to get an approval to legally operate its marijuana business in Florida.²²³

The *Florigrown* case highlights some important issues presented in the competitive medical marijuana market as a whole and in Florida in particular, where licenses have been granted for the cost of over \$50 million. The outcome of the case is awaited by many prospective medical marijuana licensees who would like to have a share of the Florida pie, since a favorable outcome to Florigrown would signal a possible access to one of the country’s most lucrative marijuana markets.²²⁴ More importantly, a final decision by the Florida Supreme Court may ultimately end up with the DOH formulating new rules or revising its current rules pertaining to the application for licensees for additional MMTCs.²²⁵

Lawsuits, like *Florigrown*, regarding licenses are not uncommon in Florida. When initially awarding marijuana licenses, the government divided the states into five districts, and the winner of the license was the applicant

²¹⁶ Michael Liss, *Florigrown Again*, S. FLA. HOSP. NEWS (Nov. 2020), https://southfloridahospitalnews.com/page/Florigrown_Again/17014/1/.

²¹⁷ Kam, *supra* note 214.

²¹⁸ Liss, *supra* note 216.

²¹⁹ *Id.*

²²⁰ Kam, *supra* note 214.

²²¹ Liss, *supra* note 216.

²²² *Id.* Twenty-two licenses have been granted in Florida but only twelve are in operation.

²²³ Kam, *supra* note 214.

²²⁴ *Id.*

²²⁵ David C. Ashburn et al., *Florida Supreme Court Requests Additional Oral Argument in Major Medical Marijuana Licensure Case*, NAT’L L. REV. (July 28, 2020) <https://www.natlawreview.com/article/florida-supreme-court-requests-additional-oral-argument-major-medical-marijuana>.

who scored highest in each district.²²⁶ The first round of applicants resulted in fourteen vertically integrated licenses.²²⁷ Based on these application scores, however, only five of the recipients were granted the licenses, while the remaining nine had to get theirs through litigation with the state and DOH, raising issues such as discrimination and arbitrary scoring procedures, among others.²²⁸ As a result of, and compounded by, the uproar of Floridians seeking improved access to medical marijuana licenses, the DOH has either settled or lost these nine suits.²²⁹

VII. WHAT LIES AHEAD FOR THE MARIJUANA INDUSTRY?

The future of the marijuana industry cannot be comprehensively analyzed without addressing the issue of conflicting state and federal law. As discussed in this Article, under federal law, the possession, cultivation, and distribution of marijuana is still illegal, and to date the Supreme Court has dismissed any doubt about the constitutionality of the ban.²³⁰ Since state law is preempted by federal law, the federal government can always enforce its law as it has done: by finding state law illegal.²³¹ However, the states continue to exercise both “de jure and de facto power to legalize medical marijuana in the CSA’s shadow.”²³² One may categorize state marijuana programs as any of the following: “(1) preempted, and thus unenforceable, (2) enforceable but impotent, or (more rarely) (3) unencumbered by federal law.”²³³ None of these analyses have satisfactorily proven state authority, as they are rather wanting and unpersuasive.²³⁴

Despite federal preemption concerns, recreational marijuana is the new wave in the marijuana industry. The District of Columbia and eleven states—Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington—have passed expansive laws legalizing marijuana for recreational use for adults who are twenty-one or older.²³⁵ Other states are working towards this, and so it is the

²²⁶ Somerset, *supra* note 206. The Florida Administrative Code establishes the scoring process. See FLA. ADMIN. CODE ANN. r. 64-4.002(5)(b) (2019). Specifically, it requires a panel of three reviewers to individually review and score each application. *Id.* The individual scores are then calculated together to form an aggregate score, the highest of which from each district is then selected and awarded the marijuana license of that district. *Id.*

²²⁷ Somerset, *supra* note 206.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See generally *Gonzales v. Raich*, 545 U.S. 1 (2005).

²³¹ See U.S. CONST., art. VI, § 2 (“[T]he laws of the United States . . . shall be the supreme Law of the Land . . .”). See also Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crimes*, 62 VAND. L. REV. 1421 (2009).

²³² Mikos, *supra* note 231, at 1444.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *State Marijuana Laws in 2019 Map*, GOVERNING, <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> (last visited Dec. 2, 2020).

continuing wave in the marijuana industry.²³⁶ The question now is not whether to legalize marijuana, but how? The federal government should come to terms with the “impracticability of fighting [this] war against marijuana” enforcement and instead use social scientific evidence to regulate marijuana in ways that are safe yet controlled.²³⁷

Voters across the country are vehemently denouncing a federal marijuana policy that they believe has failed the war on drugs and undermines or denies the scientific evidence that does exist.²³⁸ As shown in this Article, voters are eliminating state and local penalties for both medical and recreational use.²³⁹ Criminalizing conduct that thirty-three states and 64% of the American people believe should be legal only tends to “undermine the people’s faith in the law and the government.”²⁴⁰ As a result, the law loses its purpose, power, and authority over the majority of the population because they refuse to conform to it.²⁴¹

Marijuana legalization is at its peak in this country, which is supported by anecdotal evidence showing that marijuana use is extensive in many different aspects of American life.²⁴² Yet, the federal position of prohibition does not appear to want to embrace any change. Although the enforcement pattern of the federal government has been up and down, the bottom line remains—for over the past seventy-five years, marijuana remains a federally prohibited drug.²⁴³ No doubt, commentators suggest, and rightfully so, that it is time for the federal government to choose between blocking state laws that legalize marijuana or allowing them to be executed without federal interference.²⁴⁴ The overlapping of state and federal law is untenable, as it makes no sense that an industry employing tens of thousands of people—and generating hundreds of millions in revenue—is erected on illegal transactions for which people could be imprisoned for many, many years.

Scholars have suggested that the federal prohibition is inconsistent with the desire to regulate because one can only regulate that which is legal.²⁴⁵ Thus if analogized to alcohol, which is legal and, therefore, regulated, that would offer a template that could be used for marijuana legalization as well.²⁴⁶

²³⁶ *Id.*

²³⁷ See Gene Taras, Note, *High Time for Change: How Legalizing Marijuana Could Help Narrow the Racial Divide in the United States*, 24 CARDOZO J. INT’L & COMPAR. L. 565, 598 (2016).

²³⁸ Todd, *supra* note 88, at 103.

²³⁹ *Id.*

²⁴⁰ *Id.* at 103–04; Struyk, *supra* note 2.

²⁴¹ Todd, *supra* note 88, at 103–04.

²⁴² Kamin, *supra* note 33, at 166.

²⁴³ *Id.*

²⁴⁴ See Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise*, 91 OR. L. REV. 1029, 1040 (2013).

²⁴⁵ See Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1308 (2013).

²⁴⁶ *Id.*

Under this governing model, the federal government would rescind the ban on the possession and distribution of marijuana, while at the same time maintaining some restrictions against interstate commerce, like in unlicensed and mislabeled drugs.²⁴⁷ The federal government could then participate alongside the state in taxing the manufacturer and distributor of the goods.²⁴⁸ Other regulations would be left in the hands of the states.²⁴⁹ For example, “a state could decide to leave the drug distribution to a state institution; other states would license production and distribution to either private individuals or institutions.”²⁵⁰ And just like restrictions that apply to alcohol, states control where distribution and consumption can take place.²⁵¹ States would then impose the necessary sanctions against misappropriating the drug to minors, including possible revocation of license and criminal sanctions under certain circumstances.²⁵² So, if marijuana is to be regulated like alcohol, “controls [could] be placed on such factors as quality, potency, amount purchased, time and place of sales, age of buyers, etc.”²⁵³ Such regulations would prove valuable to the consumer as they would provide safe, good-quality potency, which would be more valuable than prohibited drugs.²⁵⁴

VIII. CONCLUSION

Marijuana legalization is still ongoing. Most states allow for limited use of medical marijuana under certain circumstances, while several states have also decriminalized the possession of small amounts of marijuana.²⁵⁵

The pertinent question is whether, with this growth in legalization, there is a concomitant measurable growth in social good from all the gains resulting from state marijuana legalization. Minority communities that have historically suffered and been hampered by the war on drugs are at least a part of the booming new marijuana trend through programs that address their community needs. The results from legalization are reassuring, so much so that even elected officials who initially opposed the idea are now in favor of legalization.²⁵⁶ As this Article demonstrates, there is a general trend towards social justice from tax revenue, but there remains the problem of diversity bias in the industry post-legalization.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.*

²⁵⁰ *Id.*

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ JON B. GETTMAN, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, CRIMES OF INDISCRETION: MARIJUANA ARRESTS IN THE UNITED STATES 163 (2005), <http://www.doctordelUCA.com/Library/WOD/CrimesOfIndiscretion-NORML05.pdf>.

²⁵⁴ Duke, *supra* note 245, at 1308.

²⁵⁵ *See State Medical Marijuana Laws, supra* note 1.

²⁵⁶ Todd, *supra* note 88, at 119. For example, the Governor of Colorado, who was opposed to the marijuana initiative in 2012, now sings the praises of legalization and contacted the Trump administration requesting they not interfere with the legalization as it is working favorably for his state. *See id.*

State regulatory requirements are some of the impediments to entry into the market for people of color. Therefore, there is an urgent need to highlight and prioritize policies that would repair the unequal and discriminatory harms inflicted by marijuana criminalization and enforcement. This should include regulations that reduce or even eliminate barriers that preclude total participation by all.

The states' regulations of marijuana through vertical integration fall into three categories: required, allowed, and prohibited.²⁵⁷ The different types of marijuana business regulation models come with advantages and disadvantages. Therefore, it is incumbent upon the marijuana business owners and investors to understand the pros and cons of vertical integration in their respective states.²⁵⁸ This is even more crucial because it could take years to gather enough evidence to demonstrate insight into whether vertical integration is indeed effective in protecting, promoting, and predicting the regulation of the marijuana industry.

The ongoing conflict between state and federal laws in marijuana legalization is still a fundamental issue to be resolved. Some states in an attempt to find a solution to this state-federal conflict, have rescheduled marijuana under their state laws as a Schedule II drug.²⁵⁹ However, practically speaking, this does not resolve the issue, because state schedules are superseded by federal schedules, which do not permit marijuana prescriptions.²⁶⁰ Thus, the final say in addressing this matter remains with Congress; it should resolve this impasse once and for all. Some of the proposed bills are a step in the right direction, but Congress must act—take the bull by the horns and bring finality to this state and federal conflict.

²⁵⁷ van Leynseele, *supra* note 138.

²⁵⁸ *Id.*

²⁵⁹ Aurit, *supra* note 27, at 550.

²⁶⁰ *Id.*