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Chew on This: Learning From Colorado's Edible Marijuana Market

Christina Cole

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CHEW ON THIS: LEARNING FROM
COLORADO’S EDIBLE MARIJUANA MARKET

*Christina Cole**

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I. INTRODUCTION

In March 2014, less than three months after the effective date for the legalization of recreational marijuana in Colorado, a nineteen-year-old

* The author is a May 2016 Juris Doctor candidate at the University of Arkansas School of Law. This comment received the University of Arkansas *Journal of Food Law & Policy*'s 2015 Arent Fox/Dale Bumpers Excellence in Writing Award.

college student from Wyoming died after jumping from a hotel balcony.¹ A post-mortem examination showed that marijuana intoxication was a factor in his death.² It was later determined that the student had consumed a single cookie that contained 65 milligrams of Tetrahydrocannabinol (“THC”), over six times the recommended amount of THC to be consumed through a marijuana-infused food product at one time.³

In June 2014, Maureen Dowd, a *New York Times* columnist, reported she had a bad experience after consuming a caramel-chocolate flavored candy bar infused with marijuana.⁴ She described how she laid “curled up in a hallucinatory state for . . . eight hours.”⁵ She later discovered candy bars like the one she consumed were intended to be cut into 16 pieces for inexperienced users.⁶ However, the serving size recommendation was not on the label of the candy bar.⁷

Arguably, not since the repeal of Prohibition has there been a scenario in which a change in public opinion resulted in the legalization of a previously unlawful product, resulting in a significant positive economic impact, as well as a financial windfall for governmental entities. On the surface, it may seem like a win-win situation, but, in reality, for an unsuspecting, uninformed consumer, like the nineteen-year-old student from Wyoming and the *New York Times* columnist, it could become a no-win situation.

The Eighteenth Amendment, which established Prohibition, was enacted in 1920 in an attempt to eliminate the consumption of alcohol.⁸ In reality, the only thing that Prohibition accomplished was to deregulate the alcohol market.⁹ Prior to Prohibition, the manufacturing and sale of alcohol

1. *Marijuana Linked to Death of Colorado Exchange Student*, BBC NEWS (Apr. 2, 2014), <http://www.bbc.com/news/world-us-canada-26860982>.

2. *Id.*

3. Kieran Nicholson, *Man Who Plunged from Denver Balcony Ate 6x Recommended Amount of Pot Cookie*, THE DENVER POST (Apr. 2, 2014), http://www.denverpost.com/news/ci_25585976/man-who-plunged-from-denver-balcony-ate-6.

4. Maureen Dowd, *Don't Harsh Our Mellow, Dude*, N.Y. TIMES (June 3, 2014), http://www.nytimes.com/2014/06/04/opinion/dowd-dont-harsh-our-mellow-dude.html?_r=0.

5. *Id.*

6. *Id.*

7. *Id.*

8. Michael Lerner, *Unintended Consequences*, PBS.ORG, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Oct. 24, 2015).

9. *Id.*

was regulated by the federal government.¹⁰ With the enactment of Prohibition, this governmental oversight ceased, and as a result, purchasers risked consuming poorly made homemade alcohol or moonshine, which often resulted in sickness, blindness, and even death.¹¹

Similar to the alcohol market during Prohibition, the unlawful, unregulated marijuana market has resulted in an environment in which purchasers are unable to determine the quality of the marijuana or if the marijuana is laced with undesirable substances that can cause various health risks.¹²

To generate increased public support for the legalization and regulation of both medical and recreational marijuana, many advocates have used the argument that a widely consumed, unregulated product is far riskier to the public than a legalized product with regulation over its production and sale.¹³ In fact, public support for the legalization of recreational marijuana has been increasing at an astronomical rate in recent decades.¹⁴ Fifty-two percent of Americans supported the legalization of marijuana in 2013, up from only sixteen percent in the 1990s.¹⁵ Two-thirds of millennials¹⁶ currently support the legalization of recreational marijuana.¹⁷

As of January 2015, twenty-three states have legalized medical marijuana.¹⁸ Two of those twenty-three states, Colorado¹⁹ and

10. *Significant Dates in U.S. Food and Drug Law History*, FDA.GOV, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Milestones/ucml28305.htm> (last updated Dec. 19, 2014).

11. *Bootleggers, Bandits and Badges: Mortal Moonshine*, TIME (Dec. 4, 2008), http://content.time.com/time/specials/packages/article/0,28804,1864521_1864524_1864626,00.html.

12. Garrett Peck, *For Marijuana Legalization, Lessons From Prohibition*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/roomfordebate/2013/05/22/how-can-marijuana-be-sold-safely/for-marijuana-legalization-lessons-from-prohibition>.

13. Graham Boyd et al., *Marijuana Legalization: Does Congress Need to Act?*, THIRD WAY (June 10, 2014), <http://www.thirdway.org/report/marijuana-legalization-does-congress-need-to-act>.

14. *Id.*

15. *Id.*

16. *Millennial Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/millennial> (last visited Oct. 24, 2015) (stating that millennials are people born in the 1980s or 1990s).

17. Ronald Brownstein, *How Millennials Have Already Reshaped Politics*, NAT'L J. (Jan. 9, 2014), <http://www.nationaljournal.com/political-connections/how-millennials-have-already-reshaped-politics-20140110>.

18. *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 16, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

19. Michael Martinez, *10 Things to Know About Nation's First Recreational Marijuana Shops in Colorado*, CNN (Jan. 1, 2014),

Washington,²⁰ currently allow the distribution and sale of marijuana for recreational use.²¹ In November 2014 elections, Alaska, Oregon, and the District of Columbia legalized the use of recreational marijuana.²² In many more states, initiatives are underway to do the same.²³ Advocates in California, Nevada, Arizona, Maine, and Massachusetts are working toward placing the issue on the ballot.²⁴ Supporters in Vermont, Rhode Island, New Hampshire, Hawaii, and Maryland are lobbying their state legislatures for legalization of recreational marijuana.²⁵

In addition to the public health benefits derived from product regulation, the legalization of marijuana can perhaps provide a positive economic impact and increase state government revenues. In 2014, the first year after legalization, the sales of recreational marijuana products in Colorado totaled \$313 million.²⁶ As a result of both recreational and medical marijuana sales in 2014, the state of Colorado collected \$63 million in tax revenue, with an additional \$13 million collected in licenses and fees.²⁷ Clearly, Colorado has financially benefitted from the legalization of marijuana.²⁸ By allowing the sale of a product still considered by the federal government as illegal and therefore not federally regulated, Colorado

<http://www.cnn.com/2013/12/28/us/10-things-colorado-recreational-marijuana> (stating that Colorado legalized recreational marijuana on November 6, 2012).

20. Jonathan Martin, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Nov. 7, 2012), <http://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/> (stating that Washington legalized recreational marijuana on November 6, 2012).

21. German Lopez, *3 Things We Learned From Colorado's First Year of Legal Marijuana Sales*, VOX (Dec. 24, 2014), <http://www.vox.com/2014/12/24/7408571/marijuana-legalization-colorado>.

22. Shelby Sebens, *Voters Give Nod to Legal Marijuana in Oregon, Alaska, and Washington D.C.*, REUTERS (Nov. 5, 2014), <http://www.reuters.com/article/2014/11/05/us-usa-elections-marijuana-idUSKBN0IO13620141105>; see also Stephen Gutwillig, *A Crucial Election Season for Legalizing Marijuana and Ending the Drug War*, HUFFINGTON POST (Nov. 18, 2014), http://www.huffingtonpost.com/stephen-gutwillig/2014-marijuana-ballot-questions_b_5844152.html.

23. *Which States Could Legalize Marijuana Next?*, VOX, <http://www.vox.com/cards/marijuana-legalization/where-are-the-next-rounds-of-marijuana-legalization-efforts> (last visited Oct. 25, 2015).

24. *Id.*

25. *Id.*

26. Christopher Ingraham, *Colorado's Legal Weed Market: \$700 Million in Sales Last Year, \$1 Billion by 2016*, WASH. POST (Feb. 12, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/12/colorados-legal-weed-market-700-million-in-sales-last-year-1-billion-by-2016/>.

27. *Id.*

28. *Id.*

arguably has an obligation to the consumer to establish regulations for the manufacture and sale of marijuana and marijuana products.

As additional states legalize recreational marijuana, they too will be faced with implementing regulations that ensure the safety of consumers. State regulators can look to the problems Colorado has faced, including Colorado's problems with edible marijuana. This comment looks at the problems related to the packaging and selling of recreational edible marijuana ("Edibles") in Colorado to understand how states legalizing recreational marijuana in the future can create regulations to minimize the risk of overconsumption of Edibles. Part I will address the evolution of marijuana in Colorado, from the legalization of medical marijuana to the future of Edibles. Part II will present three recommended regulations – one or all of which should be implemented – that would act to limit the overconsumption of Edibles: (1) limit the food products allowed to be infused with marijuana; (2) limit the sale of Edibles to residents of the state in which the Edibles are sold; and/or (3) include an educational component at the point-of-sale to ensure the consumer understands the nature and effects of Edibles.

II. OVERVIEW: THE HISTORY OF EDIBLES IN COLORADO

This overview section will analyze the legalization process of recreational marijuana in Colorado by first describing what marijuana is and how inhaled and edible marijuana differ. This section will then summarize the historical events leading to the legalization of recreational marijuana in Colorado. Next, the regulations Colorado initially implemented governing the sale of Edibles will be examined as well as the problems with those initial regulations. Lastly, this section will review subsequent and anticipated regulations pertaining to the sale of Edibles.

A. What is Marijuana

To understand the Edibles overconsumption problem, it is important to first understand the nature of marijuana. Part 1 will address the characteristics of inhaled marijuana, Part 2 will address the characteristics of Edibles, and Part 3 will address the differences between inhaled marijuana and Edibles.

Marijuana refers to the dried leaves, flowers, stems, and seeds from the hemp plant *Cannabis sativa*.²⁹ Marijuana can be inhaled or consumed

29. *Drug Facts: Marijuana*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/marijuana> (last updated Sept. 2015).

orally.³⁰ Marijuana's psychological effects are caused by Tetrahydrocannabinol ("THC"), a type of cannabinoid.³¹ Unlike alcohol, which contains molecules which are nothing like those in our bodies, cannabinoids, like THC, resemble molecules produced naturally in the human brain.³² Cannabinoids circulate in low quantities in the body, but smoking or consuming marijuana causes a large influx of cannabinoids.³³

Cannabinoids affect the neurons in the brain.³⁴ Neurons are the cells that process information by releasing chemicals called neuro-transmitters.³⁵ Neurons temporarily become unresponsive after firing, which prevents them from overreacting or becoming too dominant, allowing the brain to function in a calm and controlled manner.³⁶ THC mimics the actions of naturally produced cannabinoids and interrupts this natural approach in specific parts of the brain.³⁷ By removing the refractory period of the neurons, the cannabinoid THC causes a person's thoughts, imagination, and perception to magnify.³⁸ Cannabinoids also affect the levels of dopamine and norepinephrine in the brain, which leads to a sense of euphoria, relaxation, pain modulation, and general enhancement of an experience.³⁹

1. Inhaled Marijuana

Marijuana can either be smoked in hand-rolled cigarettes known as joints, smoked using a traditional pipe or a water pipe, otherwise known as a bong, or consumed through vaporization.⁴⁰ Inhalation of marijuana provides the quickest physiological effect.⁴¹ When a consumer inhales marijuana, THC enters the blood stream through the lungs.⁴² Generally, a single intake of smoke from a joint, known as a hit, is approximately 1/20 of

30. *Id.*

31. AsapSCIENCE, *Your Brain on Drugs: Marijuana*, YOUTUBE (Oct. 3, 2012), <https://www.youtube.com/watch?v=oeF6rFN9org>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. AsapSCIENCE, *supra* note 31.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Drug Facts: Marijuana*, *supra* note 29.

41. *How Marijuana is Consumed*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/facts/drug-facts/marijuana/how-marijuana-consumed> (last visited Oct. 25, 2015).

42. *Id.*

a gram of THC (about 50 milligrams of THC).⁴³ It takes about one to three hits of high potency marijuana to produce the “desired” effects.⁴⁴ The effects of inhaled marijuana are felt within a few minutes, with the peak effect occurring around an hour after inhalation.⁴⁵ The total effect lasts around two hours.⁴⁶

2. Edible Marijuana

Marijuana can be incorporated into a variety of foods and beverages, including, but not limited to, tinctures (alcohol and glycerin based extractions), cooking oils, premade desserts, drinks, snack foods, candies, and chewing gum.⁴⁷ Edibles fall into three basic categories: Edibles absorbed by the body through gastrointestinal uptake (digested through the stomach), Edibles absorbed through saliva or oral uptake, and Edibles that fit into a hybrid category and are absorbed both gastrointestinally and orally.⁴⁸

Most commonly, Edibles are absorbed through the gastrointestinal system.⁴⁹ These types of Edibles take longer to be absorbed because they pass through the gastrointestinal tract and liver before entering the blood stream.⁵⁰ Therefore, generally, the effects of THC in an Edible are felt thirty minutes to two hours after eating or drinking the Edible⁵¹ and can last for up to six to ten hours.⁵² When the THC passes through the liver, a potent THC metabolite is formed, which is five to ten times more psychoactive than the

43. *Drugs and Human Performance Fact Sheets: Cannabis/Marijuana*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (last visited Oct. 25, 2015).

44. *Id.*

45. *How Marijuana is Consumed*, *supra* note 41.

46. *Id.*

47. See Zach Reichard, *An Introduction to Marijuana Edibles: What You Should Know About Ingesting Cannabis*, MED. JANE (Feb. 5, 2013), <http://www.medicaljane.com/2013/02/05/an-introduction-to-marijuana-edibles-why-ingesting-cannabis-just-makes-sense>; *Drug Facts: Marijuana*, *supra* note 29.

48. Reichard, *supra* note 47.

49. *Id.*

50. *Delivery Systems*, DIXIE ELIXIRS, <http://dixieelixirs.com/adult-use/marijuana-forms-absorption> (last visited Oct. 25, 2015).

51. *Id.*

52. Matt Ferner & Nick Wing, *3 Things You Should Remember (But Probably Won't) If You Get Too High on Marijuana Edibles*, HUFFINGTON POST (Mar. 26, 2015), http://www.huffingtonpost.com/2014/06/04/high-on-marijuana-edibles_n_5446062.html.

THC originally ingested.⁵³ As a result, the effects of an Edible absorbed through the gastrointestinal system are much more significant than the effects experienced after inhaling marijuana or consuming an Edible absorbed through saliva.⁵⁴

Edibles can also be absorbed orally through three areas of the mouth: (1) the mucosa lining inside the entire mouth; (2) the area under the tongue; and (3) the tongue itself.⁵⁵ Edibles placed under the tongue are felt more quickly than those absorbed through the general mucosal tissue lining the mouth.⁵⁶ Edibles that are held in the mouth for a long period of time and absorbed through saliva affect an individual almost immediately, approximately the same speed as when marijuana is inhaled.⁵⁷ While the effects of orally ingested Edibles and inhaled marijuana are generally felt within the same timeframe, the effects of orally ingested Edibles last much longer and can often have an effect for four to six hours.⁵⁸

3. Differences Between Inhaled and Edible Marijuana

The effects of consuming Edibles vary greatly from the effects of inhaling marijuana.⁵⁹ There are three primary differences between Edibles and inhaled marijuana.⁶⁰ The most significant difference is the length of time each takes to be absorbed into the blood stream.⁶¹ Edibles (excluding oral Edibles) are absorbed through the stomach instead of the lungs and take longer to reach the blood stream.⁶² Because it takes longer for the effects from an Edible (excluding oral Edibles) to be felt, many times users unwittingly eat more than intended.⁶³

53. *Delivery Systems*, *supra* note 50.

54. *See* Ferner & Wing, *supra* note 52; *Delivery Systems*, *supra* note 50.

55. *Delivery Systems*, *supra* note 50.

56. *Id.*

57. Reichard, *supra* note 47 (stating that this category includes edibles such as suckers, lozenges, or tinctures).

58. Joseph Winke, *3 Tips on How to Eat Marijuana Edibles*, RESET.ME (Dec. 2, 2014), <http://reset.me/story/3-tips-eat-marijuana-edibles/>.

59. Trevor Hughes, *Marijuana 'Edibles' Pack a Wallop*, USA TODAY (May 8, 2014), <http://www.usatoday.com/story/news/nation/2014/05/08/marijuana-pot-edibles-the-legalized-recreational/8463787/>.

60. *See* Bailey Rahn, *Ingest or Inhale? 5 Differences Between Marijuana Edibles and Flowers*, LEAFLY (July 17, 2014), <http://www.leafly.com/news/cannabis-101/ingest-or-inhale-5-differences-between-marijuana-edibles-and-flow>.

61. *Id.*

62. *See id.*

63. *Id.*

Second, THC is absorbed differently when marijuana is inhaled than when Edibles are consumed.⁶⁴ When Edibles are consumed, the THC is metabolized by the liver, which leads to a more intense high.⁶⁵ Inhaled marijuana goes through a different metabolic process, and the THC travels directly into the brain.⁶⁶ Third, Edibles are more difficult to dose.⁶⁷ Even professional distributors have difficulty determining the THC content and potency of an Edible.⁶⁸ The difficulty in determining the amount of THC, along with the delay between the ingestion and the onset of effects and the stronger intensity, increases the risk that a consumer can overconsume Edibles.⁶⁹

B. Colorado's Legalization of Recreational Marijuana

On November 6, 2012, Colorado became one of two states to legalize and regulate the sale of recreational marijuana through the passage of Amendment 64 to the Colorado Constitution to become effective January 1, 2014.⁷⁰ Twelve years prior to the adoption of Amendment 64, marijuana was already an issue for Colorado voters.⁷¹ In 2000, the state constitution was modified by the passage of Amendment 20, allowing a Colorado citizen to carry two ounces of marijuana for medical purposes without facing criminal prosecution.⁷² By 2010, the number of individuals authorized to buy medical marijuana had reached six figures, with most listing “severe pain” as their chronic illness.⁷³ The significant number of individuals purchasing medical marijuana led to an uncontrolled environment, which ultimately led to an outcry among Colorado citizens to create a system of regulation through the legalization of recreational marijuana.⁷⁴

64. *Id.*

65. Rahn, *supra* note 60.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See Hughes, *supra* note 59; Valerie Richardson, *Colorado, Washington Legalize Pot for Adult Recreational Use*, WASH. TIMES (Nov. 6, 2012), <http://www.washingtontimes.com/news/2012/nov/6/three-states-poised-to-legalize-pot/?page=all>.

71. David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 363 (2014).

72. See COLO. CONST. art. XVIII § 14; see also Blake & Finlaw, *supra* note 71.

73. Blake & Finlaw, *supra* note 71, at 364.

74. *Id.*

1. The Ogden Memo and the First Cole Memo

In 2009, David W. Ogden, United States Deputy Attorney General, issued a memo (the “Ogden Memo”) directing federal prosecutors in states that had legalized medical marijuana to cease prosecuting individuals who use medical marijuana, provided they act according to state law.⁷⁵ The Ogden Memo stated that the Department of Justice is committed to the “efficient and rational use” of its resources⁷⁶ and prosecuting patients and distributors who are in “clear and unambiguous compliance” with state laws does not meet the Department of Justice’s standards.⁷⁷

On June 29, 2011, the Department of Justice’s position was later expanded upon by another memorandum written by United States Deputy Attorney General James M. Cole (the “First Cole Memo”).⁷⁸ The First Cole Memo stated that “there [had been]. . .an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes” and the Ogden Memo was “never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”⁷⁹

While the First Cole Memo seemed to contradict the federal government’s position presented in the Ogden Memo, in reality, the vast majority of federal prosecutions subsequent to the issuance of the First Cole Memo took place in states that did not provide clear and robust regulations.⁸⁰ In states with strong regulations, federal enforcement was generally limited to prosecuting individuals breaking the state law and requiring dispensaries to locate further away from schools.⁸¹ The federal government’s position on enforcement, as presented in the Ogden Memo and as evidenced by actual

75. See Memorandum from Deputy Attorney Gen. David W. Ogden to Selected U.S. Attorneys (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; see also David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), http://www.nytimes.com/2009/10/20/us/20cannabis.html?_r=0.

76. Memorandum from Deputy Attorney Gen. David W. Ogden to Selected U.S. Attorneys, *supra* note 75.

77. Stout & Moore, *supra* note 75.

78. See Memorandum from Deputy Attorney Gen. James M. Cole to U.S. Attorneys (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

79. *Id.*

80. *Federal Enforcement Policy on State Marijuana Laws*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/federal/federal-enforcement-policy-on-state-marijuana-laws> (last visited Oct. 25, 2015) (stating that California and Montana bore the brunt of federal enforcement activity due to their lack of regulatory framework for marijuana providers).

81. *Id.*

prosecutions, opened the door for states to legalize recreational marijuana without fear of substantial federal government interference as long as states created robust regulatory systems.⁸²

2. Amendment 64

Amendment 64 was presented to Colorado voters in an effort to regulate marijuana in the manner in which alcohol is regulated.⁸³ Specifically, Amendment 64 states:

In the interest of the efficient use of law enforcement resources, enhancing revenue for public purpose, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.⁸⁴

Amendment 64 regulated marijuana in the same manner as alcohol by requiring identification for purchase, making it illegal to sell to anyone under the age of 21, and making it illegal to drive while under the influence of marijuana.⁸⁵ Amendment 64 passed with fifty-five percent of the vote in November 2012.⁸⁶

3. The Second Cole Memo

Colorado's position on recreational marijuana was supported by a second memo issued by James M. Cole on August 29, 2013 (the "Second Cole Memo"), specifying "certain enforcement priorities that are particularly important to the federal government."⁸⁷ The Second Cole Memo indicated that the federal government was interested in "[p]reventing the diversion of

82. See generally PETER HECHT, *WEED LAND: INSIDE AMERICA'S MARIJUANA EPICENTER AND HOW POT WENT LEGIT* 211 (2014); Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 15 n.72 (2013).

83. John W. Hickenlooper, *Experimenting with Pot: The State of Colorado's Legalization of Marijuana*, 92 MILBANK Q. 243, 243 (2014).

84. COLO. CONST. art. XVIII, amended by COLO. CONST. amend. LXIV, § 16.

85. *Id.*

86. Blake & Finlaw, *supra* note 71, at 359.

87. Memorandum from Deputy Attorney Gen. James M. Cole to U.S. Attorneys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

marijuana from states where it is legal under state law in some form to other states [where marijuana has not been legalized]”⁸⁸ The Second Cole Memo acknowledged that for areas outside of the federal government’s priorities, the government would rely “on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”⁸⁹ Furthermore, the Second Cole Memo mandated that states must “implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”⁹⁰ The Second Cole Memo effectively stated that the federal government would leave individual states to their own devices as long as states create rules and regulations.⁹¹

C. Colorado’s Initial Edible Marijuana Regulations

After the passage of Amendment 64, Colorado worked to create a set of regulations that addressed the various aspects of manufacturing, distributing, and selling recreational marijuana.⁹² To accomplish this task, Colorado Governor John W. Hickenlooper created the Amendment 64 Implementation Task Force (the “Task Force”) in November 2012 to “identify the legal, policy, and procedural issues that need[ed] to be resolved, and to offer suggestions and proposals for legislative, regulatory and executive actions that need[ed] to be taken, for the effective and efficient implementation of Amendment 64.”⁹³ The Task Force’s recommendations were adopted in May 2013 with the passage of House Bill 1317.⁹⁴

This section will present the regulations created that affect the distribution and sale of Edibles. First, this section will address the regulations identifying the agencies responsible for the oversight of the Edibles market. Second, this section will summarize the initial regulations dealing with the labeling of Edibles. Next, this section will review the initial regulations pertaining to the packaging of Edibles. Finally, this section will address the initial regulations specifying the serving size of Edibles.

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. Hickenlooper, *supra* note 83, at 245.

93. *Id.* at 244.

94. Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2280 (2014).

1. Regulatory Oversight Agencies

The Task Force acknowledged the lack of a regulatory agency at the state level similar to the Food and Drug Administration that could enforce the safe manufacturing and packaging of Edibles.⁹⁵ The Food and Drug Administration, the federal agency charged with ensuring consumer safety over food, drugs, and alcohol would have no oversight responsibilities because marijuana is considered an illegal substance by the federal government.⁹⁶ Instead, the burden of enforcement would fall on various state agencies, including the Colorado Department of Revenue and the Disease Control and Environmental Epidemiology Division of the Colorado Department of Public Health and Environment.⁹⁷

2. Labeling of Edible Marijuana

Amendment 64 states that “marijuana sold in [Colorado] will be labeled and subject to additional regulations to ensure that consumers are informed and protected.”⁹⁸ Based on this provision in Amendment 64, the Task Force recommended regulations addressing the labeling of Edibles.⁹⁹

House Bill 1317 stipulated that labels on the packaging of Edibles include, but not be limited to: (1) the number of the retail marijuana cultivation license; (2) the license number of the retail marijuana store; (3) an identity statement and standardized graphic symbol; (4) a batch number; (5) a net weight statement; (6) a statement of THC potency; (7) a list of the nonorganic pesticides, fungicides, herbicides, and solvents used during cultivation; (8) a statement declaring that the product was produced without regulatory oversight; (9) warning labels; (10) solvents used in the extraction process; (11) the amount of THC per serving and the number of servings per package; (12) a list of ingredients; (13) an expiration date; (14) a nutritional panel; and (15) a universal symbol indicating the package contains marijuana.¹⁰⁰ These labeling requirements were thought to be sufficiently

95. JACK FINLAW ET AL., TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64 54 (2013).

96. Ricardo Carvajal, *Please Pass the Brownies – Uh – “Edible Retail Marijuana Products,”* FDA LAW BLOG (Nov. 6, 2013), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2013/11/please-pass-the-brownies-uh-edible-retail-marijuana-products-.html.

97. See FINLAW ET AL., *supra* note 95, at 58.

98. COLO. CONST. amend. LXIV.

99. FINLAW ET AL., *supra* note 95, at 60.

100. H.R. 13-1317, 69th Gen. Assemb., Reg. Sess. (Colo. 2014), *available at* http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont/807A035CD583C95E87257B1F005CDB59?Open&file=1317_enr.pdf.

comprehensive to inform and protect both the consumer and the general public.¹⁰¹

3. Packaging of Edible Marijuana

With regard to the packaging of Edibles, Amendment 64 simply states that the state licensing authority should create further regulations with regard to packaging.¹⁰² The Task Force recommended regulations approved in House Bill 1317, including the requirement that Edibles must leave a retail marijuana store in packaging that meets the regulatory standards defined by the Colorado Department of Public Health and Environment.¹⁰³ Specifically, all Edibles must be packaged in child-resistant packaging.¹⁰⁴ The Task Force recognized three distinct points that Edibles may be placed in child-resistant packaging: (1) by the manufacturer; (2) by the store before they are sold; or (3) by the store after the sale in an “exit package/container” prior to the consumer exiting the store.¹⁰⁵

The Task Force stated that the requirement that Edibles be placed in child-resistant packaging was important to ensure the safety of consumers and children, acknowledging that because Edibles do not have an intrinsic noxious taste or burning effect to naturally deter children from ingesting them, there have been instances of children being taken to the hospital for ingestion of Edibles.¹⁰⁶ By requiring Edibles be placed in child-resistant packaging, the Task Force hoped that the accidental consumption of Edibles by children naturally attracted to the underlying food product would be limited.¹⁰⁷

4. Serving Size of Edible Marijuana

The Task Force also addressed the recommended serving size for Edibles.¹⁰⁸ It recommended a single serving of an Edible have no more than ten milligrams of THC.¹⁰⁹ In addition, the Task Force recommended that the label on Edibles clearly identify the serving size for packages containing

101. FINLAW ET AL., *supra* note 95, at 58.

102. H.R. 13-1317, *supra* note 100.

103. See FINLAW ET AL., *supra* note 95.

104. 1 COLO. CODE REGS. § 212-2 (2013), *available at* https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf.

105. FINLAW ET AL., *supra* note 95.

106. *Id.* at 55.

107. *Id.*

108. *Id.* at 60.

109. *Id.*

multiple servings, as well as disclose the total number of servings.¹¹⁰ Based on the Task Force recommendations, state lawmakers, through passage of House Bill 1317, stipulated serving size regulations.¹¹¹ These serving size regulations were intended to educate consumers about the THC content in Edibles and to prevent accidental over-ingestion by strictly restricting both the THC content per serving and per package.¹¹² The Task Force believed that by limiting the THC levels in a single serving and package of Edibles, “both children and inexperienced users [were] less likely to become ill, even if they consume[d] multiple servings of the product or an entire package.”¹¹³

D. Overconsumption of Edible Marijuana in Colorado

The legalization of recreational marijuana has been extremely profitable for Colorado.¹¹⁴ In 2014, the initial year after legalization, Colorado received approximately \$63 million in tax revenue from medical and recreational marijuana sales, and an additional \$13 million was collected in licenses and fees.¹¹⁵

While the Task Force initially recommended regulations addressing the labeling, packaging, and serving size of Edibles in an attempt to ensure the safety of individuals, the regulations were not extensive enough to minimize the risk of overconsumption.¹¹⁶ Children’s Hospital Colorado reported an uptick in the amount of children entering the emergency room after eating Edibles.¹¹⁷ The hospital reported that fourteen children younger than ten were admitted for ingestion of Edibles between January 2014 and November 2014, and of these fourteen, seven were in critical condition and required ICU treatment.¹¹⁸

The Edibles problem not only affects children, but also has caused issues among adults.¹¹⁹ Colorado’s Rocky Mountain Poison and Drug Center reported at least 56 marijuana-related calls from adults nineteen and

110. FINLAW ET AL., *supra* note 95, at 60.

111. *Id.*

112. *Id.* at 61.

113. *Id.*

114. Ingraham, *supra* note 26.

115. *Id.*

116. *See supra* notes 92-113 and accompanying text.

117. Lopez, *supra* note 21.

118. Lori Jane Gliha & Serene Fang, *Potent Snacks: How Big is Colorado’s Marijuana Edibles Overdose Problem?*, ALJAZEERA AM. (Jan. 8, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/1/8/colorado-marijuanaediblesinfusedthcoverdose.html>.

119. *Id.*

older between January and December 2014.¹²⁰ This is over 70 percent more calls related to marijuana exposure than were received in 2013.¹²¹ While Colorado created labeling regulations to inform consumers, these regulations were inadequate.¹²² The media brought attention to specific situations, illustrating problems with Edibles, including the death of the nineteen-year-old Wyoming college student and Maureen Dowd's bad experience consuming Edibles.¹²³ Additional instances involving overconsumption of Edibles have helped draw the attention of critics and state officials, including an instance of a husband shooting his wife after consuming candy infused with marijuana, and a story about a father who was rushed to the hospital after consuming an excess of marijuana-laced chocolates at a county fair.¹²⁴ The father subsequently sued LivWell marijuana company for distributing marijuana-infused candy without the consumer's knowledge.¹²⁵

E. The Future of Edible Marijuana in Colorado

In response to the growing problem of overconsumption of Edibles and to "help ensure the public is adequately protected when they purchase retail marijuana products,"¹²⁶ the Colorado legislature passed House Bill 1366, requiring the establishment of additional regulations.¹²⁷ As a result, on August 1, 2014, seven months after the initial sale of Edibles, "Emergency Rules" were established.¹²⁸ These rules, effective November 1, 2014, grew

120. *Id.*

121. Tista S. Ghosh et al., *Medical Marijuana's Public Health Lessons – Implications for Retail Marijuana in Colorado*, 372 NEW ENG. J. MED. 991, 992 (2015).

122. See *supra* notes 98-101 and accompanying text.

123. See *supra* notes 1-7 and accompanying text.

124. See generally Gliha & Fang, *supra* note 118 (discussing the story of Jordan Coombs, a father who was rushed to the hospital after consuming an excess of marijuana-laced chocolates at a county fair). Kevin Conlon & Shawn Nottingham, *Colorado Question: Did Marijuana Play a Role in Husband's Alleged Slaying of Wife?*, CNN (Apr. 18, 2014), <http://www.cnn.com/2014/04/18/justice/murder-charge-in-911-call/> (discussing the story of Kristine Kirk, a wife killed by her husband after he consumed marijuana-infused candy).

125. *Lawsuit: Pot Candy Handed Out Without Knowledge*, CBS DENV. (Aug. 7, 2014), <http://denver.cbslocal.com/2014/08/07/lawsuit-pot-candy-handed-out-without-knowledge/>.

126. Gliha & Fang, *supra* note 118.

127. H.R. 14-1366, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014), available at http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont/4882145846DC62CE87257C98005D4C5D?Open&file=1366_01.pdf.

128. See 1 COLO. CODE REGS. § 212-2 (2014), available at <http://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=5890&fileName=1%20CCR%20212-2>; see also Luke Runyon, *Colorado's Pot Brownies Now Come With Instructions*, NAT'L PUB. RADIO (Aug. 26, 2014),

out of meetings between health officials, regulators, industry representatives, and activists on both sides of the legalization issue.¹²⁹ With regard to Edibles, the Emergency Rules require: (1) serving sizes be limited to 10 milligrams of THC; (2) manufacturers to include warning labels; and (3) products be packaged in child-resistant packaging by the manufacturer.¹³⁰ While a single package of Edibles can contain up to 100 milligrams of THC, the product must be easily broken off into a single serving size piece of ten milligrams or less.¹³¹ Manufacturers are also required to put single-serving Edibles into child-resistant packaging before shipping the products to stores.¹³² Manufacturers can no longer rely on stores to provide the child-resistant packaging.¹³³

In addition to the items above, the Emergency Rules prohibit the sale of Edibles unless the product is “shaped, stamped, colored, or otherwise marked with a standard symbol indicating that it contains marijuana.”¹³⁴ Furthermore, the bill prohibited the production of Edibles in which the underlying food product is primarily marketed to children or the use of any food product that could reasonably be confused with a trademarked food product.¹³⁵ Colorado House Bill 1366 is the first of many bills expected to be considered by the Colorado legislature as Colorado continues to refine its regulations.¹³⁶ Representative Jonathan Singer stated that “it’s a wide-open game starting January 7 [2015], when [the legislature] get[s] back in session.”¹³⁷

Although the Emergency Rules have significantly changed the production and sale of Edibles, many individuals feel that the additional

<http://www.npr.org/blogs/thesalt/2014/08/26/343432131/colorados-pot-brownies-have-a-new-ingredient-warning-labels>.

129. Eric Gorski, *Colorado’s Marijuana Edible Manufacturers Face Tougher Rules*, DENV. POST (July 31, 2014), http://www.denverpost.com/news/ci_26254614/colorado-marijuana-edibles-manufacturers-face-tougher-rules.

130. 1 COLO. CODE REGS. § 212-2, *supra* note 128.

131. Gorski, *supra* note 129.

132. *See* 1 COLO. CODE REGS. § 212-2, *supra* note 128 (stating that a single serving of Edibles means “an edible retail marijuana product unit for sale to consumers containing no more than 10 mg of active THC”).

133. *Id.*

134. H.R. 14-1366, *supra* note 127.

135. *Id.*

136. John Ingold, *Colorado Marijuana Edibles Rules Group Adjourns Without a Decision*, DENV. POST (Nov. 17, 2014),

http://www.denverpost.com/news/ci_26955322/colorado-marijuana-edibles-rules-group-adjourns-without-decision.

137. *Id.*

regulations will not be enough to ensure consumer safety.¹³⁸ Colorado's Marijuana Enforcement Director, Lewis Koski, stated that adding more labels onto packaging of Edibles is not likely to increase safety.¹³⁹ Even Governor John Hickenlooper has stated if he "could've waved a wand the day after the election [in November 2012], [he] would've reversed the election and said, 'This was a bad idea.'"¹⁴⁰

III. POLICY RECOMMENDATIONS TO ENSURE CONSUMER SAFETY

States have an obligation to ensure the safety of their citizens. As additional states legalize recreational marijuana, they too will be faced with implementing regulations that ensure the safety of adult consumers of Edibles by mitigating the risk of overconsumption.¹⁴¹ State regulators can look to the regulations Colorado has imposed, as well as regulations currently under consideration.¹⁴² In addition, states should consider one or more of the following three additional regulations: (1) limitation of the types of Edibles available to consumers; (2) limitation of the sale of Edibles to residents of the state; and (3) the inclusion of a mandatory educational component at the point-of-sale of Edibles.

A. Limiting the Types of Edible Marijuana Available to Consumers

To mitigate the risk of overconsumption of Edibles among adults, states should create regulations that limit the types of Edibles sold. While Colorado does not currently limit the types of Edibles that are available, some groups are calling for a limitation of the types of Edibles available.¹⁴³ Colorado Department of Public Health and Environment ("CDPHE") officials want to go beyond the Emergency Rules and ban many forms of Edibles, including brownies, cookies, and most candies.¹⁴⁴ The CDPHE's recommendation would limit the legal sale of pot-infused food to those orally

138. See *Colorado Wants Most Edible Marijuana Banned*, CBS NEWS (Oct. 21, 2014), <http://www.cbsnews.com/news/colorado-wants-most-edible-marijuana-banned/>.

139. Runyon, *supra* note 128.

140. Kevin Cirilli, *Governor: Legalizing Pot Was Bad Idea*, THE HILL (Jan. 23, 2015), <http://thehill.com/policy/finance/230511-colorado-governor-legalizing-pot-was-bad-idea>.

141. Hilary Bricken, *Cannabis Edibles: Fear, Regulation, Data and Maureen Dowd*, CANNA LAW BLOG (Dec. 3, 2014), <http://www.cannalawblog.com/cannabis-edibles-fear-regulation-data-and-maureen-dowd/>.

142. *Id.*

143. *Colorado Wants Most Edible Marijuana Banned*, *supra* note 138.

144. *Id.*

absorbed into the blood stream, such as lozenges and some liquids.¹⁴⁵ While the CDPHE's recommendations would take most forms of Edibles off the shelves, the final decision about Edibles would ultimately be made by the Department of Revenue's Marijuana Enforcement Division.¹⁴⁶

Other states have already limited the types of Edibles available for purchase.¹⁴⁷ Washington, which legalized recreational marijuana at the same time as Colorado, limits the food products that can be infused with marijuana.¹⁴⁸ Washington's edible product manufacturers must be certified by the Washington State Liquor Control Board (the "WSLCB") or its vendor as meeting the Board's requirements before the WSLCB will conduct any necessary quality assurance testing.¹⁴⁹ These requirements are documented in a nine page checklist that includes necessary organization, human resources, facilities, and testing requirements.¹⁵⁰

After the manufacturer is certified by the WSLCB, the manufacturer must obtain approval from the WSLCB for any marijuana-infused product, label, and package.¹⁵¹ To obtain this approval, the manufacturer must submit a picture of the product, labeling, and packaging to the WSLCB.¹⁵² The WSLCB has a list of food items that cannot be infused with marijuana¹⁵³ and has banned any Edible that is especially attractive to children.¹⁵⁴ Edibles must also be regularly tested to ensure that infused cannabis-based compounds, such as THC, are uniformly spread throughout the product.¹⁵⁵ These regulations have led to a strict control of Edibles in Washington and, arguably, increased safety for consumers.

145. *Id.*

146. *Id.*

147. *Marijuana Edibles in Washington State: The NEW Rules You NEED to Know*, CANNA LAW BLOG (June 26, 2014), <http://www.cannalawblog.com/marijuana-edibles-in-washington-state/>.

148. *Id.*; Ella Peterson, *Marijuana Legalization: Colorado and Washington State Grapple With Implementing New Laws*, POL'Y MIC (Jan. 10, 2013), <http://mic.com/articles/22459/marijuana-legalization-colorado-and-washington-state-grapple-with-implementing-new-laws#.kP3UiCm1o>.

149. *Washington State Liquor Control Board (WSLCB) Certification Good Laboratory Practice (GLP) Checklist – Version 1.0*, WASH. STATE LIQUOR CONTROL BD., http://liq.wa.gov/publications/Marijuana/1-502/Good_Laboratory_Practice_Certification_Checklist.pdf (last visited Nov. 16, 2015).

150. *Id.*

151. WASH. ADMIN. CODE § 314-55-077 (2015).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

B. Limiting the Sale of Edible Marijuana to State Residents

When it implemented the Emergency Rules effective November 1, 2014, Colorado limited the amount of marijuana that can be sold to out-of-state residents to a quarter ounce of marijuana or its equivalent in marijuana-infused products in a single-sale transaction.¹⁵⁶ Comparatively, Colorado residents may purchase one ounce of marijuana or its equivalent in a single transaction.¹⁵⁷ A resident must provide a valid government-issued picture identification card at the time of purchase.¹⁵⁸

Colorado's regulations limiting the quantity of product that can be purchased in a single transaction were created to deter non-residents from "smurfing."¹⁵⁹ "Smurfing" occurs when one person goes to multiple stores and accumulates marijuana to sell on the black market or in neighboring states.¹⁶⁰ While the deterrence of "smurfing" was the primary goal of Colorado lawmakers, the regulation limiting the sale of Edibles to out-of-state residents also, perhaps, ensures that uneducated consumers do not have access to a dangerous amount of marijuana.

When determining new regulations regarding recreational marijuana, states should implement a regulation prohibiting the sale of Edibles to non-residents. Prohibiting the sale of Edibles to non-residents would not only help ensure that Edibles do not reach other states, but also ensure that inexperienced, uninformed, out-of-state consumers are not at risk for overconsumption.

While eliminating the sale of Edibles has tremendous merit, it should be acknowledged that an argument might be made that doing so would violate the Constitution.¹⁶¹ Facially, an action to ban the sale of Edibles to out-of-state residents could violate the Privileges and Immunities Clause of Article IV, Section 2 ("P&I Clause").¹⁶²

While facially a regulation that bans the sale of Edibles to out-of-state residents seems to violate the P&I Clause, an argument can be made that the P&I Clause does not guarantee such a right. The P&I Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of

156. 1 COLO. CODE REGS. § 212-2, *supra* note 128.

157. *Id.*

158. *Id.*

159. John Ingold, *Colorado Marijuana Task Force Recommends Allowing Pot Tourism*, DENV. POST (Feb. 19, 2013), http://www.denverpost.com/breakingnews/ci_22623779/colorado-marijuana-task-force-recommends-allowing-pot-tourism.

160. *Id.*

161. *See* Denning, *supra* note 94, at 2284.

162. *Id.*

Citizens in the several States.”¹⁶³ The P&I Clause was described by Alexander Hamilton as “the basis of the Union,”¹⁶⁴ and the Clause was intended to promote political union by prohibiting states’ discrimination against outsiders.¹⁶⁵ Today, the Court prohibits state discrimination against nonresidents unless there is a “substantial reason” for the discrimination and the discrimination itself is “substantially related” to the reason for the discriminatory treatment.¹⁶⁶ The P&I Clause only guarantees “fundamental rights.”¹⁶⁷

The ability to purchase Edibles is not a fundamental right.¹⁶⁸ Two Supreme Court cases support this premise.¹⁶⁹ First, in *Baldwin v. Fish and Game Commission*, the Court rejected a P&I Clause challenge to a Montana law, which required out of state residents to pay more for elk-hunting licenses.¹⁷⁰ This holding was later affirmed in *McBurney v. Young*.¹⁷¹ *McBurney* asserted Virginia’s Freedom of Information Act (“FOIA”), which made public records available only to residents of the state, was constitutional.¹⁷² The Court held that the privileges and immunities protected by the P&I Clause must be fundamental, and the P&I Clause “does not mean . . . that ‘state citizenship or residency may never be used by a State to distinguish among persons.’”¹⁷³ The Court further observed that “FOIA laws are of relatively recent vintage” and however beneficial they are, “[t]here is no contention that the Nation’s unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.”¹⁷⁴

The holdings of *Baldwin* and *McBurney* support the proposition that the purchase of Edibles is not a fundamental right for two reasons.¹⁷⁵ First, as indicated by its name, the use of “recreational” Edibles, like elk hunting

163. U.S. CONST. art. IV, § 2, cl. 1.

164. THE FEDERALIST No. 80 (Alexander Hamilton).

165. Denning, *supra* note 94, at 2284.

166. See Denning, *supra* note 94, at 2284. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998).

167. Denning, *supra* note 94, at 2284.

168. See *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 388 (1978) (stating that the ability to obtain an elk hunting permit is not a fundamental right), and *McBurney v. Young*, 133 S. Ct. 1709, 1711 (2013) (stating that access to public information under Virginia’s Freedom of Information Act is not a fundamental right).

169. See *Baldwin*, 436 U.S. at 388; *McBurney*, 133 S. Ct. at 1711.

170. *Baldwin*, 436 U.S. at 388.

171. See *McBurney*, 133 S. Ct. at 1714-15.

172. *Id.* at 1709.

173. *Id.* at 1714.

174. *Id.* at 1719.

175. Denning, *supra* note 94, at 2286.

in *Baldwin* and access to public records in *McBurney*, is not an activity that is essential to the maintenance of the Union.¹⁷⁶ Second, the Court in *McBurney* seemed to indicate that a fundamental right inquiry is, at least in part, a historical inquiry.¹⁷⁷ Therefore, an argument can be made that equal access to legal marijuana was not historically viewed as a fundamental right and, therefore, it cannot be currently viewed as a fundamental right under the P&I Clause.¹⁷⁸ Consequently, states could constitutionally ban the sale of Edibles to out-of-state residents.

C. *Inclusion of an Educational Component at the Point-of-Sale*

Finally, states implementing regulations over recreational Edibles should include an educational component to be implemented at the point-of-sale. The marijuana industry in Colorado was created “for people who smoked frequently,” and the industry “needs to learn how to educate new users in the market.”¹⁷⁹ This regulation, requiring education at the point-of-sale, would focus on uninformed, inexperienced consumers who would not have regular access to ongoing state-sponsored educational campaigns. Ron Kammerzell, Senior Director of Enforcement at Colorado Department of Revenue,¹⁸⁰ stated:

The average consumer for medical marijuana is extremely knowledgeable about the effects of THC . . . , the effects of how edible products interact with their bodies. . . . Some of the edibles that are produced are a cookie. Well, the cookie might have 60 to 100 milligrams of THC in it. For a retail user who doesn’t know about the effects of THC ingestion, he views that cookie as if anyone would a cookie: as a single serving.¹⁸¹

Requiring an educational component at the point-of-sale would ensure that uninformed, inexperienced consumers would have access to some form of education before they purchase and consume an Edible.

176. *Id.*

177. *Id.*

178. *Id.*

179. Dowd, *supra* note 4.

180. Lori Jane Gliha, *Colorado Cannabis Czar: We Didn’t Anticipate Problems With Pot Edibles*, ALJAZEERA AM. (Jan. 7, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/1/7/colorado-cannabisczarwedidntanticipateproblemswithpotedibles.html> (stating that Ron Kammerzell was one of the people charged with implementing legalized marijuana retail sales in Colorado).

181. *Id.*

Historically, education about marijuana has been focused on discouraging consumption of the product.¹⁸² Mason Tvert, spokesman for the Marijuana Policy Project, the nation's largest marijuana policy advocacy group, stated that "every campaign designed to educate the public about marijuana has relied on fear-mongering and insulting marijuana users."¹⁸³ The industry is specifically concerned with inexperienced consumers who are using Edibles.¹⁸⁴ The Colorado state government's position concerning public education shifted after it became evident that Edibles are more popular than originally expected.¹⁸⁵ Policymakers have shifted from attempting to deter consumers to educating consumers.¹⁸⁶

Colorado launched its first public-education campaign, called the "Good to Know" campaign, in January 2015.¹⁸⁷ The campaign, paid for with recreational marijuana tax dollars, focuses on educating marijuana users about responsible use without alienating them.¹⁸⁸ The intended targets of this new campaign are adults and visitors to Colorado.¹⁸⁹ While one of the goals of the campaign is to educate visitors, there is no assurance that visitors or even all Colorado residents will see the ads on television or hear them on the radio. The only way to ensure out-of-state visitors or inexperienced residents are adequately educated is to provide the education at the point-of-sale.

Many individuals in the industry believe that the warning label present on the packaging of Edibles is adequate to educate consumers.¹⁹⁰ Originally, warning labels were not included or were not prominent on the package of Edibles.¹⁹¹ The lack of adequate warning labels was a concern to policymakers, and when they implemented the Emergency Rules, effective ten months after the initial sale of Edibles, they included a provision that requires warning labels be present on all Edibles.¹⁹² Some people, including

182. Kristen Wyatt, *Marijuana Ad Campaign Battles Stereotypes, Promotes Safe Use*, THE CANNABIST (Sep. 17, 2014), <http://www.thecannabist.co/2014/09/17/marijuana-industry-launching-ad-campaign-battling-stoner-stereotypes/19821/>.

183. *Id.*

184. *Id.*

185. *Id.*

186. John Ingold, *New Colorado Marijuana Public Education Campaign Takes Lighter Tone*, DENV. POST (Jan. 5, 2015), http://www.denverpost.com/news/ci_27262040/new-colorado-marijuana-public-education-campaign-takes-lighter.

187. *Id.*

188. *Id.*

189. *Id.*

190. FINLAW ET AL., *supra* note 95, at 58.

191. Dowd, *supra* note 4.

192. 1 COLO. CODE REGS. § 212-2, *supra* note 128.

Tripp Keber, CEO of Dixie Elixirs & Edibles, one of Colorado's largest edible product manufacturers, advocated for the same increased education that is being recommended in this paper.¹⁹³ Keber has stated that the increase in the amount of overconsumption of Edibles "represents . . . the immense need for additional consumer education. [A] first-time user of [a] cannabis-infused edible" should not be able to buy more than 5 milligrams of Edibles.¹⁹⁴

Ideally, the education at the point-of-sale would mirror the regulatory requirements currently existing for pharmacies. In the early 1990s, Congress began to recognize the improvement in patient care resulting from pharmacist consultations and, as a result, required all states to implement consulting requirements in order to receive funding for Medicaid patient prescriptions.¹⁹⁵ Congress expanded, both directly and indirectly, the duty of pharmacists through the Omnibus Budget Reconciliation Act of 1990 (OBRA-90).¹⁹⁶ Specifically, under OBRA-90, "the pharmacist is required to discuss with each person who presents a prescription matters that are significant in the pharmacist's professional judgment, such as special directions and precautions for preparing, administering and using the drug, common severe or adverse effects or interactions, and contraindications."¹⁹⁷ Many states have also implemented laws requiring pharmacists to provide counseling at the point-of-sale of pharmaceuticals.¹⁹⁸

While at a minimum, states should require education at the point-of-sale, states should also consider requiring customers to sign a statement indicating that they have received education about Edibles. Although not specifically for educational purposes, signatures are already required in the pharmaceutical industry for the sale of drugs containing pseudoephedrine.¹⁹⁹ The signature requirement was in response to the Combat Methamphetamine

193. Gliha, *supra* note 180.

194. *Id.*

195. Robert A. Gallagher, *Pennsylvania Pharmacists Should No Longer Assume That They Have No Duty To Warn*, 45 DUQ. L. REV. 59, 74 (2006).

196. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4401 (codified at 42 U.S.C. § 1396r-8 (1990)).

197. *Id.*; see also Gallagher, *supra* note 195, at 75.

198. See 49 PA. CODE § 27.19(d) (1994) (stating that pharmacist must offer patient counseling with each new prescription); MO. ANN. STAT. § 338.010 (West 2014) (stating that the practice of pharmacy includes "consultation with patients and other health care practitioners"). See also *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 435 (Tenn. 1994) (stating that a pharmacist has a duty to warn patients of the dangers of the prescription drug dispensed by the pharmacist).

199. *Legal Requirements for the Sale and Purchase of Drug Products Containing Pseudoephedrine, Ephedrine, and Phenylpropanolamine*, FDA, <http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm072423.htm> (last updated July 30, 2014).

Epidemic Act of 2005 and various state laws restricting the sale of products containing pseudoephedrine.²⁰⁰ In general, these laws require the seller to obtain and record the identity of the purchaser and enforce quantity restrictions.²⁰¹ The pharmaceutical customer can sign either a written or electronic log to complete the transaction.²⁰²

An educational requirement likely can be enforced with relative ease. Many states, under OBRA-90, have created regulations that include penalties, such as reprimands, license suspensions or revocations, and fines for not complying with the mandates of OBRA-90.²⁰³ Similar regulations can be created to ensure that marijuana dispensaries provide education to consumers. If marijuana dispensaries do not comply with the regulation requiring education, dispensaries could possibly face license suspensions or revocations, reprimands, or fines.

Dispensaries selling Edibles should provide education verbally to consumers at the time of sale. Further, the customer could be required to sign a statement that education was provided, similar to the signature verification obtained at a pharmacy prior to the distribution of medications containing pseudoephedrine. Although allowing the point-of-sale education to be delivered by marijuana dispensary employees does not provide absolute assurance that the education will be consistent or even accurate, it would allow for the consumer to individualize questions and for the education to be tailored to the individual consumer, something that would be absent with electronic delivery or preprinted education material. There can be no question that given the nature of the product, it is an obligation of both the state and the seller, both receiving significant financial benefits, to ensure that the customer is adequately informed about the unique characteristics and effects of Edibles.

IV. CONCLUSION

State governments have an obligation to enact regulations to protect the welfare of citizens. As more states legalize recreational marijuana, states will face problems similar to the problems that Colorado has faced. Based

200. See Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, § 711 (codified as amended in scattered sections of 21 U.S.C. (2006)); see also IND. CODE § 35-48-4-14.7 (2015); KAN. STAT. ANN. § 75-722 (West 2015); N.C. GEN. STAT. § 90-113.52 (2014).

201. Combat Methamphetamine Epidemic Act of 2005, *supra* note 200.

202. *PSE and Ephedrine Retailer Requirements and Purchase Limits*, IND. PROF'L LICENSING AGENCY, <http://www.in.gov/pla/3267.htm> (last visited Nov. 18, 2015).

203. Richard Hight Gastineau, *Drug Therapy Counseling: Whose Duty To Warn?*, 2 J. PHARMACY & L. 293, 322 (1993).

on the results of Colorado's initial regulations and subsequent emergency regulations, it is evident that the overconsumption of Edibles continues to be a major problem not yet adequately addressed. The overconsumption issue stems primarily from a lack of knowledge by the consumer of the characteristics and effects of Edibles. Although states should use Colorado's experience as a guide, to ensure that the risk of overconsumption of Edibles is minimized, more needs to be done. States should consider three additional options. First, states should limit the production and sale of Edibles to a limited number of products. Second, states should limit the sale of Edibles to residents of their respective state. Finally, states should require education about Edibles at the point-of-sale. These additional measures will maximize a state's ability to properly oversee the industry in an effort to protect the safety of citizens.