

WEED WARS: WINNING THE FIGHT AGAINST MARIJUANA SPILLOVER FROM NEIGHBORING STATES

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Today, a “novel social and economic experiment[]”[†] involving the sale, use, and distribution of marijuana is sweeping the nation. Despite a federal ban on the drug, states have begun to legalize medical and even recreational marijuana use. While these entrepreneurial states push forward with marijuana legalization, other states and the federal government remain opposed to the expansion of marijuana use or its legalization in any form.

Regardless of one’s position on the merits of marijuana legalization, the federalism and conflict-of-laws issues that arise from this multi-state experiment deserve scholarly attention. In particular, non-legalizing states that border more permissive neighbors have begun to see an upsurge in marijuana use within their borders—and an attendant increase in crime and accidents—and these states need ways to protect themselves. In a previous Article, I proposed that non-legalizing states enact laws modeled on Dram Shop Acts, which create liability against those who sell alcohol to already intoxicated people who then injure third-party victims. These aptly named “Gram Shop Acts” would create liability against out-of-state marijuana dispensaries that sell to Home State buyers who, while high, injure third parties in the Home State or residents of the Home State.

Three challenges to the viability and success of this mode of protection arise. First, will the courts of the non-legalizing state have personal jurisdiction over the out-of-state sellers? Second, as a matter of conflict of laws, will those courts apply their laws, particularly the Gram Shop Act, to the dispute? Finally, would the non-legalizing state’s use of its own laws comport with the requirements of the Full Faith and Credit Clause, the Due Process Clause, and the dormant Commerce Clause? This Article explores these horizontal federalism issues emanating from the legalization quagmire.

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

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INTRODUCTION

Reefer madness has been set ablaze. Over the past few decades, states have increasingly joined California in legalizing first medical and now recreational marijuana. As of August 2018, thirty-one states have legalized marijuana in some form,¹ and more than half the nation supports that trend.²

The path toward state legalization has not been all highs; there have been some crashes. After California became the first state to legalize medical marijuana in 1996, the US Supreme Court stepped in and upheld Congress's authority to regulate even entirely personal use within a state.³ Some thought that the Supreme Court's pronouncement spelled the end of the legalization experiment

¹ See ALASKA STAT. §§ 17.37.010–17.37.080, 17.38.010 (2018); ARIZ. REV. STAT. ANN. §§ 36-2801–36-2819 (2018); ARK. CONST. amend. XCVIII, §§ 1–25; CAL. HEALTH & SAFETY CODE § 11362.1 (West 2018); COLO. CONST. art. XVIII, § 16; CONN. GEN. STAT. ANN. § 21a-408a (2018); DEL. CODE ANN. tit. 16, § 4903A (2018); D.C. CODE § 7-1671.02 (2018); FLA. CONST. art. X, § 29; HAW. REV. STAT. § 329-122 (2018); 410 ILL. COMP. STAT. 130/1–999 (2018); LA. STAT. ANN. § 40:1046 (2018); ME. STAT. tit. 22, §§ 2421–4230-B (2018); MD. CODE ANN., HEALTH-GEN. § 13-3301.1 (West 2018); MASS. GEN. LAWS ch. 94G §§ 1–17 (2018); MICH. COMP. LAWS §§ 333.26421–333.26430 (2018); MINN. STAT. §§ 152.21–152.37 (2018); MONT. CODE ANN. §§ 50-46-301–50-46-345 (2017); NEV. REV. STAT. §§ 453A.010–453A.810 (2017); N.H. REV. STAT. ANN. §§ 126-X:1–126-X:11 (2018); N.J. STAT. ANN. §§ 24:6I-1–24:6I-16 (West 2018); N.M. STAT. ANN. §§ 26-2B-1–26-2B-7 (2018); N.Y. PUB. HEALTH LAW § 3362 (McKinney 2018); N.D. CENT. CODE § 19-24.1-01–19-24.1-40 (2017); OHIO REV. CODE ANN. §§ 3796.01–3796.30 (West 2018); OKLA. STAT. tit. 63, §§ 420–426 (2018); OR. REV. STAT. §§ 475b.005–475b.548 (2018); 35 PA. CONS. STAT. §§ 10231.101–10231.2110 (2018); 21 R.I. GEN. LAWS §§ 21-28.6-1–21-28.6-17 (2018); VT. STAT. ANN. tit. 18, §§ 4472–4474m (2018); WASH. REV. CODE §§ 69.51A.005–69.51A.900 (2018); W. VA. CODE § 16a-1-1–16a-16-1 (2018); H.B. 823, Reg. Sess. (La. 2018); H. 3932, 189th Gen. Court, Reg. Sess. (Mass. 2016).

² See Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1037 (2013) (“[W]hile Americans remain split roughly evenly in their views on marijuana legalization, a sizable majority believes states should have the option to pursue legalization laws without federal interference.”).

³ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

and that the federal law criminalizing marijuana, the Controlled Substances Act of 1970 (“CSA”),⁴ would be read to preempt state medical marijuana laws.⁵

But just as garden weeds, once they have taken root, do not die easily, nor did this weed. So, today, the United States has sown an uncomfortable patchwork of marijuana laws. The federal government regulates marijuana as a Class I drug (the worst kind) and criminalizes marijuana’s growth, use, and possession.⁶ The federal government shows few signs of mellowing on this anti-marijuana stance. First, on May 1, 2017, Attorney General Jeff Sessions sent a letter to Congress urging it to undo protections for state marijuana businesses;⁷ then, on January 4, 2018, Sessions issued a memorandum reiterating that marijuana is illegal under federal law, and urging that federal prosecutors weigh “all relevant considerations” when seeking to file charges—including marijuana charges.⁸ Perhaps, though, Congress may protect states’ rights to blaze into the marijuana haze. On June 7, 2018, a group of bipartisan legislators introduced a bill to protect legalizing states from federal interference.⁹

Some states fall in line with federal regulations and fully criminalize *cannabis*; other states have decriminalized its use; still others have legalized medical use; and, finally, some states have fully legalized marijuana.¹⁰ Because of these differing laws, the United States faces “one of the most important federalism conflicts in a generation.”¹¹ This federalism conflict has both vertical and horizontal aspects, which Professor Denning termed “Diagonal Federalism”:

⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as 21 U.S.C. §§ 801–971 (2012)).

⁵ Debra Yvonne Hughes, *The Supremacy Clause Disappears in a Puff of Smoke—The Effort of Medical Marijuana Supporters to Circumvent Federal Law in United States v. Oakland Cannabis Buyers’ Cooperative*, 26 T. MARSHALL L. REV. 131, 155–61 (2001); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 6–7 (2013).

⁶ 21 U.S.C. §§ 801–971.

⁷ See Letter from Jeff B. Sessions III, Att’y Gen., to Mitch McConnell, Majority Leader, U.S. Senate, Charles Schumer, Minority Leader, U.S. Senate, Paul Ryan, Speaker, U.S. House of Rep. and Nancy Pelosi, Minority Leader, U.S. House of Rep. (May 1, 2017), <https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections> [<https://perma.cc/5M6J-8WVX>].

⁸ See Memorandum from Jeff B. Sessions III, Att’y Gen., to All United States Att’y’s (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/V44Y-B3N2>].

⁹ STATES Act, S. 3032, 115th Cong. (2018). Even if this law passes, it will solve only the vertical conflict between the states and the federal government, not the horizontal conflict among states with widely divergent marijuana tolerances.

¹⁰ *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/Z6SM-BBQZ>] (last updated Mar. 30, 2018).

¹¹ Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

the conflict between legalizing states and the federal government (the vertical aspect) and the conflict among the states (the horizontal aspect).¹²

The horizontal aspect emanates from the fact that legalizing states cannot fully stop the transboundary wafting—the contact high that a neighboring state unintentionally receives. For example, residents of non-legalizing states may purchase marijuana in legalizing states and bring it home (either in their suitcases or in their bodies, while the metabolites are still active).¹³ This spillover places burdens on the non-legalizing state. Statistics reflect an increase in marijuana use and possession in non-legalizing states that border legalizing ones¹⁴ and a resulting increase in the numbers of drug arrests,¹⁵ car accidents,¹⁶ and volume of drugs seized.¹⁷ In addition, citizens of the non-legalizing states are experiencing long-term health consequences¹⁸ and lost productivity.¹⁹ It is high time that non-legalizing states fight back in these weed wars.

¹² Brannon P. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, 11 FIU L. REV. 349, 349 (2016).

¹³ See Rachael Rettner, *Riding High: Pot-Smoking Drivers Evade Blood Tests*, LIVE SCI. (Feb. 3, 2016, 12:07 PM), <http://www.livescience.com/53578-marijuana-driving-the-blood-test.html> [<https://perma.cc/5ZXD-GL8D>] (noting that active metabolites break down quickly, from 8.2 micrograms per liter—an amount associated with impairment—to less than 5 micrograms per liter within two hours).

¹⁴ See David Hendee, *Nebraska on its Own with Drug Enforcement Costs Tied to Colorado Pot Sales*, OMAHA WORLD-HERALD (Apr. 20, 2014), https://www.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html [<https://perma.cc/3Q4F-DZ7D>] (stating that Colorado marijuana can be found throughout the United States); Denver7, *Colorado Weed Blamed for Increasing Law Enforcement Costs in Nebraska*, YOUTUBE (May 25, 2014), <https://www.youtube.com/watch?v=y0JocQFv2IE> [<https://perma.cc/C7PW-GYVB>] (explaining that Colorado marijuana has required a Nebraska town to raise its jail budget more than \$100,000); see also ROCKY MOUNTAIN HIDTA, *THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT* 38 (2013) (noting a 407 [percent] increase in Colorado “marijuana interdiction seizures destined for other states”).

¹⁵ See Jenny Deam, *Colorado’s Neighbors Dismayed by New Wave of Marijuana Traffic*, L.A. TIMES (May 27, 2014, 6:00 AM), <http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html> [<https://perma.cc/PL7S-MTFZ>] (describing increases in marijuana-related arrests and charges in Nebraska); Trevor Hughes, *Sheriffs Sue Colorado Over Legal Marijuana*, USA TODAY (Mar. 5, 2015, 12:08 AM), <http://www.usatoday.com/story/news/2015/03/05/sheriffs-from-three-states-sue-colorado-over-marijuana/24385401/> [<https://perma.cc/66S2-3LE2>] (“Felony drug arrests in the town of Chappell in Deuel County, Neb., 7 miles north of the Colorado border, jumped 400 [percent] over three years Police officers monitoring the flow of marijuana outside Colorado say volumes have risen annually.”).

¹⁶ See John Faubion, *Reevaluating Drug Policy: Uruguay’s Efforts to Reform Marijuana Laws*, 19 L. & BUS. REV. AM. 383, 402 (2013) (“Perhaps most importantly, the short-term motor function impairment accompanying ‘acute intoxication’ results in difficulty operating motor vehicles, presenting the greatest health and safety risk.”); *id.* at 406 (noting a potential for “increase in the amount of traffic accidents resulting from driving under the influence”).

¹⁷ See ROCKY MOUNTAIN HIDTA, *supra* note 14, at 38 (407 percent increase in marijuana seizures destined for other states).

¹⁸ Faubion, *supra* note 16, at 406 (noting “loss in IQ points over time,” “acute short-term memory loss, slowed reaction time and impaired motor coordination, altered judgment and decision-making, and increased heart rate” and citing studies regarding “lower life satisfac-

In a previous Article, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, I proposed that at least part of the battle plan should include the enactment of statutory liability against the out-of-state marijuana dispensaries.²⁰ These statutes, modeled on Dram Shop Acts, would impose civil liability on marijuana sellers when their sales to citizens from a non-legalizing state cause harm to the non-legalizing state. That Article explored the utility of such laws in terms of decreasing the flow of marijuana into non-legalizing states by forcing dispensaries to internalize the externalities they create.²¹ This Article will explore the likelihood and constitutionality of the extraterritorial application of such laws.

This Article will proceed in four principal parts. Part I will review the hypothetical Gram Shop Act, will pose a hypothetical that will be used to explore the utility and constitutionality of such an Act, and will briefly reiterate why a non-legalizing state might wish to adopt such an Act. The next three parts will tackle the primary doctrinal arguments against Gram Shop liability: personal jurisdiction problems, choice-of-law uncertainty, and constitutionality concerns. Part II will consider whether non-legalizing states may assert jurisdiction over out-of-state dispensaries when they sell to Home State citizens who, in turn, cause harm in the Home State. Part III will explore the extraterritorial application of gram shop liability under generally accepted choice-of-law principles. Part IV will more closely address potential constitutional problems associated with the extraterritorial application of the Gram Shop Act under the Full Faith and Credit Clause, Due Process Clause, and the dormant Commerce Clause. The Article concludes that non-legalizing states will benefit from Gram Shop legislation and that such legislation comports with constitutional norms.

I. DRAM SHOP LAWS AND GRAM SHOP LAWS

Most US states have dram shop laws²² that impose liability on restaurants, bars, and liquor stores when they sell alcohol to minors or already intoxicated

tion, poorer mental and physical health, relationship problems, and less academic and career success,” in addition to “higher risk of heart attack,” “respiratory illnesses, hallucinations, and paranoia”).

¹⁹ *Id.* at 407 (comparing income from alcohol and tobacco taxes to its costs in terms of health care, criminal justice, and lost productivity).

²⁰ Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 863 (2017).

²¹ *Id.* at 880.

²² The National Conference of State Legislatures catalogues that thirty states have dram shop statutes. See *Dram Shop Civil Liability and Criminal Penalty State Statutes*, NAT'L CONF. ST. LEGISLATURES, www.ncsl.org/research/financial-services-and-commerce/dram-shop-liability-state-statutes.aspx [https://perma.cc/C7NQ-JBPR] (last updated June 14, 2013). Additional jurisdictions have dram shop liability by court decision. See Thomson Reuters, *Dram Shop Statutes*, 0110 SURVEYS 65 (Dec. 2017) (finding the following U.S. jurisdictions

individuals who then cause injuries because of their intoxication. Dram shop liability enables the third-party victims of intoxicated tortfeasors to sue the establishment that furnished the alcohol, instead of or in addition to the intoxicated individual who directly caused the harm.²³ Evidence shows that dram shop laws have been successful in deterring the sale of alcohol to minors and overly intoxicated patrons.²⁴

Given the deterrent value of dram shop liability on alcohol sales, it stands to reason that gram shop liability would deter marijuana sales. A model Gram Shop Act, originally set forth in *Reefer Madness*,²⁵ is reproduced below. For ease of discussion throughout this Article, the Act is written for a non-legalizing state (Nebraska) that borders a legalizing state (Colorado).

A. Model Gram Shop Act

The Gram Shop Act could provide as follows:

A. A person who furnishes marijuana to a resident of Nebraska may be liable in damages to an injured third party if the Nebraskan to whom the marijuana is furnished consumes the marijuana and, while under the influence thereof, causes personal injury in Nebraska or to any resident of Nebraska.²⁶

B. Definitions. For purposes of this section the following definitions apply:

1. “Person” means any individual or company or business or any employee thereof, except any federally permitted researchers or facilities running a drug trial approved by the Food and Drug Administration under the Controlled Substances Act.²⁷

do *not* have dram shop liability: Kansas, Maryland, Oklahoma, South Carolina, Virginia, Washington, West Virginia, Guam, Puerto Rico, and the U.S. Virgin Islands).

²³ Of course, the victim may sue the drunkard instead of the bar, or in addition to it, using normal tort principles. Dram shop liability casts a wider net to include the seller, as well as the drinker. Most dram shop statutes impose liability on those who furnish the alcohol to the drinker; they use terms like “selling,” “giving” or “otherwise disposing” to cast a wide net, which may include liquor stores in addition to restaurants and bars. *E.g.*, ALA. CODE § 6-5-71 (2018). For a full list of states with dram shop acts, see *Dram Shop Civil Liability and Criminal Penalty State Statutes*, *supra* note 22.

²⁴ Julia A. Harden, Comments, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 232 (1987) (discussing Ohio’s dram shop law and stating that “the statute certainly intends to protect the public”); Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473, 499 (2000) (“[T]here is a strong rationale for relying on tort law as a method for controlling excessive alcohol use.”); Jeffrey W. Stempel, *Making Liquor Immunity Worse: Nevada’s Undue Protection of Commercial Hosts Evicting Vulnerable and Dangerous Patrons*, 14 NEV. L.J. 866, 874 (2014) (“The weight of scholarly research clearly suggests that dram shop laws are effective in reducing alcohol-related driving injuries.”).

²⁵ Berch, *supra* note 20, at 886–87.

²⁶ *Id.* The statute has been drafted narrowly, so that a dispensary must furnish marijuana to a Nebraskan to trigger liability. As explained in Part IV, below, this is necessary to provide notice to the dispensary in order to avoid any Due Process concerns.

²⁷ Regulations permit certain clinical trials on cannabidiol, an extract from the marijuana plant. See 21 C.F.R. § 1301.18 (2018) (discussing research protocols for a Schedule I con-

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2. “Furnish” means to sell, exchange, barter, deliver, give, make available, or provide in any manner.

3. “Marijuana” includes any consumable product containing Tetrahydrocannabinol (THC), the principal psychoactive constituent of cannabis.

4. “Resident” means someone who has an in-state address at which he or she presently resides.

5. “While under the influence” means the person is affected to the slightest degree.

6. “Damages” include compensatory damages, pain and suffering, and punitive damages.

B. Hypothetical

Let us set up the litigation and constitutionality issues with a fairly routine hypothetical. Assume that Mary Jane, a Nebraskan, drives to Colorado, a trail-blazer in the recreational marijuana experiment.²⁸ Mary Jane visits Colorado in part because the state has legalized marijuana, although she has other reasons for visiting as well.

Toward the end of Mary Jane’s trip (which turns out to be metaphorical in addition to actual), she visits a dispensary just on the Colorado side of the Nebraska/Colorado border. As the dispensary employees must do, they ask for her identification as she enters the store. She displays her Nebraska driver’s license, which establishes that she is of legal age to purchase marijuana.²⁹ After purchasing a legal quantity of marijuana,³⁰ she returns to her hotel and consumes the drug,³¹ unaware that modern marijuana delivers considerably more THC than the substance she vaguely remembers from her college years.³² After

trolled substance); see also *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol*, DRUG ENFORCEMENT ADMINISTRATION (Dec. 23, 2015), <https://www.dea.gov/divisions/hq/2015/hq122315.shtml> [<https://perma.cc/5KLW-RKXJ>].

²⁸ Colorado legalized recreational marijuana in November 2012. See COLO. CONST. art. XVIII, § 16.

²⁹ Evan Bush & Bob Young, *Everything You Want to Know About Legal Pot in Washington*, SEATTLE TIMES (June 30, 2014, 3:40 PM), <http://blogs.seattletimes.com/pot/2014/06/30/everything-you-want-to-know-about-legal-pot-in-washington/> [<https://perma.cc/VV5A-XRGL>]

(“If you want to purchase legal pot, you had better bring valid identification with you to the store.”). If Mary Jane had shown her passport, the rest of the hypothetical might not work. A passport does not reflect current domicile, so the employees would not know that Mary Jane is a Nebraskan and so would not be aware that they had sold marijuana to an out-of-state citizen who lives in a non-legalizing state. Presumably, it is a rare instance in which a U.S. citizen would use her passport as her identification at a U.S. store.

³⁰ Colorado permits adults to purchase up to one ounce of pot. COLO. REV. STAT. § 44-12-402(3)(a)(I) (2018) (“A retail marijuana store may not sell more than one ounce of retail marijuana . . . during a single transaction to a person.”).

³¹ Mary Jane may not smoke in public. See Faubion, *supra* note 16, at 390 (“As in Colorado, it remains illegal [in Washington] to smoke the drug in public places . . .”).

³² *Marijuana Far More Potent than it Used to Be, Tests Find*, CBS NEWS (Mar. 23, 2015, 9:40 AM), <http://www.cbsnews.com/news/marijuana-far-more-potent-than-it-used-to-be-test-s-find/> [<https://perma.cc/3EXF-927Y>] (“[T]he average potency of marijuana has probably increased by a factor of at least three.”); see also Faubion, *supra* note 16, at 387 (“In recent

finishing her joint and polishing it off with a marijuana-infused brownie, she checks out of her hotel, hops in her car, and drives home to Nebraska.

Shortly after crossing into Nebraska, Mary Jane causes a car accident. The other driver sustains serious injuries and must remain in a Nebraska hospital for several days.³³ Mary Jane carries the minimum amount of state-required auto insurance and is largely judgment-proof.

The other driver hires a lawyer, who sues Mary Jane in Nebraska state court. During discovery, the victim learns that Mary Jane had driven to Colorado intending to purchase and consume marijuana. That gives the victim's attorney a "dope idea." He turns his attention to the marijuana dispensary, which has substantially more assets than Mary Jane does, and which may be liable under Nebraska's newly enacted (hypothetical) Gram Shop Act.

The injured victim timely amends his suit against Mary Jane to include a claim against the dispensary based on the Nebraska Gram Shop Act. The Nebraska court immediately faces three thorny issues in this revised lawsuit.³⁴ First, is it constitutionally permissible to assert personal jurisdiction against the out-of-state defendant?³⁵ Second, As a matter of choice of law, may the Nebraska court apply the Nebraska Gram Shop Act against the Colorado defendant?³⁶ Third, if the court may do so under choice-of-law principles, would such a choice comport with the constitution?³⁷ The stakes for the injured victim could not be any higher: his medical bills substantially overwhelm Mary Jane's minimal insurance coverage. The next three Parts of the Article will consider these three issues.

II. PERSONAL JURISDICTION CHALLENGES

Personal jurisdiction addresses a court's ability to exercise power over the parties in a case. As a quick reminder, for a court to be able to assert such power over an out-of-state defendant, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"³⁸ There are two types

years, the toleration policy [of Amsterdam] has been called into question as the tetrahydrocannabinol (THC) element of cannabis—the primary psychoactive component—has increased dramatically.”); *id.* at 406 (“[I]n 1970, the THC content of an average marijuana plant was one and a half percent; today, the THC content varies from 8 to 20 percent.”).

³³ This injured victim may be a Nebraskan, though he need not be. As explored further, particularly in Section IV.A (regarding the Full Faith and Credit Clause), the victim's status as a Nebraska domiciliary increases Nebraska's interest in applying its law to the litigation, though such status is not necessary for the application of Nebraska's law to be constitutional.

³⁴ See generally Berch, *supra* note 20, at 889–91 (providing a brief overview to these issues).

³⁵ See personal jurisdiction discussion *infra* Part II.

³⁶ See conflict of laws discussion *infra* Part III.

³⁷ See constitutional discussion *infra* Part IV.

³⁸ *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

of personal jurisdiction, general and specific.³⁹ A court has general jurisdiction over a corporate defendant when it is “essentially at home”⁴⁰ in the forum because its in-state activity is “continuous and systematic.”⁴¹ A court has specific jurisdiction even if the defendant has committed only “single or isolated” acts in the forum as long as the suit arises out of those acts.⁴² In addition, the assertion of jurisdiction must be fair, taking into consideration “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.”⁴³

If the injured victim chooses to sue the dispensary in Nebraska (which he ought to do for his own convenience and for the stronger likelihood that Nebraska’s Gram Shop Act will apply),⁴⁴ he has a strong case for specific jurisdiction over the out-of-state dispensary. Given the many purposeful contacts between the defendant and the state of Nebraska described below, the Nebraska court will likely conclude that the defendant has “purposefully derive[d] benefit” from its contacts with Nebraska.⁴⁵

Of paramount importance, the out-of-state dispensary knowingly sold marijuana to, and therefore earned profit from, Mary Jane, whom the employees knew to be from Nebraska. The dispensary employees would have been aware of Mary Jane’s state citizenship because Colorado law requires purchasers of

³⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985) (“‘Specific’ jurisdiction contrasts with ‘general’ jurisdiction, pursuant to which ‘a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum.’”) (citation omitted).

⁴⁰ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

⁴¹ *Int’l Shoe*, 326 U.S. at 317.

⁴² *Id.*

⁴³ *Burger King*, 471 U.S. at 477 (citations omitted) (internal quotation marks omitted). On June 19, 2017, the Supreme Court may have unsettled this two-part framework. In *Bristol-Myers Squibb v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017), the Court seemingly returns to a territorial justification for jurisdiction after endorsing a fairness understanding for the last several decades. *See, e.g.*, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (Personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”). After some hand-waiving at the fairness implications of personal jurisdiction, the Court clearly articulates the territorial notion: “As we have put it, restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.” *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (citation omitted) (internal quotation marks omitted).

⁴⁴ For a further discussion of choice-of-law principles, see *infra* Part III. For now, it suffices to say that many courts exhibit a distinct forum-law preference: “When the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.” *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972).

⁴⁵ *Burger King*, 471 U.S. at 473 (citation omitted).

marijuana to show identification.⁴⁶ The sale to Mary Jane likely is not the dispensary's only sale to a Nebraskan; the location of the dispensary near the Nebraska/Colorado border belies any suggestion that the dispensary owner did not intend to sell to Nebraskans. Moreover, the dispensary may have placed advertisements in newspapers and magazines (online or paper versions) that circulated in the area and may have found their way into Nebraska either virtually (when an out-of-state citizen viewed the advertisement) or actually (when the advertisement was physically carried into the neighboring jurisdiction). Other contacts may be imagined, such as a billboard placed on the Colorado side of the border but visible from Nebraska, touting "Nearest Marijuana Dispensary 2 Miles Ahead," or a listing in a directory that circulated in the cross-border area. Given that level of purposeful contacts with the forum state, it is unlikely that the Nebraska court would decline to find jurisdiction over the dispensary.⁴⁷

In terms of fairness (should such a restriction still carry independent weight), requiring the Colorado dispensary to defend in Nebraska should not pose an unreasonable hardship.⁴⁸ Given the dispensary's location just over the border from Nebraska and the ease of modern travel, the Nebraska court should find the exercise of jurisdiction fair.⁴⁹ The plaintiff's extensive injuries render it difficult for him to pursue his case in Colorado.⁵⁰ And Nebraska, too, has an interest in adjudicating the suit in the forum, as the accident has placed a burden on its law enforcement and medical personnel.⁵¹

In sum, the dispensary has more than minimal contacts with neighboring Nebraska, and fairness considerations do not appear to provide strong basis

⁴⁶ COLO. REV. STAT. § 44-11-402(5) (2018) (requiring medical identification card to purchase medical marijuana); COLO. REV. STAT. § 44-12-402(3)(b)(I) (2018) ("Prior 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.").

⁴⁷ See, e.g., *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (requiring "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State") (alteration in original) (citation omitted) (internal quotation marks omitted). This suggests the dispensary's purposeful contacts with Nebraska (by advertising, for example) are sufficient contacts; and the fact that this particular victim was injured in Nebraska helps further the relationship between the forum and the claim.

⁴⁸ *Burger King*, 471 U.S. at 477 ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").

⁴⁹ *Id.* at 474 ("And because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.") (citation omitted) (internal quotation marks omitted).

⁵⁰ *Id.* at 476-77 (listing the fairness factors and noting "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable").

⁵¹ *Id.*

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against jurisdiction. Thus, a relatively strong case for personal jurisdiction over the out-of-state dispensary can be made.

III. CONFLICT-OF-LAWS CHALLENGES

Assuming that the Nebraska court agrees with the analysis in the previous Part and accepts personal jurisdiction over the Colorado dispensary, the next hurdle for the injured victim is to convince the court to apply its in-state Gram Shop Act against the out-of-state dispensary. This Part will take up that charge, principally by comparing gram shop liability to dram shop liability, which has been applied extraterritorially.

A. *Dram Shop Cases*

A state clearly may apply its own law to a case that has connections solely with that state. For example, the California legislature has adopted dram shop liability.⁵² Because that State also permits the sale of alcoholic beverages, a person may overindulge at a California bar, leave the bar, and negligently harm another individual in California. The injured person may sue the bar in California and invoke California's Act to recover for injuries incurred. That entirely in-state application of dram shop liability poses no (interesting) conflict-of-laws controversy.⁵³

But not all torts are entirely intrastate. The overindulging California driver may have decided against drinking in California, instead slipping over into Nevada to gamble and drink at a casino on the California/Nevada border. Although he consumed alcohol solely in Nevada, upon leaving the casino, he might return to his Home State of California and injure an innocent victim in California. This injured person may sue the casino in California and invoke California's Act to recover for his injuries. It is this extraterritorial application of dram shop liability that poses the conflict-of-laws issue.⁵⁴

When faced with this issue in the dram shop context, some courts have applied dram shop liability against the extraterritorial defendant; that is, a court in a state with a dram shop liability sometimes has applied that in-state law against a liquor establishment in a neighboring state, regardless of whether that neighboring state has such a law. This is what happened in the famous conflict-of-laws case *Bernhard v. Harrah's Club*.⁵⁵ There, in response to advertisements by Harrah's Club, two California residents drove from California to Harrah's

⁵² CAL. BUS. & PROF. CODE § 25602 (West 2018).

⁵³ Of course, the business may have a defense or otherwise escape liability. But the *potential* for liability against the in-state business is apparent.

⁵⁴ See generally Donald M. Zupanec, Annotation, *Choice of Law as to Liability of Liquor Seller for Injuries Caused by Intoxicated Person*, 2 A.L.R. 4th 952 (1980) (collecting cases regarding the extraterritorial effect of dram shops).

⁵⁵ *Bernhard v. Harrah's Club*, 546 P.2d 719, 725 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2018).

Club, “[a] gambling and drinking club” just across the border in Nevada.⁵⁶ They drank to “a point of obvious intoxication rendering them incapable of safely driving a car.”⁵⁷ They then drove back to California, where they caused a car accident with another California resident, Richard A. Bernhard.⁵⁸ Mr. Bernhard sued Harrah’s Club, invoking California’s common-law dram shop liability.⁵⁹ Mr. Bernhard had to rely on California’s law because Nevada law denied dram shop liability.⁶⁰

When the case made its way to the California Supreme Court, the justices noted that the case posed a classic conflicts problem because the two interested states had divergent liability laws: “(1) California—the place of plaintiff’s residence and domicile, the place where he was injured, and the forum; and (2) Nevada—the place of defendant’s residence and the place of the wrong.”⁶¹ The California Supreme Court endeavored to determine which state had a stronger interest in having its law applied.⁶² Nevada had a “definite interest . . . to protect its resident tavern keepers,”⁶³ while California also had an interest in “protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor.”⁶⁴ California’s interest, however, was “special” or paramount in the instant case because the plaintiff happened to be a California resident injured in California.⁶⁵ After cataloguing the various interests of the states, the court thought it “clear that each state ha[d] an interest in the application of its respective law of liability and nonliability,” and that those interests conflicted with each other.⁶⁶ In other words, this case presented a true conflict between the laws and policies of the two affected states.⁶⁷

The California Supreme Court then proceeded “to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.”⁶⁸ The court noted that the defendant had “put itself at the heart of California’s regulatory interest[s]” by “advertis[ing] for and otherwise solicit[ing] in California the business of California residents” and, further, the de-

⁵⁶ *Id.* at 720.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 722.

⁶⁰ *Id.* Nevada denied liability for obvious reasons—its interest in its casinos, which cannot thrive without liquor sales.

⁶¹ *Id.* at 721.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 722.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ True conflicts arise when both states have an interest in applying their laws. *See generally* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 238 (1958) (propounding the governmental interest analysis).

⁶⁸ *Bernhard*, 546 P.2d at 723.

fendant knew that these Californians “in response to said advertising and solicitation, [would] use the public highways of the State of California in going and coming from” Harrah’s Club.⁶⁹ The court further found a shared policy interest between Nevada and California: Nevada, although it refused to impose civil liability on resident taverns, prohibited the selling of alcohol to already intoxicated persons through its criminal law.⁷⁰ The court therefore upheld the extraterritorial application of California’s common-law liability against the Nevada bar.⁷¹

Although *Bernhard* presents the most famous example of extraterritorial application of dram shop liability, the case is by no means the only one.⁷² Other courts have applied dram shop liability against out-of-state bars when the accident happened in the Home State, particularly where the injured plaintiff was also a Home State citizen.⁷³

In *Zygmuntowicz v. Hospitality Investments, Inc.*, for example, a group of friends drove from their Pennsylvania homes to a New Jersey nightclub because of advertisements and promotions offered by that establishment.⁷⁴ Michael Zygmuntowicz drank four beers, four shots of unknown liquor, six to seven mixed vodka drinks, and one or two additional alcoholic beverages.⁷⁵ On

⁶⁹ *Id.* at 725.

⁷⁰ *Id.*

⁷¹ *Id.* at 725–26.

⁷² In *Meyers v. Kallestead*, No. 91 C 20362, 1992 WL 280450, at *6 (N.D. Ill. Sept. 30, 1992), the Northern District of Illinois applied the in-state dram shop law against an out-of-state business. In that case, James Hall drove his truck from Iowa to Savanna, Illinois, where he drank several alcoholic beverages at the defendant’s business. *Id.* at *1. On his drive home, while in Iowa, he caused a car accident that killed one person and injured another, and the victims and their families filed suit against the bar in an Illinois court. *Id.* Interestingly, despite the fact that the Iowa state courts held that there was no personal jurisdiction over the defendants, *id.*, using choice-of-law analysis, the *Illinois* District Court found that *Iowa* had the most significant contacts with the dispute, *id.* at *6, because it was “the place of the injury” and the domicile of the plaintiffs, *id.* at *4, and despite the fact that defendant did not advertise in Iowa, *id.* at *1.

⁷³ *Waynick v. Chicago’s Last Dep’t Store*, 269 F.2d 322, 326 (7th Cir. 1959); *Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F. Supp. 346, 349 (E.D. Pa. 1993); *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702, 706 (N.D. Ill. 1989); *Bankord v. DeRock*, 423 F. Supp. 602, 602, 606 (N.D. Iowa 1976); *Hoeller v. Riverside Resort Hotel*, 820 P.2d 316, 316, 322 (Ariz. Ct. App. 1991); *Bernhard*, 546 P.2d at 725–26; *Meyers*, 1992 WL 280450, at *6; *Rubitsky v. Russo’s Derby, Inc.*, 216 N.E.2d 680, 680, 682 (Ill. App. Ct. 1966); *Colligan v. Cousar*, 187 N.E.2d 292, 302 (Ill. App. Ct. 1963); *Butler v. Wittland*, 153 N.E.2d 106, 110 (Ill. App. Ct. 1958); *Shaw v. LDC Enters.*, 863 N.E.2d 424, 433 (Ind. Ct. App. 2007) (affirming the application of Indiana nuisance law against an Illinois bar alleged to have served underage Indiana citizens); *Blamey v. Brown*, 270 N.W.2d 884, 890–91 (Minn. 1978), *abrogated on other grounds by* *W. Am. Ins. Co. v. Westin, Inc.* 337 N.W.2d 676 (Minn. 1983); *Carver v. Schafer*, 647 S.W.2d 570, 578 (Mo. Ct. App. 1983), *superseded by statute as stated in* *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547 (Mo. 1987).

⁷⁴ *Zygmuntowicz*, 828 F. Supp. at 348.

⁷⁵ *Id.*

the drive home, he crashed his car and died.⁷⁶ His parents sued the nightclub, invoking Pennsylvania's dram shop law.⁷⁷ The District Court for the Eastern District of Pennsylvania reviewed the "policies and governmental interests underlying the competing laws" of New Jersey (the location of the nightclub) and Pennsylvania (the domicile of the decedent).⁷⁸ In part because the nightclub had specifically targeted the Pennsylvania market, the court determined that Pennsylvania's dram shop law governed the action.⁷⁹

In yet another case, *Meyers v. Kallestead*, a district court permitted extraterritorial application of dram shop liability simply because that state was the place of the injury and the domicile of the plaintiffs, despite the fact that the out-of-state defendant did not advertise in that state.⁸⁰ This opinion purports to follow the mainstream in modern choice of law analysis—the Restatement (Second) of Conflicts—which sets forth a presumption that the state with the most significant relationship to a tort is the state where the accident occurred.⁸¹

Contrary cases do exist, refusing to apply the law of the state where the injury occurred against the out-of-state seller.⁸² These cases tend to employ the same methodology as the ones that do apply dram shop liability extraterritorially. They, too, examine the states' interests and try to determine the center of gravity. In these cases, however, the courts come to the opposite conclusion, finding that the bar's residence presents the weightier connection to the suit.⁸³

⁷⁶ *Id.* at 349.

⁷⁷ *Id.* at 348.

⁷⁸ *Id.* at 349.

⁷⁹ *Id.* ("We find that after comparing the competing dram shop laws, Pennsylvania's law favors finding liability and is better able to achieve both states' policies and interests. Additionally, the Defendant specifically targeted the Pennsylvania market and should, therefore, have expected and planned for possible suits under Pennsylvania law. Therefore, we must conclude that Pennsylvania's law governs in this case.")

⁸⁰ *Meyers v. Kallestead*, No. 91 C 20362, 1992 WL 280450, at *3–4, 6 (N.D. Ill. Sept. 30, 1992).

⁸¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (AM. LAW INST.1971) ("In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.")

⁸² *See, e.g.,* *Wimmer v. Koenigseder*, 484 N.E.2d 1088, 1092 (Ill. 1985); *Liff v. Haezbroeck*, 200 N.E.2d 525, 527 (Ill. App. Ct. 1964); *Dunaway v. Fellous*, 842 S.W.2d 166, 168 (Mo. Ct. App. 1992).

⁸³ In *Dunaway v. Fellous*, for example, Illinois resident Rudy Sample "consumed some intoxicating beverages" and "became intoxicated" at a restaurant in Missouri. *Dunaway*, 842 S.W.2d at 167. After leaving, he drove into Illinois, where he crashed into another car. *Id.* at 167–68. The driver and passenger of that other car sued the restaurant in a Missouri court, alleging violations of the Illinois dram shop law. *Id.* at 168. The Missouri court of appeals, applying the "most significant relationship" test of the Second Restatement, ultimately determined that Missouri, not Illinois, had the stronger relationship to the suit. *Id.* at 168–69. At first, the court said that the two states had equal interests in the dispute: "where the injury occurred, in Illinois, balances equally against the place where the alleged conduct giving rise to the accident or the drinking occurred, in Missouri," *id.* at 168, and "the domicile or resi-

Sometimes, too, these courts determine that the state legislature did not wish the law to apply outside the state's borders.⁸⁴

Reasonable minds may differ on whether the cases permitting extraterritorial application are better supported than those that do not, which factors should weigh more heavily in the conflicts analysis, and how exactly a court should go about breaking a tie in the event of a true conflict.⁸⁵ But reasonable minds cannot disagree that *some* courts have permitted the extraterritorial application of dram shop liability against out-of-state liquor establishments, particularly when the injured victim is a Home State citizen, the out-of-state establishment advertises in-state, and the Home State legislature has not signaled a desire that the law apply only to intrastate disputes.⁸⁶

If dram shop liability may be imposed extraterritorially, it stands to reason that gram shop liability may as well, unless there are material differences between the two forms of liability that make the analogy inapposite. These potentially distinguishing factors will be explored in the next Part.⁸⁷

dence of appellants, in Illinois, counterbalances the location of [the] business of respondents, in Missouri." *Id.* However, Missouri, as the forum, "has a real interest in ensuring that the laws applied in its courts do not contravene its public policies." *Id.* at 169. And, therefore, the Missouri court applied its own law. This analysis reaffirms why the injured plaintiff in the Mary Jane hypothetical should sue in Nebraska; that is, the Home State is more likely to apply its own law to the dispute (just like the Missouri court applied Missouri law in *Dunaway*).

⁸⁴ *Graham v. Gen. U.S. Grant Post No. 2665, V.F.W.*, 248 N.E.2d 657, 660 (Ill. 1969) ("A relevant fact is that the legislature has not seen fit to amend the Dram Shop Act so as to give it extraterritorial applicability.").

⁸⁵ One case notes that "[t]he modern trend has also been toward choosing the law that would impose liability." *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702, 706 (N.D. Ill. 1989).

⁸⁶ Additionally, in *Sommers*, the court was influenced by the fact that the tavern was near the border, so application of the neighboring state's law should not be "unexpected or unpredictable." *Id.*

⁸⁷ To the extent that the dram shop laws in these cases may be read broadly to cover the sale of other "intoxicating" items, such as marijuana, those states hardly seem to have standing to complain if Nebraska applies its Gram Shop Act extraterritorially. For example, Colorado's Dram Shop Act prohibits the sale of liquor to already intoxicated persons. COLO. REV. STAT. § 44-3-801 (2018). Even though Colorado has textually limited dram shop liability to purveyors of "alcohol beverages," the existence of the law indicates a policy to hold the sellers of intoxicating products liable for injuries resulting from the consumption of the products. That is the same policy animating Nebraska's hypothetical Gram Shop Act. Thus, if anything, application of Nebraska's law "effectuates, rather than frustrates, the policies of both states." *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1352 (R.I. 1986). In classic conflicts terms, this may be the case of a false conflict. *Currie*, *supra* note 67, at 253-54. In plainer terms yet, there simply is no conflict between the states' policies, and therefore no reason not to apply the shared policy of liability. To the extent that a state has dram shop liability at all (even one that does not textually cover marijuana), that state's policy should not be offended by application of Nebraska's more specific Gram Shop Act. Thus, while it is plausible that Nebraska would apply its Gram Shop Act against an out-of-state seller, it is also within the realm of possibility that Colorado would apply Nebraska's law as well.

B. Dram Shop Liability Versus Gram Shop Liability

Three facts may distinguish dram shop liability from the proposed Gram Shop liability. *First*, some states' dram shop liability is judge-made, not statutory, while the hypothetical Gram Shop Act comes in the form of a statute.⁸⁸ *Second*, dram shop liability primarily applies in-state with some out-of-state applicability, while a Gram Shop Act passed by a prohibiting state would apply to few (if any) in-state defendants, but instead will apply almost entirely to out-of-state sales by out-of-state dispensaries—that is, it will primarily apply to out-of-state activities and actors who cause effects in the enacting state. *Third*, dram shop liability paradigmatically applies against bars and restaurants when they sell liquor to patrons who become overly intoxicated on the premises, and thus is based on a theory that the servers at the bars and restaurants can see their patrons' intoxication and, presumably, can cease to serve such patrons to avoid over-intoxication. The Gram Shop Act, on the other hand, would apply to dispensaries even though the individuals became intoxicated off-site so there would be no opportunity for a dispensary employee to monitor the level of ingestion or impairment.⁸⁹ Despite these differences between dram shop liability and the hypothetical gram shop liability, courts should apply gram shop liability extraterritorially—at least those courts that apply dram shop liability out-of-state.

The first distinguishing fact—that some dram shop liability is common-law—makes little difference for purposes of extraterritorial application. Whether created by the courts as common-law or enacted by a legislature as statutory law, the law is the law. Courts have applied extraterritorially both common-law dram shop liability, like that at issue in *Bernhardt*,⁹⁰ and statutory dram shop liability, like the law at issue in *Zygmuntowicz*.⁹¹ Thus, the fact that gram shop liability would be a creature purely of statute should not inhibit the potential extraterritorial application of gram shop liability in the conflict-of-laws analysis.

In fact, the argument for applying statutory law extraterritorially is perhaps even stronger than that for applying judge-made law outside the state because

⁸⁸ *Bernhard v. Harrah's Club*, 546 P.2d 719, 720 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2018) (noting liability arose under the decision in *Vesely v. Sager*, 486 P.2d 151 (Cal. 1971)).

⁸⁹ *See* COLO. REV. STAT. § 44-11-901(1)(a) (2018) (“Except as otherwise provided in this article 11, it is unlawful for a person . . . [t]o consume medical marijuana in a licensed medical marijuana center, and it shall be unlawful for a medical marijuana licensee to allow medical marijuana to be consumed upon its licensed premises.”); COLO. REV. STAT. § 44-12-901(1) (2018) (“Except as otherwise provided in this article 12, it is unlawful for a person to consume retail marijuana or retail marijuana products in a licensed retail marijuana establishment, and it is unlawful for a retail marijuana licensee to allow retail marijuana or retail marijuana products to be consumed upon its licensed premises.”).

⁹⁰ *See generally Bernhard*, 546 P.2d at 721; *see supra* text accompanying notes 54–70.

⁹¹ *See generally Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F. Supp. 346, 348 (E.D. Pa. 1993); *see supra* text accompanying notes 73–78.

modern choice-of-law doctrines consider legislative intent and purpose.⁹² That means that if a state legislature evidences a desire to have its statutory law applied extraterritorially, courts generally should enforce this legislative policy and apply the law outside state borders.⁹³ Even if an action is filed in the non-enacting state, those courts should still follow the legislative directive and apply the statute to the case because that is what the enacting legislature intended. For example, the Northern District of Illinois applied Iowa's dram shop statute against an Illinois business "[i]n light of the Iowa legislature's clear mandate that its Dram Shop Act is to apply prospectively and retrospectively to out-of-state licensees."⁹⁴ As a matter of choice of law, then, Nebraska courts faithfully applying the Nebraska Gram Shop Act should impose liability extraterritorially, at least if the Nebraska legislature intended such a result and such application comports with the constitution,⁹⁵ and non-Nebraska courts, including Colorado's courts, may do so as well.

The second fact that may distinguish the proposed dispensary liability from other states' liquor liability is the high potential for in-state liability in the latter as compared to the former. Nebraska's hypothetical Gram Shop Act, at least if it targets solely marijuana sellers (and is not part of a broader law encompassing sales of other intoxicating substances, such as alcohol), would have been enacted with the primary purpose of capturing out-of-state sellers because no legal sales of marijuana transpire within the state.⁹⁶ But fewer in-state applica-

⁹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (AM. LAW INST. 1971) (instructing that if extraterritoriality is not "explicitly covered by statute," the court should attempt to discover what the "legislature intended").

⁹³ *E.g.*, *Kunda v. C.R. Bard, Inc.*, 671 F.3d 464, 468 (4th Cir. 2011) (upholding application of New Jersey law because of the lack of express language to the contrary by Maryland's legislature); *Experience Hendrix LLC v. James Marshall Hendrix Found.*, 240 F. App'x 739, 740 (9th Cir. 2007) (affirming use of New York law where Washington's statute did not contain any language evidencing legislative intent to apply extraterritorially); *United States v. Ivanov*, 175 F. Supp. 2d 367, 373 (D. Conn. 2001) ("[T]here is clear evidence that the statute was intended by Congress to apply extraterritorially. This fact is evidenced by both the plain language and the legislative history of each of these statutes [the Computer Fraud and Abuse Act (18 U.S.C. § 1030) Hobbs Act (18 U.S.C. § 1951), and Access Device Statute (18 U.S.C. § 1029)]. There is a presumption that Congress intends its acts to apply only within the United States, and not extraterritorially. However, this 'presumption against extraterritoriality' may be overcome by showing 'clear evidence of congressional intent to apply a statute beyond our borders.'") (citation omitted).

⁹⁴ *Meyers v. Kallestead*, No. 91 C 20362, 1992 WL 280450, at *3-4, 6 (N.D. Ill. Sept. 30, 1992).

⁹⁵ The constitutionality of extraterritorial application is discussed *infra* in Part IV.

⁹⁶ Illegal in-state sales or provision of marijuana, such as among gang members or by drug dealers, would more likely be handled by criminal law than the Gram Shop's civil liability (though, of course, Gram Shop liability could apply to these sales as well, at least if the individuals can be found and their assets can be seized). While criminal law does not compensate the injured third-party victim—except perhaps for expenses, through restitution statutes—ordinary principles of tort liability would permit the injured victim to sue the drug user. Moreover, several states have enacted the Drug Dealer Liability Act, which makes drug dealers civilly liable to those injured by a driver to whom the dealer sold or provided drugs

tions does not imply the complete absence of in-state applications. In non-legalizing states that have not enacted a version of the Drug Dealer Liability Act, the Gram Shop Act may provide a cause of action against in-state drug dealers and people who furnish marijuana to others (such as family members). In addition, the Gram Shop Act may be rolled into the state's dram shop laws, which clearly apply to in-state intoxicant sales. These in-state applications ensure the Act is not entirely extraterritorial.⁹⁷ Finally, and perhaps this argument is too cute, but a legislature that enacts a law that has only (or almost only) out-of-state applicability clearly intends for such extraterritorial effect, thus strengthening, rather than diminishing, the case for extraterritorial application.

A final fact serves to distinguish gram shop liability from dram shop liability: whether the purchaser consumes the intoxicating item on the seller's premises. But this difference, too, is not sufficiently material to dictate a different result from the dram shop cases and preclude all extraterritorial application.

In states that have legalized recreational or medical marijuana, the drug cannot be consumed on the distributors' premises;⁹⁸ restaurants and bars, on the other hand, usually require the liquor they sell to be consumed at their facilities.⁹⁹ Thus, in a typical dram shop case, the already intoxicated person con-

who, while under the influence of those drugs, causes an accident. *See* ARK. CODE ANN. § 16-124-103 (2018); CAL. HEALTH & SAFETY CODE § 11704 (West 2018); COLO. REV. STAT. §§ 13-21-801–13-21-813 (2018); FLA. STAT. § 772.12 (2018); GA. CODE ANN. § 51-1-46 (2018); HAW. REV. STAT. § 663E-2 (2018); 740 ILL. COMP. STAT. 57/20 (2018); IND. CODE § 34-24-4-1 (2018); LA. STAT. ANN. § 9:2800.61 (2018); MICH. COMP. LAWS § 691.1605 (2018); N.H. REV. STAT. ANN. §§ 318-C:1–318-C:18 (2018); N.J. STAT. ANN. § 2C:35B-4 (West 2018); N.Y. GEN. OBLIG. LAW §§ 12-101–12-110 (McKinney 2018); OKLA. STAT. tit. 63, §§ 2-421–2-435 (2018); S.C. CODE ANN. §§ 44-54-10–44-54-140 (2018); S.D. CODIFIED LAWS §§ 34-20C-1–34-20C-19 (2018); TENN. CODE ANN. §§ 29-38-101–29-38-116 (2018); UTAH CODE ANN. §§ 58-37e-1–58-37e-14 (West 2018); V.I. CODE ANN. tit. 19, §§ 641–58 2018. A typical injured party, however, may not relish bringing a civil action against a known drug dealer or gang member, making the option of suing the drug user a more attractive one, even if not a fully compensatory one. Unlike a dispensary, which is easy to find and serve, a drug dealer or gang member may prove elusive. Unlike a dispensary, which should have seizable assets, a dealer or gang member's finances may be liquid, hidden, or nonexistent.

⁹⁷ In addition, legalizing states may enact versions of the Gram Shop Act and apply these laws against in-state sellers.

⁹⁸ *See, e.g.*, COLO. REV. STAT. § 44-11-901(3) (2018) (“It is unlawful for a person licensed pursuant to this article 11 . . . [t]o provide public premises, or any portion thereof, for the purpose of consumption of medical marijuana in any form”); COLO. REV. STAT. § 44-12-901(4)(c) (2018) (“It is unlawful for any person licensed to sell retail marijuana or retail marijuana products pursuant to this article 12 . . . [t]o provide public premises, or any portion thereof, for the purpose of consumption of retail marijuana or retail marijuana products in any form”); WASH. REV. CODE § 69.50.445(1) (2018) (“It is unlawful to . . . consume marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, in view of the general public or in a public place.”).

⁹⁹ Open container laws in most states prohibit people from carrying their drinks in public, including inside their cars (which would make it impossible to transport the purchased drink away from the bar or restaurant). *See Open Container and Open Consumption of Alcohol State Statutes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/financial-servic>

sumes alcohol on the defendant's premises, in sight of and served by employees of the establishment. By way of contrast, in a typical Gram Shop case, the marijuana would be purchased on-site, but consumed elsewhere, out of sight of the dispensary employees. But even this distinguishing fact highlights a difference for only *some* dram shop cases; in those states where dram shop liability extends to liquor stores, as many do, the alcohol is consumed off-site, making such dram shop laws a more fitting analogy for the potential liability of marijuana dispensaries.¹⁰⁰

Even so, it should be acknowledged that the location of the consumption proved pivotal in at least one dram shop case, and led the court to deny extraterritorial application.¹⁰¹ In *Goodwin v. Young*, a Vermont plaintiff invoked New York law and sued a New York innkeeper for damages to the plaintiff's mode of transportation (the plaintiff's horse).¹⁰² The plaintiff's employee had taken a team of horses to New York, drunk a single "glass of liquor at the defendant's store," but also purchased a bottle of whiskey for consumption at a later time.¹⁰³ After leaving the defendant's New York establishment, the employee became intoxicated.¹⁰⁴ Back in Vermont, the employee stabled the horses, but left the barn door open, allowing in the cold air, which caused one of the horses to become sick and die.¹⁰⁵ The court refused to apply the New York statute because no wrongful act occurred in New York.¹⁰⁶ "The sale of liquor was not a wrongful act" because the employee was not clearly intoxicated at the time of the sale.¹⁰⁷ Instead, "[t]he wrongful act . . . was done in Vermont."¹⁰⁸ So too, the argument may go, the Nebraska Gram Shop Act cannot apply extraterritorially because the consumption did not occur on-site and so the dispensary workers would not know—and so could not control or influ-

es-and-commerce/open-container-and-consumption-statutes.aspx [https://perma.cc/VSU2-E6SM] (last updated May 13, 2013).

¹⁰⁰ *E.g.*, ALA. CODE § 6-5-71 (2018) (providing "a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person . . .").

¹⁰¹ *See Rutledge v. Rockwells of Bedford, Inc.*, 613 N.Y.S.2d 179, 181 (N.Y. App. Div. 1994).

¹⁰² *Goodwin v. Young*, 34 Hun. 252 (N.Y. Sup. Ct. 1884).

¹⁰³ *Id.* at 253.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 253–54.

¹⁰⁷ *Id.* at 253.

¹⁰⁸ *Id.* at 253–54. The court also said that the statute "cannot be intended to have an extraterritorial effect," but that seems to be part of the reasoning as to why *in this case*, the New York statute should not apply to the Vermont injury. *Id.* at 254. In *Rutledge v. Rockwells of Bedford, Inc.*, 613 N.Y.S.2d 179, 181 (N.Y. App. Div. 1994), the New York Appellate Division distinguished *Goodwin* because, unlike in *Goodwin* where the tortfeasor became intoxicated after leaving the defendant's premises, the deceased in *Rutledge* "became intoxicated at the defendant's establishment in Bedford, New York," then left the establishment, "had an accident in Connecticut," and died. Thus, the key fact in each case was whether the consumer drank and became intoxicated "at the innkeeper's premises."

ence—the patron’s level of intoxication, though they could control the amount sold to the patron.¹⁰⁹

But this analogy to *Goodwin* should fail. Not only did *Goodwin* subordinate the law of the place of the sale to the law of the place of the injury—meaning that Colorado’s law should take second chair to Nebraska’s because Nebraska is the place of the injury—but also dram shop liability as it relates to bars and restaurants often requires that establishments over-serve *already intoxicated* individuals, meaning the location of consumption clearly matters for purposes of proving that element.¹¹⁰ After all, it would be materially more difficult to prove the defendant had any knowledge of the consumer’s level of intoxication if the defendant removes the alcohol and drinks it off-site. Thus, the fact of off-site consumption does matter, but it matters for the *knowledge* aspect of liability rather than for the extraterritorial sweep of the law.¹¹¹ Precisely because of this difficulty of proof for off-site consumption, any drafted Gram Shop Act should not rely on the dispensary employees’ knowledge of intoxication or impairment, but should instead rely on their knowledge of selling to a citizen from a non-legalizing state.¹¹²

In fact, rather than militating against the extraterritorial application of gram shop liability, the off-site consumption for marijuana may support a stronger case for extraterritorial application. Those running the dispensary certainly know that the marijuana will be removed from the premises and, if the dispensary is close to the border of a non-legalizing state, those who sold the marijuana should reasonably suspect that a non-resident may take the marijuana across the border and consume it in the Home State, or quickly partake of the marijuana in a hotel room and then return, still high, to the Home State.¹¹³ These suspicions are borne out by facts: states surrounding Colorado have alleged that

¹⁰⁹ Note, however, that the law sought to be applied in *Goodwin* was New York law (the place of the purchase). In the Gram Shop hypothetical, the law sought to be applied is Nebraska law (the place of the injury and, potentially, consumption).

¹¹⁰ *Goodwin* may simply be a case of failure of proof. The employee did become intoxicated, but it is unclear that the intoxication was a result of the defendant’s sales. That is, there is no proof that the defendant’s establishment sold the tortfeasor the liquor that caused him to become intoxicated.

¹¹¹ Dram shop acts typically require that the bar over-serve an already intoxicated individual—thus requiring knowledge of the level of intoxication. The proposed Gram Shop Act, to the contrary, merely requires knowledge of the buyer’s domicile, not his level of intoxication. So, the location of consumption may not be material in the Gram Shop context.

¹¹² Even if the Gram Shop Act as enacted does require knowledge of intoxication, the Gram Shop Act may still perform its primary purpose—deterrence—even though liability would be more difficult to establish in an actual case. See Berch, *supra* note 20, at 885 (describing the deterrence value of a Gram Shop Act).

¹¹³ See Jack Healy, *Advocates in Denver, Home to Legal Marijuana, Seek Public Place to Smoke*, N.Y. TIMES (Sept. 2, 2015), www.nytimes.com/2015/09/03/us/advocates-in-denver-home-to-legal-marijuana-seek-public-place-to-smoke.html [https://perma.cc/3TE5-AN2H] (discussing the fact that marijuana cannot be consumed in public places).

some dispensaries set up business along the border because they anticipate demand from customers residing in non-legalizing states.¹¹⁴

All in all, off-site consumption may make it more difficult for a plaintiff to prove that an establishment had knowledge of excess imbibing in the alcohol context, but that should not significantly affect the choice-of-law issues, particularly in the marijuana dispensary context. In fact, any proposed Gram Shop Act should provide for strict liability precisely because dispensary employees would not have an opportunity to watch patrons consume the marijuana they have been sold. Moreover, given that some Dram Shop Acts also apply to liquor stores, where on-site consumption is prohibited, the comparison is still useful.

In sum, the similarities between dram shop liability and the proposed gram shop liability outweigh the differences. Courts have found it appropriate to apply dram shop liability extraterritorially. The reasoning informing extraterritorial application of dram shop liability supports extraterritorial application of gram shop liability.

A legislature intent on extraterritorial application should make an explicit statement to that effect, preferably in the text of the law, but at least in legislative history,¹¹⁵ because when courts apply their dram shop laws extraterritorially, they routinely rely on legislative intent.¹¹⁶ Conversely, when courts do not permit extraterritoriality, they often point to the fact that the legislature has not authorized such sweeping action.¹¹⁷ So, one easy way to bolster the likelihood of out-of-state application of an in-state Gram Shop Act is to have the enacting

¹¹⁴ For example, dispensaries have sprung up in Sedgwick, Colorado, just a few miles from the Nebraska border. See POTGUIDE.COM, <https://www.coloradopotguide.com/where-to-buy-marijuana/colorado/sedgwick/> (last visited June 20, 2018).

¹¹⁵ E.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (describing the “new textualism” of Justice Scalia who believed that a statute’s plain meaning could not be overridden by legislative history). To capture those current judges and justices who agree with Justice Scalia’s view, the legislature should make an explicit statement of extraterritoriality in the Gram Shop Act’s text, rather than bury the statement in the legislative history.

¹¹⁶ Brainerd Currie, *SELECTED ESSAYS ON THE CONFLICTS OF LAW* 364–65 (1963) (“A prime advantage of [interest analysis] over traditional conflict-of-laws methodology is that, while inquiring specifically into the governmental policies and interests involved, it explicitly recognizes the power of the legislative branch to determine what domestic policy is and when domestic interests require the application of that policy.”). Elsewhere, Professor Currie explained that interest analysis “is explicitly an attempt to determine legislative purpose.” *Id.* at 727.

¹¹⁷ E.g., *Graham v. Gen. U.S. Grant Post No. 2665*, V.F.W., 248 N.E.2d 657, 660 (Ill. 1969) (“In the last analysis, the question of whether the Dram Shop Act should be given extraterritorial effect is a question of policy that is peculiarly within the province of the legislature.”); *Wienke v. Champaign Cty. Grain Ass’n*, 447 N.E.2d 1388, 1391 (Ill. App. Ct. 1983) (“The supreme court stated in *Graham* that any determination to give extraterritorial effect to the Dramshop Act should come from the legislature.”).

legislature explicitly request extraterritorial application in the appropriate context.¹¹⁸

Although many cases support the conclusion that choice-of-law rules allow dram shop laws to be applied against out-of-state sellers, those cases generally do not analyze the constitutionality of such extraterritorial application.¹¹⁹ The next Part will consider that issue and conclude that extraterritorial application comports with the Constitution.

IV. EXTRATERRITORIALITY CHALLENGES

Even assuming the victim's hypothetical case against the out-of-state marijuana dispensary meets the first two hurdles of personal jurisdiction and choice of law explored above, three potential constitutional provisions might be invoked against applying the hypothetical Gram Shop Act extraterritorially: the Full Faith and Credit Clause, the Due Process Clause, and the dormant Commerce Clause.¹²⁰

A. Full Faith and Credit Clause

The Full Faith and Credit Clause ("FFCC") prescribes the effect that one state must provide another state's laws and judgments.¹²¹ Of particular importance to the present inquiry, the FFCC requires that "[f]ull [f]aith and [c]redit shall be given in each [s]tate to the public [a]cts . . . of every other [s]tate."¹²² As though presaging the rise in the mid-twentieth century of the conflict-of-laws field, James Madison, in Federalist No. 42, commented that the

¹¹⁸ Indeed, the very language of the proposed Gram Shop Act may already accomplish this goal.

¹¹⁹ This may suggest that extraterritorial application is *not* unconstitutional. See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058–59 (2009) ("[I]t is normally a fair assumption that, so long as a state court has personal jurisdiction over [a] defendant, it probably has the power to apply forum law to her actions" regardless of whether those actions took place outside of the state, because "we are not accustomed to thinking of state courts' routine choice-of-law decisions as raising serious extraterritoriality problems."). Or this may simply suggest inattention to the constitutional issues by the courts, by the parties, or by both.

¹²⁰ This Article addresses constitutional challenges under the U.S. Constitution. State Constitutions may provide additional rights and protections. For example, Colorado's Constitution may be more protective of the Colorado seller than the federal Constitution. This is a worthy and important discussion, but outside the scope of this Article. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

¹²¹ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); see also 28 U.S.C. § 1738 (2012).

¹²² U.S. CONST. art. IV, § 1.

Clause would “be particularly beneficial on the borders of contiguous states.”¹²³

The Supreme Court’s analysis of how the Full Faith and Credit Clause affects choice of law has fluctuated over the years.¹²⁴ But in *Pacific Employers*, the Court more or less settled on an understanding of the Clause’s implications for the choice-of-law field.¹²⁵ In that case, the Supreme Court addressed whether California could constitutionally apply its workers’ compensation laws to a case involving a Massachusetts company that employed a Massachusetts resident who was injured while working on a temporary assignment for the company in California.¹²⁶ Although California had some connections with the lawsuit because the injury occurred there, that interest paled in comparison to Massachusetts’ interest in holding its business accountable and in compensating its citizen-victim.¹²⁷ Nonetheless, the US Supreme Court upheld California’s application of California law, citing that State’s legitimate interest in protecting California medical creditors.¹²⁸

As understood in the wake of *Pacific Employers*, the FFCC places few limits on choice of law and extraterritorial application of Home State laws. As long as a state has *some legitimate interest* in the dispute, that state may, consistent with the FFCC, apply its law, even if another state has substantial interests.¹²⁹ In other words, the FFCC does not require a balancing; it is an on-off light switch without a dimmer, and any legitimate interest turns that light on and allows that state to apply its laws to the dispute.¹³⁰

¹²³ THE FEDERALIST NO. 42, at 221 (James Madison).

¹²⁴ Indeed, in the middle part of the twentieth century, the Supreme Court began merging Full Faith and Credit analysis with Due Process analysis for choice of law purposes. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 n.10 (1981) (plurality opinion) (“This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause.”). This Article, however, strives to keep the two analyses distinct, as the FFCC focuses on the state’s interest and Due Process focuses on fairness and undue surprise to the defendant. *See, e.g., Mark D. Rosen, State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1137–38 (2010) [hereinafter *State Extraterritorial*] (“[D]ue process primarily protects individuals from being unfairly subject to another state’s laws, the dormant Commerce Clause primarily protects the interstate system from being mucked up by inconsistent state laws, and the Full Faith and Credit Clause and the dual sovereignty doctrine protect different aspects of states’ sovereignty.”).

¹²⁵ *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 502 (1939).

¹²⁶ *Id.* at 497.

¹²⁷ *Id.* at 503.

¹²⁸ *Id.* at 501.

¹²⁹ *Id.* at 503 (describing Massachusetts’ interest in “safeguarding the compensation of Massachusetts employees” and California’s interest in legislating “for the bodily safety and economic protection of employees injured within [California]”).

¹³⁰ In *Hague*, the Supreme Court articulated the constraint as follows: a state may apply its law extraterritorially as long as the state possesses a “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion). The Supreme Court thus repudiated its earlier view that the FFCC required a balancing or weighing of the states’ interests, *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532 (1935),

The light switch can be turned on with minimal effort. The interest deemed sufficient in *Pacific Employers* was the safety of a *non-resident* injured in California¹³¹ and the protection of California medical creditors.¹³² If those interests allow California to apply its law to a matter otherwise centered in Massachusetts—where the employment contract, the employer-business, and the employee all were located—the FFCC provides only a weak constitutional restraint on the power of a state to apply its law extraterritorially.

As applied to the hypothetical lawsuit against the dispensary that sold to Mary Jane, a court would have several legitimate reasons to find that Nebraska has sufficient interests to overcome any FFCC challenge to the application of Nebraska law. *First*, Nebraska has interests in this hypothetical suit that mirror the interests the Supreme Court found sufficient in *Pacific Employers*. In the hypothetical, the victim was driving in Nebraska when he was seriously injured in Nebraska; he then spent several days in a hospital in Nebraska. Nebraska thus provided “medical, hospital and nursing services” to the injured victim.¹³³ *Pacific Employers* suggests those services alone may fulfill the minimal interest standard that the FFCC imposes. But Nebraska’s interests do not stop here.

Second, the injured victim in the hypothetical suit may be a Nebraska citizen, or at least have long-term connections with Nebraska. In *Pacific Employers*, the injured worker was a Massachusetts domiciliary who had only temporarily relocated to California for a work assignment.¹³⁴ If the injured victim in the hypothetical case were a Nebraska domiciliary or long-term Nebraska resident, Nebraska would have an even stronger interest in the dispute than the interest shown in *Pacific Employers*.¹³⁵ The Supreme Court has stated that the interest in obtaining “full compensation” for an injured victim to ensure that he stays “off welfare rolls” and can “meet financial obligations” is sufficient to

and blended the analysis of the FFCC with that of the Due Process Clause. *See Hague*, 449 U.S. at 312 n.15 (“While *Alaska Packers* balanced the interests of California and Alaska to determine the full faith and credit issue, such balancing is no longer required.”). As noted previously, this Article analyzes the two constitutional provisions separately. *See State Extraterritorial*, *supra* note 124.

¹³¹ *Pac. Emp’rs*, 306 U.S. at 503.

¹³² *Id.* at 501 (“To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy which that state has provided. We cannot say that the full faith and credit clause goes so far.”).

¹³³ *Cf. id.* at 498.

¹³⁴ *Id.* at 497–98.

¹³⁵ Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 871–72 (2002) [hereinafter *Extraterritoriality and Political Heterogeneity*] (“As both a commonsense and doctrinal matter, citizenship is a significant factor for purposes of legitimating state regulation.”).

satisfy the constitutional limitations on choice of law.¹³⁶ This non-fleeting relationship between the injured victim and Nebraska, then, provides a second interest sufficient on its own to satisfy the FFCC; certainly, this interest in combination with the interest in repaying Nebraskan medical creditors suffices to flip the FFCC light switch to the on position. But the interests do not stop there.

Third, Nebraska has a more general interest in keeping its roads safe, not just for Nebraskans, but for everyone. By applying its Gram Shop Act against out-of-state sellers of marijuana, the Nebraska courts may help reduce the flow of marijuana into Nebraska, thus ensuring fewer DUIs and helping secure the safety of its roadways.

Fourth, Nebraska has economic interests in applying its law extraterritorially. The state desires to save taxpayer money allocated to highway patrol and provision of emergency services. If there are fewer DUIs and generally safer roads, Nebraska may be able to reallocate its taxpayer money elsewhere or even decrease taxes on its citizens.

In sum, Nebraska's interests in facilitating repayment of its medical creditors, keeping its roads safe, saving taxpayer money, and compensating victims suffice to satisfy the FFCC.¹³⁷ This result is not surprising. As many scholars have pointed out, the FFCC provides only a "weak constraint" on a court's choice of law.¹³⁸ But there are other challenges that may impose harsher constraints on the extraterritorial application of the Gram Shop Act.

B. Due Process Clause

The Fourteenth Amendment's Due Process Clause ("DPC") provides that no state may "deprive any person of life, liberty, or property, without due process of law."¹³⁹ While the FFCC relates to a *state's* interest in the action, due process analysis focuses on the *parties'* contacts with the state and whether the application of a particular state's law would be unfair or create undue surprise to a party.¹⁴⁰ In addition, courts have, at times, grafted a "quid pro quo" onto the analysis to ensure fairness—the party against whom the state's law is to be

¹³⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981) (plurality opinion) (internal quotation marks omitted).

¹³⁷ *Oklahoma and Nebraska sued Colorado*, alleging that Colorado's sale of marijuana to Oklahomans and Nebraskans undermines their "own marijuana bans, drain[s] their treasuries, and plac[es] stress on their criminal justice systems." Complaint at 3–4, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 144). Surely, these are sufficient interests for purposes of the Full Faith and Credit Clause. This litigation tactic failed when the Supreme Court refused to grant leave to file. *See Nebraska v. Colorado*, 136 S. Ct. 1034 (2016).

¹³⁸ *State Extraterritorial*, *supra* note 124, at 1135 (describing the "weak constraint" of the commingled Due Process and Full Faith and Credit Clauses).

¹³⁹ U.S. CONST. amend. XIV, § 1.

¹⁴⁰ *See Home Ins. Co. v. Dick*, 281 U.S. 397, 404 (1930) (noting substantial contacts with Mexico and concluding that "[n]othing thereunder was to be done, or was in fact done, in Texas."); *State Extraterritorial*, *supra* note 124, at 1137–38 ("Right now, due process primarily protects individuals from being unfairly subject to another state's laws . . .").

applied must have received something of value from that state.¹⁴¹ In short, the DPC “prohibit[s] the application of law which [is] only casually or slightly related to the litigation”¹⁴² and ensures that the application of a state’s law is “neither arbitrary nor fundamentally unfair.”¹⁴³

In the hypothetical lawsuit, if the application of the proposed Gram Shop Act against the out-of-state dispensary is attacked on due process grounds, the court should have sufficient grounds to defend use of the Act, principally because of the parties’ knowledge of Nebraska’s contacts with the transaction.

There are plenty of Nebraska contacts that would provide knowledge to the defendant about Nebraska’s interest in the suit and would militate against a finding of unfair surprise.¹⁴⁴ First and foremost, the marijuana purchaser calls Nebraska home.¹⁴⁵ When the dispensary employees checked Mary Jane’s identification, they acquired knowledge that they were interacting with, and selling marijuana to, a Nebraskan. Moreover, given the laws prohibiting onsite consumption of marijuana, knowledge should be imputed to them that Mary Jane might return to her home in Nebraska after procuring marijuana at the Colorado dispensary, particularly if the dispensary is near the Nebraska/Colorado border. Any advertisements that the dispensary made that could have found their way into Nebraska would provide further contacts.¹⁴⁶ In some cases, the dispensaries may even place billboards along the highway.¹⁴⁷

¹⁴¹ *Dick*, 281 U.S. at 410 (“[T]he Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone.”).

¹⁴² *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985).

¹⁴³ *Id.* at 818.

¹⁴⁴ The reasoning that follows in this Part also goes a long way toward fulfilling the DPC’s personal jurisdiction framework, which requires “only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also supra* Part II (discussing why a suit against the Colorado dispensary in Nebraska comports with personal jurisdiction requirements).

¹⁴⁵ Although “nominal residence—standing alone” and a “postoccurrence change of residence to the forum State—standing alone—[is] insufficient to justify application of forum law,” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 311 (1981) (plurality opinion), in this case Mary Jane is a Nebraska domiciliary at the time of suit and has been since before she purchased marijuana from the dispensary.

¹⁴⁶ Other Nebraska contacts, such as the location of the accident, and witnesses, police officers, medical transport personnel, and hospital staff, do not provide the defendant knowledge of Nebraska’s interests at the time of the sale. These sorts of contacts are relevant for the FFCC analysis. *See supra* Section IV.A.

¹⁴⁷ Colorado has placed some restrictions on advertising marijuana. Of particular interest, dispensaries may not engage in advertising that specifically targets out-of-state consumers. But the regulations permit online advertising, such as websites, social media, Google AdWords, and blog posts, as long as no more than 10 percent of the audience is expected to be

Even if the DPC contains a *quid pro quo* requirement to ensure fairness, such a requirement is met here because the Colorado dispensary does receive something of value from Nebraska—money and patrons.¹⁴⁸ Given that some of its clients reside in Nebraska, as did Mary Jane, the business benefits from its relationship with Nebraska in the form of higher sales. Facing no competition from Nebraska dispensaries, this Colorado dispensary reaps increased revenue from its neighbor; therefore, it is not fundamentally unfair to subject the dispensary to the potential detriments in the form of civil liability that flow from those gains.¹⁴⁹

Despite the seemingly straightforward conclusion that the DPC would not bar application of Nebraska law against the out-of-state marijuana dispensary, at least one US Supreme Court case suggests otherwise and so is worth reviewing in some depth. In the 1975 case *Bigelow v. Virginia*, the Court opined that “[a State] possess[es] no authority to regulate the services provided in [a neighboring state].”¹⁵⁰ This language, if taken literally, does seem to halt extraterritorial application of the Gram Shop Act in its tracks;¹⁵¹ however, for the reasons

younger than twenty-one. COLO. CODE REGS. §§ 212-1:1107–212-1:1108 (2018). Traditional print media is also permitted, such as magazines. *Id.* § 212-1:1106.

¹⁴⁸ *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

¹⁴⁹ *Cf. Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66 (1954) (upholding a state’s extraterritorial regulation of a contract between noncitizens because of the contract’s impact on a citizen).

¹⁵⁰ *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). *Bigelow*’s statement has caused some judges and scholars to pause regarding the constitutionality of extraterritorial application of a state law. *E.g.*, *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring) (“To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted [sic] to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.”). In writing about whether, in the wake of the fictional overruling of *Roe v. Wade*, “the Due Process and Full Faith and Credit Clauses would also permit [Nebraska] to make it a crime for a California doctor practicing in California to abort a fetus of a [Nebraska] citizen who had traveled to California just to procure an abortion there,” Professor Richard Fallon has admitted he simply “do[es] not know.” Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 633 (2007). Professor Fallon’s issue may be complicated than the marijuana hypothetical because of the criminal nature of the law; choice of law has always had more trepidation in applying penal laws extraterritorially.

¹⁵¹ An argument could be set forth that Nebraska is not directly regulating services in Colorado. The Gram Shop Act does not prohibit Colorado dispensaries from selling marijuana, or even from selling marijuana to Nebraskans. Nor does the Act limit quantities, regulate strengths, or set prices. If the Colorado dispensary changes its behavior, it does so because of the potential for liability, not because of any direct regulation by Nebraska. *But see* Jessica Berch, *A Modest Proposal for Preventing the Marijuana of Legalizing States from Being a Burden to Prohibitionist States*, PRAWFSBLAWG (Dec. 15, 2015, 5:58 PM), Comment from Barry (Dec. 28, 2015, 2:47 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/12/a-modest-proposal-for-preventing-the-marijuana-of-legalizing-states-from-being-a-burden-to-prohi>

discussed below, this single sentence should not (and does not) receive much, if any, weight.

Jeffrey C. Bigelow, director and managing editor of the Virginia Weekly, ran an advertisement that announced that New York clinics provided low-cost abortions.¹⁵² That advertisement caused Mr. Bigelow to be charged with, and later convicted of, violating a Virginia statute that made it a misdemeanor “by the sale or circulation of any publication . . . [to] encourage or prompt the procuring of [an] abortion.”¹⁵³ The Virginia appellate courts affirmed his conviction, despite Mr. Bigelow’s arguments that the statute violated his First Amendment rights.¹⁵⁴

The Supreme Court accepted certiorari and reversed Mr. Bigelow’s conviction on First Amendment grounds.¹⁵⁵ The Virginia courts had wrongly held that the advertisement received no First Amendment protections.¹⁵⁶ The advertisement, while commercial, “conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State.”¹⁵⁷ Thus, Mr. Bigelow’s “First Amendment interests coincided with the constitutional interests of the general public.”¹⁵⁸ Although the Court had disposed of the case on this First Amendment issue, the Justices continued, putting forth the troubling sentiment that no authority exists to support the regulation of services provided in a neighboring state.¹⁵⁹ Clearly, then, that sentence is *dictum* because the Supreme Court had already reasoned to the reversal of Mr. Bigelow’s conviction by concluding that the Virginia criminal statute violated his First Amendment Rights.¹⁶⁰ No more needed to be said.

Additionally, the statute at issue in *Bigelow* regulated *in-state* actions in Virginia—the publication of advertisements in Virginia encouraging the procurement of abortions out-of-state—not the out-of-state abortion services themselves.¹⁶¹ Thus, the Court did not need to opine that “Virginia possess[es] no authority to regulate the services provided in New York.”¹⁶² Since that was not

biti.html#comments [https://perma.cc/LG8A-UC5Q] (noting that the possibility of civil penalties changes behavior and thus is a direct regulation). Surely, though, Nebraska’s law is not as direct as, for example, attempting to prohibit Colorado dispensaries from selling marijuana to Nebraskans.

¹⁵² *Bigelow*, 421 U.S. at 811–12.

¹⁵³ *Id.* at 812–13.

¹⁵⁴ *Id.* at 814.

¹⁵⁵ *Id.* at 829.

¹⁵⁶ *Id.* at 818.

¹⁵⁷ *Id.* at 822.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 824.

¹⁶⁰ *Id.* at 825.

¹⁶¹ *Id.* at 811.

¹⁶² *Id.* at 824.

what Virginia was doing, the Court had no need, and indeed no authority, to pass on the issue.¹⁶³

Even if the sentence were not double *dictum* (unnecessary given the Court's disposition and unwise given the actual issues in the case), it likely does not apply to the Gram Shop Act in any event. *Bigelow* concerned the constitutionality of a *criminal* law making it a misdemeanor in Virginia to encourage the procuring of an abortion.¹⁶⁴ Unlike Virginia's law, Nebraska's Gram Shop Act imposes civil, not criminal, liability. The extraterritorial application of criminal law has always been more problematic than similar application of civil law.¹⁶⁵

Assuming that the language from *Bigelow* is *dictum*¹⁶⁶ or distinguishable, the DPC's restrictions on choice of law are quite humble.¹⁶⁷ As Professor Rosen states, "[S]tates have a legitimate interest in their citizens' out-of-state activities to support the conclusion that states have presumptive extraterritorial regulatory authority under the Due Process Clause, *Bigelow* notwithstanding."¹⁶⁸ Unless *Bigelow*'s *dictum* becomes binding in a later case, the DPC does not preclude the extraterritorial application of Nebraska's Gram Shop Act under the facts presented in the hypothetical. As the Supreme Court has made clear, "A person who sets in motion in one [S]tate the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury."¹⁶⁹

One final hurdle remains to be cleared before the Gram Shop Act can be applied extraterritorially—the dormant Commerce Clause.

¹⁶³ 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, 1907 (1987) ("In his opinion for the Court in *Bigelow v. Virginia*, Justice Blackmun asserts that Virginia cannot prevent its residents from traveling to New York to obtain services that are legal in New York. This assertion is not entitled to any significant weight. The immediate problem in *Bigelow* was not an attempt by Virginia to forbid its citizens from traveling to New York to receive abortion referral services."); Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 723–24 (2007) [hereinafter "Hard" or "Soft" Pluralism] ("First, the language from *Bigelow* was dicta Second, in Professor Fallon's words, *Bigelow*'s 'categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong.' Third, post-*Bigelow* case law has limited *Bigelow*'s dictum.").

¹⁶⁴ *Bigelow*, 421 U.S. at 811.

¹⁶⁵ See Fallon, *supra* note 150 at 629. Even if the Gram Shop Act were criminal, Professor Fallon points out that "the categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong." *Id.*

¹⁶⁶ See *supra* notes 162–63 and accompanying text.

¹⁶⁷ "Hard" or "Soft" Pluralism, *supra* note 163, at 719 (explaining that the Supreme Court has "endorsed extraterritorial powers" by the states "since the beginning of our nation's history").

¹⁶⁸ *Id.* at 725.

¹⁶⁹ *Young v. Masci*, 289 U.S. 253, 258 (1933).

C. *Dormant Commerce Clause*

The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁷⁰ Although framed as an affirmative grant of power to Congress, the US Supreme Court has held that the Commerce Clause, by extension, also bars states from enacting legislation that interferes with the free flow of commerce.¹⁷¹ This is the so-called dormant Commerce Clause (“DCC”).

The Supreme Court has set forth three different types of state laws that may run afoul of the DCC.¹⁷² *First*, the Court has announced a virtual per se bar against protectionist state laws; these laws may be upheld only if they advance legitimate state purposes that cannot be served by reasonable nondiscriminatory alternatives¹⁷³ and must pass the “strictest scrutiny.”¹⁷⁴ These laws are virtually always unconstitutional because

“[i]f [a state], in order to promote the economic welfare of her [industries], may guard them against competition with the cheaper prices of [a sister state], 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.”¹⁷⁵

Professor DeVeaux calls this the “anti-protectionist function” of the DCC, and I adopt his nomenclature here.¹⁷⁶

New Energy Co. of Indiana v. Limbach provides an example of an anti-protectionist law.¹⁷⁷ Ohio awarded tax credits for ethanol, but only if the ethanol was produced in Ohio or in a state that provided similar tax benefits to ethanol produced in Ohio.¹⁷⁸ The reciprocity provision left a certain Indiana producer ineligible for the credit.¹⁷⁹ The Supreme Court made short work of the case. Finding the Ohio statute “on its face” violated “the cardinal requirement of nondiscrimination,” the Court struck it down.¹⁸⁰

¹⁷⁰ U.S. CONST. art. 1, § 8, cl. 3.

¹⁷¹ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (“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.”) (citations omitted).

¹⁷² *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (“On the usual telling, dormant commerce clause cases are said to come in three varieties.”).

¹⁷³ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹⁷⁴ *Fulton Corp. v. Faulkner*, 516 U.S. 325, 345 (1996).

¹⁷⁵ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

¹⁷⁶ Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1005 (2011) [hereinafter *Lost in the Dismal Swamp*].

¹⁷⁷ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

¹⁷⁸ *Id.* at 271.

¹⁷⁹ *Id.* at 273.

¹⁸⁰ *Id.* at 274.

Second, 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.”¹⁸¹ A State “has no power to project its legislation into” another state.¹⁸² This extraterritorial strand of the DCC also receives strict scrutiny, and laws that fall under its ambit usually fail to pass constitutional muster.¹⁸³ Professor DeVeaux calls this aspect of the DCC its “sovereign-capacity function.”¹⁸⁴

An example of this second type of law comes from *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.¹⁸⁵ At issue was New York’s Alcoholic Beverage Control Law, which required distributors within New York to sell liquor at a price no higher than the lowest price the distributor charged in any other state.¹⁸⁶ The parties agreed that New York’s law “regulates all distillers of intoxicating liquors evenhandedly,” and therefore did not run afoul of the protectionist prohibitions espoused by the DCC.¹⁸⁷ Nonetheless, the Supreme Court held the law unconstitutional, reasoning that “[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”¹⁸⁸ New York’s price affirmation statute failed this test by “[f]orcing a merchant to seek regulatory approval in [New York] before undertaking a transaction in another [state].”¹⁸⁹ New York thus “project[ed] its legislation into other States.”¹⁹⁰ Because the “practical effect” of New York’s price affirmation statute “control[ed] liquor prices in other states,” the Court struck down the law as a violation of the sovereign-capacity function of the DCC.¹⁹¹

Third, the DCC prohibits state regulation that unduly burdens interstate commerce in areas where uniformity is essential.¹⁹² These laws are subjected to a balancing test, which they almost always survive.¹⁹³ The Court has described the governing test this way: “[w]here [a state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate

¹⁸¹ Healy v. Beer Inst., 491 U.S. 324, 336 (1989). See also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality).

¹⁸² Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935).

¹⁸³ *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

¹⁸⁴ *Lost in the Dismal Swamp*, *supra* note 176, at 1006.

¹⁸⁵ *Brown-Forman Distillers Corp.*, 476 U.S. at 573.

¹⁸⁶ *Id.* at 575.

¹⁸⁷ *Id.* at 579.

¹⁸⁸ *Id.* (citations omitted).

¹⁸⁹ *Id.* at 582.

¹⁹⁰ *Id.* at 584 (alteration in original) (internal quotation marks omitted).

¹⁹¹ *Id.* at 583.

¹⁹² Morgan v. Virginia, 328 U.S. 373, 377 (1946).

¹⁹³ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

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.”¹⁹⁴ This aspect of the DCC fulfills what Professor DeVeaux termed the “anti-obstructionist function.”¹⁹⁵

The most widely cited example of the anti-obstructionist function of the DCC comes from *Southern Pacific Co. v. Arizona*,¹⁹⁶ which involves one of the very few state laws that has failed the forgiving balancing test.¹⁹⁷ For alleged safety reasons, Arizona limited the number of passenger cars on any train to fourteen and freight cars to seventy.¹⁹⁸ Because other states did not limit the number of cars, Arizona’s law had the effect of requiring surrounding states to limit the number of cars on their trains that would come to or pass through Arizona, impairing the uninterrupted travel of the trains by requiring trains to be broken up when they reached the Arizona border.¹⁹⁹ This added service cost the two railroads traversing the state an additional \$1,000,000 per year.²⁰⁰ The Court subjected this incidental interstate regulation to the balancing test and struck down the law because the burden on interstate commerce was “serious,” while the alleged safety benefits were speculative.²⁰¹ In fact, the Court found that the law had a deleterious effect on railway safety: the “increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced.”²⁰² Arizona’s law failed to survive the balancing test because its law, rather than improving safety, harmed it.

The most serious DCC challenge to the Gram Shop Act is that its extraterritorial application may run afoul of the sovereign-capacity function (the second of the three functions described above); the Gram Shop Act may also be

¹⁹⁴ *Id.*

¹⁹⁵ *Lost in the Dismal Swamp*, *supra* note 176, at 1006.

¹⁹⁶ *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

¹⁹⁷ Two other Supreme Court cases struck down state laws under this branch of the DCC. In *Morgan v. Virginia*, the Supreme Court struck down a Virginia statute that required passengers on interstate buses driving through Virginia to be racially segregated. *Morgan*, 328 U.S. at 374. Other states, however, forbade racial segregation. *Id.* at 382. The Virginia statute thus required passengers to change seats at Virginia’s borders, causing “disturb[ance]” of the passengers. *Id.* at 381. Noting the need for a “uniform rule to promote and protect national travel,” the Court found the Virginia statute unconstitutional. *Id.* at 386; *see also* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 520 (1959) (striking down an Illinois statute requiring certain mud flaps because it imposed an unreasonable burden on interstate commerce). Interestingly, the concurrence in *Bibb* noted that the mud flaps required by Illinois actually “create[d] certain safety hazards,” and thus were not a “necessary, appropriate, or helpful local safety measure.” *Id.* at 530 (Harlan, J., concurring).

¹⁹⁸ *S. Pac. Co.*, 325 U.S. at 763.

¹⁹⁹ *Id.* at 773.

²⁰⁰ *Id.* at 772.

²⁰¹ *Id.* at 775.

²⁰² *Id.*

attacked on anti-obstructionist grounds (the last of the functions described above), but the test there is easy to meet. The Act cannot seriously be described as protecting state industry (the first function), as there is no marijuana industry in Nebraska to protect.²⁰³

As a preliminary matter, the sovereign-capacity strand of the DCC provides a hurdle only if the doctrine persists. While sitting on the Tenth Circuit, now-Justice Gorsuch called it “the most dormant doctrine in dormant commerce clause jurisprudence.”²⁰⁴ Other members of the Supreme Court have similarly viewed the doctrine with skepticism. Justice Thomas refuses to apply the DCC to strike down state laws, a position he has held since at least 1997.²⁰⁵ In May 2015, Justice Thomas once again refused to wield the DCC ax to strike down a state tax law, stating that the DCC “has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.”²⁰⁶

Just before his death, Justice Scalia characterized the entire dormant Commerce Clause jurisprudence as “a judicial fraud,” entirely unfounded in the text.²⁰⁷ He complained that the DCC is “utterly illogical” because it “enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce” as long as Congress consents.²⁰⁸

Justice Gorsuch, while serving on the Tenth Circuit Court of Appeals, ruled in July 2015 that the sovereign-capacity function is “no more than [an] instantiation[] of the *Philadelphia* anti-discrimination rule.”²⁰⁹ Of particular interest for our purposes, Justice Gorsuch upheld *Colorado*’s indirect regulation of *Nebraska*’s coal-power industry (while in our hypothetical, we are grappling

²⁰³ If Nebraska were to legalize medical or recreational marijuana, the Gram Shop Act would apply to these in-state businesses as well.

²⁰⁴ *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015).

²⁰⁵ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–10 (1997) (Thomas, J., dissenting).

²⁰⁶ *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting).

²⁰⁷ *Id.* at 1808 (Scalia, J., dissenting).

²⁰⁸ *Id.*

²⁰⁹ *Energy & Env’t Legal Inst.*, 793 F.3d at 1173. In fact, Justice Gorsuch’s skepticism regarding the DCC received some consideration in the press during nomination proceedings. See, e.g., Vidya Kauri, *Gorsuch May Bring Change to Tax on Out-of-State Sales*, LAW360 (Feb. 2, 2017, 9:02 PM), <https://www.law360.com/articles/887648/gorsuch-may-bring-change-to-tax-on-out-of-state-sales> [https://perma.cc/LQ2D-3TQC]; Ramesh Ponnuru, *Where Neil Gorsuch Stands on Three Legal Issues That Divide Conservatives*, DENVER POST (Feb. 1, 2017, 10:04 AM), <http://www.denverpost.com/2017/02/01/where-neil-gorsuch-stands-on-three-legal-issues-that-divide-conservatives/> [https://perma.cc/2T5L-S2HP]; Kevin Russell, *Judge Gorsuch on Separation of Powers and Federalism*, SCOTUSBLOG (Mar. 15, 2017, 3:22 PM), <http://www.scotusblog.com/2017/03/judge-gorsuch-separation-powers-federalism> [https://perma.cc/CH8Y-SRRC] (Justice Gorsuch “has shown some skepticism of the so-called ‘dormant commerce clause’ doctrine.”).

with *Nebraska's* potential indirect regulation of *Colorado's* weed industry).²¹⁰ Then-Judge Gorsuch urged that there is no discrimination unless the state enacts “price control or price affirmation statutes that involve tying the price of . . . in-state products to out-of-state prices.”²¹¹ Otherwise, “wouldn’t we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?”²¹² But courts do not strike down those laws, because they have tacitly come to realize that the sovereign-capacity function of the DCC carries no independent weight.

A growing consensus has emerged among judges that the DCC prohibits only economic protectionism (if the doctrine has any role to play at all).²¹³ As one judge put it, “the extraterritoriality doctrine . . . is a relic of the old world with no useful role to play in the new.”²¹⁴ In dictum or dissent,²¹⁵ various judges have posited that states may enforce non-protectionist laws that regulate out-of-state conduct if that conduct “affects a substantial number of in-state residents,”²¹⁶ at least as long as “the burden imposed” on interstate commerce is not “clearly excessive in relation to the putative local benefits.”²¹⁷ In other words, rather than applying the virtual *per se* bar of the sovereign-capacity function, these courts are incorporating the balancing test from the anti-obstructionist function—the test that virtually all state laws pass.²¹⁸

These views enjoy widespread support in the academic community.²¹⁹ Professor Fallon agrees that the sovereign-capacity function prohibits only eco-

²¹⁰ See Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause’s Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 958–59 (2017) [hereinafter *One Toke Too Far*] (noting the humor of the flipped positions for Nebraska and Colorado).

²¹¹ *Energy & Env’t Legal Inst.*, 793 F.3d at 1174–75 (alteration in original) (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

²¹² *Id.* at 1175.

²¹³ *Id.* at 1173 (explaining that the Supreme Court has struck down laws under the sovereign-capacity function only when they involve “price control or price affirmation regulation” that “link[] in-state prices to those charged elsewhere, with . . . the effect of raising costs for out-of-state consumers or rival businesses.”); *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (stating that the extraterritoriality prohibition encompasses only “price control or price affirmation statutes”); *Am. Beverage Ass’n v. Snyder*, 700 F.3d 796, 812 (6th Cir. 2012) (Sutton, J., concurring).

²¹⁴ *Am. Beverage Ass’n*, 700 F.3d at 812 (Sutton, J., concurring).

²¹⁵ *E.g.*, *Harris*, 729 F.3d at 951 (noting that the extraterritoriality prohibition is limited to “price control or affirmation statutes”); *Am. Beverage Ass’n*, 700 F.3d at 812 (Sutton, J., concurring).

²¹⁶ *IMS Health Inc. v. Mills*, 616 F.3d 7, 44 (1st Cir. 2010), *vacated sub nom.* *IMS Health Inc. v. Schneider*, 564 U.S. 1051 (2011) (mem.).

²¹⁷ *E.g.*, *id.* at 42 n.51 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

²¹⁸ *Pike*, 397 U.S. at 142.

²¹⁹ *E.g.*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979–80 (2013) (The extraterritoriality doctrine “is dead, and unlikely to be revived by the current [Supreme] Court.”); Fallon, *supra* note 150, at 638 (“In condemning extraterritorial regulation as impermissible under the Dormant Commerce Clause, the Supreme Court has typically spoken in contexts involving what it

conomic protectionism.²²⁰ Professor Denning goes a step further and proclaims the extraterritoriality doctrine “dead.”²²¹

With all of these esteemed justices, judges, and scholars questioning the vitality of the DCC in general and the sovereign-capacity function in particular, even Professor DeVeaux, a staunch supporter of both the DCC and its limitations on extraterritoriality, admits that the sovereign-capacity function provides leeway to the states, generally permitting incidental regulation of extraterritorial commerce.²²² Otherwise, most, if not all, of the cases explored in Part III applying in-state laws against out-of-state businesses would have had to conclude that the extraterritorial application was unconstitutional; but they did not. Otherwise, scores of cases involving state laws other than dram shop acts that are applied extraterritorially would also be inconsistent with the Constitution; but they have not been declared unconstitutional.²²³ And states would not need a presumption against extraterritorial application²²⁴ because there would, instead,

calls economic protectionism”); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789–90 (2001) (The prohibition against extraterritorial regulation “is clearly too broad,” and “[s]cores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.”); Regan, *supra* note 163, at 1908 (“Why should we *not* think of a state as having an interest in its citizens which justifies regulation of their conduct wherever they may be?”); *Extraterritoriality and Political Heterogeneity*, *supra* note 135, at 863 (“[S]tates have a presumptive power to regulate their citizens’ extraterritorial conduct.”); *Dormant Commerce Clause—Extraterritoriality Doctrine—Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to Use Unique Mark on all Bottles Sold within Michigan—American Beverage Ass’n v. Snyder*, 700 F.3d 796 (6th Cir. 2012), 126 HARV. L. REV. 2435, 2442 (2013) (“[A] mechanical application of a territorial principle inhibits state experimentation with laws that attempt to solve their social and economic problems.”).

²²⁰ Fallon, *supra* note 150, at 638.

²²¹ Denning, *supra* note 219, at 980.

²²² *Lost in the Dismal Swamp*, *supra* note 176, at 1008.

²²³ For example, *CTS Corp. v. Dynamics Corp. of Am.* would be wrongly decided. At issue in *CTS* was an Indiana statute that required a majority of the preexisting shareholders to approve a change in control of certain corporations chartered in Indiana (with a requisite number of shareholders or shares in Indiana) and that had not opted out of the statute’s purview. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 72–73 (1987). The plaintiffs argued the Indiana law was unconstitutional because it regulated beyond its borders noting that “[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Id.* at 88 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)). Where “the primary purpose” of the statute was to protect in-state shareholders and in-state corporations, the Supreme Court upheld the Indiana statute. *Id.* at 91. Had there been a rule against extraterritorial effects, the Court would have struck down this Indiana statute. *See also* *In re Jevne*, 387 B.R. 301, 306 (Bankr. S.D. Fla. 2008) (permitting Rhode Island’s homestead exemption to apply to Florida land).

²²⁴ *E.g.*, *State Sur. Co. v. Lensing*, 249 N.W.2d 608, 612 (Iowa 1977) (“We cannot ignore the general rule that a state’s statutes are presumed not to have extraterritorial effect.”). Similarly, the Supreme Court’s presumption that congressional statutes cannot be applied outside the United States unless Congress has clearly indicated that the statute does apply extraterritorially would be suspect. *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

be a *rule* against extraterritorial application—that rule being constitutionally mandated through the sovereign-capacity function of the DCC.

But perhaps most importantly, if the extraterritoriality doctrine struck down all statutes having out-of-state effects, states would be left without an effective remedy to combat harm foisted upon them by their neighbors. Consider this very problem of marijuana spillover. Unlike our national borders—where the Fourth Amendment permits customs checks without any individualized suspicion²²⁵—state borders cannot have checkpoints with the primary purpose to search for drugs.²²⁶ So, if a non-legalizing state wants to keep its non-drug policy while also stemming the flow of marijuana inside its borders, the state will need to either engage in litigation against the legalizing state,²²⁷ increase criminal penalties for trafficking to a level high enough to deter would-be traffickers from bringing marijuana back into the non-legalizing state, or enact statutes (like the Gram Shop Act) encouraging those in the legalizing state to offset the cost of the spillover effects. Currently, the litigation route seems to be floundering;²²⁸ and increasing criminal penalties when drug crimes are already heavily penalized seems overly harsh, particularly given the discriminatory enforcement of drug laws against minority populations.²²⁹ That leaves open to the legalizing state the option of enacting civil liability laws. An expansive reading of the extraterritoriality principle in the DCC would close off this option as well, forcing upon non-legalizing states three unpalatable choices: (1) do nothing and keep the (harmful) status quo; (2) remain opposed to marijuana and suffer the harms from the neighboring states while potentially increasing criminal penalties for possession and trafficking; or (3) legalize marijuana so that the formerly anti-marijuana state, too, benefits financially from marijuana sales.

If instead of the overly expansive view of the DCC, which precludes an in-state statute from applying to out-of-state commerce, the balancing test from *Pike* is used (as some lower courts have begun to do), the extraterritorial application of the Gram Shop Act should pass constitutional muster.²³⁰ The balancing test permits states to enforce non-protectionist laws that regulate out-of-state conduct as long as “the burden imposed” on interstate commerce is not “clearly excessive in relation to the local benefits.”²³¹ This has been likened to

²²⁵ See *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (upholding fixed border patrol checkpoints).

²²⁶ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000) (holding that drug interdiction checkpoints violate the Fourth Amendment).

²²⁷ 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, 1871–72 (2015) (setting forth a common-law nuisance theory).

²²⁸ See Berch, *supra* note 20, at 873–76.

²²⁹ *Id.* at 877.

²³⁰ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²³¹ *IMS Health Inc. v. Mills*, 616 F.3d 7, 42 n.51 (1st Cir. 2010), *vacated sub nom.* *IMS Health Inc. v. Schneider*, 564 U.S. 1051 (2011) (mem.) (quoting *Pike*, 397 U.S. at 142). Sim-

rational-basis scrutiny: “we consider whether the legislature had a rational basis for believing there was a legitimate purpose that would be advanced by the statute. We likewise apply a deferential standard in identifying a statute’s putative benefits.”²³²

The Gram Shop Act passes this test. Although the Act is hypothetical, we can surmise many legitimate purposes for such a statute. Enacting gram shop legislation expresses moral condemnation of drug use and drug culture; protects Nebraskans from the harmfulness of both long-term and short-term drug use; decreases the number of car accidents and related injuries to Nebraska residents; reduces the likelihood of certain crimes such as disorderly conduct, vehicular manslaughter, and DUIs; conserves police and judicial resources; safeguards the state’s roads; and helps shield residents from observing drug use or its effects. Given these numerous and weighty interests and the deference given to states under this rational-basis-type review, it appears extraordinarily unlikely that any court would find the burden on commerce “clearly excessive” in comparison to these purposes. Even Professor DeVaux agrees that the hypothetical Gram Shop Act survives a challenge brought under the DCC.²³³

In sum, Nebraska’s Gram Shop Act should survive a DCC challenge, at least as long as the court does not apply the sweeping language found in a few cases espousing the sovereign-capacity function.

CONCLUSION

Scholars are calling the legalization of marijuana at the state level for medical and recreational purposes, while it remains illegal at the federal level, “one of the most important federalism conflicts in a generation.”²³⁴ Currently, states that have rejected marijuana legalization nonetheless must bear some of the

ilarly, in his Article, *Making Sense of Extraterritoriality: Why California’s Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, Jeffrey Schmitt argues that “a state regulation of in-state conduct violates the extraterritoriality principle only when the regulation: (1) lacks a corresponding in-state interest; and (2) *inescapably* has the practical effect of regulating conduct beyond the state’s borders.” Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California’s Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 425 (2015). That test, while not precisely mirroring the *Pike* balancing test, does have some of its attributes, including the requirement of an in-state “benefit,” and only “incidental” out-of-state regulation.

²³² *Yamaha Motor Corp. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 62–93 (1987)).

²³³ *One Toke Too Far*, *supra* note 210, at 990 (“[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’ or impose ‘clearly excessive’ burdens on interstate commerce.”) (emphasis omitted).

²³⁴ Chemerinsky et al., *supra* note 11, at 77; see also David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 569 (2013) (“Marijuana legalization by the states presents the most pressing and complex federalism issue of our time.”).

negative consequences flowing from legalization and accrue none of the benefits, such as increased tax and tourism revenue and increased employment opportunities. But that does not have to remain the status quo.

Non-legalizing states that are committed to remaining pot-free may enact Gram Shop Acts to impose liability against out-of-state dispensaries that sell to in-state citizens who cause harm to the Home State. If the injured victim sues in the non-legalizing state, the Home State court should accept personal jurisdiction over the out-of-state defendant dispensary and apply its Gram Shop Act, even if no such liability exists in the dispensary's state of origin. Such extraterritorial application of the law should be upheld as constitutional against any challenges based on FFCC, DPC, or DCC.