Demystifying the dormant commerce clause's considerations for cannabis

By Rachel K. Gillette, Esq., Holland & Hart LLP

AUGUST 2, 2023

While we all sit around and twiddle our thumbs waiting for the Congress to de-schedule cannabis, some western states are quietly investigating the possibility of interstate cannabis markets. It appears some states now feel comfortable enough to even pass legislation addressing this issue, including Oregon, Washington, and California.

How is this possible? We all know that state-legal cannabis cannot be sold across state lines, right? The now rescinded 2014 Cole Memorandum made this clear, noting it as one of the Department of Justice's eight "law enforcement priorities." As Cole noted, "preventing the diversion of marijuana from states where it is legal under state law in some form to other states" was of particular importance, and failure to do so could thus draw the ire of the DOJ and its immense law enforcement powers.

State laws relating to cannabis, even though squarely in contradiction of federal law, could potentially be unconstitutional under the DCC.

Because Cole guided U.S. Attorneys to focus both resources and efforts, including prosecution, on people or companies whose conduct interfered with any of Cole's eight listed "priorities," states heeded the warning, and designed regulatory frameworks with Cole's eight priorities in mind. While Cole has since been rescinded by the short-lived anti-drug crusader, former U.S. Attorney General Jeff Sessions, it is well understood by regulators that many U.S. Attorneys continue to adhere to its principles.

In homage to Cole, most states' cannabis regulatory frameworks come with one resounding principle: It is illegal under state law to transport "legal" marijuana across state lines. The theory behind this basic tenet of state marijuana regulatory regimes is prohibit diversion and the feds stay away. States can continue to count dollars in their tax coffers from marijuana sales, and the federal government will not interfere. A winning proposition…unless you happen to be a cannabis consumer in a non-legal state fearing arrest.

If you haven't been to law school lately, you may not be aware of the *dormant* Commerce Clause ("DCC"). It's a sleeping giant of legal clauses. Most people in the cannabis industry have some familiarity with the Commerce Clause as a result of the Supreme Court's 2005 ruling in *Gonzales v. Raich* whereby the highest Court held even wholly intrastate conduct, like the home cultivation of marijuana for personal use, could be regulated by Congress because it has a substantial economic effect on interstate commerce.

Thus, Congress has the authority under the Commerce Clause to pass laws such as the Controlled Substances Act, which allows the federal government to knock on your door in the middle of the night in tactical gear and arrest you for those six marijuana plants growing in your closet for strictly personal use, despite that conduct being legal under states' laws. (Not that they will, but they *can*.)

The DCC, however, is not so obvious in its grant of power to Congress. Rather, the DCC lays in wait, ready to pounce on any state or locality which dare adopt protectionist or discriminatory measures which fail to preserve or unreasonably burden the U.S. national marketplace for goods and services. Even incidental burdens created by state or local laws can be unconstitutional under the DCC if the law is excessive in relationship to its local benefit.

It just so happens that cannabis is a "good" (in more ways than one) in the U.S. marketplace. The Supreme Court said so itself in *Raich*. So thus, state laws relating to cannabis, even though squarely in contradiction of federal law, could potentially be unconstitutional under the DCC.

An example of a law potentially unconstitutional under the DCC might be a state's residency requirement. Many states have had laws which require an owner of a cannabis business to be a resident of the state. Even local jurisdictions may have laws requiring a certain percentage of the business be owned by a local resident. Social Equity programs often reward licenses only to state residents who may have lived in a particular area, such as an area of "disproportionate impact." It just so happens that these protectionist laws might be unconstitutional under the DCC.

Recent cases are illustrative. In 2019, the Supreme Court held in *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, that Tennessee's two-year durational-residency requirement

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

THOMSON REUTERS®

applicable to retail liquor store license applicants is unconstitutional, finding that Tennessee's two-year residency requirement plainly favored Tennesseans over non-residents. Under the DCC, "a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to "advanc[e] a legitimate local purpose."" *Department of Revenue of Ky.v. Davis*, 553 U. S. 328, 338.

On Aug. 17, 2022, in *NPG v. Maine Department of Administrative and Financial Services*, the 1st U.S. Circuit Court of Appeals affirmed the lower court's finding that a provision of the state's Medical Marijuana Act violated the DCC because it banned non-residents from owning or operating a state-licensed medical marijuana dispensary, rejecting the state's claim the DCC somehow does not apply to a marketplace of federally illegal goods. In its opinion, the court stated, "we are not persuaded that the dormant Commerce Clause can have no effect in a market in which Congress has made participation criminal."

However, this is an issue apparently up for debate., A District Court judge in Tacoma, Washington, recently ruled that Washington state's residency requirement was constitutional, stating the DCC "does not apply to federally illegal markets, including Washington's cannabis market, and thus, it does not apply to Washington's residency requirements." *Brinkmeyer v. Wash. State Liquor & Cannabis Bd*. (Feb. 7, 2023).

Is an unconstitutional state residency requirement distinguishable from a state ban on say the importation of cannabis products from another state? After all, the free movement of goods and services is a tenet of the DCC and laws that inhibit such movement could very well be unconstitutional under the DCC.

This may be the reason states like Washington, Oregon and California are looking into the issue of whether they should be able to import and export cannabis products from and to other states.

Most recently, the Washington State Legislature approved an interstate marijuana commerce bill, giving the governor authority to enter into agreements with other legalized states and to allow imports and exports of cannabis among them. The bill was signed into law by Governor Jay Inslee in May.

In California, State Senator Anna Caballero introduced Senate Bill 1326, (https://bit.ly/3q8n0D3) authorizing California to enter into trade agreements in order to import and export cannabis with other legalized states. In addition, California state officials have requested a formal opinion from the state attorney general's office on whether pursuing interstate marijuana commerce would put the state at "significant risk" of federal enforcement action.

An example of a law potentially unconstitutional under the dormant Commerce Clause might be a state's residency requirement. Many states have had laws which require an owner of a cannabis business to be a resident of the state.

Oregon passed its interstate cannabis commerce law last year in 2022, which included language legalizing interstate trade of cannabis products.

State voluntary compliance

So what are we doing here? If protectionist laws prohibiting commerce of cannabis amongst states is unconstitutional under the DCC, why can't I buy some of California's best weed in my local Colorado dispensary? The reality is states may be voluntarily, if not purposefully, imposing self-restrictions on interstate commerce, and such voluntary compliance is tolerated, despite its potential unconstitutionality under the DCC.

Remember that midnight raid by the feds earlier in the article? It is undoubtedly that looming threat of federal law enforcement that causes state regulators to tread carefully, if not unconstitutionally.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

About the author

Rachel K. Gillette is a partner and leader of **Holland & Hart**'s cannabis and psychedelics group, in Denver, and one of the country's first lawyers to dedicate her practice to cannabis law. She helps clients navigate complex regulatory, financial, and operational challenges, and works with startups, established cannabis operations, investors, and ancillary businesses at all points along the cannabis industry supply chain.

This article was first published on Reuters Legal News and Westlaw Today on August 2, 2023.

© 2023 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.