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## Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors

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# REEFER MADNESS: HOW NON-LEGALIZING STATES CAN REVAMP DRAM SHOP LAWS TO PROTECT THEMSELVES FROM MARIJUANA SPILLOVER FROM THEIR LEGALIZING NEIGHBORS

JESSICA BERCH\*

**Abstract:** Reefer madness is sweeping the nation. Despite a federal ban on marijuana, states have begun to legalize medical and, increasingly, recreational use of the drug. As more states legalize marijuana, their non-legalizing neighbors have seen a distinct uptick in marijuana possession and use—and an attendant increase in crime and accidents. In December 2014, Nebraska and Oklahoma, non-legalizing states that border Colorado, a trail-blazer in the full-legalization movement, requested permission to file suit in the U.S. Supreme Court over their neighbor’s lax marijuana controls, which allow cannabis to come into their states. The Supreme Court denied leave to file. In the wake of the Supreme Court’s ruling, the question remains: What can prohibiting states do to protect themselves from cross-boundary spillover? This Article surveys various litigation—and statutory—options and ultimately determines that prohibiting states should, at a minimum, consider enacting laws modeled on Dram Shop Acts, which create liability against those who sell alcohol to already intoxicated people or minors who then injure third-party victims. These revamped “Gram Shop Acts” would create liability against out-of-state marijuana dispensaries that sell to Home State buyers who, while high, injure third parties in the Home State or those who are residents of the Home State. Gram Shop Acts may help prohibiting states shift some of the costs of marijuana legalization back to those states that foster its use by deterring sales to citizens residing in non-legalizing states and by providing compensation to third-party victims.

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## INTRODUCTION

Marijuana legalization is sweeping the nation, bringing with it difficult legal and policy challenges. Although some states decriminalized marijuana in the 1970s,<sup>1</sup> most scholars trace the legalization movement to 1996, when California became the first state to legalize medical marijuana.<sup>2</sup> At that time, though, it did not seem that the movement would gain much momentum. In fact, within a decade, the U.S. Supreme Court upheld Congress's power to regulate the personal, entirely intrastate growth and use of marijuana, even when the state in which the growth and use occurred had legalized cannabis.<sup>3</sup> Many thought that the federal law criminalizing marijuana, the Controlled Substances Act of 1970 ("CSA"),<sup>4</sup> would be read to preempt state medical marijuana laws.<sup>5</sup> The budding marijuana experiment seemed as if it would wither on the vine.<sup>6</sup>

Rather than dying out, however, the marijuana movement took root and spread like weeds around the country. As of early 2017, thirty or thirty-

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<sup>1</sup> In the 1970s, some states decriminalized marijuana so that marijuana possession would be punished by issuance of a fine only, not imprisonment. The following states decriminalized marijuana, in this sense, during the 1970s: Alaska (1975), California (1976), Colorado (1975), Maine (1975), Minnesota (1976), Mississippi (1977), Nebraska (1977), New York (1977), North Carolina (1977), Ohio (1976), and Oregon (1973). See Act effective Sept. 2, 1975, ch. 110, 1975 Alaska Sess. Laws; Act of July 9, 1975, ch. 248, 1975 Cal. Stat. 641; Act of July 1, 1975, ch. 115, 1975 Colo. Sess. Laws 433; Act effective Mar. 1, 1976, ch. 499, 1975 Me. Laws 1273, 1368; Act of Mar. 11, 1976, ch. 42, 1976 Minn. Laws 101; Act of Apr. 15, 1977, ch. 482, 1977 Miss. Laws 922; Act of Apr. 20, 1978, No. 808, § 2, 1978 Neb. Laws 817; Act of June 29, 1977, ch. 360, 1977 N.Y. Laws 1; Act of July 1, 1977, ch. 862, 1977 N.C. Sess. Laws 1178; Act effective July 1, 1976, No. 300, § 1, 1975-1976 Ohio Laws 2311, 2323-24; Act of July 22, 1973, ch. 680, 1973 Or. Laws 1521. In 1996, Arizona passed a law providing for no incarceration on a first possession charge. See Act of Apr. 29, 1997, ch. 246, 1997 Ariz. Sess. Laws 2272. Then, in 2001, Nevada decriminalized marijuana, and Massachusetts followed suit in 2008. See An Act Establishing a Sensible State Marijuana Policy, ch. 387, 2008 Mass. Acts 1571 (2008); Act of June 14, 2001, ch. 592, 2001 Nev. Stat. 3053. Although decriminalization did away with the stigma of criminal prosecution, these states did not *legalize* marijuana.

<sup>2</sup> Proposition 215, also known as the Compassionate Use Act of 1996, was enacted on November 5, 1996 as the result of an initiative process. The Act was codified in Section 11362.5 of the California Public Health and Safety Code.

<sup>3</sup> *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

<sup>4</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (2012)).

<sup>5</sup> Debra Yvonne Hughes, *The Supremacy Clause Disappears in a Puff of Smoke—The Effort of Medical Marijuana Supporters to Circumvent Federal Law in United States v. Oakland Cannabis Buyers' Cooperative*, 26 T. MARSHALL L. REV. 131, 155-61 (2001). For a thorough discussion of federal preemption of state marijuana laws, see Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013).

<sup>6</sup> To scavenger hunt enthusiasts: See how many marijuana references and puns you can find seeded in this article. Cf. *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990) (using 215 movie titles in an opinion in an antitrust action against a movie theater owner).

one other jurisdictions<sup>7</sup> (depending on whether you count Louisiana)<sup>8</sup> have joined California in legalizing marijuana<sup>9</sup> for either medical or recreational use, and each election cycle brings with it the potential for more states to join the marijuana scene.<sup>10</sup>

In 2012, the legalization trend reached a new high, as Washington and Colorado became the first states to legalize entirely recreational, non-medical use of the drug.<sup>11</sup> The once-budding marijuana experiment had more than sprouted and spread; it had begun to blossom and bloom. In the decade from 1996 to 2006, only ten states legalized medical marijuana,<sup>12</sup>

<sup>7</sup> This tally includes the District of Columbia, Puerto Rico, and Guam.

<sup>8</sup> Louisiana law permits doctors to “recommend” marijuana, but contains no protections from prosecution for growers or distributors, only the person lawfully possessing medical marijuana. *See* Sen. B. 180 2016 Reg. Sess. (La. 2016).

<sup>9</sup> *See* ARK. CONST. amend. XCVIII, § 1–23; COLO. CONST. art. XVIII, §§ 14, 16; FLA. CONST. art. X, § 29; NEV. CONST. art. IV, § 38; ALASKA STAT. §§ 17.37.010–17.37.080, 17.38 (2015); ARIZ. REV. STAT. ANN. §§ 36-2801–36-2819 (2012); CAL. HEALTH & SAFETY CODE § 11362.1 (West 2017), §§ 11362.5, 11362.7–11362.9 (West 2007); COLO. REV. STAT. §§ 12-43.3-101–12-43.3-106 (2012), § 12-43.4-10 (2016), § 18-18-406.3 (2012), § 25-1.5-106 (2012); CONN. GEN. STAT. § 21a-408 (2012); DEL. CODE ANN. tit. 16, §§ 4901A–4926A (2011); D.C. CODE § 7-1671 (2012), § 48-904.01 (2015); HAW. REV. STAT. §§ 329-121 to 329-128 (2015); 410 ILL. COMP. STAT. 130/1–999 (2016); LA. STAT. ANN. § 40:966 (2016); ME. REV. STAT. ANN. tit. 7, §§ 2441–2454 (2017); MD. CODE ANN., HEALTH-GEN. §§ 13-3301–13-3316 (West 2014); MASS. GEN. LAWS ch. 94C, §§ 1–17 (2013); MICH. COMP. LAWS §§ 333.26421–333.26430 (2012); MINN. STAT. §§ 152.22–152.37 (2014); MONT. CODE ANN. §§ 50-46-301–50-46-344 (2011); NEV. REV. STAT. §§ 453A.010–453A.810 (2011); N.H. REV. STAT. ANN. §§ 126-X:1–126-X:11 (2013); N.J. STAT. ANN. §§ 24:6I-1 to 24:6I-16 (West 2012); N.M. STAT. ANN. §§ 26-2B-1–26-2B-7 (LexisNexis 2011); N.Y. PUB. HEALTH LAW §§ 3360–3369-e (McKinney 2015); OHIO REV. CODE ANN. §§ 3796.01–3796.30 (West 2016); OR. REV. STAT. §§ 475b.005–475b.398, 475b.400–475b.525 (2015); 35 PA. STAT. ANN. §§ 10231.101–10231.2110 (2016); R.I. GEN. LAWS §§ 21-28.6-1–21-28.6-17 (2011); VT. STAT. ANN. tit. 18, §§ 4472–4474m (2012); WASH. REV. CODE §§ 69.51A.005–69.51A.900, 69.50.354 (2015); H.B. 3932, 189th Gen. Court (Mass. 2016). For background on legalization trends, *see* G. M. Filisko, *Weed-Whacked: Employers and Workers Grapple with Laws Allowing Marijuana Use*, ABA JOURNAL, Dec. 2015, at 46. Of particular interest to the United States because of potential spillover effects, Mexico and Canada appear on the verge of legalization. *See* Dan Levin, *As Canada Moves to Legalize Marijuana, Shop Owners Ask: Why Wait*, N.Y. TIMES, Aug. 16, 2016, at A6 (regarding Canada); Michael Martinez, *Mexican Supreme Court Opens Door to Legalizing Marijuana*, CNN (Nov. 4, 2015), <http://www.cnn.com/2015/11/04/americas/mexico-supreme-court-legal-marijuana/> [<https://perma.cc/N7UP-SUFB>] (regarding Mexico).

<sup>10</sup> In November 2016, California, Massachusetts, and Nevada all passed measures legalizing recreational marijuana. *See* CAL. HEALTH & SAFETY CODE § 11362.1 (West 2017); NEV. REV. STAT. ANN. § I.P. Question 2, § 1–18 (West 2017); H.B. 3932, 189th Gen. Court (Mass. 2016). In December 2016, Maine passed a measure legalizing recreational marijuana. ME. REV. STAT. ANN. tit. 7 §§ 2441–2454 (2017).

<sup>11</sup> Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/> [<https://perma.cc/2BPD-RQML>].

<sup>12</sup> Those states are Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, Vermont, and Washington. *See* COLO. CONST. art. XVIII, § 14; NEV. CONST. art. IV, § 38; Medical

but between 2006 and 2016, nineteen additional states, Guam, Puerto Rico, and the District of Columbia legalized medical or recreational marijuana use.<sup>13</sup> Popular support for legalization has also spread its purple haze: In 2015, more than fifty percent of Americans surveyed reported support for some form of marijuana legalization.<sup>14</sup> Indian tribes had hoped to cash in, in the literal sense. A South Dakota tribe had planned to open the first marijuana resort in the country, creating “an adult playground” that would have included a “smoking lounge,” a “nightclub, arcade games, bar and food ser-

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Use of Marijuana, Ballot No. 215, ch. 135, 1996 Cal. Stat. A-321 (1996); Act No. 228, 2000 Haw. Sess. Laws 595 (2000); Act of June 1, 1999, ch. 374, 1999 Me. Adv. Legis. Serv. (1999); Act of Nov. 6, 2002, 2004 Mont. Legis. Serv. (2004); Oregon Medical Marijuana Act, ch. 4, 1999 Or. Laws 5 (1998); Act No. 134, ch. 86, 2004 Vt. Acts & Resolves (2004); Medical Use of Marijuana, ch. 2, 1999 Wash. Sess. Laws 1 (1998); *Alaska Medical Marijuana Act, Measure 8 (1998)*, BALLOTPEdia, [https://ballotpedia.org/Alaska\\_Medical\\_Marijuana\\_Act\\_Measure\\_8\\_\(1998\)](https://ballotpedia.org/Alaska_Medical_Marijuana_Act_Measure_8_(1998)) [<https://perma.cc/S8HY-DCSW>] (last visited Feb. 21, 2017).

<sup>13</sup> Those states are Arizona, Arkansas, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, and Rhode Island. See FLA. CONST. art. X § 29; Act of Apr. 28, 2010, ch. 194, 2010 Ariz. Adv. Legis. Serv. (2010); Arkansas Medical Marijuana Amendment of 2016, const. amend. 98, 2016 Ark. Legis. Serv. (2016); Act Concerning the Palliative Use of Marijuana, Pub. Act No. 12-55, 2012 Conn. Acts 147 (Reg. Sess. 2012); An Act to Amend Title 16 of the Delaware Code Creating the Delaware Medical Marijuana Act, ch. 23, 2011-2012 Del. Laws (2011); Legalization of Marijuana for Medical Treatment Amendment Act of 2010, D.C. Law 18-210, 57 D.C. Reg. 34 (Aug. 20, 2010); Act of Aug. 1, 2013, Pub. Act. No. 98-0122, 2013 Ill. Laws 3015; Act No. 343, 2016 La. Sess. Law Serv. (2016); Act of Apr. 14, 2014, ch. 256, 2014 Md. Laws 1579; An Act for the Humanitarian Medical Use of Marijuana, ch. 369, 2012 Mass. Acts 1583 (2012); Medical Marihuana Act, Initiated L. 1, 2008 Mich. Pub. Acts (2008); Act of May 29, 2014, ch. 311, 2014 Minn. Laws 2065; An Act Relative to the Use of Cannabis for Therapeutic Purposes, ch. 242, 2013 N.H. Laws 556 (2013); Act of Apr. 2, 2007, ch. 210, 2007 N.M. Laws 2833; Act of July 1, 2010, ch. 37, 2010 N.J. Laws 675; Act of July 5, 2014, ch. 90, 2014 N.Y. Laws 744; Marijuana—Use for Medical Purposes, file 83, 2016 Ohio Laws (2016) (West); Act No. 2016-16, 2016 Pa. Legis. Serv. (West); An Act Related to Food and Drugs—The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, ch. 422, 2005 R.I. Pub. Laws 2060 (2006); Guam 215-32 (COR), P.L. 32-134 (Feb. 16, 2014); *North Dakota 2016 ballot measures*, BALLOTPEdia, [https://ballotpedia.org/North\\_Dakota\\_2016\\_ballot\\_measures](https://ballotpedia.org/North_Dakota_2016_ballot_measures) [<https://perma.cc/2C59-YXPW>] (last visited Feb. 20, 2017); Alexandra Sifferlin, *Puerto Rico Governor Signs Executive Order to Legalize Medical Marijuana*, TIME (May 4, 2015), <http://time.com/3845638/puerto-rico-medical-marijuana/> [<https://perma.cc/RZ38-XQMD>] (stating that Puerto Rico’s governor signed an executive order on May 3, 2015 legalizing medical marijuana). Georgia may be state number twenty, although it has legalized only cannabis oil. GA. CODE ANN. § 43-34-120–43-34-126 (2015).

<sup>14</sup> Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1037 (2013) (“[W]hile Americans remain split roughly evenly in their views on marijuana legalization, a sizable majority believes states should have the option to pursue legalization laws without federal interference.”); John Faubion, Comment, *Reevaluating Drug Policy: Uruguay’s Efforts to Reform Marijuana Laws*, 19 L. & BUS. REV. AMERICAS 383, 400 (2013) (noting that the majority of Americans are in favor of the legalization of marijuana); Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (Oct. 21, 2015), <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx> [<https://perma.cc/97TL-ZK85>].

vice, and eventually, slot machines and an outdoor music venue.”<sup>15</sup> After pressure from the state, however, the tribe has put its plans on hold.<sup>16</sup>

Even while many states have rushed to legalize marijuana, taking advantage of the “pot of gold”<sup>17</sup> from the tax revenues and marijuana tourism,<sup>18</sup> not to mention riding the high of popular support, other states and the federal government remain chronically opposed to marijuana legalization.<sup>19</sup> The result is a “canvas [that] looks like one that Jackson Pollock got to first”<sup>20</sup>—a splattering of mismatched laws regulating marijuana use throughout the nation. Some states permit marijuana use for recreational and medical purposes, some permit it for medical purposes only, and others forbid its use altogether.<sup>21</sup> The federal government, through the CSA, prohibits the transportation and sale, and even personal possession and use, of marijuana.<sup>22</sup> These conflicting laws raise interesting legal issues, leading Dean Erwin Chemerinsky to say that the patchwork of laws has created “one of the most important federalism conflicts in a generation.”<sup>23</sup>

<sup>15</sup> Regina Garcia Cano, *South Dakota Tribe to Open Nation’s 1st Marijuana Resort*, ASSOCIATED PRESS (Sept. 29, 2015), <http://bigstory.ap.org/article/b759278274a94be89e6e4f3793b8c009/south-dakota-tribe-open-nations-1st-marijuana-resort> [<https://perma.cc/JF5Z-CN8J>].

<sup>16</sup> Mark Walker & Katie Nelson, *Flandreau Sioux Put Marijuana Resort on Hold*, USA TODAY (Nov. 8, 2015), <http://www.usatoday.com/story/news/nation-now/2015/11/08/flandreau-sioux-tribe-marijuana/75426270/> [<https://perma.cc/CM8R-7VRF>].

<sup>17</sup> Credit goes to Professor Michael Vitiello for this pun. See Michael Vitiello, *Legalizing Marijuana: California’s Pot of Gold?*, 2009 WISC. L. REV. 1349, 1349, 1376 (discussing marijuana legalization).

<sup>18</sup> See Cano, *supra* note 15 (noting that the Santee Sioux tribe in South Dakota would have generated “\$2 million a month in profit” from marijuana).

<sup>19</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1470 (2009) (discussing “[t]he federal government’s campaign against marijuana” [hereinafter Mikos, *Limits of Supremacy*]; see also Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 640 (2011) (highlighting “the federal government’s hostility toward marijuana”).

<sup>20</sup> *Gunn v. Minton*, 133 S. Ct. 1059, 1064–65 (2013) (discussing the “special and small category” of arising-under federal question cases where the plaintiff’s cause of action lies in state law, but federal law supplies one of the elements).

<sup>21</sup> See *supra* notes 8–13 and accompanying text (explaining which states legalized marijuana and when).

<sup>22</sup> 21 U.S.C. § 812(c), Sch. I(c)(10) (2012) (classifying marijuana, “marihuana,” as a Schedule I drug, the most restricted type). Drugs listed on Schedules II–V may be prescribed for medical treatment, but Schedule I drugs may not. See *id.* § 829. Regulations do permit certain clinical trials on cannabidiol, an extract from the marijuana plant. See 21 C.F.R. § 1301.18 (2016) (discussing research protocols for a Schedule I controlled substance); see also U.S. Drug Enf’t Agency, *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol*, DRUG ENFORCEMENT AGENCY (Dec. 23, 2015), <https://www.dea.gov/divisions/hq/2015/hq122315.shtml> [<https://perma.cc/H8DP-6E8D>].

<sup>23</sup> Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

Because some states permit what the federal government expressly criminalizes, the vertical federalism issues in the marijuana experiment loom large. So, since the first legalization laws were passed, scholars, politicians, courts, and attorneys have tried to resolve how legalizing states could permit marijuana sales and use when the federal government forbids those very activities.<sup>24</sup> Legal academics soon developed a three-part solution. *First*, they concluded that the CSA does not occupy the field of drug regulation or expressly preempt state laws respecting personal use and possession of marijuana, as long as there is no “positive conflict” between the federal and state laws.<sup>25</sup> *Second*, no direct conflict arises between the CSA and the seemingly contrary state laws, as those state laws merely *permit*, but do not *require*, marijuana growth, sale, possession, or use. A person may comply with both the CSA and state legalization laws by simply abstaining from marijuana.<sup>26</sup> To be blunt, no state would *order* its citizens to violate the CSA. Most obviously, such a law would make the state vulnerable to harsh reprisals by the federal government, which, though generally hands-off regarding marijuana, would roll in to stop that type of law.<sup>27</sup> *Finally*, the federal government cannot force states to enforce federal marijuana policy because of the anti-commandeering proscriptions of the U.S. Constitution, which forbid the federal government from conscripting state officers into

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<sup>24</sup> See, e.g., *id.* at 90–100 (discussing problems that arise in banking, tax law, access to lawyers, employment, probation and parole, and family law); Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 2 (2013) (noting that “unpredictable enforcement by federal authorities in states that have legalized medical marijuana not only threatens state drug policy, but also the efficacy of federal enforcement” and advocating that Congress “carve out an exemption from federal enforcement in states that have legalized the drug”).

<sup>25</sup> See Chemerinsky et al., *supra* note 23, at 105–06 (“The phrase ‘positive conflict . . . so that the two cannot consistently stand together’ in section 903 has been interpreted as narrowly restricting the preemptive reach of the CSA to ‘cases of an actual conflict with federal law such that compliance with both federal and state regulations is a physical impossibility.’”) (citation and internal quotation marks omitted) (quoting *S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002)); Michael A. Cole, Jr., *Functional Preemption: An Explanation of How State Medicinal Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 MICH. ST. U. J. MED. & L. 557, 563 (2012) (“The CSA does not contain any express preemption language anywhere in the text of the statute; thus, it cannot expressly preempt state medical marijuana law.”); Mikos, *supra* note 5, at 11–13 (discussing how Congress chose to preempt state laws on drugs); see also 21 U.S.C. § 903 (2012) (preemption provision).

<sup>26</sup> See Chemerinsky et al., *supra* note 23, at 106 (stating that an individual could comply with both federal law and state law unless “a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law”).

<sup>27</sup> See *id.* at 77 (noting that President Obama’s administration allowed marijuana “state policy experiments” to take place). It is unclear how President Trump will handle state experimentation with marijuana. See, e.g., Kurtis Lee, *What is the Future of Recreational Marijuana in Trump’s America?*, L.A. TIMES (Mar. 7, 2017), <http://www.latimes.com/nation/la-na-legal-marijuana-future-2017-story.html> [<https://perma.cc/ZB9X-MYGZ>].

enforcing federal law such as the federal marijuana ban.<sup>28</sup> As a result of the joint preemption and anti-commandeering analysis, most experts agree that, as long as the federal government chooses not to enforce its anti-marijuana laws, states may comfortably allow legal medical and even recreational marijuana.<sup>29</sup> This solution to the vertical federalism problem permits the proliferation of the paint splatters on the Jackson Pollock canvas—and the entrenchment of the “most pressing and complex federalism issue of our time.”<sup>30</sup>

That states may choose to legalize what the federal government criminalizes does not imply a lack of friction created by marijuana’s dual status.<sup>31</sup> To the contrary, people lawfully using marijuana under state law may lose their employment.<sup>32</sup> Parolees with lawful state medical marijuana cards may nonetheless be denied the drug as a condition of parole in some jurisdictions.<sup>33</sup> Federally insured banks may decline to accept money from mari-

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<sup>28</sup> See U.S. CONST. amend. X; *New York v. United States*, 505 U.S. 144, 161 (1992) (“Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”) (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (explaining that Congress cannot force the states to follow a federal program nor can it force the states’ officers to do so); Kreit, *supra* note 14, at 1035 (stating that anti-commandeering proscriptions prevent the federal government from requiring state and local governments to prosecute marijuana cases).

<sup>29</sup> Scholars have acknowledged that the two systems—state legalization and federal prohibition—may exist side-by-side. See Chemerinsky et al., *supra* note 23, at 78 (advocating “a cooperative federalism approach that allows states meeting criteria specified by Congress or the [Department of Justice] to opt out of the federal [CSA] provisions relating to marijuana”); Mikos, *Limits of Supremacy*, *supra* note 19, at 1422 (“[S]tate laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land.”).

<sup>30</sup> David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 569 (2013).

<sup>31</sup> The problems associated with marijuana legalization are well documented. See Chemerinsky et al., *supra* note 23, at 90–100 (discussing issues related to marijuana that arise in multiple areas of law).

<sup>32</sup> For example, in June 2015, a paraplegic in Colorado lost his lawsuit against his former employer, Dish Network, which had fired him for testing positive for having medical marijuana in his system. *Coats v. Dish Network, LLC*, 350 P.3d 849, 852–53 (Colo. 2015). The state of Colorado has legalized marijuana for medical and recreational use. *Id.* at 850. Mr. Coats had a state-issued license to use medical marijuana. *Id.* He “consume[d] medical marijuana at home, after work, and in accordance with his license and Colorado state law.” *Id.* The court concluded that medical marijuana use—illegal under federal law, though legal under state law—is not a “lawful” activity. *Id.*

<sup>33</sup> See CAL. HEALTH & SAFETY CODE § 11362.795(b) (West 2007) (stating that a parolee with a medical marijuana card may seek permission to use medical marijuana). *But see* *Reed-Kalisher v. Hoggatt*, 347 P.3d 136, 140 (Ariz. 2015) (holding that a probation condition prohibiting medical marijuana use that would comply with the Arizona Medical Marijuana Act is “unenforceable and illegal”).



juana commerce because of the threat of money laundering prosecutions, leaving the businesses largely cash-only and cash-on-site.<sup>34</sup> Marijuana dispensaries may not deduct business expenses from their federal taxes.<sup>35</sup> Lawyers may encounter ethical dilemmas advising marijuana businesses because attorneys cannot knowingly assist clients in illegal conduct, even if that conduct is legal in the state in which the lawyer practices or the client acts.<sup>36</sup> These problems arise because state laws permit what federal law prohibits. They present quintessential vertical federalism issues, which have been robustly explored by the legal academy.<sup>37</sup>

Other problems also arise from marijuana's conflicted status. For example, residents of non-legalizing states may visit legalizing states, purchase marijuana, and then bring it home;<sup>38</sup> or they may consume the drug in the legalizing state and return home or enter another prohibiting state<sup>39</sup>

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<sup>34</sup> See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 601–02 (2015) (discussing the problems associated with banking for marijuana-related businesses, including lack of bank accounts, difficulty in securing loans, and the public safety concerns raised by this cash-only business); Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 11, 2014, at A1 (“Banking is the most urgent issue facing the legal cannabis industry today.”). But see William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 516–17 (2015) (“[F]ederal law likely does not allow banks to serve the [marijuana] industry, though recent enforcement guidance indicates that these rules will not be enforced against banks that comply with certain additional requirements.”).

<sup>35</sup> See generally Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAW. 429 (2013) (discussing the problem that arises because federal tax law disallows deductions for ordinary and necessary business expenses for marijuana businesses).

<sup>36</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 1983) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .”); see also Alec Rothrock, *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?*, 89 DENV. U. L. REV. 1047, 1049 (2012) (explaining that a lawyer who provides legal services to a marijuana dispensary violates Colorado Rule of Professional Conduct 1.2(d) because that conduct is criminal under federal law). In addition, a dual-licensed lawyer from a prohibiting state who has a multi-state practice may face discipline if, from a prohibiting state, he advises a client in a permitting state how to legally (under the permitting state's laws) set up a marijuana business, as that conduct may be criminal under the laws of the lawyer's home state, as well as federal law.

<sup>37</sup> See *supra* notes 23–30 and accompanying text (discussing the legal academy's solution to marijuana's vertical federalism problem).

<sup>38</sup> See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 868 (2004) (noting how a marijuana user in a state where marijuana is illegal faces incentives to travel to a nearby state where marijuana is legal to purchase it and bring it back home). Cross-boundary spillover has become a problem in other countries as well. After some cities in Amsterdam restricted foreigners from purchasing and consuming marijuana in coffee shops, “[p]eople still come from neighboring countries to score marijuana, but now they stock up [from street dealers] and head back home in a day.” Winston Ross, *Holland's New Marijuana Laws Are Changing Old Amsterdam*, NEWSWEEK (Feb. 22, 2015), <http://www.newsweek.com/marijuana-and-old-amsterdam-308218> [<https://perma.cc/UKQ9-2CY3>].

<sup>39</sup> This Article interchangeably uses the terms “prohibiting state” and “non-legalizing state” to mean a state that has legalized neither medical nor recreational marijuana use.

while under marijuana's influence.<sup>40</sup> Such activity places extra burdens on law enforcement and other social systems in the non-legalizing states.<sup>41</sup> In fact, statistics confirm an increase in illegal marijuana trafficking in and around states that have legalized marijuana.<sup>42</sup> Statistics further reflect more drug arrests,<sup>43</sup> increases in the amounts of drugs seized,<sup>44</sup> and other cross-boundary spillover.<sup>45</sup> These horizontal-federalism problems will only become more acute for non-legalizing states as more states join the legalization faction, creating more spillover into the declining number of prohibiting states.<sup>46</sup>

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<sup>40</sup> See Trevor Hughes, *In Tiny Nebraska Towns, a Flood of Colorado Marijuana*, USA TODAY (June 11, 2014), <http://www.usatoday.com/story/news/nation/2014/06/11/colorado-marijuana-exports/9964707/> [<https://perma.cc/E5KQ-BAK5>] (noting the "massive influx of marijuana flowing into and through [Nebraska] communities" from Colorado dispensaries). To be fair, this Article relies on some of the more extreme statistics available. Though the numbers are disputed, they do show that there is at least some increase in marijuana spillover into neighboring, non-legalizing states.

<sup>41</sup> See Trevor Hughes, *Sheriffs Sue Colorado Over Legal Marijuana*, USA TODAY (Mar. 5, 2015), <http://www.usatoday.com/story/news/2015/03/05/sheriffs-from-three-states-sue-colorado-over-marijuana/24385401/> [<https://perma.cc/6X24-324X>] ("The out-of-state sheriffs say the flow of Colorado's legal marijuana across the border has increased drug arrests, overburdened police and courts and cost them money in overtime. Felony drug arrests in the town of Chappell in Deuel County, Neb., 7 miles north of the Colorado border, jumped 400% over three years . . . . Police officers monitoring the flow of marijuana outside Colorado say volumes have risen annually.").

<sup>42</sup> See Jenny Deam, *Colorado's Neighbors Dismayed by New Wave of Marijuana Traffic*, L.A. TIMES (May 27, 2014), <http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1> [<https://perma.cc/Y7Z2-HJVZ>] (describing a 20% increase in marijuana-related arrests in Sidney, Nebraska and a four-fold increase in marijuana-related charges); David Hendee, *Nebraska on its Own with Drug Enforcement Costs Tied to Colorado Pot Sales*, OMAHA WORLD-HERALD (Apr. 20, 2014), [http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article\\_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm](http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm) [<https://perma.cc/U5YM-K583>] (noting that Colorado marijuana can be found throughout the country); The Denver Channel, *Colorado Weed Blamed for Increasing Law Enforcement Costs in Nebraska*, YOUTUBE (May 25, 2014), <https://www.youtube.com/watch?v=y0JocQFv2IE> [<https://perma.cc/C7PW-GYVB>] (indicating that marijuana from Colorado has increased a Nebraska town's jail budget by more than \$100,000); see also ROCKY MOUNTAIN HIDTA, *THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT* 38 (2013) (listing a 407% increase in Colorado "marijuana interdiction seizures destined for other states").

<sup>43</sup> See Hughes, *supra* note 41 (noting that felony drug arrests increased by 400%).

<sup>44</sup> See ROCKY MOUNTAIN HIDTA, *supra* note 42, at 38 (noting that the amount of seized marijuana destined for other states increased by 407%).

<sup>45</sup> See Baude, *supra* note 34, at 518 (discussing Colorado marijuana's diversion to other states); Marc Fisher, *Colorado's Marijuana Policy Raises Nearby States' Costs*, LINCOLN J. STAR (July 28, 2014), [http://journalstar.com/news/state-and-regional/colorado-s-marijuana-policy-raises-nearby-states-costs/article\\_ee5ed264-1203-5a02-9e14-3ac4b27f61f9.html](http://journalstar.com/news/state-and-regional/colorado-s-marijuana-policy-raises-nearby-states-costs/article_ee5ed264-1203-5a02-9e14-3ac4b27f61f9.html) [<https://perma.cc/C4GS-7AQJ>].

<sup>46</sup> See Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 543 (2006) ("[S]pillovers . . . would be concentrated in states bordering on the legalizing jurisdictions or otherwise in close proximity to them."). Professor Somin suggests that, through Coasean bargaining, if a legalizing state inflicts harm on a neighboring state, the neighbor "can cut a deal with [the legalizing state] to get it to change its policies." *Id.*

The cross-boundary spillover effects present quintessential horizontal-federalism problems. In stark contrast to the blaze of discussion regarding the vertical-federalism issues, the legal academy has been virtually silent on these horizontal-federalism issues, despite the obvious salience to state leaders and citizens and the intriguing federalism, jurisdiction, and choice-of-law questions raised.<sup>47</sup>

This Article strives to help fill that gap. It surveys potential responses prohibiting states may take to prevent the negative effects of marijuana from wafting across state lines into their states from their more permissive neighbors. It proceeds in three parts. Part I reviews litigation responses and assesses their likelihood of success.<sup>48</sup> Part II explores potential statutory responses, and focuses on the “Gram Shop Act” as a minimally intrusive option that still supplies some measure of protection for non-legalizing states.<sup>49</sup> A Gram Shop Act, like its namesake, the Dram Shop Act, would create liability against out-of-state marijuana dispensaries that sell to Home State buyers who, while high, injure third parties in the Home State or those who are residents of the Home State. It further explores both the benefits and potential shortcomings of such a law as a method of compensation and deterrence. Finally, Part III reviews the legal viability of such gram shop laws, including the personal jurisdiction, choice-of-law, and constitutional challenges that may be leveled against their use to impose liability on out-of-state dispensaries.<sup>50</sup>

Although states may serve as laboratories of democracy to “try novel social and economic experiments,” such as the marijuana experiment, these entrepreneurial states must do so “without risk to the rest of the country.”<sup>51</sup> The cross-boundary spillover shows that the marijuana experiment has failed to remain cabined within legalizing states. When the effects of such experiments waft outside the laboratory walls, their neighbors should be

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<sup>47</sup> *But see* Brannon P. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, 11 FIU L. REV. 349, 349 (2016) (explaining that state legalization partakes of both vertical federalism problems and horizontal ones); Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 587–92 (2015) (discussing horizontal federalism and spillover effects); *see also* Brannon P. Denning, *One Toke over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2283–84 (2014) (discussing how Colorado distinguishes between residents and non-residents purchasing marijuana). *See generally* Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court’s State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829 (2015) (exploring the possibility that neighboring states may invoke the Supreme Court’s original jurisdiction to challenge legalization).

<sup>48</sup> *See infra* notes 52–71 and accompanying text.

<sup>49</sup> *See infra* notes 72–141 and accompanying text.

<sup>50</sup> These issues will be more robustly discussed in a future article, currently in draft and on file with the author. *See infra* notes 142–151 and accompanying text.

<sup>51</sup> *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

able to protect themselves. This Article helps clear the smoke for those neighbors, allowing them to find some protection.

### I. LITIGATION RESPONSES

When someone harms us, our first reaction is often to “sue the bastard!” In December 2014, Nebraska and Oklahoma did just that, invoking the U.S. Supreme Court’s original jurisdiction, and arguing that the CSA preempts Colorado’s laws and regulations permitting use of the newly legalized drug.<sup>52</sup> The lawsuit alleged that “Colorado has created a dangerous gap in the federal drug control system,” enabling marijuana to “flow[] from [Colorado] into neighboring states, undermining Plaintiff States’ own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.”<sup>53</sup> The Court nipped the suit in the bud, refusing to grant Nebraska and Oklahoma leave to file.<sup>54</sup>

The suit may have failed for a variety of reasons, in addition to the Court’s discretionary docket, including lack of standing and failure to plead with sufficient particularity.<sup>55</sup> Standing requires the plaintiff to have suffered an injury-in-fact.<sup>56</sup> Where, as here, a plaintiff who is not the enforcing officer alleges non-enforcement of a law, the plaintiff lacks a personal stake in its enforcement.<sup>57</sup> In addition, when invoking the Supreme Court’s original jurisdiction, a complaint “must allege . . . facts that are clearly sufficient to call for a decree in its favor.”<sup>58</sup> Nebraska and Oklahoma generically pointed to a “significant increase in the trafficking of marijuana,” but failed to cite more specific statistics in their complaint.<sup>59</sup> It is worth noting that Nebraska and Oklahoma have not refiled their complaint in district court, perhaps signaling that the leaders in those states, too, understand the failures in their litigation theory.

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<sup>52</sup> See Complaint at 28, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 22O144).

<sup>53</sup> See *id.* at 3–4.

<sup>54</sup> See *Nebraska v. Oklahoma*, 136 S. Ct. 1034, 1034 (2016). *But see id.* (Thomas & Alito, J.J., dissenting from the denial of motion for leave to file).

<sup>55</sup> See DeVeaux & Mostad-Jensen, *supra* note 47, at 1832–33. Professors DeVeaux and Mostad-Jensen also posited that the complaint should have failed because of the anti-commandeering proscriptions of the U.S. Constitution. See *id.* at 1883–89; see also *supra* note 28 and accompanying text (noting how anti-commandeering proscriptions prevent the federal government from requiring states to enforce federal marijuana laws).

<sup>56</sup> *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (discussing standing requirements).

<sup>57</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).

<sup>58</sup> *Alabama v. Arizona*, 291 U.S. 286, 291 (1934).

<sup>59</sup> See Complaint, *supra* note 52, at 8.

Perhaps other suits brought by non-legalizing states are not doomed. Rather than relying on preemption analysis, Professors DeVeaux and Mostad-Jensen suggest that non-legalizing plaintiff states should invoke federal nuisance law, asking the Court to award damages to the plaintiff states in an amount sufficient to cover the cost of remediating the harms foisted on them by their neighbors' legalization.<sup>60</sup> That way, legalizing states, like Colorado, would be forced to bear the true costs of their legalization experiments. Under the theory advocated by Professors DeVeaux and Mostad-Jensen, if marijuana legalization still proves profitable and politically palatable after these expenses are deducted, states like Colorado will maintain marijuana's legal status, but will pay for the privilege. In turn, non-legalizing states will be able to retain their prohibitions, but with the resources to pay for the emanations from drug legalization that manifest themselves within their borders. If, however, the marijuana experiment proves unprofitable once legalizing states must compensate non-legalizing states for the costs inflicted on them, then the great marijuana experiment will burn itself out and go up in smoke—not because of heavy-handed or moralistic regulation, but because of economic realities.<sup>61</sup>

So far, no states have invoked the federal nuisance theory. In fact, since Nebraska and Oklahoma initiated their suit against Colorado, only one other suit has been filed by angry extraterritorial neighbors, though admittedly even this suit includes in-state plaintiffs.<sup>62</sup> County sheriffs in Colorado, Nebraska, and Kansas sued Colorado alleging that its legalization cre-

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<sup>60</sup> Professors DeVeaux and Mostad-Jensen contend that injunctions, unlike damages, tread too deeply on the legalizing states' sovereign authority. *See generally* DeVeaux & Mostad-Jensen, *supra* note 47, at 1181–96 (describing how those trafficking Colorado pot to neighboring states should face the remedy of damages).

<sup>61</sup> *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (describing that, in a world without transaction costs, people would bargain to the most efficient allocation of resources and how the low point should produce outcomes similar to ones that would result in the transaction-cost-free world). This analysis may not capture the full picture with respect to marijuana legalization. States legalize not just because marijuana is profitable in terms of taxes and tourism revenue, but also because the costs of the War on Drugs, both literally (incarceration) and socially (making criminals out of a substantial percentage of the population), has proved unpalatable. If this is true, then even if the damages imposed by the lawsuits cost legalizing states more money than legalization brings in, these states may continue to support legalization for these social and political reasons. Or, perhaps, these states will simply decriminalize cannabis, rather than legalize it. *See supra* note 1 and accompanying text (regarding decriminalization in the 1970s).

<sup>62</sup> Additional suits have been filed by in-state citizens. In one, a Colorado hotel owner alleges that marijuana sales from a proposed dispensary will harm his business. Complaint, *Safe Sts. All. v. Med. Marijuana of the Rockies, LLC*, No. 15-cv-00350 (D. Colo. filed Feb. 19, 2015) (complaining about a state-licensed dispensary scheduled to open fewer than seventy-five yards from the plaintiff's hotel). In another, a Colorado landowner argues that marijuana is decreasing his property values. Complaint, *Safe Sts. All. v. Med. Marijuana of the Rockies, LLC*, No. 1:15-cv-00349 (D. Colo. filed Feb. 19, 2015).

ates a “crisis of conscience” as law enforcement officers must decide whether to violate the Colorado Constitution (permitting the sale) or United States law (the “supreme” law of the land, which currently prohibits marijuana sales).<sup>63</sup> The district court dismissed the case, noting that the CSA does not create a private right of action and that the plaintiffs cannot engraft a private right of action onto the CSA by using preemption analysis.<sup>64</sup>

The state-versus-state litigation efforts appear to have burned out. What other options exist for the prohibiting states? Every day prohibiting states suffer from the externalities of marijuana legalization—increased numbers of car accidents,<sup>65</sup> hospital use,<sup>66</sup> short- and long-term health consequences for their citizens,<sup>67</sup> drug trafficking arrests, incarceration costs, lost productivity in the workplace,<sup>68</sup> and simply a steady and increased flow

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<sup>63</sup> See *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1286 (D. Colo. 2016). These sheriffs’ “crisis of conscience” reminds one of Kim Davis, the county clerk who had her own crisis of conscience and could not, consistent with her personal religious belief, bring herself to issue marriage licenses to gay couples, despite clear law requiring her to do so. See *Miller v. Davis*, No. 15-CV-00044-DLB (E.D. Ky. filed Aug. 12, 2015); see also Garrett Epps, *When Public Servants Refuse to Serve the Public*, ATLANTIC (Aug. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/08/religious-freedom-gay-marriage/401390/> [<https://perma.cc/8BRH-UVXV>]. The difference in the sheriffs’ case may lie in the fact that it is not their personal beliefs—but rather federal law—that provides the counterpoint.

<sup>64</sup> See *Smith*, 164 F. Supp. 3d at 1290–91.

<sup>65</sup> See Faubion, *supra* note 14, at 402 (“Perhaps most importantly, the short-term motor function impairment accompanying ‘acute intoxication’ results in difficulty operating motor vehicles, presenting the greatest health and safety risk.”); *id.* at 406 (noting a potential for “increase in the amount of traffic accidents resulting from driving under the influence”); see also *supra* notes 40–45 and accompanying text (discussing negative consequences of marijuana).

<sup>66</sup> See Faubion, *supra* note 14, at 407 (citing studies regarding “lower life satisfaction, poorer mental and physical health, relationship problems, and less academic and career success,” in addition to “higher risk of heart attack,” “respiratory illnesses, hallucinations, and paranoia”); see also OFFICE OF NAT’L DRUG CONTROL POLICY MARIJUANA RES. CTR., THE PUBLIC HEALTH CONSEQUENCES OF MARIJUANA LEGALIZATION, <http://www.asapaz.com/resources/ThePublicHealthConsequencesofMarijuanaLegalization.pdf> [<https://perma.cc/PS4D-P2RT>] (“Evidence shows our drug problem is a major public health and safety threat . . . . Legalizing drugs would increase their availability and normalize their use, leading to increased negative health consequences, particularly among young people.”); David G. Evans, *Marijuana Legalization’s Costs Outweigh Its Benefits*, U.S. NEWS & WORLD REP. (Oct. 30, 2012), <http://www.usnews.com/debate-club/should-marijuana-use-be-legalized/marijuana-legalizations-costs-outweigh-its-benefits> [<https://perma.cc/PP34-ZUWZ>] (“Marijuana use accounts for tens of thousands of marijuana related complaints at emergency rooms throughout the United States each year.”).

<sup>67</sup> See Faubion, *supra* note 14, at 404–07 (noting “loss in IQ points over time,” “acute short-term memory loss, slowed reaction time and impaired motor coordination, altered judgment and decision-making, and increased heart rate”).

<sup>68</sup> See *id.* at 407 (comparing income from alcohol and tobacco taxes to its costs in terms of health care, criminal justice, and lost productivity and concluding that “[i]t seems clear that regulation of marijuana would likely add to a deficit, rather than eliminate one”).

of illegal marijuana across state lines.<sup>69</sup> Importantly too, these prohibiting states may wish to express moral condemnation regarding drug culture, and so they may not wish to simply join the party and legalize the drug and, in fact, may wish to take an affirmative stance against marijuana. Without innovative protections, non-legalizing states will continue to suffer harm because legalizing states have economic and social incentives to continue to sell marijuana, including increases in taxes, tourism, business, and employment.<sup>70</sup> To ameliorate these harms, non-legalizing states should consider taking statutory action to redress the wrongs, either in addition to litigation or in lieu of it.<sup>71</sup>

## II. STATUTORY RESPONSES

Section A discusses criminal penalties as a method to decrease marijuana spillover into non-legalizing states.<sup>72</sup> Section B explores the “Gram Shop Act.”<sup>73</sup>

### A. Criminal Penalties

One option that a non-legalizing state might consider is to increase criminal penalties for marijuana possession and use, thus attempting to deter individuals from transporting marijuana across the border into a prohibiting state. After all, “[i]f the sanctions that presently attach to a violation . . . do not provide sufficient deterrence,” then, according to one school of thought, the “sanctions should be made more severe.”<sup>74</sup> For example, federal law currently permits sentences of up to one year for possession of marijuana.<sup>75</sup> If the prohibiting state mirrors that penalty, and it appears that the

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<sup>69</sup> See O’Hear, *supra* note 38, at 868 (“Thus, liberalizing the [marijuana] laws in one state may make drugs cheaper and more readily available to the residents of other states, thus undermining the ability of get-tough states to achieve their preferences to be drug-free.”); Somin, *supra* note 46, at 542 (“[T]he danger is that medical marijuana produced in one state might find its way into illegal drug markets in neighboring states.”).

<sup>70</sup> See O’Hear, *supra* note 38, at 859 (“[S]tates do not themselves experience these spillover effects, [so] each [legalizing] state has an incentive to adopt policies that overproduce negative externalities and underproduce positive externalities.”). Professor O’Hear concludes that this state of affairs cries out for “federal intervention,” rather than protective measures by the non-legalizing state. *Id.*

<sup>71</sup> See David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1620 (2015) (“Self-help enclaves in the law permit an actor to take otherwise unlawful action to redress another’s wrongdoing. . . . Whether for reasons of fairness or efficiency, the law sometimes permits actors to take matters into their own hands.”).

<sup>72</sup> See *infra* notes 74–95 and accompanying text.

<sup>73</sup> See *infra* notes 96–141 and accompanying text.

<sup>74</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

<sup>75</sup> 21 U.S.C. § 844(a) (2012).

possibility of a one-year sentence does not sufficiently deter possession, the state could increase the maximum penalty to eighteen months, two years, or even more. Increasing criminal penalties for marijuana may deter some would-be “traffickers” (individuals who would have otherwise brought marijuana from a legalizing state into a prohibiting one).<sup>76</sup>

There are, however, some serious drawbacks to relying on punitive criminal penalties to curb marijuana externalities. As has been well documented by Professor Gabriel (Jack) Chin, members of minority groups often bear the brunt of harsh criminal laws.<sup>77</sup> Professor Chin has further observed that the United States finds itself in the midst of an epidemic of both mass incarceration (an increase in the rate of imprisonment) and mass conviction (an increase in the rate of conviction, even if not leading to prison sentences).<sup>78</sup> Such statistics and social truths may make lengthier sentences for marijuana use and possession ill-advised as a response to cross-boundary spillover. Moreover, incarceration is expensive for the non-legalizing state.<sup>79</sup>

In other contexts, where some states have legalized what other states prohibited, Professor Donald Regan has advocated the application of “personal law.”<sup>80</sup> By personal law, he posits that states can enact statutes prohibiting their citizens from traveling to other states to engage in conduct prohibited in their Home States because each state has a “constitutionally permissible interest in the behavior of its citizens [that] does not stop at its territorial boundaries.”<sup>81</sup> From this premise, he reasons that a state “may regu-

<sup>76</sup> Or not. “Despite these stiff penalties for possession, distribution, and production of marijuana, marijuana sellers and users do not seem to be deterred, possibly in-part due to a lack of government enforcement.” Melanie Reid, *The Quagmire That Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M. L. REV. 169, 187 (2014).

<sup>77</sup> See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 254 (2002) (“[W]hile African Americans are not more likely to commit drug crimes than members of other races, they are much more likely to be arrested, prosecuted, convicted, and sentenced to prison.”).

<sup>78</sup> See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803–06 (2012) (noting that the number of Americans in prisons and jails has almost quadrupled since 1980).

<sup>79</sup> See CHRISTIAN HENRICHSON & RUTH DELANEY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 9 (2012) (surveying forty states, and finding “the total per-inmate cost averaged \$31,286 and ranged from \$14,603 in Kentucky to \$60,076 in New York”).

<sup>80</sup> See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1908 (1987).

<sup>81</sup> See *id.*; see also *id.* at 1889 (“It is not so obvious that Georgia may not regulate the sexual behavior of Georgians in Illinois as it is that Georgia may not regulate the sexual behavior of Illinoisans in Illinois. States may have some power to legislate extraterritorially where the behavior of their own citizens is concerned.”).



late the extraterritorial behavior of its citizens.”<sup>82</sup> Under personal law theory, a prohibiting state could enact a law making it a crime for one of its citizens to visit another state and consume marijuana.<sup>83</sup>

Professor Regan confesses that he is not “pleased [with personal law] on policy grounds.”<sup>84</sup> Nor am I. Although arguably constitutional,<sup>85</sup> personal law is a draconian response, particularly to the problem of marijuana spillover. If such a theory works, as Professor Regan admits, it would prohibit non-New Jerseyans or Nevadans from taking a vacation in Atlantic City or Las Vegas to gamble.<sup>86</sup> These laws would prohibit non-Nevadans from visiting brothels in those counties in Nevada where prostitution is legal. They would prohibit Nebraskans from traveling to Colorado and smoking a joint. Make no mistake about it, under Professor Regan’s formulation, the Nebraskan who travels to Colorado and tokes a joint would be guilty of a *crime*. In an era of mass incarceration, mass conviction, and teeming jails and prisons,<sup>87</sup> creating additional crimes—for engaging in conduct that is legal where undertaken—does not seem like a wise option.<sup>88</sup> Moreover, such a solution poses significant problems with detection and enforcement, and, as always in the criminal justice system, the attendant specter of racially discriminatory enforcement looms.

Given the drawbacks of personal law, a non-legalizing state may choose to enact a law making it illegal, not for the *in-state citizen* to travel to the neighboring state to gamble, fornicate, or partake of marijuana, but for the *out-of-state business* to permit the in-state citizen to engage in those acts. Professor Richard Fallon discussed such a possibility with respect to providing abortion services in the event the U.S. Supreme Court’s 1973

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<sup>82</sup> *Id.* at 1912.

<sup>83</sup> Professor Richard Fallon explains that such a law may be constitutional under the Due Process and Full Faith and Credit Clauses because “a state has an enduring contact with its citizens and an interest in their well-being.” See Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 630 (2007). Professor Fallon continues, “I would not pretend to pronounce a confident judgment on whether, following the overruling of *Roe v. Wade*, the Due Process and Full Faith and Credit Clauses would permit a pro-life state to make it a crime for its citizens to procure abortions in other states.” *Id.* at 632.

<sup>84</sup> Regan, *supra* note 80, at 1912.

<sup>85</sup> Or not. I express no opinion on this point in this paper.

<sup>86</sup> See Regan, *supra* note 80, at 1909.

<sup>87</sup> See Chin, *supra* note 78, at 1803–04; Vitiello, *supra* note 17, at 1352 (“Proponents of legalizing marijuana can also point to the selective enforcement of drug laws. Despite survey data suggesting that the same proportion of whites, Hispanics, and African Americans use illegal drugs, enforcement falls far more heavily on minority communities.”).

<sup>88</sup> It also seems an incomplete solution to the spillover problem, at least when it comes to marijuana, because is not just Home State citizens who bring marijuana from the legalizing Host State into the prohibiting Home State.

holding in *Roe v. Wade* were overruled.<sup>89</sup> He explains that a state that prohibits abortion might want to make it unlawful for its citizen to obtain an abortion, even in a different state that permitted abortions and by a doctor from that different state.<sup>90</sup> Professor Fallon admits he is not sure whether such an approach would satisfy constitutional standards,<sup>91</sup> but he posits that determination involves “whether the [Home] state’s interest in the life of a fetus gave it a sufficient ‘contact’ to make the exercise of its regulatory jurisdiction neither ‘arbitrary nor fundamentally unfair.’”<sup>92</sup> If Professor Fallon’s hypothetical law is constitutional, or even arguably constitutional, an entrepreneurial non-legalizing state could enact such a law against out-of-state dispensaries.

This sort of law, like Professor Regan’s personal law, also imposes too-harsh penalties, at least for the personal use of marijuana.<sup>93</sup> First, a state’s interest in reducing marijuana within its borders almost certainly pales in comparison to the state’s interest in fetal life. In fact, as Professor Fallon admits that the constitutionality of his theory hinges on the compelling nature of the state’s interest, the theory seems best limited to instances in which one can argue that fundamental rights are at stake. Marijuana use has not been deemed a fundamental right, nor is it likely to be.<sup>94</sup>

Second, the primary problem for the non-legalizing state is not that another state has legalized cannabis or that non-Home State individuals are getting high in the legalizing state, but rather the *spillover* into the non-legalizing

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<sup>89</sup> Fallon, *supra* note 83, at 627.

<sup>90</sup> *Id.* Although Professor Fallon limited his remarks to abortion, they apply to other alleged vices legal in one state but illegal in another. Today, we could add assisted suicide, gambling, and prostitution to the list; in the not-too-distant past, no-fault divorce and gay marriage would make the list as well.

<sup>91</sup> *See id.* at 633.

<sup>92</sup> *Id.* (quoting *Phillips Petrol. v. Shutts*, 472 U.S. 797, 818 (1985)).

<sup>93</sup> This sort of law may also be too difficult—if not impossible—to enforce in the casino context, though perhaps easier with marijuana. With respect to gambling, a Home State citizen could legally travel to Nevada and legally enter a casino. The moment she put a dollar in a slot machine, however, the *casino* would face criminal liability. A casino could place security guards at the doors to keep out-of-staters outside. That would, of course, come at the cost of losing all the *legal* in-casino sales of liquor, high-end merchandise, shows, and food. Professor Fallon also thought that issues of notice would be a problem in the abortion context. He explained that “[i]ssues of fair notice might also arise if a [Host State] doctor had no reasonable way of knowing whether a patient resided within an anti-abortion state or whether her fetus was conceived there.” *Id.* Regarding marijuana sales, this proposed statute is easier to enforce. In jurisdictions that currently have legalized medical or recreational marijuana, the dispensary employees already must confirm the identity of the purchaser—and when they see identification from a prohibiting state, the employees can turn the marijuana-seeker away.

<sup>94</sup> Courts have held that marijuana possession and use is not a fundamental right. *See Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007); *United States v. Maas*, 551 F. Supp. 645, 647 (D.N.J. 1982).

state. If the Home State citizen travels to a legalizing state, smokes a single joint there, and returns home the next day clear-eyed and sober, thus imposing no additional costs on his Home State, there is no substantial justification for reaching across the border and imposing criminal punishment on the out-of-state dispensary.<sup>95</sup> In other words, the law does not seem sufficiently tailored to remedy the scope of the extraterritorial harm.

Each of these three criminal statutory solutions seems overly draconian and not appropriately adapted to handle the limited problem of marijuana spillover. So what is a proportionate response to the problem of cross-boundary spillover, one that responds more directly to the problem of trans-boundary spillover, yet does not rely on heavy-handed criminal penalties?

### B. *Gram Shop Act*

Prohibiting states should consider enacting statutes, modeled on extant dram shop laws, to impose civil liability on marijuana sellers when their sales to Home State citizens cause harm in the Home State or to Home State residents.<sup>96</sup> Dram shop laws permit imposition of liability on bars, restaurants, and liquor stores arising out of the sale of alcohol to already intoxicated persons or minors who subsequently injure third parties.<sup>97</sup> Modified dram shop laws—appropriately called “gram shop” laws<sup>98</sup>—are less harsh than the criminal laws explored in the previous section because gram shop

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<sup>95</sup> Similarly, if the Home State citizen goes to Nevada, gambles away a couple of hundred dollars, and returns to his Home State, the Home State has not been meaningfully harmed (at least not any more than if the Home State citizen had eaten an expensive dinner in Nevada). In that scenario, the Home State should not be able to reach into Nevada to impose criminal liability on the out-of-state casino for permitting an in-state resident to gamble where there is no in-state harm. Professor Fallon’s thought experiment regarding abortions can be distinguished because of the fundamental rights at stake. *See supra* notes 89–93 and accompanying text (discussing Professor Fallon’s thought experiment).

<sup>96</sup> Legalizing states may also enact such laws, just as states with legal liquor sales have dram shop liability. *See infra* note 121 and accompanying text (noting states with dram shop liability).

<sup>97</sup> To establish liability under a dram shop law, a plaintiff must prove the following elements:

1. There must be an intoxicating liquor.
2. The intoxicant must be transferred by the defendant.
3. The transferee must consume the transferred intoxicant.
4. The transferee must become intoxicated.
5. The intoxicated transferee must cause an actionable injury to the plaintiff.
6. The intoxication must have a causal connection with plaintiff’s injury.
7. The plaintiff must be of a class entitled to recover under the Act.

12 AMERICAN JURISPRUDENCE TRIALS § 729 (1966, updated Mar. 2017).

<sup>98</sup> *See* Michael E. Bronfin, Comment, “Gram Shop” Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers, 1994 U. CHI. LEGAL F. 345, 353–54. Mr. Bronfin suggests holding drug dealers liable. This Article recommends a potentially broader application against legal, but out-of-state, sellers.

laws impose civil liability rather than criminal penalties. The gram shop law is also arguably an improvement because it supplies civil liability in limited circumstances—that is, only when there is cognizable in-state harm. On the other hand, gram shop liability is certainly more protective of Home State interests than the status quo of doing nothing and wishing the harms would go away on their own or by relying solely on failed (and failing) litigation techniques.

Gram Shop Acts would allow non-legalizing states to modify and expand a weapon already likely in their arsenals<sup>99</sup> to help force dispensaries to bear the cost of the harm they cause and thereby ultimately to help deter the widespread sale of marijuana to Home State citizens.<sup>100</sup> Subsection 1 discusses how the type of laws enacted to combat the negative effects of alcohol sales can be used to combat the negative effects of marijuana.<sup>101</sup> Subsection 2 proposes and discusses a model Gram Shop Act.<sup>102</sup>

### 1. Dram Shop to Gram Shop

Liquor laws provide compelling templates for marijuana laws: Although the state-sanctioned sale of marijuana is a relatively new phenomenon in the United States, the state-sanctioned sale of liquor is not, and liquor consumption presents many of the same issues that marijuana consumption does.<sup>103</sup> Drinking alcohol suppresses inhibitions and so can cause people to act stupidly, and it impairs judgment and muscle control. Inebriated persons may drive when they are unable to adequately control their vehicles,<sup>104</sup> or perform acts,

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<sup>99</sup> Not every state has dram shop liability, but most do. *See infra* note 121 and accompanying text (noting states with dram shop liability).

<sup>100</sup> Gram shop liability provides a useful supplement to the nuisance law theory advocated by Professors DeVeaux and Mostad-Jensen for at least two reasons. *See supra* notes 60–61 and accompanying text (discussing such theory). First, the federal common law of nuisance has fallen into disuse since the environmental statutes of the 1970s came into effect. It is not at all clear that the U.S. Supreme Court will revive that area of the law and expand it to cover the “pollutant” marijuana. Second, the Gram Shop Act will provide a clear statutory cause of action to a person injured by an out-of-state marijuana sale. Not only will gram shop liability aid prohibiting states in the form of deterrence, but it may also aid the public at large. “[E]mpirical studies have found that implementation of dramshop liability lowers motor vehicle fatality rates as well as fatality rates for other alcohol-related causes such as liver cirrhosis and homicides.” Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473, 497 (2000).

<sup>101</sup> *See infra* notes 103–129 and accompanying text.

<sup>102</sup> *See infra* notes 130–141 and accompanying text.

<sup>103</sup> One group, called the Campaign to Regulate Marijuana Like Alcohol, led the failed campaign in favor of Arizona Proposition 205, which proposed to fully legalize marijuana. *See Our Campaign*, REGULATE MARIJUANA LIKE ALCOHOL, <https://www.regulatemarijuanainarizona.org/about/> [https://perma.cc/C49X-WZDC] (last visited Mar. 30, 2017).

<sup>104</sup> The Centers for Disease Control and Prevention maintains a website showing the effects of alcohol on a driver’s ability to control a vehicle. *See Impaired Driving: Get the Facts*, CTRS. FOR

such as assault, battery, or disorderly conduct, that they would not commit while sober.<sup>105</sup> Indeed, with alcohol suppressing inhibitions and judgment, they may do a variety of acts they would not undertake if they were unimpaired. Similarly, because marijuana consumption weakens ability to focus, impairs short-term memory and motor skills,<sup>106</sup> and decreases judgment,<sup>107</sup> marijuana use leads to increased numbers of car accidents. Drivers who have marijuana in their systems are roughly twice as likely to be involved in both fatal and non-fatal collisions.<sup>108</sup> Thus, marijuana, like alcohol, leads people to drive when they should not,<sup>109</sup> commit acts they might not undertake if clear-headed,<sup>110</sup> and behave in other ways they ought to avoid.<sup>111</sup>

To combat the negative effects of too much liquor consumption, states have enacted a wide variety of laws. These range from criminal responses, such as DUI laws and drunk and disorderly laws,<sup>112</sup> to administrative responses, such as controls on liquor licenses<sup>113</sup> and suspension of licenses of

DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/motorvehiclesafety/impaired\\_driving/impaired-drv\\_factsheet.html](https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html) [<https://perma.cc/44QB-BY2N>] (last visited Feb. 19, 2017).

<sup>105</sup> See Antonia Abbey et al., *Alcohol and Sexual Assault*, 25 ALCOHOL RES. & HEALTH 43, 43 (2001) (noting that “[a]pproximately one-half of [all sexual assaults] involve alcohol consumption by the perpetrator, the victim, or both”).

<sup>106</sup> Itai Danovitch, *Sorting through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV. 91, 94 (2012).

<sup>107</sup> Hayley Dean, *Through the Haze: Fashioning a Workable Model for Imposing Civil Liability on Marijuana Vendors*, 49 GONZ. L. REV. 611, 619 (2014).

<sup>108</sup> *Id.* at 616.

<sup>109</sup> See Matt Schmitz & Chris Woodyard, *Marijuana Playing Larger Role in Fatal Crashes*, USA TODAY (June 9, 2014), <http://www.usatoday.com/story/money/cars/2014/06/09/marijuana-accidents/10219119/> [<https://perma.cc/PX3N-SH2E>] (noting that marijuana played a role in 12% of car accident deaths in 2010 and that Colorado has seen an increase in driving fatalities from marijuana since medical marijuana dispensaries became legal in Colorado).

<sup>110</sup> See C. Heather Ashton, *Pharmacology and Effects of Cannabis: A Brief Review*, 178 BRITISH J. PSYCHIATRY 101, 104 (2001) (noting that marijuana can cause “dysphoric reactions, including severe anxiety and panic, paranoia and psychosis . . . including aggravation or precipitation of schizophrenia”).

<sup>111</sup> Some studies also suggest that long-term consumption of marijuana harms the brain. See NAT’L INST. ON DRUG ABUSE, MARIJUANA 16–19 (2017). Alcohol has similar negative long-term health effects. See generally NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, ALCOHOL’S DAMAGING EFFECTS ON THE BRAIN (2004) (highlighting some of the effects of heavy drinking in the long-term). In this respect too, then, liquor and marijuana are similar.

<sup>112</sup> See Katherine L. Hanna, Comment, *Old Laws, New Tricks: Drunk Driving and Autonomous Vehicles*, 55 JURIMETRICS J. 275, 277–79 (2015) (providing an overview on DUI laws); see also Colby J. Morrissey, Note, *Anonymous Tips Reporting Drunk Driving: Rejecting a Fourth Amendment Exception for Investigatory Traffic Stops*, 45 NEW ENG. L. REV. 167, 168 (2010) (noting how frequently drunk driving is committed).

<sup>113</sup> See generally J.B. Glen, *Power to Limit the Number of Intoxicating Liquor Licenses*, 163 A.L.R. 581 (1946) (noting the ability of states to limit the number of liquor licenses).

those convicted of DUI or who refuse blood alcohol tests,<sup>114</sup> to civil responses, such as civil liability against drunk drivers (ordinary negligence actions) and civil liability against alcohol sellers (dram shop laws).<sup>115</sup>

The same responses created to combat the negative externalities of alcohol can be used, and are being used, to combat the negative effects of marijuana. Indeed, states have enacted criminal laws to combat marijuana consumption and sales, at least in states that continue to criminalize such use.<sup>116</sup> Of course even legalizing states continue to criminalize improper activities, such as impaired driving.<sup>117</sup> States also have responded administratively to marijuana. In prohibiting states, there is little need for administrative responses, such as licensing, given marijuana's illegal status, though the state may suspend the driver's license of an individual who has been convicted of drugged driving. Legalizing states do have administrative apparatuses designed to control licensing and sales.<sup>118</sup> Regarding civil actions, states permit liability directly against the drugged driver.<sup>119</sup> Some states have even passed laws imposing civil liability on drug dealers.<sup>120</sup>

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<sup>114</sup> See generally *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (permitting warrantless breathalyzer tests on DUI suspects, and permitting a state to suspend the driver's license if he refuses the test).

<sup>115</sup> See *infra* note 121 and accompanying text (noting states with dram shop liability).

<sup>116</sup> See, e.g., ALA. CODE § 20-2-23(b)(3) (2016) (listing "marihuana" as a Schedule I controlled substance); ARIZ. REV. STAT. § 13-3405 (2010) (describing the crimes associated with marijuana).

<sup>117</sup> In some states, it is a crime to drive "with any amount of marijuana . . . including the metabolites and derivatives of marijuana . . . . In other states, it is a crime to drive 'under the influence' of marijuana." FLEM K. WHITED III, *DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL* § 16:19 (2d ed. 2016).

<sup>118</sup> See, e.g., *Application and Licensing—Marijuana Enforcement*, COLO. DEP'T. OF REVENUE, <https://www.colorado.gov/pacific/enforcement/application-and-licensing-marijuana-enforcement> [<https://perma.cc/KWD8-QYYD>] (last visited Mar. 31, 2017).

<sup>119</sup> General tort principles should permit liability against the drugged driver who, after all, is the proximate cause of the accident.

<sup>120</sup> See Bronfin, *supra* note 98, at 346-52; see also ARK. CODE ANN. §§ 16-124-102-16-124-112 (2015); CAL. HEALTH & SAFETY CODE §§ 11700-11730 (West 2007); COLO. REV. STAT. §§ 13-21-801-13-21-813 (2017); FLA. STAT. § 772.12 (2016); GA. CODE ANN. § 51-1-46 (2015); HAW. REV. STAT. § 663E (2015); 740 ILL. COMP. STAT. Ann. 57/1-85 (2016); IND. CODE ANN. § 34-24-4 (West 2016); LA. STAT. ANN. §§ 9:2800.61-9:2800.76 (2016); MICH. COMP. LAWS §§ 691.1601-691.1619 (2016); N.H. REV. STAT. ANN. §§ 318-C:1-318-C:18 (West 2017); N.J. REV. STAT. §§ 2C:35B-1-2C:35B-9 (2016); N.Y. GEN. OBLIG. LAW §§ 12-101-12-110 (McKinney 2015); 3 OKLA. STAT. §§ 2-421-2-435 (2016); S.C. CODE ANN. §§ 44-54-10-44-54-140 (2016); S.D. CODIFIED LAWS §§ 34-20C-1-34-20C-19 (2017); TENN. CODE ANN. §§ 29-28-101-29-28-116 (2005); UTAH CODE ANN. §§ 58-37e-1-58-37e-14 (2016); V.I. CODE ANN. tit. 19, §§ 641-658 (2016). Such responses are a start toward a resolution, but are not sufficient. Not all sales of marijuana are illegal. Further, not all sales occur in-state. Gram shop liability that could also be applied against state-sanctioned legal out-of-state dispensaries is necessary to supplement these sorts of laws.

What about, however, a more robust civil liability statute—one that not only operates within a state, but also has the potential to reach across state borders from a non-legalizing state into a legalizing one to force marijuana dispensaries to pay for some of the harms they create? As a matter of drafting, such a statute poses no significant hurdles. Indeed, most states already have dram shop laws,<sup>121</sup> which may operate both in-state and extraterritorially.<sup>122</sup> Although these laws vary in detail,<sup>123</sup> the laws generally permit restaurants, bars, and liquor stores to be held liable for selling alcohol to minors<sup>124</sup> or already intoxicated individuals who cause injuries as a result of their intoxication. Dram shop laws enable the third-party victims to sue the bar or restaura-

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<sup>121</sup> The National Conference of State Legislatures (“NCSL”) publishes a list of states that have dram shop liability. *See Dram Shop Civil Liability and Criminal Penalty State Statutes*, NAT’L CONF. ST. LEGISLATURES, [www.ncsl.org/research/financial-services-and-commerce/dram-shop-liability-state-statutes.aspx](http://www.ncsl.org/research/financial-services-and-commerce/dram-shop-liability-state-statutes.aspx) [https://perma.cc/3SF7-YJ9J] (last visited Mar. 31, 2017) (list last updated in June 2013). The NCSL places the number of states with dram shop statutes at thirty. *Id.* Other U.S. jurisdictions may have dram-shop liability by court decision. *See* Westlaw, *Dram Shop Statutes*, 0110 SURVEYS 65 (Dec. 2015) (finding the following U.S. jurisdictions do not have dram shop liability: Kansas, Maryland, South Carolina, Virginia, Washington, West Virginia, Guam, Puerto Rico, and the U.S. Virgin Islands).

<sup>122</sup> Clearly, dram shop laws impose liability in purely in-state situations to combat over-zealous sales in their own states. Dram shop laws, however, may also impose liability for the provision of liquor in one state that results in harm in another. *See* *Bernhard v. Harrah’s Club*, 546 P.2d 719, 726 (Cal. 1976), *abrogated by statute*, CAL. CIV. CODE § 1714 (West 2016). Similarly, although Gram Shop Acts may be useful tools for legalizing states to deter over-selling or selling to minors, the focus of this Article is how non-legalizing states may protect themselves, and thus how non-legalizing states may deploy gram shop liability.

<sup>123</sup> Some states do not hold an establishment liable if the drunk patron injures only himself (so-called first-party dram shop liability), on the theory that the drunk person proximately caused his own injuries by drinking the alcohol. For example, before the State of Indiana moved from contributory negligence to comparative fault, the intoxicated patron was barred from recovering for his own injuries. *See, e.g.,* *Davis v. Stinson*, 508 N.E.2d 65, 68 (Ind. Ct. App. 1987), *superseded by statute*, IND. CODE § 34-51-2-14 (2016), *as stated in* *Gray v. D & G, Inc.*, 938 N.E.2d 256, 260 n.3 (Ind. Ct. App. 2010). After adoption of comparative fault, the intoxicated patron may recover, but in a reduced amount. *Gray*, 938 N.E.2d at 260–61. *See generally* Julia A. Harden, Comment, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227 (1987) (reviewing both positions on whether to include the drunk patron as a member of the protected class). Some states limit damages. Dram shop statutes may permit recovery for three types of damages: injury to the injured person, injury to his property, and injury to means of support. 12 AMERICAN JURISPRUDENCE TRIALS § 729 (1966, updated Mar. 2015). “Not all the statutes encompass all three of these injuries.” *Id.* Other states require mandatory notice to a liquor establishment before it may be held liable for serving a “habitual drunkard.” *See, e.g.,* COLO. REV. STAT. § 13-21-103 (2016).

<sup>124</sup> Because the National Minimum Drinking Age Act made the states’ receipt of full federal highway funding dependent on accepting the minimum drinking age of twenty-one years old, all states have adopted that age. *See* National Minimum Drinking Age Act, Pub. L. No. 98-363, § 6(a), 98 Stat. 435, 437 (1984) (codified as amended at 23 U.S.C. § 158 (2012)). Puerto Rico and the U.S. Virgin Islands permit persons eighteen years of age and older to drink. *See* P.R. LAWS ANN. tit. 13, § 32565 (2011); V.I. CODE ANN. tit. 14, § 485 (2012).

rant directly, rather than relying solely on compensation from the over-served or under-aged intoxicated individual.<sup>125</sup> In this way, dram shop laws have dual aims: to compensate the victim and also to protect the public by deterring the sale of alcohol to minors and clearly intoxicated patrons.<sup>126</sup>

The key to dram shop laws is their deterrence value. Bars and restaurants, aware of the possibility of a tort suit and potentially crippling judgment, override their economic incentive to continue to serve intoxicated patrons and minors. Most research indicates that dram shop laws reduce driving injuries caused by alcohol.<sup>127</sup> Without dram shop liability, these establishments have an economic incentive to sell more alcohol.<sup>128</sup> With liability, the establishments must balance the economic disincentive of potentially expensive litigation.<sup>129</sup> Most U.S. states believe that this disincentive compels liquor stores, bars, and restaurants to consider these costs and either change their behavior (by selling less alcohol) or internalize the economic harm they create (by paying judgments).

Marijuana dispensaries create externalities similar to those created by bars. Dispensaries may sell to minors or to already intoxicated patrons; they may sell to individuals intent on trafficking the marijuana to other states; they may sell more quantity to their customers than is permitted by law; and they may sell to individuals who then drive while under the influence and cause accidents or other harms because of their impairment. Without the threat of liability, marijuana dispensaries, like bars and restaurants, generally have economic incentives to sell more and to worry less about the consequences of doing so. With liability, these dispensaries must factor in the possibility of tort judgments, which may cause some owners to change their behavior and exercise more care regarding their sales. Entrepreneurs seeking to open new dispensaries might not place them near the borders of non-legalizing states that have dram shop laws; dispensaries may curb their advertising in non-legalizing states or in media that easily cross state bounda-

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<sup>125</sup> The victim may sue the intoxicated person instead of the bar, or in addition to it, using normal tort principles. The purpose of the dram shop laws (and the proposed Gram Shop Act) is to cast a wider liability net to redress harms to include the seller, particularly given the fact that the seller is often better capitalized than the impaired driver.

<sup>126</sup> See Sloan et al., *supra* note 100, at 499 (noting that tort law can deter excessive alcohol consumption); Harden, *supra* note 123, at 232 (discussing Ohio's dram shop law and stating that the "statute certainly intends to protect the public").

<sup>127</sup> See Jeffrey W. Stempel, *Making Liquor Immunity Worse: Nevada's Undue Protection of Commercial Hosts Evicting Vulnerable and Dangerous Patrons*, 14 NEV. L.J. 866, 874 (2014).

<sup>128</sup> At some point, the economic incentives may flatten out or even run the other way; for example, if the patron becomes so intoxicated that he or she becomes unruly and destructive, the establishment will have an incentive to cut him or her off, even without dram shop liability.

<sup>129</sup> See Sloan et al., *supra* note 100, at 484 ("In states with strict dramshop laws, [bar owners] perceived a higher probability of being sued for serving an obviously intoxicated adult.")



ries, such as the internet, radio, or television; dispensary employees may more carefully review their patrons' forms of identification to see if they reside in non-legalizing states; and ultimately dispensaries may not sell marijuana, or may sell less in quantity, to citizens from non-legalizing states that impose gram shop liability.

## 2. Model Act

A model Gram Shop Act, drafted here for Nebraska, a non-legalizing state that borders a legalizing state (Colorado), could provide as follows:

A. A person who furnishes marijuana to a resident of Nebraska may be liable in damages to an injured third party if the Nebraskan to whom the marijuana is furnished consumes the marijuana and, while under the influence thereof, causes personal injury in Nebraska or to any resident of Nebraska.<sup>130</sup>

B. Definitions. For purposes of this section the following definitions apply:

1. "Person" means any individual or company or business or any employee thereof, except any federally permitted researchers or facilities running a drug trial approved by the Food and Drug Administration under the Controlled Substances Act.<sup>131</sup>

2. "Furnish" means to sell, exchange, barter, deliver, give, make available, or provide in any manner.

3. "Marijuana" includes any consumable product containing Tetrahydrocannabinol (THC), the principal psychoactive constituent of cannabis.

4. "Resident" means someone who has an in-state address at which he or she presently resides.

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<sup>130</sup> As explored throughout this Article, the Gram Shop Act would certainly protect Home State citizens who are injured. The Act, however, also protects out-of-state citizens who are injured in the Home State; that is, even if the injured plaintiff is not a Nebraskan, Nebraska's interest in keeping its roads safe may be sufficiently great to allow the state to apply its gram shop law to protect this individual as well. As a matter of drafting, this statute could have reached even farther. For example, the statute could cover situations in which the dispensary furnishes marijuana to a non-Nebraskan who then injures a Nebraskan in Nebraska. Such a statute, however, is more likely to suffer from constitutional infirmities, as the out-of-state dispensary has no notice that such a consumer may have ties to a prohibiting state, and thus can do nothing to protect itself other than refusing to sell marijuana to non-Colorado citizens (or perhaps refusing to sell to anyone at all). To avoid this Due Process challenge, the statute has been more narrowly drafted.

<sup>131</sup> See 21 C.F.R. § 1301.18 (2016) (describing research protocols for Schedule I controlled substances); see also U.S. Drug Enf't Agency, *supra* note 22 (discussing requirements for clinical trials on cannabidiol).

5. “While under the influence” means the person is affected to the slightest degree.

6. “Damages” include compensatory damages, pain and suffering, and punitive damages.

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This law has aspects that favor the dispensary and aspects that favor the injured plaintiff. Aiding the injured plaintiff is the fact that the law provides some opportunity for recovery for injuries, even if the other driver—the one who consumed the marijuana and caused the accident—lacks the resources to pay a tort judgment. Also aiding the plaintiff is that the statute imposes strict liability in the sense that the dispensary employees’ state of mind is irrelevant; short of refusing to sell to the Nebraskan or selling only in an amount that could not render a person “under the influence,” the dispensary cannot protect itself from liability.<sup>132</sup> And unlike dram shop laws, the purchasing Nebraskan need not show signs of intoxication at the dispensary to trigger liability against the dispensary. Indeed, such a requirement would render the statute largely ineffective, as marijuana purchased at dispensaries, unlike alcohol purchased at bars and restaurants, must be removed from the premises and consumed in the privacy of a home; marijuana generally cannot be consumed on-site.<sup>133</sup>

Nevertheless, an injured plaintiff may encounter some difficulties in proof. Studies have shown that a THC level of 8.2 micrograms per liter leads to impaired driving.<sup>134</sup> THC levels, however, dissipate quickly; a person with a THC blood concentration of thirty-eight micrograms per liter might, within thirty minutes, have a concentration of only ten micrograms per liter.<sup>135</sup> Unless the impaired driver is tested almost immediately, the test may prove inconclusive.<sup>136</sup>

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<sup>132</sup> Many dram shop laws impose strict liability as well. *See, e.g., Red Flame, Inc. v. Martinez*, 996 P.2d 540, 543 (Utah 2000) (noting that the Dramshop Liability Act utilizes strict liability).

<sup>133</sup> *See, e.g., COLO. REV. STAT. § 12-43.3-901(1)(a)* (2016) (“Except as otherwise provided in this article, it is unlawful for a person . . . [t]o consume medical marijuana in a licensed medical marijuana center, and it shall be unlawful for a medical marijuana licensee to allow medical marijuana to be consumed upon its licensed premises.”); *WASH. REV. CODE § 69.50.445(1)* (2015) (“It is unlawful to . . . consume marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, in view of the general public or in a public place.”).

<sup>134</sup> *See Rachael Rettner, Riding High: Pot-Smoking Drivers Evade Blood Tests*, *LIVESCIENCE* (Feb. 3, 2016), <http://www.livescience.com/53578-marijuana-driving-thc-blood-test.html> [<https://perma.cc/YE4V-PHH2>].

<sup>135</sup> *See id.*

<sup>136</sup> Conversely, THC can linger in the body long after its effects have dwindled, particularly if the person is a habitual user. *See Anthony Rivas, Driving Under the Influence of Marijuana and Alcohol*

To combat these difficulties of proof, a state like Nebraska, serious about prohibiting marijuana use and decreasing spillover, might consider various options, either singly or in combination. *First*, the state might redefine “driving while impaired” as zero-tolerance for the presence of any measurable amount of marijuana in the system (THC or active or impairment-causing metabolites).<sup>137</sup> Currently, about twenty percent of U.S. states have a zero-tolerance drugged-driving law covering marijuana.<sup>138</sup> *Second*, because of the rapid dissipation of THC and its metabolites, the state might consider allowing routine blood draws upon suspicion of impaired driving—either with a warrant if a prosecutor is available to facilitate the application, or without one under the rubric of exigency, if no prosecutor is available and there is no other way to obtain the information expeditiously.<sup>139</sup> *Third*, because of the constitutional problems with warrantless blood draws, a state might equip its police force with marijuana breathalyzers, the warrantless use of which should be upheld on the same theory as warrantless breathalyzer tests for the presence of alcohol.<sup>140</sup> *Finally*, if blood testing proves too difficult without a warrant and the new marijuana breathalyzers too expensive or too untrustworthy, the state may permit proof of impairment by testimony of a police officer trained in “Drug Influence Evaluation,” which includes an evaluation of the suspect’s appearance, movements, gaze, and ability to perform certain coordination tests.<sup>141</sup>

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*Impairs Driving Significantly, but Blame the Alcohol*, MEDICAL DAILY (June 24, 2015), <http://www.medicaldaily.com/driving-under-influence-marijuana-and-alcohol-impairs-driving-significantly-blame-339738> [<https://perma.cc/7UL8-J5HL>].

<sup>137</sup> See *supra* note 117 and accompanying text. At least one state, however, has narrowed its apparent zero-tolerance statute to cover only those metabolites capable of causing impairment. See *Arizona ex rel. Montgomery v. Harris*, 346 P.3d 984, 990 (Ariz. 2014).

<sup>138</sup> *Drug-Impaired Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, <http://www.ghsa.org/state-laws/issues/Drug-Impaired-Driving> [<https://perma.cc/8FNW-U6FB>] (last visited Feb. 19, 2017). See generally J. MICHAEL WALSH, A STATE-BY-STATE ANALYSIS OF LAWS DEALING WITH DRIVING UNDER THE INFLUENCE OF DRUGS 4 (2009) (providing an examination of each states’ statutes regarding driving under the influence of drugs).

<sup>139</sup> See *Birchfield*, 136 S. Ct. at 2184 (holding that the Fourth Amendment does not permit routine warrantless blood draws in drunk driving cases); *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013) (holding that natural metabolization of alcohol by itself does not create a sufficient exigency to sidestep the warrant requirement in drunk driving cases, but leaving open the possibility of exigency in future cases). Because alcohol and marijuana dissipate at different rates, it may be possible that although alcohol dissipation does not create a per se exigency, marijuana dissipation does.

<sup>140</sup> See Steven Nelson, *Pot Breathalyzer Hits the Street*, U.S. NEWS & WORLD REP. (Sept. 13, 2016), <http://www.usnews.com/news/articles/2016-09-13/pot-breathalyzer-hits-the-street> [<https://perma.cc/X7A5-8S5V>].

<sup>141</sup> See 8A NEW YORK JURISPRUDENCE 2D AUTOMOBILES § 899 (updated Feb. 2017) (noting that describing the driver’s behavior can evidence that the driver is impaired). See generally H. Morley Swingle, *Drug Recognition Experts in Missouri*, 66 J. MO. B. 250, 252 n.37 (2010) (defin-

In addition to the problem of gathering information regarding impairment, an injured plaintiff may also encounter difficulties in getting impaired drivers to admit that they consumed marijuana purchased at an out-of-state dispensary. In the context of Gram Shop litigation, such information may be obtained during discovery, when the judgment-proof driver is subpoenaed as a witness.

As with dram shop laws, however, the primary purpose of a Gram Shop Act is deterrence; therefore, these practical litigation problems, though certainly obstacles for litigants invoking the law, pose few problems for the Act's normative goals. The *possibility* of a tort suit, with the attendant possibility of a large tort judgment or settlement, may well deter a marijuana dispensary from locating near the border of a non-legalizing state, from advertising in a non-legalizing state, from selling large quantities of marijuana to a citizen of a non-legalizing state, or from selling any marijuana products at all to that citizen. Though not a complete solution, the law provides a solid start to curbing the excessive spillover.

### III. COMMENTS ON CONSTITUTIONAL CONSTRAINTS

In addition to the practical litigation problems a potential plaintiff may face when invoking the Gram Shop Act, this statute may also be vulnerable to constitutional and structural challenges, which will be fully addressed in a future companion Article. Although, on its face, this law applies to both in-state and out-of-state sales, the primary purpose of the law is to reach outside the non-legalizing state and deter sales by the extraterritorial dispensary.<sup>142</sup> The principally out-of-state focus leads to at least three interesting legal questions. First, under what circumstances would a court in the non-legalizing state assert personal jurisdiction over the out-of-state defendant? Second, would the court then apply its own gram shop law against such defendant? Third and finally, would such application be constitutional?

Personal jurisdiction requires that the out-of-state dispensary purposefully avail itself of the benefits and protections of the Home State.<sup>143</sup> There is a fairly decent case for jurisdiction for some out-of-state dispensaries: Presumably, there will be numerous sales to Home State residents, includ-

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ing a Drug Recognition Expert ("DRE") as "a specially trained law enforcement officer whose extra training allows him to personally examine a person and give an opinion as to whether that person is under the influence of a drug" and noting that, as of 2010, forty-six states have DREs certified by the International Association of Chiefs of Police).

<sup>142</sup> Of course, there will be many legal sales if legalizing states enact Gram Shop Acts.

<sup>143</sup> See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

ing the particular sale to the driver who caused the accident; the employees would have checked the tortfeasor's identification, so they would be aware that they sold to a Home State citizen;<sup>144</sup> the dispensary may have located itself near the border of the non-legalizing state, likely for the purpose—at least in part—of attracting as customers residents from that state, as there would be no competition from (legal) sellers in the non-legalizing state; any advertisements, websites, and mailers that reach across the border into the prohibiting state may create further contacts, particularly if the purchaser saw these advertisements and visited the dispensary because of them. Given that level of reaching out, it is plausible that if the injured plaintiff sued in the non-legalizing state, that state would assert jurisdiction over the out-of-state defendant.<sup>145</sup>

If the non-legalizing state asserts personal jurisdiction, then the state will likely apply its Gram Shop Act. As Professor Katherine Florey notes, “[I]t is normally a fair assumption that, so long as a state court has personal jurisdiction over [a] defendant, it probably has the power to apply forum law to her actions” regardless of whether those actions took place outside of the state, because “we are not accustomed to thinking of state courts’ routine choice-of-law decisions as raising serious extraterritoriality problems.”<sup>146</sup> Indeed, in-state courts already feel free to apply their dram shop laws against out-of-state defendants.<sup>147</sup> This makes sense. Courts are more familiar with their own laws and will likely apply them if given that option.

The third issue—regarding constitutional challenges—finds its most troublesome hurdle in the dormant Commerce Clause, which bars states

<sup>144</sup> See CAL. BUS. & PROF. CODE § 26140(a)(4) (West 2016) (requiring “a valid government-issued identification card showing that the person is 21 years of age or older”); COLO. REV. STAT. § 12-43.4-402(3)(b)(I) (2016) (“Prior to initiating a sale, the employee of the retail marijuana store making the sale shall verify that the purchaser has a valid identification card showing the purchaser is twenty-one years of age or older.”); COLO. REV. STAT. § 12-43.3-901 (2016) (requiring medical identification card to purchase medical marijuana); OHIO REV. CODE ANN. § 3796.20(B)(1) (West 2016) (specifying that a “current, valid identification card” is needed).

<sup>145</sup> Cf. *Bernhard v. Harrah’s Club*, 546 P.2d 719, 725 (Cal. 1976), *abrogated by statute*, CAL. CIV. CODE § 1714 (West 2016) (reaching choice-of-law issue without deciding personal jurisdiction).

<sup>146</sup> Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058–59 (2009). That a court has such power does not, of course, mean that it will use that power to apply its own law. There may be reasons for finding that the law of some other jurisdiction is superior or that another state has more significant contacts or interests.

<sup>147</sup> The most famous example is the Supreme Court of California’s 1976 case *Bernhard v. Harrah’s Club*, 546 P.2d at 726. Others include *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346, 348, 354 (E.D. Pa. 1993), and *Meyers v. Kallestaed*, No. 91 C 20362, 1992 WL 280450, at \*1, \*5 (N.D. Ill. Sept. 30, 1992). Conflict-of-laws issues are discussed more fully in the companion article.

from enacting legislation that interferes with the free flow of commerce.<sup>148</sup> Even this hurdle is lessening, however. A growing number of lower-court judges and academics believe that the dormant Commerce Clause prohibits only economic protectionism,<sup>149</sup> leaving states free to enforce non-protectionist laws that regulate out-of-state conduct if that conduct touches a significant number of in-state residents<sup>150</sup> and the burden on interstate commerce is not excessive compared to the benefits.<sup>151</sup> The Gram Shop Act should easily clear this low hurdle.

Although the Act is hypothetical, we can surmise many legitimate purposes for such a statute. Creating gram shop liability expresses moral condemnation of drugs and drug culture, protects Home State citizens from the harmfulness of both long-term and short-term drug use and may thereby decrease healthcare costs, on-the-job injuries, absences from work, job loss, and worker's compensation and welfare claims. In addition, enacting a Gram Shop Act may decrease the likelihood of certain crimes such as disorderly conduct, vehicular manslaughter, and DUIs, may conserve police, healthcare worker, jail and prison, and judicial resources, safeguard the state's roads, and help shield residents from observing drug use or its effects. Given these numerous and weighty interests and the deference given to states under this rational-basis-type review, it appears extraordinarily unlikely that any court would find the burden on commerce "clearly excessive" in comparison to these purposes.

In brief, the prohibiting state should be able to assert personal jurisdiction over the extraterritorial defendant; the prohibiting state's courts should use their choice-of-law principles to apply the Home State's Gram Shop Act against the dispensary; and such extraterritorial application should be upheld as constitutional.

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<sup>148</sup> Other constitutional issues that will be explored in the companion article include challenges brought under the Due Process Clause and the Full Faith and Credit Clause.

<sup>149</sup> See *Energy & Envtl. Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015) (explaining that the Supreme Court has struck down laws under the dormant Commerce Clause only when they involve "price control or price affirmation regulation . . . [that] link[] in-state prices to those charged elsewhere, with . . . the effect of raising costs for out-of-state consumers or rival businesses"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (extraterritoriality prohibition encompasses only "price control or price affirmation statutes").

<sup>150</sup> *IMS Health Inc. v. Mills*, 616 F.3d 7, 44 (1st Cir. 2010), *vacated sub nom. IMS Health Inc. v. Schneider*, 564 U.S. 1051 (2011) (mem.).

<sup>151</sup> *E.g., id.* at 42 n.51 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

## CONCLUSION

State-by-state legalization of marijuana, while the drug remains illegal under federal law, presents significant federalism issues.<sup>152</sup> It is, however, now a fact of life, and states that choose to remain drug-free must find ways to protect themselves from the negative consequences of their neighbors' permissive pot policies.<sup>153</sup> This Article offers one, admittedly incomplete, protective measure for non-legalizing states to use: Gram Shop Acts.

From a prohibiting state's perspective, the Gram Shop Act provides some defense against its neighbors' marijuana industry. Assuming passage of a constitutional Gram Shop Act, owners of marijuana dispensaries might think twice before opening near the border of a prohibiting state, advertising in that state, or selling to a prohibiting state's citizens. These actions would stem the flow of marijuana into the non-legalizing state. In turn, less marijuana into the state may translate to fewer accidents, intoxicated drivers, and disorderly conduct arrests, to name a few positive results. The Act may also make dispensaries more vigilant in policing the signs of intoxication, at least when dealing with non-resident buyers; and that, in turn, may further stem the external costs to non-legalizing states.

Additionally, one day, a plaintiff—who has been injured by a marijuana-intoxicated but judgment-proof Nebraskan who bought cannabis in Colorado—may use the Gram Shop Act to sue the dispensary to recover for his or her injuries. If the plaintiff prevails, the dispensary, rather than Nebraska taxpayers, may help to make the injured plaintiff whole.

A Gram Shop Act is not a panacea. It does not build a wall that prevents marijuana immigration. It does not stop DUI accidents from occurring in Nebraska after Nebraskans get high from out-of-state cannabis. The Gram Shop Act may, however, provide some recompense for Nebraskans in the form of deterrence and for injured plaintiffs in the form of compensation for injuries. Without the Act, Nebraska only suffers from the legalization experiment; it accrues none of the benefits, such as increased tax and tourism revenue and increased employment opportunities. With the Act, however, the playing field levels a bit as Colorado businesses account for the cross-boundary harm they inflict on their neighbors.

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<sup>152</sup> Chemerinsky et al., *supra* note 23, at 77; *see also* Schwartz, *supra* note 30, at 569 (“Marijuana legalization by the states presents the most pressing and complex federalism issue of our time.”).

<sup>153</sup> *See* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 83 (2014) (“[I]nterstate friction is a symptom of a healthy democracy rather than a disease unto itself.”).

Reefer madness is gripping the country, and the once-budding marijuana industry is nearing full bloom. Perhaps prohibiting states will blaze the path through the haze. Or maybe not. At least now non-legalizing states have an option in addition to traditional litigation or increasing already harsh criminal penalties: the Gram Shop Act.



