

Legalizing Marijuana in California: A Review of Policy Considerations

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FOREWORD

The Law and Policy Lab practicum is an important innovation in the curriculum at Stanford Law School, in which students address important public policy questions for a real-world client, under the supervision of a SLS faculty member. In some ways, the Policy Lab is similar to a traditional legal clinic, but the focus is more broadly on the public interest rather than advocacy on behalf of a particular individual or organization.

In the 2015 Spring Quarter, nine students enrolled in my Policy Lab on marijuana regulation. Our clients were Dr. Beau Kilmer (co-director of RAND's Drug Policy Research Center) and California Assemblyman Rob Bonta and his staff, who provided us with a set of questions about how California might best implement marijuana legalization: *What agency (or agencies) would be best equipped to regulate such an industry? What are the implications of different ways of taxing marijuana, and how could they be adjusted over time? And what kinds of labor regulation issues would be raised in an industry that involves everything from agricultural work to retail service?* The tension between state legalization and federal prohibition provides an overarching complication for all three questions. We agreed from the start that the analysis would not address *whether* California should legalize, but rather *how* it should legalize if citizens vote to do so.

This report demonstrates how well these students tackled these complex questions in just three months' time. I should note that the students were familiar with my own work on these topics; most recently presented in:

Caulkins, J. P., Kilmer, B., Kleiman, M. A. R., MacCoun, R. J., Midgette, G., Oglesby, P., Pacula, R. L., & Reuter, P. H. (2015). *Considering marijuana legalization: Insights for Vermont and other jurisdictions*. Santa Monica, RAND.

MacCoun, R. J., & Mello, M. M. (2015). Half baked—The retail promotion of marijuana edibles (Perspective). *New England Journal of Medicine*, 372, 989-991.

MacCoun, R. J. (2014, October 26). Grow your own marijuana law. *San Francisco Chronicle*, Sunday Insight Section (cover essay).

But this is very much their own analysis, and in my opinion they have done much to advance the discussion of these pressing policy questions. I for one learned a great deal from their research and analysis.

We received extremely useful comments from Beau Kilmer and the attendees at a 26 May 2015 briefing at RAND in Santa Monica, and from Luciana Herman at a “dry run” of the briefing. I thank former deans Paul Brest and Larry Kramer and current dean Elizabeth Magill for their leadership and support of the Policy Lab program.

Robert J. MacCoun
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EXECUTIVE SUMMARY

One or more marijuana legalization initiatives will probably qualify for the 2016 California ballot, and recent polls suggest they have a good chance of passing. Our hope with this policy brief is to stoke the discussion of how marijuana should be legalized in California. We focused on three specific areas of research: the choice of state agency to regulate legalized marijuana, the tax regime in California for legalized marijuana, and finally the effect of legalized marijuana on labor relations. During the course of our work, two general themes have emerged. First, the balance between state and federal interests that has thus far allowed state legalization of marijuana markets is far more tenuous than it may at first appear. Second, any substantive policy choice concerning legalized marijuana will depend critically on the social and fiscal priorities of the state, however there has been very little attention paid to these important issues by the broader public.

In creating a legalized marijuana regulatory regime, California's choice of supervisory agency will have significant ramifications. Although the Obama administration has accommodated state experimentation in this arena, it has emphasized the importance of creating a strong state regulatory enforcement mechanism to combat violations of federal enforcement priorities. In light of current administrative positioning, as well as the potential for a future administration to change course, respecting those interests going forward is critical to state-level legalization. Although there does not appear to be a singular best practice for agency choice, there are broadly two viable options. California could choose a single, integrated agency—whether a pre-existing state organization or a newly-formed independent commission—or adopt a shared responsibility regime, drawing on the relative strengths of multiple agencies. A careful review of California's existing state-level agencies and any newly created agency will have comparative advantages and disadvantages, which may be weighed differently according to policy priorities. In any case, deliberate and proactive agency choice is critical to the success of legalized marijuana in California.

The tax regime for legalized marijuana has the potential to provide significant revenue to the state, however it can also be a primary way to influence and regulate business and consumer behavior. While marijuana tax systems already exist in Colorado and Washington, and lessons from cigarette and alcohol tax systems may provide insight,

there remains a lack of data to be able to understand the precise effects of various tax structures and rates on behavior. As a result, it may be preferable to have a tax regime in California that can be flexible and adaptable as more is understood about the externalities of marijuana use and legalized purchasing. Unfortunately, due to several state constitutional amendments, the tax system in California is regarded as one of the most complex and difficult to modify of any state in the union. We consider a number of different types of taxes that California could employ, higher and lower tax rates and various tax bases along a number of criteria that can help to start a discussion of how California should employ its tax regime. The sooner these issues are considered, the more prepared California can be to both capitalize on a new revenue opportunity and prioritize other important policy objectives that will be affected by the tax system.

The marijuana industry offers the potential for a broad range of jobs, which creates complexities in regulating labor. The diversity of functions in the industry, along with the complications created by an interlocking state and federal regulatory framework, require a comprehensive approach that seeks to clearly define the requirements and rights of industry workers. At the outset, NLRB statements indicate that marijuana workers will likely be afforded federal protections under the National Labor Relations Act. Additionally, even purely agricultural workers will probably receive the same protections under California state law. Though marijuana workers would likely be able to unionize and collectively bargain, there then remains the question of labor standards. California may resolve this issue by implementing a licensing program to ensure that the workforce is professionalized and complies with minimum standards. It is yet unclear what types of requirements and restrictions will be placed on those hoping to enter the recreational marijuana industry, or how these regulations will be administered. In addition, legalization poses concrete questions for employment law. However, thus far, legal precedent indicates that employers will continue to be able to implement drug-free workplace policies and terminate employees for off-duty use. There has been very little research or discussion of labor issues in California if marijuana is legalized, but considering the potential for jobs in the industry, it is likely to be a significant issue.

I. INTRODUCTION

The decision of whether to legalize recreational marijuana is an increasingly mainstream policy debate. Beginning with Colorado and Washington passing ballot initiatives to legalize recreational marijuana in 2012, and continuing in 2014 when Oregon, the District of Columbia, and Alaska each introduced their own versions of legalization, the movement to legalize marijuana has gained momentum. Assuming there is not federal intervention of some kind, in 2016 and beyond, legalized marijuana is likely to be considered in many states.

California may be one of the states to vote on legalized marijuana in 2016 through a ballot initiative. The decision of whether the State should legalize marijuana is important. However, as the states that have legalized marijuana have found out, no less important is the question of how the legalization regime will operate. Broadly, this can be summed up, “What should California policymakers consider when framing a system for legalized marijuana?” We attempt to bring attention to several distinct aspects of a regulatory framework that states, policy-makers and voters should give meaningful attention to:

- (1) Which state executive agencies are best equipped to regulate marijuana?
- (2) How should the State tax marijuana?
- (3) What government protections are available to marijuana workers, and how will the marijuana market generally impact labor?

The authors of the paper are all students in Stanford Law School’s policy lab, which “serves as a policy incubator, allowing students to work under the supervision of faculty advisers to advise real-world clients on policy issues . . .”¹

In this case, the students worked under the direction of Professor Robert J. MacCoun, addressing policy questions suggested by Beau Kilmer, co-director of the RAND Drug Policy Research Center, and by California Assemblymember Rob Bonta and his staff.

In this paper, we do not attempt any conclusions or recommend policy, we aim only to inform the public debate and bring attention to these important issues so that they

¹ Stanford Law School, Law and Policy Lab, <https://www.law.stanford.edu/policy-lab>.

may be better understood and more widely recognized. The policy direction a state takes will of course depend first and foremost on the weight to which objectives are given. In beginning our analysis, we set out objectives that we could foresee being a part of the public debate, though this is not exhaustive. Objectives could include:

- **Efficiency and simplicity.** Will this decision result in a process that is simple and easy to administer?
- **Public health.** Will this decision limit the negative impact of marijuana consumption on public health and well-being?
- **Cost.** Will this decision require significant state resources?
- **State revenue.** Will this decision increase the State's ability to collect tax revenue from marijuana sales?
- **Medical marijuana market.** How will this affect the medical marijuana market and how do we want these markets to evolve going forward?
- **Black market.** Will this decision limit the size of the marijuana black market, or will it encourage consumers to continue to purchase marijuana from drug dealers?

Not surprisingly, some of these objectives counteract each other, and a state will need to decide which objectives are most important. For example, the decision of how much to tax marijuana will depend largely on which of the preceding objectives weigh most heavily for the state.

The complexity of marijuana legislation warrants additional context. As such, before jumping into our discussion of the proposed questions, we briefly discuss the history of marijuana in California and the United States, as well as the tenuous relationship of state and federal laws regarding marijuana possession and use.

1. HISTORY OF MARIJUANA REGULATION

With President Reagan's War on Drugs underway, the future of marijuana in the U.S. looked bleak in 1986. Heavy mandatory sentences for use, and the "three strikes" policy requiring life sentences for repeat drug offenders, deterred many from purchasing

marijuana, and moved it out of mainstream culture.² Yet, just one decade after the Anti-Drug Abuse Act was signed—the cornerstone of Reagan’s anti-drug campaign—California became the first U.S. state to legalize the medical use of marijuana.³ Proposition 215 passed in 1996, and the Compassionate Use Act was born. The Proposition contained somewhat vague wording, which has been clarified by subsequent laws and court decisions.

In 2003, California Governor Gray Davis signed the Medical Marijuana Protection Act, which established a card identification system for licensed patients, issued and maintained by the California Department of Public Health.⁴ The program is not without its critics, many of whom suggest that California’s policy imbues marijuana with a semi-legal status and creates a system open to manipulation and abuse.⁵ In 2015, there are estimated to be around 1,000,000 card-carrying medical marijuana users in California, and marijuana has once again made its way back into mainstream culture in California.⁶

Other states followed California’s lead after the Compassionate Use Act passed, with Washington, Oregon, and Alaska voting to legalize medical marijuana in 1998.⁷ Maine legalized soon after, and two years later, Colorado and Nevada followed suit. Through a mixture of ballot initiatives and legislative action, medical marijuana gained momentum and spread throughout the U.S.—as of 2015, 23 states and the District of Columbia have legalized medical marijuana.⁸ Louisiana’s Governor has now signed a bill that brings this total up to 24,⁹ with legislation pending in several more.

² Frontline, *Marijuana Timeline* (last visited June 5, 2015), <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html>.

³ *Id.*

⁴ Los Angeles Times, *Medical Marijuana in California: A History* (March 6, 2009), <http://www.latimes.com/health/la-ow-gutwillig-impler6-2009mar06-story.html#page=1>.

⁵ *Id.*

⁶ Chris Roberts, *California Has 1.1 Million Medical Marijuana Users, NORML Says*, San Francisco Weekly News (May 31, 2011 at 4:00 p.m.), <http://www.sfweekly.com/thesnitch/2011/05/31/california-has-11-million-medical-marijuana-users-norml-says>.

⁷ NORML, *Marijuana Law Reform Timeline* (last visited June 5, 2015), <http://norml.org/shop/item/marijuana-law-reform-timeline>.

⁸ *Id.* States that have legalized medical marijuana include: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts,

Many of the first movers on the medical marijuana front were also the first to approve recreational use. Although California voters narrowly defeated Prop. 19, a legalization initiative, in 2010,¹⁰ Colorado and Washington became the first states in the nation to legalize the use of recreational marijuana in November of 2012. These first states were joined by Alaska and Oregon in 2014,¹¹ with each measure being passed through ballot initiative.¹²

Recreational marijuana will almost certainly make it onto more ballots in 2016, and several states look poised to legalize. Residents in Nevada, Arizona, Maine, Massachusetts, and California will likely all be considering some version of legalization next fall.¹³ However, much of the speculation has focused around California, where Prop. 19 lost in 2010 by a close margin of 53% to 46%.¹⁴ Public opinion polls now indicate that a majority of Californians favor recreational legalization,¹⁵ and though it will no doubt be a fiercely contested issue, the ballot initiative seems likely to pass.

Yet, the future of marijuana in California remains uncertain. Much of the dialogue and public discourse has focused on whether or not recreational marijuana *should* be legalized. This debate has eclipsed important discussions of how legalization should be approached from a policy standpoint in terms of effective regulation. Problems with the medical marijuana industry may foreshadow more regulatory problems for California

Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

⁹ Kevin Litten, *Bobby Jindal Signs Marijuana Bills that Reform Criminal Penalties, Medical Marijuana Access*, The Timmes-Picayune (June 29, 2015 at 5:25 pm), http://www.nola.com/politics/index.ssf/2015/06/bobby_jindal_marijuana_laws.html

¹⁰ Ballotpedia, *California Proposition 19, The Marijuana Legalization Initiative (2010)*, (last visited June 5, 2015), http://ballotpedia.org/California_Proposition_19_the_Marijuana_Legalization_Initiative_%282010%29.

¹¹ NORML, *Marijuana Law Reform Timeline* (last visited June 5, 2015), <http://norml.org/shop/item/marijuana-law-reform-timeline>.

¹² *Id.*

¹³ Katy Steinmetz, *These Five States Could Legalize Marijuana in 2016*, Time (March 17, 2015), <http://time.com/3748075/marijuana-legalization-2016/>.

¹⁴ Ballotpedia, *California Proposition 19, The Marijuana Legalization Initiative (2010)*, (last visited June 5, 2015), http://ballotpedia.org/California_Proposition_19_the_Marijuana_Legalization_Initiative_%282010%29.

¹⁵ Mark Baldassare, Dean Bonner, Renatta DeFever, Lunna Lopes and Jui Shrestha, *Californians and Their Government*, Public Policy Institute of California (March 2015), http://www.ppic.org/content/pubs/survey/S_315MBS.pdf.

unless a clear framework is adopted, one that befits the complexity of the issue and caters to the many needs of the state.

2. FEDERALISM

A. Reconciling State Legalization with Federal Law

There are several relevant constitutional considerations—the Commerce Clause, the Supremacy Clause, and the anti-commandeering doctrine—in addition to the practical reality of prosecutorial autonomy, which together define the structure of the federal conflict with state legalization. Regardless of initiatives undertaken by a state to decriminalize or legalize aspects of the marijuana trade within its borders, conduct pertaining to the sale, transport, or possession of marijuana remains illegal at the federal level. Congress passed the Controlled Substances Act (CSA) in 1970 as an element of the Comprehensive Drug Abuse Prevention and Control Act, supplanting the previous “patchwork of federal legislation” regulating psychoactive and addictive substances.¹⁶ Under the CSA it is illegal to manufacture, distribute, or dispense marijuana, and the law also applies penalties for those that aid and abet, or conspire to engage in illegal marijuana-related activity.¹⁷ Because this activity remains prohibited federally, there continues to be a risk of prosecution by federal authorities, with punishments extending to life in prison for large volume manufacturers and dealers.¹⁸

Courts have upheld the ability of the federal government to regulate marijuana-related activity, even those acts strictly intra-state in nature. In *Gonzales v. Raich*, two patients using doctor-recommended marijuana to treat serious medical conditions under California’s medical marijuana law had their cannabis plants seized and destroyed by federal agents.¹⁹ The patients sued the Attorney General of the United States and the head of the Drug Enforcement Agency, alleging that the government’s use of the CSA to

¹⁶ Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won’t Solve Advocates’ Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 83 (2012).

¹⁷ Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 607 (2015).

¹⁸ Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 83 (2015).

¹⁹ 545 U.S. 1, 7 (2005).

regulate activity not directly affecting interstate commerce violates the Commerce Clause of the Constitution.²⁰ The Commerce Clause grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,”²¹ and has historically been used to control the application of state law in interstate contexts.²² A majority of the Supreme Court defended the federal government’s authority to regulate “quintessentially economic” drug activity within a state’s borders, due its tangential impact on the interstate market.²³ Given that the Supreme Court was willing to find federal jurisdiction over an area of historical state authority, namely the protection of the “health, safety, and welfare of their citizens,”²⁴ it appears indisputable that federal authority exists to regulate the more explicit economic activity of legalized recreational marijuana.

Although the ability of the federal government to enforce federal law is established, the more enigmatic doctrinal question is whether states also have the legal capacity to regulate marijuana in light of the federal position in the CSA. Under the Constitution’s Supremacy Clause, federal law is the “law of the land,” and to the extent that federal and state law conflict, state law is “preempted.”²⁵ This preemption may occur even in areas of traditional state authority if simultaneous compliance with both federal and state law is impossible, or if the state law acts as an obstacle to the full execution of the federal statute.²⁶ The key constitutional concerns that decide whether a state law will be preempted are whether there is an impermissible conflict,²⁷ and if so whether there was intent on the part of Congress to preempt the specific category of state laws on the subject.²⁸

²⁰ *Id.* at 8.

²¹ U.S. Const. art. I, § 8, cl. 3

²² Harold W. Horowitz, *The Commerce Clause as a Limitation of State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 807 (1971).

²³ *Raich*, 545 U.S. at 26-27.

²⁴ *Id.* at 66 (Thomas, J., dissenting).

²⁵ Chemerinsky et al., *supra* note 18, at 102.

²⁶ *Id.* at 105.

²⁷ *Id.* at 102.

²⁸ Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 101, 106 (2013) [hereinafter “Mikos, *Preemption*”].

Even though a federal statute trumps in situations of direct conflict, the Tenth Amendment’s anticommandeering doctrine acts as a “significant constitutional counterweight to the Supremacy Clause.”²⁹ The anticommandeering doctrine stipulates that Congress may not compel states to enforce a federal regulatory program.³⁰ As a result, the federal government does not have the power to require states to enact or conserve a law prohibiting marijuana, and a state can constitutionally decide not to criminalize activity through state law that is otherwise illegal under federal law.³¹ When viewed through the lens of both the Supremacy Clause and the anticommandeering doctrine, the tenuous balance can be largely reduced to the following legal reality: states cannot prevent the federal government from enforcing its laws within their borders, but the federal government cannot require the states to do its bidding.

Although in its broadest sense these competing constitutional considerations have been delineated, the judiciary has yet to establish the “precise contours of federal preemption doctrine” in the context of the legalized marijuana debate.³² Federal courts have yet to opine on the preemption argument, although the Supreme Court has denied certiorari in cases where state courts ruled against efforts to invalidate state medical marijuana laws.³³ The prevailing view of constitutional law scholars appears to be that state laws decriminalizing marijuana activity are constitutional to the extent that it is not physically impossible to comply with both sets of statutes.³⁴ However, regulations, which promote marijuana-related activity by reducing the cost of using or distributing marijuana, or those which directly require someone to violate federal law, will likely be preempted.³⁵

²⁹ Chemerinsky et al., *supra* note 18, at 102.

³⁰ Mikos, *Preemption*, at 113.

³¹ *Id.*

³² *Id.* at 79.

³³ *Id.* at 101.

³⁴ *Id.* at 106; Mikos, *Preemption*, at 106.

³⁵ Mikos, *Preemption*, at 114.

B. The Department of Justice's View and the Present Unstable Position

Historically the Department of Justice took a dim view of state efforts to loosen restrictions on marijuana policy. During the Clinton and George W. Bush administrations, the DOJ actively combated local experiments with medical marijuana, raiding hundreds of marijuana dispensaries and threatening to take action against physicians recommending the drug to their patients.³⁶ These efforts were particularly pronounced during the Bush presidency, with U.S. Attorneys prosecuting numerous high-profile medical suppliers and dispensaries.³⁷ At the same time, the Drug Enforcement Agency conducted roughly two hundred raids on medical marijuana dispensaries in California alone, and threatened landlords with seizure if they failed to evict tenants dispensing marijuana.³⁸ During his campaign for the 2008 election, President Obama intimated that he would take a more relaxed view towards state marijuana policy,³⁹ although this tentative position would itself present difficulties for advocates and authorities attempting to craft and regulate local programs of medical marijuana distribution.

Once in office, Attorney General Holder confirmed that Obama's campaign stance would become the future Justice position on the subject,⁴⁰ setting into motion a series of agency memoranda attempting to define the contours of the new federal acquiescence. The first such memorandum, published in October 2009 under the name of Deputy Attorney General David Ogden, attempted to provide "clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."⁴¹ Although reinforcing the federal government's commitment to the enforcement of the CSA, the Ogden Memo declared that federal prosecutors "should not

³⁶ Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. J. L. & POL'Y REV. 633, 633 (2011) [hereinafter "Mikos, *Critical Appraisal*"].

³⁷ *Id.* at 638.

³⁸ *Id.*

³⁹ Chemerinsky et al., *supra* note 18, at 86.

⁴⁰ *Id.*

⁴¹ Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1 (Oct. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁴²

Although the Ogden Memo contained substantial cautionary language confirming the government’s continued dedication to implementing congressional will on drug policy, many saw the memo as granting *carte blanche* for medical marijuana activity in states with requisite laws. In Colorado, the number of dispensaries increased from a handful to upwards of a thousand in the year 2009 alone, and in California a “largely unregulated” medical marijuana movement exploded, including large-scale facilities capable of servicing thousands of patients.⁴³ The federal government responded with an updated memorandum in 2011 (the 2011 Cole Memo), clarifying that the Ogden Memo was never intended to shield the proprietors of “large-scale, privately-operated industrial marijuana cultivation centers” with projected revenues in the millions of dollars “based on the planned cultivation of tens of thousands of cannabis plants.”⁴⁴ Federal prosecutors embraced the updated guidance—the U.S. Attorney’s in California worked collectively to bring pressure against the state’s largely unregulated medical marijuana industry, Montana’s industry was effectively shut down by law enforcement actions, and all Colorado dispensaries within a thousand feet of a school were either closed or relocated.⁴⁵

However, this reinforced prosecutorial vigor would itself be short-lived. In response to the legislative initiatives for legalized recreational marijuana proposed by Colorado and Washington, Deputy Attorney General James Cole issued a subsequent memorandum in 2013 reinterpreting the Obama administration’s position on marijuana policy. Although the Ogden and 2011 Cole Memo were either equivocal or openly hostile to industrial marijuana producers and distributors, the 2013 Cole Memo restricted its focus

⁴² *Id.* at 1-2.

⁴³ Chemerinsky et al., *supra* note 18, at 87.

⁴⁴ Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011).

⁴⁵ Chemerinsky et al., *supra* note 18, at 88.

to eight “enforcement priorities.”⁴⁶ To the extent that state and local governments implement a “strong and effective regulatory enforcement system,” which ostensibly means a capacity to enforce the newly-articulated federal priorities, the DOJ would respect state law consistent with the states’ historical role in policing most drug activity.⁴⁷

The present state of marijuana legalization has thus been properly characterized as “unstable,”⁴⁸ and state authorities and courts have struggled to define the scope of admissible activity.⁴⁹ Recent history has demonstrated that states can move fairly close to full-scale legalization, irrespective of whether the federal government adopts an accommodative policy.⁵⁰ Some have argued that, were Congress to remove state discretion entirely, “they would need to hire thousands more federal law enforcement agents, confirm more federal judges, and build more federal prisons to replace the monumental work now done by their state counterparts.”⁵¹ Given the modern reality of budgetary constraints, this appears highly unlikely. However, an intermediate position may also exist, wherein federal authorities target enough retail outlets or grow facilities to forestall the creation of a properly functioning market. Thus, although the Obama administration’s deferential position towards state marijuana policy has given some the impression that the battle for wholesale marijuana legalization has been won, for a variety of reasons the present regulatory regime of legalized marijuana is exceedingly tenuous.

⁴⁶ Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance Regarding Marijuana Enforcement 1-2 (Aug. 29, 2013) [hereinafter “2013 Cole Memo”]. These enforcement priorities consisted of: preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property. *Id.*

⁴⁷ *Id.* at 2-3.

⁴⁸ William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 1, 1 (2015).

⁴⁹ Mikos, *Preemption*, at 123.

⁵⁰ Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 316 (2015).

⁵¹ Mikos, *Preemption*, at 109.

First, the non-enforcement provisions articulated in the DOJ policy memos are more properly viewed as agency guidelines than official statements of law.⁵² They do not create a legal defense to any violation of the CSA, and they cannot be cited by a defendant as reason for dismissal of a criminal charge.⁵³ In fact, even in the most recent and accommodative DOJ guidance, the 2013 Cole Memo, it clearly states that “nothing herein precludes investigation or prosecution, even in the absence of any one of the [enforcement priorities] listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”⁵⁴ Thus, properly viewed, the progression of policy memos amounts to little more than internal guidance on prosecutorial discretion.⁵⁵ Given the massive scale of legalized medical and recreational marijuana now being implemented and planned across the country, there is cause for caution that the non-enforcement provisions providing the legal basis for these regimes are themselves not legally enforceable.

Second, there is nothing preventing a new administration from reversing course and nullifying the present non-enforcement policy. If a future president wishes to reinstate federal prosecutions for drug-related activity, even those acts taken in accordance with state law, it is entirely within his or her purview. And this is not a hypothetical concern—although there would likely be political costs to upending marijuana legalization programs with broad public support, one potential Republican candidate, Chris Christie, has already declared that he will “crack down and not permit” legalization of recreational marijuana along the lines of the Washington and Colorado reforms.⁵⁶ Even within the Obama administration there have been significant differences in the policy position staked out at the DOJ, as evidenced by the shifting analysis of their agency memos. Given this political reality, durable state-level deregulation of marijuana is likely unattainable as long as the CSA remains in effect.

⁵² Mikos, *Critical Appraisal*, at 642.

⁵³ *Id.*

⁵⁴ 2013 Cole Memo, at 4.

⁵⁵ *Id.* at 2.

⁵⁶ Z. Byron Wolf, *Chris Christie Vows to ‘Crack Down’ on Marijuana as President*, CNN (Apr. 16, 2015, 2:21 P.M. EST), <http://www.cnn.com/2015/04/16/politics/chris-christie-marijuana>.

Finally, even were a future administration unwilling to take the political risk associated with reinstating wholesale marijuana prohibition, an assertive U.S. Attorney is capable of bringing enforcement actions even without authorization from Washington. This is because, as a practical matter, the DOJ in Washington exercises limited and indirect control over the determination of whether to bring an individual case to trial.⁵⁷ As one commentator poignantly stated: “the institutional factors that shield the executive from accountability for leaving aspects of the CSA unenforced also grant prosecutors implicit license to liberally interpret and even undermine the President’s policy, without violating the letter of the vague and nonbinding memoranda that have been issued thus far.”⁵⁸ All told, federal prosecutors and regulatory authorities have granted states significant leeway to enact reforms in recent years, but nothing assures that this environment will persist.

C. Legal Liability and Risks in Drafting Marijuana Legislation

Given that the law also punishes those who assist or conspire with drug offenders,⁵⁹ a concern in drafting state legislation governing a federally illegal substance is to ensure that liability is not created for state agents working in a regulatory capacity. In order for liability to attach for aiding and abetting a drug offense, the defendant must have the specific intent to “commit, encourage or facilitate the commission of the offense.”⁶⁰ This legal nuance is best exemplified by *City of Garden Grove v. Superior Court*,⁶¹ where drug charges for a patient carrying marijuana in his car were ultimately dismissed once the defendant verified his status as a legal medical marijuana patient.⁶² However, upon dismissal the City refused to return the confiscated product, partly out of concern that their police officers would be liable for aiding and abetting a violation of federal law. In

⁵⁷ Markano, *supra* note 50, at 306.

⁵⁸ *Id.* at 312.

⁵⁹ Sam Kamin & Eli Wald, *Public Lawyers and Marijuana Regulation*, 23 PUB. LAWYER 14, 14 (2015).

⁶⁰ *Id.* at 16 (quoting *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007), *cert. denied*, 129 S. Ct. 623 (2008)).

⁶¹ *Garden Grove*, 157 Cal. App. 4th 355.

⁶² *Id.* at 363.

ruling against the City’s motion, the court argued that the officers involved would not be “willfully encouraging the violation of federal law” and that the “requisite intent to transgress the law is . . . absent here.”⁶³

However, although courts are unlikely to attach criminal liability in instances where state agents are merely following a court order, such as *Garden Grove*, there may be a stronger argument in situations where state employees’ actions more closely resemble willful encouragement. In crafting legislative proposals, careful attention should be paid to ensure that the preemption concerns discussed above—that it becomes physically impossible to comply with both state and federal law—doesn’t arise. This could occur if, for example, a state law mandated the possession, manufacture, or distribution of marijuana in violation of federal law, or if the state were to make state officers the manufacturers or distributors.⁶⁴ In this instance it would likely be impossible for the state agents engaged in the regulatory process to comply with federal law.

One final note of caution regarding the ability of state initiatives to legalize retail marijuana sales concerns a lawsuit brought by Nebraska and Oklahoma against Colorado presently pending before the Supreme Court. In December 2014 the Attorneys General filed suit directly with the highest court, contending that Colorado’s legalization initiative violates the Supremacy Clause of the Constitution by creating its own drug policy directly counter to federal law.⁶⁵ The Complaint also alleges that the adverse effects of Colorado’s “affirmative authorization of the trafficking of federal contraband” have created a nuisance burden on their law enforcement officials who encounter Colorado’s marijuana on a daily basis.⁶⁶ Colorado has since issued a reply brief denying the existence of a direct conflict,⁶⁷ and the Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States.⁶⁸ Although one noted legal scholar

⁶³ *Id.* at 368.

⁶⁴ Chemerinsky et al., *supra* note 18, at 106.

⁶⁵ Complaint at 2, *State of Nebraska v. State of Colorado*, No. __ (2014).

⁶⁶ *Id.* at 13.

⁶⁷ Brief for the Respondent, *State of Nebraska v. State of Colorado*, No. 220144 (2015).

⁶⁸ *State of Nebraska v. State of Colorado*, 135 S. Ct. 2070 (2015)

believes the suit lacks merit,⁶⁹ the stakes are sufficiently high to demand the attention of state legalization drafters.

⁶⁹ Robert Mikos, *State Versus State on Marijuana Reforms*, MARIJUANA LAW, POLICY & REFORM (Dec. 18, 2014), http://lawprofessors.typepad.com/marijuana_law/2014/12/state-versus-state-on-marijuana-reforms.html.

II. AGENCY CHOICE

The choice of agency is critical to marijuana regulation in California, and the implications thereof are far-reaching. California's troubled history with the regulation of medical marijuana reveals how powerful a well-informed, thoughtful agency choice would be. The regulation of medical marijuana in California is widely seen as, at best, subpar and disjointed.⁷⁰ These complications demonstrate that deliberate and proactive agency choice is critical to the success of the regulation of marijuana in California.

While the long-term implications of agency choice in comparative states are yet to be fully examined, the immediate benefits of a well-informed agency are twofold. First, an effective and proactive agency can help streamline the transition into a state of legalized marijuana. Second, a strong and robust regulatory agency can shield states from federal intervention, as discussed in Part I.2 The states of Washington, Colorado, Oregon, and Alaska are all currently struggling to determine precisely what system of regulation will best suit state interests while surviving potential federal challenges. The deliberate and well-informed choice of agency for the regulation of marijuana, therefore, is essential.

Regulatory considerations are driven by the overarching need to strike a balance between best practices—as informed by the lessons and regulatory decisions of other states, medical marijuana programs, and comparable industries—and consistency with current California needs and regimes, including administrative, political, and legal implications. These tradeoffs are exemplified in the analysis of the packaging and labeling of marijuana. Further, any regulatory analysis within the state of California is underscored by key issues of federalism. This Part provides an analysis of the possible agency choices for marijuana regulation in California, considering a range of agencies in depth to elucidate the benefits and limitations of each. While policymakers may weigh

⁷⁰ See, e.g. Carly Schwartz, *California's Medical Marijuana Industry Gets a Much-Needed Kick in the Pants*, HUFFINGTON POST (Apr. 9, 2014, 4:23pm), http://www.huffingtonpost.com/2014/04/09/california-medical-marijuana-regulations_n_5119010.html (“multiple failed attempts at regulating California’s haphazard medical marijuana program”); Christopher Cadelago, *California Medical Marijuana May Finally Get Elusive Guidelines*, SACRAMENTO BEE (May 31, 2015), <http://www.sacbee.com/news/politics-government/marijuana/article22752732.html> (“Nearly two decades after California established a medical marijuana program, the patchwork of local regulations on the billion-dollar industry is often distilled to just two words: Wild West.”).

such positives and drawbacks differently depending on their regulatory priorities, the following analysis will help lay a strong foundation for the regulation of marijuana in California.

1. POLICY PRIORITIES

In considering agency choice for the regulation of marijuana, it is critical to examine the overarching policy priorities. Marijuana regulations will influence prices, revenue collection, product safety, and consumer information, as well as sales to minors and distribution in other states.⁷¹ These regulations will shape “who consumes, what they consume, and how they consume.”⁷² But regulations are traditionally costly and often burdensome. If regulations make the legal marijuana market too expensive, complicated, or otherwise burdensome, people will likely continue to use the illegal market.⁷³ However, if the regulations are too relaxed, the federal government may interfere, as discussed in Part I.2 [Federalism].

In August 2013, United States Deputy Attorney General James M. Cole’s released an updated memo highlighting eight enforcement priorities for marijuana, reinforcing that the federal government will rely on state and local law enforcement to address marijuana activity.⁷⁴ The current administration will tolerate marijuana legalization if the state creates “**strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.**”⁷⁵ When deciding how to regulate and structure the legalization of marijuana in California, many of these federal priorities will, and must, be part of the discussion. While these federal priorities for the regulation of marijuana are not exhaustive, and are in part informed by certain limitations and interests of federal policy perhaps not vital in California state regulation, they provide important insight into larger

⁷¹ JONATHAN P. CAULKINS, BEAU KILMER, MARK A. R. KLEIMAN, ROBERT J. MACCOUN, GREGORY MIDGETTE, PAT OGLESBY, ROSALIE LICCARDO PACULA, & PETER REUTER, CONSIDERING MARIJUANA LEGALIZATION, INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 53 (RAND 2015).

⁷² *Id.*

⁷³ *See Id.*

⁷⁴ 2013 Cole Memo, *supra* note 46, at 1-2.

⁷⁵ *Id.* at 2 (emphasis added).

goals to consider. In designing this new industry and selecting the best agency for the regulation of marijuana policymakers must balance all of these considerations.

Agency choice will be a critical regulatory decision for California. Marijuana has unique public health and safety concerns, and requires an agency that will be adaptable to the specific needs of a legalized marijuana industry. Furthermore, interested parties will likely view agencies differently depending on which considerations they prioritize more strongly. For instance, if your top consideration is public health and safety, you would likely want the Department of Health to play a large role in the regulation of marijuana. On the other hand, if the state's goal is to increase revenue, the Board of Equalization may be the best choice to facilitate that option.

The impact of agency choice can be seen through the experiences of Colorado and Washington, which have both legalized marijuana. After several issues with their medical marijuana program, Colorado decided to create a new division within the Department of Revenue to handle marijuana legalization.⁷⁶ Alternatively, in Washington, the Liquor Control Board regulates marijuana.⁷⁷ These states limit marijuana sales to dedicated stores so they are not sold in general retail stores with other products, thereby reducing the likelihood that minors are able to purchase products and allowing the state to better control the pricing.⁷⁸ The agency choice may reflect the fact that a state liquor board or department of revenue has more capacity to issue, enforce, and monitor regulations.⁷⁹

However, while the agency decision in other states may be instructive for agency choice in California, it is still too early to know the long-term results of the regulation of marijuana in Colorado or Washington.⁸⁰ California may decide that a single agency system, as adopted in Colorado and Washington, is not ideal for the legalized marijuana industry. With competing priorities, a shared agency system may be the preferred option, as each agency could handle the perspective parts of the industry that they have the most experience in. Alternatively, an independent commission could be the most flexible and

⁷⁶ JOHN HUDAK, COLORADO'S ROLLOUT OF LEGAL MARIJUANA IS SUCCEEDING (Brookings 2014).

⁷⁷ CAULKINS ET AL., *supra* note 71, at 53.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

adaptable choice, because the state can control who is included and what expertise they contribute to policy decisions.

In considering which agency should be tasked with overseeing retail marijuana legalization in California, it may also be helpful to compare the agencies selected by other states to regulate their medical marijuana programs. Table II.1 below contains the regulatory choice of each state with a medical marijuana law that allows for medical dispensaries, as determined by the National Conference of State Legislatures.⁸¹ Consistent with the intent and purpose of medicinal marijuana, the majority of medical marijuana programs are regulated by a state department of health or public safety.

⁸¹ *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. Washington State is removed from Table II.1, because there were no state-licensed dispensaries prior to the legalization of retail sales. *Washington Medical Marijuana Law*, NORML, <http://norml.org/legal/item/washington-medical-marijuana>.

Table II.1: Medical Marijuana Regulatory Agency by State

State	Regulatory Agency⁸²
Arizona⁸³	Department of Health Services
California⁸⁴	Department of Health Services
Colorado⁸⁵	Department of Public Health and Environment
Connecticut⁸⁶	Department of Consumer Protection
Delaware⁸⁷	Department of Health and Social Services
District of Columbia⁸⁸	Department of Health
Illinois⁸⁹	Department of Agriculture, Department of Financial & Professional Regulation, Department of Public Health, and Department of Revenue
Maine⁹⁰	Department of Health and Human Services
Maryland⁹¹	Natalie M. LaPrade Medical Cannabis Commission
Massachusetts⁹²	Department of Public Health
Minnesota⁹³	Commissioner of Health
New Hampshire⁹⁴	Department of Health and Human Services

⁸² The name of the state is dropped from each respective agency title, if applicable, for ease of comparison.

⁸³ Ariz. Rev. Stat. Ann. § 36-280.1

⁸⁴ Cal. Health & Safety Code § 11362.7 (West).

⁸⁵ Colo. Const. art. XVIII, § 14.

⁸⁶ Conn. Gen. Stat. Ann. § 21a-408 (West)

⁸⁷ Del. Code Ann. tit. 16, § 4902A (West).

⁸⁸ D.C. Code § 7-1671.01.

⁸⁹ 410 Ill. Comp. Stat. Ann. 130/10.

⁹⁰ Me. Rev. Stat. tit. 22, § 2422.

⁹¹ Md. Code Ann., Health-Gen. § 13-3301 (West).

⁹² Mass. Gen. Laws Ann. ch. 94C App., § 1-2 (West).

⁹³ Minn. Stat. Ann. § 152.22 (West).

New Jersey ⁹⁵	Department of Health
New Mexico ⁹⁶	Department of Health
New York ⁹⁷	Department of Health
Rhode Island ⁹⁸	Department of Health
Vermont ⁹⁹	Department of Public Safety

2. OVERVIEW OF CRITERIA: POSSIBLE MODELS

In this agency analysis, we consider two overarching possible models for agency regulation. A *shared responsibility system* would allow several agencies to regulate the industry by taking individual pieces of the process. Each agency would assume responsibility for the elements of regulation in which they maintain a comparative advantage. Such possible delegations of responsibility within the regulation of marijuana might include the Department of Public Health managing the health and safety regulations, while the Board of Equalization would control taxation. Alternatively, a *single integrated agency* would allow a single agency to regulate all aspects of the industry. This system would be vertically and horizontally integrated with one agency monitoring the entire industry and all elements thereof. In the example of the marijuana industry, a single agency would regulate everything from public health concerns, packaging, retail sales, and cultivation. There are benefits and limitations to each of these models that must be further considered,¹⁰⁰ and it is critical to consider the implications of

⁹⁴ N.H. Rev. Stat. Ann. § 126-X:1.

⁹⁵ N.J. Stat. Ann. § 24:6I-3 (West).

⁹⁶ N.M. Stat. Ann. § 26-2B-3 (West).

⁹⁷ N.Y. DEP'T OF HEALTH, MEDICAL MARIJUANA PROGRAM REGULATIONS, https://www.health.ny.gov/regulations/medical_marijuana/regulations.htm.

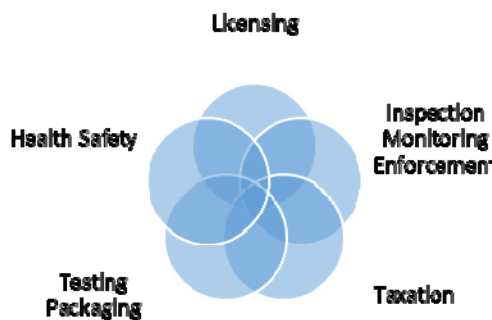
⁹⁸ R.I. Gen. Laws Ann. § 21-28.6-3 (West).

⁹⁹ Vt. Stat. Ann. tit. 18, § 4472 (West).

¹⁰⁰ It should be noted that two proposed articles of legislation for the regulation of *medical* marijuana in California reflect the tenability of the single integrated agency and shared responsibility system models, respectively, for the regulation of legalized marijuana. While these bills were not considered in this agency analysis, policymakers should be aware of their proposed structure, and discussion over the advantages and

structural models for marijuana regulation. The diagrams below demonstrate how each of these models might operate, reflecting potential delegation and/or integration of various components of marijuana regulation, which include, but are not limited to: licensing, inspection, monitoring, enforcement, taxation, testing, packaging, health, and safety.

Shared Responsibility System



Single Integrated Agency



3. AGENCY ANALYSIS

A. California Department of Food and Agriculture

The California Department of Food and Agriculture (CDFA) was created in 1919 to protect and promote the state’s food production, and today is a cabinet-level agency with authority over the state’s \$46.4 billion dollar agricultural industry.¹⁰¹ The CDFA’s mission is to serve California’s citizens by “promoting and protecting a safe, healthy food supply, and enhancing local and global agricultural trade, through efficient management, innovation, and sound science, with a commitment to environmental stewardship.”¹⁰² As part of this mission, the agency works to ensure the safety and quality of California’s

disadvantages of each may prove further instructive in the agency decision. Please see further discussion of these bills in Part IV [Labor].

¹⁰¹ *CDFA-History*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/CDFA-History.html>.

¹⁰² *Mission Statement*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/CDFA-Mission.html>.

food source, protect against invasive species, promote California’s agriculture at home and abroad, and provide an orderly marketplace for the state’s agricultural products.¹⁰³

The CDFA is organized into six service-specific divisions—Animal Health and Food Safety, Fairs and Expositions, Inspection, Marketing, Measurement Standards, and Plant Health and Pest Prevention—which operate at more than 100 locations throughout the state.¹⁰⁴ The most relevant divisions for potential oversight of a legalized marijuana regime are likely the inspection, measurement, and plant health services. Inspection Services provides examinations and chemical analysis to ensure that produce meets state standards for maturity, grade, size, weight, and packaging and labeling standards.¹⁰⁵ To the extent that large-scale fertilizer use is an environmental concern for those planning a legalized marijuana regime,¹⁰⁶ Inspection Services is also responsible with enforcing proper standards for fertilization.¹⁰⁷ Measurement Standards Services is responsible for enforcing the weights and measurements of agricultural products at the local level to ensure fair compensation and accurate value comparison for consumers.¹⁰⁸ Finally, Plant Health and Pest Prevention Services works to protect the food supply from the impact of exotic pests, and the environment from increased pesticide usage.¹⁰⁹

The CDFA has regulations at its authority, which may be useful were the agency to oversee the supervision of marijuana packaging. According to Section 890 of the California Food and Agricultural Code, it is unlawful for any person or entity to make an untrue statement in advertising that is misleading with regards to either the area of production, the identity of the producer, or the manner and method of production.¹¹⁰ Under the provisions of the statute, a violation is a misdemeanor punishable by up to six

¹⁰³ *Id.*

¹⁰⁴ *CDFA-History*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/CDFA-History.html>.

¹⁰⁵ *Inspection Services Division*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/is>.

¹⁰⁶ MICHAEL O’HARE, DANIEL L. SANCHEZ & PETER ALSTONE, BOTECH ANALYSIS CORP., ENVIRONMENTAL RISKS AND OPPORTUNITIES IN CANNABIS CULTIVATION 10 (2013), http://lcb.wa.gov/publications/Marijuana/SEPA/BOTECH_Whitepaper_Final.pdf (listing fertilizer runoff and N₂O release as environmental considerations for outdoor marijuana growth).

¹⁰⁷ *Inspection Services Division*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/is>.

¹⁰⁸ *Division of Measurement Standards*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/dms>.

¹⁰⁹ *Plant Health Division*, CAL. DEP’T FOOD & AGRIC., <http://www.cdfa.ca.gov/plant>.

¹¹⁰ Cal. Food & Agric. Code § 890 (West)

months in county jail.¹¹¹ In lieu of prosecution, the Secretary of the CDFA or a county agricultural commissioner can also bring a civil penalty of not less than \$500 and not more than \$5,000.¹¹²

A unique democratic feature of the CDFA is the California State Board of Food and Agriculture, a fifteen-member panel appointed by the governor to represent the state's diverse agricultural community.¹¹³ The members of the board must include one from the Agricultural Sciences Division of the University of California, one from a state university, nine total members from the state agricultural industry, two members of the public with an interest and knowledge in the environment, and two with an interest and knowledge in consumer affairs.¹¹⁴ The board "encourages public participation and input in all matters concerning agriculture," and advises the governor and the secretary of the CDFA on key issues of importance to California's agricultural industry, local communities, and the citizenry at large.¹¹⁵ To the extent that an ideal regulatory enforcement system for recreational marijuana in California should be responsive to a broad cross-section of community stakeholders, the CDFA has a demonstrated history working with participants from private industry, academia, and the public.

Concomitant with the scope of its authority, the CDFA has an extensive budgetary presence in the state. The total estimated budget for Fiscal Year 2015/2016 is \$384 million, of which \$228 is allocated to Agricultural Plant and Animal Health, Pest Prevention, and Food Safety, \$71 million will go to Marketing, and \$81 million to General Agricultural Activities.¹¹⁶ The funding for CDFA's budget comes primarily from the Department of Agriculture Account (\$144 million), the state's General Fund (\$76 million), and the Federal Trust Fund (\$110 million).¹¹⁷ In addition, there is no cap on the

¹¹¹ *Id.*

¹¹² Cal. Food & Agric. Code § 891 (West)

¹¹³ *State Board of Food & Ag*, CAL. DEP'T FOOD & AGRIC., http://www.cdfa.ca.gov/state_board.

¹¹⁴ Cal. Food & Agric. Code § 902 (West).

¹¹⁵ *State Board of Food & Ag*, CAL. DEP'T FOOD & AGRIC., http://www.cdfa.ca.gov/state_board.

¹¹⁶ CAL. DEP'T OF FIN., GOVERNOR'S BUDGET 2015-16, <http://www.ebudget.ca.gov/2015-16/StateAgencyBudgets/8000/8570/spr.html>.

¹¹⁷ *Id.*

CDFA’s ability to spend money—“[t]he department may expend in accordance with law all money which is made available for its use.”¹¹⁸

Finally, the CDFA has already been retained, through the California Industrial Hemp Farming Act of 2013, as the lead regulatory agency to oversee industrial hemp.¹¹⁹ The bill would revise the definition of marijuana to exclude industrial hemp, classified as product limited to non-psychoactive types of the cannabis plant with no more than 0.3% tetrahydrocannabinol (THC) contained in the dried flowering tops.¹²⁰ The bill would establish an Industrial Hemp Advisory Board within the CDFA, with the role of advising the Secretary of Food and Agriculture, and would also shield registered farmers who obtain laboratory tests indicating THC-content compliance of a random sampling of their crops from prosecution.¹²¹ Although signed by the Governor in 2013, the bill contains a provision rendering it inoperative “unless authorized under federal law.”¹²² In a legal opinion published on June 6, 2014, the Attorney General of California, Kamala Harris, ruled that those provisions of the bill permitting hemp production outside of agricultural or academic research were not operative under federal law.¹²³ Although the substantive provisions of the bill have been rendered moot, the passage of the bill demonstrates that the California legislature envisions a role for the CDFA in regulating the production of the cannabis plant.

There are aspects of the CDFA’s core administrative capacities that make the agency well-suited to regulate recreational marijuana. That it has locations across the state and room for budgetary growth means it may be able to scale operations faster than a smaller agency. Additionally, considering that legalized recreational marijuana will move much of the growing, processing, and distribution of product above ground, the agency’s technical expertise in regulating agricultural products could be invaluable. Finally, given the sensitive nature of a marijuana legalization initiative, the CDFA’s history of working

¹¹⁸ Cal. Food & Agric. Code § 201 (West).

¹¹⁹ California Industrial Hemp Farming Act, 2013 Cal. Legis. Serv. Ch. 398 (S.B. 566) (West).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Opinion of Kamala Harris, Office of Att’y Gen. (June 6, 2014), *available at* http://oag.ca.gov/system/files/opinions/pdfs/13-1102_0.pdf.

with competing stakeholders in crafting agency policy could ease the transition to wholesale legalization. However, the agency has limited experience dealing with public health considerations outside of product testing, which many may see as the most imperative administrative duty for the regulator of the marijuana industry.

B. California Board of Equalization

The California Board of Equalization (BOE) was established through a constitutional amendment in 1879, and was initially tasked with ensuring the uniformity and equality of county property tax assessments across the state.¹²⁴ Today, the BOE administers programs in four general areas: sales and use taxes, property taxes, special taxes, and the tax appellate program, which generate revenue in excess of 30% of the state total.¹²⁵ Within these broad areas, the BOE administers over thirty specific tax and fee programs, including the Sales Tax, the Alcoholic Beverage Tax, and the Cigarette and Tobacco Products Taxes.¹²⁶ The BOE has experience dealing with forms of legalized marijuana in the state, as all sellers of medical marijuana are required to hold a BOE seller’s permit and pay sales tax to the General Fund.¹²⁷

Under the California Constitution, the BOE consists of five voting members—the California State Controller and four members elected for four-year terms at gubernatorial elections.¹²⁸ The BOE is unique in this regard, and is in fact the only elected tax board in the United States.¹²⁹ In addition to the aforementioned tax and fee programs, the BOE also interprets tax and fee laws, educates and assists taxpayers and fee payers, and coordinates with businesses to improve roads and invest in law enforcement and the environment.¹³⁰ Within its investigative capacity, the BOE has the authority to “conduct

¹²⁴ *The Agency and its History*, BD. OF EQUALIZATION, http://www.boe.ca.gov/info/agency_history.htm.

¹²⁵ *Id.*

¹²⁶ BD. OF EQUALIZATION, ANNUAL REPORT FY 2013-14 7 (2014), <http://www.boe.ca.gov/pdf/pub306.pdf> [hereinafter, “BOE ANNUAL REPORT”].

¹²⁷ *Medical Marijuana/Legalization of Marijuana*, BD. OF EQUALIZATION, <https://www.boe.ca.gov/news/marijuana.htm>.

¹²⁸ Cal. Const. art. XIII, § 17.

¹²⁹ BOE ANNUAL REPORT, at 1.

¹³⁰ *Id.* at 2.

inspections, seize illegal product, and issue civil and misdemeanor citations to those in violation of the state’s cigarette and tobacco products tax laws.”¹³¹ Finally, the BOE is the appellate body of review for property, business, and income taxes disputes from taxpayers.¹³² These determinations are afforded the same deference afforded judicial decisions, leading to the common characterization of the BOE’s capacity as quasi-judicial in nature.¹³³

As of the last published BOE Annual Report for the Fiscal Year 2013-14, the BOE’s total cost of operations was \$578 million, or approximately 93 cents for each \$100 of revenue collected.¹³⁴ This figure is expected to rise slightly to \$584 million dollars in Fiscal Year 2015-16.¹³⁵ The funding for the BOE’s operations comes primarily from the General Fund (\$324 million) and agency reimbursements (\$165 million), with only \$435,000 coming from the Federal Trust Fund.¹³⁶

Although the Board has a long history of enacting various tax programs, its experience as the primary regulator of post-Prohibition liquor control was “the most difficult period in the history of the Board of Equalization”.¹³⁷ After repeal in 1933, the BOE was assigned the role of collecting excise taxes and managing the state liquor licenses.¹³⁸ This responsibility eventually transformed into a “predominately regulatory and law enforcement function” of which the BOE staff was unaccustomed.¹³⁹ According to the Board’s website, their staff were incapable of enforcing the provisions the Alcohol Beverages Control Act, leading to a series of investigations by state legislative

¹³¹ *Id.* at 22.

¹³² *Id.* at 23.

¹³³ *Westlake Farms, Inc. v. Cnty. of Kings*, 39 Cal. App. 3d 179, 185 (Ct. App. 1974) (“while sitting as a board of equalization, the county board of supervisors is a constitutional agency exercising quasi-judicial powers delegated to the agency by the Constitution.”)

¹³⁴ BOE ANNUAL REPORT.

¹³⁵ CAL. DEP’T OF FIN., GOVERNOR’S BUDGET 2015-16, <http://www.ebudget.ca.gov/2015-16/pdf/GovernorsBudget/0010/0860.pdf>

¹³⁶ *Id.*

¹³⁷ BD. OF EQUALIZATION, PUBLICATION 216, THE FIRST 100 YEARS, 1954 AMENDMENT RELIEVES BOARD OF LIQUOR CONTROL (1980), http://www.boe.ca.gov/info/pub216/1954_amendment.html.

¹³⁸ *Id.*

¹³⁹ *Id.*

committees.¹⁴⁰ In 1954, the Subcommittee on Alcoholic Beverage Control filed a comprehensive report with the Senate and Assembly, stating in part that “[w]e can best summarize our work by saying that we hope that never again will the administration and enforcement standards of any branch of the California State Government be found to be as low as we found to be the case with alcoholic beverage control under the present system.”¹⁴¹ Following the release of this report, the subcommittee recommended the creation of a separate agency to assume liquor control, which was overwhelmingly approved as a constitutional amendment by the state’s voters.¹⁴²

The BOE’s history in implementing a variety of specific sales and excise taxes in California makes it an attractive option for overseeing the revenue functions of a legalized marijuana regime. Its quasi-judicial capacity will also allow it to more effectively adjudicate the myriad disputes that will inevitably arise in the enforcement of taxes and fees. However, the BOE’s core competencies are to a certain degree narrowly confined to issues of public finance, and an effective regulator will need to provide guidance across public health and social issues as well. Finally, although many years have passed since its failed experiment regulating liquor sales, the agency’s own website alludes to the “incongruity” of combining control functions over a substance with tax administration,¹⁴³ suggesting a potential reluctance to assume broad responsibility over the state’s marijuana production.

C. California Department of Alcoholic Beverage Control

The California Department of Alcoholic Beverage Control (ABC) was created in 1955, replacing oversight from the Board of Equalization, which still maintains taxing authority.¹⁴⁴ The Alcoholic Beverage Control Act contains numerous regulations, which are implemented by the Department of Alcoholic Beverage Control.¹⁴⁵ ABC maintains

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Mission Statement*, CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, <http://www.abc.ca.gov/mission.html> (last visited June 25, 2015).

¹⁴⁵ 2015 California Alcoholic Beverage Control Act, CAL. BUS. & PROF. CODE § 25600 (Deering 2015).

exclusive authority¹⁴⁶ to license, regulate, and control the manufacture, importation, and sale of alcoholic beverages. ABC has a clear and cognizant administrative process, fulfilling their three essential functions of “inspection, compliance, [and] administration.”¹⁴⁷ The organizational hierarchy is threefold, involving field offices, district offices, and Sacramento headquarters.

One of the central duties of the ABC is licensing. Any and all establishments “involved” with alcohol must have a license.¹⁴⁸ This licensing regulation is extensive in nature: as of June 2010, there were 81,754 active ABC permits in the state of California.¹⁴⁹ These licenses are sub-classified by alcohol type,¹⁵⁰ a feature that may present applicability to possible classifications of marijuana. While these licenses range from \$54-\$1200¹⁵¹, the revenue generated may not render ABC self-sufficient, and ABC remains partially dependent on state budgetary decisions.¹⁵² The application process is clearly established but complex, and the complicated nature of application process has produced a cottage industry of lawyers and firms specializing in licensing. After ABC’s issuance of license, license holders remain subject to routine and random inspections.¹⁵³ License holders must open their premises to ABC inspectors at any time, with no search warrant required.¹⁵⁴

ABC relies on census data to determine the maximum number of liquor licenses allowed in a certain area (one license per every 2,500 people) and subsequently imposes bans on new licenses or restrictions on transfers thereof.¹⁵⁵ ABC also has the authority to

¹⁴⁶ CAL. CONST. art. XX § 22.

¹⁴⁷ *Mission Statement*, CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, <http://www.abc.ca.gov/mission.html> (last visited June 25, 2015).

¹⁴⁸ CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, <http://www.abc.ca.gov/mission.html> (last visited June 25, 2015).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, REPORT: THE ROLE OF ALCOHOL BEVERAGE CONTROL AGENCIES IN THE ENFORCEMENT AND ADJUDICATION OF ALCOHOL LAWS (2005).

¹⁵³ CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

deny, suspend, or revoke any license, with requirements of good cause and the due process of a public hearing.¹⁵⁶

In terms of packaging and testing, the role of ABC is regulatory only, with no internal institutional capacity for packaging or testing. It must be recognized that the regulation of alcoholic packaging and labeling is pursuant to federal regulations. California may perhaps evade federal requirements for marijuana, but policymakers should be cognizant of the federal standards of comparable industries to facilitate potential future adaptation to federal regulations. The majority of alcohol manufacturers or importers are large-scale; the demands of packaging and labeling regulations may present an economic hurdle to small-scale marijuana industry.

In terms of the testing, packaging, and labeling of alcohol, such activity is done entirely by alcohol companies themselves. ABC has assumed a regulatory and enforcement function over these private entities. While packaging and labeling requirements are federally established, they are regulated by California Business and Professions Code Sections 25200-25206. For further discussion of the role of federal government regulation preemption, see Part I.2 [Federalism]. Every manufacturer must file with the state the brand name(s) under which labeled or sold. Labeling requirements vary by type of alcohol, with heightened conditions for liquor and for beer and wine with more alcoholic content,¹⁵⁷ which may provide a plausible parallel to the marijuana industry. Every container must bear a label detailing alcohol content, if more than 5.6 percent alcohol by volume, pursuant to Section 7.71 of Part 7 of Title 27 of Code of Federal Regulations.

The California Department of Alcoholic Beverage Control presents an array of advantages and disadvantages for its potential role in regulating marijuana. Most notably, ABC demonstrates the viability of the Single Integrated Agency model, as a wholly integrated agency (with the minor exception of taxation, which is delegated to the State Board of Equalization). ABC has a longstanding role in regulatory conduct, with broadly focused, complete jurisdiction over all aspects of alcohol policy in the state of California. ABC has authority over nearly all elements of alcohol industry: licensing,

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

regulation, and control of manufacture, importation, and sale of alcoholic beverages. Further, ABC has developed a clear and streamlined process of licensing, although its applicability to marijuana may not be absolute.

California's Department of Alcoholic Beverage Control has extensive institutional capacity, featuring over 430 attorneys, clerks, investigators, and law enforcement professionals. These law enforcement professionals are sworn peace officers who carry firearms, and may make arrests, in the enforcement of ABC regulation, a relative unique feature in regulatory agency choices, which may itself present political complications. These ABC peace officers have shared jurisdiction with other state and local officials, and it remains duty of all peace officers and district attorneys to enforce the Alcoholic Beverage Control Act. Such existence of ABC officers may present further implications for police workload and jurisdictional tension.

However, the California Department of Alcoholic Beverage Control remains heavily dependent on its budget for efficacy. As a non-general fund department, ABC's operating budget is funded primarily by liquor license fees.¹⁵⁸ Accordingly, ABC is faced with extensive backlog in periods of economic downturn.¹⁵⁹ Further, the ABC's budget is not immune to budgetary debate: a five million dollar budget cut in 1991, for example, had "crippling effects" on enforcement.¹⁶⁰ Given the existing backlog in the realm of alcohol regulation, perhaps the expansion of services to include the regulation of marijuana would impose too high a burden on the agency, especially in light of the anticipated rush of initial applications as marijuana is legalized.

Furthermore, a 2005 Report by the National Highway Traffic Safety Administration identified other key weaknesses of California's Department of Alcoholic Beverage Control, including: limited agents to monitor licensees, poor record keeping, inconsistently applied penalties, and lack of effective administrative processes.¹⁶¹ The

¹⁵⁸ CALIFORNIA DEP'T OF FINANCE, GOVERNOR'S REVISED BUDGET 2015-2016, *available at* [HTTP://WWW.EBUDGET.CA.GOV/2015-16/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf](http://www.ebudget.ca.gov/2015-16/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf).

¹⁵⁹ Marisa Lagos, *Liquor License Backlog in California a Bad Mix*, S.F. CHRON. (Oct. 17, 2010), <http://www.sfgate.com/news/article/Liquor-license-backlog-in-California-a-bad-mix-3170015.php>.

¹⁶⁰ Eric Young, *The Department of Alcoholic Beverage Control Fell Behind After 1991 Funding Cuts*, L.A. TIMES (Feb. 14, 1993), http://articles.latimes.com/1993-02-14/local/me-45_1_alcoholic-beverage-control-investigators.

¹⁶¹ NHTSA REPORT, *supra* note 152.

report encouraged the reform of public participation, and there continues to be much academic debate about the role of ‘court watch’ monitoring activities.¹⁶² These weaknesses, if not fully addressed, may present uncertainty over ABC’s potential to effectively regulate a new industry like marijuana.

D. California Department of Public Health

In contrast to the California Department of Beverage Control’s representation of a single integrated agency, the regulation of tobacco in California reflects a shared responsibility approach. Elements of tobacco regulation are divided among different California agencies: the California Board of Equalization oversees retail licenses, while Department of Health is tasked with the creation and implementation of policy.¹⁶³ Further, much of tobacco policy is created and implemented by the federal Food and Drug Administration, which preempts a portion of California tobacco regulation. The California Department of Public Health features overlapping jurisdiction of enforcement. Some policies (including the sale of tobacco to minors) are enforced by local law enforcement agencies. In other realms of regulation, the Food and Drug Branch of the California Department of Public Health is the primary enforcement agency, but any state agency or local law enforcement agency may also enforce criminal statutes. Accordingly, questions of institutional capacity must consider the budget, staff, and competence of both the California Department of Public Health and larger implications of local and state law enforcement.

The California Department of Public Health demonstrates the possibility of jurisdictional discretion. An array of local jurisdictions are legally allowed to regulate more strenuously than California state requirements (for instance, a city wide ban on smoking in public parks).¹⁶⁴ Such allowance for local discretion, giving localities should additional regulatory and enforcement capacity, provides both potential benefits and potential hurdles in marijuana regulation. Policymakers must consider the benefits

¹⁶² *Id.*

¹⁶³ *California Tobacco Control Program*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <http://www.cdph.ca.gov/programs/tobacco/Pages/default.aspx> (last visited June 25, 2015).

¹⁶⁴ *Id.*

(namely, variation in policy and subsequent political palatability in different localities) and drawbacks (the potential “race to the bottom” phenomenon) in deciding whether the Department of Public Health’s model of jurisdictional discretion is suitable for the regulation of marijuana.

California’s experience in regulating tobacco demonstrates its unique role in the national landscape. California was in many ways a pioneer in tobacco regulation, as the first state in nation to institute statewide smoking ban (with some exemptions and loopholes).¹⁶⁵ California’s status as a regulatory pioneer demonstrates proven commitment to public health and must be considered in light of marijuana regulations. Regulations consistent with California smoking policy created and implemented by the Department of Public Health may likely include similar bans on cannabis use in public locales. However, DPH policies from 2001 to 2013 moved away from this “finishing first.”¹⁶⁶ Currently, the DPH is driven by a “Change Social Norms” approach. The current focus of Tobacco Control Programs is to change social norms surrounding tobacco, with the mission of “indirectly influencing current and potential future tobacco users by creating a social milieu and legal climate in which tobacco becomes less desirable, less acceptable, and less accessible.”¹⁶⁷ DPH’s approach has included a focus on a statewide media campaign, community intervention to limit tobacco promoting influences, reducing exposure to secondhand smoke, reducing the availability of tobacco, and promoting tobacco cessation.

This key focus of the Department of Public Health on public health may limit their expertise and ability to regulate other areas of marijuana regulation, thereby narrowing the policy priorities that this agency choice could fulfill. An agency that seeks to severely limit tobacco usage is perhaps best not suited, from a policy perspective, to regulate usage of marijuana. Indeed, of the agency choices considered, the Department of Public Health may administer the most restrictive policies, in the interest of public health, perhaps at the expense of commercial goals of marijuana regulation in California.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Moreover, the California Department of Public Health heavily relies on the federal agency of the FDA for guidance and policy direction regarding tobacco products. Such reliance on federal agencies for policy direction and implementation presents a hurdle in the context of marijuana regulation, as regulation of legalized marijuana in California would necessarily depart from current federal policy.

Lastly, the DPH delegates criminal enforcement to local law enforcement, with no internal capacity for its own enforcement, unlike the ABC. Such delegation bifurcates the authority of criminal regulation to other state officials, who may have better expertise in such a realm. Indeed, the DPH presents a clear model of the successes of the delineation of tobacco regulation into an array of agency choices with their own internal comparative advantages thereof.

E. Independent Commission

An independent commission is an alternative to putting marijuana legalization in an existing agency. Unlike existing agencies, independent commissions are able to be tailored to fit the needs of the legalized marijuana industry. They come without a preexisting agency culture, structure, or additional responsibilities. In a realm as foreign as legalized recreational marijuana, this may be an ideal solution to regulating marijuana effectively.

An independent commission can act as a single integrated agency and handle all aspects of marijuana legalization. Nevertheless, it could also use the shared responsibility model and work with existing agencies to implement the policy goals and regulations the commission has envisioned. In fact, an independent commission often serves as a policymaking body that then delegates its plans to another agency. Though, this delegation could result in a slower process or policies that get altered in translation.

Independent commissions usually involve a diverse array of decision-makers with different backgrounds and capacity, which includes experts important to the industry and very few politicians or bureaucrats.¹⁶⁸ This could be extremely beneficial for the

¹⁶⁸ See H.B. 881, 434 Sess. (Md. 2014); *Background on Commission*, California Citizens Redistricting Commission, <http://wedrawthelines.ca.gov/commission.html> (last visited June 24, 2015); *About Us*, PARKS FORWARD, <http://parksforward.com/about-us#sthash.qxBTINp4.dpuf> (last visited June 24, 2015); *About the*

Californian government because the commission could help preempt backlash by getting their respective groups or organizations on board with the new policies. Meanwhile, the government would be able to maintain some oversight by placing a representative from the executive government on the commission.

In entering the uncharted territory of legalized marijuana, it could also be beneficial to be shielded from the political pressures of existing government agencies.¹⁶⁹ This would be possible if the commissioners are appointed to long terms or are only removable for good cause.¹⁷⁰ In addition, by removing the partisan nature of politics, there may be less conflict over the commission's decisions in an already controversial industry.

Moreover, in an industry like marijuana, which lacks research and policy history, an independent commission could help address the specific concerns of marijuana legalization. For example, to address the lack of research on marijuana packaging and testing, the commission could include individuals who have experience with testing and packaging, as well as, an interest in researching the best methods for monitoring marijuana products. This option would be the most discretionary and flexible option available. Nevertheless, the lack of experience in running an agency and working within the California government could slow down the implementation plan.

There are budgetary concerns associated with an independent commission. It is often cheaper to work within an existing agency because there are costs associated with building a completely new agency rather than using an existing one.¹⁷¹ In addition, there are no existing funds to be allocated to the commission, which could slow down the policymaking process. However, the program could be set up to be financially self-sufficient through fees from licenses for growers, retailers and processors. This method

Regents, UNIVERSITY OF CALIFORNIA BOARD OF REGENTS, <http://regents.universityofcalifornia.edu/about/index.html> (last visited June 24, 2015).

¹⁶⁹ Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 BERKELEY J. OF CRIM. L. 97, 120 (2010).

¹⁷⁰ *Id.* at 124.

¹⁷¹ Beth A. Rosenson, *Against Their Apparent Self-Interest: The Authorization of Independent State Legislative Ethics Commissions, 1973–96*, 3 ST. POL. & POL'Y QUARTERLY 42, 46 (2003).

has been used by the Maryland Medical Commission to mixed reviews.¹⁷² The downside of a self-sufficient commission is that it can drive up fees, which may be translated to the consumer.¹⁷³ This may not be an issue if your primary concern is public health, but if the state's main concern is generating revenue or reducing the black market, it may present an undesirable problem.

California Independent Commissions:

California Citizens Redistricting Commission

The Commission was created to draw the district lines in conformity with strict, nonpartisan rules to create districts of relatively equal population that will provide fair representation for all Californians.¹⁷⁴ The fourteen-member Commission is made up of five Republicans, five Democrats, and four not affiliated with either of those two parties but registered with another party or as decline-to-state.¹⁷⁵ The commission was authorized following the passage of California Proposition 11, the Voters First Act, by voters in November 2008.¹⁷⁶ After hearing from the public and drawing the maps for the House of Representatives districts, forty Senate districts, eighty Assembly districts, and four Board of Equalization districts, the Commission must vote on the new maps to be used for the next decade.¹⁷⁷

Parks Forward Commission

Parks Forward California is an independent panel of experts, citizens, advocates and thought-leaders, which has conducted a wholesale assessment of the parks system and recommended substantial

¹⁷² Timothy B. Wheeler, *Medical Marijuana Licensing Fees Stir Debate in Maryland*, BALT. SUN, (Oct. 11, 2014), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-medical-marijuana-fees-20141011-story.html#page=1>.

¹⁷³ *Id.*

¹⁷⁴ *Background on Commission*, CALIFORNIA CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/commission.html> (last visited June 24, 2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

improvements to address the financial, operational, cultural, and population challenges facing California State Parks.¹⁷⁸ They were created after the Department of Recreation faced years of “scandal, mismanagement and stagnation.”¹⁷⁹ The Parks Forward Commission was supported by significant charitable funding, public agency commitments, the nonprofit community, and other stakeholders. The plan was published after two years of outreach and study that included public meetings.

California Board of Regents

The University is governed by The Regents, which under Article IX, Section 9 of the California Constitution has “full powers of organization and governance” subject only to very specific areas of legislative control.¹⁸⁰ “The university shall be entirely independent of all political and sectarian influence and kept free therefrom in the appointment of its Regents and in the administration of its affairs.”¹⁸¹ The board consists of eighteen regents appointed by the governor for twelve-year terms, one student appointed by the Regents for a one-year term, and seven ex officio members—the Governor, Lieutenant Governor, Speaker of Assembly, Superintendent of Public Instruction, President and Vice President of the Alumni Associations of the University of California, and the University of California President.¹⁸² In addition, two faculty members sit on the board as non-voting members.¹⁸³ The Regents operates through ten standing committees: Compliance and Audit, Compensation, Educational Policy,

¹⁷⁸ *About Us*, PARKS FORWARD, <http://parksforward.com/about-us#sthash.qxBTINp4.dpuf> (last visited June 24, 2015).

¹⁷⁹ Chris Megerian, *Panel urges transformation of California state parks system*, L.A. TIMES, (Jan. 29, 2015), <http://www.latimes.com/local/politics/la-me-pol-state-parks-20150130-story.html>.

¹⁸⁰ *Bylaw 5. Composition and Powers of the Corporation*, UNIVERSITY OF CALIFORNIA BOARD OF REGENTS, <http://regents.universityofcalifornia.edu/governance/bylaws/bl5.html#5.1> (last visited June 24, 2015).

¹⁸¹ *Id.*

¹⁸² *About the Regents*, UNIVERSITY OF CALIFORNIA BOARD OF REGENTS, <http://regents.universityofcalifornia.edu/about/index.html> (last visited June 24, 2015).

¹⁸³ *Id.*

Finance, Governance, Grounds and Buildings, Health Services, Investments, Long Range Planning, and Oversight of the Department of Energy Laboratories.¹⁸⁴

Marijuana Commissions:

Maryland Medical Commission

The Maryland Medical Commission is composed of fifteen members including the Secretary of Health and Mental Hygiene, three physicians, one nurse, one member of the public, and one scientist.¹⁸⁵ The Commission is implementing the Medical Marijuana Program in Maryland, which provides for the approval, licensing, and registration of academic medical centers, growers, dispensaries, grower agents, and dispenser agents.¹⁸⁶ To provide qualifying patients legally with medical marijuana, the Program establishes a structure to certify physicians and qualify patients.¹⁸⁷ The Program is expected to be operational by 2016 with medical marijuana available for patients in 2017.¹⁸⁸ Qualifying patients, who have received written certification from their certifying physician, will be able to obtain medical marijuana.¹⁸⁹ Only those growers or dispensaries licensed by the Commission will be authorized to sell marijuana to qualifying patients.¹⁹⁰ The program is self-supporting and financed by the licensing and registration fees.¹⁹¹ This structure has been

¹⁸⁴ *Id.*

¹⁸⁵ H.B. 881, 434 Sess. (Md. 2014).

¹⁸⁶ *Id.*

¹⁸⁷ Natalie M. Laprade Medical Cannabis Commission, MARYLAND MANUAL ON-LINE, <http://msa.maryland.gov/msa/mdmanual/25ind/html/51marijuana.html> (last updated May 15, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Timothy B. Wheeler, *Medical Marijuana Licensing Fees Stir Debate in Maryland*, BALT. SUN, (Oct. 11, 2014), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-medical-marijuana-fees-20141011-story.html#page=1>.

subject to growing criticism due the high rates the Commission charges in order to pay for its operation.¹⁹²

As these examples demonstrate, an independent commission is a flexible, adaptable body that could be used for a variety of industries. A commission does not have to balance competing responsibilities, existing culture, or the same political considerations that an existing agency has to contend with. In addition, it is able to gain support and expertise from interested parties. But, if the commission is going to be a single integrated agency as in the Maryland Medical Commission, there will be both increased costs and a reduced speed in the implementation of marijuana regulations. The time and cost will be less if the commission is used as a policymaking group that uses existing agencies to implement their policies. Either way, there are distinct advantages from getting a diverse range of input in designing a completely new industry.

Tables II.2 and II.3 below present a schematic representation of the comparative advantages and disadvantages of each agency across a range of selection criteria.

Table II.2: Agency Analysis Decision Matrix (Overview)

	ABC	Board of Equalization	Food and Agriculture	Public Health	Independent Commission
Skillssets and Capacity	+	+	+	+	+
Funding and Budget	-	+	- +	-	- +
Political Feasibility and Impacts	+	- +	- +	- +	+
Capacity for Adaptation	-	- +	- +	+	+
History of Comparable Regulation	- +	-	+	-	-

¹⁹² *Id.*

Table II.3: Agency Analysis Decision Matrix

	ABC	Board of Equalizations	Department of Food and Agriculture	Department of Public Health	Independent Commissions
Skillsets and Capacity	<ul style="list-style-type: none"> -Vertically integrated regulation of alcohol industry (broad jurisdiction) -Clear and streamlined licensing process -Specific ABC officers for enforcement -No experience with agricultural elements -Administrative weaknesses identified in NHTSA report 	<ul style="list-style-type: none"> -Long history of tax collection, both general and targeted -Quasi-judicial appeals process for violations -History of both creating and enforcing rules and regulations for tax policies -Educates constituencies on tax requirements 	<ul style="list-style-type: none"> -Regulates a large, \$46 billion per year industry -Dual focus on both protecting public health and promoting industry -Has presence in over 100 locations spread throughout the state -Diverse board representing various stakeholders in the agricultural community 	<ul style="list-style-type: none"> -Social norms focused agency that seeks to severely limit tobacco usage is perhaps best not suited, philosophically, to regulate usage of marijuana -Reliance on state police officers and federal FDA for enforcement -Authority over different elements of tobacco industry dispersed among array of state and federal agencies -No singular decision-maker for integrated policy (not vertically integrated) 	<ul style="list-style-type: none"> -Can involve a diverse array of decision makers with different backgrounds and capacities
Funding and Budget	<ul style="list-style-type: none"> -Efficacy highly dependent on budget -Suffers massive backlog in times of budgetary restriction -Problematic in light of potential rush of initial action 	<ul style="list-style-type: none"> -State General Fund supplies more than half the board's budget -Majority of remainder from local government reimbursements. 	<ul style="list-style-type: none"> -Department can expand: can spend all money which is made available for its use -Over half of money comes from Federal Department of Agriculture and Federal Trust Fund 	<ul style="list-style-type: none"> -Budget from state and federal funding (problematic implications of federal funding) -Budget directed primarily toward public health and education programs -Would have to expand budget to oversee licensing or delineate responsibilities 	<ul style="list-style-type: none"> -Could be self-sufficient with funding coming from selling licenses -Would likely be more expensive than using an existing agency

Political Feasibility and Impacts	-Long history of support for ABC -Regulations largely independent and constant	-Only elected Tax Board in the U.S. and as such may be more sensitive to public opinion	-Large portion of activity is centered on promoting state business	-Political considerations of a policy approach informed by focus on public health	-Politically usually bipartisan with a diverse group of members -Due to this and the lack of political history could be easier to push forward plans
Capacity for Adaptation/Discretion	-Marijuana is potentially comparable product, but ABC regulations are rigid and extensive	-Has history of targeted tax policies on individual products -Limited experience in agriculture	-Has authority to sanction certain packaging violations -History of working with parties across the interest spectrum -Little history with public health	-Model for jurisdictional discretion with variance across state (i.e. bans on usage)	-More flexibility since it would be created and tailored to regulate recreational marijuana
History of Comparable Regulation	-No history with any oversight other than alcohol	-Post-Prohibition failure of alcohol regulation	-Proposed agency for regulation of hemp industry	-Heavy reliance on federal agencies for policy guidance	N/A
Consistency with Current Regimes	-Could provide vertically integrated regulation, but little to no focus on agriculture	-Tax policy could be seamlessly integrated -Many other policy issues would be outside normal operating business.	-Marijuana as a crop falls under already existing agricultural regulations -Little to no framework for public health consideration outside of testing and inspecting food sources.	-Focus primarily on public health -Little to no focus on agricultural or commercial issues	N/A

Testing and Packaging	<ul style="list-style-type: none"> -Regulatory role only, without internal capacity for testing and packaging (companies provide first-party testing and packaging) -Extensive code of regulation -Regulations are federally mandated 	<ul style="list-style-type: none"> -Little to no experience with the regulation of packaging or testing of products 	<ul style="list-style-type: none"> -Criminal and civil sanctions for certain false, deceptive, or misleading statements on packaging -Inspects crops, conducts chemical analysis, and audits good handling and agricultural products to ensure a safe food supply. -Has division of measurement standards to ensure quantity of packaged commodities. 	<ul style="list-style-type: none"> -Tobacco industry reliant on third-party testing companies -Role in policing and enforcing -Federal regulations 	<ul style="list-style-type: none"> -Could include scientists or researchers that specialized in this area
Positive Attributes	<ul style="list-style-type: none"> -Vertically integrated regulation -Broad jurisdiction -Expertise in licensing process -Specific officers for enforcement 	<ul style="list-style-type: none"> -Large budget and room for growth -History with taxing specific products -Quasi-judicial capabilities in assessing penalties -Emphasis on education 	<ul style="list-style-type: none"> -Large agency spread across state -Large budget and room for growth -Has authority to sanction certain packaging violations -History of working with diverse set of stakeholders (industry, academia, environment) 	<ul style="list-style-type: none"> -Jurisdictional discretion: allows variance within state -Heavily informed by public health considerations, with considerable expertise in the field 	<ul style="list-style-type: none"> -Flexible and can be tailored to specific concerns of legal marijuana -Most adaptable and discretionary option -Diverse group of stakeholders
Negative Attributes	<ul style="list-style-type: none"> -Massive administrative backlog -Little to no focus on agriculture -Administrative weaknesses -Has no role in marketing of an agricultural product 	<ul style="list-style-type: none"> -Complete failure with alcohol oversight -Elected board could create political conflicts impeding consistency of regulatory regime 	<ul style="list-style-type: none"> -Minimal emphasis on public health outside product testing -Large agency without a particular expertise in marijuana or drug regulation 	<ul style="list-style-type: none"> -Narrowly focused on health policy -Funded largely from federal sources -Significant reliance on federal agencies for policy direction and regulations 	<ul style="list-style-type: none"> -Will have higher upfront costs -Without experience to draw on, may have more initial administrative shortcomings

4. CONCLUSION

The choice of regulatory agency is critical to the efficacy of a legalized marijuana regime. As evidenced by California's history with medicinal marijuana, a lack of effective oversight can inhibit the creation of a politically accountable program, and can engender a swift federal response. Given the present administration's emphasis on a strong and robust regulatory enforcement mechanism for state experimentation with legalization, California would be well-served to carefully consider its choice in regulatory agency. A careful review of state-level agencies demonstrates that each has its own comparative advantages and disadvantages. Although there does not appear to be a definitive best practice when it comes to agency choice, there broadly are two viable options. California could choose a single, integrated agency—whether a pre-existing state organization or a newly-formed independent commission—or a shared responsibility regime, drawing on the relative strengths of multiple agencies. Finally, this choice should be guided by the state's specific desired policy priorities, as each agency emphasizes different objectives in carrying out their supervisory duties.

III. TAX REGIME

How to tax marijuana is one of the most pressing questions in the implementation of a legalized regime for its recreational use. Despite the primacy of the question, effective taxation can be difficult. “There is no part of the administration of government that requires extensive information and a thorough knowledge of the principles of political economy, so much as the business of taxation.”¹⁹³ In this section, we outline some of the “extensive information” and “principles of political economy” required to establish an effective plan for legalized marijuana taxation.

In this part of the paper, we address considerations for how marijuana is taxed. First, we discuss possible objectives of marijuana taxation; second we examine California tax landscape and lessons learned from marijuana taxation in Colorado and Washington. We conclude by examining the effects of higher and lower tax rates, the possibilities for tax structure, and we raise additional areas of needed research as it relates to the tax system.

1. OBJECTIVES FOR TAXING LEGALIZED MARIJUANA

The two primary uses for taxation are to regulate behavior and to fund government. Although both are critical, they can potentially exist as opposing dyads because different forms of taxation may further one objective more than the other.

Objective: Regulate Behavior and Limit Negative Externalities

Taxes regulate behavior in a very straightforward manner. Charging a tax on a product increases its price, and when something is more expensive, people buy less of it. Modifying behavior is an important tool when the government intends to limit consumption of products with negative externalities, such as tobacco, alcohol, and pollution. Even for addictive substances such as tobacco and alcohol, increases in taxes (and subsequent price increases) leads to decreased use.¹⁹⁴

¹⁹³ THE FEDERALIST NO. 35 (Alexander Hamilton).

¹⁹⁴ For a summary of studies on the issue of tax rates and tobacco use, see Campaign for Tobacco Free Kids, Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (And the Cigarette Companies Know It) (October 11, 2012), <https://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf>.

Threats to public health are some of the foremost negative externalities associated with marijuana use. A White House report from the Obama Administration summarized a number of these concerns, stating “[m]arijuana places a significant strain on our health care system, and poses considerable danger to the health and safety of the users themselves, their families, and our communities.”¹⁹⁵ The report specifically noted that “[m]arijuana use is associated with addiction, respiratory illnesses, and cognitive impairment” and is “a major cause for visits to emergency rooms.”¹⁹⁶ Marijuana use may also potentially lead to negative externalities unrelated to healthcare costs. These include decreased levels of labor productivity, increased levels of job turnover, social disengagement, and others.

It is important to note that the extent to which legalized marijuana harms public health is debatable. For example, Pacula and Williams, et al., found that young adults, a group responsible for a disproportionate share of traffic accidents and fatalities, typically substitute marijuana in place of alcohol,¹⁹⁷ which may lead to less traffic accidents and better public health. In fact, Anderson, Hansen and Rees found that “legalizing medical marijuana was associated with a 13 percent decrease in fatalities involving alcohol.”¹⁹⁸

Still, limiting threats to public health will be many people’s primary objective for a marijuana tax, and those concerns outlined in the White House Report are representative of the threats to public health that could be limited through taxation.

Objective: Raise Government Revenue

The privilege to sell and consume marijuana is potentially worth a lot of money, and the state could collect substantial revenues from selling and taxing that privilege.¹⁹⁹ Because states are often strapped for cash, the possibility of creating an additional

¹⁹⁵ White House Report, *The Public Health Consequences of Marijuana Legalization*.
https://www.whitehouse.gov/sites/default/files/ondcp/issues-content/marijuana_and_public_health_one_pager_-_final.pdf.

¹⁹⁶ *Id.*

¹⁹⁷ Rosalie Liccardo Pacula et. al, *Alcohol and Marijuana Use Among College Students: Economic Complements or Substitutes*, 1-39? (Nat’l Bureau of Econ. Research, Working Paper No. 8401, July 2001).

¹⁹⁸ D. Mark Anderson et. al, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption* (October 2012).

¹⁹⁹ See JONATHAN P. CAULKINS ET AL., *CONSIDERING MARIJUANA LEGALIZATION INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 75 (2015).

funding stream is a serious proposition. Through eleven months of Colorado’s 2014-2015 fiscal year, the state generated \$91,068,724 in marijuana taxes and licensing fees.²⁰⁰ That is a substantial amount of revenue for the state of Colorado, and in California this could be even more significant. The revenue that is brought in by the state could be a part of the general tax fund or it could be earmarked for specific purposes, like in Colorado where a portion of the revenue goes directly toward financing public education and regulating the marijuana industry.

Regardless of the objective, the extent to which the tax will impact the price of marijuana and how much it is consumed is difficult to calculate. There is no empirical data of the price elasticity of marijuana consumption under a legalized regime because the precise nature of the market curve for marijuana has not been evaluated and the assumption that “all other things are held constant is not met when considering a policy change like legalization.”²⁰¹ Further, in addition to taxation, legalization represents more than a monetary change in price, because “a change in other factors, including the legal risk associated with using marijuana, the perceived health risks associated with use, and the social norms regarding the appropriateness of using marijuana for recreational purposes,” are all unknown factors that will influence consumption.²⁰² “[E]stimates suggest that annual prevalence would be 4 to 5 percent higher if all states decriminalized marijuana.”²⁰³ Across all the models, “the price elasticity for both annual and thirty day prevalence is -0.30, implying that a 10% reduction in the price of marijuana would lead to an increase in the number of high school seniors reporting past year and past month use of 3%.”²⁰⁴ Significantly, Bretteville-Jensen and Williams found that the “monetary

²⁰⁰ State of Colorado, Marijuana Taxes, Licenses, and Fees Transfers and Distribution April 2015 Sales Reported in May 2015 (June 2015), *available at* <https://www.colorado.gov/pacific/sites/default/files/0415%20Marijuana%20Tax%2C%20License%2C%20and%20Fees%20Report.pdf>.

²⁰¹ *Id.* at 222.

²⁰² *Id.*

²⁰³ *Id.* at 228. (citing Farrelly et al. 2001).

²⁰⁴ *Id.* (citing Pacula et al., 2003; Jacobson 2005; Pacula et al., 2001).

price of marijuana was not statistically significant for predicting initiation of marijuana for individuals who choose to start after age 18.”²⁰⁵

2. CALIFORNIA LAW FOR CREATING OR MODIFYING TAXES

Both the California legislative process and the California tax structure are complex due to the state’s constitutional amendments, specifically Proposition 13 and 26. Proposition 13, which passed in 1978, requires a supermajority of the legislature, or two-thirds of each house, to pass any tax increase.²⁰⁶ Proposition 13 requires any increases in “special taxes” that are passed by the local government to gain approval from two-thirds of the voters.²⁰⁷ Proposition 26 extends the supermajority voter approval requirement to taxes that do not increase state revenues if they would increase taxes for any single tax payer.²⁰⁸ Proposition 13 marked the beginning of an era characterized by Californians passing numerous measures to restrict the state’s fiscal activities.²⁰⁹ Commentators have remarked on the difficulty California’s elected officials face in making budgetary and fiscal decisions as a result, and California has been described as posing the most difficulty of any other state to legislators due to its high degree of institutional constraints.²¹⁰ Indeed, in California, direct democracy plays a central role when considering the best tax alternatives to pursue for the taxation of legalized recreational marijuana.

Passing a tax faces a high bar in the legislatures, as any minority can easily block tax legislation. The state relies heavily on ballot initiatives due to this, and so voters’

²⁰⁵ Bretteville-Jensen & Williams, *Does Liberalizing Cannabis Laws Increase Cannabis Use?*, *Journal of Health Economics*, Vol. 36, 20-32 (July 2014).

²⁰⁶ CAL. CONST., art. XIIIIC, § 2(b).

²⁰⁷ CAL. CONST., art. XIIIIC, § 2(d).

²⁰⁸ California Legislative Analyst’s Office, *Proposition 26: Increases Legislative Vote Requirement to Two-Thirds for State Levies and Charges. Imposes Additional Requirement for Voters to Approve Local Levies and Charges With Limited Exceptions. Initiative Constitutional Amendment (July 2010)* http://www.lao.ca.gov/ballot/2010/26_11_2010.aspx.

²⁰⁹ See Gene Park & Kevin Wallsten, *Confidence, Perception, and Politics in California: The Determinants of Attitudes toward Taxes by Level of Government*, 7 *Cal. J. Pol. & Pol’y* 2, 1-22 (2015).

²¹⁰ Bruce E. Cain & George A. Mackenzie, *Are California’s Fiscal Constraints Institutional or Political?*, *Public Policy Institute of California*, 1-28, 8 (2008).

attitudes play an important role in raising revenues in California.²¹¹ Notably, a measure passed by initiative cannot be overturned by the Legislature.²¹² To change a tax that was passed by the voters thus requires the initiative process to begin anew.

A. Local Level

Since 1978, the voters have passed three initiatives limiting the ways in which local governments may raise local revenues. Beginning with Proposition 13, which added Article XIII A to the Constitution, local governments were prohibited from raising special taxes without gaining voter approval. Further, the property tax rate—formerly an exclusive domain of the local governments—was also limited. Proposition 218 was passed in 1996 and applies to all local taxes.²¹³ It requires local authorities to gain a majority of voters to approve of any increase in taxes and “for most new property-based revenues.”²¹⁴ Proposition 218 defines a “general tax” as any tax imposed for general government purposes.²¹⁵ Proposition 218 includes taxes imposed for specific purposes but placed into a general fund in its definition of “special tax,” which broadens the scope of taxes that are required to receive two-thirds voter approval: Any tax imposed for specific purposes including taxes imposed for specific purposes and placed into a general fund.²¹⁶ Additionally, the state maintains exclusive taxing power over certain enumerated items including cigarettes, alcohol and personal income, which localities are not able to tax separately.²¹⁷

There are conflicting studies on the degree to which the increased role of direct democracy in decisions about taxing and spending actually reduce the level of taxation or

²¹¹ See Park & Wallsten.

²¹² See CAL CONST., Art. II § 10 (“The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”).

²¹³ Proposition 218 applies to counties, cities, cities and counties, including charter cities or counties, any special district, or other local or regional governmental entity. CAL. CONST., art. XIII C, § 1(b); art. XIII D, § 2(a).

²¹⁴ See Cain at 11. Under Proposition 218, no local government may impose, extend, or increase any general tax until such tax is submitted to the electorate and approved. CAL. CONST., art. XIII C, § 2(b).

²¹⁵ See CAL. CONST., art. XIII C, § 1(a).

²¹⁶ See CAL. CONST., art. XIII C, § 1(d).

²¹⁷ See Cal Rev & Tax Code § 30130.

spending. California does not have a lower level of expenditures and it is not a low-tax state.²¹⁸ Notably, since the passage of Proposition 218, California voters have “approved many bonds, taxes and other revenue enhancements in response” to increased spending.²¹⁹

B. Sales Tax

A sales tax is imposed on retailers as a percentage of their gross receipts. It is important to note that sales taxes are inherently regressive. The amount of sales tax in California ranges from 7.5 percent to 10 percent, with a state average of 8.5 percent.²²⁰ The State Board of Equalization has the primary responsibility of collecting and administering the tax. Other agencies, such as the DMV (tax on private sales of used vehicles), and Franchise Tax Board (use tax reported on personal income tax returns) are also responsible for collecting taxes.²²¹ Most sales taxes go to the state’s general fund (4.2 percent) which means it can be spent on any state program.²²² Under the Bradley Burns Act, 1 percent (Bradley Burns Rate) goes to cities and counties for general purposes.²²³ Local governments sometimes also impose their own optional local rates called Transactions and Use Taxes that are also used for general purposes.²²⁴ Local governments rely on the sales tax to varying degrees to fund local programs. On average, it is the fourth-largest revenue source for local governments and a primary funding source for transportation agencies.²²⁵

The Bradley Burns Act, passed in 1995, authorized local governments to impose their own sales taxes for general purposes, however it is limited in several ways.²²⁶

²¹⁸ See Cain at 12.

²¹⁹ Cain at 24.

²²⁰ Cal Rev & Tax Code § 6051.

²²¹ *Id.*

²²² Mac Taylor, California Legislative Analyst’s Office, An LAO Report: Understanding California’s Sales Tax, 4 (May 2015).

²²³ Cal Rev & Tax Code § 7201.

²²⁴ *Id.*

²²⁵ Taylor at 4.

²²⁶ Cal Rev & Tax Code § 7201.

Proposition 163 (1992) constrains the Legislature’s authority to tax food; Proposition 1A (2004) “prohibits the Legislature from (1) lowering the Bradley-Burns local sales tax . . . or (2) changing the allocation of these revenues.”²²⁷ Proposition 26 applied the 2/3 super majority requirement to a broader variety of state tax changes,²²⁸ and Proposition 172 requires a half-cent of the sales tax to go to local public safety programs.²²⁹

All tangible goods are subject to the sales tax when they are sold at retail, but this excludes businesses that purchase for resale to other businesses.²³⁰ Household spending, such as paying for utilities, groceries (food for home consumption), and certain prescription medicines are generally not subject to the sales tax (although goods like restaurant food, furniture, cars, and clothes are subject to the sales tax).²³¹

There are items that seem as though they would be exempted from the sales tax as otherwise falling within one of the exempted categories but are not, such as over-the-counter pain medication, but not prescription, and medical marijuana is subject to state sales tax. Tangible items that produce food for human consumption are also exempted such as pear trees, plants, animals, seeds, fertilizer, feed, and medicine used for food production.²³² Unlike many other states, California has a standard sales tax base across all cities and counties. Thus, if a good is taxed in one part of the state it will also be taxed in a different part of the state.²³³

There are some items that cannot be included in the sales tax base under the California Constitution (for example, food and insurance), but apart from constitutional limitations on extending the tax base, the Legislature can impose a tax on new items if it is approved by 2/3 of the Legislature. Narrowing the tax base only requires the majority of the Legislature to vote in favor.²³⁴

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 7.

²³⁰ *Id.* at 8.

²³¹ Cal Rev & Tax Code §§ 6351-6380.

²³² *Id.*

²³³ Taylor at 12-13.

²³⁴ *Id.* at 13

C. Excise Taxes

California imposes excise taxes on distributors of specified products. For example, under California's Cigarette and Tobacco Products Tax Program, BOE administers and collects California's excise taxes on tobacco products. These taxes are levied on distributors who sell cigarettes or other tobacco products to wholesalers or retailers. This tax is facilitated through the sale of stamps to distributors, which provides fraud prevention and an effective, easily enforceable method of collecting taxes. More discussion about the tobacco, alcohol, and gasoline excise taxes are discussed in a subsequent section.

In general, for the state, the sales tax is relatively stable year to year whereas the revenue generated from the personal income tax is much more volatile. At the same time, the sales tax is relatively volatile in terms of revenue generation for local governments compared with the stability of the property tax.²³⁵

D. Public Licensing for Businesses

“The cases recognize that ‘tax’ has no fixed meaning, and that the distinction between taxes and fees is frequently ‘blurred,’ taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.”²³⁶

From a public health perspective, “limiting the scope of private interests to ‘grow the market’ is an important consideration.”²³⁷ “The alternative of licensing for private operators works best from a public health perspective if the number of outlets is kept down, giving operators a privileged market position for which they can be held accountable, and there is a personal licensee to be held responsible for what happens in a particular outlet.”²³⁸

²³⁵ *Id.* at 20.

²³⁶ *Sinclair Paint Company v. State Board of Equalization*, 15 Cal.4th 866, 874 (1997). See also *Shapell Industries, Inc. v. Governing Board*, 1 Cal.App.4th 218, 240 (1991).

²³⁷ Robin Room, “Legalizing a market for cannabis for pleasure: Colorado, Washington, Uruguay and Beyond,” *Addiction*, Vol. 109, Issue 3, 345-351, 347 (March 2014).

²³⁸ *Id.*

Licenses are also highly flexible when compared to sales or excise taxes because as long as they reflect the reasonable costs of state regulation—including the costs of protecting against a vast array of externalities like public safety, hospital visits, drug rehabilitation, education, and increased administrative costs—they can be imposed by local and state governments without voter or legislative approval.²³⁹ The importance of utilizing licenses and fees to cover costs of regulating the retail sale of marijuana due to the institutional constraints—the supermajority legislative and voter approval requirements—encumbering the passage of a tax for unanticipated costs necessitates a thorough examination of the legal prerequisites that a fee entails.

Proposition 218 forbids any local government from imposing, extending, or increasing any general tax until it is approved by the electorate.²⁴⁰ The imposition of a tax is not determined by when the law or ordinance was passed, but extends to when the tax is collected.²⁴¹ “Impose” is defined as any time the tax is collected; “extend” means any increase in the duration of an existing tax or fee, which includes a decision to amend or remove an expiration date or sunset provision.²⁴² A tax is increased when the rate increases or when a government body adopts a different mode of calculating the tax if it results in an increased amount that is levied on an individual, parcel, piece of property or activity. Significantly, “increase” of a special or general tax excludes taxes imposed at a

²³⁹ See CAL. CONST. Art. XIII A § 3 (“(b). As used in this section, ‘tax’ means any levy, charge, or exaction of any kind imposed by the State, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law. . .”

²⁴⁰ CAL. CONST., art. XIII C, § 2(b).

²⁴¹ *Howard Jarvis Taxpayers Association v. City of La Habra*, 25 Cal.4th 808, 824 (2001).

²⁴² Gov. Code, § 53750.

rate no higher than the maximum rate previously approved, or a tax that is adjusted in accordance with a schedule of adjustments, including a clearly defined formula for inflation that was adopted prior to November 6, 1996.²⁴³ For our purposes, this permits increase of the rate or amount of a tax on marijuana, if the implementing legislation includes a maximum amount or rate, and the increase falls within the permitted range that received voter or legislative approval. However, the way that the implementing legislation is drafted is critical to the degree of flexibility the government may enjoy in adjusting the rate or amount of a specific tax.

The tax will not be considered “increased” if the voters approve a measure that specifies a range of rates or amounts and the adjustment is made in accordance with that range but if the voters approve of a tax that states it will be adjusted for “inflation,” or some other extraneous proxy, the tax can only be adjusted without “increasing” the tax if the tax is not determined by using a percentage calculation. Thus, a tax that reflects a percentage amount cannot be adjusted for inflation if it results in an “increase” without voter approval (even if the voters already approved of the tax). Extending a tax to a new class of taxpayers is not an “increase,” but rather a new tax that requires those not previously subject to the tax to vote their approval.

The difference between assessments and taxes is that assessments are charges "for benefits conferred"²⁴⁴ while taxes are charges “imposed by or under the authority of the legislature, for public purposes.”²⁴⁵ Taxes are used to fund the government, while assessments pay for special benefits to particular properties for improvements.²⁴⁶ A fee that exceeds the reasonable cost of providing the service or regulatory activity for which it is charged is not necessarily a tax; it may be an illegal fee that allows for recoupment of any surplus paid.²⁴⁷

²⁴³ CAL. CONST., art. XIIC, § 2(b); Gov. Code, § 53750(h)(2)(A).

²⁴⁴ *County of Santa Barbara v. City of Santa Barbara*, 59 Cal.App.3d 364, 379 (1976).

²⁴⁵ *Crawford v. Herrerger*, 85 Cal.App.3d 544, 548 (1978).

²⁴⁶ *Taylor v. Palmer*, 31 Cal.240, 250 (1866).

²⁴⁷ See *Barratt American, Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 686-94 (Cal. 2005) (“Unless there has been voter approval, as prescribed by Section 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service charge is levied. If, however,

“Regulatory fees” are not subject to Proposition 218’s requirements.²⁴⁸ A regulatory fee is distinguished from a tax because a regulatory fee is imposed pursuant to the government’s police power. In the context of regulating the retail sale of marijuana, a majority of fees the state or local governments choose to enforce will easily fit within this category. The police power includes any fee designed to curtail the potential for adverse effects to the community of various activities and are generally imposed for engaging in a regulated activity.²⁴⁹ Since, the police power is the authority to enact laws to promote the public health, safety, morals and general welfare of the community,²⁵⁰ it is hard to imagine any fee related to the sale, distribution, or manufacturing of marijuana to fall outside this category. Cities and counties have a direct grant of authority under the California Constitution to impose fees within their police powers without conforming to the voter approval requirements that other fees, assessments, charges or levies face.²⁵¹

The police power is broad enough to include fees for “measures to mitigate the past, present, or future adverse impact of the fee payer's operations.”²⁵² Generally, fees that pay for regulatory activities are not special taxes if the fees do not exceed the reasonable cost of providing the services for which the fee is charged, and the fees are not collected for unrelated revenue purposes.²⁵³ A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation.²⁵⁴ Such costs include all those incident to the issuance of the

the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess.”).

²⁴⁸ But See *Apartment Association v. City of Los Angeles*, 34 Cal. 4th at 838 (“[T]he mere fact that a levy is regulatory... or touches on business activities... is not enough, by itself, to remove it from article XIII D’s scope.”).

²⁴⁹ *Sinclair Paint Company v. State Board of Equalization*, 15 Cal.4th 866, 875 (1997); *Pennell v. City of San Jose*, 42 Cal.3d 365, 373 (1986).

²⁵⁰ *Community Memorial Hospital of San Buena Ventura v. County of Ventura*, 50 Cal.App.4th 199, 206 (1996).

²⁵¹ See CAL. CONST., art. XI, § 7.

²⁵² *Sinclair Paint Company v. State Board of Equalization*, 15 Cal.4th 866 (1997).

²⁵³ CAL. STATE BOARD OF EQUALIZATION, PROPERTY TAXES LAW GUIDE, California Constitutional Provisions, Art. XIII A §4.

²⁵⁴ *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* 203 Cal.App.3d 1132, 1146 (1988) fn. 18.

license, permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.²⁵⁵

Regulatory fees are valid despite the absence of any perceived benefit accruing to the fee payer.²⁵⁶ A local legislative body need only “apply sound judgment and consider probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the regulatory fee.”²⁵⁷

3. LESSONS LEARNED FROM CALIFORNIA ALCOHOL, TOBACCO, AND GASOLINE TAXES

The most straightforward analogies to marijuana taxation are excise taxes on alcohol, tobacco, and gasoline. Each of these taxes serves the dual purpose of raising revenue and limiting negative externalities. Each has an established history in California and shows what practitioners have learned over years of taxation. Accordingly, each tax provides guidance for marijuana taxation policies.

A. Alcohol Taxation in California

The California Constitution outlines that “[t]he State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State.”²⁵⁸ With this power, the State Legislature has established a per-gallon excise tax collected on the sale, distribution, or importation of alcoholic beverages in California. Although regulation is the responsibility of the Department of Alcoholic Beverage Control, the authority to assess and collect taxes is in the State Board of Equalization.

California assesses taxes on drinks differently depending on the type and concentration of alcohol. Currently, California taxes beer, wine, and sparkling hard cider at \$0.20 per gallon. Champagne and sparkling wine are taxed at a slightly higher

²⁵⁵ *United Business Com. v. City of San Diego*, 91 Cal.App.3d 156, 165 (1979).

²⁵⁶ *Pennell v. City of San Jose*, 42 Cal.3d 365, 375 (1986).

²⁵⁷ 91 Cal. App. 3d at 166.

²⁵⁸ CAL CONST., art. XX, § 22. The Constitution further outlines that the Department of Alcoholic Beverage Control regulates alcohol, but the State Board of Equalization assesses and collects the tax revenue.

rate of \$0.30 per gallon.²⁵⁹ Distilled alcohol, which potentially causes more extreme negative externalities, is taxed at a much higher rate. For distilled liquor that is less than fifty percent alcohol by weight, the tax is \$3.30 per gallon, and \$6.60 per gallon when the alcohol is more than fifty percent alcohol by weight.²⁶⁰

Table III.1: California Alcohol Taxes²⁶¹	
	2015
<100 Proof Distilled Spirits	\$3.30
>100 Proof Distilled Spirits	\$6.60
Beer	\$0.20
Wine	\$0.20
Sparkling Hard Cider	\$0.20
Champagne and Sparkling Wine	\$0.30
(Price per gallon)	

California could take a similar approach to taxing marijuana. Because stronger marijuana potentially creates more public health concerns than less potent marijuana, the State should consider taxing potent marijuana more heavily. The potency of marijuana can be measured by the different Cannabidiol (CBD), Tetrahydrocannabinol (THC), and associated acidic content in the plant.²⁶² As such, just as distilled liquor is taxed at a much higher rate than beer, more powerful marijuana can be taxed more heavily than less

²⁵⁹ CAL. STATE BOARD OF EQUALIZATION, BUSINESS TAX LAW GUIDE, Vol. 3, Alcoholic Beverage Tax Law, Ch. 4.

²⁶⁰ *Id.* at ch. 5.

²⁶¹ Data from Cal. State Board of Equalization, *accessible at* https://www.boe.ca.gov/sptaxprog/tax_rates_stfd.htm#5.

²⁶² See, e.g., Analytical360, Potency Testing, <http://analytical360.com/cannabis-analysis-laboratory/potency-testing>.

potent strands. Also, just as sparkling wine is taxed slightly more than wine or sparkling hard cider, California can differentiate tax rates based on the form of marijuana. For example, trim, edibles, hash, and plants could all be taxed at slightly different rates.

B. Tobacco Taxation in California

Cigarette purchases are subject to a traditional excise tax in addition to cigarette and tobacco products surtaxes, all of which are simultaneously and jointly assessed by the State Board of Equalization.²⁶³ Added together, the current rate is \$0.87 per 20 pack of cigarettes. Revenue from the cigarette tax goes into a general fund, but revenue from the surtaxes are placed in separate funds which have limited uses, such as tobacco-related school education programs and tobacco-related disease research. For marijuana taxation, two important lessons learned from tobacco taxation are the stamp process used to collect taxes and the rigidity with which the tax rate is set.

The cigarette taxes are assessed through a cigarette tax stamp, where licensed tobacco distributors are required to purchase cigarette tax stamps from the California Board of Equalization.²⁶⁴ It is illegal for distributors to sell cigarettes without attaching the required stamp. The stamp has monetary-like security devices, making it difficult for counterfeiters to replicate the stamps.²⁶⁵

Figure III.1: Cigarette Stamp



These stamps serve multiple purposes. For consumers, the stamp ensures that the cigarettes meet certain quality standards. For regulators, the stamp is an easy way to

²⁶³ CAL. STATE BOARD OF EQUALIZATION, BUSINESS TAX LAW GUIDE, Vol. 3, Cigarette and Tobacco Products Tax Law, Ch. 2.

²⁶⁴ CAL. STATE BOARD OF EQUALIZATION, CIGARETTE AND TOBACCO PRODUCTS TAXES, Pub. 93 LDA (June 2015) accessible at <https://www.boe.ca.gov/pdf/pub93.pdf>.

²⁶⁵ *Id.*

police the distribution of cigarettes. This is an important corollary for the marijuana market. Not only are stamp sales a straightforward method of tax collection, but it could be an important mechanism to limit the black market. Black market marijuana would not have access to the stamps, and it would be easy to distinguish whether the product was legally purchased or not.

Another lesson from tobacco taxation is the rigidity with which the tax rate is set. Because changes to tax rates requires an approval of two thirds of the legislature, the tax rate is rarely changed, and as a result, California has relatively low tobacco tax rates. Additionally, although the legislature has made seven attempts to raise tobacco taxes since 2002, each has failed.²⁶⁶ Beyond the fact that a supermajority is required to raise tax rates, interest groups make it difficult for legislation to pass. In 2012, a \$1.00 per pack tax increase was on the ballot, but was rejected, likely in part to the \$47.7 million spent by the tobacco industry to defeat the initiative.²⁶⁷

The marijuana tax rate could be similarly rigid. Because the impacts of marijuana are largely debated, it would be unlikely for the state legislature to reach the required consensus to enact changes. Further, industry groups and citizen groups will rally against unwanted changes, making it even more difficult for the State to change the tax rate.

C. Gasoline Taxation in California

Unlike the alcohol and tobacco excise taxes, which have not changed in more than a decade, the excise tax on motor vehicle gasoline is adjusted annually. In 2010, California passed a law stating, “[f]or the 2011-12 fiscal year and each fiscal year thereafter, the board [of equalization] shall . . . adjust the [fuel tax] rate . . . as to generate [a net neutral] amount of revenue . . .”²⁶⁸ Because revenues from gasoline taxes were limited to offset the negative externalities created by the market, California passed the Fuel Tax Swap in order to change the amount of different taxes levied on gasoline and

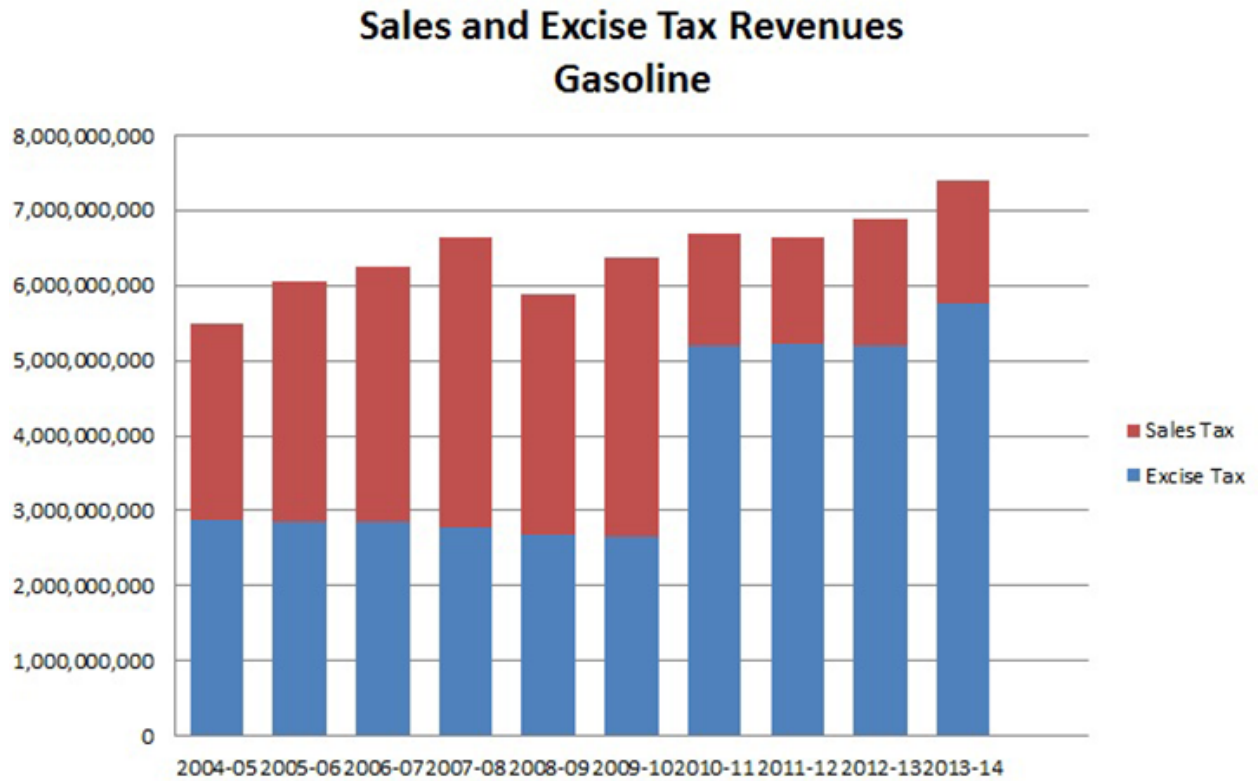
²⁶⁶ Patrick McGreevy, *Health officials would add \$2 tax to packs of cigarettes in California*, LA TIMES, Mar. 3, 2015, accessible at <http://www.latimes.com/local/political/la-me-pc-health-officials-would-add-2-tax-to-pack-of-cigarettes-in-california-20150303-story.html>.

²⁶⁷ Patrick McGreevy, *Tobacco tax initiative proposed for California*, LA TIMES, May 4, 2015, accessible at <http://www.latimes.com/local/political/la-me-pc-tobacco-tax-initiative-proposed-for-california-20150504-story.html>.

²⁶⁸ BUSINESS TAX LAW GUIDE, Vol. 3, Motor Vehicle Fuel Tax Law, Ch. 2, §7360 (b)(2).

increase the amount tax revenue in the state’s general fund. The legislation was intended to “allow[] legislators to pull funding from the state’s transportation budget to fund other projects.”²⁶⁹

Figure III.2: Gasoline Sales and Excise Tax Revenues²⁷⁰



Accordingly, the State Board of Equalization adjusts the excise tax on gasoline each year, accounting for expected gasoline prices and revenue from previous years. However, because taxes in California cannot be adjusted without legislative approval, “[t]he intent of [the fuel tax swap] is to ensure that the act . . . does not produce a net revenue gain in state taxes.”²⁷¹ “[T]he various legislative changes enacted into law **did not authorize the BOE to raise or lower the net taxes on gasoline**, nor did it give the

²⁶⁹ Daniel Nussbaum, *CA Gas Tax Cut 6 Cents–But Don’t Expect to Notice Savings*, BREITBART, Feb. 24, 2015 accessible at <http://www.breitbart.com/california/2015/02/24/ca-gas-tax-cut-6-cents-but-dont-expect-savings/>.

²⁷⁰ From State Board of Equalization. Accessed at https://www.boe.ca.gov/taxprograms/excise_gas_tax.htm.

²⁷¹ BUSINESS TAX LAW GUIDE, Vol. 3, Motor Vehicle Fuel Tax Law, Ch. 2, §7360 (b)(4).

BOE the authority to adjust for the various factors impacting the price of gasoline.”²⁷² Although the tax rate changes each year, drivers do not notice a difference at the pump, and the total government revenue is largely unchanged.

Table III.2: Gasoline Tax by Year²⁷³		
<u>Year</u>	<u>Excise Tax Rate</u>	<u>Tax Revenue</u>
2015-16	\$0.30	n/a
2014-15	\$0.36	Not yet official
2013-14	\$0.395	\$5,763,417
2012-13	\$0.360	\$5,206,304
2011-12	\$0.357	\$5,221,980
2010-11	\$0.353	\$5,203,759

Because of uncertainty about the most efficient tax rate for marijuana, California could similarly enact a taxation scheme that allows for annual adjustments without going through the legislative rigors that make rate adjustments so rare. However, a number of obstacles limit the state’s ability to take the same approach with marijuana as they did with gasoline. The underlying purpose of the fuel tax swap - moving tax revenue from one fund to another - is not existent in the marijuana context. Additionally, because recreational marijuana is a currently nonexistent market with no tax revenue, maintaining revenue neutrality (the overarching feature of the fuel tax swap) may be difficult to achieve.

²⁷² Jerome Horton, Chairman Board of Equalization, Learn More about the Fuel Tax Swap, http://www.boe.ca.gov/members/horton/gasoline_taxes.html.

²⁷³ Data obtained from State Board of Equalization, *accessible at* https://www.boe.ca.gov/taxprograms/excise_gas_tax.htm.

4. LESSONS LEARNED FROM COLORADO AND WASHINGTON MARIJUANA TAXATION

Colorado and Washington's marijuana taxation regimes are different in many respects, but they provide valuable illustrations of the complexities that exist. Colorado's marijuana tax has a number of elements: a 15 percent excise tax on the "average market rate" of wholesale marijuana; a 10 percent state tax on retail marijuana sales; the state sales tax of 2.9 percent; and any local sales taxes and local marijuana taxes (for example Denver has an additional 3.5 percent tax). In total, this equates to approximately a 29 percent overall tax rate.²⁷⁴ However, the revenue collected has fallen short of the projections that accompanied the initiative campaign, leaving Colorado short of the funds it had anticipated collecting for enforcement and the general state funds.²⁷⁵

There are several possible causes for this shortfall, and each could have a similar impact in California. Retailers didn't open immediately, delaying sales. Medical marijuana sales have remained constant, despite expectations that they would be cannibalized by retail marijuana. This could be explained by the lower tax burden on consumers of medical marijuana which keeps its price lower than that for retail marijuana (medical marijuana purchases are subject only to state and local sales taxes and a \$15 registration fee, or approximately one-third of the tax imposed on retail marijuana). One analysis found that the black and gray markets were still substantial, estimating that the gray market (home growing and caregivers) is supplying approximately 35 percent of the demand while the black market is supplying approximately 6 percent. The gray and black markets are likely to be responsive to the price of retail marijuana, suggesting that making up the deficit through higher taxes may result in that market continuing in its current state or even growing. The overall sales in Colorado grew throughout the year, and the retail marijuana market likely attracted visitors to the state, with people holding an out-of-state identification card accounting for 44 percent of retail sales.²⁷⁶ To the

²⁷⁴ Joseph Henchman, *Taxing Marijuana: The Washington and Colorado Experience*, TAX FOUNDATION, Aug. 25, 2014, accessible at <http://taxfoundation.org/article/taxing-marijuana-washington-and-colorado-experience>.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

extent that retail marijuana provided demand for travel to Colorado, the additional commerce that resulted should be attributed to this regime.

Washington State imposes a multitude of taxes, and at each stage of the supply chain: a 25 percent tax on producer sales to processors, a 25 percent tax on processor sales to retailers, a 25 percent tax on retailer sales to customers, the state Business & Occupation (B&O) gross receipts tax, the state sales tax of 6.5 percent, and local sales taxes for a combined effective tax rate of 44 percent.[14] This article goes on to note impressive revenue projections, including \$122,459,893 for the period 2015-2017 and \$336,898,396 from 2017-2019.²⁷⁷

There are several other noticeable differences between Colorado and Washington as it relates to tax and licenses:

- Vertical integration is allowed in Colorado so that businesses can both produce and sell marijuana to consumers, with an additional stipulation that these vertically integrated businesses are required to produce the majority of the pot they sell. On the other hand, Washington does not allow vertical integration among the three stages of business: producers, processors and retailers. Some marijuana businesses in Washington have complained about how this limits their ability to efficiently bring marijuana to market at a low price.
- In Colorado, residents are allowed to grow up to six cannabis plants at home (or twelve plants per household), which likely contributes to the existence of the sizable gray market. Washington does not allow any home production and regulators have also suggested reducing the number of pot plants patients with medical licenses should be allowed to grow.
- Colorado's license fees are considerably higher than Washington's, with charges between \$2,750 and \$14,000 with an additional \$5,000 application fee for new businesses. Washington charges only \$250 to apply and \$1,000 per year for a marijuana business license.
- Colorado's law included a local opt-out of the law which offers local jurisdictions the ability to not allow marijuana businesses to operate, and a number of jurisdictions have pursued this option. Washington does not have this option, and

²⁷⁷ *Id.*

instead cities have attempted to create zoning ordinances to keep out marijuana businesses, but state regulators have been clear that jurisdictions may not ban pot shops entirely.

Each state has its own nuances that will in all likelihood have a substantial effect on the development of their respective retail and medical marijuana markets, but also on their state's marijuana policy in general. This may take several years however, as this is still very much a growing industry undergoing rapid change and expansion over a short period of time. Both of these states have shown a willingness to adapt and change their tax policies since they were enacted, and that behavior can be expected to continue as more data is collected, more is understood about these levers and their effects, and public opinion evolves.

With that background, we next address specific questions that California will need to answer if they choose to legalize recreational marijuana.

5. DECISION: HOW MUCH SHOULD CALIFORNIA TAX MARIJUANA?

If California legalizes recreational marijuana, the State will need to set a tax rate. This is much easier said than done. Colorado and Washington have set differing rates—one estimate states that Washington's overall effective tax rate on marijuana is 44 percent, while Colorado's is only 29 percent.²⁷⁸ California cannot establish both a high tax rate and a low tax rate, so this decision is mutually exclusive. For the purpose of this paper, we do not attempt to compute the optimal rate, nor do we argue for any particular range of acceptable levels of taxation. We simply provide some guidance to consider when setting the rate. Also, it is critical to remember that due to the rigidity of tax rates, setting the initial tax rate at an appropriate level is important because it may be difficult to adjust the rate later.

Option 1: High Taxes

²⁷⁸ *Id.*

High taxes would lead to competing interests in both raising tax revenue and limiting collateral consequences of marijuana use.

A high tax rate has the potential to both increase and decrease maximum government revenue. If marijuana is an inelastic market, then consumption will not vary much based on price. In this case, high taxes will lead to increased government revenue. However, it is not certain if marijuana is an inelastic good. Marijuana is less addictive than tobacco, and increased tobacco taxes have shown to decrease the amount that consumers purchase tobacco. As such, a high tax rate could significantly limit the amount of marijuana consumed, in which case a high tax rate could raise less money than a lower tax rate. Further, the cost of producing marijuana is uncertain. Under a legal regime, the market may see extreme benefits from economies of scale that drive the price of marijuana down. Low production costs will interact with high tax rates differently than with low production costs. Due to the lack of a recreational marijuana market in California, it is difficult to know how much consumers will demand marijuana, how responsive those consumers will be to price changes, and how much producers will be able to supply marijuana. Because of the market uncertainty, it is difficult to know how a high tax will impact the net revenue.

A high tax rate also has an ambiguous impact on public health and the other collateral consequences of the marijuana market. On the one hand, a high tax rate will likely limit the amount of marijuana consumed, which would also limit the extent and severity of the negative consequences associated with marijuana consumption. This is also in line with the notion of Pigovian taxes that pass some of the cost of the societal burden to the individual creating the problem. However, a high tax rate could also negatively impact public health. If the tax rate is prohibitively high, the legal recreational market may not eliminate the black market for marijuana, and consumers would still purchase marijuana from drug dealers and expose themselves to other harmful drugs and more serious crimes. Lastly, high taxes may be unjust. High marijuana taxes would extract a greater proportion of income from low-income populations than the proportion of income from wealthier groups, and it would be unjust for government to extract more money from poorer citizens to pay for programs that generally benefit the entire population.

Regardless of the market specifics, for goods without large negative externalities, higher tax rates always create greater deadweight loss. That is, any increase to governmental revenue is offset by an even greater loss of consumer and producer welfare. For this reason, many interest groups are opposed to high taxes, and they may be similarly opposed to high marijuana taxes.

Option 2: Low Taxes

Similar to the above discussion, low tax rates have an ambiguous impact on public health and revenue creation.

Although low taxes are typically more efficient, the government may not be able to extract a meaningful amount of revenue with a low tax, especially if the tax is based on price and the price of marijuana is much lower than anticipated. Also, a low tax rate would encourage more consumption of marijuana while limiting the amount of government revenue. This would essentially allow for more potential problems with public health, and the government would be less equipped to pay for the additional problems. Conversely, a benefit of a low tax rate would be the greater likelihood of eliminating the black market, so users would not need to traverse all of the hazards of purchasing marijuana illegally.

In short, knowing the optimal tax rate for recreational marijuana is difficult. The limited experience of recreational marijuana provides a limited foundation for setting a precise tax rate. If California legalizes marijuana, much thought should be given to how a high or low tax would impact society and the market.

6. DECISION: WHAT TYPE OF TAX SHOULD CALIFORNIA ASSESS TO MARIJUANA?

Unlike the decision of how much to tax marijuana, the decision of what type of tax to use is not mutually exclusive. The State can use any number of these taxes to regulate consumption and increase government revenue. In fact, Colorado assesses a 15

percent excise tax, a 10 percent state tax on retail sales, a 2.9 percent state sales tax, and varied local marijuana taxes such as Denver’s 3.5 percent tax.²⁷⁹

We evaluated the different tax options based on their flexibility, future revenue maximization, simplicity, administration costs, potential for gaming, and ability to regulate the market. Beyond the short written evaluation for each tax, see Table III.3 for a comparison of how each tax is expected to perform under each factor.

Table III.3: Type of Tax Decision Matrix

	Future Flexibility	Future Revenue Maximization	Simplicity	Administration Costs	Potential for Gaming	Ability to Regulate Usage	Ability to Regulate Price
State Sales Tax							
State Excise Tax							
Local Sales Tax							
Local Excise Tax							
Business License							
Consumer License							

Option 1: State Sales Tax

California imposes a 7.5 percent sales tax on the sale of most goods and services, and localities have the option of imposing an additional sales tax. The base 7.5 percent sales tax will most likely apply to marijuana sales. Both Colorado and Washington apply the state sales tax to marijuana sales.

The primary benefit of the state sales tax is that it is simple and does not require administration. But, the state sales tax is nominal and rigid, and it does not fulfill all of

²⁷⁹ Joseph Henchman, *Taxing Marijuana: The Washington and Colorado Experience*, TAX FOUNDATION, Aug. 25, 2014 accessible at <http://taxfoundation.org/article/taxing-marijuana-washington-and-colorado-experience>.

the needs of an effective marijuana tax regime. Ultimately, because the sales tax serves a more general purpose beyond the scope of marijuana consumption, applying the state sales tax to marijuana is likely and fairly uncontroversial. The State should account for the nominal sales tax when deciding which excise taxes and licensing fees should also apply to marijuana. For the state, the sales tax is relatively stable year to year whereas the revenue generated from the personal income tax shows high volatility.²⁸⁰

Option 2: State Excise Tax

Using a state excise tax for marijuana would allow California to exercise a high degree of customization for its tax, both in terms of rate and application. Like in Colorado and Washington, it could use an excise tax at any stage of the supply chain and unlike the state sales tax, the rate can exceed 7.5 percent. With this high degree of revenue maximization potential, there is also a significant amount of ability to regulate price by making tax rate changes which are passed directly to the consumer in the form of either a higher or lower total amount paid. This change in price is likely to affect consumer behavior, with larger behavior changes expected with larger changes in price. However, state excise taxes also present challenges: there is limited future flexibility to change the tax rate and structure because of the stringent requirements for changes to tax law; depending on the complexity and processes involved in carrying out the specific excise tax (e.g. potency-based excise tax at processor level), administration costs could be high. Finally, there is increased potential for gaming or deciding to try to avoid or circumvent taxes as excise taxes place pressure on businesses.

Option 3: Local Sales Tax

Due to the restrictions on localities with respect to local sales taxes, local sales taxes offer an inflexible means of a local government raising the overall tax burden by a maximum of 1.5 percent. They are simple and easy to administer, but offer only a limited ability to raise revenue, regulate price or have an effect on usage. The attractiveness of using a local sales tax will depend in part on the characteristics of a locality and how those characteristics influence the city's average local sales tax revenue per resident in a

²⁸⁰ Taylor, 20.

legalized marijuana locality. With all local taxes, there is also a concern about creating pricing wars between cities as they compete on price with lower and lower taxes, seeking to become a city of choice for people’s purchasing. This price warring could effectively drop the bottom out from the market and has the potential to be a divisive aspect of marijuana taxation.

It is important to note that while local governments may increase the sales tax, the variance among California’s cities and counties is pretty insignificant.²⁸¹ Rural counties are more likely to have a 7.5% sales tax rate. The rate that will be applied is the rate in the location where the buyer takes possession of the good.

Even though the Bradley-Burns Rate is uniform throughout the state, the amount of revenue per resident that each city raises varies significantly.²⁸² These variations reflect average income disparities across cities as well as average incomes in surrounding cities, or the relative degree of retailers located within each city.²⁸³ A city could have a high average income (Atherton) but a low average dollar amount of revenue per resident (\$18) if it contains few retailers.²⁸⁴

The sales tax is relatively volatile in terms of revenue generation for local governments compared with the stability of the property tax.²⁸⁵ Cities can shape their policies to further their sales tax revenue generating goals even without containing many retailers or inhabitants with high incomes. For example, the city of Auburn is neither populated with large numbers of retailers nor residents with high incomes, yet the city’s average revenue per resident is \$280 due to a business within its borders that uses a “cardlock system.” These businesses are organized in a way to concentrate taxable sales in a single location even when the transaction —when the buyer physically possess the good—occurs at many locations.²⁸⁶

²⁸¹ Taylor notes that “two-thirds of Californians live in cities or counties with 8 percent or 9 percent rates.

²⁸² Taylor, 18. (Compare Commerce, California: \$1,150 per resident -outlet mall with Los Angeles: \$ 90 per resident)

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 20.

²⁸⁶ See Cal Rev & Tax Code §7205 (“Card lock system” means a system where owners of unattended card lock fueling stations form a network whereby customers may purchase fuel at any of the network’s

Because Bradley Burns Revenue is allocated to cities based on the location of sale, Cities compete for Bradley-Burns Revenue by trying to attract retail development within their borders. This can be seen in cities' reservation of land for development as well as in fiscal policies (e.g., sales tax rebates to retail businesses) that are favorable to retailers to increase retail development. Attracting businesses that sell "cardlock systems" is a highly effective way of shifting the place of sale into the city without the actual economic activity occurring within the city.²⁸⁷ This practice allows businesses to make large advanced purchases in the city, while the actual transfer of the good occurs outside the city.

Thus, local governments with low property tax revenues may pursue fiscal policies to capitalize on the retail sale of marijuana. Because of the uncertainty surrounding the emergence of the marijuana retail market, centralized regulation is critical to monitor potential policies that could produce deleterious outcomes. For example, local governments may be incentivized to pursue lenient business regulations or competitively "price" business licenses in order to maximize local sales tax revenues by channeling the location of sales within their borders. You can imagine the emergence of highly profitable cardlock systems that engage in high volume sales of marijuana. Cities would naturally compete to host these companies within their borders. This presents a situation ripe for a race to the bottom.

Option 4: Local Excise Tax

Local excise taxes offer many of the same advantages as state excise taxes: they offer the opportunity for maximum revenue generation because there are no limits on their rates and this ability to raise taxes provides influence over marijuana price and usage. Initially, local excise taxes can be set up to be very customized, however once they are in effect there is limited flexibility to make significant changes. Any increase in complexity of the system will raise the costs to administer and comply with the tax, and there is potential for gaming that increases with this complexity. Local excise taxes being

participating fueling stations by use of a card issued to the customer, and where prices are not posted at the pump and no receipt is given at the time of delivery.)

²⁸⁷ Taylor, 19.

different across municipalities may eventually lead to price wars between cities that result in lower and lower prices until the market bottoms out with no benefit to the municipalities for allowing marijuana sale.

Option 5: Business License

Business licenses offer the potential for more flexibility with rate changes as new and increased costs are recognized by the state or localities after the marijuana industry develops beyond its nascent stages. In order to be considered a business license “fee,” as opposed to a tax which requires 2/3 voter or legislature approval, a fee must only cover “reasonable” regulatory costs that relate to the activity that is being licensed. The definition of “reasonable” would likely be up to a court to decide, however it could be possible to include even indirect (adverse) consequences of legalized marijuana in this calculation, such as additional public health costs or education programs. However, the fee limitation also limits the degree to which a business license could be used to maximize future revenue and price. Business licenses could be structured in unique ways to try to limit consumption or for other goals, such as limiting the number of available business licenses, or using an auction format to determine who gets licenses.

Option 6: Consumer License

California could also administer a consumer license system that would operate similar to hunting licenses. Hunting licenses are essentially a fee that serves the purpose of raising revenue and maintaining the populations of wild animals. The California Department of Fish and Wildlife administers the licensing process. Hunters and fishers pay a fee to have a license that allows them to hunt on specific lands for one year, after which they need to pay the fee again for the next year. To obtain a license, hunters need to take a course in hunting safety. Fees for California residents are less than fees for out-of-state hunters.²⁸⁸

California could administer a similar process for recreational marijuana where consumers must obtain a usage license before purchasing or consuming marijuana. The

²⁸⁸ Cal. Dep’t of Fish & Wildlife, Hunting Licenses and Tags, <https://www.wildlife.ca.gov/Licensing/Hunting>.

state could require a class on the risks of marijuana use, and it could charge a higher fee to out-of-state consumers who do not bear as much of the burden of the negative externalities associated with the marijuana market.

One of the benefits of this approach is that individual licensing fees may be much more flexible than taxes. If the State learns that it taxed marijuana too much or too little, the state may be able to remedy the mistake by adjusting licensing fees, which could be more feasible than adjusting taxes. However, a recreational marijuana licensing program does have some setbacks. The process of creating and administering an individual consumer license program is costly, and the system would require additional policing to ensure that only licensed individuals have marijuana. Further, if the process to obtain a license is too complicated, many users may avoid the legal market and continue to purchase marijuana on the black market.

Option 7: Value-Added Tax (VAT)

A value-added tax is “[a] type of consumption tax that is placed on a product whenever value is added at a stage of production and at final sale.”²⁸⁹ For accounting purposes, the tax is the price of the product sold, less any other material costs that have already been taxed. The consumer also pays a tax when purchasing the product.²⁹⁰

Although some argue for a value-added tax on marijuana, the result would be problematic. The value-added tax has never been used in the United States, and whether the United States should more regularly use the value added tax is highly debatable. Legalized recreational marijuana will be controversial enough that it does not need the added burden of also being an experimental field for the value-added tax. It is functionally equivalent to an excise tax, and for the purposes of this analysis we have not considered it beyond this.

7. DECISION: WHAT SHOULD BE THE BASE OF THE TAX?

²⁸⁹ Investopedia, Definition of ‘Value-Added Tax – VAT’, <http://www.investopedia.com/terms/v/valueaddedtax.asp>.

²⁹⁰ *Id.*

Similar to the type of tax, this decision is not mutually exclusive. California may choose to use any number of these bases to tax marijuana. However, for simplicity, it may make more sense for California to choose only one primary tax base. Colorado and Washington both opted to base marijuana tax on final sales price, but many other options are also viable.

Similar to the decision of which tax to use, the factors we considered to evaluate the different bases include flexibility to change the rate, future revenue maximization, simplicity, administration costs, potential for gaming, and ability to regulate usage. See Table III.4 for a summary of this analysis.

Table III.4: Tax Base Decision Matrix

	Future Flexibility	Future Revenue Maximization	Simplicity	Administration Costs	Preventing Gaming	Ability to Regulate Usage	Ability to Regulate Price
Simple Weight	3	3	1	2	1	3	3
Price	4	4	2	1	2	4	4
Potency	2	2	3	3	3	1	2
Differentiating by Form (Potency and Weight)	1	1	4	4	4	2	1

1 = Most effective
4 = Least effective

Option 1: Simple weight

The tax could be based on the weight of the marijuana, where consumers pay a tax per ounce of marijuana purchased. For example, many states tax tobacco based on each ounce of tobacco sold, and California taxes gasoline by the gallon, which would be the same as taxing marijuana by the ounce. Taxing based on weight is extremely straightforward and would be more simple and create less potential for gaming than any other option. However, this option does incentivize producers to sell highly potent marijuana in small amounts in order to pay a smaller tax per dose. Taxing marijuana by

the ounce would have less impact on the amount of marijuana produced, because suppliers will pay a flat rate per ounce and will not be incentivized to drive price down by flooding the market or making a lower quality product.²⁹¹

Option 2: Price

The main benefit of using price as the tax base is simplicity. Consumers and producers are accustomed to paying a percentage of the sales price as a tax. Additionally, administering the tax is almost costless. It does not require an additional process to weigh or test the marijuana. Taxing based on price also has limitations. Because the market will be new and unpredictable, the price could be volatile, and the ability of the tax to raise revenue or regulate behavior will be largely impacted based on the changes in pricing.

Taxing based on price also allows some potential for gaming. One way that producers can sidestep priced based taxes is to bundle the product with another good. For example, a company could operate a sort of parlor where customers pay a price to be at the venue, and they are then presented with music, coffee, tea, and marijuana for a minimal price or for free. Because the marijuana is bundled with the event, they sidestep the sales price and the tax.²⁹²

Option 3: Potency

California can tax marijuana based on the potency of the plant.²⁹³ Tetrahydrocannabinol (THC), Cannabidiol (CBD), and associated acidic content in the plant can serve as the baseline for marijuana potency. California could require marijuana to be tested for THC and CBD and then levy a tax based on the strength of the marijuana.

Taxing based on the potency of the marijuana is a particularly attractive option if the primary concern of the State is to limit the negative externalities associated with

²⁹¹ See JONATHAN P. CAULKINS ET AL., *CONSIDERING MARIJUANA LEGALIZATION INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 77 (2015).

²⁹² *Id.* at 78-79.

²⁹³ See ROBERT J. MACCOUN, *The paths not (yet) taken: Lower risk alternatives to full market legalization of cannabis*. In K. Tate, J. L. Taylor, & M. Q. Sawyer (eds.), *Something's in the air: Race and the legalization of marijuana* (pp. 40-53), Routledge (2013).

marijuana use. More potent marijuana is a potentially more serious threat to public health. Stronger marijuana could more likely lead to traffic accidents, dependency, limited productivity, etc. If the main purpose of the tax is to limit these collateral consequences, than the State will want to tax stronger marijuana at a much higher price than its less potent counterparts. As mentioned above, alcohol is a good example of this practice, where distilled liquor with a high alcoholic content is taxed considerably more than beer or wine.

Another benefit from taxing based on potency is that it will encourage predictability for consumers. Because the potency of marijuana plants is highly variable, it can be difficult to predict how much of a high a consumer will get from unknown marijuana plants. By taxing for potency, consumers will know the relative amount of intoxicants in the plant, and they will be able to anticipate how the product will impact them.

A prominent hurdle to taxing based on potency is the complexity required to establish a system that tests marijuana potency. Testing marijuana for THC is not the simplest process. As such, the cost of setting up a dependable process and continuing to administer that process is much greater than a tax regime based on price or weight.²⁹⁴

Option 4: Differentiation by Form of Marijuana

A separate approximation for potency is taxing based on the part of the plant from which the marijuana is extracted. The bud of the plant is often more potent than the trim. Colorado and Oregon have differentiated tax rates between marijuana based on bud and trim. The process, however, is not bullet proof. There is still a significant amount of potency variety within each category, and the line that separates the bud from the trim can be difficult to definitively draw.²⁹⁵

Marijuana taxation should also account for concentrated marijuana which is consumed through vaporization. Electronic cigarettes are becoming increasingly more popular, but they are not taxed as tobacco. Marijuana taxation should account for the fact

²⁹⁴ For an extended discussion, see JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 80-82 (2015).

²⁹⁵ *Id.* at 83.

that marijuana can be sold in a number of different forms, and the State should be ready to tax all of the different forms.

8. ADDITIONAL CONSIDERATIONS

The above questions represent three of the more basic decisions facing California when implementing the best tax regime for recreational marijuana. However, we are unable to address all of the complexities surrounding marijuana taxation in this paper. As such, we briefly mention a few other tax issues that California should consider before legalizing recreational marijuana.

A. Federal Income Exemption – 280E

In 1982, Congress enacted the following language into the tax code.

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.²⁹⁶

In short, because Marijuana is a schedule I drug under the Controlled Substances Act, marijuana producers cannot deduct typical business expenses like most other businesses do. This has led some producers in Colorado and Washington to pay exuberant federal income taxes. The New York Times reported that one medical marijuana dispensary owner earned \$53,369 last year, and paid \$46,340 in taxes.²⁹⁷

A U.S. Senator from Oregon, Ron Wyden, recently proposed legislation that would “[a]mend[] the Internal Revenue Code to exempt a trade or business that conducts marijuana sales in compliance with state law from the prohibition against allowing

²⁹⁶ 26 U.S.C. § 280E.

²⁹⁷ Jack Healy, *Legal Marijuana Faces Another Federal Hurdle: Taxes*, N.Y. TIMES, May 9, 2015, accessible at http://www.nytimes.com/2015/05/10/us/politics/legal-marijuana-faces-another-federal-hurdle-taxes.html?_r=0.

business-related tax credits or deductions for expenditures in connection with trafficking in controlled substances.”²⁹⁸ This bill is currently being reviewed in the Senate Finance Committee.

B. State vs. Local Taxation and Price Wars

Marijuana legalization often discusses the balance between state and local control. As noted, Colorado allows localities to opt-out of allowing cannabis shops, and Oregon plans to take the same approach.²⁹⁹ Although some local differentiation could be beneficial, as noted above, allowing localities significant control over the tax rate could lead to marijuana price wars, which may undermine the government’s ability to raise revenue and regulate marijuana usage.

For example, if California allowed each county complete autonomy to set a tax rate and keep most of the revenue, each county would have the incentive to have a slightly lower tax rate than neighboring counties in order to bring in nonresident consumers and drive up revenue. Such an incentive could result in overall tax rates that suboptimally limit negative externalities and do not maximize the state’s ability to raise revenue.

C. Other Considerations

Other areas that require further analysis are the stage of distribution for taxation, which we have touched on but not fully explored, how the state explicitly differentiates between the medical and recreational marijuana markets, and the rationale behind those differences, and whether California should have residency requirements that affect taxes paid. This list of additional issues to explore is not meant to be exhaustive but only highlights areas we encountered that appear most ripe for analysis.

²⁹⁸ *Summary: Small Business Tax Equity Act of 2015*, S. 987, 114th Cong. (2015).

²⁹⁹ Oregon Liquor Control Commission, *Implementing recreational marijuana in Oregon* (Feb. 2015), accessible at <http://www.oregon.gov/olcc/marijuana/Documents/Listening%20tour%20presentation.pdf>.

IV. LABOR & EMPLOYMENT ISSUES

1. REGULATORY CONSIDERATIONS FOR MARIJUANA LEGALIZATION: LABOR & EMPLOYMENT ISSUES

Protecting the rights of workers is ingrained in American history. And so too is our tradition of prohibiting the use of certain intoxicating substances. As states begin to allow recreational marijuana use within their borders, how will workers in an industry—and industry expressly illegal at the federal level but legal at the state level—be able to organize and call attention to unfair labor practices? In California specifically, what kinds of protections can workers in a legal marijuana industry expect to enjoy?

A. The Scope of NLRA Protection

The National Labor Relations Act seeks to give workers “freedom of association, self-organization, and designation of representatives of their own choosing” in order to equalize the bargaining power between employers and employees and limit interruptions to the free flow of commerce.³⁰⁰ The NLRA provides protections for the collective activities of workers, and regulates “groups of workers for extended periods of time.”³⁰¹ Specifically, the Act protects “the right of employees to engage in protected concerted activities-group action to improve wages, benefits, and working conditions and to engage in union activities and support a union.”

The Act includes a broad definition of who constitutes an “employee” receiving protection. Under the NLRA, the term “employee”:

shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .³⁰²

³⁰⁰ 29 U.S.C. § 151 (1947).

³⁰¹ Kirsten Zerger, *The NLRA Agricultural Exemption - A Functional or Mechanical Approach*, 2 *BERKELEY J. EMP. & LAB. L.* 131 (1977).

³⁰² 29 U.S.C. § 152(3) (1947).

In short, an “employee” under the NLRA is anyone who works for an “employer” under the Act. The definition of “employer” is similarly broad, including almost any person or entity giving employment, save the federal and state governments, households, and a few other minor exceptions.

With such broad prescriptions, one might think that any worker’s collective activities are protected under the NLRA. However, also included in the Act’s definition of covered “employees” is an explanation of those workers exempted from protection. Under the NLRA, the term “employee”:

. . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

The exclusion of agricultural workers doesn’t appear to be nefarious; instead, it’s likely that Congress had one of two concerns.³⁰³ First, that most farming operations at the time of the NLRA’s enactment were family farms whose workers would be considered domestic workers and excluded due to the acts definition of “employer,” or second, that most farming operations at the time did not implicate interstate commerce, meaning their regulation was outside Congress’ jurisdiction.³⁰⁴

The NLRA does not give much guidance as to who qualifies as an exempted “agricultural laborer.” The term is not defined in the Act. Instead, Congress instructed the NLRB, the governmental agency charged with implementing the NLRA, to borrow the definition of “agriculture” from the Fair Labor Standards Act (FLSA). FLSA provides that “agriculture” includes:

farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing

³⁰³ 79 Cong. Rec. 9668 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935 at 3202-03 (1985).

³⁰⁴ *Id.*

animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.³⁰⁵

In a series of cases, the Supreme Court has adopted and applied a test for determining whether particular workers should be considered “agricultural” or “non-agricultural” under FLSA’s definition.³⁰⁶ A worker will be considered an “agricultural” working – and be excluded from the right to organize – if he or she is engaged in primary or secondary farming. “Primary farming” comprises the tasks explicitly outlined in FLSA’s definition of “agriculture,” such as “cultivation and tillage of the soil, dairying,” etc.³⁰⁷ “Secondary farming” comprises other tasks that would be performed “by a farmer or on a farm as an incident to or in conjunction with such farming operations.”³⁰⁸

It’s worth mentioning that “agriculture” has been construed in a narrow way, specifically in the context of large, vertically-integrated farming operations. In *Holly Farms Corp. v. N.L.R.B.*, the Supreme Court has that a vertically integrated farming operation can relinquish its status as a “farm” when it hires independent contractors—workers exempted from NLRA protections—to perform farming tasks.³⁰⁹ Then, because they are no longer working on a farm or for a farmer, any employees hired to carry out tasks subsequent to the independent contractors’ tasks will not likely be considered to be engaged in “secondary farming,” and thus, will likely receive protection under the NLRA. By limiting both the definition of “agriculture” under FLSA and “employer” under NLRA, the decision makes protections more available for employees of large, vertically integrated farming operations.

Further instruction comes from regulations promulgated by the Department of Labor.³¹⁰ These regulations provide that a practice is incident to or in conjunction with

³⁰⁵ 29 U.S.C. 203(f) (2006)

³⁰⁶ *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949); *Bayside Enters. Inc. v. N.L.R.B.*, 429 U.S. 298 (1977); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996).

³⁰⁷ *Farmers Reservoir & Irrigation Co.*, 337 U.S. at 762.

³⁰⁸ *Bayside Enters Inc.*, 429 U.S. at 301.

³⁰⁹ *Holly Farms*, 517 U.S. at 400.

³¹⁰ 29 C.F.R. § 780.144.

farming operation—“secondary farming”—only if it amounts to “an established part of agriculture,” “is subordinate to the farming operations involved,” and “does not amount to an independent business.”³¹¹ Processes that are “more akin to manufacturing than to agriculture” are not incident to or in conjunction with farming operations.³¹² When determining whether practices are incident to or in conjunction with farming operations, an examination and evaluation of all relevant factors is required,³¹³ and The Department of Labor regulations contemplate a comprehensive list.³¹⁴ One of the most important factors is the type of product resulting from the practice. If the raw or natural state of the commodity has been changed, this is a strong indication that the practice is not agricultural work.³¹⁵

B. The NLRA and the Marijuana Industry

Though marijuana remains under federal prohibition, two cases involving medical marijuana dispensary workers worked their way to the NLRB. Both settled and did not result in a decision by the NLRB. However, the procedural history and early memoranda in these cases shines a light on how the NLRB might eventually grapple with these issues.

In 2013, a group of processing assistants, members of the United Food and Commercial Workers (UFCW), brought suit for unfair labor practices against Wellness Connection of Maine, a medical marijuana dispensary. This action marked the NLRB’s first involvement in a labor dispute within the marijuana industry.

³¹¹ *Id.*

³¹² *Id.*

³¹³ 29 C.F.R. § 780.145.

³¹⁴ In determining whether practice is incident to or in conjunction with farming operation, the Department of Labor regulations urge the consideration of “. . . the value added to the product as a result of the practice and the length of the period during which the practice is performed” and also “whether products are sold under the producer’s own label the general relationship of the practice to farming; the size of the operations and respective sums invested in land, buildings and equipment for regular farming and for performance of the practice; the amount of the payroll for each type of work; the number of employees and the amount of time they spend in each of the activities; the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations; the amount of revenue derived from each activity; the degree of industrialization involved; and the degree of separation established between the activities.” 29 C.F.R. §§ 780.145, 780.147.

³¹⁵ 29 C.F.R. § 780.147.

Eventually, the NLRB would find some merit in the claims and pursue an investigation, but before that the agency had to decide whether it had jurisdiction over the dispute—a tricky question for several reasons. Finding it did indeed have jurisdiction to hear the dispute, The NLRB issued a memorandum outlining its theory.

First, as mentioned to above, marijuana remains illegal at the federal level. Should the NLRB find jurisdiction over an enterprise that explicitly violates federal law? The NLRB said yes. The agency cited recent Department of Justice policies indicating that DOJ would decline to prosecute medical marijuana companies for violations of federal law. The NLRB concluded that this federal policy creates a situation “in which the medical marijuana industry is in existence, integrating into local, state, and national economies, and employing thousands of people, some of whom are represented by labor unions or involved in labor organizing efforts despite the industry’s illegality.”

Next, by virtue of its federally prohibited status, medical marijuana industries are confined to individual states. Should the NLRB find jurisdiction even where production and consumption are intended to be wholly intrastate? The NLRB said yes. The Supreme Court had previously found that Congress’ regulatory powers under the Commerce Clause could reach commodities produced and consumed in a single state. The Court said that “production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.” Because Congress vested the NLRB with “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,” the NLRB could also reach disputes implicating a wholly intrastate industry.

Finally, processing assistants work with raw cannabis plants. Should the NLRB find jurisdiction over a dispute brought by these workers or dismiss the action because these employees are “agricultural workers”? The NLRB again found jurisdiction. The agency found that because the processing assistants “transformed” the raw cannabis plant, their work was “more akin to manufacturing than agriculture.” Moreover, the NLRB concluded that the dispensary’s “processing functions were not subordinate to the

[dispensary's] farming operations.” The functions were separate and largely completed by different individuals.³¹⁶

Though *UFCW v. Wellness Connection of Maine* ultimately settled, the memoranda and early procedural history help illustrate how the current NLRB might contemplate its jurisdiction over disputes and the scope of NLRA protection for medical marijuana dispensary workers. Early this year, another case, *UFCW v. Compassionate Care Foundation*, worked its way to the agency. The NLRB, by allowing the dispute to proceed towards oral argument, seemed to reiterate its approval of the findings in its earlier memorandum. Like the *Wellness Connection* case, the *Compassionate Care Foundation* settled before it reached the Board.

C. The Scope of CALRA Protection

The California Agricultural Relations Act seeks to “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.”³¹⁷ The Act states the policy of the State of California: “to encourage and protect the right of farm workers to act together to help themselves, to engage in union organizational activity and to select their own representatives for the purpose of bargaining with their employer for a contract covering their wages, hours, and working conditions.”³¹⁸ The Agricultural Labor Relations Board is the agency that administers CALRA. The Act permits the Board to assist workers in conducting secret elections to select a union or other representative to bargain with their employer, if they wish. The Act also gives the Board authority to investigate, process and take to trial employers or unions who engage in unfair labor practices.

The California Agricultural Relations Act applies only to agricultural employers, agricultural employees, and labor organizations that represent agricultural employees. The Act defines agricultural employers and agricultural employees as those who employ

³¹⁶ The NLRB went on to find that crossover between processing and production duties would not change its determination. In that case, the NLRB would impose a “substantiality” requirement to determine whether the non-agricultural duties were sufficient to warrant protection of the Act.

³¹⁷ See California Labor Code, Division 2, Part 3.5, Section 1140, *et seq.*

³¹⁸ “*A Handbook on the California Agricultural Labor Relations Law*,” The Staff of the Agricultural Labor Relations Board, available at: <http://www.alrb.ca.gov/content/pdfs/formspublications/handbook/handbook0207.pdf>.

those engaged in “agriculture” or those who themselves engage in “agriculture.”³¹⁹ The definition of “agriculture” in the Act should seem familiar:

farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.³²⁰

CALRA imports the definition of “agriculture” from the NLRA to define those *included* within the Act’s protection. In fact, “the [California Agricultural Relations Board] can only assert jurisdiction over workers who are excluded from the coverage of the NLRA as agricultural employees.”³²¹ Moreover, California courts, when construing the term “agriculture” in CALRA, look to the same federal definition used to exclude coverage in the NLRA and to the same federal regulations promulgated to further clarify the term’s meaning.³²²

D. The CALRA and the Marijuana Industry

In predicting how a recreational marijuana regime would function under this California law, we find no instruction from California’s current medical marijuana industry. As of this time, workers in the medical marijuana industry in California have not yet attempted to avail themselves of the protections likely afforded them under CALRA. Other than a statement from the California Agricultural Labor Relations Board’s counsel stating that medical marijuana growers “probably would qualify as agricultural workers” under the Act,³²³ we have no evidence of how the California system would grapple with the marijuana industry.

³¹⁹ California Labor Code. Division 2, Part 3.5, Section 1140.4(b)-(c).

³²⁰ California Labor Code. Division 2, Part 3.5, Section 1140(a).

³²¹ *Artesia Dairy v. Agric. Labor Relations Bd.*, 168 Cal. App. 4th 598, 608 (2008).

³²² *See Artesia Dairy*, 168 Cal. App. 4th at 608-09.

³²³ “*Medical Marijuana Growers Join Teamsters Union*,” Marcus Wohlsen, BLOOMBERG BUSINESSWEEK, September 20, 2010 (available at: <http://www.businessweek.com/ap/financialnews/D9IBM2CO0.htm>).

What we do know is that the California and federal schemes are complementary in design. Thus, whatever one act fails to cover, the other should. We expect this to mean that, no matter what the job classification within a legal marijuana industry in California, workers will be able to organize and have their disputes heard, either at the state or national level.

However, we should remain aware that these acts are both administered by politically appointed boards. These boards have great discretion in the administration of their respective tools afforded them by their respective statutes. Accordingly, it isn't difficult to imagine a situation where, due to the ideological makeups of either board, protections under one regime might shrink with the other regime declining to fill the gap. Certainly, marijuana's current federal classification as a controlled substance could give either board the necessary support to find workers' activities either non-agricultural in nature or altogether illegal and exempt from safeguards.

2. LABOR STANDARDS

The rise of legal medical and recreational markets for marijuana across the United States has produced surprisingly little consensus about the best means of regulating workers in the cannabis industry. Indeed, in some states, very little thought has been given to the question of who should be permitted to work in the marijuana trade, and what gatekeeping function, if any, the government should play. California, for instance, currently has almost no oversight for medical marijuana growers and sellers,³²⁴ despite being the first state in the nation to legalize medical marijuana use nearly twenty years ago.³²⁵

Bearing in mind that industry experts anticipate the legalization of recreational marijuana in California could “double the \$2.7 billion national marijuana market” and create “tens of thousands of jobs,”³²⁶ this section aims to elucidate some of the labor-

³²⁴ See Jim Araby, *California Legislators Should Lasso ‘Wild West’ of Medical Marijuana*, SACRAMENTO BEE (March 25, 2015), available at <http://www.sacbee.com/opinion/op-ed/soapbox/article16312133.html>.

³²⁵ CAL. HEALTH & SAFETY CODE § 11362.5 (West).

³²⁶ Joe Garofoli, *Unions Seek Larger Role—and Members—In Marijuana Industry*, SAN FRAN. CHRON. (Apr. 21, 2015), available at <http://www.sfgate.com/business/article/Unions-seek-larger-role-and-members-in-6214941.php> (quoting industry research group ArcView and the executive director of the United Foods and Commercial Workers Western States Council, respectively).

related concerns that states considering legalizing recreation marijuana might face, and to highlight the approaches that other states have taken in regulating their recreational cannabis workforces.

A. Jobs Available in the Marijuana Industry

As a preliminary matter, it is important to understand the broad spectrum of jobs that would become available in a legalized recreational marijuana market. These include positions—like cultivators, processors, distributors, retailers, and servers—that most people immediately associate with the recreational cannabis market, as well as others—like receptionists, accountants, chemical analysts, medical professionals, security guards, lawyers, law enforcement officers, and bankers, for instance—that are likely to be impacted by marijuana legalization, even if their link to the actual marijuana crop is more attenuated.

Colorado and Washington—the only two states with active recreational marijuana industries³²⁷—have made different choices regarding whom among this vast array of workers to regulate. Colorado, for instance, has adopted robust controls over cannabis workers, and has enacted labor standards for all “owners, managers, operators, employees, contractors, and other support staff employed by, working in, or having access to restricted areas of . . . licensed [marijuana retail] premises.”³²⁸ The state has thus chosen to regulate both “core” marijuana industry workers, as well as some individuals filling “support”-type functions, including, for instance, receptionists, security guards, and individuals involved in transporting marijuana products.³²⁹ Colorado also categorically excludes: 1) physicians who make medical marijuana patient referrals, 2)

³²⁷ Although recreational use of marijuana is legal in Colorado, Washington, Oregon, Alaska, and Washington, D.C., only Colorado and Washington have allowed retailers to begin selling marijuana. In Alaska, recreational use is permitted as of February 24, 2015, but retail sales are not yet legal. Similarly, in Oregon, retail sales are unlikely to begin until the fall of 2016. The Washington, D.C. initiative has been blocked by Congress.

³²⁸ COLO. REV. STAT. ANN. § 12-43.4-401 (West 2013).

³²⁹ See Colorado Dep’t Revenue, Enforcement Division, <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> (last visited June 22, 2015) (“When transporting Medical or Retail Marijuana within the regulated system, the individual making the transport **must** have a current MED Occupational Badge and a hard copy metric™ generated transportation Manifest.”)

immediate family members of Marijuana Enforcement Division employees (the state's marijuana regulatory body), and 3) law enforcement officers and prosecutors, from working in the state's recreational cannabis industry.

Washington, by contrast, strictly regulates financiers, owners and operators of marijuana-related businesses,³³⁰ but has opted against imposing stringent labor standards on line-level workers.³³¹ The state's marijuana laws and regulations are also nearly silent on the issue of who should be permitted to perform support functions in the marijuana industry, including whether there should be strict restrictions on who is permitted to transport marijuana intended for recreational sale.³³² The state's laxer regulation has resulted in at least some growers adopting transportation methods that likely were not contemplated by Washington's regulatory agencies, including several producers on islands in Washington's Puget Sound relying on Seattle's public ferry system to transport marijuana to retailers on the mainland.³³³

States interested in enacting labor standards for a legalized marijuana market would thus be well-advised to consider the full range of positions that may be impacted by recreational cannabis, however tangentially. While regulation of all workers—including those with the most incidental involvement in the industry—would likely be cumbersome and infeasible, there may be benefits to creating gatekeeping mechanisms for some key support positions, including those support functions that require workers to have direct contact with recreational marijuana products.

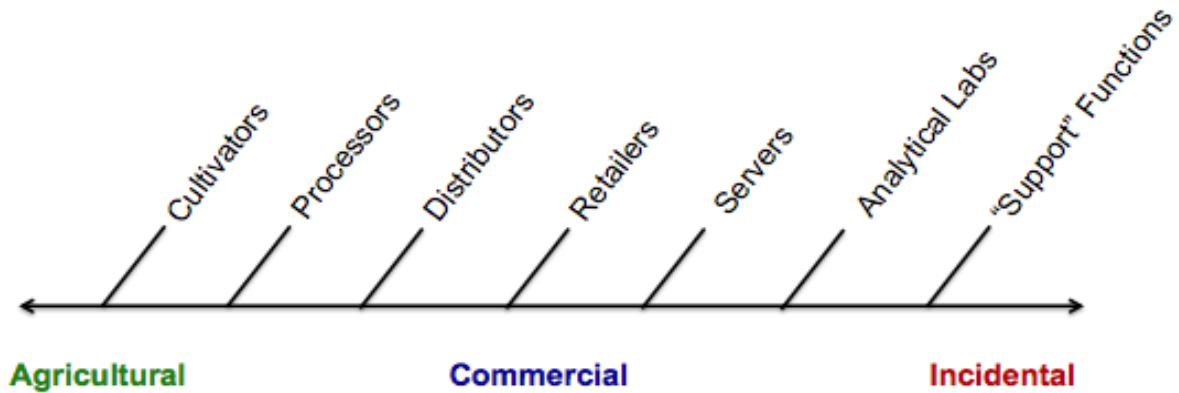
³³⁰ See *Fact Sheet on Initiative 502's Impact on the Washington State Liquor Control Board*, WASH. LIQUOR CONTROL BD., http://www.liq.wa.gov/marijuana/fact_sheet (last visited June 5, 2015).

³³¹ Indeed, Washington requires only that employees in retail shops be twenty-one, and it relies primarily on private business owners to enforce that rule. See 2015 Wash. Legis. Serv. Ch. 70 (S.S.S.B. 5052) (WEST).

³³² Under current Washington law, "only the marijuana licensee, an employee of the licensee, or a certified testing lab may transport product." However, employees of licensees in Washington are not required to undergo the same stringent vetting process that Colorado requires, which includes fingerprinting and criminal background checks. See Wash. Admin. Code 314-55-085 (West 2015).

³³³ See Andy Mannix, *Island Pot Growers Face Legal Bog in Taking Weed to Mainland*, Seattle Times, Aug. 4, 2014, available at <http://www.seattletimes.com/seattle-news/island-pot-growers-face-legal-bog-in-taking-weed-to-mainland/>.

Table IV.1: Marijuana Industry Jobs Spectrum



B. State Strategies

As with the decision about which market actors to regulate, Colorado and Washington have answered the question of *how* to regulate those individuals, and what restrictions to impose on them, somewhat differently. For instance, while both states require that all workers in the recreational cannabis industry be at least twenty-one years-old,³³⁴ the pool of individuals affected by that requirement is likely larger in Colorado, thanks to the state’s more expansive stance on which positions in the industry should be subject to government regulation.³³⁵ While all contractors in Colorado’s recreational marijuana industry are subject to the age restriction, for example, in Washington it is less clear whether a security guard or IT professional working as a contractor for a marijuana business would be legally required to be twenty-one, given that Washington regulations merely require that “[a]ll *applicants* and *employees* working in . . . licensed [marijuana] establishments” be twenty-one years-old.³³⁶

One point of convergence between the two states is their requirement that senior-level industry actors apply for state-issued operating licenses, a process that subjects principals in those businesses to financial investigations and criminal background checks. In Washington, this includes “true parties of interest”—that is, sole proprietors, corporations, and members of partnerships establishing marijuana businesses—

³³⁴ See 1 COLO. CODE REGS. § 212-2.231 (West 2014); WASH. ADMIN. CODE 314-55-015 (West 2015).

³³⁵ Colorado regulates “all owners, managers, operators, employees, contractors, and other support staff employed by, working in, or having access to restricted areas of . . . licensed [marijuana retail] premises.” COLO. REV. STAT. ANN. § 12-43.4-401 (West 2013)..

³³⁶ WASH. ADMIN. CODE 314-55-015 (West 2015).

financiers, and “persons who exercise control” of marijuana businesses.³³⁷ These individuals must also meet at three-month in-state residency requirement.³³⁸ In Colorado, in addition to undergoing criminal and financial checks, principals in marijuana establishments must meet a two-year residency requirement, and present evidence of “good moral character” to Colorado’s Marijuana Enforcement Division.³³⁹

But Colorado and Washington have taken markedly different approaches to regulating lower-level employees. Indeed, other than requiring marijuana businesses to employ only individuals who are twenty-one or older, Washington has imposed no other standards for non-principals in the cannabis industry. Moreover, the state relies primarily on marijuana business license-holders to enforce the age restriction for their employees. Although it is still too early for reliable data on job growth resulting from Washington’s legalization of recreation marijuana sales to be available, the state’s decision to keep barriers to entry for line-level works relatively low could be an advantage for employers looking to grow their businesses quickly. Whereas entry-level workers in Colorado’s marijuana industry must live in the state for ninety days to establish residency before beginning a comparatively rigorous occupational licensing process, individuals looking for employment in Washington’s marijuana industry need only move to the state to begin work.

That said, minimal regulation of the marijuana workforce also raises questions about who will participate in the market and whether the participation of those individuals is desirable from a policy perspective. By not requiring criminal background checks for lower-level employees, for instance, the state has made entry to the legitimate market possible for individuals who may have previously been involved in the illicit drug trade. Similarly, Washington’s more relaxed oversight regime might make it easier for employers—and especially marijuana growers—to rely on (or to exploit) undocumented laborers.³⁴⁰ These are trade-offs worth considering for states weighing best practices for labor regulation in the event recreational cannabis is legalized.

³³⁷ WASH. ADMIN. CODE 314-55-035 (West 2015).

³³⁸ WASH. ADMIN. CODE 314-55-020 (West 2015).

³³⁹ 1 COLO. CODE REGS. § 212-2.202 (West 2014).

³⁴⁰ See e.g. Joe Garafoli, *Unions Seek Larger Role—And Members—In Marijuana Industry*, SFGATE, April

Unlike Washington, Colorado has established a fairly rigorous vetting system for all levels of marijuana workers, using occupational licensing as a gatekeeping mechanism for the industry. The state has a tiered licensing system, with different requirements and fees for principal, supervisory, and working-level marijuana employees, administered by the Marijuana Enforcement Division (MED) in Colorado’s Department of Revenue. Thus, even entry-level trimmers or retail servers are required to receive a state “marijuana badge” before they can be hired by growers, processors, or retailers.

The requirements for even line-level workers are fairly stringent. In addition to paying a one-year licensing fee of \$150,³⁴¹ applicants must be at least twenty-one years-old, have resided in the state for at least ninety days, and may not have “any controlled substance felony conviction in the ten years” immediately preceding their application.³⁴² In other words, Colorado’s regulatory agencies have made a policy choice to exclude more serious black market actors from the state’s legal recreational marijuana market, at least for the near future. Similarly, applicants may not have had any other felony convictions from the five years leading up to their occupational license applications.³⁴³ Finally, while only recent felony convictions and controlled substance felony convictions will categorically disqualify applicants from receiving an occupational license, applicants must also provide more general criminal history and financial information to the MED, and submit to fingerprinting.³⁴⁴

Colorado’s regulatory agencies thus play an important role in shaping the marijuana workforce and enforcing minimum standards for laborers and employers. Although the

21, 2015, available at <http://www.sfgate.com/business/article/Unions-seek-larger-role-and-members-in-6214941.php> (describing the exploitation of undocumented workers at marijuana farms in Imperial Valley, California, noting “most who tend and clip cannabis plants are immigrants between 55 and 65 years old, working 10 to 12 hours a day They’re paid \$150 to \$300 per pound of weed cleaned . . . ‘and the best they can do is a pound in a day. But that’s not typical.’ . . . [Workers are] ‘told not to take bathroom breaks, [t]hey’re searched when they come in and out of the bathroom, and they’re constantly under surveillance by men with guns.’ [Moreover, according to one source], some dispensary workers . . . are ‘being paid in product’ — which is illegal. ‘But because of the quasi-legality of this industry, there’s a fear of speaking up that’s intense.’”)

³⁴¹ See Colorado Marijuana Enforcement Division, <https://www.colorado.gov/pacific/enforcement/medical-marijuana-occupational-licensing> (last visited June 22, 2015).

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

barriers to enter Colorado’s recreational marijuana market are higher than those in Washington and in many states with medical marijuana laborers, the state’s occupational licensing system provides an easy means of imposing legislative and regulatory priorities and values on the industry. It helps ensure that minimum labor standards—like age and residency requirements—are being met, which provides some protection to individuals within the workforce. Moreover, occupational licensing furnishes the state with a helpful means of measuring growth in the fledgling industry, since license application numbers can provide insight into the health of the market and the demand for cannabis workers.

Colorado has faced some criticism, however, for backlogs in its license application system, particularly in the early days after legalization, when the MED was overwhelmed with applications.³⁴⁵ Despite their utility, such systems can be cumbersome and bureaucratic, especially when they are overwhelmed by a sudden demand for their services.

It is also worth noting that Colorado has been embroiled in an internal policy debate regarding the regulatory agencies’ decision to exclude felons who have served their sentences from the recreational marijuana market.³⁴⁶ Proponents of the measures have argued that excluding felons and past “bad actors” results in a workforce that is more professionalized and legitimate. But opponents have countered that, under Colorado’s criminal laws, controlled substance felonies sometimes involve low levels of possession—rather than distribution—and that these relatively minor infractions should not bar broad swaths of the unemployed from entering a rapidly growing industry. They also contend that it is inappropriate to continue to penalize felons who have served their sentences.³⁴⁷

³⁴⁵ See e.g. Eric Gorski, *State Facing Backlog in Marijuana Employee Licensing*, Denver Post, Dec. 16, 2013, available at http://www.denverpost.com/ci_24730833/state-facing-backlog-marijuana-employee-licensing (“At 8 a.m. on a recent weekday, would-be bud-tenders and trimmers filed in bleary-eyed to the Marijuana Enforcement Division at 455 Sherman St. in Denver. They lined up to get their paperwork stamped. The rules change with the circumstances, but on this day anyone who had come back 11 times — and gotten 11 stamps — was given the green light for license processing. Those on the short end on stamps were cast into a lottery, their fates tied to green poker chips drawn out of a red Folgers' coffee jar.”).

³⁴⁶ See Kristin Wyatt, *Dispute Over Felons in Pot Industry Flares at Statehouse*, ASSOCIATED PRESS, May 5, 2015, available at <http://denver.cbslocal.com/2015/05/05/dispute-over-felons-in-pot-industry-flares-at-statehouse/>.

³⁴⁷ *Id.*

Colorado and Washington's approaches to labor regulation in the marijuana industry are highly instructive for other states facing the possible legalization of recreational cannabis, particularly since their regulatory choices have been so disparate. Both are good examples of how state governments have crafted labor standards and enforcement mechanism in response to different economic and policy priorities, resulting in varying levels of both oversight and red tape. Occupational licensing seems to have been a fairly successful means of tightly controlling the composition of the marijuana workforce in Colorado, and it presents attractive benefits for states seeking to impose robust regulatory controls. That said, Washington's experience to-date is a good illustration of how somewhat less labor regulation can help an industry grow apace with demand for workers.

3. EMPLOYMENT LAW CONCERNS

Legalization raises several important employment law concerns—most of which center around the issue of drug testing. California legal precedent as well as administrative decisions in Colorado are informative on this point. Both indicate a trend towards employer autonomy and a refusal to interfere with drug testing, despite the inherent tension with off-duty employment laws. Many of these finer points still need to be ironed out. However, for now, though legal ambiguities remain, there seems to be strong inertia in favor of maintaining the status quo with respect to drug testing.

A. Firing Under Legalization

Perhaps the most pressing concern arising from a legalized recreational marijuana market is whether employers will be permitted to terminate employees who engage in marijuana use, and, if so, the circumstances under which such a termination would be permissible. These questions have already been raised by companies and employees, alike, in states where medical and recreational use is legal, and the outcome of those disputes should be instructive should California adopt a legalized recreational market in the future.

B. Employers' Rights Under Legalization

Employers will almost certainly not be forced to accommodate on-job use of recreational marijuana. No state has passed a medical marijuana law requiring employers to accommodate marijuana use in the work place, let alone such a provision for recreational use.³⁴⁸ If such a requirement were included in the proposed initiative for recreational use, it would almost certainly fail. However, the question of whether employers must tolerate off-duty use is less clear.

C. Termination for Off-Duty Use

This is a more difficult question, made more complicated by the limitations of marijuana testing. However, California case law and precedent in Colorado suggests that employers will be able to set their own drug policies.³⁴⁹ Accordingly, they may terminate or refuse to hire individuals who fail drug tests— regardless of the legal status of marijuana. This thinking can be understood in that marijuana use is not truly “legal” under federal law or, alternatively, that legalization applies only to purchasing and use, but does not protect the consumer to against any secondary consequences.

D. State and Federal Employees

Regan's War on Drugs and Drug-Free Workplace Act have left a somewhat hollow legacy of drug testing federal employees. The federal government is still the nation's largest drug tester. As of 2004, 400,000 federal employees undergo testing, many of them in transportation or national security related industries.³⁵⁰ State legalization should not change this landscape since marijuana will remain illegal on the federal level.

³⁴⁸ Sarah Matt, *The Impact of Medical Marijuana in the Workplace*, American Bar Association, Section of Litigation – Employment and Labor Relations (August 13, 2014) <http://apps.americanbar.org/litigation/committees/employment/articles/summer2014-0814-impact-medical-marijuana-workplace.html>.

³⁴⁹ *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. Ct. App. 2013); *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012); *Ross v. RagingWire Telecomm., Inc.*, 42 Cal. 4th 920 (2008).

³⁵⁰ Lydia DePillis, *Companies Drug Test A Lot Less Than They Used To – Because It Doesn't Really Work*, WASH. POST (March 10, 2015) <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/>.

For state employees, the story is slightly more complicated; however, especially in transportation and safety-related industries, it seems likely that drug testing would continue as it has under California’s Drug Free Workplace Act.³⁵¹ California requires drug free workplace certifications from any company receiving a contract or grant from the state.³⁵²

The issue with respect to private workers is slightly different. If legalization were to substantially affect employer drug testing, this is the area in which we would expect to see the greatest change. According to a 2004 study by the American Management Association, 62% of private employers require employees to submit to drug testing of some kind. More than half of these require pre-employment testing.³⁵³ However, if California medical marijuana cases serve as precedent, changes to employee drug testing policies may be slow or negligible.

E. Industry Dependent Standards

Agencies that fall under the purview of the U.S. Department of Transportation are subject to random drug and alcohol testing.³⁵⁴ The California Department of Human Resources administers this program as it applies to state employees.³⁵⁵ California

³⁵¹ California Department of Human Resources, *Drug Testing* (visited June 5, 2015) <http://www.calhr.ca.gov/employees/Pages/drug-testing-main.aspx>.

³⁵² Cal. Gov’t Code § 8355 (West 2015).

³⁵³ Lydia DePillis, *Companies Drug Test A Lot Less Than They Used To – Because It Doesn’t Really Work*, WASH. POST (March 10, 2015) <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/>.

³⁵⁴ 49 C.F.R. §§40.1, et. seq. (“Procedures for Transportation Workplace Drug and Alcohol Testing Programs”).

³⁵⁵ The Department of Transportation random drug testing policy applies to the following California agencies:

- Air Resources Board
- California Conservation Corps
- Department of Consumer Affairs
- Department of Corrections and Rehabilitation
- Department of Developmental Services
- Department of Education
- Employment Development Department
- Department of Fish and Game
- Department of Food and Agriculture
- Department of Forestry

currently applies stricter drug testing requirements to transportation employees, drivers with a commercial license, and those tasked with providing for public safety.³⁵⁶ It is very unlikely that the state or its citizens would want to restrict the abilities of employers to test these types of employees because of the larger risks to public welfare.

F. Efficacy of Testing

Unlike other drugs and alcohol, it is difficult to determine the precise timeframe in which someone used marijuana. Limitations of marijuana testing make it virtually impossible for employers to limit detection to on-job use.³⁵⁷ Additionally, there is no equivalent of a breathalyzer test for marijuana that measures the level of inebriation.³⁵⁸

Many employers require pre-employment testing for job applicants, while some continue to test current employees or perform a post-employment test as well. Four types of marijuana drug tests are commonly used in an employment setting: urine, blood, saliva, and hair tests.³⁵⁹ All are considered accurate indicators of drug use. Each of these four tests detects use over a different time range. They also vary in terms of the length of time needed after use in order for the drug to be detectable by the test.

-
- Franchise Tax Board
 - Department of General Services
 - California Highway Patrol
 - Military Department
 - Department of Motor Vehicles
 - Department of Parks and Recreation
 - Department of State Hospitals
 - Department of Veterans Affairs
 - Department of Water Resources

³⁵⁶ *Employee Drug and Alcohol Testing*, CalChamber Advocacy (retrieved on May 6, 2015), <http://www.calchamber.com/california-employment-law/pages/drug-and-alcohol-testing.aspx>.

³⁵⁷ *Drug Tests – Methods of Detecting Cannabis Use*, ProCon.org (updated April 1, 2009, 7:20 p.m.), <http://medicalmarijuana.procon.org/view.additional-resource.php?resourceID=000157>.

³⁵⁸ Don Jergler, *Marijuana and Workers' Compensation on Industry's Watch List*, Insurancejournal.com (October 3, 2014) <http://www.insurancejournal.com/news/national/2014/10/03/342650.htm>.

³⁵⁹ *Workplace Drug Testing* United States Department of Labor (visited on June 5, 2015), <http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>.

	Urine	Blood	Saliva	Hair
Length of time marijuana can be detected by test	A few days to several weeks depending on use	A few hours up to two or three days	A few hours up to two days	90 days after past use
Length of time after use before marijuana can be detected by test	2-8 hours	Immediately	Immediately	Five to seven days
Admissible as evidence in court?	Yes	Yes	Yes	Yes

Though each of these types of tests covers a different time period, none are able to effectively determine how much marijuana the employee used or the concentration of the drug. Additionally, unlike alcohol testing, marijuana tests are unable to estimate the level of inebriation that resulted from the use. Where a breathalyzer test approximates blood-alcohol content, marijuana tests yield only binomial results—positive or negative.³⁶⁰

All of this taken together, means that drug tests can offer a “yes/no” answer to employers but pose significant problems in terms of equitable application and testing specifically for on-job use. Saliva and blood tests offer the narrowest time range, but even these cannot effectively be limited to detect only workplace use for the average American, working nine-to-five.³⁶¹ In general, information offered by marijuana testing is limited, and reveals little about the quality of use or its impairment effects. Because of these shortcomings, those factions that oppose drug testing in an employment context may gain additional momentum with the advent of legalization.³⁶²

³⁶⁰ *Drug Testing: Methods of Detecting Cannabis Use*, ProCon.org (April 4, 2009), <http://medicalmarijuana.procon.org/view.additional-resource.php?resourceID=000157>.

³⁶¹ *Id.*

³⁶² The number of employers test employees for drug use has gone down consistently since its peak in the 1990’s. At this time, 81% of workplaces required mandatory testing for employees. In 1987, this number was just 21%. Lydia DePillis, *Companies Drug Test A Lot Less Than They Used To – Because It Doesn’t Really Work*, The Washington Post (March 10, 2015)

G. Drug Testing Under California Law

In California, drug testing is permitted, but only under specific circumstances.³⁶³

These include:

1. Pre-employment and (immediately) post-employment testing is allowed.
2. Random drug testing is generally not allowed but may be under certain circumstances.
3. Courts generally allow testing based on “reasonable suspicion.”
4. Strict requirements for employees working in the transportation industry.
5. California Drug-Free Workplace Act requires employers contracting with or receiving grants from the state to “certify a drug-free” workplace.
6. Federal Drug-Free Workplace Act imposes the same requirements if the contract is valued at \$100,000 or more, or if the employer is receiving any grant.

In addition, some cities, including San Francisco, have enacted local ordinances related to drug testing policies.³⁶⁴

H. Trends in Litigation

One area of tension with California employment law comes at the cross-section between laws protecting lawful off-duty and workplace drug testing laws. If legalized, the two rules of regulation would no longer be compatible since recreational marijuana use would be considered “lawful” off duty conduct, which is protected by California Labor Law.³⁶⁵ California Labor Code Section 96(k) protects workers from being discharged or otherwise discriminated against for lawful conduct occurring during nonworking hours

<http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/>.

³⁶³ *Employee Drug and Alcohol Testing*, CalChamber Advocacy (retrieved on May 6, 2015), <http://www.calchamber.com/california-employment-law/pages/drug-and-alcohol-testing.aspx>.

³⁶⁴ *Employee Drug and Alcohol Testing*, CalChamber Advocacy (retrieved on May 6, 2015), <http://www.calchamber.com/california-employment-law/pages/drug-and-alcohol-testing.aspx>.

³⁶⁵ CA Labor Code § 96(k) (West Ann. Cal 2000 or 2015?).

away from the employer's premises.³⁶⁶ However, workplace drug testing would presumably do just that—punishing workers for lawful, off-duty marijuana use.³⁶⁷

California courts have been reluctant to limit employers' ability to enforce drug-free policies. There seems to be a clear trend in the medical marijuana suits of this nature that have been brought. Ninth Circuit Precedent in *James v. City of Costa Mesa* holds that the Americans with Disabilities Act does not protect those who engage in the use of federally prohibited drugs, or force employers to “accommodate” such use—medicinal or otherwise.³⁶⁸ Similarly, in *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court found that an employer was not required to waive its negative drug test requirement for new employees despite the employee's claim that not doing so violated California's Fair Employment and Housing Act because his medical marijuana use was lawful under California's Compassionate Use Act of 1996.³⁶⁹

Both of these cases indicate an unwillingness of the part of the court to limit the ability of employers to drug test employees even when the employee's use was legal under state law. Based on the reasoning in *James*, which involved federal regulation, and *Ross*, dealing with state law, California courts would most likely uphold employers' right to drug test in the face of recreational legalization.³⁷⁰ Any other course of action would be patently inconsistent with their reasoning thus far.

I. Confusion in Washington & Colorado

In Colorado, there has been some confusion and disagreement about whether to limit employer's ability to drug test employees and dismiss them for legal marijuana use.³⁷¹ The response in Colorado provides a helpful anecdote in predicting how California will

³⁶⁶ *Id.*

³⁶⁷ Donna Ballman, *States With Pro-Employee Laws: No Firing for Legal Off-Duty Activity* (December 18, 2014), <http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2014/12/18/states-with-pro-employee-laws-no-firing-for-legal-off-duty-activity.aspx>.

³⁶⁸ *James v. City of Coasta Mesa*, 700 F.3d 394, 397 (9th Cir. 2012).

³⁶⁹ *Ross v. RagingWire Telecomm., Inc.*, 42 Cal. 4th 920 (2008).

³⁷⁰ *James v. City of Coasta Mesa*, 700 F.3d 394, 397 (9th Cir. 2012); *Ross v. RagingWire Telecomm., Inc.*, 42 Cal. 4th 920 (2008).

³⁷¹ *Coats v. Dish Netword, L.L.C.*, 303 P.3d 147 (Colo. Ct. App. 2013).

respond when confronted with similar issues. The language of Proposition 64, the legalization bill passed in Colorado, provides

Nothing in this [Amendment] is intended to require an employer to permit or to accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.³⁷²

The language of the Proposition 64 created tension with employment laws protecting employees from firing for lawful, off-duty conduct.³⁷³ Similar to the California law, Colorado Statute prevents employers for discriminating against employees for lawful conduct that occurred during nonworking hours.³⁷⁴ The law allows for limited exceptions to this rule, in cases where the activity is “reasonably or rationally related to” a “bona fide occupational requirement;” however, this regulation creates a tension with the language of Proposition 64 in terms of restricting employers’ ability to dismiss employees for positive drug testing.³⁷⁵

The subject is currently being litigated in the case of *Coats v. Dish Network, L.L.C.*, where an employee’s case for a violation of the Lawful Activities Statute was dismissed for failure to state a claim.³⁷⁶ This ruling was upheld at the appellate level, but the Colorado Supreme Court has recently granted review of this case.³⁷⁷

The issue has also been considered on the regulatory side as well. After Prop. 64 passed, Governor Hirkenlooper created a task force to make recommendations about

³⁷² *Amendment 64: Use and Regulation of Marijuana*, Colorado Ballot Initiative (retrieved on June 5, 2015), <http://www.fcgov.com/mmj/pdf/amendment64.pdf>

³⁷³ Colo. Rev. Stat. § 24-34-402.5 (West Colo. Rev. Stat. Ann. 2007).

³⁷⁴ Colo. Rev. Stat. § 24-34-402.5 (West Colo. Rev. Stat. Ann. 2007).

³⁷⁵ Colo. Rev. Stat. § 24-34-402.5 (West Colo. Rev. Stat. Ann. 2007).

³⁷⁶ *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. Ct. App. 2013).

³⁷⁷ Tiffany Koenig, *Legalized Loophole: Is Marijuana Truly “Lawful”?* The National Law Review (December 19, 2014), <http://www.natlawreview.com/article/legalized-loophole-legalized-marijuana-truly-lawful>.

possible legislation in this area.³⁷⁸ The task force was comprised of local business leaders, owners of medical marijuana businesses, employment lawyers, and members of the public.

A minority of the task force asked that the legislature adopt an “impairment standard” before being able to take disciplinary action against an employee testing positive for THC.³⁷⁹ However, the majority recommended that the law remain as written and employers be free to enforce policies restricting the use of marijuana.³⁸⁰

The primary point of conflict between off-duty statuses and workplace drug testing has consistently been resolved in favor of the employer’s right to maintain a drug-free work environment. It seems increasingly likely, as this position gathers more precedent, that legalization will not dramatically alter this landscape.

4. CONCLUSION

The advent of legalized marijuana may create tension areas of tension within labor and employment law. The current regulatory framework that governs workers’ rights in California is somewhat fragmented and fragile. Recreational marijuana may upset the delicate balance that has been struck between state and federal legislation. Additionally, regulators must consider how to maintain labor standards within the industry and ensure that the workforce is professionalized. Finally, legalization creates questions in the area of employment law where it conflicts with drug policy. Though these issues are currently being resolved in the courts, more areas of tension may emerge. In each of these three areas of labor law, the examples of Colorado and Washington provide valuable insight as to which regulatory approaches are the most and least effective.

³⁷⁸ *Anti-Discrimination Provisions in State Medical Marijuana Laws Raise Additional Considerations for Workplace Drug Testing*, Hunton Employment and Labor Perspectives (January 22, 2015), <http://www.huntonlaborblog.com/>

2015/01/articles/employment-policies/antidiscrimination-provisions-in-state-medical-marijuana-laws-raise-additional-considerations-for-workplace-drug-testing/.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

Regulating marijuana from a labor standpoint, with its broad range of jobs, may prove challenging. The diversity of jobs in the industry, along with the complications created by the interlocking state and federal regulatory framework, require a comprehensive approach that seeks to clearly define the requirements and rights of industry workers. At the outset, NLRB statements indicate that marijuana workers will likely be afforded federal protections under the NLRA. Additionally, even purely agricultural workers will probably receive the same protections under California state law. Though marijuana workers should be able to unionize and collectively bargain, this leaves open the question of labor standards. California may resolve this issue by implementing a licensing program to ensure that the workforce is professionalized and complies with minimum standards. It is yet unclear what types of requirements and restrictions will be placed on those hoping to enter the recreational marijuana industry or how these regulations will be administered. Legalization poses questions for employment law as well. However, thus far, legal precedent indicates that employers will continue to be able to implement drug-free workplace policies and terminate employees for off-duty use.

V. FINAL THOUGHTS

As seen in this paper's discussion, the policy decisions surrounding legalized recreational marijuana are complex. If recreational marijuana becomes legal, State policymakers should follow the adage of "measure twice, cut once" and ensure that the regulatory system reflects the values and objectives of Californians. And, as previously noted, we simply hope to assist in the "measuring" process, and we do not offer any specific policy recommendations for what those policies should be. We hope that the above discussion highlights the complexity of the decision and brings attention to some important issues of regulation, taxation, and employment.

Lastly, even though the efficient operation of legalized marijuana will have a major impact on the well being of all Californians, it is important to remember that the California decision will have a much broader impact. California, as the most populous state, regularly serves as an example for the entire country. Just as we currently glean insight from the experience of Colorado and Washington, it is reasonable to assume that many subsequent states will look to California's example to inform their own decisions.