ONE TOKE OVER THE (STATE) LINE: CONSTITUTIONAL LIMITS ON “POT TOURISM” RESTRICTIONS

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INTRODUCTION

Among the myriad legal issues confronting states—like Colorado—that are experimenting with the legalization of marijuana, is the need to regulate “pot tourism” by visitors from other states where marijuana remains illegal. In Colorado, the final recommendations from the

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Amendment 64 Implementation Task Force included a proposal “to limit purchases by state residents to an ounce at a time and to a quarter of an ounce for out-of-state visitors.” The lower amounts for nonresidents were intended to deter pot tourists from “smurfing”—visiting a number of different dispensaries to accumulate larger amounts of marijuana with a view to illegally reselling the pot. Colorado’s legislature adopted the task force’s recommendation in House Bill 1317 to establish the regulatory framework for the legal sale of marijuana. Colorado’s governor recently signed the Bill into law, and among its provisions is a quarter-ounce purchase limit for nonresidents. Under Colorado’s new law, the sale, to a nonresident, of an amount in excess of the quarter-ounce limit is a class 2 misdemeanor, punishable by between three and twelve months imprisonment, a $250 to $1000 fine, or both.

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2. John Ingold, Colorado Marijuana Task Force Recommends Allowing Pot Tourism, DENVERPOST.COM (Feb. 19, 2013), available at http://www.denverpost.com/breakingnews/ci_22623779/colorado-marijuana-task-force-recommends-allowing-pot-tourism (noting that “[the goal of the recommendation to limit sales to nonresidents] is to prevent ‘smurfing,’ which would occur when one person goes from store-to-store accumulating marijuana to then sell into the black market. The thinking is that lowering the amount of marijuana an out-of-stater could buy in any one store would make smurfing too time-consuming to be worthwhile”). See generally Sam Kamin, The Work of the Task Force to Implement Amendment 64: A Case Study, 90 DENV. U. L. REV. ONLINE 157 (2013) (recounting the task force’s work from a participant’s perspective).


4. Id.

5. COLO. REV. STAT. § 12-43.4-901(4)(f) (2013) (“It is unlawful for any person licensed to sell retail marijuana” to “sell more than a quarter of an ounce of retail marijuana . . . to a nonresident of the state”).

6. Id. § 12-43.4-901(6).

7. Id. § 18-1.3-501(1)(a). Washington, on the other hand, chose not to treat nonresidents differently in the implementation of its legalization regime. See FAQs on I-502, WASH. STATE LIQUOR CONTROL BD., http://lcb.wa.gov/marijuana/faqs_i-502 (last visited Sept. 30, 2014) (“Will non-Washington residents be able to purchase marijuana? Yes, but the marijuana products are to be consumed in Washington.”). For background on legalization in both states, see generally Michael
Treating purchasers of a legal product differently based on their state of residency implicates constitutional doctrines that limit a state’s ability to discriminate against nonresidents. This Essay examines the Colorado recommendation in light of two of those doctrines: the Privileges and Immunities Clause of Article IV, Section Two and the dormant Commerce Clause doctrine (DCCD). At first glance, Colorado’s facially-discriminatory law appears to be almost certainly unconstitutional under current doctrine. This Essay will argue, however, that Colorado could make a compelling case that its law does pass constitutional muster. This argument is bolstered by the U.S. Supreme Court’s recent treatment of both Privileges and Immunities and dormant Commerce Clause claims in **McBurney v. Young**, as well as recent federal guidance on enforcement of federal drug laws.

Part I of this Essay briefly describes the task force’s recommendation, its subsequent adoption by the Colorado legislature, and a recent Department of Justice (DOJ) memorandum providing enforcement guidance in light of state legalization initiatives. The DOJ memo is particularly relevant to the defense—addressed in Part II—of the Colorado nonresident purchase limit under both the Privileges and Immunities Clause and the DCCD. Finally, a brief conclusion suggests a role the federal government could play to remove considerable, though not all, constitutional doubt from state regulation of pot tourism.

**I. LEGISLATIVE ADOPTION OF COLORADO’S AMENDMENT 64 TASK FORCE RECOMMENDATIONS**

In March 2013, a task force established to implement Amendment 64 to Colorado’s constitution, legalizing marijuana in the state, released a

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8. Two other possible challenges merit mention, at least in passing. The first, a state constitutional challenge, would claim that because the amendment requires only that a person show some identification that proves they are of legal age, the residency requirement is at best unenforceable if not unauthorized. Jacob Sullum, **Colorado Will Soon Decide the Rules for Selling Pot**, REASON.COM (Apr. 22, 2013, 2:13 PM), http://reason.com/blog/2013/04/22/colorado-legislature-will-soon-decide-th. The second would involve an equal protection challenge under the Fourteenth Amendment to the U.S. Constitution. But “nonresident would-be purchaser of marijuana” is unlikely to be considered a suspect classification, and thus, Colorado would need to establish only that it has a rational basis for the distinction. **Armour v. City of Indianapolis**, 132 S. Ct. 2073, 2079–80 (2012). While the Court has in the past invalidated legislative classifications that discriminate against out-of-state commerce or disadvantage new residents, see, e.g., **Hooper v. Bernalillo Cnty. Assessor**, 472 U.S. 612, 614–16 (1985); **Metro. Life Ins. Co. v. Ward**, 470 U.S. 869, 871, 874 (1985), these cases involve economic protectionism, which is absent from Colorado’s legislation. See text accompanying infra notes 62–63, 89–96, 107–09 (describing other cases and instances where protectionism was absent).

9. 133 S. Ct. 1709, 1720 (2013) (rejecting Privileges and Immunities Clause and dormant Commerce Clause challenges to a provision in Virginia’s Freedom of Information Act (FOIA) that permitted only citizens of the state to file FOIA requests).
lengthy report containing its final recommendations. Recommendation 7.1 suggested “that the General Assembly consider setting per-transaction purchase limits that are more restrictive for non-residents than for residents.” Acknowledging that residency requirements risked creating a black market within the state, the task force nevertheless offered that:

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

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

The report added that additional safeguards against diversion should be undertaken, including “point-of-sale information to out-of-state consumers, signage at airports and near borders, coordination with neighboring states regarding drug interdiction, and restricting retail licenses near the borders.” Colorado House Bill 1317 followed the task force recommendation and limited nonresidents to a quarter-ounce purchase per transaction. As a result, only residents would be able to purchase, in a single transaction, the full ounce they are permitted to legally possess under the state constitution.

Colorado’s concern with the federal government’s reaction to diversion of marijuana was prescient. The Obama Administration had sent

11. Id. at 49–50.
12. Id. at 50.
13. Id.
14. See supra notes 1–7 and accompanying text.
15. Amendment 64 to Colorado’s constitution decriminalizes possession or purchase of an ounce of marijuana or six marijuana plants. COLO. CONST. art. XVIII, § 16(3)(a).

The memo set forth “certain enforcement priorities that are particularly important to the federal government” in light of state experiments with legalization.\footnote{Id.} Specifically, the memo mentioned “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states.”\footnote{Id. at 2.} The memo also noted that the itemized priorities “will continue to guide the Department’s enforcement of the [Controlled Substances Act] against marijuana-related conduct.”\footnote{Id.} For behavior outside the memo’s “enforcement priorities,” the memo would adhere to its reliance “on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”\footnote{Id.} The memo further stressed that states must “implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”\footnote{Id. at 3.} It called on states that had legalized marijuana to implement “strong and effective regulatory and enforcement systems” to “affirmatively address [federal] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states.”\footnote{See id.}

The memo warned that failure to address those enforcement priorities could provoke federal intervention that would end legalization experiments.

II. CONSTITUTIONAL LIMITS ON NONRESIDENT DISCRIMINATION AND COLORADO’S NONRESIDENT PURCHASE LIMIT

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

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

Because the Colorado law “poses the question whether [Colorado] can deny out-of-state citizens a benefit that it has conferred on its own citizens,”25 the Privileges and Immunities Clause of Article IV, Section Two of the Constitution would seem the most appropriate ground for a constitutional challenge. Adapted from a similar provision in the Articles of Confederation,26 the Privileges and Immunities Clause of Article IV reads: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”27 The Founders intended the Clause—described by Alexander Hamilton as “the basis of the Union”28—to promote political union by prohibiting state discrimination against outsiders that might provoke retaliation and disrupt that union.29 As interpreted by the Court today, the Clause prohibits state discrimination against nonresidents unless there is a “substantial reason” for the discrimination and the discrimination itself is “substantially related” to the reason for the discriminatory treatment.30 The Privileges and Immunities Clause, however, guarantees only “fundamental rights”31 such as the right to earn a living on terms of substantial equality as residents32 and the right to receive medical care available to residents.33

Predicting what a court (or the Court) would do with a Privileges and Immunities Clause challenge to a law limiting the amount of pot nonresidents could buy, as compared to residents, certainly involves guesswork. The Court has never clearly stated what rights are fundamental and trigger the protection of the Clause; neither has the Court been clear

26. ARTICLES OF CONFEDERATION OF 1781, art. IV.
27. U.S. CONST. art. IV, § 2, cl. 1.
31. See, e.g., McBurney v. Young, 133 S. Ct. 1709, 1714–15 (2013) (“[W]e have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are fundamental.” (internal quotation marks omitted)); Baldwin v. Fish & Game Comm’n, 436 U.S. 371, 388 (1978) (holding that the Privileges and Immunities Clause does not apply because elk hunting is not a fundamental right).
about what counts as a substantial reason for differential treatment; nor about how tight the means–ends fit must be to satisfy the substantially-related prong. However, several reasons exist for courts to give some latitude to a state seeking to curb pot tourism by restricting the amount of marijuana nonresidents may obtain at each dispensary visit. First, it is unlikely that the ability to buy marijuana qualifies as a fundamental right—at least for recreational users. Second, even if it does qualify, the state could make plausible arguments that nonresidents who cross the border, buy marijuana, and might sell it elsewhere would constitute a “peculiar source of evil” justifying differential treatment. The arguments seem at least nonfrivolous, though, their strength would likely depend on the record established at trial. More importantly, however, unlike laws restricting bar membership to state residents or taxes that favor residents over nonresidents, no apparent protectionist motive animates Colorado’s law.

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

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

The recent McBurney v. Young decision shored up Baldwin by reaffirming that the privileges and immunities protected by the Clause must be fundamental, and clarifying that the Clause “does not mean . . . that ‘state citizenship or residency may never be used by a State to distinguish among persons.’” McBurney involved a challenge to Virginia’s Freedom of Information Act (FOIA), which makes public records available for inspection or copying, but only to citizens of the state. The petitioners were nonresidents whose requests for information under Virginia’s FOIA were denied because they were not Virginia citizens; the petitioners claimed the citizens-only provision violated the Privileges and Immunities Clause and the DCCD.
The petitioners— one seeking records from the state regarding a child support matter, the other requesting real estate tax records on behalf of clients— argued that the citizens-only provision implicated four fundamental rights. These included “the opportunity to pursue a common calling, the ability to own and transfer property, access to the . . . courts, and access to public information.” The Court unanimously held that the Virginia law did not infringe the first three and that the fourth was not a fundamental privilege or immunity.

In dispatching the claim that the provision infringed “the right to access public information,” the Court concluded that no such broad right was a fundamental right under the Clause. It reaffirmed the Court’s prior holdings that “there is no constitutional right to obtain all the information provided by FOIA laws.” The Court also looked to history, noting that early cases “do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic.” The Court observed that “FOIA laws are of relatively recent vintage” and that however useful they might be, “[t]here is no contention that the Nation’s unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.”

The holdings of Baldwin and McBurney would almost certainly doom any Privileges and Immunities Clause claim related to nonmedical marijuana use. First, purchasing marijuana for recreational use is, like elk hunting, recreational—not the sort of activity essential to the maintenance of the Union. In fact, far from causing friction between states, which the Clause was meant to prevent, Colorado’s law seeks to ameliorate any friction by reducing the incentives for nonresidents to purchase pot in Colorado and import it into states where it is still illegal. Second, McBurney also seems to stand for the proposition that the fundamental-right inquiry is, in part, a historical one. If access to public records does not qualify because FOIA laws are of “relatively recent vintage,” arguments that equal access to legal marijuana is a fundamental right seem almost frivolous.

2. Would Medical Marijuana Users Fare Better?

On the other hand, at least some out-of-state purchasers might seek marijuana for medicinal purposes and might seek equal access under Doe

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42. Id. at 1714–15.
43. Id. at 1715.
44. Id.
45. Id. at 1718.
46. Id.
47. Id. at 1719.
v. Bolton. In Doe, the Court invalidated provisions of a Georgia law restricting nonresidents from obtaining abortions in that state. For the Court, Justice Blackmun wrote that:

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

The Court decided Doe prior to Baldwin’s announcement that the Clause protected only fundamental rights, but the latter decision gave no indication the Court intended to disturb its prior holdings. In any event, it is hardly a stretch to argue that access to needed medical care in another state, no less than the right to earn a living or ply a trade there, is the sort of fundamental right the Clause was intended to secure. Imagine that Maryland, Minnesota, or Texas passed laws restricting the care provided by their world-class medical centers to only their own state residents. Such parochialism would be inconsistent with the political union the Constitution created, to put it mildly, and retaliatory measures from affected states would likely follow. At the very least, the provision of medical care is far removed from the provision of recreational activities such as elk hunting or nonmedicinal marijuana use.

Further, marijuana remains a Schedule I drug under the Controlled Substances Act (CSA), meaning that the federal government does not acknowledge it as having any acceptable medical use. In United States v. Oakland Cannabis Buyers’ Cooperative, the Supreme Court held that marijuana’s Schedule I status prevented a defendant from raising a necessity defense to contempt proceedings brought by the federal government for violation of an injunction to prevent the sale of medical marijuana pursuant to state law. Conceivably, the absence of any recognized medical use for marijuana under the CSA would bar a nonresident’s Privileges and Immunities Clause challenge even for medicinal purposes.

50. Id. at 200-01.
51. Id. at 200.
52. See supra notes 27–29 and accompanying text.
53. If Doe’s outcome turned on the fact that abortion was, in 1973, a fundamental constitutional right under the Due Process Clause, Roe v. Wade, 410 U.S. 113, 153 (1973), the opinion in Doe gave no hint of it.
55. Id. at 491–92, 494.
3. Satisfying the Rest of the Test

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

The McBurney Court held that Virginia’s FOIA did not infringe three fundamental rights guaranteed by the Privileges and Immunities Clause—“the opportunity to pursue a common calling, the ability to own and transfer property, [and] access to the [ ] courts.” The Virginia law did not infringe the right to ply a trade or business because, according to the Court, it “has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.” The petitioner did not “allege—and has offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens.” Virginia law, moreover, did not prevent noncitizens from obtaining “title documents and mortgage records . . . necessary to the transfer of property.” Further, the state and its subdivisions generally made real estate tax assessment records, sought by one of the petitioners, available online rendering a FOIA request unnecessary.

56. See supra notes 30–33 and accompanying text.
57. See supra text accompanying note 30.
60. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 486 (4th ed. 2011) (commenting that “[t]hus far, the Court has not found that any law meets this rigorous test”).
62. Id.
63. Id.
64. Id. at 1716 (listing items open for inspection and copying by “any person” regardless of their residency).
65. Id. at 1710.
The other petitioner, who sought agency records relevant to a child-support dispute with his ex-wife, claimed the citizens-only provision burdened his access to public proceedings.66 The Court noted that he was able to obtain almost all the information sought under the state FOIA by using another Virginia statute.67 The Court held that the Privileges and Immunities Clause “does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage.”68

Interestingly, the Court in McBurney treated the lack of any lurking protectionist purpose and the availability of functional alternatives as dispositive. The Court did not inquire further into the substantialness of the reasons for the differential treatment nor did it assess the means–ends fit between the citizens-only restriction and whatever end Virginia was pursuing. This bodes well for Colorado’s law, especially if a court were to conclude that the purchase of marijuana for medicinal purposes was a fundamental right under Doe.

Unlike other laws successfully challenged under the Privileges and Immunities Clause,69 Colorado did not design the purchase limits for nonresidents to enrich in-state residents at the expense of those from out-of-state, or to hoard a resource to keep prices artificially depressed for in-state consumers. The task force mentioned three reasons for differentiating between in-state and out-of-state residents: (1) preventing diversion of legal marijuana to the black market; (2) reducing federal scrutiny; and (3) respecting the policy choices of neighboring states.70 These reasons—coupled with the lack of any explicit (or covert) protectionist motive—ought to qualify as substantial. Under McBurney, the lack of any protectionist motive might be sufficient to end the inquiry.

Assuming a reviewing court applied the rest of the test, could Colorado’s law survive scrutiny? Specifically, would purchase amount restrictions bear a substantial relationship to the reasons given for differentiating between residents and nonresidents in the first place? And would those reasons themselves qualify as “substantial”? In other words, to quote the Court in Toomer, could Colorado anticipate that nonresidents would be (or become) a “peculiar source of evil” justifying the lower purchase amounts?71

Here again, Colorado could make a strong case. The state would argue that the goal of the law was not to discriminate against nonresidents qua

66. Id. at 1717.
67. Id. at 1717–18.
68. Id. at 1717.
70. Supra text accompanying note 12.
71. Supra text accompanying note 58.
nonresidents. Rather, it was to prevent nonresidents from buying legal marijuana in Colorado and transporting it in interstate commerce—a federal crime72—back to their state of residence where it may be illegal to possess marijuana for recreational or even medical use.73 If the federal government found pot tourists overly eager to return home with souvenirs of their travels, it might feel pressure to take a more proactive enforcement role than it is currently inclined to take.74 Further pressure on the federal government could come from neighboring states whose policy choices are being undermined by their proximity to Colorado.75 From Colorado’s perspective then, nonresidents—at least nonresidents currently living in states where marijuana is illegal, which is most everywhere—are a “peculiar source of evil” because they are likely the very purchasers who would carry pot out of the state and draw unwanted attention to Colorado’s permissive regime.

In addition, Colorado’s law does not bar nonresidents from obtaining marijuana; it simply potentially requires nonresidents to engage in more transactions than residents to obtain the same desired quantity. In a similar fashion, Virginia made it marginally more difficult for nonresidents to obtain certain public records by restricting its FOIA to citizens, but alternate sources of information existed that the Court determined were sufficient.76 Colorado might argue that nonresidents’ ability to obtain the same quantity by visiting multiple retail establishments means that despite appearances, its law does not really discriminate at all, or only discriminates incidentally, much like Virginia’s citizen-only FOIA provision.

Traditionally, the Court has considered the availability of less restrictive means when assessing the means–ends fit under the Privileges and Immunities Clause.77 Does Colorado’s ability to level up (by eliminating the nonresident purchase restriction) or level down (by imposing the same quarter-ounce limit on Colorado residents) render its law ipso facto

73. See, e.g., ALA. CODE § 13A-12-214 (2014) (criminalizing marijuana possession for personal use).
74. See supra text accompanying notes 17–24.
75. Reminiscent of the days prior to Prohibition in which states struggled to control alcohol shipped into states where it was illegal, individual state attempts to stop illicit cross-border traffic in marijuana from Colorado or to stop its citizens from going to Colorado to engage in pot tourism would run into similar Privileges and Immunities and DCCD problems. See BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 13.02 (2d ed. 2013) (describing the difficulties of regulating interstate traffic in liquor prior to the ratification of the Eighteenth Amendment); see also infra notes 121–24 and accompanying text (suggesting federal legislation to free states from some of these restrictions when regulating pot tourism by drawing on historical analogies to pre-Prohibition efforts to empower states to regulate liquor coming into the state).
76. See supra text accompanying notes 63–67.
77. See supra text accompanying note 59.
unconstitutional? Because the analysis is similar under both the Privileges and Immunities Clause and the DCCD, this Essay will take this question up in the next Section.

B. Dormant Commerce Clause Challenges

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

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

1. Is Interstate Commerce Involved?

Would the DCCD apply? In addition to their Privileges and Immunities Clause claim, the McBurney plaintiffs argued that Virginia’s citizens-only FOIA provision violated the DCCD as well. The Court rejected their claim in part because, in its estimation, “Virginia’s FOIA neither ‘regulates’ nor ‘burdens’ interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all.”

78. See generally DENNING, supra note 75, §§ 6.01–.08 (providing in depth background and analysis on the DCCD).
79. U.S. CONST. art. I, § 8, cl. 3.
80. See DENNING, supra note 75, § 6.06[A].
82. McBurney v. Young, 133 S. Ct. 1709, 1720 (2013). The Court observed that, in the alternative, the market participant exception to the DCCD could justify the restriction. Id. Under this exception, a state that buys or sells goods or services with taxpayer money is entitled to discriminate in favor of in-state buyers or sellers. See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429, 432–33, 446 (1980) (upholding a state regulation requiring a state-owned cement factory to fill orders of in-state customers before filling orders from nonresidents); see also DENNING, supra note 75, § 7.02; Dan T. Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395, 421–22 (1989) (“[I]t seems sensible that when a state
By contrast, there is little doubt that enough interstate commerce is involved in marijuana sales to implicate the DCCD. First, nonresident pot tourists would be traveling in interstate commerce to purchase marijuana legally in Colorado. Second, in *Gonzales v. Raich*, the Court concluded that the production and consumption of locally-produced, noncommercial medical marijuana substantially affected the interstate marijuana market and was thus subject to congressional regulation under the CSA. *Raich*’s holding is relevant here because, as the Court has made clear elsewhere, “[t]he definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.” Therefore, state restrictions on the sale of marijuana to nonresidents, even if applied within Colorado, would likely substantially affect interstate commerce and would trigger DCCD scrutiny.

government distributes state resources, it may—on behalf of all its citizens—pick and choose among the proper recipients. An essential feature of having property is, after all, the right to exclude others.”); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 495 (2008) (discussing states providing “some preferential treatment for state citizens in distributing taxpayer-funded services”).

83. 545 U.S. 1 (2005).

84. *Id.* at 19, 22; see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (rejecting an argument that the DCCD did not apply to a discriminatory tax credit available to a not-for-profit summer camp serving state residents but unavailable to not-for-profit summer camps serving out-of-state campers); *id.* (“The services that petitioner provides to its principally out-of-state campers clearly have a substantial effect on commerce, as do state restrictions on making those services available to nonresidents.”).


86. The DOJ memo notwithstanding, marijuana remains illegal under the CSA. The astute reader might wonder whether the DCCD applies at all because instead of congressional inaction—the DCCD is a default rule that applies when there is federal legislative quiescence—Congress has very much spoken on the marijuana question. Here the author must enter a plea in confession and avoidance. The preemptive effect of the CSA on state legalization efforts is a complicated issue. For arguments that the preemptive effect of the CSA is much less than judges have assumed, see generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5 (2013); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009). But see generally Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. (forthcoming 2015) (on file with author) (arguing that state legalization efforts are more vulnerable to preemption than Professor Mikos does, but noting that it might not be easy to find a party with standing to raise the issue). As a practical matter, the DOJ memo means the federal government will not be swooping in to invoke the CSA’s preemptive effect as long as states remain attentive to the enforcement priorities listed in that memo; thus it is as if Congress is silent, though only because the executive branch has exercised its discretion not to enforce the CSA in Colorado or Washington. *See supra* note 17 and accompanying text.
2. Satisfying Strict Scrutiny Under the DCCD

Could a Colorado statute that limited nonresidents’ purchases satisfy strict scrutiny? Ordinarily, facially-discriminatory state laws are presumed to be unconstitutional unless an exception to the DCCD applies. However, there is one case in which the Court concluded that a discriminatory state law passed constitutional muster. That case, Maine v. Taylor, is instructive, for it sheds some light on what sort of evidentiary burden the state must carry to meet both prongs of strict scrutiny. A close reading of Taylor shows that DCCD strict scrutiny is not “‘strict’ in theory and fatal in fact” when economic protectionism does not taint the state’s actions. Taylor provides a roadmap for Colorado officials who might be called upon in the future to defend different resident and nonresident purchase amounts against a DCCD challenge.

Maine v. Taylor involved a Maine law prohibiting the importation of live baitfish. A federal grand jury in the District of Maine indicted Taylor for violating a federal law that prohibited the importation of wildlife into a state in violation of that state’s laws. Taylor sought to dismiss the indictment claiming that Maine’s importation ban violated the DCCD.

87. See, e.g., City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978) (noting that “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected” and that the “clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders”). There are three recognized exceptions to the DCCD, none of which are relevant here. See DENNING, supra note 75, § 7.01. First, while Congress may override the DCCD by exercising its affirmative power over interstate commerce, it has not authorized the states to discriminate against nonresident marijuana buyers. But see infra notes 121–24 and accompanying text (suggesting Congress can use its affirmative commerce power to permit states to regulate pot tourism free from the strictures of the DCCD). Second, states acting as market-participants—that is, buying or selling goods or services in the market as private purchasers might—may discriminate between residents and nonresidents. See supra note 82 and accompanying text. However, Colorado is not a market participant; it is not buying or selling marijuana itself. Finally, states may discriminate in favor of “public entities” that are engaged in the provision of “traditional governmental functions.” See Dep’t of Revenue v. Davis, 553 U.S. 328, 343 (2008); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (Scalia, J., concurring in part). For a discussion of the third exception, see generally DENNING, supra note 75, § 7.08; Norman R. Williams & Brannon P. Denning, The “New Protectionism” and the American Common Market, 85 NOTRE DAME L. REV. 247, 262–94 (2009) (describing the creation, case law, and rationales for the public-entities exception). The public-entities exception is not applicable here either, because Colorado has not monopolized the marijuana market in the state.


90. See infra Subsection II.B.2.a.

91. Taylor, 477 U.S. at 132.

92. Id. at 132–33.

93. Id. at 133.
The state defended the law on the ground “that the ban legitimately protect[ed] the State’s fisheries from parasites and nonnative species that might be included in shipments of live baitfish.” Specifically, Maine’s experts testified that out-of-state fish carried parasites foreign to the state’s native fish stocks and that other invasive species inadvertently included in imported shipments of baitfish could threaten Maine’s native ecology. The experts also testified that there “was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species.”

Reversing the court of appeals, the U.S. Supreme Court upheld the import ban, concluding that it satisfied strict scrutiny. First, the Court held that Maine’s environmental concerns were legitimate, despite the fact that the risks were “imperfectly understood” and might “ultimately prove to be negligible.” On the question of whether less discriminatory means were available, the Court wrote that “[n]o matter how one describes the abstract issue,” the “more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact, and the District Court’s finding that such techniques have not been devised cannot be characterized as clearly erroneous. Indeed, the record probably could not support a contrary finding.”

a. Colorado’s Legitimate Goals

Given the nonprotectionist nature of the task force’s recommended restrictions, the Court would likely describe Colorado’s aims as legitimate. “As long as a state does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’” the Taylor Court stressed, “it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.” There is no hint that any limitations on nonresident purchases of marijuana were intended to confer some benefit on Colorado pot growers, sellers, or consumers at the expense of nonresidents. Rather, as noted earlier, the

94. Id. at 133.
95. Id. at 140–41.
96. Id. at 141.
97. Id. at 151–52.
98. Id. at 148.
99. Id. at 146.
100. See supra text accompanying notes 69–70.
102. Colorado’s position would be even better on this question than was Maine’s in Taylor. The Court dismissed some slight evidence in Taylor that the refusal to lift the ban on baitfish was motivated in part by economic protectionism in the form of a statement by the Maine Department of Inland Fisheries and Wildlife in opposition to lifting the ban. Id. at 149. Taken in context, the Court concluded, the department’s statement simply challenged the argument that supplies of bait were sufficiently low to warrant acceptance of any environmental risks that might accompany
goals are to prevent diversion of marijuana to out-of-state black markets and reduce friction with the federal government and other states.

Just as the Taylor Court did not require absolute proof of either the extent or the magnitude of the environmental threat Maine sought to mitigate, 103 a reviewing court should defer to Colorado’s identification of possible problems with legalization as legitimate. The proposed remedy should also stand, especially in light of the DOJ enforcement memo. Colorado’s experiment with legalization is unprecedented. 104 The lack of legalization in most other states, and the federal government’s equivocation on the issue of enforcement of federal laws means that Colorado’s fears—that unchecked nonresident travel to the state to purchase marijuana could generate unwanted attention from and friction with the federal and neighboring state governments—are hardly fanciful. Even if these fears ultimately fail to materialize, or if the magnitude of the problems arising from pot tourism are of smaller scope than the state imagines, they closely resemble Maine’s fears about the integrity of its fish stocks and ecosystem.

b. Are Less Discriminatory Means Available?

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

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

The Taylor Court concluded that the state met its burden of proving lack of less discriminatory means, and that it was not clearly erroneous for the district court to rely on uncontradicted testimony that no reliable methods of testing and screening imported baitfish existed. 105 As the Court made clear, the availability of less restrictive means depends on the facts in

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103. In fact, the Taylor Court held that the ban was legitimate even if no significant threat ultimately materialized. Id. at 148 (majority opinion).

104. See Chemerinsky, supra note 60, at 321–22 (discussing the states’ role as laboratories in which policy experiments could be tested before launching them on a national scale).

105. Id. at 146.
the record.\textsuperscript{106} The Supreme Court admonished the appellate court for holding that the district court had erred in ruling that no less discriminatory means were available, and it declared the lower court was “not to decide factual questions \textit{de novo}, reversing any findings [it] would have made differently.”\textsuperscript{107}

Further, despite the Court’s readiness to concede that some tests for the parasites “could be easily developed,”\textsuperscript{108} it agreed with the district court judge that:

the “abstract possibility” of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an “[a]vailabl[e] . . . nondiscriminatory alternativ[e],” for purpose of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.\textsuperscript{109}

The Court invited opponents of the ban to develop such tests, noting that “if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.”\textsuperscript{110}

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

\textbf{ii. Narrow Tailoring, Content-Neutral Speech Regulations, and the DCCD}

In \textit{Ward v. Rock Against Racism},\textsuperscript{111} the Court held that narrow tailoring of content-neutral speech restrictions did not require employing “the least

\begin{itemize}
\item[\textsuperscript{106}] See supra text accompanying note 99; supra note 102 and accompanying text.
\item[\textsuperscript{107}] \textit{Taylor}, 477 U.S. at 145.
\item[\textsuperscript{108}] \textit{Id.} at 147 (internal quotation marks omitted).
\item[\textsuperscript{109}] \textit{Id.} (alterations in original) (citations omitted).
\item[\textsuperscript{110}] \textit{Id.} at 147.
\item[\textsuperscript{111}] 491 U.S. 781 (1989).
\end{itemize}
restrictive or least intrusive means” of achieving the government’s interests.\footnote{112.\ } “Rather,” the Court continued, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’”\footnote{113.\ } A court’s opinion that the government could have employed “some less-speech-restrictive alternative” is not a sufficient basis to invalidate a regulation “[s]o long as the means chosen are not substantially broader than necessary to achieve the government’s interest.”\footnote{114.\ }

The Court’s imposition of a lesser standard of review is rooted in the animating purpose behind its content-based/content-neutral distinction: that the First Amendment prohibits government from penalizing officially disfavored ideas. Because government could attempt to mask its true intentions by broadly drawing speech regulations, intermediate scrutiny of apparently content-neutral regulations requires courts first to determine whether the true purpose of the governmental regulation is to suppress ideas.\footnote{115.\ } Once the lack of such motive is confirmed, the Court’s jurisprudence grants some leeway, as long as the regulations do not stifle too much speech.

Just as the Court’s free speech jurisprudence is designed to ensure that government does not overtly or covertly suppress ideas, the DCCD is designed to implement the constitutional principle that states may not exercise regulatory power over interstate commerce in ways that risk undermining political union among the states.\footnote{116.\ } The DCCD’s antidiscrimination principle, reflected in the Court’s scrutiny of laws that discriminate against interstate commerce, is aimed at the types of state actions that were (and remain) the most likely sources of friction among states and most likely to ignite cycles of retaliation and further discrimination.\footnote{117.\ } If the government receives some slack in the First Amendment context when it satisfies the Court that it is not out to suppress ideas, then similar leeway as to means should be available under the DCCD’s no-less-discriminatory-means prong if the state can establish that

\footnote{112.\ } Id. at 798.
\footnote{113.\ } Id. at 799 (alteration in original) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
\footnote{114.\ } Id. at 800.
\footnote{115.\ } Id. at 791 (indentifying the “principal inquiry” in content neutrality as “whether the government has adopted a regulation of speech because of disagreement with the message it conveys").
\footnote{116.\ } Or so this author has argued. See Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, 50 WM. & MARY L. REV. 417, 484–85 (2008).
\footnote{117.\ } See McBurney v. Young, 133 S. Ct. 1709, 1719 (2013) (noting that the DCCD “is driven by a concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’” (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988))).
its ends have nothing to do with economic protectionism or retaliation against states with which it trades.118

iii. Less Discriminatory Means and Colorado’s Nonresident Purchase Limits

Colorado wants to discourage the diversion of legally-purchased marijuana out of Colorado, reduce the likelihood of federal scrutiny of Colorado’s adult-use marijuana industry, and support harmonious relationships with Colorado’s neighboring states. There is no hint that a desire to benefit residents at the expense of nonresidents is at the heart of the per-transaction restriction. If the restriction was a bid to artificially depress the price of marijuana for the benefit of Colorado’s residents, one would expect to see a total ban on nonresident purchases rather than the amount restriction per dispensary visit that the legislature enacted. Cases like Maine v. Taylor and the recent McBurney v. Young decision strongly suggest that a state government’s leeway to distinguish between residents and nonresidents should increase in the absence of a protectionist motive.

Worried that nonresidents are more likely than residents to engage in smurfing, Colorado has decided to make it slightly more difficult for nonresidents to divert legal Colorado pot to markets where it remains illegal. If one believes the state’s concern is a legitimate one, leveling up—permitting nonresidents and residents to purchase the same amount per visit—would not only make Colorado’s safeguard less effective, it would completely undermine its purpose. Leveling down by restricting both Colorado residents and nonresidents to a quarter-ounce of marijuana per visit might be unconstitutional under state law, which decriminalizes the possession and purchase of an ounce of marijuana.119 Regardless, leveling down would disadvantage state residents who the legislature has decided are less likely to engage in smurfing. Though there might be some conceivable methods yet to be developed that could track the purchasers (RFID tags on bags of pot? Smokeable nanobots that transmit the location of purchased marijuana’?), their mere possibility should not be sufficient to invalidate the purchase limitations based on the fact that the state failed to pursue the least discriminatory means before restricting commerce, as the holding in Taylor illustrates.

* * *

Facially-discriminatory laws labor under a presumption of unconstitutionality, often for good reason. But as Maine v. Taylor and McBurney v. Young demonstrate, the Court has acknowledged that states

118. Professor Donald Regan famously argued that the presence or absence of a protectionist motive behind state and local laws was the key to understanding the entire DCCD. See Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091, 1148–50 (1986).

119. COLO. CONST. art. XVIII, § 16(3)(a).
can restrict trade for reasons other than securing commercial advantage for residents or punishing those who reside elsewhere. In their haste to enforce the Privileges and Immunities Clause or a valuable (and venerable) doctrine like the DCCD, courts should not engage in reflexive or unthinking applications, even where a law has a powerful indicium of unconstitutionality like facial discrimination. Colorado’s legalization of marijuana and restriction on sales to nonresidents are unlike anything courts have encountered recently. Given the fact that this proposed fetter on interstate commerce—and a fairly mild fetter at that—was intended to avoid interstate friction, not exacerbate it, courts should grant the state some experimental leeway in the means it chooses to enforce its legitimate interests, at least initially.120

CONCLUSION

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

One final thought: The DCCD is simply a default rule; Congress has the power to disable the DCCD by exercising its affirmative power over interstate commerce.121 A century ago, Congress used that power to grant states the ability to prevent importation of alcohol in violation of state laws.122 The old division between wet and dry states may soon give way to a similar divide between, forgive me, “toking” and “non-toking” sections

120. See supra note 104 and accompanying text.
121. See, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946) (“[The] plenary scope [of the Commerce Clause] enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons.”); ld. at 429, 439–40 (rejecting a claim that the McCarran–Ferguson Act, which allowed state laws that regulate the business of insurance to supersede acts of Congress, violated Congress’s power under the Commerce Clause). But see Norman R. Williams, Why Congress May Not “Overrule” the Dormant Commerce Clause, 53 UCLA L. REV. 153, 234 (2005) (arguing that Benjamin was wrongly decided).
of the country. And, as in the pre-Prohibition days, the DCCD might operate as a barrier to state regulatory efforts either to minimize the impact on its neighbors of its decision to liberalize its laws or to meet challenges posed by nearby liberalization. If the legalization trend continues, Congress—as it did when states were struggling to meet the challenges posed by interstate trade in alcohol—should consider legislation that frees states from the strictures of the DCCD when coping with the effects of legalization. Such action would not preempt all constitutional challenges, but legislation would go far toward removing constitutional doubts from state efforts and could even encourage experimentation as states confront the many legal and regulatory puzzles that will attend legalized marijuana.

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123. Thanks to Alli Denning and Ben Barton for suggesting other analogues to “wet” and “dry” states.

124. Congress, for example, cannot override the Privileges and Immunities Clause of Article IV. See Denning, supra note 29, at 398–99. But see Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 Harv. L. Rev. 1468, 1487–89 (2007) (suggesting that courts should interpret Article IV to permit a similar congressional override).