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License to Sell: The Constitutionality of Durational Residency Requirements for Retail Marijuana Licenses

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LICENSE TO SELL: THE CONSTITUTIONALITY OF DURATIONAL RESIDENCY REQUIREMENTS FOR RETAIL MARIJUANA LICENSES

Gregory S. Toma*

States are increasingly legalizing and regulating recreational marijuana, largely as a result of their citizens' actions. The sale of recreational marijuana is strictly regulated, but jurisprudence within the field is scarce. Among these regulations, some states have imposed a durational residency requirement as a prerequisite for a retail marijuana license. Such a requirement mirrors those imposed on retail liquor licenses the Supreme Court recently struck down.

*States have imposed durational residency requirements in many contexts throughout history and, while some are upheld, many are struck down as unconstitutional impingements on the right to travel. However, courts also use the dormant Commerce Clause doctrine to invalidate such requirements, as seen in the recent case *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*. This Note explores the constitutionality of durational residency requirements for retail marijuana licenses under the right to travel line of cases and the dormant Commerce Clause doctrine, and ultimately concludes that such requirements should be abolished.*

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INTRODUCTION

“We’re the ones who fought for this Allowing people from outside the state is not benefitting Ohio or Ohioans or our unemployment.”¹ The notion that one reaps what one sows has a long history and is prevalent in U.S. culture.² The case is no different with regard to legalizing

1. Jackie Borchardt, *Ohio Medical Marijuana Entrepreneurs Want Residency Requirement for Business Licenses*, CLEVELAND.COM (Jan. 11, 2019) (quoting Kelly Mottola, owner of Hydro Innovations in Hiliard, Ohio), https://www.cleveland.com/metro/2017/03/ohio_medical_marijuana_entrepr.html [https://perma.cc/PC47-N8KR].

2. See *Galatians* 6:7. A Pew Research Center survey found that nearly 70% of Americans describe the “typical American” as “selfish.” Janell Ross, *Americans Are Patriotic, Honest, Lazy and Selfish, According to Americans*, WASH. POST (Dec. 12, 2015, 8:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/12/americans-arent-terribly-impressed-with-americans/> [https://perma.cc/QW5Y-44MB].

marijuana;³ the citizens who pushed for legalization want to reap the benefits themselves.⁴

Despite the continued federal prohibition, in 2012, Colorado and Washington became the first states to legalize recreational marijuana use.⁵ Today, nine other states and the District of Columbia have joined Colorado and Washington in legalizing recreational marijuana.⁶ One way these states prevent outsiders from free riding off the work of their citizens is by imposing durational residency requirements on retail marijuana licenses.⁷

Throughout history, states have imposed durational residency requirements, and courts have grappled with their constitutionality.⁸ Recently, the Supreme Court struck down Tennessee's durational residency requirement for seeking a retail liquor license under the dormant Commerce Clause doctrine.⁹ However, there are many differences between alcohol and recreational marijuana, such as the fact that state regulation of the former is explicitly authorized by the

3. "Marijuana" is a popular name for a drug derived from the *Cannabis sativa* plant. See NAT'L INST. ON DRUG ABUSE, WHAT IS MARIJUANA? (2020), <https://www.drugabuse.gov/publications/research-reports/marijuana/what-marijuana> [<https://perma.cc/2MJX-TTKB>]. Some statutes use the terms "marihuana" or "cannabis," and there are many other popular names. See 21 U.S.C. § 802(16) (2018). This Note uses the term "marijuana" throughout. For an interesting examination of the history and meaning of these terms, see Jon Gettman, *Marijuana vs. Cannabis: Pot-Related Terms to Use and Words We Should Lose*, HIGH TIMES (Sept. 10, 2015), <https://hightimes.com/culture/marijuana-vs-cannabis-pot-related-terms-to-use-and-word-s-we-should-lose/> [<https://perma.cc/BL2H-57WU>].

4. See, e.g., Penelope Overton, *First Pot-Business Licenses Would Go to Maine Residents of at Least 4 Years*, PORTLAND PRESS HERALD (Apr. 3, 2018), <https://www.pressherald.com/2018/04/03/first-pot-business-licenses-would-go-to-maine-residents-of-at-least-4-years/> [<https://perma.cc/7LJ7-MMLA/>]; Borchardt, *supra* note 1.

5. See Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFINGTON POST (Nov. 20, 2012), https://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html?ncid=engmodushpmg00000004 [<https://perma.cc/K9LS-YE54>]; Jonathan Martin, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Feb. 23, 2017, 5:05 PM), <https://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/> [<https://perma.cc/4K2N-WRLR>].

6. *Legal Recreational Marijuana States and DC*, PROCON.ORG (June 25, 2019), <https://marijuana.procon.org/legal-recreational-marijuana-states-and-dc/> [<https://perma.cc/SYC3-3TYY>].

7. See BARBARA BROHL & JACK FINLAW, STATE OF COLO., TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64, at 33 (2013), https://www.colorado.gov/pacific/sites/default/files/A64TaskForceFinalReport%5B1%5D_1.pdf [<https://perma.cc/YX3A-WLA2>].

8. See *infra* Section I.A.

9. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

Constitution while the latter is subject to federal prohibition.¹⁰ Therefore, the merits of a dormant Commerce Clause challenge to durational residency requirements for retail marijuana licenses are questionable.¹¹ In light of the Court's recent decision and recreational marijuana use's growing legalization¹² at the state level, the constitutionality of durational residency requirements for retail marijuana licenses warrants examination.

Part I of this Note provides a general background on durational residency requirements and how courts have approached them. Part I also examines the recent legalization of marijuana for recreational use by several states and how those states regulate their marijuana industries. Part II examines the different arguments for and against the constitutionality of durational residency requirements for retail marijuana licenses. Finally, Part III concludes that these durational residency requirements should be abolished because they impinge on the right to travel and violate the dormant Commerce Clause.

I. THE HISTORY OF DURATIONAL RESIDENCY REQUIREMENTS AND MARIJUANA

While the legalization of recreational marijuana usage is a recent development,¹³ the existence of state-imposed durational residency requirements can be traced back to before the Constitutional Convention.¹⁴ To understand how courts will treat durational residency requirements for retail marijuana licenses, it is first necessary to examine how they have treated durational residency requirements in other contexts. Durational residency requirements "condition certain governmental benefits and privileges upon residence within a state or locality for a specified period of time."¹⁵ People who have been in the state for the required amount of time qualify to receive the conditioned

10. See *infra* Sections I.B, II.C.

11. See *infra* Sections I.B, II.C.

12. This Note refers to non-medical marijuana use as "recreational marijuana use" although some sources, including some state statutes, use the term "adult-use marijuana." See, e.g., ME. REV. STAT. tit. 28-B, § 202 (2018); Michael Cooper, *Safe Streets Alliance & the Tenth Amendment: Intrastate Cannabis Markets, Interstate Authority & Political Consequences*, 18 U.C. DAVIS BUS. L.J. 195, 196 (2018).

13. See Ferner, *supra* note 5 (explaining that, in 2012, Colorado and Washington became the first states to end marijuana prohibition).

14. Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 614–16 (2016) ("Early state constitutions were replete with durational residency requirements . . . for voting . . .").

15. Michael A. Lee, *Durational Residence Requirements for Public Employment*, 67 CALIF. L. REV. 386, 386 (1979).

benefit and those who have not do not.¹⁶ States have imposed durational residency requirements in an array of contexts, and the Supreme Court has applied different standards of review to determine their constitutionality.¹⁷

This Part discusses several types of durational residency requirements and the growing trend of states legalizing marijuana for recreational use. First, Section I.A examines the Supreme Court jurisprudence regarding state-imposed durational residency requirements. Second, Section I.B examines state-imposed durational residency requirements in the context of retail liquor licenses. Finally, Section I.C discusses the recent legalization of recreational marijuana use by several states.

A. The Right to Travel: Supreme Court Jurisprudence on State-Imposed Durational Residency Requirements

The Supreme Court has treated state-imposed durational residency requirements differently depending on the requirement's context. Over time, the Court has applied a variety of rationales to either uphold or strike down durational residency requirements. The fundamental right to travel is a product of one of these rationales.

In the 1960s, two states and the District of Columbia enacted statutes that denied public assistance to people who were not residents for a specified period.¹⁸ The Supreme Court struck down the statutes in *Shapiro v. Thompson*.¹⁹ The Court held that the statutes at issue created “two classes of needy resident families indistinguishable from each other,” other than their length of residency, and that this denied new residents “equal protection of the laws” afforded by the Fourteenth Amendment.²⁰ The Court explained that the requirements “touch[] on the fundamental right of interstate movement.”²¹

This “fundamental right of interstate movement” is commonly known as the right to travel.²² The Court “explicitly specified that it had ‘no

16. *Durational Residency Requirements*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/durational-residency-requirements#fn2102amd14> [<https://perma.cc/HCU8-GF3W>] (last visited July 21, 2020).

17. See *infra* Sections I.A, I.B.

18. See CONN. GEN. STAT. REV. § 17-2c (1967) (repealed 1969); D.C. CODE ANN. § 3-203 (1967) (repealed 1969); 62 PA. STAT. ANN. § 432(6) (1968) (repealed 1969); see also David A. Donahue, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451, 453 n.11 (1998) (collecting statutes).

19. 394 U.S. 618 (1969).

20. *Id.* at 627.

21. *Id.* at 638.

22. See Donahue, *supra* note 18, at 455.

occasion to ascribe the source of this right to travel . . . to a particular constitutional provision.”²³ According to the Court, it was enough that it had recognized the right to travel as a fundamental right in the past.²⁴

Shapiro was the first time the Court explicitly held that any impingement on a fundamental right triggers strict scrutiny.²⁵ Specifically referring to the right to travel, the *Shapiro* Court explained that under the strict scrutiny standard, “any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”²⁶ Finding that the interests the states asserted were either constitutionally impermissible²⁷ or not compelling enough²⁸ to withstand strict scrutiny, the Court struck down the statutes.²⁹ The Court subsequently used the *Shapiro* strict scrutiny framework as the basis of its analysis of durational residency requirements in other contexts that touched on the right to travel, including voting restrictions.³⁰

The Court broadened its right to travel jurisprudence in *Dunn v. Blumstein*.³¹ There, the Court struck down Tennessee’s one-year durational residency requirement for voting in state elections³² as a violation of the Equal Protection Clause of the Fourteenth Amendment.³³ The Court applied strict scrutiny because the durational residency

23. *Id.* (quoting *Shapiro*, 394 U.S. at 630).

24. *Shapiro*, 394 U.S. at 630–31.

25. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1282 (2007). Precursors to the modern strict scrutiny test existed before *Shapiro*, but they varied in form and were not clearly defined. See *id.* at 1284.

26. *Shapiro*, 394 U.S. at 634.

27. *Id.* at 631.

28. The Court rejected the states’ argument that durational residency requirements are justified because they “(1) facilitate[] the planning of the welfare budget; (2) provide[] an objective test of residency; (3) minimize[] the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourage[] early entry of new residents into the labor force.” *Id.* at 634.

29. *Id.* at 618.

30. These contexts also include access to medical care and boat mooring rights. See Lawrence J. Conlan, *Durational Residency Requirement for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389, 1395 n.46 (2002).

31. 405 U.S. 330 (1972).

32. States manipulated durational residency requirements for voting to either encourage or discourage migrants from settling in the state. See Mazo, *supra* note 14, at 626–27. When a state wanted to encourage newcomers, it would shorten the time required to satisfy the durational residency requirement for voting. See *id.* When a state wanted to curb migration, it would lengthen the durational residency requirement. See *id.*

33. At issue were provisions of the Tennessee Constitution and parts of the Tennessee Code that, together, prevented citizens from registering to vote until they were Tennessee residents for one year. See *Dunn*, 405 U.S. at 332 n.1.

requirement impinged on the fundamental right to vote³⁴ and the fundamental right to travel.³⁵ In striking down the durational residency requirement, the Court found that it was “neither narrowly tailored to [the state’s] interests, nor necessary to further compelling state interests.”³⁶ Tennessee argued that the durational residency requirement at issue did not impinge on the right to travel because it was unlikely to actually deter travel.³⁷ Unconvinced, the Court held that “durational residency requirements constitute[] penalties on the right to travel whether or not the statute in question actually deter[s] interstate travel.”³⁸ Thus, the durational residency requirements only needed to be capable of deterring but did not have to actually deter travel.³⁹

The Supreme Court again struck down a state-imposed durational residency requirement in *Memorial Hospital v. Maricopa County*.⁴⁰ This case involved an Arizona statute that imposed a durational residency requirement on free, non-emergency medical care.⁴¹ Applying the *Shapiro* framework, the Court held that the durational residency requirement impinged on the fundamental right to travel⁴² by creating “an ‘invidious classification’ which deprived newcomers to the state of ‘the basic necessities of life.’”⁴³ The Court, therefore, applied strict scrutiny and held that the durational residency requirements at issue violated the Fourteenth Amendment’s Equal Protection Clause.⁴⁴

34. *Id.* at 334–35.

35. *Id.* at 338 (“[T]he durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.”).

36. Donahue, *supra* note 18, at 456. Tennessee put forth two interests the durational residency requirement purportedly served: (1) ensuring the purity of the ballot box and (2) ensuring that those who vote are knowledgeable. The Court was not convinced. *See Dunn*, 405 U.S. at 345.

37. *See* Donahue, *supra* note 18, at 457.

38. *Id.* The Court rejected Tennessee’s attempt to distinguish *Shapiro*. *See Dunn*, 405 U.S. at 339–40 (“*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other ‘right to travel’ cases in this Court always relied on the presence of actual deterrence.”).

39. *See Dunn*, 405 U.S. at 339–40; Donahue, *supra* note 18, at 457.

40. 415 U.S. 250 (1974).

41. The statute required individuals live in Arizona for at least one year before qualifying to receive free, non-emergency medical care. *See id.* at 251.

42. *Id.* at 261–62 (“The State of Arizona’s durational residence requirement for free medical care penalizes indigents for exercising their right to migrate to and settle in that State.”).

43. Donahue, *supra* note 18, at 457 (quoting *Mem’l Hosp.*, 415 U.S. at 269). The Court held that medical care is “a basic necessity of life,” similar to welfare benefits, which cannot be disturbed. *See Mem’l Hosp.*, 415 U.S. at 259; Bryce Nixon, “*Rational Basis with a Bite*”: *A Retreat from the Constitutional Right to Travel*, 18 L. & INEQ. 209, 217–18 (2000).

44. *Mem’l Hosp.*, 415 U.S. at 250.

Shapiro and its progeny establish that “strict scrutiny applies to any classification which serves to penalize” the right to travel.⁴⁵ However, the Court has indicated that not all durational residency requirements are per se unconstitutional.⁴⁶

*Sosna v. Iowa*⁴⁷ was the first case where the Supreme Court upheld a durational residency requirement.⁴⁸ The durational residency requirement at issue in this case limited access to divorce.⁴⁹ However, the Court did not apply the *Shapiro* framework here.⁵⁰ Writing for the majority, Justice William Rehnquist distinguished *Sosna* based on the fact that the durational residency requirement at issue could be “justified on grounds other than purely budgetary considerations or administrative convenience.”⁵¹ The Court found that the consequences of divorce — to both spouses’ marital status, property rights, and custody and support obligations — are significant enough to permit states to require parties to have a “modicum of attachment to the State.”⁵² Without specifying which standard of review it applied, the Court simply concluded that the durational residency requirement for divorce was based on reasonable state interests,⁵³ and so was constitutional.⁵⁴

45. Donahue, *supra* note 18, at 458.

46. See *Mem'l Hosp.*, 415 U.S. at 256 (citing *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969)).

47. 419 U.S. 393 (1975) (upholding Iowa’s one-year durational residency requirement for seeking a divorce in the state).

48. Nixon, *supra* note 43, at 218.

49. *Sosna*, 419 U.S. at 395. At the time of the decision, 48 states imposed a durational residency requirement for divorce actions. See *id.* at 404–05. A one-year requirement such as Iowa’s was the most common length states mandated. See *id.* at 405. Louisiana and Washington were the two states without any such requirement. See *id.* at 405 n.15.

50. See *id.* at 406–09; Thomas I. Sheridan, III, *Case Notes*, 43 FORDHAM L. REV. 857, 867 (1975) (“Justice Rehnquist’s opinion in *Sosna* did not apply the [*Shapiro*] analysis.”).

51. *Sosna*, 419 U.S. at 406 (“What [*Shapiro* and its progeny] had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals.”). The Court went on to say that the case at bar “requires a different resolution of the constitutional issue presented than was the case in *Shapiro* [and its progeny].” *Id.* at 409; see also Nixon, *supra* note 43, at 218.

52. See *Sosna*, 419 U.S. at 406–09. The Court accepted Iowa’s argument that the durational residency requirement was necessary to protect the state interests in avoiding becoming a “divorce mill” and avoiding collateral attack from other states. See *id.* at 407.

53. This is not to say the Court applied a rational basis test. See Sheridan, *supra* note 50, at 870 (“[T]he closest the Court came to applying a usable standard was when it twice used, in a causal manner, the word ‘reasonably.’”) (quoting *Sosna*, 419 U.S. at 561).

54. See *Sosna*, 419 U.S. at 410; Nixon, *supra* note 43, at 218. Some criticize *Sosna* as an example of ad hoc balancing. See Donahue, *supra* note 18, at 461.

It may be possible to reconcile *Sosna* with the *Shapiro* framework.⁵⁵ The *Sosna* Court distinguished durational residency requirements for divorce from those at issue in the *Shapiro* line of cases based on the permanency of the restriction.⁵⁶ The durational residency requirement challenged in *Sosna* temporarily restricted the right to file for a divorce, but that right was fully restored once the durational residency requirement was met.⁵⁷ In the *Shapiro* line of cases, “the benefits or rights forgone during the period of restriction were permanently lost.”⁵⁸ In other words, because welfare payments are ongoing, one will never obtain their full benefit if the state requires a waiting period before administering payments. The benefit of filing for a divorce, however, can be fully experienced once obtained, even if delayed by the state.⁵⁹ This nuance left lower courts with little guidance on how to determine the proper level of scrutiny for durational residency requirement cases, especially because the Court did not specify a standard in its decision but twice used the word “reasonably.”⁶⁰

The Court unsuccessfully attempted to provide some clarification in *Saenz v. Roe*.⁶¹ In 1992, California imposed a durational residency requirement for receiving welfare benefits.⁶² In striking down the requirement, the Court declined to follow the *Shapiro* framework despite the similarities between the durational residency requirements at issue in

55. See Donahue, *supra* note 18, at 461.

56. See *Sosna*, 419 U.S. at 406 (“Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*.”).

57. See *id.* at 406–07.

58. Donahue, *supra* note 18, at 461–62; see also *Sosna*, 419 U.S. at 406.

59. See *Sosna*, 419 U.S. at 406; Donahue, *supra* note 18, at 461–62; Sheridan, *supra* note 50, at 870.

60. See Nixon, *supra* note 43, at 222–25 (explaining that some courts have applied rational basis review rather than strict scrutiny, while others follow the *Shapiro* strict scrutiny framework).

61. 526 U.S. 489 (1999); see also Nan S. Ellis & Cheryl M. Miller, *Welfare Waiting Periods: A Public Policy Analysis of Saenz v. Roe*, 11 STAN. L. & POL’Y REV. 343, 347 (2000) (explaining that the Court failed to seize the opportunity to clarify its murky right to travel jurisprudence); Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court’s Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 311 (2000) (“[T]he Court changed everything in *Saenz v. Roe* by completely altering its right-to-travel analysis.”).

62. The statute at issue limited the amount of welfare benefits for new residents to an amount equal to the maximum they received in their prior state of residence. New residents could not receive full welfare benefits from California until they were residents of the state for one year. See *Saenz*, 526 U.S. at 492; see also CAL. WELF. & INST. CODE § 11450.03 (West 1999), *invalidated by Saenz v. Roe*, 526 U.S. 489 (1999).

both cases.⁶³ Remarkably, the Court based its decision on the Fourteenth Amendment's Privileges or Immunities Clause instead.⁶⁴

California argued that the durational residency requirement at issue was enacted purely for fiscal purposes.⁶⁵ Although the Court conceded that the state had a "legitimate interest in saving money," it rejected such a basis to justify discrimination amongst citizens.⁶⁶ The Court identified three components of the right to travel⁶⁷ and focused on the third⁶⁸ — the right "of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."⁶⁹ That is to say, the right to be treated like a citizen of a state where one permanently moves to.⁷⁰ The Court explained that the appropriate standard of review for judging a state law or regulation that discriminates between citizens based on their length of residency "may be more categorical than that articulated in *Shapiro*, but it is surely no less strict."⁷¹ The Court held that "the discriminatory classification is itself a penalty" regardless of the actual effect on the right to travel — the right to travel "embraces [a] citizen's

63. See *Saenz*, 526 U.S. at 492. Note, however, that the requirement here is distinguishable from *Shapiro*'s because it did not completely deny benefits during the waiting period. See also Maynard, *supra* note 61, at 311 (the Court did not find this distinction dispositive).

64. See generally *Saenz*, 526 U.S. 489. This was only the second time the Court invoked the Privileges or Immunities Clause since the *Slaughter-House Cases*. See Conlan, *supra* note 30, at 1404–05. This was done in an effort to secure "a more stable footing on which to base the right to travel." *Id.* at 1405.

65. See Kevin Maher, *Like a Phoenix from the Ashes: Saenz v. Roe, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 123 (2001) ("California tried to distinguish *Shapiro* on the basis that no one would be denied welfare benefits . . . but that some applicants would merely receive reduced benefits during their first year of residency."). The statute at issue would "save the State approximately \$10.9 million a year." *Saenz*, 526 U.S. at 506.

66. *Saenz*, 526 U.S. at 507. The Court explained that "[t]he question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen." *Id.* at 506. Ultimately, the Court answered that question in the negative. See *id.* at 507.

67. These include (1) the right of a citizen of one state to enter and leave other states, (2) the right to be treated as a welcome visitor when in another state, and (3) the right to be treated as a citizen of the state to which one permanently moves. See *id.* at 500. For a discussion on the Court's analysis of the origin of each component, see Nicole I. Hyland, Note, *On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 FORDHAM L. REV. 187, 223 (2001).

68. See *Saenz*, 526 U.S. at 502 ("What is at issue . . . is this third aspect of the right to travel . . ."); Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities"*: *Saenz v. Roe*, 119 S. Ct. 1518 (1999), 23 HARV. J.L. & PUB. POL'Y 295, 304 (1999); Maher, *supra* note 65, at 124.

69. *Saenz*, 526 U.S. at 502.

70. See Conlan, *supra* note 30, at 1406.

71. *Saenz*, 526 U.S. at 504 (citation omitted).

right to be treated equally in her new State of residence” — and struck down the law.⁷²

Narrowing its holding, the Court distinguished welfare benefits from other benefits that could be subject to durational residency requirements, “such as divorce or . . . college education.”⁷³ Instead of focusing on the temporal characteristics among the benefits, the Court focused on the “portability” of the benefits.⁷⁴ The Court emphasized that there is no danger that welfare benefits could be received in one state then taken away to another state.⁷⁵ This portability distinction allowed the Court to strike down the durational residency requirement at issue while preserving its holdings in cases that upheld durational residency requirements in other contexts, such as divorce in *Sosna*.⁷⁶

Dissenting, Chief Justice Rehnquist criticized the majority for abandoning *Shapiro* and its progeny,⁷⁷ although the majority did not explicitly do so.⁷⁸ The Chief Justice argued the Court should have upheld the durational residency requirement as a “good-faith residency requirement.”⁷⁹

Post-*Saenz*, the constitutional basis for the right to travel is still unclear because of the plethora of varied explanations the Court provided.⁸⁰ Nevertheless, Supreme Court jurisprudence protects the three

72. *Id.* at 505; see also Conlan, *supra* note 30, at 1406. The Court held that the Fourteenth Amendment’s Citizenship Clause “does not allow for degrees of citizenship based on length of residence.” *Saenz*, 526 U.S. at 506. For an argument that no durational residency requirement can persist as a result of this holding, see Maher, *supra* note 65, at 133–34.

73. *Saenz*, 526 U.S. at 505. “By expressly distinguishing college education, Justice Stevens may have quietly suffocated any hope that durational residency requirements for in-state tuition might be declared unconstitutional under a new Privileges or Immunities analysis.” Conlan, *supra* note 30, at 1406.

74. See *Saenz*, 526 U.S. at 520; Conlan, *supra* note 30, at 1406.

75. Welfare benefits are unlike a divorce or a college education, which the Court indicates durational residency requirement may be permissible. See *Saenz*, 526 U.S. at 505; Conlan, *supra* note 30, at 1406.

76. The “readily portable” distinction was heavily criticized by the dissent. See Conlan, *supra* note 30, at 1406; see also *Saenz*, 526 U.S. at 511–12 (Rehnquist, J., dissenting).

77. See *Saenz*, 526 U.S. at 515.

78. See Tim Donaldson, *A Teasing Illusion? Homelessness and the Right to Interstate Travel*, 28 U. FLA. J.L. & PUB. POL’Y 401, 415 (2017).

79. *Saenz*, 526 U.S. at 511.

80. See Maynard, *supra* note 61, at 313. Courts and scholars have identified at least ten sources for the right. See *id.* at 314. Justice William Douglas exemplified the confusion by tracing the right to travel to

the Privileges or Immunities Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the penumbra of the First Amendment, and, as a matter of inference, from a combination of the Comity Clause, the

components of the right to travel outlined in *Saenz*.⁸¹ Some believe that the *Saenz* holding prevents states from imposing any durational residency requirement in any context.⁸² However, other scholars believe *Saenz* was simply meant to clarify a more explicit constitutional source for the fundamental right to travel and is unlikely to change the Supreme Court's right to travel jurisprudence significantly.⁸³ The "categorical reformulation of the right to travel" simply confines the rationale of prior cases to the newly identified right to travel components.⁸⁴ Therefore, "the appropriate standard" remains "no less strict" than the strict scrutiny standard articulated in *Shapiro*.⁸⁵

B. Under the Influence: The Commerce Clause's Effect on Alcohol Regulation

Public discourse often involves comparing marijuana and alcohol, and discussing how the former can be regulated similarly to the later.⁸⁶ For example, Amendment 64 of the Colorado Constitution — which legalized recreational marijuana usage — promised to establish a regulatory scheme for marijuana that would emulate the existing regulatory scheme for alcohol.⁸⁷ However, regulating marijuana is proving to be more

Privileges or Immunities Clause of the Fourteenth Amendment, the Commerce Clause, the Due Process Clauses of the Fifth and Fourteenth Amendment, and from the very nature of the Federal Union.

Id. (footnotes omitted).

81. *See id.* at 313.

82. *See, e.g., Saenz*, 526 U.S. at 515–16; Maher, *supra* note 65, at 133–34.

83. *See, e.g., Conlan, supra* note 30, at 1405–07; Ellis & Miller, *supra* note 61, at 348 ("It is difficult to believe that the Court would invalidate all durational residency requirements . . .").

84. *See Donaldson, supra* note 78, at 415.

85. Hyland, *supra* note 67, at 223 (quoting *Saenz*, 526 U.S. at 504).

86. *See, e.g.,* Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1021 (2014) ("Our goal is . . . to help policymakers understand . . . some lessons learned from research on public health approaches to regulating alcohol . . ."); Renee Jacques, *This Is Why Marijuana Should Be Legal Everywhere*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/marijuana-legalization_n_4151423 [<https://perma.cc/VQ64-U78D>] (comparing the harms marijuana poses to those alcohol poses).

87. The amendment promised to regulate marijuana like alcohol by (1) setting a minimum age of 21 years to purchase marijuana, (2) requiring proof of age before sale, (3) criminalizing driving under the influence of marijuana, and (4) mandating labeling requirements. The amendment also provided that marijuana would be "taxed in a manner similar to alcohol." Angela Macdonald, *Why Marijuana Is Not Regulated like Alcohol in Colorado: A Warning for States Seeking to Legalize Recreational Marijuana*, 2015 UTAH ONLAW 1, 1–2 (2015).

difficult in practice than regulating alcohol.⁸⁸ Nonetheless, marijuana and alcohol regulations are similar in that they sometimes include durational residency requirements for retail licenses. This Section examines durational residency requirements' roles in state regulation of alcohol. To do so first requires an examination of the dormant Commerce Clause doctrine.

i. The Dormant Commerce Clause Doctrine

The Constitution's Commerce Clause grants Congress the explicit power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."⁸⁹ Although this is a positive grant of power to Congress,⁹⁰ Congress has, historically, not exercised regulation over every area of commerce.⁹¹ Accordingly, Congress' inaction allows states room to devise their own regulations.⁹² The Supreme Court has long held that the Commerce Clause also prevents states from adopting laws and regulations that "unduly restrict interstate commerce," even in areas that Congress has left open.⁹³ "This negative aspect of the Commerce Clause' prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."⁹⁴ This "negative aspect" is known as the dormant Commerce Clause.⁹⁵ The

88. See generally *id.* (examining how recreational marijuana regulations and taxes differ from alcohol regulations and taxes).

89. U.S. CONST. art. I, § 8, cl. 3.

90. See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

91. See Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 36 DUKE L.J. 569, 570 (1987).

92. See *id.*

93. *Tenn. Wine*, 139 S. Ct. at 2459. "It is now well established . . . that the Clause itself is 'a limitation upon state power even without congressional implementation.'" *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981) (quoting *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 350 (1976)).

94. *Tenn. Wine*, 139 S. Ct. at 2459 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988)).

95. See Redish & Nugent, *supra* note 91, at 570. Chief Justice John Marshall first refers to this dormant aspect of the Commerce Clause in *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824) ("The [Commerce Clause] . . . convey[s] power which . . . must be placed in the hands of agents, or lie dormant.") (emphasis added); see also Sean Carey, *Post-Davis Conduit Bonds: At the Intersection of the Dormant Commerce Clause and Municipal Debt*, 78 FORDHAM L. REV. 121, 138 n.151 (2009).

dormant Commerce Clause doctrine is well established,⁹⁶ and courts have used it to invalidate many state regulations.⁹⁷

For example, the Supreme Court used the dormant Commerce Clause doctrine to strike down an Iowa statute that prohibited the use of certain large trucks within the state.⁹⁸ The Court expressed its reluctance to invalidate “regulations that touch upon safety — especially highway safety” because such regulations are of “matters traditionally of local concern.”⁹⁹ However, the state’s regulatory concern could not outweigh the statute’s substantial interference with interstate commerce.¹⁰⁰ Therefore, the statute was an invalid burden on interstate commerce.¹⁰¹

In his dissent, Justice Rehnquist accepted the notion of the dormant Commerce Clause doctrine in general.¹⁰² However, he heavily criticized the Court’s application of the doctrine to the case at bar.¹⁰³ His criticism was largely because of the local nature of highway regulations and the fact that Congress has considered regulating truck lengths in the past but decided to leave it to the states.¹⁰⁴ Both the plurality and the dissent agreed on the existence of the dormant Commerce Clause doctrine, but,

96. See, e.g., *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). This is not to say that the doctrine is without critics. See, e.g., *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 259–65 (1987) (Scalia, J., dissenting) (criticizing the dormant Commerce Clause doctrine); Redish & Nugent, *supra* note 91, at 573–74 (arguing that there is no textual basis for the dormant Commerce Clause doctrine and that it undermines the balance of power between the states and federal government the Constitution’s text provides).

97. See Redish & Nugent, *supra* note 91, at 574–75.

98. See *Kassel*, 450 U.S. at 678–79. “Unlike all other States in the West and Midwest, . . . Iowa generally prohibits the use of 65-foot doubles within its borders.” *Id.* at 665. For an illustration of doubles compared to singles, see *Raymond Motor Transp. v. Rice*, 417 F. Supp. 1352, 1363 (W.D. Wis. 1976).

99. *Kassel*, 450 U.S. at 670.

100. See *id.* at 670–71. Iowa’s regulatory concern was highway safety and “keeping trucks out of Iowa.” *Id.* at 677–78.

101. See *id.* at 671 (“[T]he Iowa truck-length limitations unconstitutionally burden interstate commerce.”).

102. See *id.* at 689 (Rehnquist, J., dissenting) (“[W]e have read the Commerce Clause as imposing some limitations on the States as well, even in the absence of any action by Congress.”).

103. See generally *id.* Justice Rehnquist also disagrees on what factors courts may consider when weighing a state’s regulatory concern against a regulation’s interference with interstate commerce. *Id.* at 692 n.4 (“I do not agree . . . that only those safety benefits somehow articulated by the legislature as *the* motivation for the challenged statute can be considered in supporting the state law.”).

104. *Id.* at 691 n.3 (citing S. REP. NO. 93-1111, at 10 (1974) (“The Committee believes that truck lengths should remain, as they have been, a matter for State decision.”)).

as Justice Rehnquist laments, “the jurisprudence of the ‘negative side’ of the Commerce Clause remains hopelessly confused.”¹⁰⁵

ii. Alcohol Regulation

By statutorily granting states the power to regulate a specific area, Congress can overrule a prior dormant Commerce Clause invalidation of state regulation in that area.¹⁰⁶ However, the states’ power to regulate alcohol stems from more than a mere statutory grant of power.¹⁰⁷ The Constitution itself grants states such power.¹⁰⁸

The Twenty-First Amendment repealed the Eighteenth Amendment¹⁰⁹ and authorizes states to regulate alcohol how they see fit.¹¹⁰ Every state has since repealed prohibition and implemented a regulatory scheme.¹¹¹ States enjoy “virtually complete control over” the way they regulate alcohol within their borders,¹¹² and many states have imposed durational residency requirements as a prerequisite for applying for a retail liquor

105. *See id.* at 706. The confusion persists to this day. *Compare* Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2469 (2019) (applying the dormant Commerce Clause doctrine), *with id.* at 2478 (Gorsuch, J., dissenting) (“[I]n this area . . . we should not be in the business of imposing our own judge-made ‘dormant Commerce Clause’ limitations on state powers.”).

106. *See* Redish & Nugent, *supra* note 91, at 570.

107. This is not to say that Congress has not statutorily granted states the power to regulate alcohol. In fact, Congress has done so on more than one occasion. *See* The Webb-Kenyon Act, 27 U.S.C. § 122 (2018) (prohibiting the transportation of alcohol from one state to another in any manner that violates the receiving state’s laws); The Wilson Act, 27 U.S.C. § 121 (2018) (“[I]ntoxicating liquors or liquids transported into any State . . . shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . in the same manner as though such liquids or liquors had been produced in such state.”).

108. *See* U.S. CONST. amend. XXI.

109. *See id.* amend. XXI § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).

110. *See id.* amend. XXI § 2 (“The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

111. The majority of states have established a “three-tier system” which requires manufacturers, wholesalers, and retailers be separately licensed, and prohibits uniform ownership between tiers. *See* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 211–13 (2016). 17 states operate a “control model” whereby the state government controls the sale of alcohol at the wholesale level. *See Control State Directory and Info*, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, <https://www.nabca.org/control-state-directory-and-info> [<https://perma.cc/R45T-EE7R>] (last visited July 31, 2020). Thirteen of these jurisdictions also maintain governmental control over retail sales. *See id.*

112. *See* Granholm v. Heald, 544 U.S. 460, 488 (2005) (quoting Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

license.¹¹³ Recently, the Supreme Court struck down this type of durational residency requirement in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*,¹¹⁴ notwithstanding the “virtually complete control” over alcohol regulation the Twenty-First Amendment granted to the states.¹¹⁵

Tennessee required prospective liquor retailers to be Tennessee residents for two years before applying for a retail liquor license.¹¹⁶ Such a requirement is discriminatory on its face and, under the dormant Commerce Clause,¹¹⁷ “could not be sustained if it applied across the board to all those seeking to operate any retail business in the State.”¹¹⁸ However, the Court recognized that alcohol is a unique commodity; the power to regulate it is specifically granted to the states by the Constitution.¹¹⁹ Consequently, the Twenty-First Amendment may save an otherwise discriminatory requirement.¹²⁰ The Court held that Tennessee’s two-year durational residency requirement was protectionist in effect and could not be “justified as a public health or safety measure or on some other legitimate nonprotectionist ground.”¹²¹ Therefore, the Court struck down Tennessee’s durational residency requirement as a violation of the dormant Commerce Clause, unable to be saved by the Twenty-First Amendment.¹²² The dormant Commerce Clause doctrine now limits the “virtually complete control over” alcohol regulation states previously enjoyed, and states cannot impose durational residency requirements on prospective retail liquor licensees.¹²³ Despite the lack of any comparable grant of power, states impose similar durational

113. See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2478 n.2 (2019) (Gorsuch, J., dissenting) (collecting statutes).

114. See *id.* at 2476.

115. See *id.* (holding unconstitutional Tennessee’s two-year durational residency requirement for seeking a liquor license).

116. See TENN. CODE ANN. § 57-3-204 (2018), *invalidated by Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. 2449.

117. See *Tenn. Wine*, 139 S. Ct. at 2477–84 (Gorsuch, J., dissenting). The Court did not discuss the right to travel. See *generally id.*

118. *Id.* at 2474 (“Tennessee’s 2-year durational-residency requirement plainly favors Tennesseans over nonresidents.”).

119. See *id.*

120. See *id.* at 2483 (Gorsuch, J., dissenting).

121. *Id.* at 2474 (“The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety.”).

122. See *id.* at 2476.

123. See *generally Tenn. Wine*, 139 S. Ct. at 2476; *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

residency requirements on persons seeking to apply for retail marijuana licenses.¹²⁴

C. Recreational Marijuana's Recent Legalization by States: The Prevalence of Durational Residency Requirements

The federal Controlled Substances Act of 1970 (CSA) criminalizes the possession of marijuana for any purpose.¹²⁵ Nevertheless, 33 states have established medical marijuana programs,¹²⁶ and today, recreational marijuana use has been legalized in 11 states and the District of Columbia.¹²⁷ The first of the states, Colorado and Washington, legalized recreational marijuana in 2012,¹²⁸ and both states have since established regulatory authorities to oversee their marijuana industries.¹²⁹ Durational residency requirements for prospective marijuana retailers were among the laws and regulations first promulgated by both states.¹³⁰ Other states¹³¹ have also imposed durational residency requirements on

124. See *infra* Section I.C.

125. See John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL'Y 1, 13–14 (2019). See generally 21 U.S.C. § 844 (2018).

126. See *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Mar. 10, 2020), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/SSR2-BBBP].

127. See *Legal Recreational Marijuana States and DC*, *supra* note 6.

128. See Ferner, *supra* note 5; Martin, *supra* note 5.

129. The Marijuana Enforcement Division of Colorado's Department of Revenue regulates the Colorado marijuana industry. See generally *Marijuana Enforcement*, COLO. DEPT' T REVENUE, <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> [https://perma.cc/7LUZ-8PRK] (last visited July 31, 2020). Washington tasked its already established Liquor Control Board with regulating marijuana. See Press Release, Washington State Liquor & Cannabis Bd., Liquor Control Board Statement Following Passage of Initiative 502 (Nov. 7, 2012), <https://lcb.wa.gov/pressreleases/liquor-control-board-statement-following-passage-initiative-502> [https://perma.cc/EM5F-3PHY].

130. Colorado prohibited anyone not a resident of the state for at least two years from seeking a retail marijuana license. See COLO. REV. STAT. ANN. § 12-43.3-307(1)(m) (2010) (repealed 2018). Washington imposes a six-month durational residency requirement. See WASH. REV. CODE ANN. § 69.50.331(1)(b)(ii) (2019) ("No license of any kind may be issued to . . . [a] person . . . who has not lawfully resided in the state for at least six months prior to applying to receive a license . . .").

131. Local jurisdictions have also imposed durational residency requirements on retail marijuana licenses. For example, Hollister, California requires 75% of the applicants and managers or a proposed marijuana dispensary to be residents of the state for at least three years prior to applying for a license. See *Hollister Cannabis Facilities Permit Application and Information*, CITY HOLLISTER CAL., <http://hollister.ca.gov/business/medical-cannabis/> [https://perma.cc/22BV-UUWE] (last visited July 31, 2020).

retail marijuana licenses — including California,¹³² Maine,¹³³ Michigan,¹³⁴ and Oregon.¹³⁵ Presently, Alaska has a residency requirement, but it is not a durational residency requirement per se.¹³⁶ Illinois does not have an explicit durational residency requirement but favors residents of five years when awarding licenses.¹³⁷ Only two states¹³⁸ have never imposed a durational residency requirement for retail marijuana licenses.¹³⁹

132. Proposition 64 legalized recreational marijuana in California and included a de facto three-year durational residency requirement for retail licensees that has since been repealed. The statute prohibited issuance of a license “to any person that cannot demonstrate continuous California residency from or before January 1, 2015.” Because licenses were set to be issued in 2018, this statute effectively created a three-year durational residency requirement. *See* CAL. BUS. & PROF. CODE § 26054.1 (Deering 2016) (repealed 2017).

133. To seek a retail marijuana license, one must be a resident of Maine. *See* ME. STAT. tit. 28-B, § 202(2) (2018). A resident of Maine is one who files income tax returns in the state for four years. *See id.* § 102(48).

134. Michigan imposed a two-year durational residency requirement on retail licenses that expired on June 30, 2018. *See* Marijuana — Medical Marijuana Facilities Licensing Act, 2016 MICH. PUB. ACTS 281, § 402.2(g).

135. Oregon imposed a durational residency requirement, but its legislature later disposed of it. *See* OR. ADMIN. R. 845-025-1115 (2016); *Recreational Marijuana*, OR. LIQUOR CONTROL COMM’N, <https://www.oregon.gov/olcc/Pages/default.aspx> [<https://perma.cc/Y2HV-XY2X>] (last visited July 31, 2020) (“[T]here is no residency requirement.”).

136. *See Marijuana FAQs*, DEP’T COM., CMTY. & ECON. DEV., ALCOHOL & MARIJUANA CONTROL OFF., <https://www.commerce.alaska.gov/web/amco/MarijuanaFAQs.aspx> [<https://perma.cc/ZL92-DP43>] (last visited July 31, 2020). To establish residency in Alaska an individual must take “at least one step beyond physical presence” — for example, registering to vote — before the start of the qualifying year, and “demonstrate[] intent to remain indefinitely in Alaska.” *Establishing Residency*, ALASKA DEP’T REVENUE, PERMANENT FUND DIV., <https://pfd.alaska.gov/Eligibility/Establishing-Residency> [<https://perma.cc/4K2E-BWMX>] (last visited July 31, 2020). The state considers a number of factors when evaluating an individual’s intent. *See id.* This cumbersome process could function as a de facto durational residency requirement. *See generally id.*; ALASKA ADMIN. CODE tit. 3, § 306.015 (2019).

137. The Illinois legislature has authorized 75 conditional retail marijuana licenses to be issued after January 2020. *See* 410 ILL. COMP. STAT. 705/15–25(a) (2019). A point system will be used to determine which applicants receive the licenses. *See id.* 705/15–30(c). Owners who are Illinois residents of at least five years are awarded additional points over those who are not. *See id.* 705/15–30(c)(8).

138. Nevada uses a scoring system to award licenses, but unlike in Illinois, residency of a certain length does not bolster one’s score. *See* NEV. ADMIN. CODE § 453D.272 (2019). Massachusetts imposes a durational residency requirement for certain types of producer-level licenses but not on retail licenses. *See Licensure as a Marijuana Establishment*, MASS. CANNABIS CONTROL COMM’N 4 (2018), <https://mass-cannabis-control.com/wp-content/uploads/2018/04/Guidance-for-Marijuana-Establishment-Licensure-Applicants.pdf> [<https://perma.cc/5JEE-YKEY>].

139. Marijuana regulation in Vermont is in its infancy and so it is still possible the state will impose a durational residency requirement on retail licenses. *See Vermont*, MARIJUANA POL’Y PROJECT (June 17, 2020), <https://www.mpp.org/states/vermont/> [<https://perma.cc/B8DL-KJVU>]; S.54, VT. GEN. ASSEMBLY,

The novelty of legal recreational marijuana explains why states have varying and evolving regulations.¹⁴⁰ There has been little litigation concerning state regulation of recreational marijuana at the retail level and no challenges to durational residency requirements for retail marijuana licenses as of this Note.

II. THE QUESTION: CAN DURATIONAL RESIDENCY REQUIREMENTS FOR RETAIL MARIJUANA LICENSES PASS CONSTITUTIONAL MUSTER?

The legalization of recreational marijuana is a recent trend, and state regulation of the marijuana industry is an ongoing and evolving process.¹⁴¹ Mandating the licensure of marijuana retailers is standard among states that have legalized recreational marijuana.¹⁴² Some of these states include durational residency requirements as part of their regulation of retail marijuana licenses.¹⁴³ The constitutionality of such residency requirements is questionable and has yet to be settled by the courts.¹⁴⁴ However, parallels can be drawn from existing jurisprudence on durational residency requirements in other contexts to articulate the arguments for and against durational residency requirements for retail marijuana licenses.

This Part examines the two potential answers to whether durational residency requirements for retail marijuana licenses are constitutional. Section II.A examines the argument that durational residency requirements for retail marijuana licenses pass constitutional muster. Section II.B then examines the argument that such requirements are constitutionally impermissible under the right to travel line of cases. Finally, Section II.C discusses how the dormant Commerce Clause could be used to challenge durational residency requirements for retail marijuana licenses.

<https://legislature.vermont.gov/bill/status/2020/S.54> [https://perma.cc/HF6X-VKMJ] (last visited July 31, 2020). The legislature is still developing a bill to regulate marijuana sales at the retail level. *See generally id.*

140. *See* Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 225 (2019).

141. *See, e.g., id.*

142. *See, e.g.,* COLO. CONST. art. XVIII, § 16(5); WASH. REV. CODE ANN. § 69.50.302 (2019).

143. *See supra* notes 130–36 and accompanying text.

144. *See Cannabis Residency Restrictions: Are They Unconstitutional?*, CANNA L. BLOG (Sept. 9, 2015), <https://www.cannalawblog.com/cannabis-residency-restrictions-are-they-unconstitution-al/> [https://perma.cc/E2V5-SX5H].

**A. The State View: Durational Residency Requirements for Retail
Marijuana Licenses Are Permissible**

States will argue to defend their durational residency requirements.¹⁴⁵ The arguments states put forth to defend durational residency requirements for retail marijuana licenses will mirror the arguments put forth to defend durational residency requirements in other contexts.

Although the right to travel is a fundamental right,¹⁴⁶ state law or regulation can impinge on it and still pass constitutional muster, depending on the context.¹⁴⁷ When a law or regulation impinges on the right to travel, courts will apply strict scrutiny to determine if the law or regulation is constitutionally permissible.¹⁴⁸ For such a law or regulation to survive review, the state must show that it is necessary to promote a compelling state interest and that it is narrowly tailored to do so.¹⁴⁹

States justify durational residency requirements as necessary to promote their interest in complying with federal enforcement priorities.¹⁵⁰ To survive strict scrutiny, this is not enough, however, because states must show durational residency requirements are narrowly tailored¹⁵¹ to complying with federal enforcement priorities.¹⁵² To determine whether this is the case, it is necessary to understand what those priorities are.

In response to Colorado's and Washington's unprecedented legalization of marijuana, then-Deputy Attorney General James Cole

145. States also argue to defend the durational residency requirements of other states through amicus briefs. *See, e.g.*, Brief of the Commonwealth of Pennsylvania et al. as Amici Curiae Supporting Petitioners, *Anderson v. Roe*, 134 F.3d 1400 (9th Cir. 1998) (No. 98-97), *aff'd sub nom.* *Saenz v. Roe*, 526 U.S. 489 (1999) (No. 98-97); Brief of Appellee, *Sosna v. Iowa*, 419 U.S. 393 (1975) (No. 73-762).

146. *See Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *see also supra* notes 21, 32 and accompanying text.

147. For example, durational residency requirements for divorce and college tuition have survived constitutional challenges. *See Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970) (upholding a durational residency requirement for in-state tuition); *see supra* notes 47–54 and accompanying text.

148. *See, e.g.*, Donahue, *supra* note 18, at 456.

149. *See Saenz*, 526 U.S. at 504; Donahue, *supra* note 18, at 456.

150. *See* ALLIE HOWELL, REASON FOUND., RESIDENCY REQUIREMENTS FOR MARIJUANA LICENSURE 1 (2019); Kristen Wyatt, *Pot States Take Fresh Look at Out-of-State Investment*, SEATTLE TIMES (Apr. 25, 2016, 3:11 PM), <https://www.seattletimes.com/business/pot-states-take-fresh-look-at-out-of-state-investment-2/> [<https://perma.cc/2LA3-KF2N>].

151. “Narrowly tailored” requires “a sufficient nexus between the stated government interest and the classification created by the regulation or its implementation.” Zachary Ford, *Reefer Madness: The Constitutional Consequence of the Federal Government’s Inconsistent Marijuana Policy*, 6 TEX. A&M L. REV. 671, 689 (2019) (quoting Nunez by Nunez v. City of San Diego, 114 F.3d 935, 945 (9th Cir. 1997)).

152. *See* Donahue, *supra* note 18, at 456.

issued a memorandum that laid out what the federal government's enforcement priorities would be concerning marijuana.¹⁵³ These priorities include “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states” and “[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.”¹⁵⁴

In the words of one U.S. Attorney, marijuana diversion is a “formidable” problem.¹⁵⁵ States that have not legalized marijuana complain that legalization in nearby states forces redirection of their police resources to marijuana enforcement.¹⁵⁶ The Cole Memo makes clear that the federal government will enforce the CSA if states fail to prevent diversion of their legal marijuana into states where it is illegal.¹⁵⁷ Durational residency requirements allow a state to ensure a prospective retailer is a bona fide resident of the state and not merely pretending to be while actually intending to divert marijuana to other states.¹⁵⁸

The Cole Memo also threatens federal enforcement of the CSA in states where recreational marijuana is legal if the states fail to prevent marijuana revenue from going to criminals.¹⁵⁹ Prior to legalization, criminal organizations selling on the black market were the only sources of marijuana.¹⁶⁰ The legalized market has the potential to be abused by criminal organizations.¹⁶¹ For example, a cartel could use a frontman to set up a retail marijuana business in the legalized market to benefit its criminal organization. To prevent this, states need durational residency

153. See Memorandum from Deputy Att’y Gen. James Cole, U.S. Dep’t of Just., to All U.S. Attorneys 1 (Aug. 29, 2013) [hereinafter Cole Memo], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. [https://perma.cc/54MJ-GYVW].

154. *Id.*

155. Gillian Flaccus, *US Prosecutor: Oregon Has Big Pot Overproduction Problem*, SEATTLE TIMES (Feb. 2, 2018, 1:29 PM), <https://www.seattletimes.com/business/oregons-top-prosecutor-convenes-marijuana-summit/> [https://perma.cc/B2EE-G3FZ].

156. See Trevor Hughes, *Colorado Sued by Neighboring States over Legal Pot*, USA TODAY (Dec. 18, 2014, 5:12 PM), <https://www.usatoday.com/story/news/nation/2014/12/18/colorado-marijuana-lawsuit/20599831/> [https://perma.cc/EW65-99EZ].

157. See Rebecca Sweeney, *Unrealistic Expectations: The Federal Government’s Unachievable Mandate for State Cannabis Regulation*, 93 WASH. L. REV. 2175, 2184 (2018); see also Cole Memo, *supra* note 153, at 1.

158. See HOWELL, *supra* note 150, at 1–2; see, e.g., BROHL & FINLAW, *supra* note 7, at 33.

159. See Cole Memo, *supra* note 153, at 1.

160. Legalization makes it difficult for criminal elements to compete with the legal, regulated market. See Kamin, *supra* note 140, at 242.

161. See *id.* at 242–43.

requirements to “ensure that only law-abiding and responsible applicants receive licenses.”¹⁶²

Following the Cole Memo, the Financial Crimes Enforcement Network (FinCEN)¹⁶³ issued its own guidance,¹⁶⁴ which is still in effect.¹⁶⁵ The FinCEN guidance listed several “red flags” for financial institutions to be aware of that “indicate a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law.”¹⁶⁶ Financial institutions are tasked with filing a Suspicious Activity Report (SAR)¹⁶⁷ after encountering activity deemed to be a red flag.¹⁶⁸ Two of these “red flags” are particularly relevant to durational residency requirements.

The first red flag is if “[t]he owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.”¹⁶⁹ Durational residency requirements require a prospective marijuana retailer to be a resident of the state for a specified period.¹⁷⁰

162. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2475 (2019); *see also* Wyatt, *supra* note 150 (describing residency requirements “as a safeguard against investment by foreign drug cartels”).

163. “FinCEN is a bureau of the U.S. Department of the Treasury,” whose mission is to use financial intelligence to “safeguard the financial system from illicit use and combat money laundering and promote national security.” *What We Do*, U.S. DEP’T TREASURY, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/what-we-do> [<https://perma.cc/RKT8-7TST>] (last visited July 31, 2020).

164. *See* DEP’T TREASURY FIN., FIN. CRIMES ENF’T NETWORK, FIN-2014-G001, GUIDANCE FOR BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014) [hereinafter GUIDANCE FOR BSA EXPECTATIONS], <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/KNC5-SBJZ>] (clarifying Bank Secrecy Act expectations for financial institutions that serve marijuana-related businesses).

165. *See* Norman M. Vigil, *XV. The States Act: A Response to the Rescission of the Cole Memo*, 38 REV. BANKING & FIN. L. 196, 204 (2018) (highlighting that the reporting process set forth in the FinCEN guidance is still in effect despite then-Attorney General Jefferson Sessions’s new guidance). Although then-Attorney General Sessions repealed all guidance the Obama Administration set forth, the justifications stemming from such guidance are still advanced by states. *See* Memorandum from Att’y Gen. Jefferson B. Sessions, U.S. Dep’t of Just., to All U.S. Attorneys 1 (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/VG9D-VBEF>]; HOWELL, *supra* note 150, at 1.

166. GUIDANCE FOR BSA EXPECTATIONS, *supra* note 164, at 5.

167. A financial institution is required to file a SAR if it “knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution” involves illegal activity. *Id.* at 3. SARs are mandated by the Bank Secrecy Act and must be filed by financial institutions providing services to marijuana-related businesses because marijuana is illegal on the federal level. *See id.* (“The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity.”).

168. *See id.* at 4–5.

169. *Id.* at 7.

170. *See supra* notes 15–16 and accompanying text.

Such a requirement clearly prevents out-of-state involvement with retail marijuana licenses — which are “marijuana-related businesses” — thereby preventing this red flag from ever occurring.

The second red flag avoided by durational residency requirements occurs when “[a] marijuana-related business engages in international or interstate activity.”¹⁷¹ The FinCEN guidance explains that this type of activity can be evidenced by a marijuana-related business’s receipt of “cash deposits from locations outside the state in which the business operates.”¹⁷² Virtually any transaction with “persons or entities” outside the state where the marijuana business is located is evidence of “international or interstate activity” for purposes of the FinCEN guidance.¹⁷³ By imposing durational residency requirements on marijuana retailers, states can avoid this red flag by ensuring that they only license bona fide residents who will have no reason to conduct out-of-state transactions.

In addition to avoiding federal enforcement of the CSA, states may justify durational residency requirements as a way to promote the state’s interest in avoiding “the land rush phenomenon [seen] in other jurisdictions” that have legalized recreational marijuana.¹⁷⁴ States do not want people moving into their territory for the sole purpose of opening a marijuana retail store, and imposing a durational residency requirement on retail marijuana licenses prevents outsiders from doing just that.¹⁷⁵

Similarly, states have an interest in preventing outsiders from free riding off the work of their citizens.¹⁷⁶ The state legalization of marijuana is largely a result of citizen-initiated ballot measures within those

171. GUIDANCE FOR BSA EXPECTATIONS, *supra* note 164, at 6.

172. *Id.*

173. *Id.*

174. See Kym Kemp, *Trinity Supes Pass Marijuana Ordinance; One Year Residency, 500 Permit Cap*, REDHEADED BLACKBELT (Sept. 1, 2016), <http://kymkemp.com/2016/09/01/trinity-supes-pass-marijuana-ordinance-one-year-residency-500-permit-cap/> [https://perma.cc/R8NY-23VW].

175. See *e.g.*, BROHL & FINLAW, *supra* note 7, at 33; see also Kemp, *supra* note 174 (describing a durational residency requirement imposed by a county’s Board of Supervisors to protect its local communities as it does not “want to see a lot of outsiders pouring in”).

176. See HOWELL, *supra* note 150, at 3 (“[T]here is a fear that out-of-state business will swoop in and take advantage of voters’ hard work in passing legalization.”); see also BROHL & FINLAW, *supra* note 7, at 33.

states,¹⁷⁷ which require a significant effort by the state's citizens.¹⁷⁸ The citizens who mobilized to change their state's policy should be the first to benefit from their success,¹⁷⁹ and states want to protect the "great financial and personal risk" their citizens take to enter the "nascent" marijuana industry.¹⁸⁰ Imposing a durational residency requirement allows states to do so.

B. The Opposing View: Durational Residency Requirements for Retail Marijuana Licenses Are Unconstitutional

The constitutionality of durational residency requirements for retail marijuana licenses could be challenged under the right to travel line of cases.¹⁸¹ The right to travel line of cases applies strict scrutiny to state action that impinges on the fundamental right to travel.¹⁸² Courts have struck down durational residency requirements in other contexts when states could not meet the strict scrutiny standard.¹⁸³ Challengers of durational residency requirements for retail marijuana licenses could mirror the arguments put forth by successful challengers of durational residency requirements in other contexts, and argue that such requirements for marijuana licenses cannot stand under this line of cases.

First, critics argue that the state interests durational residency requirements promote are not compelling enough to satisfy the strict scrutiny standard.¹⁸⁴ According to the states, durational residency requirements for retail marijuana licenses serve a number of interests.¹⁸⁵

177. Amber Phillips, *How Illinois Became the First State Legislature to Legalize Marijuana Sales*, WASH. POST (June 14, 2019, 10:09 AM), <https://www.washingtonpost.com/politics/2019/06/04/how-illinois-became-first-state-legislature-legalize-marijuana-sales/> [https://perma.cc/LNY6-D4C6] ("Ten states have legalized recreational marijuana use, most through ballot initiatives.").

178. See JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAWMAKING* 7–9 (2d ed. 2014) (describing the differing requirements for ballot initiatives among the states). For a discussion of how residency requirements impact one part of the petition process, see Ryan A. Partelow, *Decoding the "Sphinx-Like Silence": State Residency, Petition Circulation, and the First Amendment*, 86 FORDHAM L. REV. 2553, 2558–60 (2018).

179. See, e.g., Borchardt, *supra* note 1; Overton, *supra* note 4.

180. See e.g., WASH. REV. CODE ANN. § 69.50.563 (2019).

181. It may be possible to challenge durational residency requirements on other grounds, but such grounds are beyond the scope of this Note.

182. See *supra* notes 146–49 and accompanying text.

183. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 504 (1999); *Dunn v. Blumstein* 405 U.S. 330, 344–45 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

184. See, e.g., Brief of Appellant at 21–28, *Sosna v. Iowa*, 419 U.S. 393 (1975) (No. 73-762).

185. See *supra* Section II.A.

Showing that these interests are not compelling would induce courts to strike them down as unconstitutional.¹⁸⁶

States justify durational residency requirements for retail marijuana licenses as being necessary to promote the states' interests in preventing an influx of prospective marijuana retailers from out of state,¹⁸⁷ preventing nonresidents from free riding,¹⁸⁸ and avoiding federal enforcement of the CSA.¹⁸⁹ Preventing an influx of people from out of state and preventing free riding are not compelling interests.¹⁹⁰

States have imposed durational residency requirements for voting as a means to discourage migrants from settling in the state.¹⁹¹ When a state wanted to encourage newcomers, it would shorten the time required to satisfy the durational residency requirement for voting.¹⁹² When a state wanted to curb migration, it would lengthen the durational residency requirement.¹⁹³ The Supreme Court effectively eliminated this practice through a series of decisions,¹⁹⁴ and in *Shapiro*, it held that "deterrence of indigents from migrating to the State" is a constitutionally impermissible interest.¹⁹⁵ Similarly, a state's interest in preventing an influx of retail marijuana license-seeking migrants is not an interest compelling enough to justify imposing a durational residency requirement.

Preventing free riding is a form of economic protectionism,¹⁹⁶ an interest the Supreme Court has repeatedly held as un compelling.¹⁹⁷ The

186. The Supreme Court struck down the statutes at issue in *Shapiro* for this reason. See *Shapiro* 394 U.S. at 633–38.

187. See *supra* notes 174–75 and accompanying text.

188. See *supra* notes 176–80 and accompanying text.

189. See *supra* note 150 and accompanying text.

190. See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2469 (2019) (explaining that protectionism is not a legitimate state interest).

191. See Mazo, *supra* note 14, at 626. By the 1940s, every state imposed a type of durational residency requirement on its voters, and millions of people were prevented from voting as a consequence of these requirements. See Edward T. Hand, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357, 364 (1973); Mazo, *supra* note 14, at 632 ("All states had some kind of durational residency qualifications that they maintained by the 1930s and 1940s.").

192. See Mazo, *supra* note 14, at 626.

193. See *id.* at 626–27.

194. See *id.* at 645.

195. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

196. See HOWELL, *supra* note 150, at 3–4.

197. See, e.g., *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2469 (2019) (stressing that economic protectionism is not a legitimate state interest); *Granholtz v. Heald*, 544 U.S. 460 (2005); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.").

Shapiro Court held that prioritizing the allocation of “welfare benefits to those regarded as contributing to the State” is an impermissible state interest.¹⁹⁸ Likewise, prioritizing the allocation of the benefits of retail marijuana licenses to residents who live in-state long enough to contribute to legalization is impermissible.

On the other hand, complying with federal enforcement priorities and avoiding enforcement of the CSA is likely a compelling state interest.¹⁹⁹ The Supremacy Clause states that the Constitution and laws made in pursuance thereof are “the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁰⁰ This gives rise to the preemption doctrine whereby federal law trumps conflicting state law.²⁰¹ There is a balance between federal and state power, which states generally have an interest in maintaining by avoiding preemption by the federal government.²⁰² Furthermore, the public is likely in accordance with the notion that states have an interest in avoiding conflict with the federal government, and “[c]ontroversy seldom erupts when a consensus exists about the supervening importance of a governmental interest.”²⁰³

Assuming, *arguendo*, that the state interests promoted by durational residency requirements for retail marijuana licenses are compelling, the relationship between the interests and the requirements can still be challenged.²⁰⁴ To pass strict scrutiny, the requirements must be narrowly tailored to promote the interest.²⁰⁵ Critics challenge durational residency

198. *Shapiro*, 394 U.S. at 633.

199. The Supreme Court often fails to explain why a particular interest is compelling or not. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988).

200. U.S. CONST. art. VI, cl. 2.

201. Maria Marulanda, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321, 335 (2010).

202. “[P]owers ebb and flow” so much so that the Supreme Court — in an effort to maintain the balance of power between the states and federal government — now recognizes that the states have certain rights as a result of being states. See Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights,”* 46 WM & MARY L. REV. 213, 226 (2004) (criticizing the notion of state rights as being incompatible with the founders’ intended system of federalism); see also Marulanda, *supra* note 201, at 335.

203. Fallon, *supra* note 25, at 1322.

204. See, e.g., Donahue, *supra* note 18, at 456.

205. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 521 (1999); see also Donahue, *supra* note 18, at 456.

requirements by arguing they are not narrowly tailored to promote state interests, even if such interests are compelling.²⁰⁶

Durational residency requirements can be said not to be narrowly tailored to the state interests they purportedly serve because they fail to fulfill their purpose.²⁰⁷ For instance, preventing marijuana diversion is a high priority for states,²⁰⁸ but durational residency requirements fail to prevent diversion.²⁰⁹

Finally, the benefit of having a state-issued retail marijuana license is not portable, and so durational residency requirements are inappropriate. Unlike an education or a divorce, one cannot enter a state, receive the benefit of a retail marijuana license, then take the benefit away to another state. The benefits of a retail marijuana license are more akin to welfare benefits — they cannot be enjoyed outside the state they are received.²¹⁰

C. Another Question: Can Durational Residency Requirements for Retail Marijuana Licenses Be Challenged under the Dormant Commerce Clause Doctrine?

State laws and regulations can be challenged under the dormant Commerce Clause if they interfere with interstate commerce.²¹¹ But the existence of an interstate market for marijuana was questionable until the Supreme Court examined the issue in *Gonzales v. Raich*.²¹²

Raich involved the federal seizure of an individual's marijuana plants that were possessed legally under California's medical marijuana laws.²¹³ At issue was the conflict between the federal prohibition of the manufacture, distribution, and possession of marijuana²¹⁴ and

206. See, e.g., Brief of Respondents at *34–35, *Anderson v. Roe*, 119 S. Ct. 31 (1998) (No. 98-97), 1998 WL 847469, *sub nom.* *Saenz v. Roe*, 526 U.S. 489 (1999) (No. 98-97); *Donahue*, *supra* note 18, at 456.

207. See, e.g., *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2475–76 (2019). In striking down Tennessee's durational residency requirement for retail liquor licenses, the Court declared that “[t]he 2-year residency requirement . . . poorly serves the goal of enabling the State to ensure that only law-abiding and responsible applicants receive licenses.” *Id.*

208. See HOWELL, *supra* note 150, at 1–2; Wyatt, *supra* note 150.

209. See HOWELL, *supra* note 150, at 11 (“[I]t is not clear that the [durational residency] requirements reduce marijuana diversion . . .”).

210. See *supra* notes 73–76 and accompanying text.

211. *Carey*, *supra* note 95, at 139–40.

212. 545 U.S. 1 (2005).

213. *Id.* at 7.

214. See 21 U.S.C. § 841 (2018).

California's Compassionate Use Act.²¹⁵ *Raich* challenged the constitutionality of the CSA, but the Court upheld the statute.²¹⁶ The Court held that the Commerce Clause authorizes Congress to regulate the intrastate possession of marijuana despite it being a "purely local" activity because it has "a substantial effect on interstate commerce."²¹⁷ There is "an established, albeit illegal, interstate market" for marijuana, which puts the regulation thereof under Congress's Commerce Clause power.²¹⁸

The courts use the dormant Commerce Clause doctrine to ensure states do not inhibit interstate commerce in areas that Congress has left to the states to regulate.²¹⁹ In certain areas, Congress invokes its commerce authority but leaves "substantial room . . . for state regulation" in the area.²²⁰ Regarding marijuana, Congress has exercised its commerce power to regulate via the CSA²²¹ but has left no room for state regulation.²²² However, states continue to contravene the CSA by legalizing medical and recreational marijuana.²²³

States' continued contravention of federal law has led to a number of constitutional questions.²²⁴ Whether the dormant Commerce Clause doctrine can be used to challenge durational residency requirements for

215. *Raich*, 545 U.S. at 5–7. The Compassionate Use Act of 1996 gave California residents the right to use marijuana for medical purposes upon a physician's recommendation. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2017).

216. *See generally Raich*, 545 U.S. at 5–9.

217. Sprankling, *supra* note 125, at 44. "Congress can regulate purely intrastate activity that is not itself 'commercial,' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18.

218. *See id.* at 18–19 ("[T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity.").

219. *See supra* notes 89–95 and accompanying text.

220. Redish & Nugent, *supra* note 91, at 570.

221. *See supra* notes 217–18 and accompanying text.

222. The CSA provides for the complete prohibition of marijuana and so the Supreme Court's approval should have ended the debate concerning state and federal power to regulate marijuana. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1422–23 (2009).

223. *See Ford*, *supra* note 151, at 676. "Raich did not stop (or even slow) state legalization campaigns." Mikos, *supra* note 222, at 1423.

224. These questions concern equal protection for noncitizens, federalism, preemption, and property rights, among others. *See generally Ford*, *supra* note 151; Sprankling, *supra* note 125.

marijuana licenses is among them.²²⁵ Federal legislation that legalizes marijuana would simplify the answer.²²⁶

If marijuana is legalized on the federal level,²²⁷ durational residency requirements for retail licenses will undoubtedly be open to dormant Commerce Clause challenges.²²⁸ Such requirements are similar to those for retail liquor licenses,²²⁹ which have been challenged and invalidated on dormant Commerce Clause grounds.²³⁰

A law or regulation that is discriminatory on its face is presumed by the courts to be invalid under the Commerce Clause.²³¹ Because durational residency requirements create two classes of individuals — residents and nonresidents — they are discriminatory on their face.²³² As

225. For an argument that recreational marijuana does not fall under Congress's commerce power despite *Raich*, see Cooper, *supra* note 12, at 202.

226. Polls show that U.S. support for the legalization of marijuana has risen steadily since 1979, and currently support is at 65%. Jennifer De Pinto, *Support for Marijuana Legalization Hits New High, CBS News Poll Finds*, CBS NEWS (Apr. 19, 2019, 10:25 AM), <https://www.cbsnews.com/news/support-for-marijuana-legalization-hits-new-high-cbs-news-poll-finds/> [https://perma.cc/AY5U-KTSG]. The debate concerning federal legalization's merits is outside the scope of this Note.

227. What exactly federal legalization would entail is debatable. See JONATHAN P. CAULKINS ET AL., RAND CORP., *CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 50 (2015), https://www.rand.org/pubs/research_reports/RR864.html [https://perma.cc/64QA-BNPS] (describing 12 alternative ways to regulate marijuana). Establishing a three-tier system to regulate recreational marijuana is widely supported, especially by the alcohol industry. See Spencer Bokart-Lindell, *What's the Right Way to Legalize Weed?*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/opinion/weed-legalization-biden.html> [https://perma.cc/9DSF-YPGR]; see, e.g., Thomas Pellechia, *Wine & Spirits Wholesalers of America Group Supports Legalized Cannabis*, FORBES (July 27, 2018, 10:21 AM), <https://www.forbes.com/sites/thomaspellechia/2018/07/27/the-u-s-trade-group-representing-80-of-alcohol-sales-supports-legalized-cannabis/#1a19aa6d74c2> [https://perma.cc/UA7F-SGR2]. Regardless of the end result, the first step must be removing marijuana from Schedule I of the CSA, and the House Judiciary Committee recently approved a bill that does just that. See Berkeley Lovelace, Jr., *House Committee Approves Landmark Bill Legalizing Marijuana at the Federal Level*, CNBC (Nov. 21, 2019, 6:18 PM), <https://www.cnbc.com/2019/11/20/house-committee-approves-bill-decriminalizing-marijuana-on-the-federal-level.html> [https://perma.cc/E9DZ-H8RK].

228. Federal legalization would allow for an interstate marijuana market in the traditional sense. See Sprankling, *supra* note 125, at 44.

229. Compare CAL. BUS. & PROF. CODE § 23961(c) (West 2019), GA. CODE ANN. § 3-4-23(a) (2019), and IND. CODE § 7.1-3-21-3 (2019), with WASH. REV. CODE ANN. § 69.50.331(1)(b)(ii) (2019), OR. ADMIN. R. 845-025-1115 (2016), and CAL. BUS. & PROF. CODE § 26054.1 (Deering 2016) (repealed 2017).

230. See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019).

231. Carey, *supra* note 95, at 140 (“[W]here a statute discriminates against interstate commerce, the law is ‘virtually *per se* invalid.’”).

232. *Tenn. Wine*, 139 S. Ct. at 2474.

such, they are presumptively invalid and will be struck down unless the state can show they are narrowly tailored to a compelling state interest.²³³ However, the Supreme Court makes clear that durational residency requirements for retail licenses that are discriminatory on their face cannot be sustained for any purpose.²³⁴

States could argue that marijuana is a unique commodity — similar to alcohol — and so they should have more power to regulate it.²³⁵ This is unlikely to stand, however, the Court did not find states were granted such broad power to regulate alcohol, despite the Twenty-First Amendment.²³⁶ There is no constitutional amendment that grants states the power to regulate marijuana, and so the argument is much weaker.

III. DURATIONAL RESIDENCY REQUIREMENTS FOR RETAIL MARIJUANA LICENSES ARE UNCONSTITUTIONAL AND SHOULD BE ABOLISHED

Durational residency requirements for retail marijuana licenses are unconstitutional under the right to travel line of cases. Furthermore, there is a strong case against such requirements under the dormant Commerce Clause doctrine. Therefore, states with durational residency requirements for retail marijuana licenses should repeal them, and states that legalize recreational marijuana in the future — or have yet to promulgate regulations — should not include such requirements.

This Part argues that durational residency requirements for retail marijuana licenses are unconstitutional under the right to travel line of cases and the dormant Commerce Clause. First, Section III.A argues why, if challenged today, these requirements should be held to be an unconstitutional impingement on the right to travel. Next, Section III.B argues that these requirements are also unconstitutional under the dormant Commerce Clause doctrine. Finally, Section III.C examines alternatives to durational residency requirements for retail licenses available to states.

233. *See id.* at 2461.

234. The Court struck down durational residency requirements for retail liquor licenses after balancing the dormant Commerce Clause doctrine and the Twenty-First Amendment. *See generally Tenn. Wine*, 139 S. Ct. 2449. In doing so, the Court declared that “[s]ince the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State.” *Id.* at 2474.

235. *See supra* note 119 and accompanying text.

236. *See supra* notes 114–23 and accompanying text.

A. The Right to Travel and Sell Marijuana

Durational residency requirements have been struck down in a variety of contexts for unconstitutionally interfering with the fundamental right to travel that U.S. citizens enjoy.²³⁷ Courts have yet to examine durational residency requirements in the retail marijuana context but will likely be compelled to strike them down. Therefore, states should not impose durational residency requirements on retail marijuana licenses.

The right to travel is a fundamental right that courts protect by applying strict scrutiny to state action that interferes with it.²³⁸ To survive a constitutional challenge under the right to travel line of cases, a durational residency requirement must be narrowly tailored to achieve a compelling state interest.²³⁹ That the requirement promotes a compelling state interest cannot be satisfied in the retail marijuana license context.

There are a number of different “compelling” interests the states claim are promoted by durational residency requirements for retail marijuana licenses.²⁴⁰ First, states claim their interest in preventing an influx of people who move to the state solely to seek a retail marijuana license is a compelling interest that durational residency requirements for retail marijuana licenses promote.²⁴¹ However, the Supreme Court has held that curbing migration is not a compelling state interest that can justify durational residency requirements.²⁴²

Second, states claim they have an interest in preventing noncitizens from free riding off the work of their citizens.²⁴³ However, this is a form of economic protectionism, which is constitutionally impermissible.²⁴⁴

The final interest put forth by the states is their interest in complying with federal enforcement priorities.²⁴⁵ This is the most likely interest to be compelling in the eyes of the courts.²⁴⁶ Even so, states cannot show that durational residency requirements for retail marijuana licenses are narrowly tailored to complying with federal enforcement priorities.

237. See Donahue, *supra* note 18, at 456.

238. Saenz v. Roe, 526 U.S. 489, 504 (1999); see also Donahue, *supra* note 18, at 456.

239. Saenz, 526 U.S. at 504; see also Donahue, *supra* note 18, at 456.

240. See *supra* notes 187–89 and accompanying text.

241. See *supra* notes 174–75 and accompanying text.

242. See *supra* notes 191–95 and accompanying text.

243. See *supra* notes 176–80 and accompanying text.

244. See *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); HOWELL, *supra* note 150, at 3–4.

245. See HOWELL, *supra* note 150, at 1; Wyatt, *supra* note 150.

246. See *supra* notes 199–225 and accompanying text.

To be narrowly tailored, there must be a sufficient connection between complying with federal enforcement priorities and durational residency requirements for retail marijuana licenses.²⁴⁷ To survive strict scrutiny, durational residency requirements must “fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate.”²⁴⁸ Durational residency requirements for retail marijuana licenses fail to achieve compliance with federal enforcement priorities, so they do not “fit the compelling goal” whatsoever.²⁴⁹

For example, preventing marijuana diversion is a high priority for states,²⁵⁰ and durational residency requirements for retail licenses arguably allow a state to ensure licenses are only granted to bona fide residents who will not facilitate diversion.²⁵¹ However, durational residency requirements fail to prevent diversion.²⁵² A Nebraska town — where recreational marijuana is illegal — that borders Colorado — where recreational marijuana is legal — has seen marijuana-related arrests increase 400% in three years.²⁵³ The issue escalated to a point where two states sued the neighboring state that legalized recreational marijuana because of marijuana diversion into their territory.²⁵⁴ Evidently, states are failing to comply with the Cole Memo priority of preventing diversion, despite imposing durational residency requirements for retail licenses.²⁵⁵

247. See Ford, *supra* note 151, at 689.

248. See *id.* at 689–90 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

249. Federal enforcement priorities include preventing diversion and preventing marijuana revenue from going to criminal elements. See *supra* notes 154–58 and accompanying text. However, durational residency requirements have failed to do so. See Dennis Romero et al., *Foreign Cartels Embrace Home-Grown Marijuana in Pot-Legal States*, NBC NEWS (May 29, 2018, 8:28 AM), <https://www.nbcnews.com/news/us-news/foreign-cartels-embrace-home-grown-marijuana-pot-legal-states-n875666> [https://perma.cc/BN3J-NTG8] (“[L]egal recreational marijuana states . . . have been providing cover for transnational criminal organizations . . .”).

250. See HOWELL, *supra* note 150, at 1–2; Wyatt, *supra* note 150.

251. See BROHL & FINLAW, *supra* note 7, at 33; HOWELL, *supra* note 150, at 1–2; see also *supra* notes 154–58 and accompanying text.

252. See HOWELL, *supra* note 150, at 11 (“[I]t is not clear that the [durational residency] requirements reduce marijuana diversion . . .”).

253. Hughes, *supra* note 156.

254. However, the Supreme Court declined to hear the case. See Richard Wolf & Trevor Hughes, *Justice Won’t Hear Nebraska, Oklahoma Marijuana Dispute with Colorado*, USA TODAY (Mar. 21, 2016, 12:58 PM), <https://www.usatoday.com/story/news/2016/03/21/marijuana-lawsuit-colorado-oklahoma-nebraska-supreme-court/81984006/> [https://perma.cc/N7QW-MJRD].

255. “Diversion continues to be a problem . . .” Sweeney, *supra* note 157, at 2203; see also Thomas Fuller, *‘Getting Worse, Not Better’: Illegal Pot Market Booming in California Despite Legalization*, N.Y. TIMES (Apr. 27, 2019),

Furthermore, the Supreme Court looks at the “portability” of the government benefit when analyzing the validity of a durational residency requirement that restricts receipt of that benefit.²⁵⁶ When a government benefit can be received from one state then taken and enjoyed in another, a durational residency requirement may be permissible.²⁵⁷ However, if the benefit cannot be transferred to another state, “there is no danger that . . . citizens of other States . . . establish residency for just long enough to acquire . . . [the] benefit” and then leave to enjoy it in their original state.²⁵⁸ This distinction allowed the Court to strike down California’s durational residency requirement for welfare benefits after upholding Iowa’s durational residency requirement for seeking a divorce.²⁵⁹ A retail license is valid only in the state where it is granted, and so retail marijuana licenses, like welfare benefits, are a benefit that cannot be received from one state and subsequently taken to another.²⁶⁰

B. The Illegal Interstate Market: Retail Marijuana Licenses and the Dormant Commerce Clause Doctrine

The Supreme Court’s recent decision in *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*²⁶¹ makes clear that the dormant Commerce Clause doctrine is alive and well.²⁶² The dormant Commerce Clause doctrine is used to prevent states from restricting interstate commerce.²⁶³ The purpose of the doctrine is to “preserve[] a national market for goods and services.”²⁶⁴ However, the CSA makes distributing marijuana illegal at the federal level,²⁶⁵ which prevents the marijuana market from being

<https://www.nytimes.com/2019/04/27/us/marijuana-california-legalization.html> [<https://perma.cc/SYU7-263U>]; Andrew Selsky, *Legal Marijuana States Seek to Crack Down on Illegal Smuggling*, INC. (Aug. 14, 2017), <https://www.inc.com/associated-press/legal-marijuana-pot-states-crack-down-on-smuggling.html> [<https://perma.cc/N9HL-BQWL>].

256. See *Saenz v. Roe*, 526 U.S. 489, 505 (1999).

257. See *id.*

258. *Id.*

259. Compare *id.*, with *Sosna v. Iowa*, 419 U.S. 393, 410 (1975); see also Conlan, *supra* note 30, at 1406.

260. See, e.g., WASH. REV. CODE ANN. § 69.50.331 (2019); ME. REV. STAT. tit. 28-B, § 202 (2018).

261. 139 S. Ct. 2449 (2019).

262. See *id.* at 2469 (rejecting the view that the Twenty-First Amendment shields state alcohol regulation from application of the dormant Commerce Clause doctrine).

263. Redish & Nugent, *supra* note 91, at 570.

264. *Tenn. Wine*, 139 S. Ct. at 2459 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988)).

265. 21 U.S.C. § 841 (2018) (“[I]t shall be unlawful for any person . . . to . . . distribute . . . a controlled substance . . .”). Marijuana is a controlled substance. *Id.* § 812(c)(10).

“interstate” in the traditional sense.²⁶⁶ Notwithstanding the fact that it is illegal to move marijuana across state lines, the Supreme Court has held that there is an interstate market for marijuana.²⁶⁷

This is a borderline legal fiction in that no market exists whereby marijuana can be legitimately transferred from one state to another.²⁶⁸ Despite any uneasiness that one might experience accepting a counterintuitive fact as true merely because the Court says it is so, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²⁶⁹ Therefore, there is an interstate market for marijuana as per the Court’s holding in *Raich*.²⁷⁰ However, to say state regulation of retail marijuana licenses interferes with interstate commerce even though there is no traditional interstate market is nonsensical, so a dormant Commerce Clause challenge might fail to win the courts. If marijuana is legalized on the federal level, then this type of challenge would be more convincing.

The growing trend of legalization by the states and the popularity of legalization among the populace make federal legalization not as farfetched an idea as it first might seem.²⁷¹ Such an event would clearly thrust marijuana into the interstate market and thereby subject durational residency requirements for retail marijuana licenses to dormant Commerce Clause challenges.²⁷²

266. Sprankling, *supra* note 125, at 44.

267. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (“[T]here is an established, albeit illegal, interstate market.”).

268. See 21 U.S.C. §§ 801, 844 (2018).

269. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

270. *Raich*, 545 U.S. at 18.

271. Eleven states and the District of Columbia have legalized recreational marijuana. *Legal Recreational Marijuana States and DC*, *supra* note 6. The first retail recreational marijuana sales in Michigan occurred on December 1, 2019, and the five locations across the state sold \$1.6 million of marijuana in eight days. See Kathleen Gray, *Recreational Marijuana Sales in Michigan Exceed \$1.6 Million in First 8 Days*, DETROIT FREE PRESS (Dec. 9, 2019, 5:22 PM), <https://www.freep.com/story/news/marijuana/2019/12/09/recreational-marijuana-sales-michigan-exceed-1-6-million-first-week/2634432001/> [https://perma.cc/M433-HK5W]. Despite these statistics, legalization of recreational marijuana is not without opposition. See, e.g., Samuel T. Wilkinson, *More Reasons States Should Not Legalize Marijuana: Medical and Recreational Marijuana: Commentary and Review of the Literature*, 110 MO. MED. 524, 524 (2013); German Lopez, *A New Study Found Marijuana Legalization Leads to More Problematic Use*, VOX (Nov. 13, 2019), <https://www.vox.com/policy-and-politics/2019/11/13/20962924/marijuana-legalization-us-e-addiction-study> [https://perma.cc/S225-XPVN]. Again, the merits of the arguments for and against legalization are outside the scope of this Note.

272. Given the Court’s holding in *Raich* that there is an interstate market for medical marijuana, it may be possible to challenge durational residency requirements for recreational retail marijuana licenses under the dormant Commerce Clause, although there

Durational residency requirements for retail marijuana licenses will not survive a dormant Commerce Clause challenge. Such requirements are discriminatory on their face because they create two classes which favor residents over nonresidents.²⁷³ When this is the case, it is presumed that the discriminatory statute is invalid,²⁷⁴ and courts will strike it down.²⁷⁵

C. Alternatives to Durational Residency Requirements

There are alternative ways states can regulate retail marijuana sales that do not discriminate against nonresidents. The abundance of alcohol jurisprudence provides examples of how states can do so. The fact that nondiscriminatory alternatives exist may also push courts to strike down durational residency requirements.²⁷⁶

State law may allow local governments to cap the number of retail liquor licenses issued within their jurisdiction, and states may also cap the amount of alcohol retailers can sell to an individual purchaser.²⁷⁷ States are also empowered to mandate high levels of training for retailers and “could even demand that they demonstrate an adequate connection with and knowledge of the local community.”²⁷⁸ The Supreme Court found that these powers — without durational residency requirements — are enough for the states to promote any compelling interest they might have in regulating alcohol.²⁷⁹

The same alternatives to durational residency requirements for retail liquor licenses can be used to regulate marijuana in a way that does not discriminate against nonresidents while still promoting any compelling

is no interstate market in the traditional sense. *See Raich*, 545 U.S. at 18, 22 (“That the regulation ensnares some purely intrastate activity is of no moment.”).

273. Similar to Tennessee’s durational residency requirement that the Court invalidated in *Tennessee Wine*. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2474 (2019) (“Tennessee’s 2-year durational-residency requirement plainly favors Tennesseans over nonresidents.”); *see also Carey*, *supra* note 95, at 140 (“[W]here a statute discriminates against interstate commerce, the law is ‘virtually *per se* invalid.’”).

274. *Carey*, *supra* note 95, at 141.

275. “Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State.” *Tenn. Wine*, 139 S. Ct. at 2474.

276. *See id.* at 2476 (discussing nondiscriminatory alternatives to the durational residency requirement for retail liquor licenses at issue).

277. *See id.*

278. *Id.*

279. *See id.* (“Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices (an interest that we recognize as legitimate . . .), but there are obvious alternatives that better serve that goal without discriminating against nonresidents.”). The Court went on to hold that given all the possible alternatives, the durational residency requirement could not be valid. *See id.*

interests the state has in regulating marijuana. Some states such as California allow local governments to limit the number of retail marijuana licenses issued within their jurisdiction,²⁸⁰ and some state governments impose a limit themselves.²⁸¹ There is no compelling interest that a durational residency requirement for retail marijuana licenses promotes that alternative, nondiscriminatory means cannot promote.²⁸² As Justice Samuel Alito bluntly explained, a “State can thoroughly investigate applicants without requiring them to reside in the State,” making durational residency requirements for retail licenses unnecessary.²⁸³

CONCLUSION

States have started to legalize recreational marijuana despite the continuing federal prohibition. Jurisprudence on durational residency requirements for retail marijuana licenses is lacking, but as more states begin to legalize and regulate recreational marijuana, courts will have to confront the question of their constitutionality.

Although durational residency requirements on retail licenses are a popular restriction the states impose, such requirements are an unconstitutional impingement on the right to travel. These requirements will also be held unconstitutional if subject to challenge under the dormant Commerce Clause. States have alternative ways to regulate their nascent marijuana industries and should not impose durational residency requirements on retail marijuana licenses.

280. See CAL. BUS. & PROF. CODE § 26201 (Deering 2016) (“A local jurisdiction may establish additional standards, requirements, and regulations.”).

281. See e.g., 410 ILL. COMP. STAT. 705/15–25(a) (2019) (authorizing the issuance of 75 retail marijuana licenses).

282. See *supra* Section III.A.

283. See *Tenn. Wine*, 139 S. Ct. at 2475. “As the Fifth Circuit observed in a similar case, ‘[i]f [the State] desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the ‘burden’ of residing’ in the State.” *Id.* (alterations in original) (quoting *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994)).