

## Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We're Going

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### INTRODUCTION

2016 was supposed to be a tipping point for marijuana legalization in the United States. Hillary Clinton was a huge favorite to win the presidency and, despite her lukewarm stance on marijuana law reform,<sup>1</sup> many were predicting that the federal ban on marijuana would end during her first term in office. The unexpected election of Donald Trump changed all of that. Marijuana activists came to fear not just that fundamental change in the nation's marijuana laws would stall with Trump as president but that he might bring a significant, perhaps permanent, reversal of the building momentum toward marijuana legalization in the United States.<sup>2</sup>

To the surprise of many, however, the last four years have seen continued expansion of marijuana law reform at both the state and federal levels. The federal prohibition of marijuana has shown its first cracks, and

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1. See German Lopez, *Democratic Voters Love Marijuana Legalization. Hillary Clinton Doesn't*, VOX (June 13, 2015), <https://www.vox.com/2015/4/13/8393495/hillary-clinton-marijuana-legalization> [<https://perma.cc/L2RC-CQC8>] (“Hillary Clinton’s approach to marijuana legalization can best be described as a cautious, leave-it-to-the-states strategy similar to that of the Obama administration. But her wary approach to the issue puts her at slight odds with most voters, more of her Democratic base, and even most voters in some key swing states, all of whom flat-out support legalization.”).

2. See German Lopez, *Marijuana Legalization Won Big on Election Day. It Will Keep Winning*, VOX (Nov. 9, 2016), <https://www.vox.com/policy-and-politics/2016/11/9/13523384/marijuana-legalization-2016-election> [<https://perma.cc/5E4Y-BHS9>] (“Trump has said that legalization should be left to the states. But his administration, especially one in which an anti-legalization figure like Trump ally and New Jersey Gov. Chris Christie holds sway, could try to clamp down on states legalizing.”); see also Rob Hotakainen, *Why the Next President Could Be a Buzzkill for Pot Advocates*, MCCLATCHY DC (June 20, 2016), <https://www.mcclatchydc.com/news/politics-government/election/article84841107.html> (last visited Apr. 12, 2020) (“Across the country, pot legalization advocates worry that a Trump victory on Nov. 8 could mean trouble for legalized recreational pot in Washington state and Colorado, as well as other states such as California and Nevada that want to follow their lead.”).

an increasing number of states are authorizing marijuana under their own laws as well. With another presidential election now looming on the horizon, both political parties and both sides of the marijuana law reform debate are once again preparing for the possibility of a seismic change in how marijuana is regulated in the United States.

In this Article, I lay out the state of marijuana law and policy in the United States today with an eye toward that uncertain future. I describe the differential treatment of marijuana under state and federal law and the tensions this causes for those seeking to take advantage of marijuana law reform in the states. I analyze recent changes to marijuana federalism and then look to the future, discussing what changes we may expect in the way marijuana is regulated under both state and federal law in the years to come. I show that as marijuana law continues to evolve in the states, the conversation at the federal level will have to move beyond calls for legalization and toward the difficult work of creating a sensible regulatory regime to replace fifty years of prohibition.

#### I. BRIEF BACKGROUND ON THE INTERACTION OF STATE AND FEDERAL MARIJUANA LAWS

Since 1970, marijuana<sup>3</sup> has been a Schedule I drug under the federal Controlled Substances Act (CSA), classified as a substance with no approved medicinal use and a high potential for abuse.<sup>4</sup> As a result, marijuana's production, transportation, and distribution are all serious crimes under federal law. No doctor with the power to prescribe other federally scheduled drugs,<sup>5</sup> such as narcotics, can prescribe marijuana to a patient.

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3. In this Article, I use marijuana to describe the psychoactive variants of the plant *cannabis sativa*. Hemp is used to describe non-psychoactive cannabis plants and their derivatives. Although the use of the word marijuana has been criticized because of its supposedly racist origins, it is used here to clarify when I am talking about the psychoactive drug that derives from the cannabis plant.

4. Controlled Substances Act of 1970, 21 U.S.C. §§ 801–971 (2018); *id.* § 812(c).

5. The Controlled Substances Act defines “drugs” as

(A) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

21 U.S.C. § 802 (2018) (referencing the definition of drugs in 21 U.S.C. § 321(g)(1) (2018)).

In passing the CSA, Congress could have<sup>6</sup> preempted all state laws regulating marijuana—but chose not to.<sup>7</sup> The reason for Congress’s decision to include the states in the regulation of marijuana and other controlled substances is simple: the federal government plays only a limited role in the enforcement of criminal laws in the United States. Only about ten percent of all people serving prison and jail time in our country are in federal rather than state custody.<sup>8</sup> While the share of incarcerated individuals in federal custody is significantly higher with regard to the enforcement of drug laws,<sup>9</sup> it remains true that the states do the lion’s share of drug regulation<sup>10</sup> in this country. The federal government has neither the resources nor the political will to expand its prosecutorial and law enforcement resources to the degree that would be necessary to take over sole enforcement of the nation’s drug laws.<sup>11</sup> The passage of the CSA was designed to foster state–federal cooperation rather than to preempt the drug control work being done at the state level and make the federal government the nation’s sole drug regulator.

This federalist model worked well as long as the states also prohibited marijuana in all circumstances; federal and state policies were largely aligned, and state and federal law enforcement officials often cooperated to achieve their shared goal of suppressing all marijuana activity throughout the land. However, beginning in 1996 and continuing through the present, a number of states have begun to authorize marijuana use—first for medical patients and then for all adult users.<sup>12</sup> Today, marijuana is permitted in far more states than it is prohibited. Thirty-three

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6. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 9 (2013) (“The Constitution, of course, makes federal law the Supreme law of the land, meaning that Congress can normally preempt (i.e., void) state laws if it so desires. The key in every preemption case is thus divining Congress’s preemptive intent.”).

7. 21 U.S.C. § 903 (2018) (“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.”).

8. See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/NX7Y-QWP3>] (reporting 221,000 people in federal prisons and jails compared with 1,918,000 in state prisons and jails).

9. See *id.* (The proportion of individuals incarcerated for drug offenses compared to the overall individuals incarcerated in federal prisons is 43.9% compared to those in state prisons 18.3%).

10. *Id.* (While the federal government accounts for just 10% of those incarcerated nationwide, its share of those held for drug offenses is more than twice as high.).

11. By contrast, the federal government has preempted the field in other areas, assuming full responsibilities for such tasks as issuing patents and setting foreign policy.

12. Throughout this Article, I use the terms “adult-use” and “recreational” interchangeably. Marijuana law reform advocates have largely rejected the term “recreational” for its implication of libertine drug use rather than sensible adult decision-making.

states permit the medical use of marijuana, with eleven more states additionally permitting it for adult recreational use.<sup>13</sup> These law reform states have not only legalized the personal use of marijuana; they have also generally regulated and, in the case of adult use of recreational marijuana, taxed its production and sale.<sup>14</sup> Meanwhile, all of this commerce—every plant grown and every product sold—remains serious criminal conduct under federal law.

For almost twenty-five years, therefore, marijuana has existed in a contested, contradictory legal space. Marijuana is the only product or activity that has been universally prohibited by the federal government while also being regulated as a beneficial substance in the states. The contrasting legal treatment between state and federal law creates obvious tensions; both states and the federal government are free to operate in this sphere<sup>15</sup> but the power of each is severely limited. It is apparent that the states can discard or disregard their own marijuana prohibitions. Even if the federal government were to preempt any state laws that were inconsistent with the aims of the CSA, it can neither require the states to pass laws<sup>16</sup> nor prevent them from repealing ones already on the books. And even if the federal government could force the states to adopt or maintain marijuana prohibition, it could not require any state to enforce either its own laws or those of the federal government.<sup>17</sup> On the other hand, states reforming their own marijuana laws can do nothing to change federal prohibition or to protect their citizens from prosecution under federal law. If the federal government wishes to enforce federal law against anyone using, producing, or selling marijuana, it may do so anywhere in the country, regardless of whether such conduct complies with state law.<sup>18</sup>

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13. See, e.g., *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 16, 2019), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/Y4VA-R6TR>]. In addition to the eleven legal marijuana states, the territories of Guam, Puerto Rico, and the District of Columbia have also made marijuana legal for adult consumers. *Id.* Additional states permit the use of non-psychoactive CBD but continue to criminalize any amount of the psychoactive chemical THC. *Id.*

14. See generally *id.* The principal exception is the District of Columbia, which has been prohibited by Congress from enacting marijuana regulations. *Id.*

15. In 2005, the Supreme Court affirmed the power of Congress to regulate even marijuana grown on one's own property for one's own consumption under the Interstate Commerce Clause. See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

16. See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government cannot commandeer the state legislatures in the pursuit of federal policy goals).

17. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the Tenth Amendment prohibits the federal government from conscripting the participation of state law enforcement officials in the enforcement of a federal statute).

18. See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (holding that compliance with state medical marijuana laws is not a defense in a federal prosecution).

These overlapping powers of the state and federal governments have caused a standoff in marijuana reform states since 1996—the federal government keeps marijuana prohibition in place while an increasing number of states are removing their own prohibitions. As marijuana law reform continued to accelerate in the first decade of the twenty-first century, the Obama administration was forced to develop a formal policy regarding how to treat marijuana activity authorized by an increasing number of states. Although it was clear they could do so, federal prosecutors around the country were unsure whether they should enforce federal criminal laws against those in compliance with state regulations and turned to Washington for guidance. After a number of fits and starts,<sup>19</sup> the Obama Justice Department eventually settled on a policy of non-interference with law reform in states with robust marijuana regulations.<sup>20</sup> The 2013 Cole Memorandum set forth seven federal priorities, noted the leading role that states traditionally play in setting drug policy, and asserted that state marijuana regulations might be as effective as prohibition at preventing the harms of illegal drug production and sale.<sup>21</sup> The dissemination of this *laissez-faire* policy with regard to state law

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under the CSA). For the last several years, Congress has used stop-gap spending riders, now referred to as the Rohrabacher-Farr Amendment, to prohibit the federal government from interfering in state policies that authorize the *medical* use of marijuana. Such protections are only temporary and only protect medical marijuana producers and patients. *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. (2014) (enacted).

19. In 2009 and 2011, the Justice Department released the Ogden and Cole memorandums which seemed, respectively, to condone and then reject marijuana law reform in the states. *Compare* Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys (Oct. 19, 2009), <https://www.justice.gov/usao/az/reports/medical-marijuana.pdf> [<https://perma.cc/3KDS-NR7S>] (“As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.”), *with* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/4JH-D-8684>] (“Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.”).

20. *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/G4CP-SQTF>] (setting forth criteria including keeping regulated marijuana out of prohibitionist states and keeping criminal elements out of the regulated marijuana industry). The memorandum stated that the adoption of robust regulations for the production and distribution of marijuana may be as effective at meeting these priorities as prohibition. *See id.*

21. *Id.*

reform made similar reforms at the federal level appear to simply be a matter of time.<sup>22</sup>

But once again, the industry was plunged into uncertainty. The 2016 election caused many to fear for the future of federal noninterference and for the larger project of marijuana law reform. Although marijuana reform continued to roll along in the states, the election of Donald Trump cast a pall over the industry. Trump's appointment of Jefferson Sessions—one of the Senate's leading opponents of state marijuana law reform—to the post of Attorney General appeared to portend a significant shift in federal policy.<sup>23</sup> A memo from the Sessions Justice Department lent credence to this fear by rescinding the Obama-era deference to state law reform and leaving the question whether to enforce federal marijuana law in the hands of individual U.S. Attorneys around the country.<sup>24</sup> In response, several of those U.S. Attorneys indicated that they would not tolerate state-licensed marijuana distribution taking place within their jurisdictions.<sup>25</sup>

After this early saber-rattling, however, there has been little practical change in the enforcement of federal marijuana law over the last three years. No U.S. Attorney has moved against state-compliant marijuana businesses and, after a pause, marijuana business in the states continues to boom.<sup>26</sup> Although the threat of criminal prosecution is currently remote, the status quo is far from ideal. In the next Part, I describe some of the complications that linger over marijuana regulation in the U.S. today.

## II. UNSTABLE STATUS QUO

This Article is part of a symposium that focuses on current issues directly associated with the continued prohibition of marijuana in the

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

23. See, e.g., Baynard Woods, *Jeff Sessions Nomination Sparks Fear Among Legal Marijuana Advocates*, THE GUARDIAN (Nov. 22, 2016), <https://www.theguardian.com/us-news/2016/nov/22/jeff-sessions-marijuana-legalization-race-colorado> [<https://perma.cc/7MDW-UL3E>].

24. Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/V9XB-SUXU>] (“Given the Department’s well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”).

25. See, e.g., *Statement from U.S. Attorney Andrew Lelling Regarding the Legalization of Recreational Marijuana in Massachusetts*, U.S. ATTORNEY OFFICE DIST. OF MASS. (July 10, 2018), <https://www.justice.gov/usao-ma/pr/statement-us-attorney-andrew-elling-regarding-legalization-recreational-marijuana> [<https://perma.cc/7QCR-2SD9>] (“Because I have a constitutional obligation to enforce the laws passed by Congress, I will not effectively immunize the residents of the Commonwealth from federal marijuana enforcement.”).

26. According to one cannabis market watcher, the total size of the legal marijuana industry nearly quadrupled between 2014 and 2019 while the illicit marijuana market shrank. See Chris Hudock, *U.S. Legal Cannabis Market Growth*, NEW FRONTIER DATA (Sept. 8, 2019), <https://newfrontierdata.com/marijuana-insights/u-s-legal-cannabis-market-growth/> [<https://perma.cc/BF3V-ETEV>].

United States today—for athletes and sports leagues, for marijuana businesspeople, for lawyers and their clients. At the University of Denver, I teach a class largely dedicated to helping clients navigate the contradictory legal environment marijuana consumers and businesspeople find themselves in today. It is obviously impossible to produce an exhaustive list of those challenges in this Article, though some recent flashpoints will likely illustrate my point.

### *A. Marijuana Businesspeople*

Those engaged in the regulated marijuana industry face special challenges associated with marijuana's continued presence in Schedule I of the CSA. The two best-known and well-documented challenges are in the areas of banking and taxation. Since the beginning of marijuana legalization, it has been clear to state regulators that allowing marijuana businesspeople access to merchant banking services is an integral part of any successful regulatory regime.<sup>27</sup> Yet, notwithstanding a memo from the Treasury Department designed to encourage banks to do business with the marijuana industry,<sup>28</sup> most banks remain reluctant to take on marijuana businesses as clients. Federal illegality raises the specter of money laundering charges or the seizing of assets traceable to violations of federal law; as a result, the generally risk-averse banking industry has erred on the side of avoiding marijuana businesses.

As long as marijuana is primarily a cash business, regulators will have a difficult time ensuring that funds are only coming in from, and being distributed to, reputable sources and that taxes are being paid as required by law. What is more, when marijuana businesses are unable to gain banking services, they must pay things like payroll, taxes, and licensing fees in cash, making both the businesses themselves and other third parties a target for violent crime. One need not be a full-throated

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27. *See, e.g.*, Letter from 20 Governors to Congressional Leaders (June 13, 2019), <https://dfi.wa.gov/sites/default/files/06-13-19-letter.pdf> [<https://perma.cc/7NV3-PQYN>] (“[W]ithout banking services, cannabis businesses are less able to obey the law, pay taxes, and follow these important regulations. The public safety risks posed by these cash-only businesses can be mitigated through access to banking service providers.”); Letter from 38 Attorneys General to Congressional Leaders (May 8, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/naag-letter-safe-banking-act-2019.pdf> [<https://perma.cc/Y8MP-HJRH>] (“Compliance with tax laws and requirements would be simpler and easier to enforce with the regulated tracking of funds in the banking system, resulting in higher tax revenues.”).

28. DEP’T. OF TREASURY, FIN. CRIMES ENF’T NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014) (“This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”).

advocate of marijuana law reform to understand that the consequences of the marijuana industry remaining a cash business impacts more than just those engaged in regulated marijuana production and sale.

For much of 2019, it appeared that a solution was on the way. On September 25, 2019, the United States House of Representatives passed the SAFE Banking Act,<sup>29</sup> which would have cleared the way for federally-insured banks to offer services to the marijuana industry.<sup>30</sup> The Senate failed to pass the measure, however, and opposition came from an unlikely source. Progressive groups and individual senators called for other marijuana-related issues—principally undoing the damage of the war on drugs and ensuring minority participation in the nascent marijuana industry—to take priority over creating a path to banking.<sup>31</sup> As I discuss more fully below, this is an example of a phenomenon taking place throughout marijuana law reform at the moment. With the goal of substantial federal legal change finally in sight, groups that once found themselves aligned now find themselves on opposite sides of the fence, arguing over what form federal change should take rather than walking arm in arm towards it.

Section 280E of the Internal Revenue Code is another issue that has hampered marijuana businesspeople. This provision requires marijuana businesses to pay taxes on their revenue but denies them all deductions except the cost of goods sold.<sup>32</sup> As a result, effective tax rates for marijuana businesses are often north of eighty percent, making the operation of a

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29. Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019); *see also* 116th CONG. REC. H7962-74 (daily ed. Sept. 25, 2019).

30. H.R. 1595 § 2(a) (“A Federal banking regulator may not . . . terminate or limit the deposit insurance or share insurance of a depository institution . . . or take any other adverse action against a depository institution . . . solely because the depository institution provides or has provided financial services to a cannabis-related legitimate business or service provider.”).

31. *See, e.g.*, Coalition Letter from the Am. Civil Liberties Union, et. al. to Nancy Pelosi, Speaker of U.S. House of Representatives, and Steny Hoyer, Majority Leader of U.S. House of Representatives (Sept. 17, 2019), [https://www.aclu.org/sites/default/files/field\\_document/marijuana\\_banking\\_vote\\_letter\\_002.pdf](https://www.aclu.org/sites/default/files/field_document/marijuana_banking_vote_letter_002.pdf) [<https://perma.cc/XH38-EPQQ>] (“The banking bill does not address marijuana reform holistically. Instead, it narrowly addresses the issues of banking and improved access to financial services, measures that would benefit the marijuana industry, not communities who have felt the brunt of prohibition. To be clear, we recognize the challenges facing marijuana businesses that lack access to financial services. However, we believe it is a mistake to move this issue forward while many of the other consequences of marijuana prohibition remain unresolved.”). The letter was signed by the ACLU, the Drug Policy Alliance, and Human Rights Watch, among others.

32. 26 U.S.C. § 280E (2018) (“No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”).

compliant, licensed marijuana business a difficult financial venture.<sup>33</sup> For some, however, the inability of marijuana businesses to deduct expenses—such as marketing and advertising—is a feature, rather than a bug, in federal marijuana policy. Pat Oglesby, an expert on marijuana taxation and former counsel to Congress’s Joint Committee on Taxation, has been a vocal advocate for leaving parts of 280E in place even as marijuana laws are liberalized more generally. He argues that 280E makes marijuana advertising and marketing costs more expensive than they are for other businesses, creating a drag on such practices in the marijuana industry.<sup>34</sup> Furthermore, because marijuana businesses would have a First Amendment right to advertise their products following federal marijuana legalization,<sup>35</sup> denying tax deductions for those ads might be the only way to limit them in the interest of public health and safety.<sup>36</sup>

### B. Marijuana Consumers

The issues discussed so far arise only for those who have chosen to take part in the burgeoning marijuana industry. But, compared to those

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33. See, e.g., Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 531–34 (2014) (offering an example under which the tax imposed exceeds 100%).

34. Pat Oglesby, *How Bob Dole Got America Addicted to Marijuana Taxes*, BROOKINGS (Dec. 18, 2015), <https://www.brookings.edu/blog/fixgov/2015/12/18/how-bob-dole-got-america-addicted-to-marijuana-taxes/> [<https://perma.cc/2XFS-767X>] (“280E makes marijuana ads cost more, after tax, than standard ads. That higher cost will nudge against marijuana consumption, in one of two ways. Either sellers will be disincentivized from advertising or the additional costs will be passed onto the consumer through higher prices.”); see also JONATHAN CAULKINS ET AL., RAND CORP., *CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 164 (2015) (“Section 280E slows advertising and marketing that the law might not be able to stop. That is, Vermont’s conformity to Section 280E could keep a useful brake on marketing of marijuana—and on the marijuana industry generally.”).

35. The Supreme Court’s holding in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) protects commercial speech that concerns lawful activity. So long as marijuana is illegal at the federal level, therefore, First Amendment challenges to marijuana advertising restrictions are unlikely to succeed.

36. The National Organization for Marijuana Law Reform (NORML), long an advocate for legalizing marijuana, has come to a similar conclusion: 280E should be used to slow corporate growth and predatory practices. See *Federal: Legislation Pending to Cease Penalizing State-Compliant Marijuana Businesses Under the Federal Tax Code*, NORML, <https://norml.org/action-center/item/federal-legislation-pending-to-cease-penalizing-state-compliant-marijuana-businesses-under-the-federal-tax-code> [<https://perma.cc/CE98-NDEA>].

Allowing deductions for rent and employee costs would help the bottom line of small businesses and give incentives for further hiring, while maintaining the non-deductibility of advertising costs can act as a preemptive move against well funded corporate controlled marijuana companies, which can afford extensive advertising. This development would encourage the proliferation of a more diverse array of smaller businesses, as opposed to the consolidation by large corporate interests. A legal industry dominated by smaller businesses in turn would create more competition, thus leading to higher quality and better priced products for the consumer.

*Id.*

working in the marijuana industry, far more people are taking advantage of law reform to consume marijuana or to become more forthright about their marijuana use. Given marijuana's increasingly public nature—and the proliferation of marijuana and CBD products in mainstream spaces—it is easy enough for consumers to forget that marijuana remains criminal at the federal level. While there is almost no practical likelihood of consumers of state-sanctioned marijuana products being targeted by law enforcement, the continued federal prohibition of marijuana does set some traps for the unwary.

Immigration is one important example of the consequences of marijuana's continued prohibition, particularly as Canada has recently legalized marijuana at the federal level. An official U.S. Customs and Border Patrol statement in 2018 attempted to clarify the immigration status of those in Canada who work in the marijuana industry, but the document left many questions unanswered.<sup>37</sup> For example, the statement makes clear that:

[A]ny arriving alien who is determined to be a drug abuser or addict, or who is convicted of, admits having committed, or admits committing, acts which constitute the essential elements of a violation of (or an attempt or conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, is inadmissible to the United States.<sup>38</sup>

As all marijuana conduct is illegal in this country, anyone at the border who admits to being in the Canadian marijuana industry is excludable for that reason alone. Yet, the statement goes on to explain that “[a] Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S.”<sup>39</sup> The memorandum thus grants border agents the power to refuse entry to those in the Canadian marijuana industry but states that such individuals will “generally” be admitted.<sup>40</sup> Press accounts indicate that the U.S. is in fact turning away a number of Canadians on the basis of their participation in Canada's emerging marijuana industry.<sup>41</sup>

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37. See *CBP Statement on Canada's Legalization of Marijuana and Crossing the Border*, U.S. CUSTOMS & BORDER PROTECTION (Sept. 21, 2018), <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border> [https://perma.cc/33TB-SQYP].

38. *Id.*

39. *Id.*

40. *Id.*

41. See, e.g., Matt Lamers, *Seattle Law Firm Sues US Government over Marijuana Industry Border Bans*, MARIJUANA BUS. DAILY (Mar. 8, 2019), <https://mjbizdaily.com/seattle-law-firm-sues-us-government-over-marijuana-industry-border-bans-canada/> [https://perma.cc/7XMH-QV46] (“A

The continuing illegality of marijuana in the United States does not only affect travelers at the northern border or those participating in Canada's marijuana industry. *Any* visitor to the United States who participates in the marijuana industry, either while in the United States or while abroad and whether that conduct is legal or illegal in the traveler's home country, risks being permanently excluded from the U.S. My occasional co-author Joel Warner told the story of Nate and Claudia, an American and a Chilean citizen who have been separated, perhaps permanently, because Claudia admitted at a port of entry that the couple visited a Colorado marijuana dispensary during one of her previous visits to the United States.<sup>42</sup> Even in the absence of a conviction, and even when the underlying conduct was legal under state law or the laws of the country in which the conduct occurred, conduct that constitutes a federal crime can still be grounds for exclusion and a bare admission of such conduct is deemed sufficient proof.

Employment is another area where the continuing federal illegality hampers state law reform, even in the absence of a present threat of federal criminal enforcement. The case of *Coats v. Dish Network* from Colorado best demonstrates the tension.<sup>43</sup> Brandon Coats tested positive for marijuana when he was an employee in Dish Network's Colorado call center.<sup>44</sup> The positive test was not a surprise; Coats was a medical marijuana patient who used the substance to control muscle spasms so that he could work.<sup>45</sup> Nonetheless, Dish Network fired him, and he subsequently filed suit under a Colorado statute that prohibited the state's employers from firing at-will employees for engaging in legal off-duty conduct.<sup>46</sup> The Colorado Supreme Court unanimously rejected Coats's claim, holding that because his conduct was prohibited by federal law, it was not "legal" and therefore did not qualify for protection under the statute.<sup>47</sup>

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Washington State law firm is suing the U.S. government in an attempt to gain 'immediate' access to records it hopes will shed light on why some foreign nationals – particularly Canadians – have been denied entry to the United States because of their involvement in the legal cannabis industry."); *see also* Vanmala Subramaniam, *Canadian Cannabis Investor Gets Lifetime U.S. Entry Ban as Conference Goers Face Scrutiny at Border*, FIN. POST (Nov. 20, 2018), <https://business.financialpost.com/cannabis/cannabis-business/cannabis-investing/canadian-cannabis-investor-gets-lifetime-ban-from-u-s-as-vegas-conference-goers-face-scrutiny-at-border> [<https://perma.cc/WJ36-9UL4>].

42. Joel Warner, *Marijuana Is Legal in Colorado — But Only if You're a U.S. Citizen*, WESTWORD (Sept. 13, 2016), <https://www.westword.com/news/marijuana-is-legal-in-colorado-but-only-if-youre-a-us-citizen-8304837> [<https://perma.cc/J729-AT6Z>].

43. *See* *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).

44. *Id.* at 850.

45. *Id.*

46. *Id.* at 851.

47. *Id.* at 853.

On the one hand, *Coats* was merely a statutory interpretation case—one that could easily be undone by a legislative statement that the lawful off-duty conduct statute applied to any conduct permitted under state law. But *Coats* also represents the judgment of nearly all marijuana reform states that employers are under no obligation to accommodate off-duty marijuana use by employees. Some states go even further and state explicitly that an employer may enforce a zero-tolerance marijuana policy notwithstanding state law permitting marijuana consumption.<sup>48</sup> Given that marijuana can stay in the bloodstream for days, if not weeks, after use, these rules effectively require many marijuana patients or consumers to choose between use of the drug and their continued employment.

The reticence of legislatures and courts to give full effect to state marijuana law reform may reflect concern that employers will argue that state laws requiring them to accommodate employees' marijuana use are inconsistent with federal drug-free workplace laws and are therefore preempted.<sup>49</sup> It is true that if an employer cannot comply with both state and federal laws then the state law must give way.<sup>50</sup> But it is not at all clear that federal law requires most employers to have a zero-tolerance policy for its employees. As legalization spreads to more and more states, this issue is sure to be tested in court sooner rather than later.

These two examples are just illustrations of a broader theme. Because marijuana remains illegal at the federal level, any public benefit that depends on federal funding is put at risk by engaging in any marijuana-related conduct. The most recent prominent example of this was the Chicago Housing Authority's announcement that residents in federally-funded housing in the city would face eviction if they were found in

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48. *See, e.g.*, GA. CODE ANN. § 16-12-191(g) (West 2019) ("Nothing in this article shall require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, purchase, sale, or growing of marijuana in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work."); OHIO REV. CODE ANN. § 3796.28(A)(3) (West 2016) ("Nothing in this chapter . . . [p]rohibits an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.").

49. *See, e.g.*, Answer Brief at 7–8, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (No. 13SC394), 2014 WL 3738687, at \*7–\*8 ("Employers' abilities to maintain drug-free workplaces must be preserved for business, safety, health, and legal reasons. A reversal here would mean that all drug-free policies violate CLAS. But federal contractors (including some of Colorado's largest employers) must have drug-free policies under the federal Drug-Free Workplace Act ('DFWA'). It would be impossible for these employers to comply with both laws, resulting in conflict preemption of CLAS by the DFWA.").

50. *See, e.g.*, 21 U.S.C. § 801 (2018) (stating the intent of Congress to preempt state marijuana laws when it is impossible to comply with both state and federal law).

possession of marijuana on their premises.<sup>51</sup> Although there was no indication that the federal government was interested in imposing negative consequences on the city if marijuana was used by residents of its public housing, that was a risk that the city seemed unwilling to run.

### III. CURRENT ISSUES IN STATE AND FEDERAL MARIJUANA POLICY

Marijuana legalization may be on a record number of state ballots in 2020. Marijuana law reform advocates often focus their attention on presidential election years to take advantage of higher turnout among young voters, who overwhelmingly support marijuana law reform.<sup>52</sup> As a result, marijuana may be on the ballot in as many as sixteen states this fall.<sup>53</sup> However, marijuana law reform is becoming more nuanced, and voters in these states may have to decide not just whether to liberalize their marijuana laws, but also where to focus the attention of that reform. At both the state and federal levels, the question of whether to reform marijuana laws is becoming an increasingly nuanced discussion about how marijuana law should evolve in the future.

For example, matters of social justice and racial equity have rightly come to occupy a central place in marijuana law reform at both the state and federal levels. We saw that banking reform at the federal level failed in 2019 in part because progressives were concerned that matters of business efficiency were being given priority over righting the drug war's harms.<sup>54</sup> Illinois's legalization initiative, which went into effect in January 2020, is an example of a state choosing to place social equity at center stage.<sup>55</sup> In addition to legalizing marijuana for adult users and setting up a licensing scheme for the production and sale of marijuana to adults, the

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51. See Vanessa Romo, *As Illinois Prepares To Legalize Pot, Public Housing Tenants Not Allowed To Partake*, NPR (Nov. 11, 2019), <https://www.npr.org/2019/11/11/778371751/as-illinois-prepares-to-legalize-pot-public-housing-tenants-not-allowed-to-partake> [https://perma.cc/NB3D-JPQ6] (“Housing voucher recipients received a letter from the agency last week, warning them about the ramifications of smoking or possessing pot on federally funded grounds even after it becomes legal on Jan. 1. In a nutshell, those who violate the federal law could face eviction.”).

52. See, e.g., Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/9KMW-B4Z4] (reporting that 76% of millennials and 65% of generation X support marijuana legalization).

53. See, e.g., Tom Angell, *Marijuana on the 2020 Ballot: These States Could Vote*, FORBES (Dec. 26, 2019), <https://www.forbes.com/sites/tomangell/2019/12/26/marijuana-on-the-2020-ballot-these-states-could-vote/#1982e679dff8> [https://perma.cc/SJ4L-23BK] (stating that marijuana initiatives could be on the ballot in Arizona, Arkansas, Connecticut, Florida, Idaho, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Nebraska, Ohio, Oklahoma, Rhode Island, and South Dakota).

54. See *infra* Part IV.

55. See H.B. 1438, 101st Gen. Assemb. (Ill. 2019), <http://www.ilga.gov/legislation/101/HB/PDF/10100HB1438lv.pdf> [https://perma.cc/M8AF-3JHB].

Illinois law addresses social equity in a number of ways: it sets up a fund to invest in communities most impacted by the war on drugs, creates a category of “social equity applicants” who are given a leg up in the licensing scheme, provides \$30 million in low-cost loans to help social equity applicants, and calls for the expungement of prior marijuana convictions.<sup>56</sup> This last piece is particularly notable because, for some categories of marijuana crime, expungement is automatic under Illinois law. While some states like Colorado require a defendant to move for expungement, the burden in Illinois is on the state to bring forward cases that qualify for expungement under the new law.<sup>57</sup>

The expungement of past marijuana convictions is an issue that every state considering marijuana law reform will have to confront going forward. The appeal of expungement is obvious: if a state decides that marijuana is a substance to which adults should have legal and safe access, the state should free everyone being held for possessing or selling marijuana in the past before allowing entrepreneurs to benefit from it in the future. Even though relatively few people are actually serving prison time for low-level marijuana offenses,<sup>58</sup> the stigma associated with arrest and conviction can linger long after a sentence has been served, and it is now widely accepted that marijuana laws are enforced in a way that disproportionately impacts communities of color.<sup>59</sup> After agreeing to these simple premises, however, expungement becomes significantly more complicated. For example, a jurisdiction considering expungement must determine whether it will be based on the offense of the conviction or instead, on the conduct the defendant actually engaged in. If it is the latter, prosecutors often argue that in many cases plea bargaining requires them to allow a defendant to plead to a charge that fails to adequately capture the seriousness of the defendant’s conduct. For example, a person arrested

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56. See ILLINOIS.GOV, ADULT USE CANNABIS SUMMARY 5–8, [https://www2.illinois.gov/IIS/News/20242-Summary\\_of\\_HB\\_1438\\_The\\_Cannabis\\_Regulation\\_and\\_Tax\\_Act.pdf](https://www2.illinois.gov/IIS/News/20242-Summary_of_HB_1438_The_Cannabis_Regulation_and_Tax_Act.pdf) [<https://perma.cc/GBY8-7GUZ>].

57. H.B. 1438 § 5.2 (b)(i)(1)(A), 101st Gen. Assemb. at 404 (Ill. 2019), <http://www.ilga.gov/legislation/101/HB/PDF/10100HB1438lv.pdf> [<https://perma.cc/M8AF-3JHB>] (“The Department of State Police and all law enforcement agencies within the State shall automatically expunge all criminal history records of an arrest, charge not initiated by arrest, order of supervision, or order of qualified probation for a Minor Cannabis Offense committed prior to the effective date of this . . . Act . . .”).

58. The United States Sentencing Commission reported that in 2017, only 92 people were sentenced for marijuana possession in the federal courts, which, as we have seen, handle a disproportionate share of drug offenses in the U.S. See U.S. SENTENCING COMM’N, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2017), at Table 33, <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table33.pdf> [<https://perma.cc/USX8-JEHV>].

59. See, e.g., ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013) (reporting that although blacks and whites use marijuana at approximately the same rates, blacks are nearly four times as likely to be arrested for a marijuana offense as whites).

with four ounces of marijuana who was allowed to plead guilty to possession of one ounce was technically engaged in conduct that is still illegal in most states today—even though his crime of conviction describes conduct that is legal in an increasing number of states.<sup>60</sup> Furthermore, dealing drugs before the legalization of marijuana is not exactly the same as running a licensed marijuana business in a post-legalization world. Marijuana licensees are regulated, taxed, and must provide a safe product to adults; those convicted of drug dealing in the past cannot make any of these claims. This is not to say that those convicted of drug trafficking in the past are not deserving of expungement or other relief from their convictions. It is merely to note that even seemingly obvious public policy decisions can be far more nuanced and problematic in context.

Relatedly, expungement raises the question of how to treat illicit marijuana activity *after* legalization. It is worth bearing in mind that, ironically, legalization rarely means that all marijuana conduct is legal. Rather, most possession and all production and distribution outside of the regulated marketplace remain criminal in so-called legalization states. In fact, for regulation to succeed, states must endeavor to direct all marijuana production and sale into the licensed and regulated market. It is impossible to induce compliance with a complicated, expensive, and time-consuming regulatory system if producers know that they are competing with others who are not bearing these costs. But if states use their criminal justice systems to move producers out of the black market, they risk replicating exactly the kinds of injustice that motivated legalization in the first place.

Other questions—such as whether to have a competitive process with only a certain number of licenses available or a compulsory system where the market determines how many producers and retailers are appropriate; at what level and rate to tax recreational marijuana products; whether there should be limits on the types of products available to consumers; and so on—will also help determine the direction of marijuana law reform in the states. But more than that, these issues will help shape the eventual content of federal law as well. By criminalizing marijuana for the last fifty years, the federal government has failed to play a role in how marijuana is regulated in this country. Thus far, most marijuana reform states have adopted similar regulatory models, following the examples of Colorado and Washington State, which both legalized marijuana for adult users in

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60. See, e.g., Sam Kamin & Joel Warner, *The Plight of the Pre-Legalization Marijuana Offender*, SLATE (Sept. 17, 2014), [http://www.slate.com/articles/news\\_and\\_politics/alterd\\_state/2014/09/colorado\\_marijuana\\_convictions\\_now\\_that\\_weed\\_is\\_legal\\_what\\_happens\\_to\\_former.html](http://www.slate.com/articles/news_and_politics/alterd_state/2014/09/colorado_marijuana_convictions_now_that_weed_is_legal_what_happens_to_former.html) [<https://perma.cc/7P7R-5393>] (“Convictions don’t always match the crime that was committed. Many of the low-level offenders who might seek clemency struck plea deals with prosecutors, and those negotiations can obscure the underlying crimes.”).

2012. However, as Illinois demonstrates, states are developing new, often progressive, and comprehensive regulatory systems as marijuana law reform matures. As advocates look to 2020 and beyond, the success or failure of these experiments will have an enormous impact on what is to come.

However, before turning to the prospects for federal change in 2020, a few words must be said about the most significant change in federal marijuana policy under the Trump administration, which came in an unusual form. Prior to 2018, any part of the cannabis sativa plant, as well as the psychoactive cannabis chemical THC, were Schedule I drugs under federal law. The 2018 Farm Bill removed from the CSA cannabis sativa plants with less than 0.3% THC and all derivatives of such plants.<sup>61</sup> This change means that the cultivation of industrial hemp—cannabis plants low in THC—is now federally legal, even in those states that continue to prohibit all cannabis products under their own laws.

This development has inverted the traditional state–federal cannabis dynamic in complicated ways. As we saw above, for most of the last generation, the principal questions in marijuana regulation stemmed from the fact that the states were taxing and regulating a substance the federal government criminalized. The federal legalization of industrial hemp produced confusion, because the federal government is now authorizing what many states will continue to prohibit. We can see the first significant example of this confusion in the Ninth Circuit case *Big Sky Scientific L.L.C. v. Idaho State Police*.<sup>62</sup> A load of industrial hemp was en route from its producer in Oregon to a processing plant in Colorado when it was stopped by state police in Idaho.<sup>63</sup> The Idaho State Police claimed that the seizure of the truck and its contents was the largest marijuana bust in state history,<sup>64</sup> while the hemp’s transporter and producer maintained that they were shipping legal industrial hemp. The federal trial court ruled that the contents of the truck—legal under the laws of Oregon, Colorado, and the federal government—could nonetheless be seized and the trucker prosecuted under the laws of Idaho.<sup>65</sup> Although the Farm Bill will eventually prevent states from prohibiting the flow of industrial hemp

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61. 7 U.S.C. § 1639o(1) (2018).

62. See *Big Sky Sci. L.L.C. v. Idaho State Police*, No. 1:19-cv-00040-REB, 2019 WL 438336, at \*1–6 (D. Idaho Feb. 2, 2019).

63. *Id.* at \*2–3.

64. *Idaho State Police Make Biggest Pot Bust in Its Known History*, IDAHO ST. J. (Jan. 30, 2019), [https://www.idahostatejournal.com/news/local/idaho-state-police-make-biggest-pot-bust-in-its-known/article\\_28ee5b80-5042-5b7f-a258-232c74409b39.html](https://www.idahostatejournal.com/news/local/idaho-state-police-make-biggest-pot-bust-in-its-known/article_28ee5b80-5042-5b7f-a258-232c74409b39.html) [https://perma.cc/ESN9-M9JS] (“Idaho State Police officials say troopers made the biggest marijuana bust in the agency’s known history after a semi-truck allegedly filled with nearly 7,000 pounds of marijuana plants was stopped between Boise and Mountain Home.”).

65. *Big Sky Sci. L.L.C.*, 2019 WL 438336, at \*5–6.

through their territory if that product was grown in compliance with federally-approved state regulations, the similarities between federally-illegal marijuana and federally-legal industrial hemp are likely to cause confusion for years to come.

But this is not the only confusion that will be wrought by the legalization of industrial hemp and its byproducts. For example, CBD oil produced from industrial hemp is not a controlled substance.<sup>66</sup> While it is still subject to FDA regulation—sellers cannot make untested claims about its efficacy, for instance—hemp-derived CBD is a legal substance under federal law.<sup>67</sup> By contrast, chemically identical CBD oil that derives from marijuana plants (cannabis plants that *do* contain THC) remains a Schedule I drug.<sup>68</sup> The enforcement concerns associated with such a nonsensical result will only intensify in the years ahead as CBD products continue to multiply.

#### IV. FEDERAL CHANGE AND THE ROAD AHEAD

An alphabet soup of marijuana reform bills are either currently before Congress or have been introduced in recent years.<sup>69</sup> What is more, marijuana law reform promises to have a significant impact on the presidential election campaign. Four senators who ran for the democratic presidential nomination—Cory Booker, Kamala Harris, Elizabeth Warren, and Bernie Sanders—were each sponsors of significant marijuana legalization bills. In fact, Senator Sanders made headlines late in his campaign by asserting that he would deschedule marijuana and make it legal throughout the country on his first day in office—something he almost certainly could not have done.<sup>70</sup> Ironically, the presumptive

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66. See Controlled Substances Act of 1970, 21 U.S.C. § 802 (16)(B)(i)–(ii) (2018).

67. See *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, U.S. Food & Drug Administration (Mar. 11, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [<https://perma.cc/2RR2-BWAR>].

68. Controlled Substances Act of 1970, 21 U.S.C. §§ 801–971 (2018); 21 U.S.C. § 812(c) (2018).

69. In addition to the SAFE Banking Act discussed above, bills have also been introduced under the names STATES Act (Strengthening the Tenth Amendment Through Entrusting States), the MJA (Marijuana Justice Act), MORE Act (Marijuana Opportunity Reinvestment and Expungement), LUMMA (Legitimate Use of Medicinal Marihuana Act), and MMRA (Medical Marijuana Research Act) among others. See Marijuana Opportunity Reinvestment and Expungement Act, S. 2227, 116th Cong. (2019); Medical Marijuana Research Act of 2019, H.R. 3797, 116th Cong. (2019); Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. (2019); Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019); Marijuana Justice Act of 2019, S. 597, 116th Cong. (2019); Legitimate Use of Medicinal Marihuana Act, H.R. 171, 116th Cong. (2019).

70. Kyle Jaeger, *Could Bernie Sanders Actually Legalize Marijuana Nationwide on Day One as President?*, MARIJUANA MOMENT (Feb. 4, 2020), <https://www.marijuanamoment.net/could-bernie->

Democratic presidential nominee—former Vice President Joe Biden—was the candidate least supportive of marijuana law reform at the federal level.

Yet, as Keith Humphreys wrote, it is not at all clear that progressivism and marijuana legalization are one and the same.<sup>71</sup> An unbounded legalized marijuana industry might look too much like Big Alcohol, Big Pharma, Big Tobacco, or Big Agriculture—impersonal oligopolies driven by profits at the expense of the public well-being. And because marijuana is habit-forming, if not physically addictive in the way that alcohol and tobacco are, there is concern that an unregulated marijuana industry would, like alcohol and tobacco, target and prey upon the most vulnerable and problematic users to increase revenues.<sup>72</sup> Given these concerns, Democrats might try to distinguish themselves as progressive by backing something other than a corporatist, free market approach to regulating marijuana. A Biden administration could look to the hard decisions being made in the states—regarding who may participate in the industry, how to make amends for the prior harms of the Drug War, and how to regulate marijuana in the public interest—to guide federal policy going forward.

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sanders-actually-legalize-marijuana-nationwide-on-day-one-as-president/ [https://perma.cc/4MED-PT2N].

71. See Keith Humphreys, *In Push for Marijuana Legalization, 2020 Democrats Side with Industry*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/business/2019/03/13/push-marijuana-legalization-democrats-side-with-industry/> [https://perma.cc/UFV8-SXC9] (“In a crowded primary where candidates are struggling to differentiate themselves, one of the Democratic presidential candidates might very well embrace a nonprofit form of marijuana legalization that makes the rest of the field look like corporate Democrats.”).

72. See, e.g., German Lopez, *Big Marijuana is Coming — and Even Legalization Supporters Are Worried*, VOX (Apr. 20, 2016), <https://www.vox.com/policy-and-politics/2015/12/2/9831980/marijuana-legalization-industry-business> [https://perma.cc/TB4Y-CB52] (“As support for marijuana legalization continues to grow, the question is quickly shifting from *whether* to legalize to *how* to legalize. And a movement that’s led by a pot industry has different interests than the public and policy reformers might have.”); Ryan Stoa, *Is Big Marijuana Inevitable?*, NEW REPUBLIC (Aug. 19, 2016), <https://newrepublic.com/article/136172/big-marijuana-inevitable> [https://perma.cc/52U3-382H] (“One paramount question looms over the rest: Will marijuana agriculture become consolidated, with ‘Big Marijuana’ companies producing vast quantities of indistinct marijuana?”).