Illinois’s Marijuana Madness: A Protectionist Scheme of an Illegal Market in the Shadow of the Constitution

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Illinois’s Marijuana Madness: A Protectionist Scheme of an Illegal Market in the Shadow of the Constitution.

ALEC C. MOEHN

From prohibition to legalization, Marijuana has had a storied legal history in the United States, but its story is not quite over. A new gray area is coming to the forefront of the legal field: Marijuana is illegal federally but legal in many states. This Note discusses how some states, including Illinois, are operating in that gray area to better their political and economic goals, but the Constitution places a barrier to do so with the Dormant Commerce Clause. States are not free to discriminate against other states or out-of-state economic actors, and Illinois does just that with the Cannabis Regulation and Tax Act and other provisions of the Illinois Administrative Code. Ultimately, these laws should be struck down for violating the Constitution, and the Illinois General Assembly should create a new, much-less regulated system for marijuana licensing to better afford social justice and equity.

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I. INTRODUCTION

Cannabis, or as it is more commonly referred to as ‘marijuana,’ has a long and storied history in which its public perceptions have taken wild swings from positive to negative. A large contributing factor to the negative downturn in public perceptions of marijuana is rooted in express racism. Ultimately, the negative perceptions culminated in the Controlled Substance Act (hereinafter “CSA”), which deemed marijuana a Schedule 1 controlled substance alongside other drugs such as heroin and psilocybin. Fortunately, public perception has begun to shift back towards a positive perception, and states have begun to decriminalize marijuana as a controlled substance. However, this too has not been without issue. Many states have enacted extensive licensing schemes in order to obtain or distribute marijuana. And, in particular, many states have enacted either explicit or implicit restrictions on out-of-state persons and business obtaining those licenses.

Such restrictions serve many political purposes. Chiefly among them is the tangible “project” for politicians to flout to their constituents. When constructing an industry only for Illinois, the Illinois representatives and politicians have the opportunity to say to their constituents “look how I helped Illinois through this law.” Aside from political purposes, strict licensing rules provide for a safety theater; most voters and elected officials believe in the notion that, without regulation, industries will become dangerous. Neither of these purposes are invalid or completely divorced from reality. However, the implementation of the in-state versus out-of-state licensing schemes leaves much to be desired, and there lies an issue with the authority of the state governments to implement these laws in the first place. Specifically, states may not facially discriminate or unduly burden interstate commerce under the Dormant Commerce Clause. But how does this analysis change if that market is federally illegal? Are states free to discriminate in favor of their own interest because it is illegal?

2. Vitiello, supra note 1 at 448-49 (showing that a prominent drug warrior, Harry J. Anslinger, made explicit and racist connections between drug use and race).
8. See infra note 43.
Section II of this Comment will outline the history and jurisprudence regarding the Dormant Commerce Clause to picture the current layout of the landscape of the Constitution. Section III will outline the specific licensing scheme of Illinois at issue, and it will show how the courts, which include an Illinois court, have dealt with this issue. Section IV will analyze the statutes and rules at issue against the jurisprudence of the Dormant Commerce Clause and how the law should square with an illegal market. Finally, this Comment will conclude with Section V in which I will provide a recommendation on how to better handle the stated goals of the licensing scheme and marijuana decriminalization more broadly.

II. HISTORY OF THE DORMANT COMMERCE CLAUSE

A. ORIGIN OF THE DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause has a long history, but the doctrine, as it is known today, generally traces its roots to *Cooley v. Bd. Of Wardens*,9 but the concept of the Dormant Commerce Clause was first articulated in the decision of *Gibbons v. Ogden*.10 In *Gibbons*, New York granted an exclusive monopoly to run steamboats in New York waters to Robert Livingston and Robert Fulton.11 Eventually, Livingston’s brother, John Livingston, was granted the exclusive right to run steamboats between New York and certain parts of New Jersey.12 Livingston ran a ferry service that competed with Aaron Ogden—the eventual defendant in the seminal case—but Ogden could not compete with Livingston given his lack of steam-powered boats.13 In failing to fight the monopoly held by the Livingstons, Ogden joined his competitors and purchased a license from Livingston to exclusively ferry between New York City and Elizabethtown.14 However, Ogden’s partner in the business venture, Thomas Gibbons, went separate ways with Ogden after disagreements to establish his own steamboat ferry service.15 However, Gibbons obtained a federal coasting license for his steamboat business. After catching wind of Gibbon’s plan, Ogden filed suit in the chancery court to enjoin Gibbon’s venture under New York law which granted exclusive rights to the members of the Livingstons’ group.16 Gibbons eventually argued that the Federal Navigation Act of 1793 gave him the right to transport passengers between New York and New Jersey. Unsurprisingly, Gibbon’s arguments

10. Id.
11. Id. at 1407.
12. Id. at 1408.
13. Id.
15. Id.
16. Id. at 1409.
failed which led him to appeal to the United States Supreme Court on the issue.\textsuperscript{17} The Court began its opinion by determining the extent of the Commerce Clause as granted in the Constitution. And in order to determine the extent the Court must “settle the meaning of [commerce].”\textsuperscript{18} The Court described commerce as an “intercourse between nations,” and that commerce includes navigation because, after all, since the commencement of the United States the power to regulate navigation “has been exercised with the consent of all.”\textsuperscript{19} The Court then addressed the applicability of the Commerce Clause against the states.\textsuperscript{20} The Court focused in some part on the word “among” and found that commerce extends to that which involves more than one state;\textsuperscript{21} the completely internal commerce of a state which does not affect others is reserved for the state itself.\textsuperscript{22} However, the Court stopped short of endorsing the idea that the Commerce Clause was an exclusive right.\textsuperscript{23} Instead, the Court found the Act gave authority to Gibbons to transport passengers,\textsuperscript{24} and that the New York law had to yield to the Supremacy Clause.\textsuperscript{25} The reasoning of the Court in \textit{Gibbons} was expanded upon in \textit{Cooley v. Bd. Of Wardens}. In that case, the petitioner sought to be exempted from certain pilotage fees imposed by a Pennsylvania state law regulating transport ships.\textsuperscript{26} The pertinent portion of the law provided “[a]nd if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel. . . .”\textsuperscript{27} The Court ultimately found that the Pennsylvania law did not violate any provision of the Constitution.\textsuperscript{28} In discussing the idea of exclusive control over commerce the Court delineated between categories of commerce that imperatively require uniform rules and those that do not.\textsuperscript{29} This Pennsylvania law fell into the latter category\textsuperscript{30} which allowed for a concurrent exercise of regulatory power over commerce.

\begin{itemize}
\item[\textsuperscript{18}] \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 189 (1824).
\item[\textsuperscript{19}] \textit{Gibbons}, 22 U.S. at 189-90.
\item[\textsuperscript{20}] \textit{See id.} at 193-200.
\item[\textsuperscript{21}] \textit{Id.} at 193-94.
\item[\textsuperscript{22}] \textit{Id.} at 195.
\item[\textsuperscript{23}] \textit{See Norman R. Williams, Gibbons}, 79 N.Y.U.L. Rev. 1398, 1415 (2004).
\item[\textsuperscript{24}] \textit{See Gibbons}, 22 U.S. at 219-21.
\item[\textsuperscript{25}] Williams, \textit{supra} note 23.
\item[\textsuperscript{26}] \textit{Cooley v. Bd. of Wardens}, 53 U.S. (12 How.) 299 (1852).
\item[\textsuperscript{27}] \textit{Cooley}, 53 U.S. at 311.
\item[\textsuperscript{28}] \textit{Id.} at 321.
\item[\textsuperscript{29}] \textit{Id.} at 319.
\item[\textsuperscript{30}] \textit{Id.} at 320.
\end{itemize}
This logic concerning rules of uniformity would be applied in *Case of State Freight Tax* in 1872.\(^{31}\) The State of Pennsylvania required companies “to pay to the State treasurer for the use of the Commonwealth, ‘on each two thousand pounds of freight so carried,’ a tax at the specified rates.”\(^{32}\) The Court went through a lengthy discussion on the reasons on which the state law was grounded\(^ {33}\) and found the law was not a toll that has a foundation in compensation for services rendered but rather an exaction—for an alleged right of sovereignty.\(^ {34}\) When addressing the constitutionality of the law, the Court did not reach the question of whether commerce clause power is exclusive to Congress, broadly speaking. Rather, the Court held that, similar to the logic in *Cooley*,\(^ {35}\) a national and or uniform system of regulation requires exclusivity of Congress’s authority;\(^ {36}\) transportation of passengers or merchandise falls into that category.\(^ {37}\) Thus, the law violates the Constitution.

Finally, in 1876 the Court in the case of *Welton v. Missouri* established the modern launching point for dormant commerce clause jurisprudence. In *Welton*, Missouri imposed a tax on those who did not have a license as a “peddler.”\(^ {38}\) The statute defined a “peddler” as one who went from place to place to deal with and sell goods whose origins were not of the state of Missouri.\(^ {39}\) So then, were a person to travel around selling items of Missouri origin, they would not need a license. The Court found that the power which ensures uniformity must “cover the property which is transported as an article of commerce from hostile or interfering legislation.”\(^ {40}\) However, this protection did not apply until the article was a part of the general property of the country.\(^ {41}\) To hold otherwise would allow states like Missouri to defeat the purpose of investing the control over interstate commerce to Congress.\(^ {42}\) All the preceding cases laid the groundwork for the modern approach to the dormant commerce clause cases. They are generally delineated into several categories: facial discrimination, neutral law with discriminatory impact, state actor discrimination, and quarantine laws. In the next section, this Article will discuss each category in depth.

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33. *Id.* at 273-76.
34. *Id.* at 279.
37. *Id.* at 280.
40. *Id.* at 281.
41. *Id.*
42. *Id.*
B. MODERN CONTOURS DORMANT COMMERCE CLAUSE

1. Facially Discriminatory Laws

When the state law facially discriminates against out-of-state commerce, the law is presumptively invalid. Courts must look first to whether the state law “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.” The Court defines discrimination simply as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”

In Oregon Waste, the State of Oregon had a complex regulatory scheme surrounding waste disposal in landfills. One such aspect is the imposition of fees on landfill operators. Among these fees was a “surcharge” on persons disposing of out-of-state waste. Eventually, the legislature passed a surcharge for in-state waste, but the surcharges were $2.25 for out-of-state waste disposal and $0.85 for in-state waste disposal. The Oregon Supreme Court upheld the law as prima facie valid because of its connection to the actual costs incurred to the local government. The Supreme Court, on the other hand, found the surcharge on out-of-state waste was facially invalid under the commerce clause.

Oregon first argued that the surcharge difference was a compensatory tax in order for out-of-state shippers to pay their fair share. However, the Court disregarded this argument because Oregon failed to establish the interstate tax burden by which out-of-state shippers placed on Oregon which needed to be compensated. Next, Oregon argued that it had a resource interest in spreading the costs of waste disposal to all Oregonians. However, the Court disregarded this argument in kind because of its protectionist underpinnings. “[A] State may not accord its own inhabitants a preferred right

45. Id.
46. Id. at 95.
47. Id. at 96.
48. Id.
50. Id. at 108.
51. Id. at 100-101.
52. Id. at 102.
53. Id. at 104.
of access over consumers in other States to natural resources located within its borders.”

2. Facially Neutral Laws with Discriminatory Impact

Generally, in order to pass constitutional muster as a facially neutral law, the state law at issue must pass the test set forth in *Pike*.

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” In *Pike*, the plaintiff was a fruit and vegetable packer who served the national market in locations of Arizona and California. The plaintiffs gained land in Arizona to grow high-quality cantaloupes which would perish quickly. They did not have the necessary packing infrastructure in Arizona, so they would send the fruit to a facility in California for packing. However, the State of Arizona gave them an order to pack and label the melons before shipment to California based on Arizonan standards. But the plaintiffs could not because they lacked the facility, and they would be practically required to build a facility in Arizona to comply with the law. Ultimately, the Court found the Arizona law was designed for the purpose of protecting the interest of Arizona fruit packers, and the Arizonan government was complaining not because the labels were needed to protect against unfit fruit but rather the labels were not put on high-quality products. This state interest was minimal at best and was not enough to justify the burden on interstate commerce.

3. Market Participant Doctrine

While the Dormant Commerce Clause is widely limiting, it still has boundaries, and in some ways the states are able to impede interstate commerce in two ways. The first way is the so-called “market participant” doctrine, and the second is the quarantine exception. At its core, the Court focuses on the State’s motivation when considering the Dormant Commerce Clause. The market participant doctrine was laid out generally in *Reeves, Inc.*

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57. *Id.* at 139.
58. *Id.*
59. *Id.*
60. See *id.* at 138.
62. *Id.* at 144.
63. *Id.* at 146.
In Reeves, South Dakota in the early 1900's faced cement shortages which negatively affected the entire construction industry in South Dakota. In the face of the shortages, the South Dakotan government built a cement plant to service the needs of the State, but the output of the plant eventually became too much for the South Dakotan construction industry alone to handle. The plant then began to service out-of-state businesses which included the petitioner, Reeves, Inc. Reeves, Inc. bought almost all its cement from the South Dakota plant and serviced construction projects in Wyoming where it was incorporated. However, in 1978, problems arose at the South Dakota plant, and production slowed. In an attempt to uphold its original purpose of service to South Dakota, the South Dakota Cement Commission decided to honor all in-state contracts before out-of-state contracts. This decision drastically hurt the ability of the petitioner to continue its projects.

The Supreme Court, in ruling in favor of South Dakota, found that South Dakota was acting as a market participant rather than a market regulator. The Court maintained this distinction from a prior decision and explained that the thrust of the Dormant Commerce Clause acts in response to state action impinging on “free private trade in the national marketplace” given the state’s sovereignty. States, like other businesses, should be able to “exercise his own independent discretion as to parties with whom he will deal.” Similarly, the Court has altered its analysis when the state is acting on functions that are traditionally held by the public. In Davis, the Court held that Kentucky may exempt its own state-issued bonds from taxation, as opposed to other states’ bonds, because Kentucky is providing for its own public projects. The Court noted “[a] government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.”

The theme of legitimate motivating factors continues to

65. Reeves, 447 U.S. at 430.
66. Id. at 431-32.
67. Id. at 432.
68. Id.
69. Id.
70. Reeves, 447 U.S. at 432-33.
71. Id. at 433.
72. Id. at 440.
74. Reeves, 447 U.S. at 437.
75. Id. at 438-39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).
77. Davis, 553 U.S. at 341-42.
78. Id. at 341.
permeate with the Court’s next exception to standard Dormant Commerce Clause analysis.

4. Quarantine Doctrine

Finally, the states may prohibit infectious articles of commerce in an attempt to quarantine or safeguard their industry. In 1908, the State of Kansas had a law that prohibited the transportation of cattle into the State without having the cattle first checked and certified as healthy by state or federal officials. The petitioner, Asbell, was convicted of violating this prohibition, and sued to challenge the law’s validity as a power outside of the State of Kansas’s authority. The Court reiterated the precedent that no State may interfere with commerce because such power lies exclusively with the national government and Congress. However, the Court recognized Chief Justice Marshall’s words in Gibbons that the States and the federal government may still each have powers that may conflict with each other. Furthermore, the States did not lose their police powers to protect the health of the public. Regardless of whether the States may retain their police powers in such a way as to indirectly affect commerce, any conflicting power of the States must yield to the federal government’s enumerated power. The purpose of the statute was to protect public health, and the Court ultimately found that this Kansas law was a genuine exercise of police powers, which had only an indirect effect on commerce. Moreover, the Kansas law did not conflict with federal law because it allowed federal officials to certify healthy cattle.

III. CURRENT MARIJUANA REGULATIONS AND CONTROVERSIES

A. THE CANNABIS REGULATION AND TAX ACT

Over the last decade, marijuana has become an increasingly important political issue given its wide-ranging implications on personal liberty and criminal justice reform. As such, many states have begun the process of decriminalization. Illinois was no different in responding to the changing

80. Asbell, 209 U.S. at 253-54.
81. Id. at 254.
82. Id.
83. Id. at 255.
84. Id.
85. Asbell, 209 U.S. at 256.
86. Id.
87. Id. at 258.
times and passed The Cannabis Regulation and Tax Act (CRTA).\footnote{H.B. 1438, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).} Furthermore, like other states, the CRTA is convoluted and complicated, which resulted in an extremely long delay\footnote{Robert McCoppin, Judge Allows Illinois to Issue Licenses For 185 New Cannabis Stores Following Prolonged Legal Delay, CHICAGO TRIBUNE (May 27, 2022, 6:29 PM), https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-judge-lifts-license-stay-20220527-lvog34r3jahecc5yckdmrque-story.html [https://perma.cc/8F4H-UVXQ].} for the issuance of dispensary licenses. Moreover, the Act is riddled with constitutionally dubious sections. This section of this Article will outline the portions of the Act’s sections which are likely unconstitutional.

First, before 2022, in order for someone or some business to receive a dispensary license, they must be issued a conditional dispensary license.\footnote{410 ILL. COMP. STAT. ANN. 705/15-36(a) (LEXIS through Pub. Act No. 103-561).} Only qualifying candidates are issued conditional licenses.\footnote{410 ILL. COMP. STAT. ANN. 705/15-35(a) (LEXIS through Pub. Act No. 103-561).} To qualify, the applicant must meet a minimum threshold of eighty-five percent of the total points in a scoring system to be considered a qualifying candidate.\footnote{410 ILL. COMP. STAT. ANN. 705/1-10 (LEXIS through Pub. Act No. 103-561)} The applicant submits various documents and plans to the government in order to receive points. The points system is as follows: sixty-five points for security

\footnote{“Qualifying Applicant” means an applicant that submitted an application pursuant to Section 15-30 that received at least 85\% of 250 application points available under Section 15-30 as the applicant’s final score . . . “}. 

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\(91\). 410 ILL. COMP. STAT. ANN. 705/15-36(a) (LEXIS through Pub. Act No. 103-561).


\(93\). 410 ILL. COMP. STAT. ANN. 705/1-10 (LEXIS through Pub. Act No. 103-561) ("Qualifying Applicant’ means an applicant that submitted an application pursuant to Section 15-30 that received at least 85\% of 250 application points available under Section 15-30 as the applicant’s final score . . . “).
and record keeping; sixty-five points for a business plan and floor plan; fifty points for status as a social equity applicant; thirty points for


(A) The security plan accounts for the prevention of the theft or diversion of cannabis. The security plan demonstrates safety procedures for dispensing organization agents and purchasers, and safe delivery and storage of cannabis and currency. It demonstrates compliance with all security requirements in this Act and rules.
(B) A plan for recordkeeping, tracking, and monitoring inventory, quality control, and other policies and procedures that will promote standard recordkeeping and discourage unlawful activity. This plan includes the applicant’s strategy to communicate with the Department and the Illinois State Police on the destruction and disposal of cannabis. The plan must also demonstrate compliance with this Act and rules.
(C) The security plan shall also detail which private security contractor licensed under Section 10-5 of the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 [225 ILCS 447/10-5] the dispensary will contract with in order to provide adequate security at its facility.

Id.


(A) The business plan shall describe, at a minimum, how the dispensing organization will be managed on a long-term basis. This shall include a description of the dispensing organization’s point-of-sale system, purchases and denials of sale, confidentiality, and products and services to be offered. It will demonstrate compliance with this Act and rules.
(B) The operating plan shall include, at a minimum, best practices for day-to-day dispensary operation and staffing. The operating plan may also include information about employment practices, including information about the percentage of full-time employees who will be provided a living wage.
(C) The proposed floor plan is suitable for public access, the layout promotes safe dispensing of cannabis, is compliant with the Americans with Disabilities Act and the Environmental Barriers Act [410 ILCS 25/1 et seq.], and facilitates safe product handling and storage.

Id.

96. 410 ILL. Comp. Stat. Ann. 705/1-10 (LEXIS through Pub. Act No. 103-561). A social equity applicant is defined as:

an applicant that is an Illinois resident that meets one of the following criteria:
(1) an applicant with at least 51% ownership and control by one or more individuals who have resided for at least 5 of the preceding 10 years in a Disproportionately Impacted Area;
(2) an applicant with at least 51% ownership and control by one or more individuals who:
knowledge and experience; 97 fifteen points for suitability of employee training plan; 98 five points for majority ownership by IL resident; 99 five points for majority ownership by veterans; 100 five points for diversity plan; 101 five points for environmental plan; 102 five points for labor and employment

(i) have been arrested for, convicted of, or adjudicated delinquent for any offense that is eligible for expungement under this Act; or
(ii) is a member of an impacted family;
(3) for applicants with a minimum of 10 full-time employees, an applicant with at least 51% of current employees who:
(i) currently reside in a Disproportionately Impacted Area; or
(ii) have been arrested for, convicted of, or adjudicated delinquent for any offense that is eligible for expungement under this Act or member of an impacted family.

Id. 97. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(4) (LEXIS through Pub. Act No. 103-561).

(A) The applicant’s principal officers must demonstrate experience and qualifications in business management or experience with the cannabis industry. This includes ensuring optimal safety and accuracy in the dispensing and sale of cannabis.
(B) The applicant’s principal officers must demonstrate knowledge of various cannabis product strains or varieties and describe the types and quantities of products planned to be sold. This includes confirmation of whether the dispensing organization plans to sell cannabis paraphernalia or edibles.
(C) Knowledge and experience may be demonstrated through experience in other comparable industries that reflect on the applicant’s ability to operate a cannabis business establishment.

Id. 98. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(1) (LEXIS through Pub. Act No. 103-561).

The plan includes an employee training plan that demonstrates that employees will understand the rules and laws to be followed by dispensary employees, have knowledge of any security measures and operating procedures of the dispensary, and are able to advise purchasers on how to safely consume cannabis and use individual products offered by the dispensary.

Id. 99. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(8) (LEXIS through Pub. Act No. 103-561) (“The applicant is 51% or more owned and controlled by an Illinois resident, who can prove residency in each of the past 5 years. . .”)
100. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(9) (LEXIS through Pub. Act No. 103-561).
101. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(10) (LEXIS through Pub. Act No. 103-561) (“The plan includes a narrative of not more than 2,500 words that establishes a goal of diversity in ownership, management, employment, and contracting to ensure that diverse participants and groups are afforded equality of opportunity.”)
102. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(7) (LEXIS through Pub. Act No. 103-561) (“The applicant may demonstrate an environmental plan of action to minimize the carbon
practices. However, after 2022 the law provides that the Department of Financial and Professional Regulation may issue regulations for the new license lottery.

Second, the CRTA has certain operational requirements for dispensary organizations. Among them, the CRTA requires that all dispensary organizations must buy all “cannabis, cannabis-infused products, and cannabis seeds” from an Illinois registered adult use cultivation center, craft grower, infuser, or another dispensary. Furthermore, dispensary organizations shall not obtain any marijuana products from outside of the state of Illinois. The requirements in order to be granted a license for a craft grower, cultivation center, or infuser are all virtually the same. The applicants who receive the greatest number of points are awarded conditional licenses that may turn into full licenses. Following a similar point system as the dispensary organization license, the point system breakdown for a grower, cultivation center, or infuser is as follows: seventy-five points for suitability of the proposed facility; fifty points for the suitability of employee training plan; 145 points for a security and recordkeeping plan; seventy-five points for a cultivation or infusing plan; ninety-five points for a product safety and labeling plan; 110 points for a business plan; 200 points for status as a Social Equity Applicant; twenty points for a plan of footprint, environmental impact, and resource needs for the dispensary, which may include, without limitation, recycling cannabis product packaging.”.

103. 410 ILL. COMP. STAT. ANN. 705/15-30(c)(6) (LEXIS through Pub. Act No. 103-561) (“The applicant may describe plans to provide a safe, healthy, and economically beneficial working environment for its agents, including, but not limited to, codes of conduct, health care benefits, educational benefits, retirement benefits, living wage standards, and entering a labor peace agreement with employees.”).


105. 410 ILL. COMP. STAT. ANN. 705/15-70(c) (LEXIS through Pub. Act No. 103-561).


108. ILL. ADMIN. CODE tit. 8, §1300.307 (a)(2) (2023); ILL. ADMIN. CODE tit. 8, §1300.105 (a)(2) (2023); ILL. ADMIN. CODE tit. 8, §1300.407 (a)(2) (2023).


110. ILL. ADMIN. CODE tit. 8, §1300.307 (a)(4) (2023); ILL. ADMIN. CODE tit. 8, §1300.105 (a)(4) (2023); ILL. ADMIN. CODE tit. 8, §1300.407 (a)(4) (2023).

111. ILL. ADMIN. CODE tit. 8, §1300.307 (a)(5) (2023); ILL. ADMIN. CODE tit. 8, §1300.105 (a)(5) (2023); ILL. ADMIN. CODE tit. 8, §1300.407 (a)(5) (2023).

112. ILL. ADMIN. CODE tit. 8, §1300.307 (a)(6) (2023); ILL. ADMIN. CODE tit. 8, §1300.105 (a)(6) (2023); ILL. ADMIN. CODE tit. 8, §1300.407 (a)(6) (2023).

113. ILL. ADMIN. CODE tit. 8, §1300.307 (a)(7) (2023); ILL. ADMIN. CODE tit. 8, §1300.105 (a)(7) (2023); ILL. ADMIN. CODE tit. 8, §1300.407 (a)(7) (2023).
labor and employment practices;\(^{114}\) twenty points for an environmental plan;\(^{115}\) ninety points for ownership by a majority of Illinois residents;\(^{116}\) twenty points for ownership by veterans;\(^{117}\) and finally, one hundred points for a diversity plan.\(^{118}\) The total amount of points possible is one thousand, and those with the greatest number of points will be selected for a conditional license.\(^{119}\) The only difference among them are different characterizations of certain substantive requirements. Importantly, the Illinois Department of Agriculture has noted that in order to qualify for consideration for transporter and infuser licenses, the applicant must meet 75 percent of the total maximum points allotted.\(^{120}\)

Lastly, the Illinois Department of Financial and Professional Regulation proposed a new rule for issuing new licenses for a 2022 lottery.\(^{121}\) The Department proposed that the applicant must meet and prove that it is either an Illinois Resident with majority ownership by Illinois residents of at least the last five years, or it must show four of seven other factors in order to qualify.\(^{122}\) Those factors are:

(a) Applicant is owned by at least 26% persons who are Illinois residents of the last five years, have been arrested or convicted of drug offense eligible for expungement, or is a member of an impacted family.\(^{123}\)

(b) Applicant will operate the dispensary in a Disproportionately Impacted Area (hereinafter “DIA”)\(^{124}\) for at least two years.


\(^{119}\) See infra note 120 (“Of the applicants that receive at least 75% of available points, the 40 top scoring applicants will receive a license.”).


\(^{121}\) 46 Ill. Reg. 5127 (proposed Mar. 25, 2022).

\(^{122}\) 46 Ill. Reg. 5141 (proposed Mar. 25, 2022).

\(^{123}\) 46 Ill. Reg. 5141 (proposed Mar. 25, 2022).

\(^{124}\) 46 Ill. Reg. 5141 (proposed Mar. 25, 2022).
(c) During the first two years, 25% of cannabis products will be purchased from licensed social equity applicants. (see III(a)(ii)(3)).

(d) During the first two years, applicant will purchase at least 30% of its contracts and subcontracts from vendors that are registered Illinois BEP vendors owned by various disadvantaged groups.

(e) For at least two years, the applicant will establish a cannabis industry training or education program in an Illinois community college and grant $250,000 to students and mentor students.

(f) Within 60 days, applicant will pay $250,000 as a grant to another cannabis business establishment licensed as a social equity applicant. Furthermore, applicant is restricted from gaining ownership or control over the grantee.

(g) Within 60 days, applicant pays $500,000 to the cannabis business development fund.

In summation, there are two paths under the proposed rule to the issuance of a dispensary license. The first is to, simply, be an applicant who is an Illinois resident. Second, for those who are not Illinois residents, they must, in effect, contribute to and give benefits to Illinois’s businesses and commerce. This is because in the least discriminatory path to obtain a license, out-of-state applicants must: either pay upwards of $2,000,000 to the cannabis business development fund or operate in a DIA, purchase 25 percent of products from Illinois Social Equity Applicants, purchase 30 percent of its contracts from BEP businesses, and pay another sum of at least $250,000. However, and no doubt because of the drafting of this Article, the Illinois Department of Financial and Professional Regulation adopted a different rule regarding dispensary licensing. The new rule provides that applicants must meet at least one element of two criteria. First for criterion A, an applicant

125. 46 Ill. Reg. 5141 (proposed Mar. 25, 2022).
126. Welcome to the Business Enterprise Program, ILL. COMM’N. ON EQUITY AND INCLUSION, https://cei.illinois.gov/business-enterprise-program.html [https://perma.cc/KFJ7-4QRG] (last visited Feb. 24, 2023) (“The Business Enterprise Program (BEP) for businesses owned by minorities, women, and persons with disabilities is committed to fostering an inclusive, equitable and competitive business environment that will support underrepresented businesses increase their capacity, grow revenue, and enhance credentials.”).
129. 46 Ill. Reg. 5143 (proposed Mar. 25, 2022).
130. 46 Ill. Reg. 5143 (proposed Mar. 25, 2022).
must show: that they resided for at least five out of the last ten years in an area that had a poverty rate of at least 20 percent;\textsuperscript{133} or that the applicant resided for at least five out of the last ten years in an area classified as “low income and low access”;\textsuperscript{134} or that the applicant received Medicaid, Supplemental Security Income, Social Security Disability, or subsidized housing for at least five out of the last ten years; or that the applicant resided for at least five out of the last ten years in an area in which the residents are in the top fifteenth percentile of people failing to graduate from high school.\textsuperscript{135} Next for criterion B, an applicant must show: that they were arrested, convicted, or adjudicated delinquent of a marijuana-related crime;\textsuperscript{136} or that the applicant has a family member who was arrested, convicted, or adjudicated delinquent for a marijuana-related offense;\textsuperscript{137} or that the applicant was a victim of a firearm injury.\textsuperscript{138} These requirements are much less constitutionally dubious than that which preceded them. But in-state favoritism still permeates the Act. As it will be discussed in the next section, in-state favoritism and residency requirements are not uncommon forms of regulations, and in fact another state, Maine, has attempted a more straight-line approach to residency requirements for its marijuana industries.\textsuperscript{139}

B. COURT CASES

In 2009, Maine passed the “Maine Medical Marijuana Act.”\textsuperscript{140} It provided that dispensaries may sell medical marijuana so long as they meet certain requirements.\textsuperscript{141} In section 2428(6)(H), those dispensaries that can sell marijuana are those that have been authorized, and to be authorized, all of the officers or directors of the dispensary must be residents of Maine.\textsuperscript{142} Also, an officer or a director is broadly defined as a “director, manager, shareholder, board member, partner or other person holding management position or ownership in the organization.”\textsuperscript{143} So, in effect, the law went a step forward and even required some employees to be Maine residents rather than just the owners. In \textit{Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.}, the plaintiff was a corporation owned entirely by Maine residents that

\textsuperscript{133} ILL. ADMIN. CODE tit. 68, § 1291.410 (e)(6)(A)(i) (2023).
\textsuperscript{134} ILL. ADMIN. CODE tit. 68, § 1291.410 (e)(6)(A)(iii) (2023).
\textsuperscript{135} ILL. ADMIN. CODE tit. 68, § 1291.410 (e)(6)(A)(iii-v) (2023).
\textsuperscript{139} See infra notes 140-43 and accompanying text.
\textsuperscript{140} Maine Medical Marijuana Act, 2009 Me. Laws 631 (codified as amended at Mt. Stat. 22 § 2421-2430).
\textsuperscript{141} ME. STAT. ANN. 22 § 2428 (LexisNexis 2023).
\textsuperscript{142} ME. STAT. ANN. 22 § 2428(6)(H) (LexisNexis 2023).
\textsuperscript{143} ME. STAT. ANN. 22 § 2422(6)(B) (LexisNexis 2023).
operated dispensaries. A Delaware corporation desired to buy the plaintiff's corporation but was prevented from doing so because the resulting outcome would be the inability for the dispensaries to operate given Maine’s law. And the plaintiff sued to have the law declared unconstitutional as an interference with the Commerce Clause. However, the interesting quirk about this dormant commerce clause case, is that the underlying market, marijuana, is a federally illegal substance, and thus its market is entirely illicit. As opposed to the normal dormant commerce clause cases which center around legal markets, commodities, or articles.

The First Circuit Court of Appeals begins its decision by first laying the groundwork and underlying theme which is the dormant commerce clause precedent; the United States is supposed to be a free trade zone among the several states, and the Dormant Commerce Clause defends against economic protectionism and isolation. But does this calculus change since the commodity is illegal? May the states interfere with commerce at will with what Congress deems to be illicit? The respondent’s answer and argument before the court answered these questions in the affirmative. But the court disagreed. First, the court outlined that simply because Congress passed the Controlled Substance Act does not mean that the interstate market of marijuana does not exist and therefore states are free to regulate it. To the contrary, the market exists, and Congress has even expressly provided that federal funds may not be used to prohibit states from allowing marijuana use. Also, the defendants admit that Congress could use its Commerce Clause powers to preempt the residency requirement which requires the existence of a market in the first place. Second, preemption from the Commerce Clause and prohibition of regulation under the Dormant Commerce Clause are two distinct sources of law. The Dormant Commerce Clause operates independently even where Congress has chosen to exercise its authority. Just because its affirmative action makes the market unlawful does not immediately grant states the authority to burden that market. To the contrary, Congress has, in the wake of the CSA, contemplated that the interstate market of

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148. Id. at 546.
149. See supra note 146.
150. Ne. Patients Grp., 45 F.4th at 547.
151. Id. at 548.
152. Id.
153. Id. at 548-49.
154. Id. at 549.
medical marijuana may exist and that it is free from federal criminal enforce-
ment.\textsuperscript{156} Thus, it is subject to state regulation within the limitations of the
Dormant Commerce Clause.\textsuperscript{157} Third, Congress did not expressly allow
states to burden the medical marijuana market by virtue of the CSA.\textsuperscript{158} Usu-
ally, Congress must affirmatively and expressly state its intent to do away
with the Dormant Commerce Clause’s limitations.\textsuperscript{159} The Supreme Court, as
the First Circuit Court of Appeals explained that the clear intent rule was
based on the idea that the democratic processes of the states are not effective
restraints against protectionist laws because the burden falls on those not re-
presented in the state legislature.\textsuperscript{160} In contrast, when Congress acts, it does so
with the representatives of all the states and their localities; there is less dan-
ger to exploit the unrepresented, and this decision to allow protectionism is a
collective national decision.\textsuperscript{161} Here even though the market is illegal, the
states still have an incentive to exploit the market in favor of its citizens and
burden out-of-state citizens.\textsuperscript{162} Furthermore, given the founding of our nation
was rooted in a free trade zone idea; that trade wars were a terrible outcome,
the courts should be reluctant to allow such a broad power in states which
may end up in a trade war fashion.\textsuperscript{163} Additionally, Congress has taken af-
firmative steps to thwart federal enforcement of its laws with the
Rohrabacher-Farr Amendment.\textsuperscript{164} Importantly, that amendment has, in some
sense, provided a basis for the idea that the national marijuana market is not
as illegal as the law would make it out to be, and Congress is becoming more
sympathetic toward the idea of a legal national marijuana market.\textsuperscript{165} So, the
court affirmed the ruling of the district which granted a permanent injunction
against the enforcement of the residency requirement.\textsuperscript{166}

As opposed to the many years\textsuperscript{167} it took for Maine’s residency require-
ment to be challenged in court, the Illinois rules and residency requirement

\textsuperscript{156} Id. at 555.
\textsuperscript{157} Id. at 553-54.
\textsuperscript{158} Id. at 554.
\textsuperscript{159} Id. at 551(citing Sporhase v. Nebraska, \textit{ex rel.}
Douglas, 458 U.S. 941, 960 (1982)).
\textsuperscript{160} \textit{Ne. Patients Grp.}, 45 F.4th at 552 (citing South-Central Timber Dev., Inc. v.
Wunnicke, 467 U.S. 82, 92 (1984)).
\textsuperscript{161} Id. (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984)).
\textsuperscript{162} Id. at 553.
\textsuperscript{163} Id.
\textsuperscript{164} Id.; see generally \textit{Consolidated Appropriations Act of 2022, Pub. L. No. 117-103,}
§ 531, 136 Stat. 49.
\textsuperscript{165} \textit{Ne. Patients Grp.}, 45 F.4th at 554.
\textsuperscript{166} Id. at 558.
\textsuperscript{167} \textit{Compare} Maine Medical Marijuana Act, 2009 Me. Laws 631 (codified as
amended at ME. STAT. 22 § 2421-2430), \textit{with} Ne. Patients Grp. v. United Cannabis Patients &
Caregivers of Me., 45 F.4th 542, 544 (1st Cir. 2022).
were subject to challenge much more quickly. In *Finch v. Treto*, the plaintiffs were an out-of-state resident and a new Illinois resident who challenged the residency requirements under section 15-25 of the Cannabis Regulation and Tax Act because of the apparent lack of ability to obtain licenses. The plaintiffs asked the court to enjoin the issuance of 185 licenses from section 15-25 of the Act. Beginning first, the court found that the plaintiffs had standing to sue; they stood to be injured and suffer irreparable harm given the issuance of the licenses. Furthermore, under the analysis on whether to grant the injunction on Commerce Clause grounds, the court found that the plaintiffs’ likelihood of success, that the residency requirement likely violated the Dormant Commerce Clause, was high. This court, like the First Circuit Court of Appeals, found that Congress had not expressly granted the states authority to burden the market of marijuana with the CSA. And that since Illinois has legalized the industry, it will certainly affect interstate commerce, and thus Congress’s power under the Commerce Clause attaches to this industry. Also, the doctrine of unclean hands has no application where plaintiffs seek to engage in a legal state market. The injunction preventing enforcement of the residency requirements would not force the parties to violate federal law. Even with the likelihood of success on the merits falling in the plaintiffs’ favor, the court nonetheless sided against the plaintiffs because the court found the balance of the equities weighed in favor of the State. There would be significant damage done to the applicants who had already applied if the process were halted. Furthermore, the plaintiffs waited until after the application deadline to file suit. The court surmised that this delay may show a less significant need on the part of the plaintiffs. Regardless, the plaintiffs still challenged the 2022 lottery. However, concerning the 2022 lottery, the court found the issue not to be ripe. While the Illinois Department of Financial and Professional Regulation had issued an application guideline that required either Illinois residency or meeting four out of seven convoluted requirements, the rule was

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170. *Id.* at 824.
171. *Id.* at 828.
172. *Id.* at 834.
173. *Id.* at 831.
175. *Id.* at 832-34.
176. *Id.* at 839-40.
177. *Id.* at 837-40.
178. *Id.* at 836.
technically only proposed and not final. Therefore, since changes could alter legal analysis, the issue was not ripe for adjudication. Fortunately, this Article is not so constrained and may attempt a legal analysis. In the next section, this Article will evaluate the proposed rule under the constitutional precedent to see if it would pass constitutional muster.

IV. ILLINOIS RESIDENCY REQUIREMENT UNDER THE DORMANT COMMERCE CLAUSE

A. THE CANNABIS REGULATION AND TAX ACT’S JUSTIFICATIONS

When evaluating a claim that a state has overreached and interfered with commerce, courts look to whether the regulation overtly discriminates against out-of-state economic interests. If the regulation is not overt discrimination, the court should use a balancing test in which the regulation will be struck down if the burden on commerce is clearly excessive in relation to its local benefits. However, it is important to remember that certain scenarios, such as quarantines and market participants, change the Dormant Commerce Clause analysis. As such, it is pertinent to examine the legislative history of the CRTA to see what reasons the Illinois General Assembly used when passing the CRTA. Such justification may lend credence to a particular theory beyond the plain language of the statute. On May 29, 2019, the Illinois Senate convened to discuss and debate multiple bills, and among them was House Bill 1438. Several senators took to the floor of the Senate to voice their support, opposition, and reasoning for the bill. Senator Heather A. Steans, in particular, took to the floor to discuss the reasoning and support the bill possessed. She noted that: 1) prohibition simply does not work; 2) unregulated markets create unsafe products; 3) teens have easy access to marijuana; 4) the current marijuana system is unjust; and 5) revenue. Social justice was a key theme in Senator Steans’s speech, that the CRTA was an effort to help those disproportionately affected by the war on drugs.

182. Finch, 606 F. Supp. 3d at 844.
185. See supra notes 78-86 and accompanying text.
186. See supra notes 63-77 and accompanying text.
188. Id. at 50-73.
189. Id. at 51-54, 70-73.
190. Id. at 51-54 (statements of Senator Steans).
191. Id. (statements of Senator Steans).
Senator Steans claimed that Illinois was in a unique situation, given its legislative rather than referendum upbringing when it came to recreational marijuana use legalization. Illinois would be poised to be able to balance all of the aforementioned policy goals because, as Senator Steans said, the legislature could debate and build the new adult-use system upon “a good model in the medical program of a well-regulated system that does not divert product out of the system.” Query whether the system Senator Steans is referring to is the Illinois system and the goal is to keep Illinois marijuana in Illinois, or rather Senator Steans is referring to the legal system and the goal to keep marijuana in the legal system as opposed to the illegal system. Given that Senator Steans spoke about the illicit market in Illinois previously, it is most likely she is referring to the latter rather than the former. However, Senator Rose says the quiet part out loud, that “there’s a limited number of licenses and we’re going to give preference to vendors who are going to be in the poorest zip codes in Illinois.” The main focus of the Act is social equity and helping those disproportionately affected by the drug war, and the underlying current of the debate and the statute’s language is geared toward helping Illinois residents. This is a natural tendency for politicians, helping the voters may often secure support for future reelections. However, the problem at the crux of this Article is, as Senator Rose says, the CRTA “give[s] preference to vendors who are . . . in Illinois.” The rest of the debate in the Senate chamber revealed nothing constitutionally dubious; each Senator gave a speech on key topics, such as safety, taxation, social equity, and minors’ safety, and the reasons to either vote for or against.

B. CONSTITUTIONAL ANALYSIS

CRTA Sections 15-70(p)(3), 15-70(c), and the administrative code sections concerning licensing under Title 8 Section 1300 are overtly discriminating against out-of-state commerce. The Supreme Court has been clear that discrimination only refers to “differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter.” First, the market participant and quarantine exceptions do not apply. Illinois is acting as a regulator by regulating the conduct of the economic actors and

193. Id. (statements of Senator Steans).
194. Id. (statements of Senator Steans).
195. Id. at 61 (statements of Senator Rose).
196. Id. at 60-61 (statements of Senator Rose).
198. Id. at 54 (statements of Senator Steans).
199. Id. at 55-57 (statements of Senator Hutchinson).
200. Id. at 70-71 (statements of Senator Steans).
how they may even be licensed rather than proscribing rules for conducting business with the State. Furthermore, the justification and purpose of the CRTA was mainly that of criminal justice reform rather than the prohibition of diseased or injurious marijuana. The legislative history suggests the intent for pecuniary benefits for Illinois residents. Even though the intent for pecuniary benefits is rooted in social equity and justice.

Concerning the rule for dispensary licenses, the Illinois Department of Financial and Professional Regulation adopted a different rule regarding future conditional licensure. Previously, the proposed rule made a clear delineation between in-state applicants and out-of-state applicants, and the out-of-state applicants are subject to much more rigorous standards. Those steps either require out-of-state applicants to benefit Illinois economic interests by reserving some contracts, purchasing from Illinois businesses, or simply paying hundreds of thousands of dollars toward Illinois community colleges, business funds, or even other Illinois social equity applicants. The monetary obligations alone create an immense financial burden; each out-of-state business would need access to large amounts of capital in order to even begin business operations. Given the burden placed onto out-of-state applicants and the benefits that are required to be conferred to in-state interests, the proposed rule falls squarely in the facial discrimination category of regulations. In contrast, making the licenses connected to any tract of land that is considered a DIA rather than contributing to the Illinois industry takes the rule out of the realm of Dormant Commerce Clause analysis; both in-state and out-of-state applicants must prove their residency in a DIA which need not be linked to Illinois. However, such a rule could still be applied in a discriminatory manner if the Department of Financial and Professional Regulation chooses to give preference to, or only consider Illinois residents over out-of-state residents.

Next, sections 15-70(p)(3) and 15-70(c) of the CRTA are unconstitutional. First, section 15-70(p)(3) states, “[a] dispensing organization shall not: . . . [o]btain cannabis or cannabis-infused products from outside the State of Illinois . . . .” Facially discriminatory laws are those which differentially

202. See supra note 191, 198.
203. See supra note 195.
204. See supra note 191, 198.
205. ILL. ADMIN. CODE tit. 68, § 1291.410 (2023).
208. 46 Ill. Reg. 5142 (proposed Mar. 25, 2022).
211. 46 Ill. Reg. 5143 (proposed Mar. 25, 2022).
212. 46 Ill. Reg. 5143 (proposed Mar. 25, 2022).
treat in-state versus out-of-state interests which benefit the former and burden the latter.\textsuperscript{214} Section 15-70(p)(3) expressly forbids the purchase of out-of-state cannabis products. Such a prohibition clearly puts a burden on out-of-state economic interests; they are prevented from accessing the Illinois legal marijuana market. Consequently, in-state marijuana vendors and businesses are given a benefit—separation from out-of-state competition. Thus, the in-state economic actors, namely producers, have total access to the Illinois market—free from any market forces that may siphon business from them. In a sense, all the capital that would be used to buy products must be used on an Illinois producer. Second, section 15-70(c) is unconstitutional. Section 15-70(c) requires that “[a]ll cannabis, cannabis-infused products, and cannabis seeds must be obtained from an Illinois registered adult use cultivation center, craft grower, infuser, or another dispensary.”\textsuperscript{215} An examination of the constitutionality of section 15-70(c) requires a bit of backtracking. The section requires purchases from registered cultivation centers. On its face, this requirement seems innocuous enough because any business, in-state or out-of-state, could be potentially registered. However, if the rules regarding cultivation centers prescribe Illinois residency, then the effect of section 15-70(c) would be to require products to be bought from only Illinois businesses.

The requirements for cultivation center, infuser, and grower licenses will be examined concurrently given their shared substantive requirements.\textsuperscript{216} Beginning first, the Department of Agriculture has expressly stated that “[t]o be considered for a craft grower or infuser license, the applicant must receive a minimum 75% of available points. Of the applicants that receive at least 75% of available points, the 40 top scoring applicants will receive a license.”\textsuperscript{217} Moreover, among transporters, the Department of Agriculture will issue licenses to applicants who meet at least 75 percent of the total points.\textsuperscript{218} Herein lies the constitutional issue with these rules and section 15-70(c) of the CRTA tangentially: these minimum point requirements effectively bar out-of-state applicants from receiving licenses. This is due to the number of points lost through residency falling below these minimum thresholds. Specifically, the rules allocate 200 points for status as a social equity applicant and ninety points for Illinois resident ownership. A social equity applicant is defined explicitly as “an Illinois resident . . .” who meets at least one of three criteria that revolve around social equity and or justice.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{214} Oregon Waste Sys. v. Dep’t of Env’t Quality, 511 U.S. 93, 99 (1994).
\item \textsuperscript{215} 410 ILL. COMP. STAT. ANN. 705/15-70(c) (LEXIS through Pub. Act No. 103-561).
\item \textsuperscript{216} See supra notes 107-118.
\item \textsuperscript{218} 410 ILL. COMP. STAT. ANN. 705/40-15(c) (LEXIS through Pub. Act No. 103-561).
\item \textsuperscript{219} ILL. ADMIN. CODE tit. 8, §1300.10 (2023).
\end{itemize}
Consequently, out-of-state residents cannot be defined as social equity applicants and thus miss out on the 200 points. Along this same vein, the ninety points for Illinois resident control is self-explanatory. The rule requires the applicant to be owned or controlled by a majority of Illinois residents. So, while out-of-state residents may have some stake, they may not have a controlling stake. These rules do fall short of prohibiting out-of-state residents from participating totally, but they still provide a massive barrier to entry for out-of-state residents and a benefit for Illinois residents. Pure out-of-state residents and their businesses—those without Illinois residents—are excluded from consideration; the rule would necessitate finding and ceding control and ownership to Illinois residents.

This rule promotes differential treatment between in-state and out-state residents prohibited by the Dormant Commerce Clause. Out-of-state residents are burdened with the inability to access the Illinois market because of their inability to access the licenses, and Illinois residents benefit by being free from competition and any out-of-state economic interest must flow through Illinois residents to obtain licenses. Furthermore, the language of the law and the legislative history suggest an intention to help Illinois businesses and residents affected by the war on drugs. As such, it is per se invalid under the Dormant Commerce Clause.

While this minimum threshold is constitutionally null, there is no mention of such a threshold requirement for cultivation centers. However, even without a minimum threshold, the categories are still unconstitutional. The Supreme Court has only prohibited differential treatment that burdens out-of-state interests and benefits in-state interests. Even if the rules did not effectively remove the ability of out-of-state economic interests from obtaining licenses, they would still be at a severe disadvantage—Illinois residents would have access to some twenty-nine total percentage points more than their counterparts. When the system is a scoring system that ranks its applicants, those who receive substantially fewer points are much less likely to be selected. This disparity should be especially illustrated when considering how few licenses are given out. Craft grower licenses were numbered at forty, and dispensary licenses, which barely got released, only numbered around 195. Given the size of the Illinois economy, how many residents and businesses Illinois has, and the opportunity to access a burgeoning market potentially worth hundreds of millions, these licenses are certainly sought after. The applicant pool must dwarf the number of licenses issued; these licenses are scarce. In order to receive the best possibility of issuance, the

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applicant needs as many points as possible, and the withholding of almost thirty percent of the total points is enormous. Out-of-state applicants will be burdened by the inability to effectively compete with their Illinois counterparts for licenses. As such, even without a minimum threshold of points, the scoring system, with regard to residency, is per se invalid.

Illinois would not be able to justify the scoring system nor its in-state purchase requirement because the underpinnings of the law are self-interest and protectionism. The legislators and language of the bill spell out a clear intention to help those Illinoisians affected by the drug war and create a market to benefit Illinois. Albeit admirable, these reasons are impermissible under our Constitution. Our country was founded on the idea of a free trade zone; trade wars between the several States would be and were a disaster under the Articles of Confederation. Those justifications may easily devolve into much more restrictive means, which divide our country and not unify it.

While this analysis applies perfectly well in most circumstances, this legal arena is different because marijuana is a federally illegal substance. Several arguments explain why an illegal market justifies a state’s burden on said market, but the First Circuit Court of Appeals’ logic should be applied when refuting the justification that states may burden illegal markets. One such argument is that illegal markets actually do not exist because of their illegal status, and without an established market, the states are free to burden that topic or industry.\textsuperscript{222} However, as the First Circuit Court of Appeals points out, this argument flies in the face of reality.\textsuperscript{223} Just because the United States Code prescribes the possession of marijuana, does not mean that people do not possess marijuana. In fact, it should be common knowledge that people possess and use marijuana frequently. Next, when Congress affirmatively uses its commerce clause authority, the Dormant Commerce Clause has no application, and therefore the only issue at hand is preemption.\textsuperscript{224} Unfortunately, restrictions from preemption and the Dormant Commerce Clause are not conjoined and mutually exclusive, but rather independent sources of legal jurisprudence.\textsuperscript{225} Another prominent argument is that the enaction of the CSA has shown Congress’s consent to states burdening the interstate market of marijuana.\textsuperscript{226} Essentially, when Congress makes a market illegal, the states are free to burden that market however they see fit. However, the Supreme Court has ruled that in order to obviate the Dormant Commerce Clause, Congress must expressly state an intent to do so.\textsuperscript{227} The Court’s logic in \textit{South-...
Central Timber is pictured in Illinois’s effort to discriminate against out-of-state interests. In South-Central Timber, the Court warned against the ability of states to restrain themselves when burdening out-of-state interests. The inference from the Court’s express intent rule is that, without an express intent to obviate the dormant commerce clause, states would likely use their police powers to burden out-of-state residents when operating under the pro-verbial umbrella of Congress’s affirmative acts.

Beyond the reasons articulated in Northeastern Patients Group, the illegality of the marijuana market should be irrelevant to a court’s Dormant Commerce Clause argument because of judicial economy and the core reasons of the Dormant Commerce Clause. First, as the First Circuit noted in Northeastern Patients Group, Congress is contemplating a legal marijuana market. With the Rohrabacher-Farr Amendment, Congress prevented funds from appropriations from being used to prosecute the use of medical marijuana. This is an acknowledgment of fairness and justice—it’s not fair or just to subject those who seek medical relief via marijuana with federal prosecution. Moreover, such an amendment seems unneeded if marijuana is such a dangerous substance with no medical benefits as the CSA states. Moreover, the political landscape is simply changing; more and more states, voters, and politicians are becoming comfortable with and accepting of marijuana as a legitimate and non-dangerous substance. This trajectory indicates that Congress will lift its prohibition against marijuana relatively soon. And given that such a scheme of discrimination is plainly unconstitutional if applied to a legal market, there will only be a short time period in which these laws will stand. Establishing precedent and allowing such laws to persist only serves to gum up the judicial system because the courts will have to revisit the same laws they just ruled as constitutional. Also, the core reasoning of these restrictions is based on the precise reasoning the Court has sought to avoid: protectionism. Even despite its federal illegality, there are, in fact, open and free state markets for marijuana in which lawmakers and politicians are eager to sway in their favor. A court of competent jurisdiction should strike the residency requirements from the CRTA and administrative rules.

V. CONCLUSIONS AND RECOMMENDATIONS

Justice for those wrongly affected by the war on drugs is an admirable and legitimate political goal. Drug prohibition has needlessly subjected millions of Americans, who are disproportionally black and brown, to imprisonment, harassment, and lasting inequality. In order to push for a more equal and free society, criminal justice reform is necessary. The Illinois legislature,

229. See generally Michael Tonry, Race and the War on Drugs, 1994 UNIV. CHI. LEGAL. FORUM 25 (1994).
like most politicians, fell into the typical pitfall of control and regulation. After all, what else can they point to for their reelection as success? It’s a much easier political argument to make to voters that “I made this law which made this benefit for you” because something tangible is being done regardless of its efficacy. Moreover, Illinois politicians are desperate to add additional revenues in order to tackle the mounting debt and liabilities problem that Illinois has. However, the projected marijuana revenues generated from the CRTA are estimated to be about 500 million at full maturity. Comparing this number to Illinois’s debt of roughly 154 billion shows this is only a drop in the proverbial bucket. The irony of prohibition has yet to fully strike the members of the Illinois General Assembly. Members of the General Assembly will readily accept that prohibition causes an illicit black market, but fail to realize that extensive regulations and taxation serve a similar function in creating black markets because, as in Illinois’s laws, the taxation is passed onto consumers in the form of higher prices. Moreover, the scheme for licensing forms a bottleneck upon which only the well-

230. See infra note 233.
236. See Austin Berg, Springfield lawmakers have yet to learn the lesson that money walks. And it’s not just to other states. Sometimes, it walks past the legal dispensary with a 40% tax rate and into a dealer’s house., I.L. POL’Y INST. (Jan. 9, 2020), https://www.illinoispolicy.org/illinois-cannabis-taxes-among-nations-highest-could-keep-black-market-thriving/ [https://perma.cc/FD6U-BKCL] (finding that Illinois state and local tax burden on consumer ranges from 26.25% to 41.25%).
connected—in terms of wealth, connections, accountants, and lawyers—are able to fit through. This is because of the proverbial maze of regulations to obtain a license; reading and understanding the laws myself was difficult enough as an aspiring lawyer. How could someone who has not had years of experience and training in reading laws achieve such a goal? Moreover, doing the mountain of paperwork correctly requires experience in business planning. These factors combine to create a situation, which many complain, is unfair and rigged toward an elitist class.

To illustrate this problem, take the example of Sunnyside, which is the name for a chain of marijuana dispensaries from Rockford to Chicago to Champaign. They even have dispensaries in other states.238 The Sunnyside dispensary license located in Champaign, Illinois, was granted to Phoenix Farms of Illinois, LLC. Is Phoenix Farms, LLC a small business managed by local people of color? No, instead, Phoenix Farms, LLC is managed by Phoenix Farms of Illinois Asset Management, LLC. Phoenix Farms of Illinois Asset Management, LLC is, in turn, managed by Phoenix Farms Partners, LLC. Phoenix Farms Partners, LLC is, in turn, managed by Cresco Labs Phoenix Farms, LLC. Cresco Labs Phoenix Farms, LLC is, in turn, managed by Cresco Labs Notes Issuer, LLC which is managed by Cresco Labs, LLC. Finally, Cresco Labs, LLC is managed by Cresco U.S. Corp. which is an Illinois corporation.239 While that may seem confusing, to a business lawyer this chain of business entities makes prudent sense; this is a way to disperse liability among and behind many limited liability forms. However, what this should illustrate is the complexity of business and corporate law. Each one of these entities had to be formed and maintained by lawyers in order to ensure proper function, and those same lawyers would also help apply for and obtain marijuana licenses. Critically, lawyers are one resource that many people of low income have historically been lacking access to, so setting up a licensing scheme in such a complex way almost necessitates the use of a very expensive resource which will crowd out those without the ability or access to that resource. This undoubtedly disproportionately affects people of color given the disparities that exist in income and wealth—in no doubt thanks to the war on drugs.

The removal and replacement of the current scheme with few licensing regulations should be sought to actively attempt to remedy the effects of the

war on drugs. This replacement should not just apply to dispensaries but growers, infusers, and the like. The people affected by the war on drugs have been severely economically harmed.  The label of felon often times brands people for life as unemployable without any due regard for their ability or work ethic and thus affects their ability to work.  With a lower barrier to entry, more people can enter the market—with fewer restrictions comes access to those less connected and affluent. The Illinois General Assembly should repeal the current licensing scheme in favor of a system of local control that imposes minimal restrictions on ownership, operations, licensing fees, and taxes on the product. This way more of the control over marijuana licensing goes to localities, not a state-wide agency, and people who have the least resources could begin a small business in their town, community, or municipality.

Some may argue that such a system will continue to lend itself to affluent persons, and those people will still have a domineering presence in the market, and that is likely true. Whether the hurdle is small or large, those who are connected politically or legally will always be able to navigate the law and business. The important factor to focus on is whether the small business, run by one or two people with relatively little money, may enter the market. The current scheme, which attempts to force social equity through regulation incidentally places too high a financial and legal hurdle, and in a proposed system of few regulations, anyone may have access. We should avail ourselves to avoid monopolies and oligopolies. After all, the most important scenario for big business is a lack of competition—that way they can soak up all the money and capital in the market.

Additionally, a less restricted market will lead to more safety, not less. Proponents of this scheme acknowledge the danger that the black market poses to users. Black market drug dealers have an incentive to obtain laced drugs or lace the marijuana with more addictive drugs such as fentanyl because it provides for a bigger high and more dependency. A dependent user is a returning user. But the criminal law does little to deter this criminal activity because the chain of custody and knowledge as to its trace composition

is messy.245 But how would a less regulated system provide for more safety? Fewer requirements will result in more businesses that are dangerous, right? The problem with that rhetorical question is that an extensive regulatory scheme as the one enacted in Illinois still provides for a black market. The cost of legal marijuana is so much higher than illegal marijuana that many people simply choose the latter. Moreover, through product liability, manufacturers and sellers of marijuana will be strictly liable for the injuries they cause to their customers.246 So, they will always have an incentive to make their products safe or otherwise face civil liability. But most importantly, this system is much more able to identify the manufacturers and sellers of products than a black market. Ultimately, this proposed system will be a vast improvement to the current system.

246. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (AM. L. INST. 2012).