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A Sleeping Giant:

How the Dormant Commerce Clause Looms Over the Cannabis Marketplace

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Vaguely recalled by practicing attorneys, the Dormant Commerce Clause (“DCC”) is often the bane of first-year students’ Constitutional Law courses. However, the DCC is poised to soon rise in prominence, and lawyers, lawmakers, regulators, and businesses should pay close attention as the doctrine has the potential to bedevil the emerging cannabis sector.

Congress is contemplating a national cannabis marketplace, ushering in the interstate commerce of cannabis. On September 30, 2021, the Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”) passed through the House Judiciary Committee by a vote of 26-15, with two Republicans crossing party lines (Reps. Matt Gaetz and Tom McClintock).¹ It is probable that the bill’s lead sponsor, Chairman Jerry Nadler, will seek to bring the bill to the House floor in the coming months. Senate Majority Leader Chuck Schumer, Senator Cory Booker, and Senator Ron Wyden released a discussion draft of their own version of a de-scheduling bill over the summer (the Cannabis Administration and Opportunity Act) and will likely promote that bill in the coming months.² More recently, Republican Representative Nancy Mace, joined by Rep. McClintock and two other conservative co-sponsors, introduced a bill to legalize and regulate cannabis.³

On their face, these bills look like a boon to the burgeoning cannabis industry. However, the potential federal legalization, or descheduling, of cannabis would immediately introduce an issue: what to do about existing state laws and regulatory structures necessary for the orderly business of intra-state cannabis markets. These structures, which are much-needed under current laws, might see themselves recast as potential impediments to a robust, safe, nationwide marketplace for cannabis. Regulators and licensed businesses have made substantial investments in the current state-based systems, relying on these regulatory regimes for massive capital investments.⁴ The DCC counsels that Congress must speak clearly if it is to dismantle or reform the current system, as ambiguity between federal-state relationships is likely to prompt legislative grappling among states and prolonged (and costly) litigation nationwide, leaving the cannabis industry with uncertainty about who is in charge and where their regulatory responsibilities lie. This Article discusses the largely-ignored DCC’s role in the cannabis marketplaces and the doctrine’s resurgence now that interstate commerce in cannabis may be on the horizon. As Congress contemplates cannabis legalization or descheduling, it must speak clearly and get the question of interstate commerce right at the outset, or else risk years of endless (and needless) fights among legislators, regulators, and businesses.

I. What is the Dormant Commerce Clause?

¹ See Lauren Clason, *House Committee Advances Bill to Legalize Marijuana*, Roll Call (Sept. 30, 2021), <https://www.rollcall.com/2021/09/30/house-committee-advances-bill-to-legalize-marijuana> [<https://perma.cc/MU5T-1Y56S>].

² Sens. Cory Booker, Ron Wyden & Chuck Schumer, *Cannabis Administration & Opportunity Act: Discussion Draft*, <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> [<https://perma.cc/MHB6-2N7A>] (hereinafter *Discussion Draft*).

³ See H.R. 5977 117th Cong. (2021); see also Meg Kinnard, *Republican-Backed Bill Would Federally Decriminalize Marijuana*, USA Today (Nov. 16 2021), <https://www.usatoday.com/story/news/politics/2021/11/16/nancy-mace-led-bill-would-federally-decriminalize-marijuana/8643198002> [<https://perma.cc/N4UJ-6P76>].

⁴ See Andrew Kline et al., *Federal Cannabis Descheduling Bill Needs More Clarity*, LAW360 (Jul. 6, 2021), <https://www.perkinscoie.com/images/content/2/4/v3/244605/Federal-Cannabis-Descheduling-Bill-Needs-More-Clarity.pdf> [<https://perma.cc/9WX4-VMB6>].

The DCC is the natural corollary of the bedrock Constitutional principle that Congress has the exclusive power to regulate commerce among the states.⁵ The Clause ensures against discriminating state legislation,⁶ placing “an implicit restraint on state authority.”⁷ In 2019, the Supreme Court noted that the DCC “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.”⁸ In that case, the Court struck down a state-mandated durational residency requirement to own a retail liquor store, calling the DCC “the primary safeguard against state protectionism.”⁹ As that case noted, even with a highly regulated product like alcohol, the DCC is implicated when state laws discriminate against non-residents. Similar DCC challenges regarding cannabis are already underway as courts are striking down durational residency requirements for licenses.¹⁰ Courts evaluate cases under the DCC under two frameworks. The DCC subjects laws motivated by “simple economic protectionism” to strict scrutiny,¹¹ which is triggered when a state mandate has either a “discriminatory purpose” or a “discriminatory effect.”¹² Given the high burden imposed by strict scrutiny review, states rarely prevail when laws discriminating against outsiders are challenged as the state must demonstrate that the discriminatory policy could not be served as well by some non-discriminatory means.¹³ Alternatively, state statutes that are not facially discriminatory may still violate the dormant Commerce Clause if they discriminate in their practical effect.¹⁴ A law that imposes only “incidental” burdens on interstate commerce is unconstitutional when “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”¹⁵ Courts have invalidated these more neutral state mandates challenged under this alternative standard, the *Pike* test, when the mandates would impose undue burdens on interstate commerce.¹⁶

Importantly, the DCC is a default rule. Congress may override this default position and validate what would otherwise be an unconstitutional burden upon interstate commerce.¹⁷ Despite the DCC’s implication, the Supreme Court has noted, “Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce.”¹⁸ Given that Congress has the exclusive power to legislate regarding interstate commerce, it can specifically authorize certain impediments to commerce between the states. For example, Congress has authorized state regulations that regulate insurance companies in ways that may favor in-state

⁵ See U.S. Const., Art. I, § 8, cl. 3.

⁶ See *Bacchus Imp. Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

⁷ *Utd. Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

⁸ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

⁹ *Id.* at 2461.

¹⁰ See *infra* at Section II.

¹¹ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th Cir. 2013) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (noting that such mandates are subject to a “virtually *per se* rule of invalidity”).

¹² *Bacchus Imp. Ltd.*, 468 U.S. at 270.

¹³ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹⁴ *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010).

¹⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁶ See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (invalidating state mandate regarding certain types of mudflaps); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671-75 (1981) (invalidating state mandate concerning limitations on truck length).

¹⁷ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). See also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572 (1997); *Taylor*, 477 U.S. at 138.

¹⁸ *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

insurers and limit out-of-state banks' ability to acquire in-state banks.¹⁹ When doing so, Congress “must be unmistakably clear” in its authorization to suspend the default rules of the DCC.²⁰

II. Why Is Cannabis Unique Regarding the DCC?

The modern cannabis marketplace is a patchwork of overlapping, and at times contradictory, state laws and regulations. At the federal level, cannabis is a controlled substance, and its possession and sale can lead to criminal sanctions.²¹ As noted above, Congress has considered reforms to the scheduling of cannabis, including a measure that passed the House in 2020 and the House Judiciary Committee in 2021, a current discussion draft of legislation Democratic senators have circulated, and a House Republican proposal introduced in late 2021.²² Yet, cannabis remains illegal under federal law. Among the states, more than 36 allow for medical cannabis, and more than 20 U.S. jurisdictions permit recreational adult use of cannabis.²³

Because of federal prohibition, state-sanctioned cannabis businesses cannot currently sell across state lines, meaning that cannabis must be grown, produced, processed, bought, and sold within internal state markets.²⁴ As such, the U.S. cannabis marketplace is better understood as numerous insular cannabis *marketplaces*, each with its own variations and unique regulatory regimes that are constantly evolving.²⁵ In other words, states are purposefully and regularly imposing restrictions on interstate commerce, which is tolerated (at least for now) given the federal illegality of cannabis.²⁶

Current state cannabis regulatory regimes therefore create mandates that may run afoul of the DCC.²⁷ For example, state social equity programs forward the laudable goal of addressing the disproportionate impact of the War on Drugs among communities of color. Many states promote the participation of communities of color into legalized cannabis markets by awarding extra points to social equity applicants in licensing processes or making licensing opportunities exclusive to

¹⁹ See McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000); Bank Holding Company Act of 1956, ch. 240, § 3(d), 70 Stat. 133, 135, *repealed by* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328 § 101(a), 108 Stat. 2338.

²⁰ *Id.* See also Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, PEPP. L. REV. at 41-49 (forthcoming 2022) (setting forth a proposal as to how Congress could provide such “unmistakably clear” language with regard to cannabis).

²¹ See 21 U.S.C. §§ 841, 844 (2018).

²² See H.R. 3884, MORE Act of 2020, which passed the House. The bill proposed, among other things, removing marijuana from the list of scheduled substances under the Controlled Substances Act and eliminating criminal penalties for individuals who manufacture, distribute, or possess marijuana. See also *Discussion Draft*, *supra* note 2. The draft proposal would, among other things, decriminalize and deschedule cannabis.

²³ See Nat'l. Conf. of State. Leg's, *State Medical Marijuana Laws* (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/MLX4-K5S9>].

²⁴ See Bloomberg & Mikos, *supra* note 20, at 10 (forthcoming 2022); Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 862-63 (2021).

²⁵ Bloomberg & Mikos, *supra* note 20, at 10.

²⁶ See *Original Investments v. Oklahoma*, No. 5:20-cv-00820 (W.D. Okla. June 4, 2021) (refusing to address the DCC as the court declined to use “its equitable power to facilitate [federally] illegal conduct”).

²⁷ See Mikos, *supra* note 24, at 861 (stating that if left unchecked, the DCC “is likely to spell the demise of the strange, state-based cannabis markets we have today and the rise of a national cannabis market in which local firms must compete with out-of-state firms”).

social equity applicants.²⁸ But, these social equity benefits are generally based on an applicant’s residence in a particular area within the particular jurisdiction, meaning that states are “limiting participation in social equity programs to state residents” in such a way that “almost certainly violates the DCC.”²⁹ And, state laws forbidding the sale of out-of-state cannabis would face immediate challenge once the floodgates of interstate commerce are opened.³⁰ State track-and-trace systems would also need to be updated to accommodate the sale of out-of-state cannabis. These track-and-trace systems are meant to monitor cannabis from seed to sale within a jurisdiction, and different states have implemented varying track-and-trace systems across various providers of such services. Similarly, “the DCC tends to punish outlier states that impose different regulations than those that most other states have adopted,”³¹ meaning that states with unique requirements may face particular challenges in upholding their state mandates regarding cannabis. States may face calls to harmonize their regulations with those of other states. As an additional example, many states currently require a specific “universal symbol” signifying a cannabis product, meaning that the labeling of the cannabis product is unique to that jurisdiction. States may see calls to adopt a uniform “universal symbol” for cannabis products among the many “universal symbols” currently in use.³²

The DCC has already demonstrated its salience in invalidating aspects of state cannabis systems. A Maine federal court recently struck a state law down on DCC grounds, requiring that officers and directors of licensed dispensaries be Maine residents.³³ Elsewhere in Maine, a city ordinance granting preference for long-time residents was invalidated because of the DCC.³⁴ A similar ordinance in Michigan favoring long-time Detroit residents was found to convey an unconstitutional advantage.³⁵ A Missouri federal court also granted a preliminary injunction enjoining rules that cannabis businesses must be majority-owned by individuals who had resided in the state for at least a year.³⁶

III. What’s Next?

Cannabis legalization, or descheduling, is rapidly becoming a question not of *if*, but instead of *when*. Recent Congressional proposals are not “unmistakably clear” regarding the future of the interaction between the federal government and the states regarding cannabis. For example, a discussion draft of a descheduling bill promises to “preserve[] the integrity of state cannabis laws” and “empower[] states to implement their own cannabis laws.”³⁷ Few additional details are provided, but the draft legislation appears to do quite the opposite, providing no specific guidance

²⁸ Bloomberg & Mikos, *supra* note 20, at 28 (“States give social equity applicants a range of other benefits as well, from exclusive funding programs, to fee waivers, to specialized training and educational opportunities.”).

²⁹ *Id.* at 29.

³⁰ Mikos, *supra* note 24, at 864 (“[I]f Congress adopts any of the reforms now on the table—and likely, even if it does not—the DCC will force legalization states to open their doors to cannabis imports and exports and to permit nonresidents to own and operate local cannabis businesses on the same terms as residents.”).

³¹ Mikos, *supra* note 24, at 887.

³² *Id.* at 886.

³³ *Northeast Patients Grp. v. Me. Dep’t of Admin. and Fin. Servs.*, 2021 WL 3560840, at *6 (D. Me. Aug. 11, 2021). This case is currently on appeal to the First Circuit.

³⁴ *NPG, LLC v. City of Portland*, 2020 WL 4741913 (D. Me. Aug. 14, 2020).

³⁵ *Lowe v. City of Detroit*, 2021 WL 2471476, at *1 (E.D. Mich. June 17, 2021).

³⁶ *Toigo v. Dep’t of Health and Senior Servs. et al*, 2:20CV04243 (W.D. Mo. June 21, 2021).

³⁷ *Discussion Draft*, *supra* note 2, at 1.

to the states regarding the regulatory authorities left to them. The latest version of the MORE Act, introduced as H.R. 3617 earlier this year, is largely silent as to the issues of interstate commerce and regulatory authorities. The recently introduced Republican-backed cannabis legalization bill is similarly scant in detail regarding the impact of the DCC or how to address it. Such silence does not aid states or federal officials preparing to regulate responsibly.³⁸

Congress should not sidestep the DCC and its implications for federalism as it considers proposals to legalize cannabis. The introduction of interstate commerce without a federal plan to address its implications would have immediate consequences, including upsetting stable state markets and burgeoning state social equity programs.

Congress must get interstate commerce right from the onset, recognizing that states already have stable regulatory systems in place, and businesses have invested heavily in reliance on (and to comply with) these state regulatory requirements. Instead of promoting a conflict between the federal and state governments, Congress should focus on bringing an end to the conflict, especially with regard to social equity programs that are just getting established. The example of battles over alcohol products is instructive. In 2005, the Supreme Court reviewed more than a century's worth of fights over alcohol products sold in interstate commerce.³⁹ Since at least 1880,⁴⁰ the sale of alcohol made in one state and sold in another has prompted litigation, and the Court invalidated state liquor regulations as it developed its Commerce Clause jurisprudence.⁴¹ The 2005 battle concerned Michigan and New York state mandates that favored in-state wineries, allowing these wineries to make direct sales to consumers. The Court invalidated the state regulations, holding that Congress did not expressly approve this discriminatory scheme and the states did not demonstrate the need for such discrimination of out-of-state businesses.⁴² Federal lawmakers should take heed as failing to speak clearly about DCC concerns now could lead to decades of litigation battles for cannabis businesses and courts around the country.

Congress should consider designing federal oversight of the cannabis industry that retains some of the current state regulatory systems and state social equity programs while promoting public health. This is the nature of federalism: a clearly articulated balance of powers between the federal and state governments. As it contemplates cannabis legalization or descheduling, Congress must speak clearly to address issues raised by the DCC. Legislative drafting without clarity on DCC concerns and solutions is likely to prompt years of handwringing for legislators, headaches

³⁸ See Andrew Kline, Barak Cohen & Yoko Miyashita, *Federal Cannabis Descheduling Bill Needs More Clarity*, LAW360 (Jul. 6, 2021), <https://www.perkinscoie.com/images/content/2/4/v3/244605/Federal-Cannabis-Descheduling-Bill-Needs-More-Clarity.pdf> [<https://perma.cc/E7TD-3CX9>] (“While we should all support the descheduling of marijuana, the establishment of industry guardrails, and robust social equity reforms, we must regulate responsibly, and that will take time to get right. Congress must ensure that it puts in place a thoughtful regulatory plan before intoxicating products are shipped over borders or across state lines.”).

³⁹ *Granholt v. Heald*, 544 U.S. 460, 476 (2005).

⁴⁰ *Tieman v. Rinker*, 102 U.S. 123 (1880).

⁴¹ *Granholt*, 544 U.S. at 476-77 (“These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. . . . Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce.”).

⁴² *Id.* at 493.

for regulators, and unnecessary (and expensive) litigation for regulated businesses and applicants. And it will do nothing to keep consumers safe from unregulated and potentially unsafe products.