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

CHAD DEVEAUX*

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.”

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 intrusion3—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

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”).
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).
choices, will be exercising the independently valued freedom of local self-determination within their respective spheres.”

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 . . . .” 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.”

The ultimate embrace of same-sex marriage by the Court (and the court of public opinion)—unthinkable when Vermont made the then-ground-breaking decision to recognize civil unions in 2000—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.” 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. Likewise, Colorado’s embrace of a wide-open commercial marijuana market produces harm that extends well beyond its borders.

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.
13 See id.
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. Marijuana abuse causes “long-lasting changes in brain function that can jeopardize educational, professional, and social achievements.” These changes can manifest themselves in “impairments in memory and attention,” and “significant declines in IQ.” Though medical marijuana benefits many, assertions that pot legalization is a free lunch—while sometimes taken at face value by the media—enjoy no support in peer-reviewed scholarship or “acceptance in the relevant scientific community.”

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

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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).


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. 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.” 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. 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. 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? A state, like Colorado, that chooses to decriminalize the drug implicitly imposes its choice upon its neighbors, inhibiting their “freedom of local self-determination.” 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.” Marijuana decriminalization, therefore, presents one of the most vexing federalism problems of the twenty-first century.

This constitutional quandary came into sharp focus in December 2014 when Nebraska and Oklahoma sought to invoke the Supreme Court’s original jurisdiction to enjoin marijuana legalization in Colorado. 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).
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. DeVeoux & 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.”

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 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. 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” are no longer binding.

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. Labeling the extraterritoriality case law “the


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).


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.*

most dormant doctrine in dormant commerce clause jurisprudence,” 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. 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,” the court posited that the DCC, in fact, only prohibits economic balkanization. Thus, states may presumably enforce non-protectionist laws that directly regulate extraterritorial conduct if that conduct “affects a substantial number of in-state residents”—at least as long as the burden imposed on interstate commerce is not “clearly excessive in relation to the putative local benefits.”

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. What prevents Nebraska from regulating Colorado marijuana transactions affecting a substantial number of Nebraska residents?

Part I of this Article provides background for the rise of the DCC’s extraterritoriality doctrine, as well as its purported fall. 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 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 Functions56

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

49 See infra notes 280–365 and accompanying text.
50 U.S. CONST. art I, § 8, cl. 3.
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.
57 Id.
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

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.
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.
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.”\textsuperscript{72} Such laws are “generally struck down . . . without further inquiry.”\textsuperscript{73}

In contrast, in 1970, the U.S. Supreme Court recognized in\textit{Pike v. Bruce Church, Inc.} that laws that incidentally influence extraterritorial transactions must be subjected to a balancing test.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{76} Thus, states generally retain the power to directly regulate transactions within their borders, even when such regulations incidentally affect interstate commerce.\textsuperscript{77} In contrast, states enjoy no inherent power to directly control out-of-state conduct\textsuperscript{78} by actually “punish[ing] [an actor] for conduct that was lawful [in the state] where it occurred.”\textsuperscript{79}

2. The Case Law

The DCC’s extraterritoriality prohibition originated with the Supreme Court’s 1935 decision in\textit{Baldwin v. G.A.F. Seelig, Inc.},\textsuperscript{80} which averred that no state may “project its legislation into” another state.\textsuperscript{81} Although the Court ul-

\begin{itemize}
\item \textsuperscript{73} \textit{Brown-Forman}, 476 U.S. at 579. The per se rule of invalidity also applies to protectionist statutes.\textit{Id.}
\item \textsuperscript{74} \textit{Pike}, 397 U.S. at 137.
\item \textsuperscript{75} \textit{Id.} at 142.
\item \textsuperscript{76} Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984);\textit{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.”).
\item \textsuperscript{77} \textit{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.”).
\item \textsuperscript{78} \textit{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”).
\item \textsuperscript{79} \textit{BMW of N. Am.}, 517 U.S. at 572–73.
\item \textsuperscript{80} \textit{See Baldwin}, 294 U.S. at 528.
\item \textsuperscript{81} \textit{Id.} at 521.
\end{itemize}
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

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

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. 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. 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.

The challenger, a Kentucky distiller, 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.” Nonetheless, the Court found that the statute offended the DCC because it “effectively regulate[d] the price at which liquor was sold in other States” by “mak[ing] 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.”

The Court applied the so-called "per se rule of invalidity,” meaning that state statutes regulating interstate commercial activity will “generally [be]
struck down . . . without further inquiry.” The Court found that New York’s ABC law directly regulated out-of-state commerce. 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, “New York ha[dl] ‘project[ed] its legislation’ into other States, and directly regulated commerce therein” in contravention of the DCC. For this reason, the Court invalidated the statute “without further inquiry.”

c. Healy v. Beer Institute, Inc.

The Court’s 1989 decision in Healy v. Beer Institute, Inc. involved another price-affirmation statute. 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.”


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.” 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.” Thus, as a result of the price-affirmation statute, “on January 1, when a brewer posts his February prices for Massachusetts, that

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.”\textsuperscript{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.”\textsuperscript{115} The Court found that by “t[y]ing pricing to the regulatory schemes of the border states . . . the Connecticut statute ha[d] the extraterritorial effect, condemned in \textit{Brown-Forman}, of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions.”\textsuperscript{116} Because the statute ran afoul of the DCC’s prohibition against direct regulation of extraterritorial commerce, the Court struck it down.\textsuperscript{117} The Court concluded that this prohibition preserves “the autonomy of the individual States within their respective spheres.”\textsuperscript{118}

Reaffirming the extraterritoriality principles elucidated by the \textit{Edgar} plurality and adopted by \textit{Brown-Forman}, the \textit{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.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{121}

In 1996, the Court expanded upon these proscriptions in \textit{BMW of North America, Inc. v. Gore},\textsuperscript{122} citing \textit{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”;\textsuperscript{123} thus, a state may not “punish [an actor] for conduct that was lawful [in the state] where it occurred.”\textsuperscript{124}

The \textit{Healy} Court also found that Connecticut’s statute contravened the DCC’s anti-discrimination prohibitions.\textsuperscript{125} Unlike New York’s ABC law, Con-

\begin{thebibliography}{99}
\bibitem{114} Id.
\bibitem{115} Id. (internal quotation marks omitted).
\bibitem{116} Id.
\bibitem{117} Id. at 339.
\bibitem{118} Id. at 335–36.
\bibitem{119} Id. at 336.
\bibitem{120} Id. (quoting \textit{Edgar}, 457 U.S. at 642–43 (plurality opinion)).
\bibitem{121} Id.
\bibitem{122} \textit{BMW of N. Am.}, 517 U.S. at 560.
\bibitem{123} Id. at 571–72 (citing \textit{Healy}, 491 U.S. at 335–36).
\bibitem{124} Id. at 572–73.
\bibitem{125} \textit{See Healy}, 491 U.S. at 341.
\end{thebibliography}
necticut’s “statute apply[ed] 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.”

The Court concluded that Connecticut’s law “discriminate[d] against interstate commerce” 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.”

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

From its inception, the DCC’s extraterritoriality doctrine has faced unremitting academic attack. Critics charged that the doctrine is mere dicta, that it “is a relic of the old world with no useful role to play in the new,” and that it “inhibits state experimentation with laws that attempt to solve their social and economic problems.” Yet, despite these challenges, the lower federal courts dutifully adhered to Brown-Forman’s pronouncements for nearly three decades. 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. 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. 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 808.
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

136 Id. at 801.
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

\(^{146}\) 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.*


\(^{160}\) *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 if that conduct “affects a substantial number of in-state residents”—at least as long as “the burden imposed” on interstate commerce is not “clearly excessive in relation to the putative local benefits.”

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—“visible evidence” of the killing, e.g., “the dead body of a murdered person”—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” 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).


to benefit in-state economic interests by burdening out-of-state competitors.” These commentators argue that the Court’s pronouncements that direct extraterritorial regulation “exceeds the inherent limits of [an] enacting State’s authority” 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.” Moreover, the “singular exception,” Edgar v. MITE Corp., was offered by a mere plurality. Thus, he posits that the extraterritoriality jurisprudence, in fact, “should be understood as applying only to protectionist state statutes.” Jack Goldsmith and Alan Sykes likewise dismiss the Court’s extraterritoriality jurisprudence as dicta. 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 focus[es] on . . . protectionism rather than whether a state law ‘directly’ regulate[s] interstate commerce.”

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

As I’ve stated before, assertions that the extraterritoriality doctrine is mere dicta baffle me. 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, and because it directly “regulat[ed] commerce occurring wholly outside [the] State’s borders.” 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.”

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.” 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. Forcing a business to sell its goods to Kentucky consumers at New York prices is transactional suicide. 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.” 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. The Supreme Court has “long recognized” that litigants may rely on the assumption that the facts as stipulated in the record are established. This axiom “is the bookend to a party’s undertaking to be bound by the factual stipulations it submits.” Thus, it is evident that Brown-Forman’s edict cannot rest on the alleged discriminatory nature of the statute. The Supreme Court was
obliged to accept Brown-Forman’s concession that New York’s law regulated “evenhandedly.”

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.” 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” as “a necessary basis for deciding” the case.

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.” 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.” A Harvard Law Review case comment contends that the “doctrine no longer furthers the [DCC’s] purpose.” Professor Denning agrees, asserting that the doctrine fell victim to constitutional “calcification.” He offered a purported eulogy, positing “that extraterritoriality . . . is dead, and unlikely to be revived by the current Court.”

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.
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.”\textsuperscript{205} Our courts “use decades-old and centuries-old precedents to achieve consistency over time.”\textsuperscript{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 \emph{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 \emph{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.\textsuperscript{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.”\textsuperscript{208}

For example, the \textit{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.\textsuperscript{209} New York \textit{directly} applied its laws to transactions in other states.\textsuperscript{210}

Conversely, in the 1945 case \textit{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.\textsuperscript{211} Although the statute \textit{incidentally} affected extraterritorial conduct—inducing railroads to shorten Arizona-bound trains to seventy cars to avoid breaking them up at the Arizona state line\textsuperscript{212}—it did not

\begin{itemize}
\item \textsuperscript{205} Exxon Valdez v. Exxon Mobil, 568 F.3d 1077, 1089 (9th Cir. 2009) (Kleinfeld, J., dissenting); \textit{accord} Kimble v. Marvel. Entm’t, LLC, 135 S. Ct. 2401, 2409 (2015) (“Respecting \textit{stare decisis} means sticking to some wrong decisions.”); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“\textit{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.”).
\item \textsuperscript{206} Exxon Valdez, 568 F.3d at 1089 (Kleinfeld, J., dissenting).
\item \textsuperscript{207} See SPGCC, 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).
\item \textsuperscript{208} \textit{BMW of N. Am.}, 517 U.S. at 572–73.
\item \textsuperscript{209} \textit{Brown-Forman}, 476 U.S. at 583.
\item \textsuperscript{210} \textit{Id.} at 584.
\item \textsuperscript{211} \textit{S. Pac. Co.}, 325 U.S. at 763, 765.
\item \textsuperscript{212} \textit{Id.} at 773.
\end{itemize}
directly regulate extraterritorial conduct. The law did not “punish [railroads] for conduct that was lawful [in the state] where it occurred.” Railroads could operate trains exceeding seventy cars in neighboring states without fear of prosecution by Arizona authorities. Brown-Forman did not have that luxury. Selling bourbon in Kentucky at prices New York disapproved of would invite prosecution in New York.

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.” In contrast, laws that directly regulate out-of-state conduct—such as in Brown-Forman—are unconstitutional virtually per se.

Blatant state paternalism of the sort confronted in Brown-Forman is quite rare. 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.

For example, in the Ninth Circuit’s 2013 opinion in Association des Eleveurs de Canards et d’Oies du Quebec v. Harris, a poultry trade association-challenged a California law banning the sale of foie gras, a so-called “delicacy made from fattened duck liver.” Foie gras is produced by “force feeding birds to enlarge their livers beyond normal size.” The plaintiffs contended that the statute “control[led] commerce outside of California.” 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.” 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.
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 DeVoeux, 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

\(^{226}\) 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.

\(^{230}\) 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 extraterritorial 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. Walsh242—the decision most frequently cited as proof of the Supreme Court’s abandonment of the extraterritoriality doctrine243—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.

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. 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.”

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. The statute does not directly regulate the terms of contracts between pharmaceutical companies and wholesalers—in Maine or elsewhere. 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. 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.

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.” Nor does Maine “insist that manufacturers sell their drugs to a wholesaler for a certain price.”

Accordingly, the Maine law does not directly regulate activities beyond the state’s borders; rather, it “only has incidental effects on interstate commerce.”

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246 *Id.* at 649.
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, suprano 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,” a finding that the Supreme Court did not review, the *Walsh* majority affirmed the statute’s constitutionality.

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.” 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.

*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.” 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” 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.” 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.

Yet, the *Epel* court, relying on Professor Denning’s flawed reading, concluded that *Walsh* repudiated the DCC’s extraterritoriality doctrine. 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).
263 *See Parsons*, 167 U.S. at 337.
264 *See Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).
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

\[266\] 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.” Epel rightly concluded that the law is constitutional—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. 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.” 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.

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. Section B discusses the Pike test. Section C applies the Pike test to laws that attempt to regulate out-of-state marijuana transactions.

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, what limits remain to cabin a state’s power to regulate extraterritorial conduct? Epel recognized, as explained in the previous Part, that since Brown-Forman, DCC “cases are

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.” The first species consists of protectionist laws—“[l]aws that clearly discriminate against out-of-staters.” The second line targets “laws that [directly] control extraterritorial conduct.” The third variety of cases, the *Pike* line, scrutinizes “state laws burdening interstate commerce” that produce “insufficient offsetting local benefits” to justify those burdens. 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.” Yet ultimately while *Epel* abandoned the extraterritoriality doctrine, it left both *Pike* and the DCC’s anti-protectionist prohibitions unmolested.

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,” puts a heavy thumb on the regulating state’s side of the scale. It recognizes that states enjoy a “wide scope” of authority concerning the regulation of intrastate matters even when regulations may impact interstate commerce. In particular, cases “where local safety measures” are found to “place an unconstitutional burden on interstate commerce” will be “few in number.” Thus, as Judge Posner has observed, a litigant seeking to invalidate a law under *Pike* “has a steep hill to climb.”

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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.
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-
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.
317 Id.
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.”

In contrast to the “dubious” local benefits conferred by the statutes in *Morgan, Southern Pacific*, and *Bibb*, the *Pike* Court found that Arizona’s “asserted state interest [was] a legitimate” albeit “tenuous” one. 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—was clearly excessive in relation to its local benefit.

### 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.” *Pike* noted that “the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved . . . .” 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 the subject of safety” dictates that laws enhancing local public safety bear the most weight. Such “measures carry a strong presumption of validity . . . .”

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. Because marijuana purchased at dispensaries is not consumed on site, Nebraskans who buy Colorado pot are likely to consume the

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322 Id. at 143.


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


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, leading to more drugged-driving accidents in Nebraska. 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.” Imaging studies of regular pot users’ brains reveal “decreased activity in prefrontal regions and reduced volumes in the hippocampus” leading to “impaired neural connectivity . . . in specific brain regions”—particularly those responsible for “learning and memory” and “self-conscious awareness.” This can cause “impairments in memory and attention,” and “significant declines in IQ.” Those who become dependent on marijuana as adolescents can lose up to eight IQ points by the time they reach adulthood. These “changes in brain function” yield predictable negative social consequences. Frequent marijuana use leads to “lower income, greater need for socioeconomic assistance, unemployment, criminal behavior, and lower satisfaction with life.”

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”).

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.

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).

Volkow et al., supra note 18, at 2225.

Id. at 2220.

Id.

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

ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, supra note 19, at 36.

Volkow et al., supra note 18, at 2225; accord Budney et al., supra note 18, at 4.

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-

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.
354 See COLO. CONST. art. XVIII, § 16(1)(b)(IV).
355 See U.S. CONST. amend XIV, § 1.
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,

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