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One Toke Over the (State) Line: Constitutional Limits on "Pot Tourism" Regulations

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CONSTITUTIONAL LIMITS ON “POT TOURISM” RESTRICTIONS

Brannon P. Denning

Abstract

Among the myriad legal issues confronting states like Colorado that are experimenting with the legalization of marijuana is the need to regulate “pot tourism” by persons from other states where marijuana is not legal. In Colorado, the final recommendations from the Amendment 64 Implementation Task Force included a proposal “to limit purchases by state residents to an ounce at a time and to a quarter of an ounce for out-of-state visitors.” The lower restrictions for nonresidents are designed to deter pot tourists from “smurfing”—visiting a number of different dispensaries to accumulate larger amounts of marijuana with a view to illegally reselling the pot. Colorado’s legislature adopted the Task Force’s recommendation in House Bill 1317, recently signed into law by Colorado’s governor, which established the regulatory framework for the legal sale of marijuana. Among its provisions is a quarter-ounce purchase limit for nonresidents.

Treating purchasers of a legal product differently based on state residency implicates constitutional doctrines that limit a state’s ability to discriminate against nonresidents. This essay is the first to examine the Colorado recommendation in light of two of those doctrines: the Privileges and Immunities Clause of Article IV, section 2 and the dormant Commerce Clause doctrine (DCCD). At first glance, Colorado’s facially discriminatory law appears to be almost certainly unconstitutional under current doctrine. I will argue in the remainder of this essay, however, that Colorado can put forth compelling arguments that its law passes constitutional muster, especially following the recent Department of Justice memorandum clarifying its enforcement priorities in light of state legalization. The essay also suggests a role the federal government could play to remove considerable, though not all, constitutional doubt from state regulations of pot tourism.

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I. Introduction

Among the myriad legal issues confronting states like Colorado that are experimenting with the legalization of marijuana is the need to regulate “pot tourism” by persons from other states where marijuana remains illegal. In Colorado, the final recommendations from the Amendment 64 Implementation Task Force included a proposal “to limit purchases by state residents to an ounce at a time and to a quarter of an ounce for out-of-state visitors.”\(^1\) The lower restrictions for nonresidents are designed to deter pot tourists from “smurfing”—visiting a number of different dispensaries to accumulate larger amounts of marijuana with a view to illegally reselling the pot.\(^2\) Colorado’s legislature adopted the Task Force’s recommendation in House Bill 1317, recently signed into law by Colorado’s governor, which established the regulatory framework for the legal sale of marijuana. Among its provisions is a quarter-ounce purchase limit for nonresidents.\(^3\) Sale to a nonresident in excess of the quarter-ounce limit is a class 2 misdemeanor,\(^4\) punishable by between three and twelve months imprisonment, a $250-$500, or both.\(^5\)

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\(^1\) Ana Campoy, *Colorado Sets Pot-Sale Rules*, WALL ST. J., April 9, 2013, at A2.  Washington State voters similarly voted to decriminalize marijuana sales and possession. The state liquor control board was put in charge of writing rules to implement the state initiative. The latest draft, however, does not include a nonresident purchase restriction like Colorado’s.  For a copy of the draft regulations, see https://lcb.app.box.com/proposed-rules (last visited July 28, 2013).


\(^3\) COLO. REV. STAT. § 12-43.4-306(3)(a).

\(^4\) COLO. REV. STAT. § 12-43.4-901(4)(i).

Treating purchasers of a legal product differently based on state residency implicates constitutional doctrines that limit a state’s ability to discriminate against nonresidents. This essay examines the Colorado recommendation in light of two of those doctrines: the Privileges and Immunities Clause of Article IV, section 2 and the dormant Commerce Clause doctrine (DCCD). At first glance, Colorado’s facially discriminatory law appears to be almost certainly unconstitutional under current doctrine. I will argue in the remainder of this essay, however, that Colorado could put forth compelling arguments that its law passes constitutional muster—a conclusion bolstered by the Court’s treatment of both Privileges and Immunities and dormant Commerce Clause claims last term in McBurney v. Young as well recent federal guidance on enforcement of federal drug laws. Part II briefly describes the Task Force’s recommendation, its subsequent adoption by the legislature, and a recent Department of Justice (DOJ) memorandum providing enforcement guidance in light of state legalization efforts. The DOJ memo is particularly relevant to Part III’s defense of the Colorado nonresident purchase limit under both the Privileges and Immunities Clause of Article IV and the DCCD. A brief conclusion follows in Part IV, which also suggests a role the federal government could play to remove considerable, though not all, constitutional doubt from state regulations of pot tourism.

II. Legislative Adoption of Colorado’s Amendment 64 Task Force Recommendations

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6 I should mention, at least in passing, two other possible challenges. The first, which would be a state constitutional challenge, would claim that because the amendment requires only that a person show some identification that proves they are of legal age, the residency requirement is at best unenforceable if not unauthorized. Jacob Sullum, Colorado Will Soon Decide the Rules for Selling Pot, REASON.COM, April 22, 2013, 2:13 p.m., available at http://reason.com/blog/2013/04/22/colorado-legislature-will-soon-decide-th (last visited July 28, 2013). One might also attempt an equal protection challenge under the Fourteenth Amendment to the U.S. Constitution. “Nonresident would-be purchaser of marijuana,” however, is unlikely to be considered a suspect classification, meaning that Colorado would need to establish only that it has a rational basis for its distinction. Armour v. Indianapolis, 132 S. Ct. 2073, 2079-80 (2012). While the Court has in the past invalidated legislative classifications that discriminate against out-of-state commerce or disadvantage new residents, see, for example, Hooper v. Bernalillo Co. Assessor, 472 U.S. 612 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), those cases involve economic protectionism absent in Colorado’s legislation. See infra notes 49-50, 75-77, 88-90 and accompanying text.

7 2013 WL 1788080 (April 29, 2013) (rejecting Privileges and Immunities Clause and dormant Commerce Clause challenges to a provision in Virginia’s Freedom of Information Act that permitted only state citizens to file FOIA requests).
In March, 2013, a task force established to implement Amendment 64, which legalized marijuana in Colorado, released a lengthy report containing its final recommendations.\(^8\) Recommendation 7.1 suggested “that the General Assembly consider setting per-transaction purchase limits that are more restrictive for non-residents than for residents.”\(^9\) Acknowledging that residency requirements risked creating a black market, the Task Force nevertheless offered that

the Colorado General Assembly may wish to establish a reasonable limit lower than one (1) ounce for both residents and visitors, to discourage unlawful diversion of marijuana out of the regulated system and out of the state, since the lower transaction amount would make the accumulation of marijuana more difficult. Reasonable purchase limits for residents could be set at or above the level for out-of-state residents, but not to exceed one (1) ounce.

In order to discourage the diversion of legally-purchased marijuana out of Colorado, reduce the likelihood of federal scrutiny of Colorado’s adult-use marijuana industry, and support harmonious relationships with Colorado’s neighboring states, an appropriate limit should be placed on the amount of marijuana or marijuana-infused products that can be purchased by out-of-state consumers. The Task Force discussed possible transaction limits of 1/8 - 1/4 ounce of marijuana, or its equivalent in infused products, for non-residents. . . .\(^{10}\)

The report added that additional safeguards against diversion should be undertaken, including “point-of-sale information to out-of-state consumers, signage at airports and near borders, coordination with neighboring states regarding drug interdiction, and restricting retail licenses near the borders.”\(^{11}\) House Bill 1317 followed the Task Force recommendation and limited nonresidents to a quarter-ounce purchase.


\(^{9}\) Id., § 7.1, at 49.

\(^{10}\) Id. at 50.

\(^{11}\) Id.
Residents would, by implication, be able to purchase the full ounce they are permitted to legally possess under the state constitution.

Colorado’s concern with federal reaction to diversion of marijuana was prescient. The Obama Administration had sent conflicting signals about the status of state experiments. Ominously, it raided a number of medical marijuana dispensaries in Washington State in the summer of 2013. Finally, in August of 2013, the Department of Justice released a memo that provided enforcement guidance for marijuana.

The memo set forth “certain enforcement priorities that are particularly important to the federal government” and remain so in light of state experiments with legalization. Specifically, the memo mentioned “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states . . . .” The enumerated priorities, the memo continued, “will continue to guide the Department’s enforcement of the [Controlled Substances Act] against marijuana-related conduct.” For areas outside the memo’s “enforcement priorities,” the memo would adhere to its reliance “on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.” Elsewhere it stressed that states must “implement strong and effective regulatory and enforcement systems that will address those state laws could pose to public safety, public health, and other law enforcement interests.” It called on states that had legalized marijuana to implement “strong and effective regulatory and enforcement systems” to “affirmatively address [federal] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states,” lest the federal government be forced to involve itself.

III. Constitutional Limits on Nonresident Discrimination and Colorado’s Nonresident Purchase Limit

See supra notes 2-5 and accompanying text.

Amendment 64 to Colorado’s Constitution decriminalizes possession or purchase of an ounce of marijuana or six marijuana plants. COLO. CONST. art. XVIII, § 16(3)(a).


Id. at 1.

Id.

Id. at 2.

Id. at 2.

Id.

Id. at 3.
Colorado’s law makes a distinction on its face between residents and nonresidents seeking to purchase marijuana, thus implicating the Privilege and Immunities Clause of Article IV and the DCCD, both of which generally prohibit discrimination against nonresidents and interstate commerce. At first glance, therefore, the limit would appear to face serious constitutional obstacles. On closer inspection, however, the differential treatment might readily survive a challenge under either provision. The remainder of this Part examines each challenge in turn.

A. *The Privileges and Immunities Clause of Article IV, Section 2*

Because the Colorado law “poses the question whether [Colorado] can deny out-of-state citizens a benefit that it has conferred on its own citizens,” the Privileges and Immunities Clause of Article IV, section 2 would seem the most appropriate ground for a constitutional challenge. Adapted from a similar provision in the Articles of Confederation, the Privileges and Immunities Clause of Article IV reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Described by Alexander Hamilton as “the basis of the Union,” the Clause was intended to promote political union by prohibiting state discrimination against outsiders. As interpreted by the Court today, the Clause prohibits state discrimination against nonresidents unless there is a “substantial reason” for the discrimination and the discrimination itself is “substantially related” to the reason for the discriminatory treatment. The Privileges and Immunities Clause, however, guarantees only “fundamental rights,” such as the right to earn a living on terms of substantial equality as residents and the right to receive medical care available to residents.

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23 ARTICLES OF CONFEDERATION OF 1781 art. IV (U.S. 1781).
24 U.S. CONST. art. IV, § 2.
28 *McBurney*, 2013 WL 1788080, at *4 (“[W]e have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are ‘fundamental.’”); Baldwin v. Fish & Game Comm’n, 436 U.S. 371, 388 (1978).
Predicting what a court (or the Court) would do with a Privileges and Immunities Clause challenge to a law limiting the amount of pot nonresidents could buy to some amount less than what residents could obtain involves guesswork. The Court has never been clear what sorts of rights count as fundamental, triggering the protection of the Clause; nor what counts as a substantial reason for differential treatment and how tight the means-ends fit needs to satisfy the substantially related prong. However, several reasons exist for courts to give some latitude to a state seeking to curb pot tourism by restricting the amount of marijuana nonresidents may obtain per dispensary visit. First, unlike laws restricting bar membership to state residents or taxes that favor residents over nonresidents, no protectionist motive animates Colorado’s law. Moreover, it is not clear that obtaining marijuana qualifies as a fundamental right—at least if one is a recreational user. Even if it does qualify, the state could make plausible arguments that nonresidents who would cross the border, buy marijuana and possibly sell it elsewhere would constitute a “peculiar source of evil” justifying differential treatment. The arguments seem at least nonfrivolous, though their success would likely depend on the record established at trial.

1. Is Recreational Drug Use a “Fundamental Right”?

The threshold difficulty in bringing a successful Privileges and Immunities Clause claim against a nonresident purchase limit would be proving that buying pot in a state where it is legal is a fundamental right. In Baldwin v. Fish & Game Commission, the Court rejected a Privileges and Immunities Clause challenge to a Montana law charging out-of-state hunters more for elk hunting permits. Elk hunting, the Court reasoned, was mere recreation and not the sort of fundamental privilege or immunity guaranteed by Article IV. The Baldwin Court, though, neither defined the class of fundamental rights protected by the Clause nor articulated criteria by which future claims that a fundamental right was at stake could be evaluated.

31 Supra note 28.
32 436 U.S. at 388.
33 Id.
Last Term’s McBurney v. Young shored up Baldwin by reaffirming that privileges and immunities protected by the Clause must be fundamental and making clear that the Clause “does not mean . . . that ‘state citizenship or residency may never be used by a State to distinguish among persons.’” McBurney involved a challenge to Virginia’s Freedom of Information Act, which makes public records available for inspection or copying—but only to state citizens. The petitioners were nonresidents who had requested information under the FOIA and were denied; they claimed the citizens-only provision violated the Privileges and Immunities Clause of Article IV and the DCCD.

The plaintiffs—one of whom was seeking records from the state regarding a child-support matter and the other who operated a business that requested real estate tax records on behalf of clients—argued that four fundamental rights were implicated by the citizens-only provision: “the opportunity to pursues a common calling, the ability to own and transfer property, access to the courts, and access to public information.” The Court unanimously held that the Virginia law did not infringe the first three and that the fourth was not a fundamental privilege or immunity.

In dispatching the claim that the provision infringed “the right to access public information,” the Court concluded that no such broad right was a fundamental privilege under the Clause. It repeated the Court’s prior holdings that “there is no constitutional right to obtain all the information provided by FOIA laws.” The Court also looked to history, noting that early cases “do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic.” The Court observed that “FOIA laws are of relatively recent vintage” and that however useful they might be,

34 2013 WL 1788080, at *4 (quoting Baldwin, 436 U.S. at 383).
35 Id. at *3.
36 Id. at *4.
37 Id.
38 Id.
39 Id. at *8.
40 Id.
“[t]here is no contention that the Nation’s unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.”

_Baldwin_ and _McBurney_ would almost certainly doom any Privileges and Immunities Clause claim for non-medical marijuana use. First, purchasing marijuana for recreational use is, well, _recreational_ and, like elk-hunting, not the sort of activity essential to the maintenance of the Union. In fact, far from causing friction between states, Colorado’s law seeks to reduce friction by reducing the incentives for nonresidents to purchase pot in Colorado and import it into states where it is still illegal. _McBurney_ seems to stand for the proposition that the fundamental-ness inquiry is, in part, an historical one. If access to public records doesn’t qualify because FOIA laws are of relatively recently vintage, arguments that equal access to legal marijuana is a fundamental privilege seem almost frivolous.

2. Would Medical Marijuana Users Fare Better?

On the other hand, at least some out-of-state purchasers might seek marijuana for medicinal purposes; those users might seek equal access under _Doe v. Bolton_. In _Doe_, the Court invalidated provisions of a Georgia law restricting nonresidents from entering the state to obtain an abortion. For the Court, Justice Blackmun wrote that

> [j]ust as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade . . . so must it protect persons who enter Georgia seeking the medical services that are available there. . . . A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders.

_Doe_ was decided prior to _Baldwin_’s announcement that the Clause protected only fundamental rights, but the latter gave no indication it intended to disturb prior holdings. In any event, it is hardly a stretch to argue that entering a state to obtain needed medical care, no less than entering it to earn a living or ply a

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41 _Id_. at *9.
42 _Doe_, 410 U.S. at 751.
43 _Id_. at 751-52 (citations omitted).
trade, is the sort of fundamental right the Clause was intended to secure. Imagine if Minnesota, Texas, or Maryland passed laws restricting care provided by each state’s world-class medical centers to residents. Such parochialism would be inconsistent with the political union the Constitution created, to put it mildly. Retaliatory measures from affected states would likely follow. At the very least, the provision of medical care is far removed from the provision of licenses for recreational elk hunting.\footnote{\textsuperscript{44} If \textit{Doe}’s outcome turned on the fact that abortion was, in 1973, a fundamental constitutional right under the Due Process Clause, \textit{Roe v. Wade}, 410 U.S. 113 (1973), the opinion gave no hint of it.}

On the other hand, marijuana remains a Schedule 1 drug under the Controlled Substances Act, meaning that the federal government does not acknowledge it to have any acceptable medical use.\footnote{\textsuperscript{45} \textit{U.S. v. Oakland Cannabis Buyers’ Co-op}, 532 U.S. 483, 490 (2001). Thanks to Rob Mikos for raising this point.} In \textit{U.S. v. Oakland Cannabis Buyers’ Co-op}, the Supreme Court held that marijuana’s Schedule 1 status rendered unavailable a legal necessity defense to contempt proceedings brought by the federal government, which had secured an injunction under the Controlled Substances Act to prevent the sale of medical marijuana pursuant to state law.\footnote{\textsuperscript{46} \textit{Oakland Cannabis Buyers’ Co-op}, 532 U.S. at 491-92.} It very well could be that because the Act’s classification of marijuana recognizes no medical use for marijuana, a challenger under the Privileges and Immunities Clause would be foreclosed from arguing that lack of access to marijuana for medical purposes on equal terms as Colorado residents violated Article IV, section 2.

3. Satisfying the Rest of the Test

The difficulty with a Privileges and Immunities Clause claim does not end with an answer to the question whether the right of nonresidents to obtain pot on the same terms as residents is a fundamental one. Article IV, section 2 does not guarantee absolute equality in all fundamental rights; rather, the Court has said that nonresidents are guaranteed the right to \textit{substantial} equality with residents. The test is whether there is a substantial reason for discrimination and the discrimination bears a substantial relationship to the end the state is pursuing. As one Court put it, “classifications based on the fact of non-citizenship” are unconstitutional under the Clause, “unless there is something to indicate that non-citizens
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constitute a peculiar source of evil at which the statute is aimed.” In deciding whether that relationship is sufficient, “the Court has considered the availability of less restrictive means.” In practice, this test has been difficult to satisfy, though the Court’s recent McBurney decision offers additional support for Colorado’s law.

McBurney held that Virginia’s FOIA did not infringe three fundamental rights—“the opportunity to pursue a common calling, the ability to own and transfer property, [and] access to the courts”—that the Clause guaranteed. The right to ply a trade or business was not infringed by the Virginia law because, according to the Court, it “has struck down laws as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.”

The petitioner did not “allege—and has offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens.” Virginia law, moreover, did not prevent noncitizens from obtaining “title documents and mortgage records . . . necessary to the transfer of property . . . .” Further, “Virginia and its subdivisions” generally made real estate tax assessment records sought by one of the Petitioners available on line.

The other petitioner, who sought agency records relevant to a child-support dispute with his ex-wife, claimed the citizens-only provision burdened his access to public proceedings. The Court noted that he was able to obtain almost all the information sought under the state FOIA by using another Virginia statute. The Clause, the Court held, “does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage.”

47 Toomer, 334 U.S. at 398.
48 Piper, 470 U.S. at 284.
49 See Erwin Chemerinsky, Constitutional Law: Principles and Policies 486 (4th ed. 2011) (commenting that “[t]hus far, the Court has not found that any law meets this rigorous test”).
50 2013 WL 1788080, at *4.
51 Id. at *5.
52 Id.
53 Id. at *6 (listing items open for inspection and copying by “any person”).
54 Id. at *7.
55 Id. at *8.
56 Id. at *7.
It was interesting that *McBurney* treated the lack of any lurking protectionist purpose and the availability of functional alternatives as dispositive. It did not inquire further into the substantial-ness of the reasons for the differential treatment nor did the Court assess the means-ends fit between the citizens-only restriction and whatever end Virginia was pursuing. This bodes well for Colorado’s law, even if a court were to conclude that purchase of marijuana for medicinal purposes was a fundamental privilege under *Doe*.

First, unlike other laws successfully challenged under the Privileges and Immunities Clause, purchase limits for nonresidents are designed neither to enrich in-state residents at the expense of those from out-of-state, nor to hoard a resource to keep prices artificially depressed for in-state consumers. The Task Force mentioned three reasons for differentiating between in-state and out-of-state residents: (1) preventing diversion of legal marijuana to the black market, (2) reducing federal scrutiny, and (3) respecting the policy choices of neighboring states. These reasons—coupled with the lack of any explicit (or covert) protectionist motive—ought to qualify as substantial ones. Under *McBurney*, the lack of any protectionist motive might be sufficient to end the inquiry.

Assuming a reviewing court was inclined to apply the rest of the test, could Colorado’s law survive scrutiny? Specifically, would purchase amount restrictions bear a substantial relationship to the reasons given for differentiating between residents and nonresidents in the first place. And would those reasons themselves qualify as “substantial”? In other words, to quote the *Toomer* Court, could Colorado anticipate that nonresidents would be (or become) a “peculiar source of evil” justifying the lower purchase amounts?

Here again Colorado could make a strong case. The goal of the law would not be to discriminate against nonresidents *qua* nonresidents, but rather to prevent nonresidents from buying legal marijuana in

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58 *Supra* note 10 and accompanying text.
59 *Supra* note 47 and accompanying text.
Colorado and transporting it illegally in interstate commerce (a federal crime)\(^{60}\) back to their state of residence where it may be illegal to possess for personal or even medical use.\(^{61}\) Were pot tourists found to be overly eager to return home with souvenirs of their travels, it might force the federal government to take a more proactive enforcement role than it currently seems inclined to take.\(^{62}\) Further pressure on the federal government could come from neighboring states whose policy choices are being undermined by proximity to Colorado.\(^{63}\) From Colorado’s perspective, then, nonresidents—at least nonresidents currently living where marijuana is illegal, which is most everywhere—\textit{are} a “peculiar source of evil” because they are likely the very purchasers who would carry pot out of the state and draw unwanted attention to the state’s permissive regime.

In addition, Colorado’s law does not bar nonresidents from obtaining marijuana; it simply potentially requires nonresidents to engage in more transactions than residents to obtain the desired quantity. In a similar fashion, Virginia had made it marginally more difficult for nonresidents to obtain certain public records by restricting its FOIA to citizens but alternate sources of information existed that the Court held sufficed. Colorado might argue that the ability to gain the desired quantity if one is willing to visit multiple retail establishments means that despite appearances, its law doesn’t really discriminate at all, or if it does, only incidentally, like Virginia’s citizen-only FOIA provision.

Traditionally, the Court has considered the availability of less restrictive means when assessing the means-ends fit under the Privileges and Immunities Clause.\(^{64}\) Does Colorado’s ability to level up (by eliminating the nonresident purchase restriction) or level down (by imposing the same quarter ounce limit on Colorado residents) render its law \textit{ipso facto} unconstitutional? Because the analysis is similar under

\begin{itemize}
  \item \textit{See, e.g.,} 21 U.S.C. § 841.
  \item \textit{See, e.g.,} ALA. CODE § 13A-12-214 (criminalizing marijuana possession for personal use).
  \item \textit{See supra} notes ___ and accompanying text.
  \item \textit{See supra} notes ___ and accompanying text.
  \item As was true in the days before Prohibition, individual state attempts to stop illicit cross-border traffic in marijuana from Colorado or to stop its citizens from going to Colorado to engage in pot tourism would run into similar Privileges and Immunities and DCCD problems. \textit{See} DENNING, supra note 66, at § 13.02 (describing the difficulties regulating interstate traffic in liquor prior to the ratification of the Eighteenth Amendment). \textit{See also infra} notes ___ - ___ and accompanying text (suggesting federal legislation to free states from some of these restrictions when regulating pot tourism).
  \item \textit{See supra} note ___ and accompanying text.
\end{itemize}
both the Privileges and Immunities Clause and the DCCD, I will take this question up in the next section.65

**B. Dormant Commerce Clause Challenges**

The DCCD is the term given to the judge-made doctrine limiting a state or local government’s ability to discriminate against or otherwise impermissibly burden interstate commerce.66 These limits derive from the Constitution’s grant to Congress of power over interstate commerce. Like the Privileges and Immunities Clause, the DCCD subjects to particular scrutiny laws that explicitly refer to the geographic origin of goods or commercial actors and single them out for unfavorable treatment relative to in-state goods or actors. This section examines whether Colorado’s discriminatory nonresident purchase limit would be vulnerable to a DCCD challenge.

Under the Court’s modern doctrine, laws that discriminate on their face, or in their purposes or effects, will be subject to a form of strict scrutiny requiring the government to prove that (1) the law furthered a legitimate (i.e., nonprotectionist) end and (2) the end cannot be achieved using less discriminatory means.67 Truly nondiscriminatory laws, however, will be subject to a deferential balancing test, under which a challenger must prove that the burden on interstate commerce is “clearly exceeded” by the “putative local benefits.”68 Because Colorado law draws an explicit distinction between residents and nonresidents it would be subject to strict scrutiny—if the DCCD applies.

1. Is Interstate Commerce Involved?

Would it? In addition to their Privileges and Immunities Clause claim, the *McBurney* plaintiffs argued that Virginia’s citizens-only FOIA provision violated the DCCD as well. The Court rejected their claim in part because, in its estimation, “Virginia’s FOIA neither ‘regulates’ nor ‘burdens’ interstate

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65 *See infra* notes __ - ____ and accompanying text.
66 *See generally* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01-6.08 (2nd ed. 2013).
67 *Id.* at § 6.06[A].
commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all.”

By contrast, there is little doubt that enough interstate commerce is involved in marijuana sales to implicate the DCCD. First, nonresident pot tourists would be traveling in interstate commerce to purchase marijuana legally in Colorado. Second, in *Gonzales v. Raich*, the U.S. Supreme Court concluded that the production and consumption of locally-produced, noncommercial, medical marijuana nevertheless substantially affected the interstate marijuana market and was thus subject to congressional regulation under the Controlled Substances Act. *Raich’s* holding is relevant here because, as the Court has elsewhere made clear, “[t]he definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.”

State restrictions on the sale of marijuana to nonresidents, then, even though occurring within Colorado, would likely substantially affect interstate commerce and those limitations would in turn trigger DCCD scrutiny.

2. Satisfying Strict Scrutiny under the DCCD

Could a Colorado statute that limited nonresidents’ purchases satisfy strict scrutiny? Ordinarily, facially discriminatory state laws are presumed to be unconstitutional unless an exception to the DCCD

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69 2013 WL 1788080, at *10. In the alternative, the Court argued that the restriction could be justified under the market participant exception to the DCCD. *Id.* Under the exception, a state that buys or sells goods or services with taxpayer money is entitled to discriminate in-favor of in state buyers or sellers. See, e.g., *Reeves v. Stake*, 447 U.S. 429 (1980) (upholding state regulation requiring state-owned cement factory to fill orders of in-state customers before filling orders from nonresidents); see generally *DENNING, supra* note __, at § 6.08; Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1989); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 Ohio St. L.J. 496 (2008).

70 545 U.S. 1 (2005).

71 *Raich*, 545 U.S. at 19, 22. See also *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 574 (1997) (rejecting argument that DCCD didn’t apply to discriminatory tax credit available to not-for-profit summer camp serving state residents but unavailable to those serving those from out-of-state; “[t]he services that petitioner provides to its principally out-of-state campers clearly have a substantial effect on commerce, as do state restrictions on making those services available to nonresidents”).

applies. However, there is one case in which the Court concluded that a discriminatory state law passed constitutional muster. That case, *Maine v. Taylor*, 74 is instructive, for it sheds some light on what sort of evidentiary burden the state must carry to meet both prongs of strict scrutiny. A close reading of *Taylor* shows that DCCD strict scrutiny turns out not to be “‘strict’ in theory and fatal in fact,” 75 at least when economic protectionism does not taint the state’s actions. *Taylor* provides a roadmap for Colorado officials who might be called upon in the future to defend differences between resident and nonresident purchase amounts against a DCCD challenge.

*Maine v. Taylor* involved a Maine law prohibiting the importation of live baitfish. 76 Taylor was indicted for violating a federal law that prohibited the importation into a state of wildlife in violation of that state’s laws. Taylor sought to dismiss the indictment claiming that Maine’s importation ban violated the DCCD. 77 The state defended the law on the grounds “that the ban legitimately protect[ed] the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish.” 78 Specifically, Maine’s experts testified that out-of-state fish carried parasites foreign to the state’s native fish stocks and that other invasive species inadvertently included in imported shipments of baitfish could threaten Maine’s native ecology. 79 The experts also testified that there “was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species.” 80

Reversing the court of appeals, the U.S. Supreme Court upheld the import ban, concluding that it satisfied strict scrutiny. First, the Court held that Maine’s environmental concerns were legitimate,

73 See, e.g., Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (noting that “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected” and that the “clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders”). None of the exceptions to the DCCD are relevant for purpose of this Essay. But see infra notes ___ and accompanying text (suggesting Congress use its affirmative commerce power to permit states to regulate pot tourism free from the strictures of the DCCD).

74 477 U.S. 131 (1986).


76 Taylor, 477 U.S. at 132.

77 477 U.S. at 132-33.

78 Id. at 133.

79 Id. at 141.

80 Id. (footnote omitted).
despite the fact that the risks were “imperfectly understood” and might “ultimately prove to be negligible.”

81 Id. at 148.

82 Id. at 146.

83 See text accompanying notes 58-59; see also infra note 81 and accompanying text.

84 477 U.S. at 151.

85 Colorado’s hand would be even cleaner on this score than were Maine’s. The Court dismissed some slight evidence in Taylor that the refusal to lift the ban on baitfish was motivated in part by economic protectionism in the form of a statement by the Maine Department of Inland Fisheries and Wildlife opposing the ban’s lifting. Id. at 149. In context, the Court concluded, the department’s statement simply challenged the argument that supplies of bait were sufficiently low to warrant acceptance of any environmental risks that might accompany importation. Id. at 150. But see id. at 152 (Stevens, J., dissenting) (“There is something fishy about this case.”).
lack of legalization in other states, as well as the federal government’s equivocation on the issue of enforcement of federal laws, mean that Colorado’s fears that unchecked nonresident travel to the state to purchase marijuana could generate unwanted attention from and friction with the federal and neighboring state governments are hardly fanciful. Even if those fears ultimately fail to materialize—or if the magnitude of the problem is of smaller scope than the Task Force imagines today—they seem very similar to Maine’s fears about the integrity of its fish stocks and ecosystem.

b. Are Less Discriminatory Means Available?

The more difficult question—under either the DCCD or the Privileges and Immunities Clause—is whether Colorado could pursue its legitimate goals through less restrictive or less discriminatory means. Challengers might claim, for example, that because Colorado could level up or down by either limiting all purchasers to a quarter ounce per dispensary visit or permit nonresidents to purchase the maximum amount residents are allowed to buy, the state has less discriminatory means at its disposal to pursue its legitimate goals. The answer, I think, turns on whether less discriminatory or less restrictive means that the state is obligated to use the least discriminatory means available to it. Maine v. Taylor suggest that it is not, as does at least one example from the Court’s free speech jurisprudence.

(i) Maine v. Taylor’s Less Restrictive Means Analysis

The Taylor Court concluded that the state met its burden of proving lack of less discriminatory means, and that it was not clearly erroneous for the district court to rely on uncontradicted testimony that no reliable methods of testing and screening imported baitfish existed. As the Court made clear, the availability of less restrictive means depends on the facts in the record. The Court admonished the court of appeals, which held that the district court had erred in ruling that no less discriminatory means were

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86 Id. at 146.
87 See supra note ___ and accompanying text.
available, that the court was “not to decide factual questions de novo, reversing any findings [it] would have made differently.”

Further, despite the Court’s readiness to concede that some tests for the parasites “could be easily developed,” it agreed with the district court judge that

the “abstract possibility” . . . of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an “[a]vailabl[e] . . . nondiscriminatory alternativ[e],” . . . for purpose of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.

It invited supporters of the ban’s repeal to develop such tests, noting that “if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.”

If the DCCD’s less-discriminatory-means prong meant that Maine was obliged to use the least discriminatory means, then it seems that the Court would have required it to develop tests for the imported baitfish before banning them, especially in light of the uncertain scope and severity of the problem. That it didn’t strongly suggests that the Court was willing to give the state some leeway in light of its legitimate interests and lack of protectionist motive. If this is indeed the case, then perhaps the appropriate doctrinal analogy for a less-discriminatory-means analysis is the version of narrow tailoring that the Court employs in its review of content-neutral speech regulations. In those cases the Court has explicitly rejected arguments that the narrow tailoring requirement obligates the state to use the least speech restrictive means at its disposal.

(ii) Narrow Tailoring, Content-Neutral Speech Regulations, and the DCCD

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88 477 U.S. at 145.
89 Id. at 147.
90 Id. (citations omitted).
91 Id. at 147.
In *Ward v. Rock Against Racism*, the Court held that narrow tailoring of content-neutral speech restrictions did not require government to employ “the least restrictive or least intrusive means” of achieving the government’s interests.92 “Rather,” the Court continued, “the requirement of narrow tailoring is satisfied so long as [the] regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.”93 A court’s opinion that government could have employed “some-less-speech-restrictive alternative” is not sufficient grounds to invalidate a regulation “[s]o long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . .”94

The Court’s imposition of a lesser standard of review is rooted in the animating purpose behind its content-based/content-neutral distinction: that the First Amendment prohibits government from penalizing officially-disfavored ideas. Because government could attempt to mask its true intentions by broadly drawing speech regulations, intermediate scrutiny of apparently content-neutral regulations requires courts first to determine whether the true purpose of the governmental regulation is to suppress ideas.95 Once the lack of such motive is confirmed, the Court’s jurisprudence grants some leeway, as long as too much speech is not stifled in the process.

Just as the Court’s free speech jurisprudence is designed to ensure that government does not overtly or covertly suppress ideas, the DCCD is designed to implement the constitutional principle that states may not exercise regulatory power over interstate commerce in ways that risk undermining political union among the states.96 The DCCD’s anti-discrimination principle, reflected in the Court’s scrutiny of laws that discriminate against interstate commerce, is aimed at the types of state actions that were (and remain) the most likely sources of friction among states and most likely to ignite cycles of retaliation and

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93 *Ward*, 491 U.S. at 799.
94 *Id.* at 800.
95 *Ward*, 491 U.S. at 791 (terming the “principal inquiry” in content neutrality as “whether the government has adopted a regulation of speech because of disagreement with the message it conveys”).
further discrimination. Just as government receives some slack in the First Amendment context when it satisfies the Court it isn’t out to suppress ideas, similar leeway as to means should be available under the DCCD’s no-less-discriminatory-means prong if the state can establish that its ends have nothing to do with economic protectionism or retaliation against states with which it trades.

(iii) Less Discriminatory Means and Colorado’s Nonresident Purchase Limits

Colorado wants to reduce the chances marijuana is diverted to states in which it is still illegal, possibly creating conflicts with its neighbors and inviting a federal response as well. There is no hint that a desire to benefit residents at the expense of nonresidents is at the heart of the per visit restriction. If the restriction was some bid to artificially depress the price of marijuana for the benefit of Colorado’s residents, one would expect to see a total ban on nonresident purchase, instead of the amount restriction the legislature enacted. Cases like *Maine v. Taylor* and the recent *McBurney* decision strongly suggest that government’s leeway to distinguish between residents and nonresidents should increase in the absence of a protectionist motive.

Worried that that nonresidents are more likely than residents to engage in smurfing, Colorado has decided to make it slightly more difficult for nonresidents to divert legal Colorado pot to markets where it remains illegal. If one believes the state’s concern is a legitimate one, leveling up—permitting nonresidents and residents to purchase the same amount per visit—would not only make Colorado’s safeguard less effective, it would completely undermine its purpose. Leveling down by restricting both Colorado residents and nonresidents to a quarter ounce of marijuana per visit might be unconstitutional under *state* law, which decriminalizes the possession and purchase of an ounce of marijuana. Regardless, leveling down would disadvantage state residents whom the legislature has decided are less likely to

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97 *See McBurney*, 2013 WL 1788080, at *9 (noting that the DCCD “is driven by a concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’”) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

98 Donald Regan famously argued that the presence or absence of a protectionist motive behind state and local laws was the key to understanding the Court’s entire dormant commerce clause doctrine. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 85 Mich. L. Rev. 1091 (1986).
engage in smurfing. Though there might be some conceivable method yet to be developed that could track
the purchasers (RFID tags on bags of pot? Smokeable nanobots that transmit the location of purchased
marijuana?) the mere possibility of those methods should not be sufficient to invalidate the purchase
limitations based on the fact that the state failed to pursue the least discriminatory means before
restricting commerce, as the holding in Taylor illustrates.

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Facially discriminatory laws labor under a presumption of unconstitutionality, often for good
reason. But as Maine v. Taylor and McBurney v. Young demonstrate, the Court has acknowledged that
states can restrict trade for reasons other than securing commercial advantage for residents or for
punishing those who reside elsewhere. In their haste to enforce the Privileges and Immunities Clause or a
valuable (and venerable) doctrine like the DCCD, courts should not engage in reflexive or unthinking
applications even where a law has a powerful indicia of unconstitutionality like facial discrimination.
Colorado’s proposed restrictions are unlike anything courts have encountered recently. Given the fact
this proposed fetter—a fairly mild fetter at that—on interstate commerce was intended to avoid interstate
friction, not exacerbate it, courts should grant the state some experimental leeway in the means it chooses
to enforce its legitimate interests, at least initially.

IV. Conclusion

More states are likely to follow Colorado’s lead and experiment with partial or complete
decriminalization of marijuana. Because states will proceed at different speeds, the problem of regulating
pot tourism is likely to arise with increasing frequency. State regulatory efforts, moreover, are equally
likely to be met with challenges by nonresidents claiming that differential treatment is unconstitutional.
Though my conclusions are of necessity preliminary, I maintain that states have good arguments that
provisions like the Privileges and Immunities Clause would not apply or that nonresident purchase limits
could satisfy the standards of review of either the Clause or the DCCD. Colorado’s motives appear to be
pure and its aims—preventing diversion, a federal crackdown, and minimizing friction with its neighbors—legitimate. It should therefore receive some leeway by courts as to the means it chooses to achieve these ends.

One final thought: The DCCD is simply a default rule; Congress has the power to disable the DCCD by exercising its affirmative power over interstate commerce.99 A century ago, Congress used that power to grant states the ability to prevent importation of alcohol in violation of state laws.100 The old division between wet and dry states may soon give way to a similar national divide between, forgive me, “toking” and “non-toking” sections.101 And as in the pre-Prohibition days, the DCCD might operate as a barrier to state regulatory efforts either to minimize the impact on its neighbors of its decision to liberalize its laws or to meet challenges posed by nearby liberalization. If the legalization trend continues, Congress—as it did when states were struggling to meet the challenges posed by interstate trade in alcohol—should consider legislation freeing states from the strictures of the DCCD when coping with effects of legalization. Such action would not preempt all constitutional challenges,102 but legislation would go far toward removing constitutional doubts from state efforts and could even encourage experimentation as states confront the many legal and regulatory puzzles that will attend legalized marijuana.

99 See, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (rejecting challenge to the McCarran-Ferguson Act, which turned over to states the regulation of the “business of insurance”); but see Norman R. Williams, Why Congress Cannot “Overrer” the Dormant Commerce Clause, 53 UCLA L. REV. 153 (2005) (arguing that Benjamin was wrongly decided).
100 See, e.g., 27 U.S.C. § 122 (prohibiting importation of intoxicating liquors into states in violation of state laws).
101 Alli Denning and Ben Barton receive honorable mention for suggesting other analogues to “wet” and “dry” states.
102 Congress, for example, cannot override the Privileges and Immunities Clause of Article IV, for example. See Denning, supra note 26, at 398-99; but see Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 HARV. L. REV. 1468, 1487-89 (2007) (suggesting that Article IV should be interpreted to permit a similar congressional override).