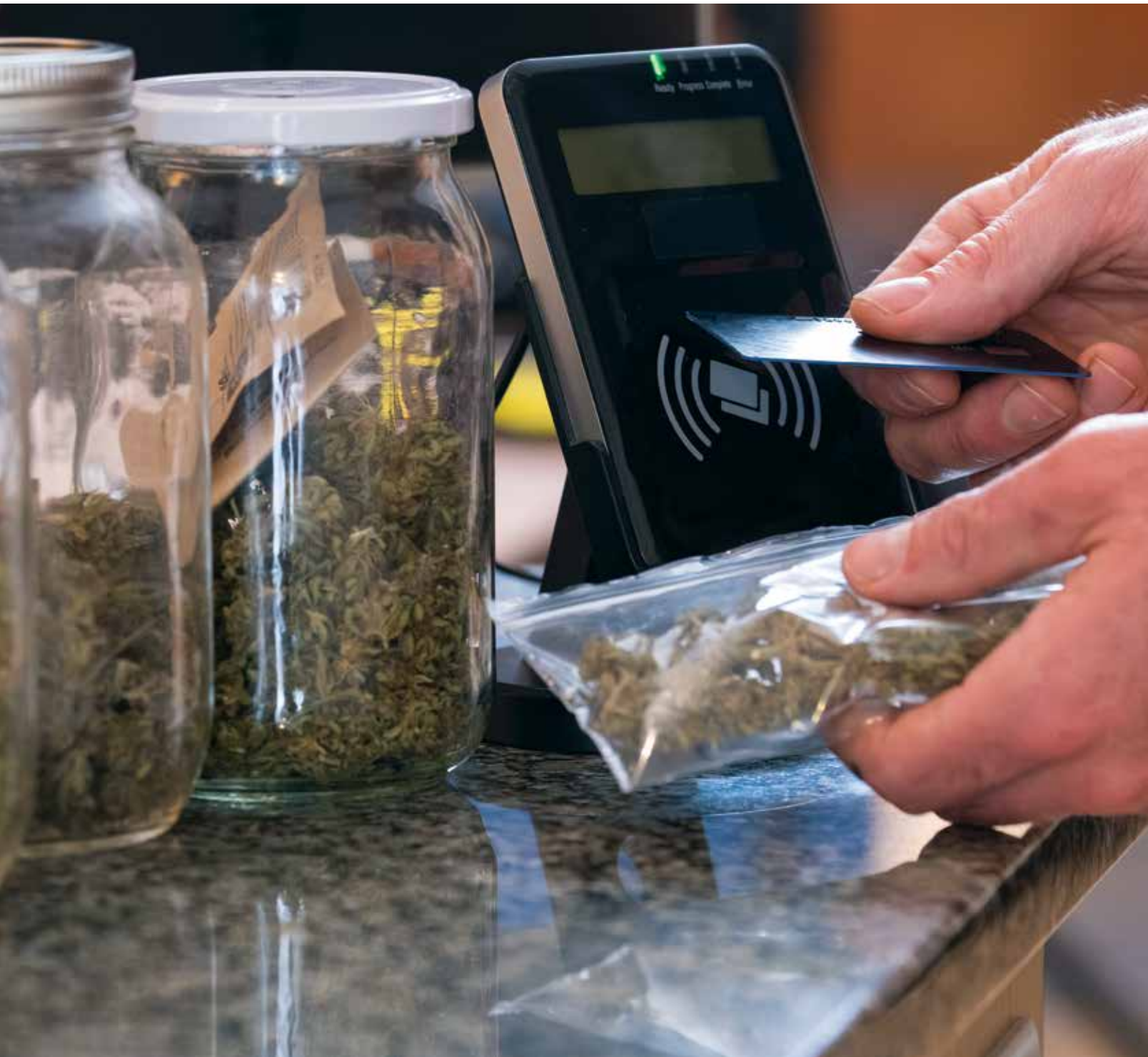
Will Regulated Weed Bring New Coke?

By Shyler Engel



At a Glance

With the heydays of marijuana activism likely over in Michigan after the legalization of marijuana, might "green" politics offer fertile ground in the larger debate over the proper role of the administrative state?

After surviving a sea change in marijuana policy, lawyers in this practice area may have to ready themselves for an entirely different debate. Recent events have some in the legal and policy circles ringing panic alarms over a creeping fear that the administrative state has supplanted the rule of law.

There are common constitutional challenges to the alleged plenary power enjoyed by regulatory agencies. One is that broad grants of authority to agencies amount to transferring legislative power to the executive branch. Another is that agencies have become powerful enough to act independently from the executive branch. Finally, some argue that modern judicial doctrines of deference violate due process. Antagonists usually blend policy arguments with their claims, arguing that agencies are prone to influence from special interests or that the supposed competency or expertise of regulators is overstated. Among this group, the consensus is that unless the legislative branch is required to delineate specifically its delegations of authority to agencies, the administrative state becomes an unaccountable social planner and representative democracy is a hollow sideshow.

With these challenges simmering, and on the heels of *Gundy v. US*,[1] professors Cass Sunstein and Adrian Vermeule released "Law and Leviathan: Redeeming the Administrative State,"[2] dismissing these fears as "New Coke," a comparison to Sir Edward Coke, the storied and preeminent 17th century jurist who is arguably the godfather of judicial review for his decision in the *Bonham* case.[3] To Sunstein and Vermeule, the powers currently enjoyed by the administrative state are not only constitutionally sound and pragmatically essential to public welfare, but rulemaking under the Administrative Procedures Act represents a significant achievement in modern public administration. According to Sunstein and Vermeule:

> "[t]hose who embrace the New Coke often speak for what they see as the original meaning of the Constitution…These contemporary fears are clearly prompted by continuing rejection, in some quarters, of the New Deal itself."[4]

Indeed, debates over the institution trace back to Roscoe Pound, who gained notoriety in the early 20th century by arguing common law had become inadequate — if not obsolete — to govern the complexity of social and economic affairs during the Industrial Revolution.[5] However, Pound later abandoned his youthful ideals to a degree,[6] perhaps after serving on the Wickersham Commission formed by President Herbert Hoover during the waning years of Prohibition to study alcohol, policing, prisons, and the judiciary.[7] By 1931, Americans were fully engaged in the "wet" politics of Prohibition repeal and the promise of the New Deal; when the commission released its recommendations, they were met with public derision. As popular writer and Detroit native Daniel Okrent concludes in his *New York Times* bestseller "Last Call: The Rise and Fall of Prohibition," "there were several reasons why the ideological coloration of the national Democrats began to change so rapidly starting in 1928, but a critical one was rooted in the (presidential) campaign of Al Smith (*Ed. Smith, a four-term governor of New York, was staunchly anti-Prohibition.*) By openly waving the 'wet' flag, a man who had emerged from the nation's most notorious machine had initiated the radical reinvention of his soon-to-be-dominant party."[8]

Aside from an early hiccup in the prosecution of kosher poultry farmers in violation of New Deal economic regulation written and enforced by President Franklin D. Roosevelt in *A.L.A. Schechter Poultry Corp. v. United States*,[9] the Supreme Court has not invoked the nondelegation doctrine to strike down legislation and has over the following 80 years shaped the intelligible principle standard, requiring courts to defer to both an agency's interpretation of any ambiguity in an authorizing statute[10] and its interpretation of the regulation.[11] While they have no objection to the status of the doctrine, Sunstein and Vermeule structure "Law and Leviathan" not to defend the standard, but to offer a reconceptualization of jurisprudence demonstrating the functional role courts serve in erecting "surrogate safeguards" that shape the boundaries of administrative authority.[12]

"First best theories of constitutional law"

To Sunstein and Vermeule, the ideals of separation of powers are merely "first best theories of constitutional law" and modern practitioners must come to recognize that when courts

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review administrative action, it is to "find accommodations on which 'opposing social and political forces [may] come to rest.'"[13] They use as an example the *Gundy* case, where the Sex Offender Registration and Notification Act (SORNA) survived a nondelegation challenge to provisions authorizing the attorney general to "prescribe rules" and "specify the applicability" of those rules "as soon as feasible."[14] Justice Neil Gorsuch's sweeping dissent determined that SORNA had endowed the attorney general alone with power to both write and enforce a criminal code at his leisure, and that the majority opinion demonstrated the urgent need to return to upholding agency conduct only where Congress assigns executive responsibilities and legislative-like power is limited to filling in the minutiae of regulated areas.[15] In turn, Sunstein and Vermeule challenge readers to consider whether or how the outcome would be different if judicial review were limited to agency conduct challenged to be arbitrary and capricious under the Administrative Procedures Act[16] or whether administrative policy would lose its internal morality under legal philosopher Lon Fuller's eight precepts of a legitimate system of laws.[17]

This author suggests that these discussions offer high ground for appreciating the mushrooming political economy of regulated marijuana in Michigan. Sunstein and Vermeule may be right that the legislative branch has lost its place as the fulcrum for balancing social interests; outside of passing the Medical Marihuana Facilities Licensing Act[18] and criminalizing possession of marijuana in the cabin of an automobile — which was later invalidated by the Michigan Court of Appeals[19] — the state legislature has largely ignored the marijuana constituency since passing the Michigan Medical Marihuana Act (MMMA) in 2008. Perhaps having grown dissatisfied with legislative inaction and the courts' narrow construction of the MMMA, citizens initiated the Michigan Regulation and Taxation of Marihuana Act (MRTMA),[20] which passed by popular vote in 2018. This time, however, the statute delegated all authority "necessary to implement, administer, and enforce the Act" to an administrative agency.[21]

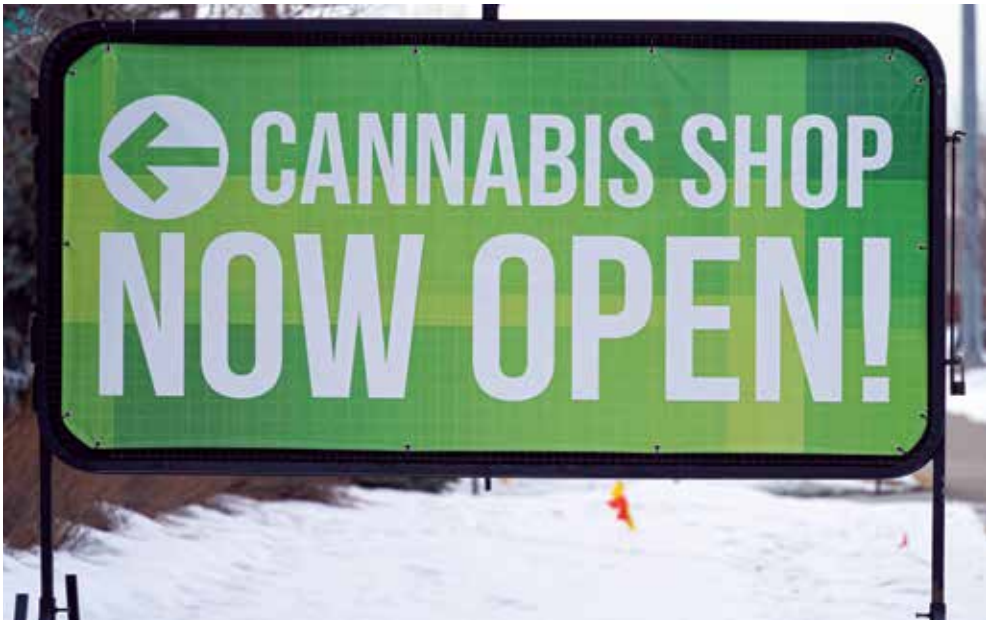
Reorganization of executive authority in Michigan

Shortly after taking office, Governor Gretchen Whitmer restructured the Department of Licensing and Regulatory Affairs (LARA) and created the Marijuana Regulatory Agency (MRA), consolidating all executive authority under the MMMA, MRTMA, and the Medical Marijuana Facilities Licensing Act (MMFLA) under one roof.[22]

Up until the reorganization, the public perception was that the administration of Whitmer's predecessor, Rick Snyder, preferred a "slow rollout,"[23] so removing the perceived bottleneck of the MMFLA board delighted most applicants. However, since the MRA took control over legalization,[24] the marketplace has become dominated by large-scale businesses. Although the language in the MRTMA permits the agency to "issu[e]… additional types or classes of state licenses to operate marijuana-related businesses, including licenses that authorize…*limited* cultivation (emphasis added),"[25] the MRA quickly created an excess grower license allowing the holder of five adult-use Class C grower licenses (a total of 10,000 plants) to expand limits by 2,000 plants for every excess grower license attained without limit.[26] Even if MRTMA had been written to create a grassroots marketplace, courts under the present intelligible principle doctrine would be unlikely to challenge the MRA's economic regulations and policies.

After one full year of adult-use marijuana, so-called legacy participants still hope for inclusion under the MRTMA's social equity component. Recently, the Racial Equity Advisory Workgroup (REAW) recommended that the MRA offer a microbusiness license allowing holders to keep up to 300 flowering plants, purchase plants directly from caregivers, and sell finished marijuana directly to adults.[27] Further, the REAW asks that the MRA create and oversee an intrastate equity-sales platform accessible only to a specified subset of participants.[28] These recommendations comport with the MRTMA's stated goal of curbing unlicensed activity, but are contrary to the chosen mood of legalization by the MRA thus far.

But the MRA may have no choice should it seek to capture unlicensed revenues and collect tax receipts. Under the dynamics of legalization and regulations created by the agency, the market has never been better for most unlicensed participants. Consider that every residence is authorized by the MRTMA's plain statutory language to grow 12 marijuana plants for adult use and formerly suspicious conduct likely no longer meets probable cause to attain a search warrant.[29] Moreover, criminal investigations and prosecutions virtually stopped after LARA began specifically allowing licensed facilities to source marijuana directly from medical marijuana caregivers[30] even though courts have routinely held that caregivers' transfer of marijuana to anyone other than their patients is illegal.[31] While this practice ended late last year, this is precisely the space the REAW would like to fill with microbusiness



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licensees and the approximately 30,000 registered caregivers under the MMMA.[32]

While there are many unresolved issues of law, a significant unknown is when criminal conduct should be prosecuted under the felony provisions of the Michigan Public Health Code or the significantly weaker penalties of the MRTMA. With the unlicensed marijuana market likely comparably sized to the regulated market and with the formidable competition posed to new entrants by the sheer scale of excess growers created by the MRA, many actors have likely opted to continue taking their chances with law enforcement and local courts. After all, becoming licensed doesn't immunize individuals from being criminally prosecuted. Most in the industry know the saga of Sweet Leaf — once the largest licensed dispensary chain in Colorado — that was shuttered and had its 26 state licenses revoked after it was caught allowing customers to exceed daily purchase limits.[33] Roughly a dozen Sweet Leaf employees were criminally charged, and its owners were sentenced to a year in prison on racketeering convictions.

As the MRA continues to work toward finding a viable balance between diverse actors and their interests, the more familiar New Coke story may offer more insight. In 1985, after the Coca-Cola Co. altered the formula of its flagship soda and introduced the iteration as New Coke, the company received thousands of letters criticizing the decision.[34] The phrase "the worst idea since New Coke" entered the lexicon.[35] Within three months of New Coke's introduction, the company reintroduced the original formula as Coca-Cola Classic.[36]

While it's likely too soon to look at the $3 billion sales projections often cited by regulated marijuana advocates and the MRA[37] with skepticism, even after marijuana businesses were declared essential under Gov. Whitmer's COVID-19 orders and legalized states reported marijuana-related windfalls under COVID-19 policies, revenues in Michigan fell just short of $1 billion.[38] While the regulated market includes both medical and adult use, Michigan's Department of Treasury, which had anticipated $97.5 million in marijuana-related tax revenues in 2020,[39] was only able to collect $31 million through the 10 percent adult-use marijuana excise tax.[40]

Meanwhile, appellate courts continue to narrow the scope of medical marijuana caregiver protections afforded under the express-initiated language of the MMMA. Last year, the Michigan Supreme Court published *DeRuiter v. Township of Byron* to the delight of attorneys who have long argued that municipalities have had significant authority over the conduct of medical caregivers through their traditional powers of zoning and use standards despite immunity protections under the MMMA.[41] And earlier this year in *Township of York v. Miller*, the Michigan Court of Appeals reversed a declaratory judgment for a caregiver against a municipality and upheld a provision in a municipal ordinance banning outdoor growing despite language in the MMMA that plainly contemplates outdoor growing.[42]

Conclusion

While the days of marijuana activism are likely over in Michigan, the politics and policy of marijuana is still young. As the *Gundy* dissent holds the interest of those questioning the role of administrative government, they may not need look to

the century-old transformative policies of the New Deal, but today's evolving marijuana law and regulation. Should the MRA only serve up a New Coke strain of marijuana policy and licensed enterprise starts to noticeably sag, it seems likely that calls for the Michigan legislature to become more involved in the state's marijuana marketplace will ensue. Indeed, the MRA is currently circulating drafts of an expansive bill that would codify its authority, consolidate the recreational and medical markets, expand funding for licensing substance-abuse disorder and law-enforcement programs, and more. Should the lessons of "wet" politics hold, the future of administrative power may rest in "green" politics. Accordingly, those concerned with the role of the administrate state would do well to acquaint themselves with the strange world of marijuana policy. ■

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ENDNOTES

1. *Gundy v US*, 139 S Ct 2116; 204 L Ed 2d 522 (2019).
2. Sunstein & Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge: Belknap Press, 2020).
3. *Bonham v College of Physicians*, 8 Co Rep 107a; 77 Eng Rep 638 (1610), holding "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void."
4. *Law and Leviathan*, p 20.
5. Pound, *The Spirit of the Common Law* (Francestown: Marshall Jones Co, 1921), available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1000&context=lawfacpub> [https://perma.cc/3489-ZDH8]. All websites cited in this article were accessed May 31, 2021.
6. *Roscoe Pound of Harvard Dies; Headed Law School 20 Years; His 'Social Interests' Theory Influenced the New Deal — Scholar in Many Fields*, The New York Times (July 2, 1964), available at <https://www.nytimes.com/1964/07/02/archives/roscoe-pound-of-harvard-dies-headed-law-school-20-years-his-social.html> [https://perma.cc/ZL4X-JKHE].
7. Hanson, *Wickersham Commission: Pro or Anti-Repeal? You Decide*, Alcohol Problems and Solutions (2021) <https://www.alcoholproblemsandsolutions.org/wickersham-commission-pro-or-anti-repeal/> [https://perma.cc/423R-PCJH].
8. Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2011), p 339.
9. *Schechter Poultry Corp v United States*, 295 US 495; 55 S Ct 837; 79 L Ed 1570 (1935).
10. *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).
11. *Auer v Robbins*, 519 US 452; 117 S Ct 905; 137 L Ed 2d 79 (1997).
12. Law and Leviathan, p 125.
13. *Id.* at 118–119.
14. *Gundy v US*, 139 S Ct at 2126-29.
15. *Id.* at 2137-43 (Gorsuch, J., dissenting).
16. *Law and Leviathan*, pp 108–109.
17. For the sake of brevity, Fuller's eight precepts are abbreviated: 1) rules are made, 2) rules are transparent, 3) rules can be relied upon, 4) rules can be understood, 5) rules do not contradict one another, 6) rules are not impossible to follow, 7) rules are not frequently changed, and 8) rules are administered by authority as written. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), p 39.
18. MCL 333.27101 *et seq.*
19. *People v Latz*, 318 Mich App 380, 898 NW2d 229 (2016).
20. MCL 333.27951 *et seq.*
21. MCL 333.27957(1)(a).
22. Executive Order No. 2019-07.
23. Gabriel, *Michigan's slow rollout for legal marijuana prompts questions*, Metro Times (2019) <https://www.metrotimes.com/detroit/michigans-slow-rollout-for-legal-marijuana-prompts-questions/Content?oid=19440187> [https://perma.cc/LK29-S2EL].
24. *City of Arlington v FEC*, 569 US 290, 314; 133 S Ct 1863; 185 L Ed 2d 941 (2013), Chief Justice Roberts stating, that congressional delegations to agencies are often ambiguous — expressing "a mood rather than a message."
25. MCL 333.27958(2)(a)(i).
26. Mich Admin Code, R 420.23.
27. *Racial Equity Advisory Workgroup Final Recommendations*, Mich Marijuana Regulatory Agency (Jan 21, 2021), p 7 <https://www.michigan.gov/documents/mra/MRA_REAWG_Report_713275_7.pdf> [https://perma.cc/88SN-AN4Z].
28. *Id.* at 14.
29. MCL 333.27955(1)(b).
30. *Resolution on Marijuana Product Access for Patients*, Medical Marihuana Licensing Board, Mich Dep't of Licensing and Regulatory Affairs (March 21, 2019), available at <https://www.michigan.gov/documents/lara/Product_Access_for_Patients_640352_7.pdf> [https://perma.cc/4ND7-YNV2].
31. *People v Tuttle*, 304 Mich App 72, 80; 850 NW 2nd 484 (2014).
32. Carmody, *Michigan completes phaseout of caregiver products in marijuana retail market*, Michigan Radio/NPR (September 30, 2020) <https://www.michiganradio.org/post/michigan-completes-phaseout-caregiver-products-marijuana-retail-market> [https://perma.cc/KV7R-CQ5Q].
33. Schaneman, *The inside story of how regulators took down a successful marijuana company*, MjBizDaily (April 4, 2021) <https://mjbizdaily.com/how-regulators-took-down-sweet-leaf-marijuana-retail-chain/> [https://perma.cc/KGH4-CXW5].
34. *The Story of One of the Most Memorable Marketing Blunders Only: The History of New Coke*, The Coca-Cola Company <https://www.coca-colacompany.com/company/history/the-story-of-one-of-the-most-memorable-marketing-blunders-ever> [https://perma.cc/72FR-6SXR]
35. *Id.*
36. *Id.*
37. *Id.* at 7. Knudson & Miller, *The Market for and Economic Impact of the Adult-Use Recreational Marijuana Industry in Michigan*, Product Center Food-Ag-Bio, Center for Economic Analysis, Michigan State University, (March 2020), available at <https://www.mpp.org/assets/pdf/issues/economics/Michigan_State_University_Product_Center_Food-Ag-Bio_Marijuana_Study_684840_7.pdf> [https://perma.cc/G9J8-NPRA].
38. Buti, *Special Report: Marijuana industry on pace to reach about $1 billion in sales*, Up North Live: 74 (November 4, 2020) <https://upnorthlive.com/news/local/special-report-marijuana-industry-on-pace-to-reach-about-1-billion-in-sales> [https://perma.cc/7CS4-3UQE].
39. *The Market for and Economic Impact*, p 7.
40. *Treasury: First Adult-Use Marijuana Payments Distributed to Michigan Municipalities, Counties*, Mich Dep't of Treasury (March 4, 2021) <https://www.michigan.gov/treasury/0,4679,7-121-1755_1963-553542--,00.html> [https://perma.cc/2GRB-77JM].
41. *DeRuiter v Township of Byron*, 505 Mich 130; 949 NW2d 91 (2020).
42. *Charter Twp of York v Donald Miller*, unpublished opinion of the Court of Appeals, issued January 28, 2021 (Docket No. 335344).