ONE TOKE TOO FAR: THE DEMISE OF THE DORMANT COMMERCE CLAUSE'S EXTRATERRITORIALITY DOCTRINE THREATENS THE MARIJUANA-LEGALIZATION EXPERIMENT

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Abstract: This Article argues that the pending feuds between neighboring states over marijuana decriminalization demonstrate the need for a strict doctrine limiting a state's regulatory authority to its own borders. Precedent recognizes that the dormant Commerce Clause ("DCC") "precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." This prohibition protects "the autonomy of the individual States within their respective spheres" by dictating that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted." But this principle was called into doubt in July 2015 by the U.S. Court of Appeals for the Tenth Circuit in an opinion by Judge (now Justice) Neil Gorsuch, which concluded that this "most dormant doctrine in [DCC] jurisprudence" had withered and died from nonuse. The Tenth Circuit's conclusion, which approved Colorado's purported direct regulation of coal-fired power generation in Nebraska, ironically coincided with Nebraska's attempt to enjoin Colorado's pot-friendly laws. Nebraska contends that Colorado's commercial pot market allows marijuana to "flow . . . into [Nebraska], undermining [its] own marijuana ban[], draining [its] treasur[y], and placing stress on [its] criminal justice system[]." While Colorado celebrated its newfound power to impose its legislative judgments on Nebraskans, the festivities might be short-lived. Colorado failed to recognize the impact the extraterritorial doctrine's apparent demise may have on its own marijuana-legalization experiment. If Colorado is empowered to regulate coal burning in Nebraska because of its effects in Colorado, what prevents Nebraska from projecting its own laws across the border to regulate Colorado marijuana transactions that affect a substantial number of Nebraskans?

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> *"The intimate union of [the] states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us . . . to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations."*[1]

INTRODUCTION

Federalism is, as a mentor of mine once observed, a "glass . . . either half empty or half full, depending on the viewer's standpoint."[2] Outside the limited bounds of "fundamental rights"—which the Constitution insulates from government intrusion[3]—states enjoy wide latitude to criminalize conduct that offends the moral sensibilities of their respective polities.[4] Recent conflicts between Colorado and its more socially conservative neighbors over marijuana decriminalization put this dynamic on display for all to see.[5] Indeed, I am no stranger to this feud.[6]

The Constitution "does not recognize a fundamental right to use . . . marijuana"—not even "to alleviate excruciating pain and human suffering."[7] But our charter demarks the floor, not the ceiling, of individual liberty. As Gerald Neuman noted, "[f]ederalism permits the majority in each state to choose how far above the constitutional minimum the exercise of fundamental rights will extend locally."[8] The states, as diverse and distinct political communities, may exercise this discretion in myriad ways. "Some states will afford more freedom than the mean; others will afford less than the mean. All states, in making these

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[1] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 590 (1839).

[2] Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 314 (1987).

[3] Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (A state law that "interferes with the exercise of a fundamental right" must be invalidated unless it can survive strict scrutiny).

[4] *See* Vacco v. Quill, 521 U.S. 793, 799–800 (1997) (upholding a state law prohibiting assisted suicide because it "neither infringe[d upon any] fundamental rights nor involve[d any] suspect classifications" and thus was "entitled to a strong presumption of validity").

[5] *See* Kirk Siegler, *Nebraska Says Colorado Pot Isn't Staying Across the Border*, NPR (Feb. 3, 2015), http://www.npr.org/2015/02/03/382646498/nebraska-says-colorado-pot-isnt-staying-on-its-side-of-the-border [https://perma.cc/8ETT-6R6X].

[6] *See* Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1837–43 (2015) (arguing that Colorado's wide-open recreational marijuana market has created a transboundary nuisance under federal common law and Colorado should be required to share some of the proceeds of its experiment with its neighbors to offset cross-border harm it causes).

[7] Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007).

[8] Neuman, *supra* note 2, at 314; *accord* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 974 (2002).

choices, will be exercising the independently valued freedom of local self-determination within their respective spheres."[9]

This dichotomy has long been viewed as one of federalism's great virtues. As one commentator noted just over a decade ago, "When citizens can choose among and compare the virtues of the permission of assisted suicide in Oregon, covenant marriage in Louisiana, . . . and same-sex unions in Vermont, we are likely to have a society that is morally richer, practically freer, and personally more fulfilling . . . ."[10] And sometimes—as the Supreme Court's recent recognition that the Fourteenth Amendment endows same-sex couples with a fundamental right to marry—such state-level experiments can shed light upon "unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[11]

The ultimate embrace of same-sex marriage by the Court (and the court of public opinion)[12]—unthinkable when Vermont made the then-ground-breaking decision to recognize civil unions in 2000[13]—demonstrates the merits of Brandeisian experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[14] But sometimes one state's "experiment" produces harmful side-effects that extend beyond its borders. North Dakota's lax regulation of its coal-heavy power industry produces pollution that falls upon neighboring Minnesota.[15] Likewise, Colorado's embrace of a wide-open commercial marijuana market produces harm that extends well beyond its borders.[16]

Reasonable minds can differ over whether marijuana's negative externalities justify the costs of its prohibition. But fanciful assertions that pot is an

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[9] Neuman, *supra* note 2, at 314.

[10] Kreimer, *supra* note 8, at 974.

[11] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

[12] In 2001, fifty-seven percent of Americans opposed same-sex marriage. Pew Research Ctr., *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/ [https://perma.cc/WH8V-VAXC]. Today, only thirty-seven percent oppose it. *Id.*

[13] *See id.*

[14] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[15] *See* North Dakota v. Heydinger, 15 F. Supp. 3d 891, 897–98, 919 (D. Minn. 2014) (striking down Minnesota's purported direct regulation of coal-fired electrical generation in North Dakota as violative of the DCC). *But see* Robert D. Cheren, *Environmental Controversies "Between Two or More States"*, 31 PACE ENVTL. L. REV. 105, 188 (2014) (discussing how states, like Minnesota, should be able to invoke the Supreme Court's original jurisdiction to sue sister states for "emissions of air pollution from coal-fired" powered plants because such plants "significantly contribute, to substantial adverse effects on the health and welfare of citizens of the [plaintiff] State," and cause "damage to the State's natural resources and economy, and harm to the State's finances").

[16] *See infra* notes 17–22 and accompanying text (discussing some of the harmful effects of marijuana); *see also* DeVeaux & Mostad-Jensen, *supra* note 6, at 1855–59 (addressing transboundary spillover effects of Colorado's marijuana market).

unmitigated social good are pure fiction.[17] Marijuana abuse causes "long-lasting changes in brain function that can jeopardize educational, professional, and social achievements."[18] These changes can manifest themselves in "impairments in memory and attention," and "significant declines in IQ."[19] Though medical marijuana benefits many,[20] assertions that pot legalization is a free lunch—while sometimes taken at face value by the media[21]—enjoy no support in peer-reviewed scholarship or "accepta[nce] in the relevant scientific community."[22]

Although alcohol raises most of these same concerns,[23] the paradoxical treatment of the two vices does not alter the constitutional calculus. Marijuana

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[17] The National Organization for the Reform of Marijuana Laws ("NORML") has argued that though "Cannabis [use] . . . has a negative impact on decision time and trajectory," stoned drivers do not "represent a traffic safety risk" because marijuana consumption "leads to a more cautious style of driving." *Marijuana and Driving: A Review of the Scientific Evidence*, NORML, http://norml.org/library/item/marijuana-and-driving-a-review-of-the-scientific-evidence [https://perma.cc/AKN2-XRY2] (last visited Feb. 3, 2017).

[18] Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2225 (2014). "[I]maging studies" of regular marijuana users' brains reveal "decreased activity in prefrontal regions and reduced volumes in the hippocampus." *Id.* at 2220; *see also* Alan J. Budney et al., *Marijuana Dependence and Its Treatment*, 4 ADDICTION SCI. & CLINICAL PRAC. 4, 4 (2007) (observing that marijuana is addictive).

[19] Volkow et al., *supra* note 18, at 2220, 2221; *accord* ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 36 (2014); Madeline H. Meier et al., *Persistent Cannabis Users Show Neuropsychological Decline from Childhood to Midlife*, 109 PROC. NAT'L ACAD. SCI. U.S.A. E2657, E2661–E2662 (2012).

[20] *See* James D. Abrams, Note, *A Missed Opportunity: Medical Use of Marijuana Is Legally Defensible*, 31 CAP. U.L. REV. 883, 909 (2003) ("Those who would use marijuana for treatment for nausea and vomiting resulting from chemotherapy treatments or for combating the wasting associated with AIDS . . . cannot be considered marijuana abusers.").

[21] *See* Kim Chatelain, *Marijuana Might Help in Fight Against Ebola, Doctor Says in Paper Reported by Website*, NEW ORLEANS TIMES-PICAYUNE (Oct. 29, 2014), http://www.nola.com/health/index.ssf/2014/10/marijuana_might_help_in_fight.html [https://perma.cc/8KDE-YGT8] (suggesting that marijuana may cure Ebola); Matt Ferner & Nick Wing, *The 11 Stupidest Arguments Against Legalizing Marijuana*, HUFFINGTON POST (Apr. 20, 2014), http://www.huffingtonpost.com/2014/04/20/stupid-arguments-against-legalizing-marijuana_n_5175880.html [https://perma.cc/H7CZ-7G4C] (asserting that marijuana-legalization opponents have premised their position in part on fears that "[l]egalization will cause mass zombification"); Anneli Rufus, *Is Pot Good for Lungs? New Marijuana Study Adds to Health-Effects Debate*, DAILY BEAST (Jan. 14, 2012), http://www.thedailybeast.com/articles/2012/01/13/is-pot-good-for-lungs-new-marijuana-study-adds-to-health-effects-debate.html [https://perma.cc/5LEV-V43U] (suggesting that smoking marijuana may increase lung function); *Rick Simpson's Hemp-Oil Medicine*, HIGH TIMES (Nov. 13, 2013), http://web.archive.org/web/20131114074056/http://www.hightimes.com/read/rick-simpsons-hemp-oil-medicine (praising a "miraculous cannabis-oil medicine" said to cure skin cancer and cervical cancer).

[22] *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (internal quotation marks omitted).

[23] *See* Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 312 (2011) ("We are entitled to know how justice can really exist when adults who privately consume marijuana are criminals while adults who consume far more dangerous substances like alcohol and tobacco, even in public, are within their rights for reasons that are widely understood.").

prohibition triggers only the deferential rational-basis test.[24] Under this standard, a law must be sustained so long as it can "be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost."[25] Prohibition furthers the legitimate objective of mitigating the referenced harms associated with marijuana use. Thus, states are within their rights to outlaw the drug—as the majority have done.

But states cannot, choose between decriminalization and prohibition in a vacuum. Marijuana is the most lucrative cash crop in the United States.[26] The resulting "high demand for marijuana in the interstate market will draw" weed acquired in pot-friendly states "into that market" thereby having a "substantial effect on the supply and demand" of the drug in the black markets of prohibitionist states.[27] So how can states exercise their "freedom of local self-determination" to "afford more freedom than the mean" or "less than the mean" with regard to marijuana policy?[28] A state, like Colorado, that chooses to decriminalize the drug implicitly imposes its choice upon its neighbors, inhibiting their "freedom of local self-determination."[29] Conversely, if a prohibitionist state, like Nebraska, is able to quell marijuana decriminalization in Colorado, then it interferes with the latter's power to "afford more freedom than the mean."[30] Marijuana decriminalization, therefore, presents one of the most vexing federalism problems of the twenty-first century.[31]

This constitutional quandary came into sharp focus in December 2014 when Nebraska and Oklahoma sought to invoke the Supreme Court's original jurisdiction[32] to enjoin marijuana legalization in Colorado.[33] Their ill-fated

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[24] *See Raich*, 500 F.3d at 866.

[25] Bd. of Trs. of State University of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[26] Nitya Venkataraman, *Marijuana Called Top U.S. Cash Crop*, ABC NEWS (Dec. 18, 2006), http://abcnews.go.com/Business/story?id=2735017 [https://perma.cc/QB7A-G6MC] (reporting on a study finding that marijuana is the most profitable cash crop in the U.S.).

[27] Gonzales v. Raich, 545 U.S. 1, 19 (2005).

[28] Neuman, *supra* note 2, at 314.

[29] *See id.*

[30] *See id.*

[31] Using the Coase Theorem (which argues "that if transaction costs are eliminated, 'parties will negotiate the efficient solution to . . . nuisance problem[s]'") as a guide, Anne Mostad-Jensen and I have argued that marijuana spillover is analogous to pollution and that pot-friendly states should compensate their neighbors for harm caused by such spillover. DeVeaux & Mostad-Jensen, *supra* note 6, at 1840–43; *accord id.* at 1889–96 (suggesting that the Coase theorem could instruct courts on how to best address the cross-border market for drugs).

[32] The Constitution expressly endows the Supreme Court with "original jurisdiction" over "Controversies between two or more States." U.S. CONST. art. III, § 2. Congress has made the Court's jurisdiction over such cases "exclusive." 28 U.S.C. § 1251(a) (2012).

[33] *See* Complaint at 1, 28–29, Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (No. 144); Brief in Support of Motion for Leave to File Complaint at 4, *Nebraska*, 136 S. Ct. 1034 (2016) (No. 144); Reply Brief in Support of Motion for Leave to File Complaint at 3, *Nebraska*, 136 S. Ct. 1034 (No. 144).

complaint contended that "Colorado has created a dangerous gap in the federal drug control system," enabling marijuana to flow "into neighboring states, undermining [their] own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems."[34]

Nebraska's and Oklahoma's suit coincided with another paradigm-shattering change to the federalism covenant. In July 2015, the U.S. Court of Appeals for the Tenth Circuit[35] in *Energy and Environment Legal Institute v. Epel*—an opinion authored by Judge (now Justice) Neil Gorsuch—broke with nearly thirty years of precedent, positing that the Constitution generally permits a state to directly regulate commercial activities beyond its borders that produce substantial effects within the state.[36] The court opined that a trio of 1980s Supreme Court opinions which purport to hold that the dormant Commerce Clause ("DCC") "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state"[37] are no longer binding.[38]

The Tenth Circuit ironically upheld *Colorado*'s purported regulation of commercial transactions in *Nebraska*—laws aimed at curbing reliance on Nebraska's coal-fired power plants.[39] Labeling the extraterritoriality case law "the

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[34] Complaint, *supra* note 33, at 3–4. The Court refused to grant leave to the plaintiffs to file their complaint for unspecified reasons. Nebraska v. Colorado, 136 S. Ct. 1034, 1034 (2016). The Court likely rejected the case because of pleading mistakes. *See* DeVeaux & Mostad-Jensen, *supra* note 6, at 1160–66.

[35] Hereinafter, all references to "Circuit" refer to the U.S. Court of Appeals for the circuit referenced.

[36] Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173–75, 1177 (10th Cir. 2015).

[37] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)); *accord* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) ("[A] State may not impose . . . sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

[38] *Epel*, 793 F.3d at 1173–75. Other courts have questioned the viability of the DCC extraterritoriality doctrine, but all ultimately concluded that the challenged statutes only incidentally affected extraterritorial transactions and thus did not implicate the doctrine. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1104 (9th Cir. 2013); Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 948–49 (9th Cir. 2013); Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1179 (9th Cir. 2011); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 647 (6th Cir. 2010); IMS Health Inc. v. Mills, 616 F.3d 7, 29 (1st Cir. 2010), *vacated sub nom.* IMS Health Inc. v. Schneider, 564 U.S. 1051 (2011) (mem.). The *Epel* court upheld the challenged statute without deciding whether it directly regulated extraterritorial commerce, but instead concluded that it did not matter because the extraterritoriality doctrine is no longer binding. *Epel*, 793 F.3d at 1173–75. Thus, in *Epel*, the Tenth Circuit became the first to hold (rather than to opine in dicta) that the extraterritoriality doctrine is dead. *See id.*

[39] The Tenth Circuit upheld Colorado's purported direct regulation of power plants that generate electricity by burning coal in states exporting electrical power to Colorado. *Epel*, 793 F.3d at 1174–75. Colorado imports a significant amount of electricity from coal-fired plants in neighboring Nebraska. GOVERNOR'S ENERGY OFFICE , 2010 COLORADO UTILITIES REPORT 15 (2010).

most dormant doctrine in dormant commerce clause jurisprudence,"[40] Justice Gorsuch opined that the doctrine has died of atrophy, as the Supreme Court has not invoked it to invalidate a state law in more than a generation.[41] Joining a growing chorus of critics who argue that "the extraterritoriality doctrine . . . is a relic of the old world with no useful role to play in the new,"[42] the court posited that the DCC, in fact, only prohibits economic balkanization.[43] Thus, states may presumably enforce non-protectionist laws that directly regulate extraterritorial conduct if that conduct "affects a substantial number of in-state residents"[44]—at least as long as the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits."[45]

While Colorado celebrated its newfound power to impose its judgments on Nebraskans, the festivities might be short lived. Colorado failed to recognize the impact that the extraterritorial doctrine's apparent demise will have on its own marijuana-legalization experiment. Sauce for the goose is, after all, sauce for the gander.[46] What prevents Nebraska from regulating Colorado marijuana transactions affecting a substantial number of Nebraska residents?[47]

Part I of this Article provides background for the rise of the DCC's extraterritoriality doctrine, as well as its purported fall.[48] Part II argues that the in-

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[40] *Epel*, 793 F.3d at 1170.

[41] *See id.* at 1172. *But see BMW of N. Am.*, 517 U.S. at 572 (invoking the extraterritoriality doctrine to invalidate a jury verdict punishing the defendant for engaging in out-of-state conduct that was lawful in the states where it was conducted, but illegal in the forum state).

[42] Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 812 (6th Cir. 2012) (Sutton, J., concurring), *opinion amended and superseded*, 735 F.3d 362 (6th Cir. 2014). Many jurists and most scholars now agree that the DCC's extraterritoriality doctrine either is no longer good law or should be abandoned. *See Epel*, 793 F.3d at 1170; *Ass'n des Eleveurs*, 729 F.3d at 951; *Am. Beverage Ass'n*, 700 F.3d at 812; Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1008 (2013); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1908 (1987); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 863 (2002); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 115, 116; Recent Case, *Dormant Commerce Clause*—American Beverage Ass'n v. Snyder, *700 F.3d 796 (6th Cir. 2012)*, 126 HARV. L. REV. 2435, 2442 (2013).

[43] *See Epel*, 793 F.3d at 1173.

[44] *IMS Health Inc.*, 616 F.3d at 44; *see Epel*, 793 F.3d at 1170–73.

[45] *IMS Health Inc.*, 616 F.3d at 42 n.51 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)); *see Epel*, 793 F.3d at 1171.

[46] *See* Kansas v. Colorado, 206 U.S. 46, 97 (1907) ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest.").

[47] *See IMS Health Inc.*, 616 F.3d at 44.

[48] *See infra* notes 50–279 and accompanying text.

terstate marijuana conflicts demonstrate the need for a vibrant extraterritoriality doctrine.[49]

I. The Rise and Purported Fall of the DCC's Extraterritoriality Doctrine

The Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[50] Although "the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[51] By "bestow[ing] Congress with exclusive plenary powers," the Clause inversely "deprives in like degree the states' authority to regulate [those] activities" it entrusts Congress to regulate.[52] Section A discusses some of the limitations imposed by the DCC.[53] Section B discusses the purported demise of the DCC's extraterritoriality doctrine.[54] Section C posits that the reports of the extraterritoriality doctrine's demise stem from a fundamental misunderstanding of the principle.[55]

A. The DCC Bars Direct Regulation of Out-of-State Transactions

1. The DCC Serves Three Distinct Constitutional Functions[56]

Notwithstanding the Tenth Circuit's 2015 decision in *Energy and Environment Legal Institute v. Epel*, the Supreme Court has recognized, as I observed six years ago, that the DCC serves three distinct constitutional functions.[57] First, it "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[58] This is now the DCC's most familiar function.[59] "If [one

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[49] *See infra* notes 280–365 and accompanying text.

[50] U.S. Const. art I, § 8, cl. 3.

[51] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

[52] Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423, 1431 (D. Kan. 1993), *vacated by* Oklahoma v. Ponca Tribe of Oklahoma, 517 U.S. 1129 (1996) (mem.); *accord* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

[53] *See infra* notes 56–128 and accompanying text.

[54] *See infra* notes 129–171 and accompanying text.

[55] *See infra* notes 172–279 and accompanying text.

[56] The case discussions in this Section and the footnotes herein are drawn from and closely track the text of a prior Article. Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 Geo. Wash. L. Rev. 995, 1005–08 (2011).

[57] *Id.*

[58] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988).

state], in order to promote the economic welfare of her [own industries], may guard them against competition with [out-of-state competitors], the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."[60] I have referred to this as the DCC's "*anti-protectionist function*."[61]

Second, the DCC protects "the autonomy of the individual States within their respective spheres": it "precludes the application of a state statute that regulates commerce that takes place wholly outside of the State's borders, whether or not the State commerce has effects within the State."[62] The DCC dictates that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted."[63] I have referred to this as the DCC's "*sovereign-capacity function*."[64]

Finally, the DCC bars state regulations that "unduly burdens . . . commerce in matters where [national] uniformity is . . . essential for the functioning of commerce."[65] These are matters that by their nature are amenable to a single uniform regulatory authority, "the regulation of which is committed to Congress and denied to the States by the [DCC]."[66] I call this the DCC's "*anti-obstructionist function*."[67]

Statutes implicating this last restriction are often said to "incidental[ly] regulat[e] . . . interstate commerce" because they induce regulated parties to alter nationwide conduct to conform to a particular state's law.[68] For example, California sets high emission standards on cars sold in the state.[69] This regulation induces automakers wishing to avoid operating separate assembly lines for California-bound vehicles to "sell only California-compliant cars . . . nationwide."[70] California's law does not directly regulate out-of-state commerce. A Michigan automaker that sells a car in its own state that does not meet California's rigorous standards faces no risk of prosecution by California authorities.

Precedent recognizes that the sometimes-elusive distinction between "direct" and "incidental" extraterritorial regulation is critically important.[71] The

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[59] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705–06 (1984).

[60] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

[61] DeVeaux, *supra* note 56, at 1005.

[62] *Healy*, 491 U.S. at 336.

[63] Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).

[64] DeVeaux, *supra* note 56, at 1006.

[65] Morgan v. Virginia, 328 U.S. 373, 377 (1946).

[66] Shafer v. Farmers' Grain Co. of Embden, 268 U.S. 189, 199 (1925).

[67] DeVeaux, *supra* note 56, at 1006.

[68] *Edgar*, 457 U.S. at 640 (plurality opinion).

[69] *Am. Beverage Ass'n*, 700 F.3d at 812 (Sutton, J., concurring).

[70] *Id.* at 813.

[71] *See Brown-Forman*, 476 U.S. at 579–80.

Court's DCC jurisprudence dictates that state regulations that run afoul of the prohibition against direct regulation must be subjected to a "virtually per se rule of invalidity."[72] Such laws are "generally struck down . . . without further inquiry."[73]

In contrast, in 1970, the U.S. Supreme Court recognized in *Pike v. Bruce Church, Inc.* that laws that incidentally influence extraterritorial transactions must be subjected to a balancing test.[74] In such cases, the Court stated, "[w]here [a state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[75]

This balancing test is necessary because the DCC's anti-obstructionist function stands in tension with its sovereign-capacity function. "The prerogative of a [polity] to control and regulate activities within its boundaries is an essential, definitional element of sovereignty."[76] Thus, states generally retain the power to directly regulate transactions within their borders, even when such regulations incidentally affect interstate commerce.[77] In contrast, states enjoy no inherent power to directly control out-of-state conduct[78] by actually "punish[ing] [an actor] for conduct that was lawful [in the state] where it occurred."[79]

2. The Case Law

The DCC's extraterritoriality prohibition originated with the Supreme Court's 1935 decision in *Baldwin v. G.A.F. Seelig, Inc.*,[80] which averred that no state may "project its legislation into" another state.[81] Although the Court ul-

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[72] Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 523 (1989) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

[73] *Brown-Forman*, 476 U.S. at 579. The per se rule of invalidity also applies to protectionist statutes. *Id.*

[74] *Pike*, 397 U.S. at 137.

[75] *Id.* at 142.

[76] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984); *accord* S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945) ("[T]here is a residuum of power in the state to make laws governing [intrastate] matters . . . which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.").

[77] *See* Goldsmith & Sykes, *supra* note 42, at 796 ("[A]uto emissions are much more likely to cause dangerous concentrations of pollutants in the Los Angeles basin than on the open prairie. For such reasons, the benefits that a local citizenry derives from a particular regulation, and its willingness to bear the costs, will commonly differ across jurisdictions.").

[78] *See Healy*, 491 U.S. at 336 (stating that any "statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority").

[79] *BMW of N. Am.*, 517 U.S. at 572–73.

[80] *See Baldwin*, 294 U.S. at 528.

[81] *Id.* at 521.

timately struck down the statute at issue in that case as protectionist, the Court later adopted *Baldwin*'s extraterritoriality dicta in three 1980s opinions.

a. Edgar v. MITE Corp.[82]

In 1982 in *Edgar v. MITE Corp.*,[83] the Court confronted an Illinois law that regulated hostile take-overs.[84] The statute required that anyone making a takeover offer for shares of a "target company" notify Illinois's Secretary of State and the company twenty days before the offer became effective.[85] The law defined a "target company" as "a corporation . . . of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer,"[86] or in the alternative, any corporation satisfying two of three conditions: "the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State."[87]

In 1979, MITE made a tender offer to purchase all the shares of the Chicago Rivet & Machine Co., a publicly held Illinois corporation.[88] Rather than complying with Illinois's anti-takeover law, MITE filed suit seeking to enjoin its enforcement.[89] The *Edgar* Court struck down the statute.[90] A four-justice plurality opinion penned by Justice White concluded that Illinois's law offended the sovereignty of sister states.[91]

The plurality concluded that the DCC prohibits attempts to regulate out-of-state transactions.[92] It "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[93] Such regulation "'exceed[s] the inherent limits of the State's power.'"[94]

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[82] The case discussions in this Subsection and the footnotes herein are drawn from and closely track the text of a prior Article. DeVeaux, *supra* note 56, at 1009–11.

[83] *Edgar*, 457 U.S. at 624.

[84] *Id.*

[85] *Id.* at 626–27.

[86] *Id.* at 627.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 628.

[90] *Id.* at 646 (plurality opinion).

[91] *Id.* at 643, 646.

[92] *Id.* at 641–43.

[93] *Id.* at 642–43.

[94] *Id.* at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)). While the Court invalidated the anti-takeover law in *Edgar*, it took care to distinguish the statute from state laws governing the internal affairs of corporations created under the regulating state's own law. The internal-affairs doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the

b. Brown-Forman Distillers Corp. v. New York State Liquor Authority[95]

In 1986, a majority of the Court adopted the *Edgar* plurality's extraterritoriality rule in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.[96] There, the Court confronted New York's Alcoholic Beverage Control Law ("ABC Law"), which required distributors to file a monthly price schedule with the State Liquor Agency specifying the prices at which they would sell their products to wholesalers for that month.[97] The law required distributors to affirm that those prices were "no higher than the lowest price the distiller [would] charge[] wholesalers anywhere else in the United States" for the month in which the affirmation was made.[98]

The challenger, a Kentucky distiller,[99] conceded that the statute regulated all distributors "evenhandedly" and that New York enacted it for a "legitimate," i.e. non-discriminatory purpose: "to assure the lowest possible prices for its residents."[100] Nonetheless, the Court found that the statute offended the DCC because it "effectively regulate[d] the price at which liquor [wa]s sold in other States" by "ma[king] it illegal for a distiller to reduce its price in other States during the period that [a] posted New York price [wa]s in effect."[101]

The Court applied the so-called "per se rule of invalidity," meaning that state statutes regulating interstate commercial activity will "generally [be]

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corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Id.* at 645 (majority opinion). The Constitution entrusts the state of incorporation to enact laws governing such matters. *Id.* at 643. This is so because "[c]orporations . . . are creatures of *state* law," and as such, the incorporating state's law is the "font" of a corporation's powers and governs its internal organization. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98–99 (1991) (emphasis added) (internal quotation marks omitted) (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)). The internal-affairs doctrine did not save Illinois's anti-takeover law from MITE's facial challenge because the law applied to corporations incorporated under the laws of other states. *See Edgar*, 457 U.S. at 645–46. "Illinois has no interest in regulating the internal affairs of foreign corporations." *Id.* Thus, the Court in *Edgar* invalidated the anti-takeover law because it directly regulated extraterritorial commerce in violation of the DCC. *Id.* In my view, Illinois's anti-takeover law could have withstood an as-applied challenge because the target company was an Illinois corporation. *See id.* at 627; *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 72–74, 79 (1987) (upholding an Indiana statute that conditioned the "acquisition of control of a corporation . . . incorporated in Indiana . . . on approval of a majority of the pre-existing disinterested shareholders" because the law only applied to Indiana corporations which were "mere creature[s] of Indiana's law").

[95] The case discussions in this Subsection and the footnotes herein are drawn from and closely track the text of a prior Article. DeVeaux, *supra* note 56, at 1011–13.

[96] *Brown-Forman*, 476 U.S. at 582.

[97] *Id.* at 575.

[98] *Id.*

[99] Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 221 (1992) (noting that Brown-Forman is based in Kentucky).

[100] *Brown-Forman*, 476 U.S. at 579.

[101] *Id.* at 579–80, 582.

struck down . . . without further inquiry."[102] The Court found that New York's ABC law directly regulated out-of-state commerce.[103] By "[f]orcing a [Kentucky] merchant to seek [New York's] regulatory approval" before it could transact business with consumers in Kentucky and other jurisdictions,[104] "New York ha[d] 'project[ed] its legislation' into other States, and directly regulated commerce therein" in contravention of the DCC.[105] For this reason, the Court invalidated the statute "without further inquiry."[106]

c. Healy v. Beer Institute, Inc.[107]

The Court's 1989 decision in *Healy v. Beer Institute, Inc.* involved another price-affirmation statute.[108] This time, Connecticut required beer makers "to affirm that their posted prices for products sold to Connecticut wholesalers [were] . . . no higher than the prices at which those products [were] sold in the bordering States of Massachusetts, New York, and Rhode Island."[109]

Connecticut's law differed from New York's ABC law in one respect: "[N]othing in [the Connecticut statute] prohibit[ed] out-of-state [brewers] from changing their out-of-state prices after the affirmed Connecticut price [wa]s posted."[110] Despite this difference, the Court found that the law directly regulated extraterritorial commerce by "purposeful[ly] interact[ing] with border-state regulatory schemes."[111]

As the Court explained, "Massachusetts requires brewers to post their prices on the first day of the month to become effective on the first day of the following month."[112] Nonetheless, "[f]ive days later . . . those same brewers, in order to sell beer in Connecticut, must affirm that their Connecticut prices for the following month will be no higher than the lowest price that they are charging in any border State."[113] Thus, as a result of the price-affirmation statute, "on January 1, when a brewer posts his February prices for Massachusetts, that

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[102] *Id.* at 579.
[103] *Id.* at 582.
[104] *Id.*
[105] *Id.* at 584 (alterations in original) (quoting *Baldwin*, 294 U.S. at 521).
[106] *Id.* at 579.
[107] The case discussions in this Subsection and the footnotes herein are drawn from and closely track the text of a prior Article. DeVeaux, *supra* note 56, at 1013–15.
[108] *See Healy*, 491 U.S. at 326.
[109] *Id.*
[110] *Id.* at 329.
[111] *Id.* at 330 (internal quotation marks omitted).
[112] *Id.* at 338.
[113] *Id.*

brewer must take account of the price he hopes to charge in Connecticut during the month of March."[114]

The Connecticut statute's interaction with Massachusetts's law "locked [the brewer] into his Massachusetts price for the entire month of February," thereby "prospectively preclud[ing] the alteration of out-of-state prices after the moment of affirmation."[115] The Court found that by "t[ying] pricing to the regulatory schemes of the border states . . . the Connecticut statute ha[d] the extraterritorial effect, condemned in *Brown-Forman*, of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions."[116] Because the statute ran afoul of the DCC's prohibition against direct regulation of extraterritorial commerce, the Court struck it down.[117] The Court concluded that this prohibition preserves "the autonomy of the individual States within their respective spheres."[118]

Reaffirming the extraterritoriality principles elucidated by the *Edgar* plurality and adopted by *Brown-Forman*, the *Healy* Court offered a summary of the doctrine. "Taken together, our our cases concering the extraterritorial effects of state economic regulation state at a minimum" for two important principles.[119] "First, the [DCC] 'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'"[120] Second, the DCC dictates that any "statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting State's authority" and ordinarily must be stricken without further inquiry.[121]

In 1996, the Court expanded upon these proscriptions in *BMW of North America, Inc. v. Gore*,[122] citing *Healy* for the proposition "that a State may not impose economic sanctions on violators of its laws with the intent of changing [such actors'] lawful conduct in other States";[123] thus, a state may not "punish [an actor] for conduct that was lawful [in the state] where it occurred."[124]

The *Healy* Court also found that Connecticut's statute contravened the DCC's anti-discrimination prohibitions.[125] Unlike New York's ABC law, Con-

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[114] *Id.*
[115] *Id.* (internal quotation marks omitted).
[116] *Id.*
[117] *Id.* at 339.
[118] *Id.* at 335–36.
[119] *Id.* at 336.
[120] *Id.* (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)).
[121] *Id.*
[122] *BMW of N. Am.*, 517 U.S. at 560.
[123] *Id.* at 571–72 (citing *Healy*, 491 U.S. at 335–36).
[124] *Id.* at 572–73.
[125] *See Healy*, 491 U.S. at 341.

necticut's "statute applie[d] solely to interstate brewers or shippers of beer, that is, either Connecticut brewers who s[old] both in Connecticut and in at least one border State or out-of-state shippers who s[old] both in Connecticut and in at least one border State."[126] The Court concluded that Connecticut's law "discriminate[d] against interstate commerce"[127] by "establish[ing] a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce, essentially penalizing Connecticut brewers if they s[ought] border-state markets and out-of-state shippers if they cho[se] to sell both in Connecticut and in a border State."[128]

B. The Purported Demise of the DCC's Extraterritoriality Doctrine

From its inception, the DCC's extraterritoriality doctrine has faced unrelenting academic attack.[129] Critics charged that the doctrine is mere dicta,[130] that it "is a relic of the old world with no useful role to play in the new,"[131] and that it "inhibits state experimentation with laws that attempt to solve their social and economic problems."[132] Yet, despite these challenges, the lower federal courts dutifully adhered to *Brown-Forman*'s pronouncements for nearly three decades.[133] But after the Sixth Circuit's controversial 2012 decision in *American Beverage Association v. Snyder* cracks in this resolve began to develop.

1. *American Beverage Association v. Snyder*

American Beverage Association involved an amendment to Michigan's "Bottle Deposit" law.[134] The statute required consumers to pay a deposit on purchases of "returnable containers," (bottles or cans) that will be refunded when used containers are redeemed at groceries and department stores.[135] Almost from the start, Michigan noted an "over-redemption" problem—"the val-

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[126] *Id.* (emphasis omitted).

[127] *Id.* at 340.

[128] *Id.* at 341.

[129] *See supra* note 42 and accompanying text (citing to authorities criticizing the DCC's extraterritoriality doctrine).

[130] *See infra* notes 174–198 (providing an overview of the argument that the extraterritoriality doctrine is merely dicta, and then making the opposite argument).

[131] *Am. Beverage Ass'n*, 700 F.3d at 812 (Sutton, J., concurring).

[132] Recent Case, *supra* note 42, at 2442.

[133] *E.g.*, *Am. Beverage Ass'n*, 700 F.3d at 810; Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 489–92 (4th Cir. 2007); Am. Booksellers Found. v. Dean, 342 F.3d 96, 102–04 (2d Cir. 2003); Dean Foods Co. v. Brancel, 187 F.3d 609, 615–18, 620 (7th Cir. 1999); *Meyer*, 165 F.3d at 1153; Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 379–80 (7th Cir. 1998); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638–40 (9th Cir. 1993); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 843–45 (1st Cir. 1988).

[134] *Am. Beverage Ass'n*, 700 F.3d at 800.

[135] *Id.* at 800–01.

ue of the deposits collected . . . was less than the total value of refunds paid."[136] This deficit results from what might be called a Kramer problem, in reference to a 1996 *Seinfeld* episode where the eponymous character drove a mail truck full of New York-sourced cans to Michigan for redemption.[137] Michigan recognized that such "unauthorized returns . . . reduce[] the revenue stream to the State because no deposit was paid to the State."[138] Such fraud results, on average, "in a loss of $15.6 to $30 million every year in Michigan deposits."[139]

In response, Michigan's legislature enacted a law requiring bottlers to brand Michigan-sold containers with a mark that is "unique to the state."[140] The statute prohibited bottlers from selling containers bearing this "unique mark" in states that did not have a bottle deposit scheme similar to Michigan's.[141]

Bottlers challenged the statute, asserting that by prohibiting the sale of containers bearing Michigan's mark *in other states*, the "unique-mark requirement" directly regulated extraterritorial commerce.[142] Although the Michigan law was not protectionist in nature—"the same unique marking requirement applie[d] equally to in-state and out-of-state manufacturers"[143]—the court concluded that the statute directly regulated out-of-state transactions in violation of *Brown-Forman*. The court noted that Michigan's "unique-mark requirement" did more than simply require manufacturers to meet Michigan-specific requirements for containers sold in Michigan, which is permissible, but it also dictated where products bearing that mark could be sold.[144] Thus, the *American Beverage Association* court concluded "that the Michigan statute [was] extraterritorial in violation of the [DCC] because it impermissibly regulate[d] interstate commerce by controlling conduct beyond the State of Michigan."[145]

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[136] *Id.* at 801.

[137] *See* Ethan Wolff-Mann, *This Guy Drove 10,000 Cans to Michigan (Like in Seinfeld) and Got Busted*, TIME (July 25, 2016), http://time.com/money/4422277/seinfeld-bottle-deposit-real-michigan/ [https://perma.cc/A6JU-NSFH]; Meg Marco, *Seinfeldian: Some Consumers Really Do Drive Their Cans and Bottles to Michigan*, CONSUMERIST (Oct. 28, 2008), https://consumerist.com/2008/10/28/seinfeldian-some-consumers-really-do-drive-their-cans-and-bottles-to-michigan/ [https://perma.cc/Y7S8-FC2W]; *Michigan's Returnable Law Needs Tweaking*, BLOGS MONROE (Dec. 4, 2008), https://web.archive.org/web/20150925204424/http://www.blogsmonroe.com/world/2008/12/michigans-returnable-law-needs-tweaking/ (coining the phrase "Kramer problem").

[138] *Am. Beverage Ass'n*, 700 F.3d at 801.

[139] *Id.*

[140] *Id.* (internal quotation marks omitted).

[141] *Id.*

[142] *Id.* at 802.

[143] *Id.* at 805.

[144] *Id.* at 810.

[145] *Id.*

Judge Sutton expressed his angst with the court's holding in a concurring opinion that reads more like a dissent.[146] Contending that the extraterritoriality doctrine has become the DCC's "dormant branch,"[147] he argued that the doctrine "is a relic of the old world with no useful role to play in the new."[148]

Although I agree that Michigan's label law violated the DCC by threatening to "punish [bottlers] for conduct that was lawful [in the state] where it occurred,"[149] I too find *American Beverage Association*'s resolution deeply unsatisfying. Unlike the paternalistic laws stricken by the Court in *Edgar*, *Brown-Forman*, and *Healy*—which intruded upon the sovereignty of sister states by directly controlling the material terms of transactions in those states—the label law evidenced no such paternalism. Yes, the statute "projected"[150] Michigan's law into Ohio by banning the sale of bottles bearing the Michigan mark in the Buckeye State.[151] But unlike New York's attempt to regulate the price of bourbon in Kentucky,[152] it is unlikely that Ohio's lawmakers or voters would regard Michigan's regulation as an affront to their state's sovereignty. But such benign extraterritorial regulations are rare. The exception, in short, does not disprove the rule.[153]

2. *Energy and Environment Legal Institute v. Epel*

In *Energy and Environment Legal Institute v. Epel*,[154] the Tenth Circuit, per Justice Gorsuch, confronted a challenge to Colorado's renewable-energy mandate.[155] The law requires Colorado utilities to "ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources."[156] The

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[146] *See id.* at 811 (Sutton, J., concurring).

[147] *Id.* (internal quotation marks omitted) (quoting *IMS Health Inc.*, 616 F.3d at 29 n.27).

[148] *Id.* at 812.

[149] *See BMW of N. Am.*, 517 U.S. at 572–73.

[150] *See Baldwin*, 294 U.S. at 521.

[151] *See Am. Beverage Ass'n*, 700 F.3d at 810.

[152] *See Brown-Forman*, 476 U.S. at 584.

[153] Michael Dorf argued that the DCC "operates as a kind of default principle" whereby "[t]he courts presume that Congress would preempt" paternalistic or discriminatory state laws if it possessed "the capacity to keep track of and override" all such laws. Michael C. Dorf, *Is the Dormant Commerce Clause a "Judicial Fraud"?*, VERDICT (May 20, 2015), https://verdict.justia.com/2015/05/20/is-the-dormant-commerce-clause-a-judicial-fraud [https://perma.cc/5ZKL-APPA]. Dorf continued, "The fact that Congress has the power to override a judicial ruling finding a DCC violation acts as a failsafe in case the presumption fails." *Id.* Michigan's label law represents the exceptional case where a state "projected its legislation" into a neighbor without offending the latter's sovereignty. *See Baldwin*, 294 U.S. at 521. Rather than upend the DCC's "default principle," Congress should simply exercise its failsafe option by enacting a law authorizing Michigan to project its "unique-mark requirement" into other jurisdictions.

[154] *Epel*, 793 F.3d at 1169.

[155] *Id.* at 1170.

[156] *Id.*

Energy and Environment Legal Institute ("EELI"), a trade group, brought suit challenging the law on behalf of out-of-state coal companies.[157] EELI claimed that because the law "means some out-of-state coal producers . . . will lose business with out-of-state utilities who feed their power onto the [electrical] grid,"[158] Colorado's statute has "the practical effect of 'control[ling] conduct beyond the boundaries of the State.'"[159] EELI's suit implicitly charged Colorado with regulating commercial transactions in Nebraska because Colorado, "a net importer of electricity,"[160] imports a significant amount of electricity from coal-fired plants in Nebraska.[161]

Because the Colorado mandate's effects on out-of-state commerce are merely *incidental*, the law should not have triggered the extraterritorial doctrine in the first place.[162] Yet, inexplicably the *Epel* court accepted EELI's premise. Noting that Colorado's mandate has "the effect of increasing demand for electricity generated using renewable sources" and "reduc[ing] demand for . . . electricity generated using fossil fuels,"[163] Justice Gorsuch contended that the DCC's extraterritoriality bar no longer inhibits a state's ability to regulate transactions beyond its borders—at least when the statute "does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'"[164]

Labeling the extraterritoriality jurisprudence "the most dormant doctrine in [DCC] jurisprudence,"[165] Justice Gorsuch asserted that the doctrine has died of atrophy, as the Supreme Court has not invoked it to invalidate a state law in more than a generation.[166] Siding with critics of the doctrine—particularly Brannon Denning, who offered a purported "autopsy" of *Brown-Forman* in *American Beverage Association*'s aftermath[167]—Justice Gorsuch posited that the extraterritoriality doctrine has been reduced to "an application of the anti-discrimination rule."[168] Pursuant to this reasoning, states may enforce non-

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[157] *Id.* at 1171.

[158] *Id.*

[159] *Id.* at 1174 (alteration in original) (quoting Appellants' Opening Brief at 30, *Epel*, 793 F.3d 1169 (2015) (No. 14-1216), 2014 WL 3795268, at *30).

[160] *Id.* at 1171.

[161] GOVERNOR'S ENERGY OFFICE, *supra* note 39, at 15.

[162] This principle will be explained in greater detail in Part I, Section C.2. *See infra* notes 199–279 and accompanying text.

[163] *Epel*, 793 F.3d at 1174.

[164] *Id.* at 1175 (alteration in original) (quoting *Ass'n des Eleveurs*, 729 F.3d at 951).

[165] *Id.* at 1170.

[166] *See id.* at 1172.

[167] *Id.* at 1175 (citing Denning, *supra* note 42, at 998–99).

[168] *Id.* at 1173.

protectionist laws that directly regulate extraterritorial conduct[169] if that conduct "affects a substantial number of in-state residents"[170]—at least as long as "the burden imposed" on interstate commerce is not "clearly excessive in relation to the putative local benefits."[171]

C. Reports of the Extraterritoriality Doctrine's Demise Stem from a Fundamental Misunderstanding of the Principle

If one accepts *Epel*'s contention that the extraterritoriality doctrine has slipped this mortal coil, a fundamental question remains: What was the cause of death? The Supreme Court, after all, has never repudiated the doctrine. Lacking the corpus delicti[172]—"visible evidence" of the killing, e.g., "the dead body of a murdered person"[173]—the doctrine's deniers usually point to two purportedly fatal blows.

1. The Extraterritoriality Doctrine Is Not Dicta

Brown-Forman recognizes that the DCC "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State"[174] Yet, despite the Court's plain statements, extraterritoriality deniers have long contended that precedent only prohibits discriminatory laws—"regulatory measures designed

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[169] *Epel* did suggest that laws that "dictate the price of a product" sold out-of-state or that "'t[ie] the price of in-state products to out-of-state prices" still run afoul of the DCC. *Id.* at 1175 (citations omitted). But the court strongly implied that such statutes are protectionist. *See id.* at 1173.

[170] *IMS Health Inc.*, 616 F.3d at 44; *accord Epel*, 793 F.3d at 1170–73.

[171] *IMS Health Inc.*, 616 F.3d at 42 n.51 (quoting *Pike*, 397 U.S. at 142); *accord Epel*, 793 F.3d at 1172. *Epel* stands in conflict with the Eighth Circuit's 2016 decision in *North Dakota v. Heydinger*. 825 F.3d 912, 912 (8th Cir. 2016). *Heydinger* addressed a challenge to Minnesota's Next Generation Energy Act, which like Colorado's renewable-energy mandate, limited the amount of electricity the state's utilities could purchase from fossil-fuel-reliant generators. *Id.* at 913–14. In apparent conflict with *Epel*, the *Heydinger* panel struck down the Minnesota law in a divided opinion. *See id.* at 922. Averring that the *Brown-Forman* doctrine is still binding, Judge Loken concluded that Minnesota's law directly regulated extraterritorial transactions in violation of the DCC. *Id.* at 921–22. Judge Murphy agreed that *Brown-Forman* remains good law, but concluded that the statute "does not cover activity which occurs 'wholly outside [of Minnesota].'" *Id.* at 926 (Murphy, J., concurring) (quoting *Healy*, 491 U.S. at 336). He nonetheless concluded that the statute is invalid because it conflicted with the Federal Power Act. *Id.* The third member of the panel, Judge Colloton, agreed with Judge Murphy that the Federal Power Act preempted Minnesota's law, but offered no opinion regarding the statute's compliance with the DCC. *Id.* at 927 (Colloton, J., concurring).

[172] Latin for the "body of the crime," the corpus delicti is defined as "[t]he fact of a transgression." *Corpus Delicti*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[173] Justin Miller, *The Criminal Act*, *in* LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 469, 478 (Max Radin & A.M. Kidd eds., 1935).

[174] *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)); *accord Brown-Forman*, 476 U.S. at 579.

to benefit in-state economic interests by burdening out-of-state competitors."[175] These commentators argue that the Court's pronouncements that direct extraterritorial regulation "exceeds the inherent limits of [an] enacting State's authority"[176] constitute dictum.

Mark Rosen was an early champion of this position, arguing that "all but one of the [three] Supreme Court cases that have struck down state regulations on the basis of extraterritoriality have concerned statutes that are readily characterized as protectionist."[177] Moreover, the "singular exception," *Edgar v. MITE Corp.*, was offered by a mere plurality.[178] Thus, he posits that the extraterritoriality jurisprudence, in fact, "should be understood as applying only to protectionist state statutes."[179] Jack Goldsmith and Alan Sykes likewise dismiss the Court's extraterritoriality jurisprudence as dicta.[180] More recently, Brannon P. Denning has joined this chorus, arguing that *Brown-Forman*'s extraterritoriality prohibitions are "a poor fit with the larger DCC [doctrine], which focuse[s] on . . . protectionism rather than whether a state law 'directly' regulate[s] interstate commerce."[181]

For more than two decades, the lower courts rejected these contentions, heeding the Supreme Court's pronouncements.[182] Nonetheless, in recent years jurists have begun to succumb to these arguments in dicta and dissent.[183]

As I've stated before, assertions that the extraterritoriality doctrine is mere dicta baffle me.[184] The *Healy* Court explicitly based its holding on two separate grounds, unambiguously striking the offending statute *both* because it discriminated against out-of-state commerce,[185] and because it directly "regulat[ed] commerce occurring wholly outside [the] State's borders."[186] Extraterritoriality deniers' oft-repeated argument that *they* can unilaterally ignore one of the Court's dual bases ignores a fundamental tenet of our legal system:

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[175] *Limbach*, 486 U.S. at 273.

[176] *Healy*, 491 U.S. at 336.

[177] Rosen, *supra* note 42, at 925; *see also* DeVeaux, *supra* note 56, at 1016.

[178] Rosen, *supra* note 42, at 925; *see also* DeVeaux, *supra* note 56, at 1016.

[179] Rosen, *supra* note 42, at 923; *see also* DeVeaux, *supra* note 56, at 1015.

[180] Goldsmith & Sykes, *supra* note 42, at 806; *see also* DeVeaux, *supra* note 56, at 1016.

[181] Denning, *supra* note 42, at 1007–08; *see also* DeVeaux, *supra* note 56, at 1016.

[182] *See supra* note 133 and accompanying text (citing to several cases from federal courts adhering to *Brown-Forman*).

[183] *E.g.*, *Ass'n des Eleveurs*, 729 F.3d at 951 (the extraterritoriality prohibition is limited to "price control or price affirmation statutes") (quoting Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)); *Am. Beverage Ass'n*, 700 F.3d at 815 (Sutton, J., concurring) ("All told, I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.").

[184] DeVeaux, *supra* note 56, at 1016.

[185] *Healy*, 491 U.S. at 340; DeVeaux, *supra* note 56, at 1016.

[186] *Healy*, 491 U.S. at 332; DeVeaux, *supra* note 56, at 1016.

"[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."[187]

The deniers' dismissal of *Brown-Forman* is even more puzzling. There, the statute's challenger, Brown-Forman Distillers, conceded on the record that New York's price-affirmation statute was *not discriminatory*, acknowledging that it regulated all distillers "evenhandedly" and was enacted for a "legitimate"—non-discriminatory purpose—"to assure the lowest possible prices for its residents."[188] Admittedly, Brown-Forman's decision to concede the statute's neutrality is a questionable one. A New York law barring liquor vendors from selling their wares in other states at lower prices than they charge in New York inherently discriminates against out-of-state distillers. New York's cost of living far exceeds the national average.[189] Forcing a business to sell its goods to Kentucky consumers at *New York prices* is transactional suicide.[190] The statute thus discouraged distillers based in other states from selling their goods in New York, creating an advantage for local distillers who did not do business in other parts of the country.

In apparent recognition of this fact, Judge Sutton asserted in his *American Beverage Association* concurrence that "[a]ll told," he is "not aware of a single Supreme Court [DCC] holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law."[191] But this normative analysis ignores yet another fundamental tenet of the American legal system: Brown-Forman's concession that New York's law regulated all distillers "evenhandedly" is binding.[192] The Supreme Court has "long recognized" that litigants may rely on the assumption that the facts as stipulated in the record are established.[193] This axiom "is the bookend to a party's undertaking to be bound by the factual stipulations it submits."[194] Thus, it is evident that *Brown-Forman*'s edict cannot rest on the alleged discriminatory nature of the statute. The Supreme Court was

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[187] Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); DeVeaux, *supra* note 56, at 1016.

[188] *Brown-Forman*, 476 U.S. at 579; *see* DeVeaux, *supra* note 56, at 1016–17.

[189] *See Cost of living in New York City, United States*, EXPATISTAN, https://www.expatistan.com/cost-of-living/new-york-city [https://perma.cc/23Q7-GWQV] (last visited Apr. 4, 2017) (showing that New York's cost of living is the highest in the U.S. and third highest in the world).

[190] *See id.*

[191] *Am. Beverage Ass'n*, 700 F.3d at 815 (Sutton, J., concurring).

[192] *See Brown-Forman*, 476 U.S. at 579.

[193] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2983 (2010). The sole exception to this rule applies to stipulated facts that are essential to establishing a federal court's subject-matter jurisdiction to adjudicate a case. *See* Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635, 639 (2014).

[194] *Christian Legal Soc'y*, 130 S. Ct. at 2983.

obliged to accept Brown-Forman's concession that New York's law regulated "evenhandedly."[195]

More importantly, the Orwellian revisionism suggested by extraterritoriality deniers ignores an even more critical facet of our stare-decisis-driven system. As Judge Friendly observed when he addressed *Erie* deniers' unrelenting arguments that the decision's federalism contentions likewise were mere dicta, "[a] court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis."[196] It is inexplicable to me how so many respected scholars and jurists have ignored this tenet. The *Brown-Forman* Court regarded its finding that the offending statute "directly regulated interstate commerce"[197] as "a necessary basis for deciding" the case.[198]

2. Recent Decisions Rejecting Attempts to Invoke the Extraterritoriality Doctrine Involved Purely Intrastate Regulations

Justice Gorsuch castigated the extraterritoriality principle as "the most dormant doctrine in the [DCC] jurisprudence."[199] Noting that nearly three decades have passed since the U.S. Supreme Court last invoked it to invalidate a state law, Judge Sutton argued in his *American Beverage Association* concurrence that "the extraterritoriality doctrine has been lost to time"; that it "is a relic of the old world with no useful role to play in the new."[200] A *Harvard Law Review* case comment contends that the "doctrine no longer furthers the [DCC's] purpose."[201] Professor Denning agrees, asserting that the doctrine fell victim to constitutional "calcification."[202] He offered a purported eulogy, positing "that extraterritoriality . . . is dead, and unlikely to be revived by the current Court."[203] Justice Gorsuch relied in large measure on this "post-mortem" analysis, concluding in *Epel* that the DCC's extraterritoriality doctrine is, indeed, dead.[204]

Although these arguments possess some rhetorical appeal, they ignore the doctrine of stare decisis. "[O]ur legal system has no sunset provision for prec-

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[195] *See Brown-Forman*, 476 U.S. at 579.

[196] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385–86 (1964); *see* DeVeaux, *supra* note 56, at 1017–18.

[197] *Brown-Forman*, 476 U.S. at 578.

[198] *See* Friendly, *supra* note 196, at 385–86.

[199] *Epel*, 793 F.3d at 1170.

[200] *Am. Beverage Ass'n*, 700 F.3d at 812 (Sutton, J., concurring).

[201] Recent Case, *supra* note 42, at 2438.

[202] Denning, *supra* note 42, at 995.

[203] *Id.* at 979–80.

[204] *Epel*, 793 F.3d at 1175 (citing Denning, *supra* note 42, at 998–99).

edents."[205] Our courts "use decades-old and centuries-old precedents to achieve consistency over time."[206]

More importantly, upon closer examination, most critiques of the Supreme Court's extraterritoriality jurisprudence reveal a complete misapprehension of the doctrine. They conflate the DCC's anti-obstructionist function, which limits state authority to regulate purely *intrastate* conduct by imposing regulations that induce regulated actors to alter their out-of-state conduct, with its sovereign-capacity function, which bars states from directly regulating *extraterritorial* conduct.

Many purely intrastate regulations incidentally affect extraterritorial commerce. Every state law requiring a manufacturer to label a product to inform consumers of a known hazard will incidentally alter labels in neighboring jurisdictions; manufacturers will wish to avoid the expense of separately labeling products bound for a particular state. A blanket prohibition on such laws would offend state sovereignty.[207] Thus, a law's extraterritorial effects will only presumptively condemn it on the rare occasion when it aims to actually "punish [actors] for conduct that was lawful [in the state] where it occurred."[208]

For example, the *Brown-Forman* Court ruled New York's ABC law per se unconstitutional because it directly regulated liquor sales in other states—it prohibited Brown-Forman from lowering its prices in Kentucky without approval from the New York State Liquor Authority.[209] New York *directly* applied its laws to transactions in other states.[210]

Conversely, in the 1945 case *Southern Pacific Co. v. Arizona*, the Supreme Court did not apply the per se rule of invalidity to an Arizona law limiting freight trains to seventy cars.[211] Although the statute *incidentally* affected extraterritorial conduct—inducing railroads to shorten Arizona-bound trains to seventy cars to avoid breaking them up at the Arizona state line[212]—it did not

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[205] Exxon Valdez v. Exxon Mobil, 568 F.3d 1077, 1089 (9th Cir. 2009) (Kleinfeld, J., dissenting); *accord* Kimble v. Marvel. Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("Respecting *stare decisis* means sticking to some wrong decisions."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

[206] *Exxon Valdez*, 568 F.3d at 1089 (Kleinfeld, J., dissenting).

[207] *See* SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) ("Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.") (emphasis omitted).

[208] *BMW of N. Am.*, 517 U.S. at 572–73.

[209] *Brown-Forman*, 476 U.S. at 583.

[210] *Id.* at 584.

[211] *S. Pac. Co.*, 325 U.S. at 763, 765.

[212] *Id.* at 773.

directly regulate extraterritorial conduct.[213] The law did not "punish [railroads] for conduct that was lawful [in the state] where it occurred."[214] Railroads could operate trains exceeding seventy cars in neighboring states without fear of prosecution by Arizona authorities.[215] Brown-Forman did not have that luxury. Selling bourbon *in Kentucky* at prices *New York* disapproved of would invite prosecution *in New York*.[216]

Statutes of the sort confronted by the *Southern Pacific* Court are subject to the deferential *Pike* test. They "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[217] In contrast, laws that directly regulate out-of-state conduct—as in *Brown-Forman*—are unconstitutional virtually per se.[218]

Blatant state paternalism of the sort confronted in *Brown-Forman* is quite rare.[219] Thus, the Supreme Court has had few occasions to evaluate such laws. This has not stopped trade groups—eager to evade burdensome regulations—from bringing suits casting purely intrastate laws as impermissible extraterritorial regulation.[220]

For example, in the Ninth Circuit's 2013 opinion in *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*,[221] a poultry trade association-challenged a California law banning the sale of foie gras, a so-called "delicacy made from fattened duck liver."[222] Foie gras is produced by "force feeding birds to enlarge their livers beyond normal size."[223] The plaintiffs contended that the statute "control[led] commerce outside of California."[224] The Ninth Circuit rejected this claim, correctly observing that a statute is not subject to *Brown-Forman*'s per se rule of invalidity "merely because it affects in some way the flow of commerce between the States."[225] Rather, a statute is only un-

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[213] *Id.* at 773–75.

[214] *See BMW of N. Am.*, 517 U.S. at 572–73.

[215] *S. Pac. Co.*, 325 U.S. at 773.

[216] *See Brown-Forman*, 476 U.S. at 583–84.

[217] *Pike*, 397 U.S. at 142.

[218] *Brown-Forman*, 476 U.S. at 579.

[219] *But see* DeVeaux, *supra* note 56, at 996–1001 (arguing that certification of nation-wide class actions under a single state's law constitutes direct extraterritorial regulation in violation of DCC).

[220] *E.g.*, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1104 (9th Cir. 2013); *Ass'n des Eleveurs*, 729 F.3d at 948–49; Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1179 (9th Cir. 2011); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 643–44 (6th Cir. 2010); *IMS Health Inc.*, 616 F.3d at 29.

[221] *Ass'n des Eleveurs*, 729 F.3d at 937.

[222] *Id.* at 941–42.

[223] *Id.*

[224] *Id.* at 949.

[225] *Id.* at 948–49 (internal quotation marks omitted) (quoting Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1149 (9th Cir. 2012)).

constitutional "per se when it *directly* regulates interstate commerce"[226]—that is when it seeks "to punish [an actor] for conduct that was lawful where it occurred."[227] Applying this principle, the court upheld California's ban, concluding that it did not directly regulate out-of-state poultry producers; it merely dictated that certain products could not be sold *in California*.[228] The statute's effects on extraterritorial conduct were merely incidental. An Oregon farmer faced no liability for force-feeding ducks in Oregon; only for selling foie gras in California.[229] Most courts have seen past efforts by trade groups to exploit the extraterritoriality doctrine to evade legitimate intrastate regulations.[230]

But many in the academic community—and a few jurists, including Justice Gorsuch—have fallen prey to this misdirection, viewing judicial rejection of such misguided arguments as evidence that the prohibition against direct extraterritorial regulation is dead.[231] Judge Sutton is another such victim. In his *American Beverage Association* concurrence, he observed that "[t]he modern reality is that the States frequently regulate activities *that occur entirely within one State* but that have effects in many."[232] As an example, he observed that Vermont's regulation that light bulbs sold in the state include labels that warn against the negative affects of mercury leads light-bulb makers to put such labels on bulbs sold in other states to avoid the cost of separately labeling their Vermont-bound bulbs.[233]

Other critics have echoed these observations. Professor Denning contends that lower court opinions "reject[ing] extraterritoriality arguments brought by manufacturers whose products must be labeled in a particular way before being sold *in a state*, even if compliance with the state law would require changes in their out-of-state manufacturing processes" confirm the extraterritoriality doctrine's demise.[234] Likewise, a *Harvard Law Review* case comment pointed out that since *Brown-Forman* and *Healy*, "the Supreme Court has . . . upheld many state regulations that significantly affect interstate commerce."[235]

Fair enough. But these arguments make the all-too-common mistake of confusing the DCC's sovereign-capacity function with its anti-obstructionist

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[226] *Id.* at 949 (internal quotation marks omitted) (quoting *Miller*, 10 F.3d at 638).

[227] *See BMW of N. Am.*, 517 U.S. at 572–73.

[228] *Ass'n des Eleveurs*, 729 F.3d at 948–49.

[229] *See id.* A recent District Court ruling concluded that Congress has preempted California's foie-gras ban. Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 79 F. Supp. 3d 1136, 1147–48 (C.D. Cal. 2015).

[230] *See supra* note 220 and accompanying text (providing examples of courts refusing to extend the extraterritoriality doctrine).

[231] *See infra* note 243 and accompanying text.

[232] *Am. Beverage Ass'n*, 700 F.3d at 812 (Sutton, J., concurring) (emphasis added).

[233] *Id.* at 813.

[234] Denning, *supra* note 42, at 993 (emphasis added).

[235] Recent Case, *supra* note 42, at 2438–39.

function.[236] For example, Professors Goldsmith and Sykes—condemning the extraterritoriality doctrine—noted that "regulatory uniformity is often undesirable" because a state's "[p]revailing attitudes . . . may depend on the religious and cultural backgrounds of the local citizenry" and "geographic factors may directly affect the value of regulation."[237] I agree.

The extraterritorially doctrine *protects* regional variation. As the Second Circuit noted, "Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate."[238] Thus, states are allowed wide latitude to regulate intrastate activities, notwithstanding incidental extraterritorially effects.[239] But allowing a "state [to] reach[] into another state's affairs" inhibits such variation.[240] Empowering Nebraska to *directly regulate* Colorado transactions allows Nebraska's polity to substitute Colorado's "[p]revailing attitudes" with its own.[241]

For this reason, *Brown-Forman*'s per se rule of invalidity prohibits state laws that *directly regulate* out-of-state transactions. In contrast, intrastate laws that *incidentally* affect interstate commerce by inducing regulated parties to alter their out-of-state conduct are subject to *Pike*'s deferential balancing test.

The Court's opinion in the 2003 case *Pharmaceutical Research and Manufacturers of America v. Walsh*[242]—the decision most frequently cited as proof of the Supreme Court's abandonment of the extraterritoriality doctrine[243]—demonstrates this critical distinction. *Walsh* confronted a Maine law that provides discounted prescription drugs to the state's citizens.[244] Pursuant to the statute, the state assumes the role of "pharmacy benefit manager"[245] to negoti-

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[236] *See supra* notes 56–79 (discussing the distinct constitutional functions served by the DCC).

[237] Goldsmith & Sykes, *supra* note 42, at 796; *see also* DeVeaux, *supra* note 56, at 1021.

[238] *SPGGC, LLC*, 505 F.3d at 196 (emphasis omitted); *accord BMW of N. Am.*, 517 U.S. at 570 (noting that the states have enacted "a patchwork of [consumer-protection laws] representing the diverse policy judgments of lawmakers in [all] 50 States"); *see also* DeVeaux, *supra* note 56, at 1021.

[239] *BMW of N. Am.*, 517 U.S.at 569–70 ("[A] State may protect its citizens by prohibiting deceptive trade practices"); *see also* DeVeaux, *supra* note 56, at 1021.

[240] *See Carolina Trucks & Equip., Inc.*, 492 F.3d at 490.

[241] *See* Goldsmith & Sykes, *supra* note 42, at 796.

[242] *Walsh*, 538 U.S. at 644.

[243] *See e.g.*, *Epel*, 793 F.3d at 1174–75; *Ass'n des Eleveurs*, 729 F.3d at 951; *Am. Bev. Ass'n*, 700 F.3d at 810–11 (Sutton, J., concurring); Denning, *supra* note 42, at 90–94; Brannon P. Denning, *The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense*, 88 MINN. L. REV. 1801, 1811 (2004); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 324–25 (2003).

[244] *Walsh*, 538 U.S. at 649.

[245] *Id.* at 654.

ate rebates with pharmaceutical companies to fund reduced prices for medications purchased by eligible Mainers.[246]

Out-of-state drug manufacturers challenged the statute, arguing that by requiring them to make rebate payments for Maine-bound drugs, the statute controls the terms of their contracts with wholesalers outside of Maine.[247] The drug makers argued that the law "change[d] the economic terms of [such out-of-state] transactions" by inducing them to charge higher prices to avoid suffering a reduction in "the price" they receive in their "out-of-state wholesale sales of drugs that ultimately cross pharmacy counters in Maine."[248]

The Court rejected these arguments, concluding that the law, at most, induces drug makers to make rebate payments to Maine authorities for drugs actually sold to consumers *in Maine*.[249] The statute does not directly regulate the terms of contracts between pharmaceutical companies and wholesalers—in Maine or elsewhere.[250] Unlike the statutes struck down in *Healy* and *Brown-Forman*—which subjected vendors to penalties for selling their wares to consumers in other jurisdictions without the approval of the regulating state—the effect of Maine's law on out-of-state pharmaceutical sales to wholesalers is merely incidental.[251] Because the drug makers know that they must make rebate payments for Maine-bound drugs, they charge wholesalers higher prices to defray some of the cost.[252]

For this reason, the *Walsh* Court concluded that the law did not run afoul of the extraterritoriality doctrine. Unlike the statutes tackled by *Brown-Forman* and *Healy*, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect."[253] Nor does Maine "insist that manufacturers sell their drugs to a wholesaler for a certain price."[254]

Accordingly, the Maine law does not directly regulate activities beyond the state's borders; rather, it "only has incidental effects on interstate commerce."[255] Because the First Circuit concluded that the burdens that the statute

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[246] *Id.* at 649.

[247] Brief for Petitioners at 28, Pharm. Research & Mfrs. of Am. v. Concannon, 538 U.S. 644 (2003) (No. 01-188), 2002 WL 31120844, at *28.

[248] Reply Brief for Petitioners at 14–15, Pharm. Research & Mfrs. of Am. v. Concannon, 538 U.S. 644 (2003) (No. 01-188), 2002 WL 31788036, at *14–15.

[249] *Walsh*, 538 U.S. at 669 (quoting Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81–82 (1st Cir. 2001)).

[250] *Id.* (quoting *Concannon*, 249 F.3d at 81–82).

[251] *Id.* (quoting *Concannon*, 249 F.3d at 81–82).

[252] *See* Brief for Petitioners, *supra* note 247, at 28–29.

[253] *Walsh*, 538 U.S. at 669 (internal quotation marks omitted) (quoting *Concannon*, 249 F.3d at 81–82).

[254] *Id.* (internal quotation marks omitted) (quoting *Concannon*, 249 F.3d at 81–82).

[255] *Concannon*, 249 F.3d at 83; *accord Walsh*, 538 U.S. at 669.

imposed on interstate commerce were not "clearly excessive in relation to the putative local benefits,"[256] a finding that the Supreme Court did not review,[257] the *Walsh* majority affirmed the statute's constitutionality.[258]

Remarkably, Professor Denning and other scholars assert that *Walsh* demonstrates that the Court has "retreated" from *Healy* and *Brown-Forman*, leaving "the extraterritoriality principle look[ing] . . . quite moribund."[259] In a similar vein, the Ninth Circuit contended, in dicta, that by simply observing that "*Healy* and *Baldwin* [*v. G.A.F. Seelig, Inc.*] involved 'price control or price affirmation statutes,'" the *Walsh* Court limited the extraterritoriality doctrine to such statutes.[260]

Walsh did no such thing. The Court has similarly observed that "*Marbury v. Madison* was a recognition of the power of Congress over the term of office of a justice of the peace for the District of Columbia."[261] By the logic of the Ninth Circuit, this means that *Marbury*'s broader pronouncement that it is "the province and duty of the judicial department to say what the law is"[262] should now be limited to cases involving attempts to interfere with Congress's control "over the term of office of a justice of the peace for the District of Columbia."[263] Nonsense. *Walsh* merely reached the unremarkable conclusion that statutes that regulate *intrastate* activity are not per se unconstitutional merely because they incidentally affect interstate transactions. This enables states to "try novel social and economic experiments" within their own borders, but prohibits them from conscripting the citizens or property of neighboring states as guinea pigs in their experiments.[264]

Yet, the *Epel* court, relying on Professor Denning's flawed reading, concluded that *Walsh* repudiated the DCC's extraterritoriality doctrine.[265] Worse, the court failed to recognize that Colorado's renewable-energy mandate does

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[256] *Concannon*, 249 F.3d at 83 (internal quotation marks omitted) (quoting *Pike*, 397 U.S. at 142).

[257] With regard to the DCC, the *Walsh* petitioner confined its petition for review to the question whether "requiring an out-of-state manufacturer, which sells its products to wholesalers outside the state, to pay the state each time one of its products is subsequently sold by a retailer within the state" ran afoul of the extraterritoriality doctrine. Petition for a Writ of Certiorari at i, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) (No. 01-188), 2001 WL 34133506. The petitioner did not petition the Court to review the First Circuit's finding that Maine's regulation satisfied the *Pike* test. *Id.*

[258] *Walsh*, 538 U.S. at 669–70.

[259] Denning, *supra* note 42, at 979.

[260] *Ass'n des Eleveurs*, 729 F.3d at 951 (citing *Walsh*, 538 U.S. at 669).

[261] Parsons v. United States, 167 U.S. 324, 337 (1897).

[262] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[263] *See Parsons*, 167 U.S. at 337.

[264] *See Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

[265] *Epel*, 793 F.3d at 1174–75 (citing Denning, *supra* note 42, at 998–99; Goldsmith & Sykes, *supra* note 42, at 806).

not directly regulate out-of-state conduct. The Colorado mandate's effects on electricity generators in Nebraska and other states are merely incidental.

Colorado's statute directs the state's utilities "to ensure that 20% of the electricity they sell to *Colorado consumers* comes from renewable sources."[266] Noting that "Colorado is a net importer of electricity," the *Epel* plaintiffs asserted that the law constitutes impermissible extraterritorial regulation because "some out-of-state coal producers . . . will lose business" to more environmentally friendly producers.[267] Accepting the plaintiffs' assertions for purposes of argument that Colorado's regulation constitutes direct regulation of extraterritoriality commerce,[268] the court posited that the DCC's prohibition against such regulation is no longer binding.[269]

But in reaching this conclusion the *Epel* court completely failed to recognize that the statute in question does not directly regulate extraterritorial commerce.[270] It only regulates *intrastate* electrical utilities—placing limits on the power they may sell to *Colorado* consumers *in Colorado*. To be sure, Colorado's cap on coal-fired electricity will affect out-of-state commerce. By directing its utilities to purchase twenty percent of the state's power from renewable-energy producers, Colorado's mandate will increase the demand for carbon-friendly power and reduce the demand for electricity produced by burning coal. Thus, as the court noted, "fossil fuel producers like [the plaintiff's] member[s] will be hurt."[271] But these effects on interstate commerce are merely incidental—and likely permissible under *Pike*.[272]

Colorado's law does not seek to "punish [Nebraska power producers] for conduct that was lawful where it occurred."[273] Such producers remain free to generate coal-fired power to the limits prescribed by local (and federal) law and to sell that power to willing buyers. Colorado has merely imposed mandates on its own utilities purchased for consumption by Colorado consumers. Colorado's law may affect coal prices in other states by reducing the demand for coal-fired electricity in Colorado.[274] But like the statute in *Walsh* Colorado's mandate does not directly regulate "any out-of-state transaction, either by

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[266] *Id.* at 1170 (emphasis added).

[267] *Id.* at 1171.

[268] *See id.* at 1173–75.

[269] *Id.* at 1174–75.

[270] *See supra* note 38 and accompanying text (discussing *Epel*).

[271] *Epel*, 793 F.3d at 1174.

[272] In *North Dakota v. Heydinger*, Judge Loken fell prey to the *Epel* plaintiffs' misguided argument. *See Heydinger*, 825 F.3d at 920; *supra* note 171 and accompanying text (discussing *Heydinger*).

[273] *See BMW of N. Am.*, 517 U.S. at 572–73.

[274] *Epel*, 793 F.3d at 1171 (noting that Colorado's law will cause "some out-of-state coal producers" to "lose business with out-of-state utilities who feed their power onto the grid").

its express terms or by its inevitable effect."[275] *Epel* rightly concluded that the law is constitutional[276]—but for the wrong reason.

Abandonment of the DCC's prohibition against direct extraterritorial regulation will not facilitate "state experimentation with laws that attempt to solve their social and economic problems," as critics contend.[277] To the contrary, investing states with such power would bring a swift end to Brandeisian experimentation. "[R]egulatory uniformity is often undesirable" because a state's "[p]revailing attitudes . . . may depend on the religious and cultural backgrounds of the local citizenry" and "geographic factors may directly affect the value of regulation."[278] Placing territorial limits on Nebraska's regulatory authority enables Colorado to experiment by decriminalizing marijuana. It prevents Nebraska's lawmakers from replacing Colorado's "[p]revailing attitudes" about "the value of [marijuana] regulation" with their own.[279]

II. Interstate Marijuana Conflicts Demonstrate the Need for a Vibrant Extraterritoriality Doctrine

Epel, purported to permit Colorado to directly regulate Nebraska utility transactions. Colorado's perceived intervention in Nebraska's internal affairs may trigger retaliation. Section A examines some of *Epel*'s potential implications.[280] Section B discusses the *Pike* test.[281] Section C applies the *Pike* test to laws that attempt to regulate out-of-state marijuana transactions.[282]

A. If Epel *Stands, What Standards Govern a State's Authority to Project Its Laws into Other Jurisdictions?*

If the extraterritoriality doctrine is, indeed, dead,[283] what limits remain to cabin a state's power to regulate extraterritorial conduct? *Epel* recognized, as explained in the previous Part,[284] that since *Brown-Forman*, DCC "cases are

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[275] *See Walsh*, 538 U.S. at 669.

[276] In my view, Colorado's mandate easily satisfies the *Pike* balancing test. *See infra* notes 291–326 and accompanying text.

[277] *See* Recent Case, *supra* note 42, at 2442.

[278] Goldsmith & Sykes, *supra* note 42, at 796.

[279] *See id.*

[280] *See infra* notes 283–290 and accompanying text.

[281] *See infra* notes 291–326 and accompanying text.

[282] *See infra* notes 327–365 and accompanying text.

[283] The Supreme Court will likely revisit the DCC's extraterritoriality doctrine in the near future because *Epel* is in conflict with rulings in other circuits. *Compare* North Dakota v. Heydinger, 825 F.3d 912, 922 (8th Cir. 2016) (holding that the extraterritoriality doctrine is still valid), *with* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174–75 (10th Cir. 2015) (declaring the extraterritoriality doctrine obsolete).

[284] *See supra* notes 56–79 and accompanying text.

said to come in three varieties."[285] The first species consists of protectionist laws—"[l]aws that clearly discriminate against out-of-staters."[286] The second line targets "laws that [directly] control extraterritorial conduct."[287] The third variety of cases, the *Pike* line, scrutinizes "state laws burdening interstate commerce" that produce "insufficient offsetting local benefits" to justify those burdens.[288] Justice Gorsuch was dismissive of the *Pike* doctrine, calling it "a pretty grand, even 'ineffable,' all-things-considered sort of test" that requires "judges (to attempt) to compare wholly incommensurable goods for wholly different populations"—"measuring the burdens on out-of-staters against the benefits to in-staters."[289] Yet ultimately while *Epel* abandoned the extraterritoriality doctrine, it left both *Pike* and the DCC's anti-protectionist prohibitions unmolested.[290]

The DCC's protectionism ban would not restrain a prohibitionist state's regulation of marijuana transactions in a pot-friendly neighbor. Such regulation would not advantage in-state pot sellers over out-of-state competitors. The prohibitionist state's aim is to evenhandedly thwart in-state and out-of-state pot sellers alike. Nonetheless, the *Pike* test would impose some limits on such regulation.

B. The Pike *Test*

Pike's modern balancing test, though "lack[ing] in precision,"[291] puts a heavy thumb on the regulating state's side of the scale.[292] It recognizes that states enjoy a "wide scope" of authority concerning the regulation of intrastate matters even when regulations may impact interstate commerce.[293] In particular, cases "where local safety measures" are found to "place an unconstitutional burden on interstate commerce" will be "few in number."[294] Thus, as Judge Posner has observed, a litigant seeking to invalidate a law under *Pike* "has a steep hill to climb."[295]

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[285] *Epel*, 793 F.3d at 1171.
[286] *Id.* (internal quotation marks omitted)
[287] *Id.* at 1172 (internal quotation marks omitted).
[288] *Id.* at 1171 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 137 (1970)).
[289] *Id.*
[290] *See id.* at 1171, 1177.
[291] Morgan v. Virginia, 328 U.S. 373, 377 (1946).
[292] *See Pike*, 397 U.S. at 142; Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959); S. Pac. Co. v. Arizona, 325 U.S. 761, 763, 770 (1945).
[293] *S. Pac. Co.*, 325 U.S. at 770.
[294] *Bibb*, 359 U.S. at 529.
[295] Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 665 (7th Cir. 2010).

Since *Lochner*'s repudiation,[296] the Supreme Court has only struck down four laws under this doctrine. In three of these cases, the putative local interest served by the offending law proved to be of "dubious advantage."[297] In the fourth—*Pike* itself—the law's putative benefit was "tenuous" at best.[298]

In its 1946 opinion in *Morgan v. Virginia*,[299] the Court confronted a Virginia statute that required buses "both interstate and intrastate, to separate" white passengers from persons of color "so that contiguous seats [would] not be occupied by persons of different races at the same time."[300] The Court assessed the conviction of Irene Morgan,[301] a forgotten heroine of the Civil-Rights movement; an African-American passenger who refused to cede her seat when her bus reached the Virginia line.[302] Applying the balancing test later articulated by *Pike*, the *Morgan* Court struck down the Virginia statute—and voided Mrs. Morgan's conviction—finding that the law "impose[d] undue burdens on interstate commerce."[303]

Virginia attested that its putative local interest was "to avoid friction between the races."[304] The Court deferentially accepted this assertion at face value, but found it deserved no real weight in the balancing process because "[s]uch regulation hampers freedom of choice in selecting accommodations."[305] Twenty-one years later, striking down Virginia's anti-miscegenation law in *Loving v. Virginia* in 1967,[306] the Court more honestly laid bare the true purpose underlying such racial classifications, recognizing that they are "obviously an endorsement of the doctrine of White Supremacy."[307] *Loving* also made explicit what *Morgan* merely implied: "There is patently no legitimate . . . purpose" justifying such "invidious racial discrimination."[308]

Noting that "no state law can reach beyond its own border," a proposition challenged by *Epel* and its supporters, the *Morgan* Court concluded that racial-

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[296] *See* Lochner v. New York, 198 US 45 (1905).

[297] *S. Pac. Co.*, 325 U.S. at 779; *accord Bibb*, 359 U.S. at 525; *Morgan*, 328 U.S. at 383.

[298] *Pike*, 397 U.S. at 145.

[299] *Morgan*, 328 U.S. at 374.

[300] *Id.*

[301] *Id.* at 373.

[302] *Id.* at 374–75. I have sometimes criticized the traditional case method's propensity to condition students to view litigants as abstract subjects—the legal equivalent of lab rats—that exist only to illustrate the application of legal principles. I believe that human dignity animates the Constitution and that cases should be understood as much for their real-world impact on the litigants as for the rules they produce. Mrs. Morgan's story demonstrates this principle as well as any in the United States Reports.

[303] *Id.* at 380, 386.

[304] *Id.* at 380.

[305] *Id.* at 383.

[306] Loving v. Virginia, 388 U.S. 1, 1 (1967).

[307] *Id.* at 7.

[308] *Id.* at 11.

ly restrictive laws, like Virginia's, impeded "interstate travel" and thus substantially "interfere[d] with commerce."[309] Because Virginia's law failed to effectuate any legitimate local public interest—and, in fact, produced *negative* local affects—the Court struck it down.[310]

The Court deployed the balancing test to invalidate obstructionist state statutes twice more before *Pike*, striking Arizona's law limiting freight trains to seventy cars in *Southern Pacific Co. v. Arizona* in 1945,[311] and Illinois's infamous "mud flaps" law in *Bibb v. Navajo Freight Lines, Inc.* in 1959,[312] which required trucks to be fitted with "contour" mud flaps rather than the "straight" flaps employed everywhere else.[313] In both cases the Court noted that "state legislatures [enjoy] great leeway in providing safety regulations,"[314] but ultimately struck down the statutes because both proved to be *more dangerous* than the alternative.[315] Arizona's train-length law led railroads to run more trains, increasing "casualties within the state."[316] Indeed, "[t]he accident rate in Arizona [wa]s much higher than on comparable lines elsewhere, where there [wa]s no regulation of length of trains."[317] Likewise, Illinois's required "use of the contour flap create[d] hazards previously unknown to those using the highways," causing more highway deaths.[318] Because these laws—like Virginia's racist bus-seating statute—produced *negative* local effects and "severely burden[ed] interstate commerce," both were stricken.[319]

Finally, in *Pike* itself, the Court addressed an Arizona regulation that barred a cantaloupe grower that operated farms on both the Arizona and California banks of the Colorado River from packaging its Arizona-sourced melons at its packaging facility on the California side of the river.[320] The putative local interest in the measure was to ensure that cantaloupes grown on the Arizona side—which were melons "of exceptionally high quality"—did not "bear the name of their California packer."[321] Cantaloupes packaged on the Arizona side

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[309] *Morgan*, 328 U.S. at 386.
[310] *Id.*
[311] *S. Pac. Co.*, 325 U.S. at 779.
[312] *Bibb*, 359 U.S. at 529.
[313] *Id.* at 522, 529.
[314] *Id.* at 530; *accord S. Pac. Co.*, 325 U.S. at 770.
[315] *Bibb*, 359 U.S. at 525; *S. Pac. Co.*, 325 U.S. at 778.
[316] *S. Pac. Co.*, 325 U.S. at 778.
[317] *Id.*
[318] *Bibb*, 359 U.S. at 525 (internal quotation marks omitted) (quoting Navajo Freight Lines, Inc. v. Bibb, 59 F. Supp. 385, 391 (S.D. Ill. 1958)).
[319] *Id.* at 528; *accord S. Pac. Co.*, 325 U.S. at 779.
[320] *Pike*, 397 U.S. at 139–40.
[321] *Id.* at 144.

would be labeled as Arizona-grown and thus "enhance the reputation of [other] growers within the State."[322]

In contrast to the "dubious" local benefits conferred by the statutes in *Morgan*, *Southern Pacific*, and *Bibb*,[323] the *Pike* Court found that Arizona's "asserted state interest [was] a legitimate" albeit "tenuous" one.[324] Nonetheless, the Court found that the burden the regulation imposed on interstate commerce, requiring the construction of "an unneeded $200,000 packing plant"—more than $1.2 million in today's dollars[325]—was clearly excessive in relation to its local benefit.[326]

C. How Does Pike *Apply to State Laws Regulating Out-of-State Marijuana Transactions?*

Many prohibitionist state laws banning the sale of marijuana in pot-friendly states to the prohibitionist state's citizens would survive "the deferential *Pike* balancing test."[327] *Pike* noted that "the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved . . . ."[328] In particular, the Court has recognized that in balancing the local benefits of a state's law against its interstate burdens, "the peculiarly local nature of th[e] subject of safety" dictates that laws enhancing local public safety bear the most weight.[329] Such "measures carry a strong presumption of validity . . . ."[330]

A Nebraska statute banning pot sales in Colorado to visiting Huskers would constitute a quintessential safety measure. At least one study suggests that since Colorado first permitted the commercial sale of marijuana, the state has witnessed a ninety-two percent increase in fatal car accidents involving stoned drivers.[331] Because marijuana purchased at dispensaries is not consumed on site,[332] Nebraskans who buy Colorado pot are likely to consume the

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[322] *Id.* at 143.

[323] *S. Pac. Co.*, 325 U.S. at 779; *accord Bibb*, 359 U.S. at 525; *Morgan*, 328 U.S. at 383.

[324] *Pike*, 397 U.S. at 145.

[325] *Consumer Price Index Inflation Calculator*, BUREAU LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=200%2C000.00&year1=1970&year2=2017 [https://perma.cc/8KDF-8J6H] (last visited Apr. 11, 2017) (adjusted for inflation, $200,000 in 1970 equals an estimated $1,255,685.52 in 2017).

[326] *Pike*, 397 U.S. at 145.

[327] *See* Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 449 (6th Cir. 2009).

[328] *Pike*, 397 U.S. at 142.

[329] *Bibb*, 359 U.S. at 523.

[330] *Id.* at 524. The Court also observed that "[t]he various exercises by the States of their police power stand . . . on an equal footing. All are entitled to the same presumption of validity when . . . measured against the Commerce Clause." *Id.* at 529.

[331] ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, *supra* note 19, at 1.

[332] *But see* W. David Ball, *Bring Back the Opium Den: Column*, USA TODAY (Feb. 11), http://www.usatoday.com/story/opinion/2015/02/11/marijuana-legislation-recreation-legalized-drug-

drug in Nebraska,[333] leading to more drugged-driving accidents in Nebraska.[334] Moreover, even weed consumed by Nebraskans in Colorado poses public-health concerns for Nebraska.

Severe marijuana abuse causes "long-lasting changes in brain function that can jeopardize educational, professional, and social achievements."[335] Imaging studies of regular pot users' brains reveal "decreased activity in prefrontal regions and reduced volumes in the hippocampus"[336] leading to "impaired neural connectivity . . . in specific brain regions"—particularly those responsible for "learning and memory" and "self-conscious awareness."[337] This can cause "impairments in memory and attention," and "significant declines in IQ."[338] Those who become dependent on marijuana as adolescents can lose up to eight IQ points by the time they reach adulthood.[339] These "changes in brain function" yield predictable negative social consequences.[340] Frequent marijuana use leads to "lower income, greater need for socioeconomic assistance, unemployment, criminal behavior, and lower satisfaction with life."[341]

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alcohol-column/23254653/ [https://perma.cc/44DZ-PDSK] (lamenting that marijuana regulations "do not allow on-premises consumption in commercial establishments such as bars and restaurants" because "[t]he best way to limit diversion from the legal market to teens would be to shift all marijuana use, or at least as much as possible, to on-premises consumption").

[333] Visitors to Colorado who lack access to a private home have few places to smoke marijuana, as dispensaries do not generally permit on-site consumption, the state bans public cannabis consumption, and most hotels prohibit smoking marijuana on their premises. Jordan Schrader, *Law Has Barrier to Pot Tourism*, NEWS TRIB. (Mar. 16, 2014), https://web.archive.org/web/20160410151241/http://www.thenewstribune.com/news/politics-government/article25866484.html.

[334] *See* Joanne E. Brady & Guohua Li, *Trends in Alcohol and Other Drugs Detected in Fatally Injured Drivers in the United States, 1999–2010*, 179 AM. J. EPIDEMIOLOGY 692, 697 (2014) (finding that between 1999 and 2010, the number of fatally injured drivers who tested positive for marijuana tripled).

[335] Volkow et al., *supra* note 18, at 2225.

[336] *Id.* at 2220.

[337] *Id.*

[338] *Id.* at 2220, 2221; *accord* ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, *supra* note 19, at 36.

[339] ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, *supra* note 19, at 36.

[340] Volkow et al., *supra* note 18, at 2225; *accord* Budney et al., *supra* note 18, at 4.

[341] Volkow et al., *supra* note 18, at 2221; *accord* Budney et al., *supra* note 18, at 8; *see also* DeVeaux & Mostad-Jensen, *supra* note 6, at 1879. Congressional findings would also support Nebraska's assertion that laws barring Colorado pot sellers from transacting with Nebraskans promotes public safety in Nebraska. *See* 21 U.S.C. § 801(2) (2012). Congress has condemned the marijuana trade as a nuisance, concluding that the "importation, manufacture, distribution, and possession" of marijuana has "a substantial and detrimental effect on the health and general welfare of the American people," and that marijuana "distributed locally usually ha[s] been transported in interstate commerce immediately before [its] distribution," and that the intrastate "distribution and possession of" marijuana "contribute[s] to swelling the interstate traffic in such substances." 21 U.S.C. § 801(2)–(4); *see also* DeVeaux & Mostad-Jensen, *supra* note 6, at 1872–77 (arguing that Congress's findings render Colorado's venture a nuisance per se under the federal common law of nuisance).

In contrast to the "dubious" local benefits conferred by the statutes in *Morgan*, *Southern Pacific*, and *Bibb*,[342] and the "tenuous" benefit conferred by *Pike*'s regulation,[343] the Nebraska statute proposed above would constitute a true safety measure and would likely confer tangible benefits.

A Nebraska statute penalizing *its own citizens* for using Colorado-sourced pot—even pot consumed in Colorado—would clear *Pike*'s hurdle. Such a law would convey local benefits to Nebraska by reducing drugged driving and by sparing the state some of the expenses associated with marijuana abuse.[344] These benefits would be balanced against the burden the law imposes on interstate commerce—chiefly the revenue that individual Colorado marijuana dispensaries and Colorado tax collectors would lose if Colorado dispensaries cannot transact with Nebraskans.

Although Colorado's lost tax revenue might constitute a meaningful hardship for *Pike* purposes, the lost profits of individual pot sellers carries little or no weight in the analysis. As one court recently noted, because "[t]he Commerce Clause is not meant to be a safety net for individual out-of-state entities," profits lost by vendors wishing to sell goods prohibited by a state's law "can hardly be considered a burden for [DCC] purposes."[345] Although Colorado's lost tax revenue would be far from de minimis, this burden would not be "clearly excessive in relation to [Nebraska's] local benefits."[346] Colorado, after all, managed to function for more than a century without collecting *any* marijuana-related taxes.[347]

A Nebraska law that imposes sanctions upon *Colorado dispensaries* transacting business with visiting Huskers would raise more pressing questions. Judge Sutton argued in his 2012 concurring opinion in *American Beverage Association v. Snyder*, that the *Pike* doctrine prevents a state from imposing its own laws on merchants in other states who engage in transactions with

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[342] *S. Pac. Co.*, 325 U.S. at 779; *accord Bibb*, 359 U.S. at 525; *Morgan*, 328 U.S. at 383.

[343] *Pike*, 397 U.S. at 145.

[344] Volkow et al., *supra* note 18, at 2226 (noting how legal drugs may be more dangerous than illegal drugs because legal status allows for more "widespread exposure"). As some scholars have noted, "As policy shifts toward legalization of marijuana, it is reasonable and probably prudent to hypothesize that its use will increase and that, by extension, so will the number of persons for whom there will be negative health consequences." *Id.*

[345] Perfect Puppy, Inc. v. E. Providence, 98 F. Supp. 3d 408, 417–18 (D.R.I. 2015) (citing Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 313 (1st Cir. 2005)).

[346] *See Pike*, 397 U.S. at 142.

[347] Colorado's marijuana taxes offset the intrastate harm caused by its marijuana-legalization experiment. Because Colorado's experiment causes transboundary harm, but the state does not share any of the proceeds of its experiment with its neighbors, Colorado's lost tax revenue, in my view, should not qualify as a burden for DCC purposes.

the regulating state's citizens.[348] He stated, "Even if Ohio, for instance, made it illegal for its citizens to gamble, the State could not prosecute Nevada casinos for letting Buckeyes play blackjack."[349] Curiously, Judge Sutton relied upon the Seventh Circuit's 2010 opinion in *Midwest Title Loans, Inc. v. Mills*[350] to support this proposition.[351] In *Mills*, Judge Posner, writing for the court, indeed posited that a hypothetical Indiana law punishing out-of-state casinos for "do[ing] business with residents of Indiana" would run afoul of the DCC.[352] But he did not rely on *Pike*'s anti-obstructionist test for this proposition. Rather, citing the Court's decisions in *Healy v. Beer Institute, Inc.* in 1989 and *Brown-Forman* in 1986, Judge Posner asserted that such a law would be "invalidated *without a balancing of local benefit against out-of-state burden*" because the DCC's extraterritoriality doctrine prohibits state laws that "[directly] regulate activities in other states."[353]

A Nebraska law subjecting Colorado vendors to strict liability whenever marijuana they sell ends up in Nebraskan hands would impermissibly burden interstate commerce. Sellers would be unable to safeguard themselves against straw purchasers and Nebraskans who fraudulently procured Colorado identification. Imposing strict liability would likely force many dispensaries out of business, impeding Colorado's policy of ensuring that "[l]egitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana" in the state.[354]

Such a law would also likely run afoul of the Due Process Clause.[355] The Clause imposes "modest restrictions" on the extraterritorial reach of a state's law,[356] limiting its application to transactions with which the state has "a significant contact or significant aggregation of contacts . . . creating state interests . . . ."[357] Such contacts exist with regard to any transaction involving a par-

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[348] Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 814 (6th Cir. 2012) (Sutton, J., concurring), *opinion amended and superseded*, 735 F.3d 362 (6th Cir. 2014).

[349] *Id.*

[350] *Midwest Title Loans, Inc.*, 593 F.3d at 666.

[351] *Am. Beverage Ass'n*, 700 F.3d at 814 (Sutton, J., concurring) (citing *Midwest Title Loans, Inc.*, 593 F.3d at 666).

[352] *Midwest Title Loans, Inc.*, 593 F.3d at 666.

[353] *Id.* (emphasis added) (citing Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582–84 (1986)).

[354] *See* COLO. CONST. art. XVIII, § 16(1)(b)(IV).

[355] *See* U.S. CONST. amend XIV, § 1.

[356] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); *accord* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion).

[357] *Shutts*, 472 U.S. at 821 (1985) (internal quotation marks omitted) (quoting *Hague*, 449 U.S. at 313) (plurality opinion)).

ty who is a citizen of the regulating state at the time of sale.[358] But due process also protects litigants from "unfair surprise."[359] Although a merchant who sells goods to a known Nebraskan must anticipate that Nebraska law could apply to their transaction,[360] a Colorado business that transacts with a Nebraskan it reasonably believes to be a Coloradan would be "unfairly surprised" by the application of Nebraska law.[361]

In contrast, a Nebraska statute punishing Colorado dispensaries that sell pot to consumers they *know or have reason to know* are Huskers would not subject vendors to "unfair surprise"[362] or impose "clearly excessive" burdens on interstate commerce.[363] Colorado law dictates that "[p]rior to initiating a sale, the employee of the retail marijuana store making the sale shall verify that the purchaser has a valid identification card showing the purchaser is twenty-one years of age or older."[364] A dispensary transacting with someone who presents Nebraska-issued identification will be on notice that it is transacting with a Nebraskan.[365] Requiring marijuana vendors to decline to sell pot to individuals who present such identification would therefore not impose any additional burdens upon sellers. Sellers are already obligated to require prospective purchasers to present identification and to turn away customers who are too young or who lack identification.

CONCLUSION

As Justice Cardozo observed long ago, if the Constitution left the states free to sabotage their neighbors' ventures by "project[ing] [their] legislation into [neighboring states]," then "the door [will be] opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."[366] The Tenth Circuit and Justice Gorsuch, in their haste to affirm what they likely viewed as socially beneficial legislation,

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[358] *See Shutts*, 472 U.S. at 842 n.24 (Stevens, J., concurring); *see also* Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 366 (2d Cir. 2003); Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1394 (8th Cir. 1997).

[359] *Hague*, 449 U.S. at 318 n.24 (plurality opinion).

[360] *Id.*; *see also Shutts*, 472 U.S. at 842 n.24 (Stevens, J., concurring).

[361] *See Hague*, 449 U.S. at 318 n.24 (plurality opinion). As a practical matter, Nebraska's courts may have difficulty exercising personal jurisdiction over Colorado pot vendors if Nebraska prosecutors attempt to enforce their State's law. Thus, if a Nebraska Grand Jury indicts a Coloradan, the dispute could test the limits of the Extradition Clause. *See* U.S. CONST. art. IV, § 2, cl. 2. Because Nebraska is most likely to pursue pot vendors operating near the states' border, it is likely that dispensary employees will sometimes enter Nebraska and be subject to personal service or arrest.

[362] *See Hague*, 449 U.S. at 318 n.24 (plurality opinion).

[363] *See Pike*, 397 U.S. at 142.

[364] COLO. REV. STAT. § 12-43.4-402(3)(b)(I) (2017).

[365] *See Hague*, 449 U.S. at 318 n.24 (plurality opinion).

[366] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521–22 (1935).

failed to heed this lesson. Hopefully, the Supreme Court will set things right, sparing us from a return to the "rivalries and reprisals" that nearly doomed our nation in its infancy.