

# CRAFT BEER AND MARIJUANA COHESIVENESS IS POSSIBLE: HOW ONE CAN LEARN FROM THE OTHER'S REGULATORY MADNESS

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## I. INTRODUCTION

Since the end of the Prohibition in 1933, the United States' alcohol industry has ballooned in various ways, and is now collectively worth \$200 billion.<sup>1</sup> While alcohol production began as a simple who-could-create-the-most-mediocre-tasting-alcohol-in-the-biggest-batches mentality, the early 1990s ushered in a new era of artisanal alcohol: craft beer.<sup>2</sup> While slow growing at first, the craft beer industry has experienced unprecedented growth and increased market share for the past several decades. Approximately 4,500 craft breweries were in operation in 2016, with this number rising to over 6,300 breweries operating during 2017.<sup>3</sup> Craft brewers now produce about one of every ten beers sold in the United States,<sup>4</sup> and over 98% of the currently-operating U.S. breweries make craft beer.<sup>5</sup> Additionally, craft beer currently occupies over 12% of the total market share, which has risen from 7.8% in 2013.<sup>6</sup> The U.S. Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) classifies over

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<sup>1</sup> Scheherazade Daneshkhu and Lindsay Whipp, *US Drinks Industry Ponders Effect of Cannabis Legalization*, FINANCIAL TIMES (Nov. 25, 2016), <https://www.ft.com/content/f72c1f00-b254-11e6-a37c-f4a01f1b0fa1>.

<sup>2</sup> Aaron Goldfarb, *An Illustrated History of Craft Beer in America*, FIRST WE FEAST (Mar. 6, 2017), <https://firstwefeast.com/features/illustrated-history-of-craft-beer-in-america>. The Brewers Association defines craft beer as innovative, "small, independent and traditional." Craft Brewers are generally involved in their local communities and positively impact their communities through individualistic approaches. *Craft Brewer Defined*, BREWERS ASSOCIATION, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Apr. 10, 2018). <https://www.brewersassociation.org/statistics/craft-brewer-defined/>.

<sup>3</sup> Press Release by Brewers Association, *Small and Independent Brewers See Sustained Growth in 2017* (Mar. 27, 2018), <https://www.brewersassociation.org/press-releases/small-and-independent-brewers-see-sustained-growth-in-2017/> [hereinafter Brewers Association Press Release 2018].

<sup>4</sup> John Kell, *Craft Brewers Now Produce 1 Out of Every 10 Beers Sold*, FORTUNE (Mar. 16, 2015), <http://fortune.com/2015/03/16/craft-beers-volume-rising/>; see also Steve Hindy, *The Craft Beer Revolution: How a Band of Microbrewers is Transforming the World's Favorite Drink* 1 (2014).

<sup>5</sup> Brewers Association Press Release 2018, *supra* note 4.

<sup>6</sup> *Id.*

90% of these breweries as small brewers, as they produce fewer than 2 million barrels annually.<sup>7</sup>

Now, locally made beer created by independent breweries is preferred over mass-produced, nationally-recognized monopolies, such as ABInBev,<sup>8</sup> and the TTB figures are proving it: though the TTB anticipates modest growth in the alcohol industry, it predicts that excise taxes will remain constant, partly due to “declining sales by volume from the country’s largest brewers, who account for approximately 90% of the beer sold in the U.S.”<sup>9</sup>

The industry’s giants, also known to those in the beer world as “Big Beer”, took quick notice of the movement’s success and positive consumer response, and have “employed several strategies to take advantage of the grassroots endeavor spawned by boredom with their products.”<sup>10</sup> For example, over the past several years, Big Beer purchased a number of craft breweries across the United States in an attempt to keep their share of the market.<sup>11</sup> Moreover, Big Beer’s most outrageous and recent tactic involves scaring craft breweries into thinking marijuana legalization will be the demise of craft beer, and unfortunately, it has made some craft brewery owners nervous.<sup>12</sup>

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<sup>7</sup> ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, ANNUAL REPORT FISCAL YEAR 2016, 3, 10 (2016), <https://www.ttb.gov/foia/pdf/ttbar2016.pdf> [hereinafter TTB 2016].

<sup>8</sup> Kellie Money, *Certifying Craft: Preserving Authenticity in the Craft Beer Market*, 55 U. LOUISVILLE L. REV. 413, 443 (2017)

<sup>9</sup> TTB 2016 *supra* note 8, at 367.

<sup>10</sup> Money, *supra* note 9, at 426.

<sup>11</sup> Alastair Bland, *Craft Beer, Brought to You by Big Beer*, NPR (July 28, 2017, 12:03 PM), <https://www.npr.org/sections/thesalt/2017/07/28/539760477/craft-beer-brought-to-you-by-big-beer>.

<sup>12</sup> Melina Delkic, *Is Marijuana the New Craft Beer? Former Budweiser Exec Thinks So*, NEWSWEEK (Nov. 14, 2017, 12:45 PM), <http://www.newsweek.com/marijuana-craft-beer-budweiser-exec-710529>. Former chief marketing officer for Anheuser-Busch In-Bev, Chris Burggraeve, stated that, in terms of craft beer and marijuana, “there will be part supplementing and part complementing.” *Id.*; see also Jonathan Shikes, *Craft-Beer Trade Group Finally Addresses the Possible Effect of Legalized Marijuana*, WESTWORD (Jan. 3, 2017, 5:21 AM), <http://www.westword.com/restaurants/craft-beer-trade-group-finally-addresses-the-possible-effect-of-legalized-marijuana-8650827> (referring to the Brewer’s Association, the organization which represents the entirety of the craft-beer industry, reluctance to address the legal sale of recreational marijuana for over two years. The article goes on to cite Boston Beer Company’s warning to its shareholders that the legalization of marijuana could “adversely impact the demand” for its beer. *Id.*).

Akin to craft beer in its beginning stages, marijuana production and cannabis brands are challenged by confusing legislation, regulations, and a patchwork of a marketplace brought by “preconceptions, misconceptions, and inexperience.”<sup>13</sup> If craft beer believes its marketplace is difficult and tedious, it should consider the current state of the marijuana industry: in states where cannabis is legalized, businesses are still only considered “quasi-pseudo-hemi-demi-legal”, as in permitted under state law, but forbidden under federal law.<sup>14</sup> While craft beer could rely on stable and consistent federal regulation through its infancy and maturity, marijuana businesses cannot even deposit their revenue into banks or rely on federal regulations, as they are nonexistent.<sup>15</sup>

The marijuana industry's approach to start-up cultivation is considerably more difficult than what craft beer has and continues to face: businesses in the marijuana industry face higher entrance barriers and stricter regulations than craft beer.<sup>16</sup> So what does this mean for both craft beer and marijuana now and in the future? Though craft beer is currently facing stagnant growth and dozens of closings,<sup>17</sup> this is not the time to turn against each other: while some scholars point to an inherent difference between the history of alcohol and marijuana generally,<sup>18</sup> marijuana is a friend to the craft beer world, not a foe. Big Beer, distributors, and confusing, high tax regulations are still the biggest threat to both.

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<sup>13</sup> Matthew Youngblood, *What Cannabis Brands Can Learn From Craft Beer*, MG CANNABIS INDUSTRY NEWS (June 7, 2017), <https://mgretailer.com/what-cannabis-brands-can-learn-from-craft-beer/>.

<sup>14</sup> Abby Haglage, *The Half-Baked Weed Protest*, THE DAILY BEAST (March 6, 2014, 5:45 AM), <https://www.thedailybeast.com/the-half-baked-weed-protest>.

<sup>15</sup> See generally 21 U.S.C. §§801-904 (2012); see generally 18 U.S.C. §§2, 3, and 371 (2012). Essentially, under the Controlled Substances Act, marijuana is still classified as a Schedule I drug, an illegal drug to possess, sell, or distribute. Pursuant to FDIC bank and regulatory laws, a bank is required to report any transaction that it believes involves “funds derived from illegal activities,” and may not aid in a federal crime. Additionally, federal laws are paramount for banks as they rely on Federal Reserve systems to function. If the FDIC believes a bank is engaged in any illegal activity, such as opening a bank account for a person who is using it to hold funds retrieved from marijuana sales, the FDIC could step in and shut down a bank with little notice. For a more in-depth analysis, see Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015).

<sup>16</sup> Jim Tankersley, *How Pot and Hippy Beer Explain the Future of the American Economy*, THE WASH. POST (Nov. 7, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/07/in-the-land-of-microbrews-and-marijuana/?utm\\_term=.36889bdcc11c](https://www.washingtonpost.com/news/wonk/wp/2015/11/07/in-the-land-of-microbrews-and-marijuana/?utm_term=.36889bdcc11c).

<sup>17</sup> Zach Fowle, *This Is Why My Brewery Shut Down*, DRAFT (Aug. 16, 2017), <http://draftmag.com/this-is-why-my-brewery-shut-down/>.

<sup>18</sup> Steven A. Vitale, *"Dope" Dilemmas in A Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States*, 23 U. MIAMI BUS. L. REV. 131, 172 (2014).

This article will first discuss the complicated and complex history and current trends of both marijuana and craft beer in the U.S. Second, this article will address Big Beer's fear of legalized marijuana, and why any fear which craft beer has regarding legalized marijuana is a red herring caused by Big Beer, distributors, and the media. Next, this article will discuss the implications of current marijuana policy on both the public and the marijuana industry. Finally, this article will discuss the existing dichotomy between craft beer and marijuana, what craft beer must do to continue flourishing, and how to smoothly integrate marijuana into the U.S. on a federal level. I propose the following for both craft beer and the impending boom of marijuana legalization in the United States: craft beer must continue to fight Big Beer, push back against additional taxes, and rebel against the three-tier system and the monopoly which distributors currently enjoy. Marijuana must push for recognition of legal marijuana on a federal level and a consistent regulatory scheme across all levels of government.

## II. MARIJUANA AND CRAFT BEER: HISTORY AND PRESENT STATE OF AFFAIRS

Comparably, the history of marijuana to craft beer is rather short and new. And while craft beer experienced a rollercoaster of a history to get where it is today, marijuana is not much different: while craft beer needed to combat negative connotations conveyed by the Prohibition, marijuana needed to combat the negative connotations which revolved around it from the War on Drugs.

### *A. Marijuana*

In 1937, the United States federal government took its first steps against marijuana by prohibiting the possession or sale of it through the Marijuana Tax Act.<sup>19</sup> The Controlled Substances Act ("CSA") passed in 1970 was an additional attempt by Congress to prohibit marijuana use in the U.S.<sup>20</sup> The CSA, per Richard Nixon's War on Drugs, considered marijuana a Schedule 1 drug, meaning the federal government defined it as "medically useless".<sup>21</sup>

Baby boomer and citizen support changed the negative connotations which marijuana faced prior to the 1970s.<sup>22</sup> State interest in medical marijuana combined with baby boomers' realization that "marijuana was not

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<sup>19</sup> Scott Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

the Demon Weed” made it easier for activist groups, such as the National Organization for the Reform of Marijuana Law (NORML), to push medical state-level marijuana legalization and eventually recreational marijuana legalization through various lobbying efforts and grassroots initiatives.<sup>23</sup>

Marijuana legalization is currently sweeping the nation.<sup>24</sup> As of March 30, 2018, thirty states and the District of Columbia have laws which legalize marijuana, ranging from broad recreational marijuana approval, to approval strictly for certain medicinal uses.<sup>25</sup> For example, California’s Medicinal and Adult Use Cannabis Regulation and Safety Act, arguably one of the least restrictive state marijuana laws, permits recreational marijuana purchases to anyone over the age of 21.<sup>26</sup> Contrarily, Texas’ Compassionate Use Act, arguably the most restrictive marijuana law in the United States, only allows medical marijuana use for patients with intractable epilepsy, with such use being limited to low-THC, high-CBD cannabis oil delivered to the patient’s home by a nurse or social worker.<sup>27</sup>

Marijuana, while starting as a simple social habit for baby boomers, has now blossomed into a sophisticated, multimillion-dollar industry which funds important state-run programs, and even has the potential to offset the opioid epidemic crisis plaguing the U.S.<sup>28</sup> States with successfully-implemented cannabis laws have witnessed a mind-boggling increase in tax

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<sup>23</sup> *Id.*

<sup>24</sup> Ryan Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FL. L. REV. 297, 297 (2017).

<sup>25</sup> State Marijuana Laws in 2018 Map, GOVERNING THE STATES AND LOCALITIES: DATA, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

<sup>26</sup> See Cal. Bus. & Prof. Code (“BPC”) §26001(b); Alicia Wallace, *A Greener America: Marijuana’s Big Statement in Election 2016*, THE CANNABIST (Nov. 8, 2016, 7:19 PM), <https://www.thecannabist.co/2016/11/08/election-2016-marijuana-results-states-recreational-medical/66994/>. (citing the National Conference of State Legislatures, National Organization for the Reform of Marijuana Laws, and state newspapers outlining relevant legislation).

<sup>27</sup> S.B. 339, 84th Leg., R.S. (Tex. 2015); *Governor Abbott Signs bill Authorizing Seizure-Reducing Treatment for Intractable Epilepsy Patients*, OFFICE OF THE GOVERNOR GREG ABBOTT (June 1, 2015), <http://gov.texas.gov/news/signature/20979>.

<sup>28</sup> Sadi Gurman, *Feds to Allow Prosecution of Marijuana Growers, Users Even in States Where it’s Legal*, THE COLUMBUS DISPATCH (Jan. 4, 2018), <http://www.dispatch.com/news/20180104/feds-to-allow-prosecution-of-marijuana-growers-users-even-in-states-where-its-legal>; Martin, *supra* note 20; Mark Lieber, *Marijuana Legalization Could Help Offset Opioid Epidemic, Studies Find*, CNN (Apr. 2, 2018), <https://www.cnn.com/2018/04/02/health/medical-cannabis-law-opioid-prescription-study/index.html>.

revenues that stem from general marijuana taxes, licenses, and fee revenue.<sup>29</sup> Colorado, Washington, and Oregon have a total of \$1.3 billion in tax revenue combined.<sup>30</sup> In Colorado, Washington, and Oregon, these pot taxes have already helped to rebuild “crumbling schools,”<sup>31</sup> create more accessibility to health care,<sup>32</sup> and increase funding for mental health and drug services,<sup>33</sup> respectively.

Many state laws are regulating cannabis similarly to alcohol, and even combining its state liquor control agency with its marijuana control agency.<sup>34</sup> Some titles of initiatives relate marijuana and alcohol simply through its name, such as the “Regulate Marijuana Like Alcohol Act,” an unsuccessful House bill from 2015.<sup>35</sup> Washington’s initial regulation of the marijuana industry in 2012, for example, paralleled the structure and wording of post-Prohibition laws, both of which purposefully made it difficult to comply with laws, and led to less product making its way to eager consumers.<sup>36</sup> And these initiatives are generally correct in its parallel to

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<sup>29</sup> See generally Tripp Baltz, *States Uneasy Over Tax Impact of Marijuana Policy Change*, BLOOMBERG: DAILY TAX REPORT: STATE (Jan. 24, 2018), <https://www.bna.com/states-uneasy-tax-n73014474644/>.

<sup>30</sup> Katie Zezima, *Study: Legal Marijuana Could Generate More Than \$132 Billion in Federal Tax Revenue and 1 Million Jobs*, The Washington Post (Jan. 10, 2018), [https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm\\_term=.f47842f9552d](https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.f47842f9552d).

<sup>31</sup> German Lopez, *Marijuana Taxes are Giving Colorado a Pot of Money to Rebuild its Crumbling Schools*, VOX (Jul. 12, 2017), <https://www.vox.com/policy-and-politics/2017/7/12/15956742/colorado-marijuana-taxes-schools>.

<sup>32</sup> WASH. REV. CODE §69.50.540(2)(e) (2018).

<sup>33</sup> Marijuana Taxes, OR. DEP’T OF REVENUE (Mar. 8, 2018), [www.oregon.gov/dor/press/documents/marijuana\\_fact\\_sheet.pdf](http://www.oregon.gov/dor/press/documents/marijuana_fact_sheet.pdf) (stating that state marijuana tax revenues in Oregon will distribute 20% for mental health treatment or for alcohol and drug abuse prevention, early intervention, and treatment. *Id.*)

<sup>34</sup> For example, Washington’s governing board for both liquor and cannabis is “Washington State Liquor and Cannabis Board,” and marijuana regulations is regulated by the Oregon Liquor Control Commission.

<sup>35</sup> Stoa, *supra* note 25, at 297.

<sup>36</sup> *Fact Sheet*, WASH. ST. LIQUOR & CANNABIS BOARD, <https://lcb.wa.gov/mj2015/fact-sheet> (last visited Apr. 7, 2018) (describing Initiative 502, which regulated and licensed marijuana production in Washington, as having “an application process that mirrors the liquor license application process.”); see generally Matt Ferner, *Rachel Maddow Draws Parallels Between Marijuana Legalization in Colorado, Washington and End of Alcohol Prohibition*, HUFFPOST (Nov. 14, 2012), [https://www.huffingtonpost.com/2012/11/14/rachel-maddow-links-marij\\_n\\_2130658.html](https://www.huffingtonpost.com/2012/11/14/rachel-maddow-links-marij_n_2130658.html); see also Sara Solovtich, *How Big Alcohol is About to Get Rich off California Weed*, POLITICO (Aug. 29, 2016), <https://www.politico.com/magazine/story/2016/08/marijuana-legalization-big-business-alcohol-214198> (describing California’s marijuana regulations as being “modeled on the system that emerged at the end of Prohibition”).

alcohol: cannabis consumption, just like alcohol consumption, follows Pareto's Law, also known as the 80/20 rule: 20% of consumers account for 80% of the volume.<sup>37</sup>

The thriving legal weed business in the United States shows no signs of stopping. In 2017, legal marijuana sales of both medical and recreational weed hit almost \$8 billion.<sup>38</sup> 2018 is expected to drive in over \$10 billion of legal marijuana sales, with a majority of this growth stemming from the recreational market.<sup>39</sup> Conservative estimates indicate that by 2025, sales of legal marijuana could reach \$16 billion; however, if legalized on a federal level, sales could be as much as \$35 billion, potentially rivaling the NFL's market value.<sup>40</sup>

Marijuana's most prominent blockade to reaching its full potential is the federal government. Should the federal government legalize marijuana and remove it from the CSA, many policy objectives which weed proponents desire could be accomplished.<sup>41</sup> For example, by removing marijuana from the CSA, research restrictions would vanish, and Americans would have access to insurance-covered marijuana.<sup>42</sup> While the likelihood of marijuana legalization on a federal level is unlikely in the near future, growing public support for legal marijuana could spur a mindset change for Congressional leaders, and lead them to "seize the moment and legalize marijuana."<sup>43</sup>

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<sup>37</sup> Mark Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY (Mar./Apr./May 2014), <https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/>.

<sup>38</sup> *The Cannabis Industry Annual Report: 2017 Legal Marijuana Outlook*, Frontier Financial Group, Inc., [https://newfrontierdata.com/wp-content/uploads/2015/11/CIAR\\_Webinar\\_FINAL.pdf](https://newfrontierdata.com/wp-content/uploads/2015/11/CIAR_Webinar_FINAL.pdf) (last visited Apr. 8, 2018).

<sup>39</sup> *Id.*

<sup>40</sup> Frank Robison, *Going Green: Legal Considerations for Marijuana Investors and Entrepreneurs*, 6 AM. U. BUS. L. REV. 57, 63–64 (2016); see also Christopher Ingraham, *The Marijuana Industry Could be Bigger than the NFL by 2020*, THE WASH. POST (Oct. 24, 2014),

[https://www.washingtonpost.com/news/wonk/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/?utm\\_term=.63bea28b0d63](https://www.washingtonpost.com/news/wonk/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/?utm_term=.63bea28b0d63).

<sup>41</sup> Jon Gettman, *Top 10 Marijuana Policy Issues for 2018*, HIGH TIMES: BUS. (Jan. 2, 2018), <https://hightimes.com/culture/marijuana-policy-issues-2018/>.

<sup>42</sup> *Id.*

<sup>43</sup> Earl Blumenauer, *Congress: Seize the Moment and Legalize Marijuana*, THE HILL (Jan. 8, 2018), <http://thehill.com/blogs/congress-blog/politics/367990-congress-seize-the-moment-and-legalize-marijuana>; Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Jan. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/>.

### *B. Craft Beer*

Post-Prohibition, every state was permitted to introduce state-level legislation repealing the prohibition of alcohol.<sup>44</sup> The federal government chose to respect the wishes of those states, counties, and/or cities who wished to remain dry after repealing the Prohibition, meaning it was up to each state, county, and/or city who wished to begin selling alcohol to enact alcohol legislation of their choosing.<sup>45</sup> Most states implemented a form of the three-tier system of distribution in order to deter the tied-house system, which many blame as the reason for “overly aggressive marketing...[a] destabilizing of the market, criminal conduct and general moral decline.”<sup>46</sup>

While the three-tiered system was enacted with good intentions, it has proven to be detrimental in many ways: most three-tier systems implemented require brewers to sell their beer first to wholesalers, who then must sell only to retailers.<sup>47</sup> This resulted in a monopoly and abuse of the market by distributors of the distribution system.<sup>48</sup> This abuse is only magnified by the fact that the three-tier system generally prohibits members of any tier from having a financial stake in members of another tier.<sup>49</sup> Moreover, because wholesalers are guaranteed a significant percentage of the beer market under most three-tier systems, wholesalers and Big Beer do not like the new, trendy idea of permitting self-distribution and on-premise sales by craft breweries.<sup>50</sup> Therefore, through lobbying efforts and many sizeable donations to politicians, Big Beer and distributors have rather successfully limited competition post-Prohibition by claiming the three-tier system promotes “consumer choice, value, [and] temperance,” and is not in place strictly for the economic gain of Big Beer and distributors.<sup>51</sup> For example, in Charlotte, North Carolina, two pieces of legislation were immediately passed which made the selling and brewing of beer on the same premises illegal, and prohibited brewpubs from existence within city limits.<sup>52</sup>

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<sup>44</sup> Alistair Williams, *Exploring the Impact of Legislation on the Development of Craft Beer*, 18 BEVERAGES, 1, 2 (2017).

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Williams, *supra* note 45.

<sup>50</sup> *Id.* For example, Massachusetts was recently forced to settle a difference between craft beer and distributors. Justin Kendall, *Massachusetts Judge Upholds \$2.6 Million ‘Pay-to-Play’ Fine Against Craft Beer Guild*, Brewbound (Oct. 4, 2017), <https://www.brewbound.com/news/massachusetts-judge-upholds-2-6-million-pay-play-fine-craft-beer-guild>.

<sup>51</sup> Williams, *supra* note 45, at 4-5.

<sup>52</sup> *Id.* at 3.



Craft beer growth has been scattered and disproportional across the U.S.<sup>53</sup> Though consumer demand shapes the development and growth of locally-owned craft breweries, it has also “been enabled by the legislative changes which have taken place in the last twenty years.”<sup>54</sup> Some legislative changes include 1) raising the ABV cap to give brewers more freedom, and 2) allowing on-site distribution and allowing brewer’s limited self-distribution – i.e., getting rid of the three-tiered system.<sup>55</sup> For example, it was not until 1986 and 2005 that Charlotte permitted the opening of brewpubs and raised the 6% ABV cap to 15% ABV respectively.<sup>56</sup> Additionally, Charlotte, North Carolina, where the average resident lives within a few miles of a local brewer, has an ABV cap on beer of 15%, and allows its breweries to produce and sell their own beer on-site and self-distribute.<sup>57</sup> Charlotte is considered to be the “undisputed leader in craft beer from Virginia to Texas” because its legislative changes post-Prohibition allow craft beer to flourish.<sup>58</sup> Ohio is another example of how raising legislative lead to the growth of craft beer. When BrewDog, a major craft beer player out of Scotland, was looking for a city in America to build its first brewery, it considered Columbus, Ohio, among a few other cities. During initial talks, the brewery was concerned with the low ABV cap in Ohio, which is also one of the rumored reasons why Stone Brewing Company chose Virginia over Ohio for its East Coast brewing operations in 2014.<sup>59</sup> Ultimately, BrewDog chose Columbus, Ohio, as its first American brewery, and the Ohio legislators, almost simultaneously, wiped out its ABV cap.<sup>60</sup>

Despite such progress, distribution and franchise laws considerably hinder craft beer growth today. Allowing the franchise laws to continue limits

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<sup>53</sup> *Id.* at 1.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> Williams, *supra* note 45 at 3. This can also be seen in other states such as Ohio, where BrewDog, a major craft beer player, propositioned Columbus, Ohio as its first American brewery, prompting Ohio’s Congress to raise the ABV cap from 6% to 20%. *Ohio ABV Limit Ends, Brewery Promptly Makes 55 Percent Beer*, VINEPAIR (Sept. 6, 2016), <https://vinepair.com/booze-news/brewdog-strongest-beer-in-ohio/>.

<sup>57</sup> William, *supra* note 45 at 3.

<sup>58</sup> *Id.* at 2, 4.

<sup>59</sup> See generally Keith Gribbins, *Holy Hell, Ohio: You Just Nixed ABV Limits for Beer (CCB Starts Slow Clap)*, CRAFT BREWING BUSINESS (June 2, 2016), <https://www.craftbrewingbusiness.com/news/holy-hell-ohio-just-nixed-abv-limits-beer-cbb-starts-slow-cap/>. “Remember Stone Brewing Co. back in 2014? Stone was shopping Columbus, Ohio, for its new East Coast brewing operations. Richmond, Va., won out over Columbus. Why? Maybe that 12 percent ABV laws worked itself into the equation.” *Id.*

<sup>60</sup> *Id.*; Laura Bischoff, *Ohio Wipes Out ABV Limit on Beer*, DAYTON DAILY NEWS (Sept. 14, 2016), <https://www.daytondailynews.com/news/state--regional-govt--politics/ohio-wipes-out-abv-limit-beer/ZzgDZXo6fbXm9rH0LTh8BO/>.

small breweries' access to eager consumers and the growing marketplace. Additionally, market power is consolidated between a few large breweries and a few distributors in each city and state.<sup>61</sup> A typical distribution arrangement, coupled with local and state franchise laws, "undermine brewer autonomy as they force brewers across the U.S.A. to turn over their brands to independent companies for distribution to retailers."<sup>62</sup> This gives them "significant bargaining advantages over small, family-owned, distributors."<sup>63</sup> While some argue franchise laws "prohibit vertical integration of the brewing, distribution and retail tiers," and therefore prevents monopolies, little evidence exists to back this claim.<sup>64</sup>

It should come as no surprise, therefore, that those states and cities which have repealed or changed distribution and franchise laws are the same states and cities which have bustling and growing craft beer industries.<sup>65</sup> For example, Illinois lifted its redistribution limit to 120,000- barrels in 2016.<sup>66</sup> Additionally, California repealed all distribution regulations, allows self-distribution, has little to no franchise laws, and is ranked in the top five states with the most breweries.<sup>67</sup> Only five states have passed any sort of legislation which exempts small brewers who produce a yearly limit from these franchise laws.<sup>68</sup>

The last main issue craft brewers face is excise taxes. Excise taxes at the state level are even more complicated than beer franchise and distribution laws. The application of state excise duties on beer and vary widely from state to state.<sup>69</sup> For example: Wisconsin varies the rate based on volume, creating a benefit to craft brewers; Idaho varies its rates based on the ABV of the beer, disproportionately affecting craft brewers more so than Big Beer; Georgia taxes draft beer differently than the same beer which happens to be bottled; and North Carolina, along with many other Southern states, continues to implement high rates of excise duty on craft beer.<sup>70</sup> Finally, state and local governments are free to implement additional taxes past the excise tax, such as volume taxes, wholesale taxes, distributor taxes, case or bottle

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<sup>61</sup> Williams, *supra* note 45 at 5.

<sup>62</sup> *Id.* at 10.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Williams, *supra* note 45, .at 4.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.* at 10. Those states are Arizona, Arkansas, Colorado, Louisiana, Massachusetts, and North Carolina; however, some of these limits are so low that there is still little incentive to grow and flourish, therefore contradicting the free market for which the United States is known. *Id.*

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.* at 10.

fees, or taxes based on the size of the container.<sup>71</sup> The plethora of excise taxes with which breweries must be familiar are a huge burden on small breweries looking to expand: if all states applied excise duties in the same way, breweries would have the opportunity to grow equally and across the board. They would be less inhibited by finding funds, more focused on helping local economies, and able to concentrate on making delicious beer.

Overall, implementing and allowing beer franchise laws to continue without any sort of consideration for change in consumer preference and marketplace factors significantly reduces the number of brewers who enter the market and successfully produce craft beer. Adjusted for population changes, statistics reveal that states which allow self-distribution have about 50% more breweries than those without self-distribution, and that states without beer franchise laws have about five more breweries per million people than states with beer franchise laws.<sup>72</sup> Craft beer, while successfully navigating many regulatory hurdles, still faces barriers from all levels of government that are hindering its true growth.

### III. CO-EXISTENCE IS KEY TO SUCCESSFULLY MERGE THE WORLD OF CRAFT BEER AND MARIJUANA

Marijuana and hops are cousins as far as plants are concerned.<sup>73</sup> Technically, a botanist may graft a hop plant onto marijuana and it would actually grow on the hop plant.<sup>74</sup> Brewers, cannabis growers, and connoisseurs of both marijuana and beer recognize this unique relationship, resulting in marijuana and beer pairings appearing across the United States, even in states where marijuana is not legalized.<sup>75</sup>

Additionally, established craft beer brands are adding cannabis to their beers, and there are no signs of this trend ceasing.<sup>76</sup> Alcohol infused

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<sup>71</sup> Chloe Della Costa, *10 States with the Highest Beer Taxes*, CHEAT SHEET (July 5, 2015), <http://www.cheatsheet.com/personal-finance/10-states-with-the-highest-beer-taxes.html/?a=viewall>.

<sup>72</sup> Jacob Burgdorf, *Craft Breweries Abound in States with Fewer Regulations*, FOUNDATION FOR ECONOMIC EDUCATION (Sept. 16, 2016), <https://fee.org/articles/craft-breweries-abound-in-states-with-fewer-regulations/>.

<sup>73</sup> *Grafting Plants*, THC FARMER (May 6, 2015), <https://www.thcfarmer.com/community/threads/grafting-on-plants.73286/>.

<sup>74</sup> *Id.*

<sup>75</sup> Brett Konen, *The Leafly Beer & Cannabis Flavor Pairing Guide*, LEAFLY (Mar. 9, 2016), <https://www.leafly.com/news/food-travel-sex/beer-cannabis-pairing-guide>; Sam Bass, *Cannabis and Beer Pairing: Northern Lights and 805 Blonde Ale*, HERBANINDIGO (Aug. 31, 2017), <http://www.herbanindigo.com/cannabis/p/805-blonde-and-northern-lights>.

<sup>76</sup> Katy Steinmetz, *With Legal Weed Comes Hemp Beer*, TIME (Nov. 21, 2013), <http://nation.time.com/2013/11/21/with-legal-weed-comes-hemp-beer/>; Bill Swindell, *Lagunitas Rolls Out a Cannabis Beer*, LA TIMES (Aug. 24, 2017),

with hemp or cannabis became a new craze and phenomenon at the beginning of 2017, with craft beer's solution to the mass regulatory hurdles and federal prohibition of marijuana revolving around making beer with parts of the cannabis plant that does not contain THC, the psychoactive property of cannabis. For example, Dad and Dudes Breweries, located in Aurora, Colorado, received approval from the TTB to sell an IPA in all fifty states that contains cannabinoids, but no THC.<sup>77</sup>

### *A. Craft Beer Worries: Blame the Media and Big Beer for the Red Herring*

The craft beer world is weary of marijuana legalization because it is unclear whether the two can co-exist peacefully. Craft beer lovers question marijuana's existence in their small, tight knit community, and wonder whether it will be "a complement to their products," or "an alternative that could sap America's love of drinking."<sup>78</sup> Marijuana lobbyists and reformers are not disagreeing with the latter alternative, which is making the craft beer world stand still.<sup>79</sup> Some studies suggest marijuana and craft beer are complementary, while others have come back mixed.<sup>80</sup>

Marijuana legalization in the short term has not affected craft beer sales,<sup>81</sup> yet news sources are quick to pull together generalized headlines and clumsy statistics to make craft beer lovers believe otherwise. For instance, articles are titled "Beer Industry Could Lose \$2 Billion from Legal

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<http://www.latimes.com/business/la-fi-lagunitas-cannabis-20170824-story.html>; Chris Morris, *Lagunitas Unveils an IPA Made with Cannabis*, FORTUNE (Aug. 22, 2017), <http://fortune.com/2017/08/22/lagunitas-ipa-marijuana/>; Oregon Brew Lab, *Marijuana and Beer*, (Dec. 8, 2015), <http://www.oregonbrewlab.com/marijuana-and-beer/>.

<sup>77</sup> Press Release, Malkin Law, Cannabis Infused Alcohol (Feb. 14, 2017), <http://www.malkinlawfirm.com/cannabis-infused-alcohol/>. While hemp-infused beer is technically legal, the regulations by the federal government are abundant: The beer label cannot use the term hemp unless it is specifically stated in an approved statement of composition specifying hemp seeds/oil, etc., and breweries cannot use depictions, graphics, statements, or slang implying or referencing the presence of hemp or marijuana. This adds to the already tedious amount of regulations which brewers must face every day).

<sup>78</sup> Elizabeth Chuck, *Vice Wars: Tobacco, Alcohol and the Rise of Big Marijuana*, NBC NEWS (Aug. 4, 2017), <https://www.nbcnews.com/storyline/legal-pot/vice-wars-tobacco-alcohol-rise-big-marijuana-n253801>.

<sup>79</sup> *Id.*

<sup>80</sup> Anna Choi, *The Impact of Medical Marijuana Laws on Marijuana Use and Other Risky Health Behaviors* (Nov. 21, 2014) (unpublished Ph.D. dissertation, Cornell University) (on file with author).

<sup>81</sup> Bart Watson, *Marijuana and the Beer Industry*, BREWERS ASSOCIATION (Dec. 12, 2016), <https://www.brewersassociation.org/insights/marijuana-beer-industry/>.

Marijuana”<sup>82</sup> and “Legal Weed is Hurting the Beer Business.”<sup>83</sup> These titles are not only inconclusive, but fail to address that the predominant loss will be felt by Big Beer rather than craft beer.<sup>84</sup>

Moreover, data in these articles which states that “many beer drinkers are swapping their six-packs for marijuana instead” not only fails to account for other mitigating factors, but also neglects to explain that those who should be worried are “makers of cheaper beers like Anheuser-Busch and Molson Coors Brewing Company.”<sup>85</sup> First, as previously stated, Big Beer accounts for the declining dollar and *volume* sales: in 2017, Big Beer’s “premium beer brands” (Bud, Bud Light, Miller Lite, Coors Light, etc.) experienced a 2.9% decrease in dollar sales, and a 3.8% decrease in volume.<sup>86</sup> This decline is almost impossible to offset through Big Beer’s other beers, even factoring in the sales from the craft breweries they acquired.<sup>87</sup> While 2.9% sounds miniscule, this decrease cost Big Beer almost \$400 million in sales.<sup>88</sup> Furthermore, Rick Maturo, co-founder of Cannabiz Consumer Group, indicates the large “overlap in marijuana and domestic beer consumption among younger college males.”<sup>89</sup> Maturo also pointed out that younger males in college also drink beer at a heavier volume than other groups, and therefore are the ones most likely to cut back if cannabis is legally available.<sup>90</sup> Therefore, while there may be a swap, it seems the swap would mainly affect Big Beer instead of craft beer.

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<sup>82</sup> Debra Borchart, *Beer Industry Could Lose \$2 Billion From Legal Marijuana*, FORBES

(Mar. 13, 2017), <https://www.forbes.com/sites/debraborchart/2017/03/13/beer-industry-could-lose-2-billion-from-legal-marijuana/#5e05f0a628c1>.

<sup>83</sup> Kerry Close, *Legal Weed is Hurting the Beer Business*, TIME MONEY (Dec. 6, 2016), <http://time.com/money/4592317/legal-marijuana-beer-sales/>.

<sup>84</sup> Hayley Peterson, *Yep, Marijuana Legalization is Bad News for Beer Sales*, SLATE (Dec. 7, 2016), [http://www.slate.com/blogs/business\\_insider/2016/12/07/beer\\_sales\\_take\\_a\\_hit\\_in\\_states\\_where\\_marijuana\\_is\\_legal.html](http://www.slate.com/blogs/business_insider/2016/12/07/beer_sales_take_a_hit_in_states_where_marijuana_is_legal.html) (“The data indicates that many beer drinkers are swapping their six-packs for marijuana instead”, then later citing that mainstream beer sales are down more so than craft beer sales. *Id.*).

<sup>85</sup> Hayley Peterson, *Legal Marijuana is Having an Unexpected Effect on the Beer Industry – and Anheuser-Busch Should be Worried*, BUSINESS INSIDER (Dec. 7, 2016), <http://www.businessinsider.com/legal-marijuana-weighs-on-beer-sales-2016-12>.

<sup>86</sup> Cat Wolinski, *Hop Take: We’re Spending More on Beer But Drinking Less of it*, VINE PAIR (Jan. 18, 2018), <https://vinepair.com/articles/hop-take-beer-sales-trends-2017/>.

<sup>87</sup> *See Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Brigit Sweeney, *How Pot is Cutting into MillerCoors’ Light Beer Biz*, CRAIN’S CHICAGO BUS. (Jan. 5, 2018), <http://www.chicagobusiness.com/article/20180105/ISSUE01/180109947/how-legalized-marijuana-is-hurting-millercoors-light-beer-business>.

<sup>90</sup> *Id.*

Second, the analysis of the data used in these articles is troubling. Bart Watson, the Chief Economist for the Brewers Association, analyzed the data used in a majority of these flawed mainstream media articles and called their analysis problematic, using Colorado's regulations and subsequent statistical analysis as an example: while "the data is great... the problem is that Denver is probably one of the markets where scan/POS misses the most volume given the incredibly strong craft on-premise scene."<sup>91</sup> Colorado, a state notorious for its recreational marijuana legalization, has the highest percentage of on-premise sales of any state, and experienced a 57% growth of on-premise sales during the same time period when the Nielsen data was extracted.<sup>92</sup> Additionally, Colorado's excise tax shows a consumption rise "year over year, suggesting the 'lost sales' were not really lost at all, but merely shifted to a different channel."<sup>93</sup> Watson ended his criticism of the Cowen report by addressing its lack of giving any data supporting a substitution effect, and also found no indication that legal weed was replacing "beer occasions," as there was no control for other factors such as sales of wine and spirits.<sup>94</sup>

### *B. Big Beer Fears Craft Beer and Marijuana Legalization*

Americans experienced a change in taste regarding its food and drink choices in the early 2010s, and craft brewers and some politicians embraced it immediately. The "farm to table" movement exploded in the United States around 2012, when Americans began searching for, and embracing, unconventional products and diverse sources of those products.<sup>95</sup> The movement and trend "spawned dramatic growth in the artisan product movement," and therefore popularized among craft brewers and craft beer lovers.<sup>96</sup> The "farm to table" movement "merged with brewers' interest in making beer not just for consumption at local brewpubs, but throughout their community to create a significant increase in microbrewers popping up around the country."<sup>97</sup> Consequently, alcohol law began to evolve because politicians desired to support job growth through the agriculture and

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<sup>91</sup> Kendall Jones, *The Impact of Legalized Marijuana on Craft Beer*, WASH. BEER (Dec. 16, 2016), <https://washingtonbeer.com/news/story/?s=the-impact-of-legalized-marijuana-on-craft-beer>.

<sup>92</sup> Rich Duprey, *No, Marijuana Legalization Isn't Crushing Craft Beer*, THE MOTLEY FOOL (Jan. 11, 2017), <https://www.fool.com/investing/2017/01/11/craft-beer-group-weighs-in-on-marijuana-legalizati.aspx>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> N. DAVEY NEAL, CURRENT AND FUTURE ISSUES FACING LOCAL BREWERS AND VINTNERS (2015), 2015 WL 9875437, at \*3.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

manufacturing sectors, increase tourism and its subsequent revenue, and encourage local spending of disposable income.<sup>98</sup>

Big Beer experienced a drastic decrease in market share simultaneous to the “farm to table” movement, and therefore began to unfairly influence the marketplace.<sup>99</sup> Starting as early as 2013, Big Beer attacked the nucleus of craft beer by purchasing ownership interest in craft breweries as a means of penetrating the market and attempting to recover its lost market share, leaving many consumers feeling deceived.<sup>100</sup> For example, major and established craft breweries such as Breckenridge Brewing Company, Ballast Point Brewing Company, and Wicked Weed Brewing Company, have all been snatched up by Big Beer. Most consumers still believe, however, that these breweries constitute craft beer because their new Big-Beer-owners continue to falsely advertise the product as “high quality, small batch, craft beers,” and are “intentionally omitting the fact” that craft beer made by these breweries are in fact produced by Big Beer.<sup>101</sup> More recently, Big Beer’s two largest players, Anheuser-Busch InBev, and SABMiller, merged in 2016.<sup>102</sup> While the consequences of this merger are still uncertain, Big Beer’s intention with this merger was, among other reasons, “to fight off the onslaught of craft brewers.”<sup>103</sup>

Big Beer also views marijuana as a threat to its place in the market. Big Beer has been lobbying against marijuana legalization across the U.S.

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<sup>98</sup> *Id.* at \*4.

<sup>99</sup> Tom Philpott, *The King of Beers Wants to Push Craft Brews out of Your Supermarket*, Mother Jones (Dec. 9, 2015), <http://www.motherjones.com/food/2015/12/big-beer-wants-take-away-your-craft-beer/>.

<sup>100</sup> Money, *supra* note 9, at 426-427; Eileen Faust, *Fast Fact About the Merger of Anheuser-Busch InBev and SABMiller*, THE MORNING CALL (Oct. 5, 2016), <http://www.mcall.com/business/getsmart/mc-fast-facts-about-anheuser-busch-inbev-merger-20161005-story.html>; For a full list of craft breweries purchased by AB InBev, see *The Cut Off – List of Imposter Craft Beer Brands*, BREW STUDS, <http://wearebrewstuds.com/craft-beer-cut-off/>.

<sup>101</sup> Faust, *supra* note 101; see also Trial Pleading, *Parent v. MillerCoors, LLC*, No. 37-2015-00013913-CU-BT-CTL, 2015 WL 1951037 (Cal. Super. Ct. Apr. 24, 2015); see generally *Marty v. Anheuser-Busch Companies, LLC*, 43 F.Supp.3d 1333 (S.D. Fla. 2014); see generally *Complaint, DeHoog v. Anheuser-Busch InBev, SA/NV*, No. 1:15-cv-02250, 2015 WL 7771081 (D. Or. Dec. 1, 2015).

<sup>102</sup> Tara Nurin, *It's Final: AB InBev Closes on Deal to Buy SABMiller*, FORBES (Oct. 10, 2016), <https://www.forbes.com/sites/taranurin/2016/10/10/its-final-ab-inbev-closes-on-deal-to-buy-sabmiller/#588e4ea8432c>.

<sup>103</sup> Danica Kirka, *Big Beer Merger Leaves Future Uncertain for Competitors*, ASSOCIATED PRESS (Nov. 12, 2015), <https://apnews.com/1a7df44b8c67473481d8dc75722ce28c>.

since 2009, and continues to this day, most recently in Massachusetts.<sup>104</sup> Opensecrets.org lists big booze, which includes Big Beer, as one of the top industries fighting to keep marijuana illegal.<sup>105</sup> They reason that, “though alcohol and weed might seem eminently compatible to some, a number of brewers fear cannabis as a competitive threat, with some industry groups going as far as contributing funds to anti-legalization campaigns.”<sup>106</sup>

While most of Big Beer is trembling in their boots from craft beer growth and state marijuana legalization, Constellation Brands, a giant alcohol craft beer acquirer, is taking a more progressive approach: Constellation invested over \$200 million into Canopy Growth Corporation, which is “a Goliath in the emerging Canadian and international cannabis markets,” and sells its marijuana-based products through brands such as Tweed.<sup>107</sup> Constellation’s CEO believes the marijuana market is emerging and is going to “become a significant consumer category in the future.”<sup>108</sup>

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<sup>104</sup> Lee Fang, *Alcohol Industry Bankrolls Fight Against Legal Pot in Battle of the Buzz*, THE INTERCEPT (Sept. 14, 2016), <https://theintercept.com/2016/09/14/beer-pot-ballot/> (describing that it’s big beer such as Sam Adams which is lobbying against marijuana legalization); Scheherazade Daneshkhu and Lindsay Whipp, *US Drinks Industry Ponders Effect of Cannabis Legalization*, FINANCIAL TIMES (Nov. 25, 2016),

<https://www.dropbox.com/s/rv3t5wobtjyv5g2/79.%20US%20drinks%20industry%20ponders%20effect%20of%20cannabis%20legalisation.pdf?dl=0>.

<sup>105</sup> *The Money In Marijuana: The Political Landscape*, OPENSECRETS.ORG, <https://www.opensecrets.org/news/issues/marijuana/> (last visited Apr. 9, 2018) (“If legalized, marijuana would compete with alcoholic beverages for consumers seeking a buzz.”). Opensecrets.org also identifies Representative Pete Sessions, marijuana’s biggest adversary in Congress, as a beneficiary of Big Beer’s lobbying money since at least 2002. Tom Angell, *This Man is the Reason Congress Can’t Vote on Marijuana Anymore*, MARIJUANA MOMENT (Feb. 21, 2018),

<https://www.marijuanamoment.net/man-reason-congress-cant-vote-marijuana-anymore/> (stating Sessions consistently blocks proposals dealing with marijuana use); see generally Rep. Pete Sessions – Texas District 32: Contributors, OPENSECRETS.ORG: POLITICIANS & ELECTIONS, CONGRESS, <https://www.opensecrets.org/members-of-congress/contributors?cid=N00005681&cycle=CAREER&recs=100&type=C> (last visited Apr. 9, 2018).

<sup>106</sup> Daneshkhu, *supra* note 105 (specifically citing Boston Beer Company, though calling themselves craft beer, as another Big Beer conglomerate).

<sup>107</sup> Alicia Wallace, *Alcohol Goliath Pours \$190M into Canadian Cannabis Company*, THE CANNABIST (Oct. 30, 2017), <http://www.thecannabist.co/2017/10/30/constellation-marijuana-investment-canopy/91171/>.

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



### *C. Distributors Fear Craft Beer and Marijuana Legalization*

Distributors, while not primarily scared of marijuana legalization, are siding with Big Beer for three reasons: 1) Big Beer either owns beer distributors or is attempting to purchase distributors, 2) distributors stand to lose a substantial amount of money if Big Beer declines in sales, and, as previously mentioned, 3) if marijuana is successfully taxed in a system with no mandatory third-party distributor, it would show that beer distributors are unnecessary as well.<sup>109</sup> First, Big Beer either owns most distributors, is currently attempting to purchase those which they do not own, or is incentivizing distributors to purchase their beers over craft beer. Big Beer either owns or controls over half of the distributor business which sells beers to restaurants and shops in the United States.<sup>110</sup> Furthermore, in 2016, AB InBev settled with the California Department of Alcoholic Beverage Control for \$400,000 over allegations that it was illegally incentivizing distributors to sell its brand over others.<sup>111</sup> Therefore, because beer distributors are owned or heavily influenced by Big Beer, they will take the side of those who are paying the bills and fight alongside Big Beer to cease marijuana legalization in America.

Second, as Big Beer declines in sales, distributors stand to lose considerable revenue. Most craft breweries abstain from using a distributor when possible because distributors “won’t go to bat for the little guy,” and

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<sup>109</sup> Ryan Grim, *California Pot Initiative Opposed by Industry*, HUFFINGTON POST (Sept. 21, 2010), [http://www.huffingtonpost.com/2010/09/21/this-buds-not-for-you-bee\\_n\\_732901.html](http://www.huffingtonpost.com/2010/09/21/this-buds-not-for-you-bee_n_732901.html) (explaining that the \$10,000 donated to back the “No on 19” campaign in California came from distributors and caught craft breweries such as Sierra Nevada and Stone off guard, thereby causing Sierra Nevada to request the CBBB to remove its name from the list of members who donated).

<sup>110</sup> Erik Oster, *The Brewers Association is Launching a Crowdfunding Campaign to Buy AB InBev for \$213 Billion*, ADWEEK (Oct. 18, 2017), <http://www.adweek.com/agencies/the-brewers-association-is-launching-a-crowdfunding-campaign-to-buy-ab-inbev-for-213-billion/>; *see also* Tankersley, *supra* note 17 (“Buying beer distributors, a move that could eventually choke off smaller brewers’ ability to grow by shipping to cities just beginning to warm to microbrews. So far, according to published reports, only California officials are investigating potential anti-competitive implications of those purchases”).

<sup>111</sup> Oster, *supra* note 111; *see also* Dave Eisenberg, *California Fines Anheuser-Busch Wholesalers for Pay-To-Play*, GOOD BEER HUNTING: SIGHTLINES (Mar. 13, 2017), <http://goodbeerhunting.com/sightlines/2017/3/13/california-fines-anheuser-busch-wholesalers-for-pay-to-play> (“But this is the second time in less than a year that AB has found itself embroiled in a pay-to-play scandal. To refresh, just last May, Anheuser-Busch was fined \$150,000 for illegally paying two Seattle concert venues to exclusively sell products “supplied by a ‘Budweiser’ distributor”).

instead push Big Beer brands which they already sell.<sup>112</sup> Thus, because the decline in beer sold in the United States is coming from distributors' primary clientele, Big Beer, distributors are a direct victim in the move away from Big Beer by Americans. Third, and finally, distributors' intense lobbying efforts against marijuana legalization exemplifies their fear. Distributors across the country have heavily donated to various ballot measures and initiatives that would allow them exclusive rights to transport legal marijuana in various states.<sup>113</sup> In other cases, distributors are donating to state ballot measures simply because they fear the potential repercussions which legalize marijuana would have on the distributor industry.<sup>114</sup>

#### *D. Craft Beer's Difficult Beginning and Current Stagnant Growth – It is Big Beer's Fault, Not Marijuana*

Craft beer continues to be regulated by post-Prohibition rules procedures, which inherently are benefitting Big Beer harming craft beer. These compliance and regulation costs also continue to materialize from every level of government, which can be explained by the "Bootlegger and Baptist Theory" of economics and is also responsible for craft beer's stagnant growth. Craft beer is attempting to push back by fighting some of these regulations and unfair practices in court; however, more must be done by legislators to fix the broken system.

##### *1. The Twenty-First Amendment and Post-Prohibition Regulations*

Craft beer continues to be ruled by regulatory measures and compliance costs that emerged from standards adopted in the 1900's – a time when the United States had a very different relationship with alcohol.<sup>115</sup> The Twenty-First Amendment and its subsequent regulations shaped the history

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<sup>112</sup> Hayley Fox, *Cannabis Farmers Insist on Driving Their Own Trucks; Here's Why*, LEAFLY (Apr. 18, 2017), <https://www.leafly.com/news/industry/california-cannabis-farmers-insist-driving-trucks-heres>.

<sup>113</sup> Michelle Rindels, *Judge Puts Brakes on Plan to Open Pot Distribution Role Beyond Liquor Licensees*, THE NEVADA INDEPENDENT (Aug. 11, 2017), <https://thenevadaindependent.com/article/in-blow-to-liquor-distributors-marijuana-stores-win-battle-for-right-to-transport-pot> (A ballot measure in November of 2016 in Nevada was approved by voters and gave liquor distributors the "exclusive right to transport marijuana from cultivation and production facilities to retail stores for the first 18 months of recreational sales." *Id.* Liquor distributors donated a whopping \$87,500 early in the campaign. *Id.*).

<sup>114</sup> See Fang, *supra* note 105; see also Grim, *supra* note 110.

<sup>115</sup> Ben Swenson, *How Virginia's Laws Struggle to Keep up with the Booming Craft Beer Industry*, STYLE WEEKLY RICHMOND (Oct. 6, 2017), <https://www.styleweekly.com/RVAGrowler/archives/2017/10/06/how-virginias-laws-struggle-to-keep-up-with-the-booming-craft-beer-industry>.

of American breweries over the past century. Prohibition decimated all thriving breweries, and the few that survived were “large-scale brewers, who favored policies that demolished competition.”<sup>116</sup> When post-Prohibition brewing laws were enacted, the stated intent was to limit overconsumption by limiting the ability of brewers to sell directly to consumers.<sup>117</sup> This legislative goal, pushed by the large-scale brewers, became the reason for the three-tier system, which requires separation between the wholesaler and brewery.<sup>118</sup> Interestingly, Congress never specified a particular type of regulated market for alcohol, rather, it left it to states to “experiment with different models.”<sup>119</sup> So, while the three-tier system is not federally mandated and therefore unenforceable from the federal level, it is still entrenched, in 50 different ways, in every single state.<sup>120</sup>

## 2. *The Three-Tier System Today: Outdated and Flawed*

The three-tier system today simply “increase[s] the market power of incumbent distributors at the expense of craft brewers.”<sup>121</sup> Therefore, while it was initially justified on public interest grounds, the three-tier system has persisted and continues to persist in an infrequent manner across America’s 50 states, and has created “an entrenched interest with a financial stake in seeing old policies persist.”<sup>122</sup> Furthermore, though craft beer continues to grow and become a fan favorite of many households, the three-tier system, and specifically the distributors, is making it difficult on new craft breweries. For example, Casselberry beer maker Bowigens Beer Co. co-owner Bobby Bowen believes that about 30% of his breweries sales are going to

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<sup>116</sup> Joe Pinsker, *Why Breweries are so Rare in the American South*, THE ATLANTIC (Apr. 13, 2015), <https://www.theatlantic.com/business/archive/2015/04/why-the-south-has-fewer-breweries-than-the-rest-of-the-country/390192/> (For example, “In 1923, the president of Anheuser-Busch wrote an urgent letter to President Calvin Coolidge, calling saloons that sold their own beer without a distributor “objectionable.””).

<sup>117</sup> Matthew Mitchell and Christopher Koopman, *Trouble Brewing for Craft Beer*, U.S. NEWS (June 3, 2014), <https://www.usnews.com/opinion/economic-intelligence/2014/06/03/craft-brewing-industry-stifled-by-regulation>.

<sup>118</sup> Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFTBEER.COM (March 6, 2017), <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer>.

<sup>119</sup> Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. PUBLIC HEALTH, 1021–1028 (2014), <http://proxy.lib.ohio-state.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=mnh&AN=24825201&site=ehost-live>.

<sup>120</sup> Lisa B. Zimmerman, *Laying Down the Distribution Law*, WINE-SEARCHER (Nov. 29, 2017), <https://www.wine-searcher.com/m/2017/11/laying-down-the-distribution-law>.

<sup>121</sup> Mitchell & Koopman, *supra* note 118.

<sup>122</sup> *Id.*

distributors.<sup>123</sup> This is hurting its growth, as the profit margins of beer sold at the taproom are 100 times better than the profit margins of selling beer to a restaurant through his distributor.<sup>124</sup>

While the three-tier system once kept Big Beer in check, it is now being abused and giving them and distributors an advantage in the marketplace. Because distributors have hundreds of beers in their portfolios, they are more likely to push their customers to purchase and stock beer “with more clout and a larger contract than beers from a small local outfit.”<sup>125</sup> Furthermore, distributors have no incentive to sell a small brewery’s beer, meaning they are not the best face for a brewery. North Carolina Craft Brewers Guild Director states it best, in that “breweries know they are their best salespeople...you can’t expect a wholesaler to sell that beer for you. It’s a lot of hard work and tooting your own horn.”<sup>126</sup> Therefore, taking 30% of a brewery’s sales while adding zero value is not beneficial to craft brewers, making the three-tier system a burden on craft beer.

Some states are attempting to eliminate parts of the three tier-system to allow craft breweries to grow. For example, Florida is currently reviewing a proposal that would loosen distribution rules.<sup>127</sup> This pressure is coming from the “growing community of local beer and liquor makers” who want “lawmakers to reform many of Florida’s 80-year-old alcohol laws to accommodate small beer and spirits makers and give consumers easier access to liquor.”<sup>128</sup> Additionally, North Carolina’s craft beer guild is attempting to fight the “distributor-favored, big beer influenced system” by banding together to try and raise the cap on the amount of beer they may distribute without working with a wholesaler.<sup>129</sup> Several states have made minor regulatory adjustments in recent years; however, fast-changing technology, progressive economies, and evolving attitudes on craft beer are pushing for faster changes.<sup>130</sup>

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<sup>123</sup> Kyle Arnolds, *Craft Brewing Craze Prompts a New Look at Alcohol Regulation*, ORLANDO SENTINEL (Feb. 15, 2017, 12:00 PM), <http://www.orlandosentinel.com/business/consumer/os-beer-and-alcohol-20170215-story.html>.

<sup>124</sup> *Id.*

<sup>125</sup> Mark Binker & Laura Leslie, *Battle Brewing Between Craft Beer Makers, Distributors*, WRAL, (Mar. 28, 2017), <http://www.wral.com/battle-brewing-between-craft-beer-makers-distributors/16602039/>.

<sup>126</sup> *Id.* (internal quotation marks omitted).

<sup>127</sup> Arnolds, *supra* note 124.

<sup>128</sup> *Id.* Reynolds, *Craft brewing Craze*, *supra*.

<sup>129</sup> Binker & Leslie, *supra* note 126.

<sup>130</sup> Arnolds, *supra*.note 124.

### *3. Fifty Different Regulatory Models, Different Federal Standards, and Sin Taxes, All Which Benefit Big Beer through the Persistence of the "Bootlegger and Baptist Theory"*

Today, there is not a single regulatory model adopted by all states, suggesting that, nearly 100 years after passing the Twenty-First Amendment, there still is not one perfect model.<sup>131</sup> Notwithstanding, there are many models and regulations which hurt craft beer more than help.

These convoluted, restrictive, and often repetitive regulations stem from the federal, state and local levels of government. At the federal level, brewers require approval from regulators just to sell their first beer or brand it with their locally-drawn artistic label.<sup>132</sup> These minute, federal regulations may take up to 100 days for each to be approved or issued.<sup>133</sup> For example, the waiting period for approval from the Alcohol and Tobacco Tax and Trade Bureau currently stands at an average of 160 days.<sup>134</sup> Further, depending on their ingredients and methods, a brewer's formula must also be approved, which could take another sixty days.<sup>135</sup>

At the state level, brewers must comply with many additional, and often times redundant, rules. For example, in Virginia, a brewer's first step to retrieve approval from the state for a license.<sup>136</sup> Not only is this redundant because of the federal regulations, but approval may be denied for arbitrary reasons, such as an applicant's ability to physically carry on the business, or lack of a good moral character.<sup>137</sup> The regulations continue once a brewer is in business: franchise laws, some of the most restrictive and inefficient regulations, restrict a brewer's ability to sell beer directly to consumers, and can even go so far as regulating how many distributors a brewer may contract with.<sup>138</sup> Finally, sin taxes do not make the cost of owning a craft brewery or

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Alcohol and Tobacco Tax and Trade Bureau, Days To Process Permits Online Original Applications, <https://www.ttb.gov/nrc/average-days.shtml> (The approval process includes background checks, field investigations, equipment and premises examination and a legal analysis of proposed operations; it is an additional twenty-four days for the TTB to approve the label).

<sup>135</sup> Mitchell & Koopman, *supra* note 118.

<sup>136</sup> *Id.*

<sup>137</sup> VA. CODE ANN. TIT. 4.1 § 4.1-222 (2017).

<sup>138</sup> Mitchell & Koopman, *supra* note 118; *see generally* Marc E. Sorini for McDermott Will & Emery LLP acting as Counsel for the Brewers Association, *Beer Franchise Law Summary* (2014), <https://s3-us-west-2.amazonaws.com/brewersassoc/wp-content/uploads/2017/04/Beer-Franchise-Law-Summary.pdf>. (For example, while Alaska has no beer franchise law, COLO. REV. STAT. §§ 12-47-4 - 05 to 12-47-406.3 (2016) dictates that, among other things, exclusive territories must be in a written contract and filed with the state. Further,

making craft beer a cheap acquisition. Each state taxes beer by the gallon, with the cost ranging anywhere between \$0.02 and \$1.29.<sup>139</sup> Some states have additional taxes. Kansas, for example, charges \$0.18 per gallon, but it also charges an additional 8% for off-premise sales, and 10% for on-premise sales.<sup>140</sup>

Although craft beer has surged in the U.S. for the past seven to eight years, compliance costs and excessive regulations still hinder prospective and aspiring brewers.<sup>141</sup> For example, in Virginia alone, a prospective brewer who desires to start up a small, local brewery to help his local economy must complete approximately twelve regulatory steps just to start brewing beer and selling his beer to consumers – the same amount of bureaucratic steps it takes to start a business in Venezuela or China.<sup>142</sup> Furthermore, each regulatory step is independent from the next – all requiring different paperwork, different fees, and subsequently governing a different step of the process.<sup>143</sup> While one step out of twelve for a potential Virginian brewer may seem trivial, each regulatory measure and compliance cost has huge implications.

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DEL. CODE ANN. tit. 6, §§ 2551- to 2556 and DEL. ADMIN. CODE ANNREGS. tit. 4, § 90146 – state that territorial arrangements must be filed with the State, and where parties have an exclusive arrangement, the brewer must obtain ABCC consent before appointing a second distributor).

<sup>139</sup> See e.g., *State Tax Rates on Beer*, FEDERATION OF TAX ADMINISTRATORS (Jan. 1, 2017), <https://www.taxadmin.org/assets/docs/Research/Rates/beer.pdf>. (For example, Wyoming only charges \$0.02 per gallon, in comparison to Tennessee that charges \$1.29 per gallon).

<sup>140</sup> *Id.* (Tennessee also has an Excise Barrelage Tax and Wholesale Tax)

<sup>141</sup> Mitchell & Koopman, *supra* note 118; see also NEAL, *supra* note 96, at \*9 (“The biggest challenge for clients operating a winery or brewery often relate to the permitting process, which differs by state and is overlapped by the TTB.”) (“However, what they often do not realize is that the production and sale of alcohol is heavily regulated--in fact, alcohol manufacturing and selling is among the most heavily regulated industries in the country. Also, there are numerous steps involved in successfully obtaining a permit, both at the federal and state level. Many artisans can accomplish the task, but not without a substantial amount of prior planning. That is an issue prospective brewers and vintners often overlook or underestimate when deciding to go into this business. For instance, there is zoning, lease agreements, qualifications for a permit, and the general timeline for attaining a permit, which can take more than four months in some cases.”).

<sup>142</sup> Matthew D. Mitchell & Christopher Koopman, *Bottling Up Innovation in Craft Brewing: A Review of the Current Barriers and Challenges*, MERCATUS CENTER ON POLICY (June 4, 2014), <https://www.mercatus.org/publication/bottling-innovation-craft-brewing-review-current-barriers-and-challenges>; see also Christopher Koopman & Thomas Savidge, *Craft Breweries Need Help, Not Handouts*, WASH. POST (Sept. 21, 2016) [https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/09/21/craft-breweries-need-help-but-not-handouts/?utm\\_term=.324833c941f6](https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/09/21/craft-breweries-need-help-but-not-handouts/?utm_term=.324833c941f6).

<sup>143</sup> Mitchell & Koopman, *supra* note 118.

The federal and state regulatory laws govern each step of a beer making its way into a customer's hand, from the moment a new beer recipe is experimented with at the brewery through to the moment when it is purchased by consumers; missing just one could cease this process immediately.<sup>144</sup> Finally, because they are enforced on a state-by-state basis, operating a successful craft brewery is comparable to setting up a brewery in fifty separate countries.<sup>145</sup>

The additional regulations and “voluntary compliance” standards are not lessening, rather they are increasing in such a way to benefit Big Beer and harm craft beer.<sup>146</sup> This is a classic case explained by the “Bootlegger and Baptist” theory of regulation: essentially, a small, motivated group of companies stand to gain from limiting competition, and are supported by Baptists, or those who oppose more alcohol hitting the market and who also have influence over government and policies generally.<sup>147</sup> In the case of the beer market in the United States, Big Beer stands to gain from limiting competition, and are supported by those in government who are also supported by Big Beer money and religious folk.<sup>148</sup> For example, beginning in May of 2017, the U.S. Food and Drug administration rules required chain restaurants to include calorie information for beers on their menus.<sup>149</sup> The Beer institute, a trade group for large industrial brewers, voiced its support for this rule and issued a press release showing its “support [for] calorie labeling of each beer listed on menus in restaurants and retail

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<sup>144</sup> See Swenson, *supra* note 116.

<sup>145</sup> Zimmerman, *supra* note 121.

<sup>146</sup> E. Frank Stephenson, *Bootleggers, Baptists, and Beer Labels*, REG., Fall 2016, at 6; Mitchell & Koopman, *supra* note 118.

<sup>147</sup> Jim Galloway, *Craft Brewers Fall Victim to the 'Baptist-Bootlegger' Connection*, AJC, <https://www.ajc.com/news/state--regional-govt--politics/craft-brewers-fall-victim-the-baptist-bootlegger-connection/A9GEAzftLiTgOTvtjwIePP/> (last updated Apr. 15, 2015, 5:17 PM); see also Stephenson, *supra* note 147 (suggesting that the Beer Institute's “Brewers' Voluntary Disclosure Initiative” was pushed by Big Beer to raise rivals' costs. “Looking beneath the foamy claims about enhanced consumer welfare reveals that familiar political machinations are likely lurking beneath the surface of the Brewers' Voluntary Disclosure initiative. The Beer Institute is the trade group for large industrial brewers such as Anheuser-Busch and MillerCoors, and its announcement of the calorie labeling initiative indicated that six major breweries, which together comprise more than 80% of the U.S. beer market, will adopt the voluntary calorie labeling.”); Pinsker, *supra* note 117 (“Around the nation, big beer producers contribute to the campaigns of politicians who will support policies that discourage competition from local upstarts – for example, taxes on breweries and laws that prevent breweries from selling their kegs directly to consumers (instead of through a distribution)... The support of Baptists provides Southern politicians with a reason to hinder brewers that politicians in other regions don't have. As a result, the states with the most Baptists tend to have the fewest breweries.”).

<sup>148</sup> *Id.*

<sup>149</sup> Stephenson, *supra* note 147.

establishments.”<sup>150</sup> This new labeling requirement is a clear advantage for Big Beer over craft beer. Estimates put calorie and nutritional labeling, of which require expensive laboratory testing, at around \$300-\$1,000 per beer.<sup>151</sup> While this is a drop in the bucket for Big Beer who have only a few beers they sell at very high volumes, craft beer would suffer from such a requirement—small batches of beer that rotate seasonally, and are typically produced in 1/6 barrels or even a small cask which lasts for only a few hours means more beer at smaller volumes.<sup>152</sup> This is not a sign of support for healthy market competition, and is a classic example of the “Bootlegger Baptist” theory.

While the arguments made by distributors and Big Beer are flawed, they both have powerful “Baptists” in politics and therefore are still successful in their ability to control craft beer flourishing and marijuana legalization. Distributors and Big Beer argue that the three-tier system is necessary and fair. Additionally, distributors argue in North Carolina’s case that “upending the system will only create a special privilege for a select few breweries, and will only open the door for a plethora of legal fights.”<sup>153</sup> Distributors also have political action committees, with many prominent state congressmen involved and a lot of money to play with for lobbying. Just in North Carolina, for example, the wholesaler’s association’s political action committee contributed approximately \$1.5 million to political campaigns between 2013 and 2016.<sup>154</sup> With the amount contributed to various ballot measures, congressmen, and state legislators, craft beer continues to be the David facing the Goliath that is Big Beer.

#### 4. Craft Beer Fighting Excessive and Unfair Regulation

Some regulations on beer have been so constricting they are deemed unconstitutional or are currently being challenged for their constitutionality. In June of 2017 in Wisconsin, craft beer was faced with last-minute budget regulations which would prohibit brewers from selling their beer in the same location where it is produced.<sup>155</sup> Had this passed, it would also have made it illegal for any brewery to have a taproom/tasting room connected to it in

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<sup>150</sup> Press Release, Beer Inst., Beer Inst. Supports FDA Action to Increase Transparency Through Menu Labeling Requirements (Aug. 3, 2017), <http://www.beerinstitute.org/press-releases/beer-institute-supports-fda-action-increase-transparency-menu-labeling-requirements/>.

<sup>151</sup> Stephenson, *supra* note 147 at 6.

<sup>152</sup> *Id.*

<sup>153</sup> Binker & Leslie, *supra* note 126.

<sup>154</sup> *Id.*

<sup>155</sup> Todd Richmond, *Craft Brewers Fear Last-Minute Regulations*, U.S. NEWS & WORLD REPORT (June 25, 2017, 10:11 AM), <https://www.usnews.com/news/best-states/wisconsin/articles/2017-06-25/craft-brewers-fear-last-minute-regulations-in-budget>.



Wisconsin; this would have limited the potential for customers to taste beer on site, restricting the brewery's audience and general income.<sup>156</sup> These regulations were backed by both alcohol distributors and the Koch Brothers.<sup>157</sup> Furthermore, Texas' recently passed regulation implements an additional fee for craft breweries to distribute their own beer.<sup>158</sup>

Recently, a federal district court in Texas delivered an upsetting opinion to Texas craft brewers by rejecting their equal protection and due process challenge on Texas' ban on on-sight beer sales for customers' off-site consumption.<sup>159</sup> In *Deep Ellum Brewing, LLC, et al. v. Texas Alcoholic Beverage Commission*, craft brewers attempted to fight Texas' three-tier laws, which disproportionately affect craft brewers compared to wineries or distilleries.<sup>160</sup> Texas' three-tier laws prohibit a brewery from becoming licensed as a manufacturer or brewer, as well as a brewpub.<sup>161</sup> Texas law considers breweries a manufacturer, whereas it considers brewpubs as retailers.<sup>162</sup> While it seems the simple answer is for a brewery to classify itself as a brewpub to sell beer for off-premise consumption, Texas "limits brewpubs to producing no more than 10,000 barrels of beer annually, making this license an impractical option for craft brewers seeking to package and

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Tristan Hardy, *New Law Costing Large Craft Beer Businesses – Smaller Breweries Say it Could Hinder Progress*, CBS-19 (Sept. 15, 2017, 4:09 AM), <http://www.cbs19.tv/news/local/new-law-costing-large-craft-beer-businesses-smaller-breweries-say-it-could-hinder-progress/475085189>; *see also* Roy Bogan, 'Beer bill' has Texas Brewers Worried About New Craft Beer Law, FOX NEWS (June 29, 2017), <http://www.foxnews.com/lifestyle/2017/06/29/beer-bill-has-texas-brewers-worried-about-new-craft-beer-law.html> (explaining how the Texas bill was supported by Big Beer and Distributors and opposed by craft beer).

<sup>159</sup> Marc Sorini & Bethany Hatef, *Federal District Court Rejects Craft Brewers' Equal Protection and Due Process Challenge of Texas' Ban on Brewer Off-Premises Retailing*, MCDERMOTT WILL & EMERY: ALCOHOL LAW ADVISOR (Mar. 26, 2018), <https://www.alcoholawadvisor.com/2018/03/federal-district-court-rejects-craft-brewers-equal-protection-and-due-process-challenge-of-texas-ban-on-brewer-off-premises-retailing/>.

<sup>160</sup> *Id.*; *see also* TEX. ALCO. BEV. CODE § 6.03; *see Tex. Alcoholic Bev. Com. V. Live Oak Brewing Co., LLC*, 2017 Tex. App. Lexis 11684 \*1-2 ("Generally speaking, manufacturers of alcoholic beverages sell their product to distributors, distributors then sell the product within designated territories to retailers, and retailers then sell the product to the end consumer. Under this system, the members of the different tiers must remain independent from members of the other tiers.") The three-tiered system originally put in place in Texas were meant to prohibit a "tied house," which means "any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels." *Id.*

<sup>161</sup> Sorini, *supra* note 160.

<sup>162</sup> *Id.*

expand.”<sup>163</sup> Texas legislators, however, made exceptions for wineries and distilleries.<sup>164</sup> For example, if you visit a distillery in Texas, you may purchase a bottle of its vodka that you can then consume at home; however, if you visit Deep Ellum Brewing, you may not leave with a six-pack of its Dallas Blonde American Blonde Ale to consume at home.<sup>165</sup> Deep Ellum Brewing brought suit against the Texas Alcoholic Beverage Commission (“TABC”). The court ultimately sided with the TABC, stating that “maintaining the integrity of the three-tier system” constitutes a legitimate state interest but refused to comment on “whether it was good governance for the legislature to grant” exemptions to wineries and distilleries, but not breweries.<sup>166</sup>

In conclusion, while beer law and regulations continue to evolve, the system continues to favor Big Beer. Craft beer must persist, and fight restrictive regulations, unfair practices by Big Beer, and distributors’ monopoly on the markets.

#### IV. MARIJUANA’S CURRENT STRUGGLE

“It’s easy to imagine the cannabis equivalent of an Anheuser-Busch InBev peddling low-cost, high-octane cannabis in Super Bowl commercials. We can do better than that, but only if Congress takes action – and soon.”<sup>167</sup> Recreational and medical marijuana are currently legal in various jurisdictions throughout the United States; however, because the federal government has not changed its position on marijuana consumption, each state and local government has developed its own complex and extensive excise tax, distribution, packaging, and marketing rules to regulate this business.<sup>168</sup> This patchwork of laws, and lack thereof, is taking its toll on innocent marijuana businesses.

##### *A. Current State of Marijuana Policy Throughout the United States*

Some states like Oregon and Colorado have had a few years to work out the kinks in federal, state, and local regulation of marijuana, but still face many difficulties. Washington state law mandates a total separation of

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; see also <http://www.deepellumbrewing.com/beer/>.

<sup>166</sup> Sorini & Hatéf, *supra* note 160.

<sup>167</sup> Mark Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASHINGTON MONTHLY (Mar./Apr./May 2014), <https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/>.

<sup>168</sup> Marc Sorini & Vanessa Burrows, *Government Affairs Extra: Craft Beer and Marijuana*, NEW BREWER, Nov/Dec. 2017, at 37.

grower and seller “because they didn’t want the same kind of monopolistic approach of Big Alcohol.”<sup>169</sup> Consumers in Washington also desire organic marijuana, and like craft beer consumers, desire to shop local; however, because the term “organic” is federally regulated and marijuana is still illegal under federal law, marijuana may not be labeled “organic.”<sup>170</sup> Consumers are rightfully frustrated by the inconsistencies and inability for state and federal laws to merge.<sup>171</sup>

On the other hand, states who only recently voted to legalize marijuana, “have months, if not years, before they establish workable laws on growing and selling.”<sup>172</sup> Take California. While voters legalized recreational marijuana with a legal date of January 1, 2018, it is running into issues with local regulations. Cities and counties face no deadline to implement regulations, which is causing concern and confusion that a dysfunctional and “patchwork of local rules could discourage operators from entering the legal economy, feeding a black market that could undercut the legitimate one.”<sup>173</sup> San Jose, California’s third-largest city, currently prohibits sales other than medical cannabis,<sup>174</sup> and Kern County, California, home to almost one million people, prohibits all marijuana sales, even though technically legal on a state level.<sup>175</sup> Los Angeles, a potential \$1 billion marketplace for marijuana, is running into a plethora of issues with proposed regulations, such as a certificate compliance system which would likely not meet state license requirements for state licenses.<sup>176</sup>

The debate over distribution in California is also an integral and recent controversy which emerged at the end of 2017 after California Governor Jerry Brown proposed merging regulations for recreational and medicinal marijuana industries.<sup>177</sup> He states that the “proposed guidelines are intended to reduce confusion and ‘duplicative costs.’”<sup>178</sup> The proposal states

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Matthew Seddaca, *Farm-to-table marijuana is watching your buds become brownies*, QUARTS (Dec. 4, 2016), <https://qz.com/852131/farm-to-table-marijuana-is-watching-your-buds-become-brownies/>

<sup>173</sup> Michael R. Blood, *Confusion Coming with California’s Legal Cannabis*, LEAFLY (Oct. 30, 2017), <https://www.leafly.com/news/politics/confusion-coming-with-californias-legal-cannabis>. <https://www.leafly.com/news/politics/confusion-coming-with-californias-legal-cannabis>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Hayley Fox, *California Cannabis Farmers Insist on Driving Their Own Trucks; Here’s Why*, LEAFLY (April 18, 2017), <https://www.leafly.com/news/industry/california-cannabis-farmers-insist-driving-trucks-heres>.

<sup>178</sup> *Id.*

that “overly restrictive vertical integration stifles new business models and does not enhance public and consumer safety.”<sup>179</sup> Clearly, however, not all cities are complying with this regulation, or the June 2017 passage of the Medicinal and Adult Use Cannabis Regulation and Safety Act (“MAUCRSA”), where cannabis licensees can vertically integrate and even act as their own distributor.<sup>180</sup>

While some states are in limbo, early adopters of recreational marijuana are dealing with larger issues. Plainly stated, the legal marijuana markets in Colorado and Washington, are “over-regulated...prejudiced against pot consumers, who should be allowed to buy marijuana as easily and safely as they do beer or wine or a pack of smokes.”<sup>181</sup> For example, in Colorado, “differences in laws at the state, county, and municipal level can make seed-to-sale operations complicated at best.”<sup>182</sup> In both Colorado and Oregon, businesses may vertically integrate, in that dispensary owners may assist growers, but most storefronts are often separate from farms.<sup>183</sup> Not only does Colorado have to worry about an astonishing amount of regulations, but it now must worry about a rise in taxes on marijuana.<sup>184</sup> The government’s excuse? Budget cuts for hospitals.<sup>185</sup> Some state congressmen are upset and worried this could lead to bad precedent.<sup>186</sup>

The state of Maine is currently debating how high to tax cannabis growers, even though it has been over a year since they legalized

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<sup>179</sup> *Id.*

<sup>180</sup> Georgina Moreno, *Balancing Vertical Integration in Calif.’s Cannabis Industry*, LAW360 (Jan. 12, 2018, 3:49 PM), <https://www.law360.com/articles/1001419/balancing-vertical-integration-in-calif-s-cannabis-industry>.

<sup>181</sup> Elizabeth Chuck, *Vice Wars: Tobacco, Alcohol and the Rise of Big Marijuana*, NBC NEWS (Aug. 4, 2017, 5:10 PM), <https://www.nbcnews.com/storyline/legal-pot/vice-wars-tobacco-alcohol-rise-big-marijuana-n253801>.

<sup>182</sup> Seddaca, *supra* note 173.

<sup>183</sup> *Id.*

<sup>184</sup> Scott Keyes, *Colorado’s Marijuana Tax Revenues Nearly Double Last Year’s Figures*, THE GUARDIAN (Sept. 21, 2015, 8:19 AM), <https://www.theguardian.com/us-news/2015/sep/21/colorado-marijuana-tax-revenues-2015>; John Frank & Alicia Wallace, *Colorado Looks to Marijuana Tax as Budget Fix, Stretching the Limits of What Voters Approved*, THE DENVER POST (May 2, 2017, 7:26 PM), <http://www.denverpost.com/2017/05/02/marijuana-tax-hike-15-percent/>.

<sup>185</sup> Frank & Wallace, *supra* note 185.

<sup>186</sup> *Id.* (“You would think if they are going to go jack up the marijuana taxes it would be for some marijuana-related purpose and not because there’s no leadership at the Capitol to talk about any other revenue source other than sin taxes and pot taxes — they are spineless,” said former state Sen. Pat Steadman, a longtime Democrat budget writer.”).

marijuana.<sup>187</sup> The proposed tax rate is 20%, which is estimated to run out small growers and only leave room for big growers to monopolize the market.<sup>188</sup> This excise tax is based on weight, which, when combined with the existing 10% sales tax, is astronomical.<sup>189</sup>

### *B. Dichotomy of the CSA and Supremacy Clause*

Attorney General Jeff Sessions recently reversed a number of Obama-era policies regarding federal marijuana law enforcement, a decision clashing directly with public opinion: over 62% of Americans approve the use of marijuana.<sup>190</sup> The intention of a federalist system is to allow states to self-govern themselves without an overbearing federal government obstructing its goals; however, this is not the case with marijuana legalization.<sup>191</sup> For instance, there have been numerous cries to remove marijuana from federal regulation under the CSA.<sup>192</sup> Pursuant to the CSA, however, the federal government may regulate local transactions pertaining to controlled substances because interstate manufacture and intrastate possession and local distribution are integral parts of interstate commerce.<sup>193</sup>

When the CSA is paired with the Supremacy Clause, which governs federal preemption of state law and the Anti-Commandeering Doctrine of the Tenth Amendment, there arises a conflict between federal law prohibiting marijuana and any state law permitting recreational or medicinal marijuana.<sup>194</sup> The Anti-Commandeering Doctrine prohibits the federal government from forcing states to criminalize conduct, meaning Congress may not force a state to criminalize marijuana or prosecute those who violate

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<sup>187</sup> Mariana, Villeneuve, *Maine Legislative Panel Mulls Raising 10 Percent Tax on Marijuana*, ASSOCIATED PRESS (July 23, 2017), <https://www.washingtontimes.com/news/2017/jul/23/legislative-panel-mulls-raising-10-percent-tax-on-/>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RESEARCH CENTER (Jan. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/>.

<sup>191</sup> See generally Avantika Chilkoti, *States Keep Saying Yes to Marijuana Use. Now Comes the Federal No.*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/us/politics/marijuana-laws-state-federal.html>.

<sup>192</sup> Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2013), which seeks to remove marijuana from the Controlled Substances Act.  
<sup>193</sup> 21 U.S.C. §801 (2014).

<sup>194</sup> David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 578-582 (2013); Mystica M. Alexander, William P. Wiggins, *The Lure of Tax Revenue from Recreational Marijuana: At What Price?*, 15 U.C. Davis Bus. L.J. 131, 146-49 (2015).

the CSA.<sup>195</sup> The federal government's prosecution tactics for violators of the CSA, therefore, is in direct contention with the laws of states which legalized marijuana.<sup>196</sup> The Supremacy Clause complicates this dichotomy between state and federal laws even further: Article VI, Clause 2 of the U.S. Constitution states, in relevant part, that "the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Pursuant to the dichotomy, the Supremacy Clause is limited regarding the "historic police powers of the States."<sup>197</sup>

### C. Current Judicial Struggles and the Cole Memo

There is still no straight-forward answer regarding preemption of the CSA and state marijuana laws. Recently, Nebraska and Oklahoma attempted to judicially preempt Colorado's marijuana laws and a growing number of courts are continually confronted with lawsuits asserting that state marijuana laws are preempted by the CSA, there is still no straight-forward answer.<sup>198</sup> numerous lawsuits regarding CSA and its preemption of marijuana.<sup>199</sup> In *John Ter Beek v. City of Wyoming*, the City of Wyoming passed an ordinance which prohibited any use of property in violation of federal or state law or local ordinance.<sup>200</sup> Ter Beek was a resident of Wyoming, Michigan and desired to grow and use marijuana, an act permitted by a Michigan statute.<sup>201</sup> Ter Beek, therefore, challenged Wyoming's City ordinance. The court held

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<sup>195</sup> Alexander & Wiggins, *supra* note 195.

<sup>196</sup> *See Id.* at 146.

<sup>197</sup> TODD GARVEY, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS, (Cong. Research Serv. R42398, 8 2012).

<sup>198</sup> Steve Nelson, *Anti-Pot Sheriffs File Lawsuit Against Colorado Legalization*, U.S. NEWS AND WORLD REPORT (Mar. 5, 2015), <http://www.usnews.com/news/articles/2015/03/05/anti-pot-sheriffs-file-lawsuit-against-colorado-legalization>; *but see also, e.g.,* *City of Riverside v. Island Empire Patients Health and Wellness Cent., Inc., et al.*, 56 Cal. 4th 729 (2013) (upholding a zoning ordinance that banned medical marijuana facilities in the City of Riverside on grounds that they constituted a public ordinance. *Id.* at 737).

<sup>199</sup> Steve Nelson, *Anti-Pot Sheriffs File Lawsuit Against Colorado Legalization*, U.S. NEWS AND WORLD REPORT (Mar. 5, 2015), <http://www.usnews.com/news/articles/2015/03/05/anti-pot-sheriffs-file-lawsuit-against-colorado-legalization>; *but see also* *City of Riverside v. Island Empire Patients Health and Wellness Cent., Inc., et al.*, 56 Cal. 4th 729 (2013) (upholding a zoning ordinance that banned medical marijuana facilities in the City of Riverside on grounds that they constituted a public ordinance. *Id.* at 737); *but see also* *Clearview Lake Corp. v. Cnty. Of San Bernardino*, No. EO56208, 2014 WL 936381, at \*1 (Cal.App. 4 Dist. Mar. 11, 2014) (applying *City of Riverside* and upholding a county-wide ban of medical marijuana facilities).

<sup>200</sup> *Ter Beek v. City of Wyoming*, 495 Mich. 1, 1 (2014).

<sup>201</sup> *Id.* at 6.

that the CSA did not preempt the Michigan statute, and that the Michigan statute preempted Wyoming's city ordinance, because the ordinance directly conflicted with Michigan's Medical Marijuana Act.<sup>202</sup>

The federal government continues to complicate marijuana law with the recent revocation of five Obama Administration Policies regarding federal marijuana enforcement ("the Cole Memo").<sup>203</sup> Attorney General Jeff Sessions' memorandum effectively allows federal prosecutors to pursue marijuana enforcement based on "all relevant considerations," including federal law enforcement priorities set by the attorney general, deterrent effect of criminal prosecution, seriousness of the crime, and the cumulative impact of particular crimes of the community.<sup>204</sup>

By rescinding the Cole Memo, each U.S. Attorney in each U.S. district is essentially the head regulatory officer for marijuana reform in his jurisdiction, thereby confusing the situation even more for those at all levels of government.<sup>205</sup> The U.S. Attorney for Oregon, for example, has already come out and made it clear that he believes current regulations in Oregon are not effective, and therefore he will be making changes in the near future.<sup>206</sup> It is being quickly noted that with this memo "the attorney general has created intolerable uncertainty for a growing industry that is now demanding legal protections from Congress."<sup>207</sup> Marijuana-based stocks dropped over 9% in value the days after Sessions' announcement of repealing the Cole memo, and even affected non-marijuana-based stocks, such as Scotts Miracle-Gro Company, which dropped more than 5%.

The Cole Memo was never intended to be a permanent fix for the dichotomy of federal and state marijuana laws; however, when paired with the Rohrabacher-Farr amendment, which barred the DOJ from spending funds to interfere with the implementation of medical marijuana laws, states

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<sup>202</sup> *Id.* at 20.

<sup>203</sup> Memorandum from Office of the Attorney General, *Memorandum for all United States Attorneys, Subject: Marijuana Enforcement* (Jan 4, 2018).

<sup>204</sup> *Id.*

<sup>205</sup> Charlie Savage and Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, THE N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>.

<sup>206</sup> Billy J. Williams, *U.S. Attorney: A Call for Transparency and Action on Marijuana*, THE OREGONIAN (Jan. 12, 2018) [http://www.oregonlive.com/opinion/index.ssf/2018/01/us\\_attorney\\_a\\_call\\_for\\_transpa.html](http://www.oregonlive.com/opinion/index.ssf/2018/01/us_attorney_a_call_for_transpa.html).

<sup>207</sup> James Higdon, *Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal*, POLITICO (Jan. 6, 2018), <https://www.politico.com/magazine/amp/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251>.

could self-regulate when it came to marijuana legalization.<sup>208</sup> The future of marijuana legalization is now more unclear than ever: the Rohrabacher-Farr amendment must be reauthorized in the 2018 omnibus spending bill in the conference committee, and “the Congressional Cannabis Caucus has less than a year to make those protections permanent.”<sup>209</sup> All Congress must do is pass H.R. 1227, the Ending Federal Marijuana Prohibition Act, which would remove marijuana from Schedule 1 and “eliminate federal penalties for anyone engaged in state-legal marijuana activity.”<sup>210</sup> It is fair to say, therefore, that the state of marijuana law is more complicated now than it has ever been before, thanks to the insane dichotomy of federal and state law.

## V. FOR CRAFT BEER IT’S NOT TOO LATE; MARIJUANA – LEARN FROM THEIR MISTAKES

Cannabis ventures are a lot like craft breweries, “in that successful entrepreneurs in both industries have built their brands on personal relationships – and hustle.”<sup>211</sup> Colorado and Washington are looking into the implications of an excise tax and any potential challenges: “With the push in Colorado and Washington to impose a high level of excise taxation on marijuana consumers to help fund education and other worthy causes, the question that remains unanswered at this time is whether higher prices will drive consumers back to the black market.”<sup>212</sup>

### A. Fight Big Beer the Distributors’ Monopoly

Americans now consume alcohol, and more specifically beer, differently than they did when the current regulations were implemented. These regulations and compliance standards, therefore, need to evolve alongside it. Craft beer is very popular now, as it accounts for approximately 12.7% of national beer sales, but represent 23.4% of the beer industry’s retail dollar value.<sup>213</sup>

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<sup>208</sup> Most recently, Consolidated Appropriations Act of 2017, Pub. L. No. 115-31 (2017)–, prohibits the DOJ from using funds provided by the federal government from preventing states from implementing their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana.

<sup>209</sup> David McNew, *Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal?*, POLITICO (Jan. 6, 2018), <https://www.politico.com/magazine/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251>.

<sup>210</sup> Consolidated Appropriations Act of 2017, *supra* note 209; *see also* Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017).

<sup>211</sup> Fox, *supra* note 178.

<sup>212</sup> Alexander & Wiggins, *supra* note 158, at 142.

<sup>213</sup> *Id.*; *see also* Brewers Association Press Release 2018, *supra* note 4.



Simply throwing money at the situation without fixing the system does more harm than good. Craft beer is not asking for a handout *per se*, but simply for a little bit of help. The redundant and overbearing regulatory system, some of which dates back to the end of Prohibition, must be the focus of legislators and policymakers, instead of just purely money.<sup>214</sup> For example, Congress' most recent tax bill included a reduction for craft brewers on the production and distribution of beer.<sup>215</sup> While this may seem helpful on its face, most craft breweries are unlikely to “transform the way they do business” because it is simply a drop in the bucket of all the regulatory measures and compliance costs which they must endure.<sup>216</sup>

The history of the American brewing industry leads consumers to believe taxes on beer are high in order to correct negative externalities and discourage consumption; however, these taxes should not apply to craft beer, and should be carved out of the sin taxes of craft breweries to relieve them of high costs.<sup>217</sup> By forcing a three-tier system on a new and progressive part of the alcohol industry, where distributors add no value to local craft breweries whose income typically stays local, the system's intended purpose is not logical, and should therefore be removed on a state level. This would allow each craft brewery to grow and reach its potential, while also creating local jobs and strong local economies.

The Craft Beer Act, a recent piece of legislation, will reduce the federal excise tax to \$3.50 per barrel for the first 60,000 barrels (currently at \$7 per barrel) for domestic brewers who produce less than 2 million barrels per year.<sup>218</sup> It also includes provisions which would streamline bookkeeping

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<sup>214</sup> Koopman & Savidge, *supra* note 143.

<sup>215</sup> Craft Beverage Modernization and Tax Reform Act of 2017, S. 236, 115th Cong. (2017).

<sup>216</sup> Matthew Gardner, *New Tax Breaks for Craft Beer Are a Drop in the Barrel: 76 percent of Tax Bill's Beer Tax Cut Goes to a Handful of the Biggest Producers*, INSTITUTE ON TAXATION AND ECONOMIC POLICY: JUST TAXES BLOG (Jan. 10, 2018), <https://itep.org/new-tax-breaks-for-craft-beer-are-a-drop-in-the-barrel-76-percent-of-tax-bills-beer-tax-cut-goes-to-a-handful-of-the-biggest-producers/>.

<sup>217</sup> See generally Doug Schwalm, *Taxation and the Economic Impacts of Alcohol*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21<sup>ST</sup> AMENDMENT IN THE 21<sup>ST</sup> CENTURY 19, 20 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008) (“By 1990, just over 50 percent of ethanol consumed in the United States was in the form of beer, with the rest being almost equally split between wine and spirits.”)(emphasis added); Andrew D'Aversa, *Brewing Better Law: Two Proposals to Encourage Innovation in America's Craft Beer Industry*, 165 U. PA. L. REV. 1465 (2017); Bryce Pfalzgraf, Note, *Taxing the Keg: An Analysis on the Potential Effects of Changing the Federal Excise Tax on Beer*, 2015 U. ILL. L. REV. 2141 (2015).

<sup>218</sup> Craft Beverage Modernization and Tax Reform Act of 2015, S.B. 1562, 114th Cong. (1<sup>st</sup> Sess. 2015).

processes for small breweries and brew pubs.<sup>219</sup> Most importantly, the Craft Beer Act continues to delineate the differences between craft beer and hard liquor in order to distinguish the tax rates on both.<sup>220</sup> While supported by a majority of senators, more still needs to be done to prohibit Big Beer from monopolizing the market, teaming up with distributors, and attempting to destroy craft beer.<sup>221</sup>

Big Beer and other alcohol companies, while lobbying against marijuana legalization, do not recognize it as a primary reason as to why consumers would shift their preferences of those products that are regulated by the excise tax:

Brown-Forman, which owns Jack Daniel's whiskey, was also able to barely summon the strength to bring it up, listing marijuana legalization near the bottom of a list of things that could cause a shift in consumer preferences. Economic conditions, demographic and social trends, public health policies, and changes in government regulation of alcoholic beverages all ranked higher on its list of priorities. It's also made the same statement each year since 2013 while Boston Beer raised it for the first time last year.<sup>222</sup>

Moreover, “a check of annual filings from Anheuser-Busch InBev, SABMiller, Molson Coors, Diageo, and numerous other brewers, distillers, and distributors show no similar mention of marijuana legalization in their filings, indicating it's not a widespread concern.”<sup>223</sup>

### *B. Marijuana: Push for Federal Regulation and Embrace Craft Growers*

Like alcohol during the Prohibition, marijuana today provides an alternative income for those outside of the “mainstream economy” and is also

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<sup>219</sup> *Id.* at § 203.

<sup>220</sup> *Id.*

<sup>221</sup> Press Release, Beer Institute, Beer Institute, Brewers Association, Distilled Spirits Council of the United States, Wine Institute and WineAmerica Praise Majority Support in Both House and Senate for Craft Beverage Modernization and Tax Reform Act (Oct. 19, 2017), <http://www.beerinstitute.org/press-releases/beer-institute-brewers-association-distilled-spirits-council-united-states-wine-institute-wineamerica-praise-majority-support-house-senate-craft-beverage-modernization/>.

<sup>222</sup> Rich Duprey, *Does Marijuana Legalization Really Have to Worry about the Alcohol Industry?*, THE MOTLEY FOOL (Sept. 21, 2016), <https://www.fool.com/investing/2016/09/21/does-marijuana-legalization-really-have-to-worry-a.aspx>.

<sup>223</sup> *Id.*

a major source of revenue in the black market.<sup>224</sup> Recognition of legal marijuana on a federal level will enforce a properly taxed system which will consequently be used to give back to state public health funding, and problems faced by counties and cities. Major concerns of leaving this matter solely in the discretion of each state and local government are valid: there already exist inequities across state borders, such as the states which border Colorado and are fed up with the marijuana easily crossing state lines and having zero laws pertaining to it and such arrests blowing through a city's police department budget.<sup>225</sup>

The federal government, in collaboration with the Food and Drug Administration ("FDA"), must implement a federal law which removes marijuana from the CSA, incentivizes states to legalize, and to implement a consistent regulatory scheme across all jurisdictions. This is necessary to protect constitutional rights, and to combat the lack of research on marijuana, to combat the effect of the war on drugs on minorities, and to effectively ease the rights of businesses. Federal recognition will also effectively diminish the black market.<sup>226</sup> By removing marijuana from the CSA, the FDA may legally research marijuana and its affects, which would help in the regulation process. Additionally, the federal government law legalizing marijuana should incentivize states through different mechanisms to legalize marijuana, and allocate money and funds to communities who have been most affected

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<sup>224</sup> Canadian Bar Association, ; Criminal Justice, Municipal Law and Health Law Sections *Legalization, Regulation and Restriction of Access to Marijuana Response to Discussion Paper*, CRIMINAL JUSTICE, MUNICIPAL LAW AND HEALTH LAW SECTIONS (Sept. 2016), <https://www.cba.org/CMSPages/GetFile.aspx?guid=c0efad9e-31b6-4cf1-9ab4-858743eec975>.

<sup>225</sup> See generally Trevor Hughes, *When Smuggling Colo. Pot, Not Epot, not ven the Sky's the Limit*, USA TODAY (May 13, 2016, 11:42 AM), <https://www.usatoday.com/story/news/2016/05/13/when-smuggling-colo-pot-not-even-skys-limit/83623226/> (describing Nebraska's issue with catching smugglers, and how each jurisdiction much decide for itself "how much money they want to put into going after those" who bring marijuana sold in Colorado into Nebraska. (internal quotations omitted.)); Marc Fisher, *At Colorado's Borders, a Dividing Line Over Mdividing line over arijuana*, THE WASH. WASHINGTONPOST (July 26, 2014), [https://www.washingtonpost.com/politics/at-colorados-borders-a-dividing-line-over-marijuana/2014/07/26/729c6462-06ac-11e4-bbf1-cc51275e7f8f\\_story.html?utm\\_term=.eeb5ec730fe7](https://www.washingtonpost.com/politics/at-colorados-borders-a-dividing-line-over-marijuana/2014/07/26/729c6462-06ac-11e4-bbf1-cc51275e7f8f_story.html?utm_term=.eeb5ec730fe7).

<sup>226</sup> Kevin Loria, *What Colorado and Other States Tell Us About How Marijuana's Big Election Day will Affect Health*, BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/marijuana-legalization-public-health-colorado-traffic-fatalities-2016-11>; See also Representative Earl Blumenauer and Representative Jared Polis, *The Path Forward: Rethinking Federal Marijuana Policy* ([https://polis.house.gov/uploadedfiles/the\\_path\\_forward.pdf](https://polis.house.gov/uploadedfiles/the_path_forward.pdf)) (last accessed May 1, 2018).

by the war on drugs.<sup>227</sup> These funds could go to programs such as health education programs. Finally, when regulating the legalized marijuana markets on a state level, the scheme should closely resemble that of Oakland's Equity Permit Programs, which, on deciding who receives a marijuana permit, gives preference to those negatively affected by the CSA's ban on marijuana.<sup>228</sup>

Second, all levels of government, just like with craft beer, must collaborate immediately on marijuana production. The federal government should set baseline standards (such as acceptable amounts of personal production)<sup>229</sup> and work with each state to determine a regulatory scheme which is relatively similar from state to state. Additionally, a well-built distribution system governed on the state level is necessary to combat the type of vertical integration and consequent monopoly seen by Big Beer.<sup>230</sup> Collaboration between federal, state, and local government on these laws is imperative to the fair growth of marijuana and to establish a small, local craft marijuana scene as well.

Finally, marijuana companies must embrace craft growers immediately. So long as craft growers are held to the same standards as craft brewers, such as licensing requirements and quality controls, there should be no issues – it is simply another controlled substance like craft beer. Personal production should be permitted similar to home brewing, where it should only be used for personal use and may not be distributed or sold without a license. A strong regulatory scheme on distributors will solidify a place in the market for the craft growers, as it will ensure that those who are not yet

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<sup>227</sup> These types of provisions were originally proposed by Senator Cory Booker in his Marijuana Justice Act of 2017. He also proposed that federal courts expunge convictions for those who were convicted of marijuana use or possession. S.1689 – 115th Congress (2017-2018) Marijuana Justice Act of 2017 <https://www.congress.gov/bill/115th-congress/senate-bill/1689>. Additionally, while marijuana usage among black and white Americans are essentially the same, blacks were arrested at a rate 3.73 times higher than that of whites in 201. Am. Civil Liberties Union, *The War on Marijuana in Black and White* 8 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-re12.pdf>.

<sup>228</sup> See Tammerlin Drummond, *A Call for Pot Entrepreneurs, Oakland Test Drives New Marijuana Permit Program*, E. Bay Times (Aug. 1, 2017), <http://www.eastbaytimes.com/2017/07/28/a-call-for-pot-entrepreneurs-oakland-test-drives-new-cannabis-permit-program/>.

<sup>229</sup> For example, the TTB limits the amount of beer which a 2-person household may produce to 200 gallons per calendar year, and 100 gallons per calendar year for a 1-person household. 26 U.S.C. § 5053 (1999).

<sup>230</sup> Eric Spitz, *Marijuana Industry Overview*, CHAPMAN (Feb. 2017), [https://www.chapman.edu/wilkinson/\\_files/2016%20smoller%20conference%20bio%20photos/Updated%20White%20Papers/Marijuana%20Industry%20Overview-%20Chapman%202017.pdf](https://www.chapman.edu/wilkinson/_files/2016%20smoller%20conference%20bio%20photos/Updated%20White%20Papers/Marijuana%20Industry%20Overview-%20Chapman%202017.pdf).

large enough to self-distribute will have reliable distributors, and ones who are not actually their competitors.<sup>231</sup>

#### V. THE FUTURE IS BRIGHT FOR MARIJUANA AND CRAFT BEER, DESPITE THE EFFORTS FROM THE FEDERAL GOVERNMENT, AND BIG BEER AND THE DISTRIBUTORS

Just like any other for-profit market, the marijuana industry is currently hindered by the dozens of states who refuse to legalize marijuana. Marijuana proponents are counting on California's decision to legalize recreational marijuana, as the industry will have more profits to carry out the political campaigns and lobbying efforts needed to achieve this.<sup>232</sup> Proponents also state that the money coming in from states with legalized marijuana will be used to cover the outrageous costs associated with ballot initiatives – the most popular way of legalizing marijuana.<sup>233</sup>

It is projected that states which have legalized marijuana are estimated to bring in \$655 million in state taxes on cannabis retail sales, and employ at least 230,000 people.<sup>234</sup> Michigan is set to put an initiative on its November 2018 ballot, which would not only legalize marijuana, but also permit craft growing.<sup>235</sup> Oklahoma will vote on the approval of medical cannabis in 2018, and New Jersey will likely legalize cannabis through a legislative action in 2018.<sup>236</sup> With the continued increase of support for legal marijuana, 2018 will likely see the strongest demand for marijuana which the market has ever seen: levels of competition will continue to rise, and demand for craft cannabis and cannabis products produced by small companies will continue to increase in 2018.<sup>237</sup> While there is no exact definition for craft cannabis, the likelihood of it becoming defined in 2018 is likely.

In the craft beer world, attorneys are offering guidance on how to navigate the world of weed and how to incorporate it into their beers.<sup>238</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> German Lopez, *California's New Legal Marijuana Market Marks the Beginning of the End for Prohibition*, VOX, (Jan. 2, 2018), <https://www.vox.com/policy-and-politics/2018/1/2/16840600/california-marijuana-legalization>.

<sup>233</sup> *Id.*

<sup>234</sup> Johnny Green, *10 Things to Anticipate in the Cannabis Space in 2018*, NCIA (Dec. 22, 2017), <https://www.seedtosaleshow.com/denver-2018/media/news-and-updates/10-things-to-anticipate-in-the-cannabis-space-in-2018>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Marc Sorini & Vanessa Burrows, *Craft Beer and Marijuana*, THE NEW BREWER, Nov./Dec. 2017, at 37, <https://www.mydigitalpublication.com/publication/frame.php?i=452897&p=&pn=&ver=html5>.

Furthermore, even though 2016 saw a decline in craft beer sale from 2015, legalizing marijuana actually boosted craft beer sales overall.<sup>239</sup> And while the total beer market decreased by 1% in 2017, craft beer saw a 5% volume growth, and an 8% dollar value growth in 2017 compared to 2016.<sup>240</sup> It is no coincidence that Colorado, Washington, Oregon, and California, the states with the most craft breweries, approved recreational marijuana.<sup>241</sup>

## VI. CONCLUSION

Marijuana and craft beer are more similar than some care to admit. Both industries, while once illegal in their own ways in the U.S., have budded into blossoming businesses responsible for the bustling of many local economies. And as Americans continue to embrace marijuana as much as craft beer, the federal government will feel the pressure of public opinion to embrace it as well. Such an embrace is just the first step for craft marijuana, as it will then be tasked with weeding through complex regulations at both a federal and state level. Craft beer, with a better understanding that it does not need to fear marijuana, can continue focusing on its real adversaries which are brewing up regulatory frustrations and monopolies of the industry: Big Beer and their distributors.

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<sup>239</sup> Rich Duprey, *The Legalization of Marijuana is not Responsible for the Craft Beer Industry's Downturn*, BUSINESS INSIDER UK (Jan. 12, 2017, 1:28 AM), <http://uk.businessinsider.com/marijuana-legalization-not-hurting-craft-beer-sales-2017-1>(stating, “in Denver, the analysis used Nielsen scan-point of sale data showing a 6.4% year-to-date decline in beer sales and a 5% drop in craft beer sales to arrive at the conclusion marijuana was impacting beer. What it failed to consider was the 57% growth experienced in on-premise sales.” Additionally, excise tax on craft beer rose year to year, meaning consumption merely shifted to different channels, i.e., on-premise sales.). *Id.*

<sup>240</sup> Brewers Association Press Release 2018, *supra* note 5.

<sup>241</sup> See Brewers Association, *State Craft Beer Sales & Production Statistics, 2016*, <https://www.brewersassociation.org/statistics/by-state/> (last visited Apr. 6, 2018).