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THE DORMANT COMMERCE CLAUSE: THE ENDGAME—FROM SOUTHERN PACIFIC TO TENNESSEE WINE & SPIRITS—1945 to 2019

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Abstract

This article attempts to develop the undue burden balancing and the virtually per se discrimination tests of the modern Dormant Commerce Clause starting with the 1945 case of Southern Pacific v. Arizona[1] *and moving to Tennessee Wine & Spirits Retailers Ass'n v. Thomas,*[2] *a case decided by the United States Supreme Court in June of 2019. The Commerce Clause, Article I, Section 8, Clause 3 gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."*[3] *Our most famous Chief Justice of the United States Supreme Court, John Marshall, defined Congress's commerce power "among the several states" to be plenary and complete, setting the stage for Congress to use this power over interstate commerce as the basis for much of Congress' power to pass legislation. Out of this immense federal power, Chief Justice Marshall deduced that since Congress had plenary power over interstate commerce, the states had none. Only Congress could regulate interstate commerce. Marshall called the implied limitations of the Commerce Clause "dormant" leading to what we now call the Dormant Commerce Clause.*

There are two main aspects to the modern Dormant Commerce Clause. First, states may pass evenhanded laws that impact interstate commerce, but even evenhanded laws may not impose undue burdens on interstate commerce. Second, states may not discriminate against interstate commerce by treating commerce from other states differently than in-state commerce simply because it is out of state. Under the undue burdens test, the Court will consider a number of factors, but primarily the

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1. S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).
2. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).
3. U.S. CONST. art. I, § 8, cl. 3.

Court will undertake a factual evaluation of the importance of the state interest in passing the law that impacted interstate commerce versus a practical consideration of the harm to interstate commerce. Under the discrimination rule, the Court will almost certainly find the discriminatory state law to violate the Dormant Commerce Clause, but the Court uses an almost tortuous series of approaches to reach what is close to a foregone conclusion. This tortious approach has led some to say that it is impossible to know which of the two tests to apply. This article attempts to identify the key factors involved in the Court's undue burdens balancing approach and to closely explore the Court's attempt to define discrimination and to determine when a state might be allowed to discriminate against interstate commerce. The hope is that at the very least students, lawyers, and lower courts might have some guidance in applying the two tests and in knowing the difference between the two.

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I. Introduction, a brief history of the Dormant Commerce Clause

Chief Justice Marshall first recognized the doctrine that is commonly called the Dormant Commerce Clause[4] in *Gibbons v. Ogden*[5] in 1824. Five years later, Chief Justice Marshall gave the doctrine its name in *Willson v. Black Bird Creek Marsh Co.*[6] Its legitimacy has been argued about ever since.[7]

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4. The Dormant Commerce Clause is also referred to as the "negative" Commerce Clause. Alliant Energy Corp. v. Bie, 330 F.3d 904, 911 (7th Cir. 2003) ("This 'negative' aspect of the Commerce Clause is often referred to as the 'Dormant Commerce Clause' and is invoked to invalidate overreaching provisions of state regulation of commerce."). Although some justices prefer the term "negative" Commerce Clause, e.g., the Supreme Court uses the terms "negative" and "dormant" interchangeably. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting). *See* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 359 (1992).

5. Gibbons v. Ogden, 22 U.S. 1 (1824).

6. Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).

7. In Thurlow v. Massachusetts, 46 U.S. 504, 579 (1847), Chief Justice Taney was one of the early critics; "[I]t appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States." Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 163 (2005) ("Justices Scalia and Thomas have been among the most strident critics of the Dormant Commerce Clause, questioning its very legitimacy."). For a forceful defense of the Dormant Commerce Clause, see Justice Alito's opinion in Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) ("But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising."). See the opening sentence to Professor Chen's article, reading "The Supreme Court's dormant Commerce Clause doctrine, a body of jurisprudence as deep as it is despised, provides the strongest constitutional bulwark against hostile state regulation and taxation of the national economy." Jim Chen, *A Vision Softly Creeping: Congressional*

In *Gibbons*, Chief Justice Marshall was primarily concerned with the scope of Congress' commerce power over interstate commerce[8] and recognized an expansive view of Congress' commerce power. The constitutional grant of plenary power to Congress to regulate interstate commerce has been argued to suggest that state and local governments[9] cannot regulate interstate commerce. The "great force" of this argument initially captured Chief Justice Marshall,[10] but eventually, he punted on the issue. Chief Justice Marshall held that under the Supremacy Clause,[11] federal law preempts state law.[12] The

Acquiescence and the Dormant Commerce Clause, 88 MINN. L. REV. 1764, 1764 (2004) (I appreciate that Professor Chen could not resist the temptation, as he acknowledges, to quote from Simon and Garfunkel's "The Sounds of Silence" in his article's title). Professor McGreal, having fun mixing his metaphors, compares the Dormant Commerce Clause with "the sound of a tree falling in a deserted forest," wondering if it really exists, or if it is perhaps "like people who claim to have seen UFOs," or "like a colorless, odorless toxic gas; a silent killer of state laws affecting interstate commerce." Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1191 (1998).

8. The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. There is almost no significant difference in the Dormant Commerce Clause issues between commerce "among the several states," what is generally called interstate commerce, and foreign commerce.

9. The Dormant Commerce Clause rules apply to both state laws and the political subdivisions of states, including the laws of cities and counties. *See, e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 361 ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.").

10. *Gibbons*, 22 U.S. at 209 ("There is great force in this argument, and the Court is not satisfied that it has been refuted.").

11. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (discussing thoroughly the Supremacy Clause and the doctrine of preemption). Kudos to Professor Nelson for resisting the temptation to use a catchy title to his thoughtful article. Professor Nelson paraphrases the Supremacy Clause, "The Clause declares that the Constitution, treaties, and valid federal statutes 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.* at 245. Professor Nelson gets to the nutshell of the Supremacy Clause in a single sentence, "Under the Supremacy Clause, then, the test for preemption is simple: Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." *Id.* at 260.

12. Marshall construed the Federal Coastal Act of 1793, though not by name, as granting Gibbons a federal license to operate in interstate waters,

Supremacy Clause makes invalid state and local laws that conflict with federal laws.[13] In deciding *Gibbons*, it was unnecessary to determine whether the constitutional grant of commerce power to Congress by itself meant that states could not regulate interstate commerce. The Dormant Commerce Clause involves a conflict between state laws and the implicit limitations of the Constitution's grant of commerce power to Congress. Under the Dormant Commerce Clause, no federal laws are required.

The Dormant Commerce Clause issue was also raised in *Black Bird Creek,* but was quickly dismissed by Chief Justice Marshall. In *Black Bird Creek*, a sloop negligently ran into a dam across an interstate tributary called Black Bird Creek.[14] In their defense, the sloop company argued that the state of Delaware's approval of the dam was contrary to the Dormant Commerce Clause.[15] Chief Justice Marshall would have none of it, stating that:

> We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its *dormant* state, or as being in conflict with any law passed on the subject.[16]

In short, the state had the police powers to build the dam, and it did not conflict with the Dormant Commerce Clause or the Supremacy Clause.

Although Marshall recognized the Dormant Commerce Clause in dicta in *Gibbons,* and named it in *Willson*,[17] the

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which preempted the state law that had given Ogden a monopoly in steamboat traffic between New York and New Jersey. *Gibbons*, 22 U.S. 1.

13. *Id.*

14. Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 251 (1892).

15. *Id.* at 250.

16. *Id.* at 252 (emphasis added).

17. Chief Justice Marshall used the Dormant Commerce Clause as an alternative ground for his decision in *Brown v. Maryland*, 25 U.S. 419 (1827), but *Brown's* primary holding was that Maryland's license fee for importation of alcoholic beverages from foreign countries violated the Import-Export Clause of Article I, Section 10 of the United States Constitution.

doctrine did not come into its own until *Cooley v. Board of Wardens*[18] in 1851. In *Cooley*, the state of Pennsylvania required that all larger vessels, including Cooley's interstate barges, entering the port of Philadelphia had to take on a Philadelphia-based pilot to guide the vessel into port.[19] Cooley claimed that this law regulated interstate commerce in a way contrary to what was considered to be *Gibbon's* dicta that states could not regulate interstate commerce.[20] The *Cooley* Court accepted the legitimacy of the Dormant Commerce Clause, but it rejected *Gibbon's* zero sum theory of commerce power, that any state regulation subtracted from Congress' plenary power to regulate interstate commerce.[21] Rather, *Cooley* said, some subjects in interstate commerce needed uniformity of regulation, and as for those subjects needing uniformity, only Congress can regulate.[22] Other subjects in interstate commerce needed diversity of regulation. As for those subjects needing diversity, both the states and the federal government had concurrent power. Unless some specific federal law preempted the state law, the states could regulate subjects of interstate commerce needing diversity of regulation.[23] Since it was unlikely that Congress would have the interest or the knowledge to regulate the peculiarities of the various ports in the United States, navigation safety rules as to ports was a subject needing diversity of regulation best left to state regulation absent federal legislation.[24]

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18. Cooley v. Bd. of Wardens 53 U.S. 299 (1851).
19. *Id.* at 311–12.
20. *Id.* at 314.
21. *Id.* at 315–16.
22. *Id.* at 316–21.
23. *Id.* at 319.

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

24. In *Cooley*, a federal law passed in 1789 had authorized state regulation of pilotage. *Id.* at 317. This federal regulation would have been unconstitutional if Marshall's dicta—that the Constitution by itself prevented state regulation of interstate commerce—had been correct. *Cooley's* holding

After *Cooley,* the Court spent almost one hundred years attempting to reconcile the absolute prohibition of *Gibbons* with the selective exclusivity approach of *Cooley*.[25] The Court in *Southern Pacific v. Arizona*,[26] after summarizing the historical origins of the Dormant Commerce Clause from *Gibbons* to *Cooley*, had little doubt about the Court's crucial role in protecting interstate commerce, stating that:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.[27]

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that not all state regulations of interstate commerce violated the Dormant Commerce Clause meant that the federal law was not unconstitutional. *Id.* Later, the Court developed the fiction that the Court in Dormant Commerce Clause cases was interpreting Congressional silence, not the Constitution. Therefore, Congress can override that silence, meaning that Congress can permit state regulations of interstate commerce that would otherwise have violated the Dormant Commerce Clause. Professor Chen summarizes this power: "One of the most distinctive characteristics of the dormant Commerce Clause as constitutional doctrine is Congress's virtually limitless ability to override the Supreme Court." Chen, *supra* note 7, at 1773. Professor Williams disagrees with the doctrine, stating that:

> The Court's willingness to allow Congress to overrule the Dormant Commerce Clause's limitation on state authority is fundamentally inconsistent with the Court's declared view that Congress may not authorize the states to violate the Constitution. That is bad enough, but, even worse, the Court has failed to provide a cogent explanation for this anomalous exception.

Norman, *supra* note 7, at 156.

25. James M. McGoldrick, *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties"—1824 to 1945*, CREIGHTON L. REV. (forthcoming).

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

27. *Id.* at 769. The importance of the Dormant Commerce Clause in this regard is hard to overstate. John J. Dinan, *The Rehnquist Court's Federalism Decisions in Perspective*, 15 J.L. & POL. 127, 181 (1999) ("In fact, throughout the history of the Court the Dormant (or Negative) Commerce Clause has

In 2018, the Court in *South Dakota v. Wayfair, Inc*. referred to the "considerable uncertainties" in the further development of the Dormant Commerce Clause after *Cooley*.[28] Despite the historical uncertainties, the *Wayfair* Court summarized the modern precedents as involving two distinct approaches:

> First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[29]

Despite the seeming simplicity of these two distinct tests—an undue burden balancing approach and a virtually per se discrimination approach—the modern test is anything but simple.[30] This article will first discuss undue burdens, and then the virtually per se rule against discrimination.[31]

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proved to be one of the most prolific sources of invalidation of state laws.").

28. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (reversing the Court's long-held view that states could not impose sales or use taxes under the Dormant Commerce Clause on out of state companies that did not have a physical presence within the state).

29. *Id.* at 2091 (citations omitted). The *Wayfair* Court cited Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), for this quotation, but the Court had a "see also" reference to *Southern Pacific v. Arizona*.

30. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 422 (2008) ("These [Dormant Commerce Clause] rules are easy to recite, but their application is notoriously difficult, resulting in cases with similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions.").

31. This article does not attempt to address the Dormant Commerce Clause cases involving state taxation of interstate commerce, which except for the rule against discrimination have their own unique approaches. This article's focus is on how the undue burdens and the discrimination tests work, but it is also important to note at least summarily that there are two major exceptions to both aspects of the limitations of the Dormant Commerce Clause. First, Congress can always use its commerce power to permit the states to regulate interstate commerce in a way that would otherwise be in violation of the Dormant Commerce Clause. Congress has plenary power to regulate

II. The beginnings of the undue burdens balancing test and the rejection of the rational basis test

This article dates the modern undue or unreasonable burdens balancing test established in *Southern Pacific v.*

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interstate commerce, which includes permitting the states to regulate interstate commerce within the Dormant Commerce Clause limits. White v. Mass. Council of Const. Employers, Inc., 460 U.S. 204, 213 (1983) ("Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."). Owner Operator Indep. Drivers Ass'n, Inc. v. Pa. Tpk. Comm'n, 383 F. Supp. 3d 353, 368 (M.D. Pa. 2019) (citations omitted) (quotation marks omitted) (one district court's summary)

> [T]he Supreme Court has recognized that where state or local government action is specifically authorized by Congress, it is not subject to the [dormant] Commerce Clause even if it interferes with interstate commerce. In making such an authorization, Congress must manifest its unambiguous intent. Stated differently, congressional intent and policy to sustain state legislation from attack under the Commerce Clause must be expressly stated.

Second, under the so-called market participant exception, states can impose undue or discriminatory burdens upon interstate commerce if the state is acting as a market participant, similar to a private business, and not as a regulator. In the first such case, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), the state of Maryland paid a modest bounty to scrap processors of abandoned hulks of automobiles, but through a discriminatory process that made it far easier for scrap processors in Maryland to claim the bounty than those in neighboring states such as Virginia. The Court reasoned that Maryland was not interfering "[W]ith the natural functioning of the interstate market either through prohibition or through burdensome regulation" but that Maryland "[H]as entered into the market itself to bid up their price." *Id.* at 806. And in a nutshell, the Court explained its logic "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. The Court applied the logic to the state as buyer in *Hughes*, to the state as seller in Reeves, Inc. v. Stake, 447 U.S. 429 (1980), and to the state as employer in White v. Massachusetts Council of Const. Employers, Inc., 460 U.S. 204 (1983). The Court seems to have expanded the doctrine in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (allowing the state to discriminate in favor of local processors of waste) and in Dep't of Revenue of Ky. v. Davis, 553 U.S. 328 (2008) (permitting the state to exempt bonds issued by the state from state income taxes, but not other states). The use of state subsidies, such as in New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988), might also be viewed as a form of the state as a market participant.

Arizona in 1945.[32] This is not a foregone conclusion,[33] but it is hardly a controversial choice.[34] Other cases prior to *Southern*

32. S. Pac. Co. v. Arizona, 325 U.S. 761 (1945). The Court uses "undue" burdens and "unreasonable" burdens interchangeably. *See e.g.*, Colorado v. United States, 271 U.S. 153, 162–63 (1926).

33. Justice Scalia, for one, dates the modern balancing test from *Pike v. Bruce Church*, "I would therefore abandon the 'balancing' approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike v. Bruce Church, Inc.*, and leave essentially legislative judgments to the Congress." Bendix Autolite Corp. v. Midwesco Enter.'s, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (citations omitted). Professor Denning, referring to *Southern Pacific,* says, "Twenty-five years later, the Court decided *Pike v. Bruce Church, Inc.* in which the Court confirmed that Chief Justice Stone's balancing approach had endured, and gave it a new name—'*Pike* balancing.'" Denning, *supra* note 30, at 447. *Pike* itself specifically cites *Southern Pacific* as applying "a balancing approach." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *Pike* has certainly won the branding battle over *Southern Pacific*. Not a single court case refers to "*Southern Pacific* balancing" while over three hundred court cases refer to "*Pike* balancing," including four Supreme Court cases. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348, (2007) (Scalia, J., concurring); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 608 (1997) (Scalia, J., dissenting); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 763 (1995) (Kennedy, J., concurring); Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 100 (1994). *Pike* seems to be the more modern test in that the *Pike* Court referred to both the undue burdens test and the virtually per se rule against discrimination. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573 (1997) ("Although *Pike v. Bruce Church* is most frequently cited for defining and embracing a balancing test in dormant Commerce Clause review, this article will show that *Pike* is also responsible for the emergence of a discrimination-focused analysis."). *Southern Pacific* mentioned only the undue burdens approach because, unlike *Pike,* there was no evidence of discrimination. Professor Aleinikoff gives *Southern Pacific* credit for introducing balancing to the Dormant Commerce Clause, but *Pike* credit for popularizing it. "Justice Stone introduced balancing to the dormant commerce clause cases [in *Southern Pacific*]. Since the 1970s, the Court has increasingly relied on a balancing test to decide whether state regulations impose an 'undue burden' on interstate commerce. The classic formulation is Justice Stewart's in *Pike v. Bruce Church, Inc.*" T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 966 (1987).

34. Professor Regan refuses to give a precise date for the beginning of the modern test, "The modern era is defined by the abandonment of the 'direct/indirect burdens' test and therefore cannot be given a precise beginning date." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1093–94 (1986). But he calls *Southern Pacific* a "new balancing approach." *Id.* at 1094. Professor Denning refers to "the paradigmatic balancing opinion in S. Pac. Co. v. Arizona." Denning, *supra* note 30, at 445–46 (Professor Denning is to be

Pacific had referred to unreasonable or undue burdens,[35] but only *Southern Pacific* adopted a complete balancing test.[36]

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congratulated for apparently being able to use his Internet word-of-the-day.) [Note to reader: "Paradigmatic" means the same as "classic." *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 966 (1987).]. *See also* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (the Court calling the protective tariff or customs duty "the paradigmatic example of a law discriminating against interstate commerce.").

35. The first Supreme Court case to refer to undue or unreasonable burdens—in an enumerated powers case—was Colorado v. United States, 271 U.S. 153 (1926). The Court found that the Interstate Commerce Commission (ICC) had the authority to deny a certificate of operations to the intrastate portion of a Pennsylvania railroad because of its impact on the interstate aspects of the railroad. The Court said, "The certificate issues not primarily to protect the railroad, but to protect interstate commerce from *undue burdens or discrimination*." *Id.* at 162 (emphasis added). Subsequently, it used the phrase "unreasonable burdens" to make the same point, "Control [by the ICC] is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the *unreasonable burdens, obstructions or unjust discrimination* which is found to result from operating a branch at a large loss." *Id.* at 163 (emphasis added). In 1930, in a case involving the scope of federal enumerated powers, Congress had used the phrase "undue burdens" in a 1925 Joint Resolution, 49 USCA s 55, directing the ICC to investigate intrastate rate regulations that might impose "undue burdens" on interstate commerce. Bd. of R.R. Comm'rs of State of N. Dakota v. Great N. Ry. Co., 281 U.S. 412, 418 n.1 (1930).

36. Prior to *Southern Pacific*, the Court often applied a mechanical test whereby it found that there was no violation of the Dormant Commerce Clause because interstate commerce had not yet begun or because any burden was indirect as opposed to direct. In one of its more famous cases, Coe v. Errol, 116 U.S. 517 (1886), the town of Errol, New Hampshire placed an *ad valorem* property tax on property within the city, including logs floating on the Androscoggin River in Errol waiting for the spring thaw to be floated interstate to Lewiston, Maine. The Supreme Court rejected a Dormant Commerce Clause challenge to the tax on the grounds that commerce did not begin until committed to an interstate carrier or until the journey actually began. In Kidd v. Pearson, 128 U.S. 1, 20 (1888), the Court upheld Iowa's ban on in-state manufacturing of alcoholic beverages because manufacturing was not commerce. Even in cases where interstate commerce was involved, the Court was more likely to refer to direct versus indirect burdens on interstate commerce. Pa. Gas Co. v. Pub. Serv. Comm'n., 252 U.S. 23, 29 (1920) (emphasis added) (citations deleted) (disapproved of by E. Ohio Gas Co. v. Tax Comm'n of Ohio, 283 U.S. 465 (1931)) ("The general principle is well established and often asserted in the decisions of this court that the state may not directly regulate or burden interstate commerce." But, the Court said, states were not excluded from regulating all subjects of interstate commerce, "In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the states to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."). Justice Stone dissented from the application of the direct indirect test, "In thus making use of the expressions,

In part, *Southern Pacific* is the beginning of the modern test because of the fork in the road that the *Southern Pacific* Court did not take. In 1938, the Court in *South Carolina v. Barnwell Brothers*[37] an opinion authored by Justice Stone, who also wrote the *Southern Pacific* opinion, took a different path than the balancing test of *Southern Pacific* or the earlier direct/indirect test. The fact that Justice Stone did not follow the *Barnwell Brothers'* path in *Southern Pacific* is crucial in the development of the balancing test. The Court in *Barnwell Brothers* applied a rational basis test to uphold a South Carolina regulation on truck sizes against a Dormant Commerce Clause challenge. The rational basis test assumes the validity of a law,[38] and is very different from the practical kind of balancing the Court applied in *Southern Pacific*.

In *Barnwell Brothers*, South Carolina limited trucks, including interstate trucks, to ninety inches in width and 20,000 pounds in total weight.[39] The lower federal Court found that South Carolina's law imposed an unreasonable burden on interstate commerce.[40] It based this decision on a practical

'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) overruled in part by California v. Thompson, 313 U.S. 109 (1941). Even in instances in which the Court applied some aspects of modern balancing, it also relied on this mechanical approach. Parker v. Brown, 317 U.S. 341, 361 (1943) (the Court upheld a California raisin marketing scheme that led to higher interstate prices for raisins) ("All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs.").

37. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

38. James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 768–69 (2018) ("In determining whether an end is legitimate in rational basis cases, the Court will pick a conceivable end that best matches with the law; it will not feel bound to consider the actual end of the law. . . . And under the rational basis test, facts in support of the law were to be presumed, even if only in the legislature's mind.").

39. *S.C. State Highway Dep't*, 303 U.S. 177 at 183.

40. The lower federal court in *S.C. State Highway Dep't*, 303 U.S. 177, discussed below, applied an unreasonable burdens approach. *See* Barnwell Bros. v. S.C. State Highway Dep't, 17 F. Supp. 803, 809 (E.D.S.C. 1937), rev'd, 303 U.S. 177 (1938) (citations omitted) (emphasis added) ("We come, then, to the third ground of attack upon the statutory regulations complained of, viz., that they constitute an unreasonable burden upon interstate commerce; and we think that the contention of plaintiffs as to this must be

evaluation of the facts. It found that eighty-five percent of the trucks designed for long-distance hauling were ninety-six inches in width and that South Carolina was the only state to impose a ninety-inch limit.[41] It also determined that total weight was irrelevant and that only wheel or axle weight was important, representing the amount of weight that actually transferred to the ground.[42] Justice Stone rejected the practical findings of the lower court, instead concluding that the state law was not without a rational basis; "Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."[43]

Justice Stone's use of a rational basis test in *Barnwell Brothers,* was likely the result of *United States v. Carolene Products* having been placed on the Supreme Court's docket in 1938.[44] In 1937, the Court rejected a laissez-faire approach to due process limits on the right to contract, stating that "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[45] The following year, *Carolene Products* adopted the rational basis test in a case where a federal law banned the interstate shipment of substitutes for dairy products. The federal law was challenged as being in violation of the due process clause of the Fifth Amendment. Justice Stone in *Carolene Products* stated that "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to

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sustained [as to all but a few miles of substandard roads and a few narrow bridges.]") .

41. *Barnwell Bros.*, 17 F. Supp. at 811, decree rev'd, 303 U.S. 177 (1938).

42. *Id.* at 810. An easy illustration of this weight transfer would be how much a small dog or cat can hurt as it transfers its entire weight on one paw as it marches across one's chest to get to another position on the couch.

43. *S.C. State Highway Dep't*, 303 U.S. at 191–92 (emphasis added).

44. United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

45. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause-A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL'Y 121 (1995) (Professor Maltz calls 1937 "the beginning of the modern era of constitutional jurisprudence.").

preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[46]

Justice Stone's use of the rational basis test in *Barnwell Brothers* was in contrast with his earlier position. In the 1927 dissent of *Di Santo v. Pennsylvania*, Justice Stone argued for a type of balancing test for Dormant Commerce Clause issues, which he called "[A] consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce."[47] Why just ten years later would he argue for a rational basis test? In 1937, the Court rejected a laissez-faire approach to regulation of businesses, adopted a rational basis test in 1938, and Justice Stone must have been conflicted. *Carolene Products* was decided on April 25, 1938, just six weeks after *Barnwell Brothers*, and it is easy to believe that the Court's rejection of strict due process clause limits in 1937 and the adoption of the rational basis test in 1938 was a course correction for Justice Stone and influenced his opinion in *Arizona v. Southern Pacific*.[48]

To be clear, the rational basis test is the wrong test for the Dormant Commerce Clause.[49] Although *Barnwell Brothers* has never been reversed, no Supreme Court case prior to *Barnwell Brothers,* and only one decided after *Barnwell Brothers,*[50] has applied the rational basis test to resolve a Dormant Commerce Clause issue.[51] *Barnwell Brothers* is an outlier in its use of the

46. *Carolene*, 304 U.S. at 152 (emphasis added).

47. Di Santo v. Commonwealth of Pa., 273 U.S. 34, 44 (1927) (the majority in *Di Santo* applied a direct/indirect test).

48. *Barnwell Brothers* was cited a number of times in *Southern Pacific*, but never for its use of the rational basis test.

49. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 476, n.2 (1981) (Powell, J., concurring) ("Commerce Clause analysis differs from analysis under the 'rational basis' test. Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext."). *But see* Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005) ("Thus, we consider whether the legislature had a rational basis for believing there was a legitimate purpose that would be advanced by the statute.").

50. *See* Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939) (applying the rational basis test in upholding a seven dollars and fifty cents state fee on automobiles brought into California for sale).

51. *E.g.*, In Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978), the state of Wisconsin relied on *Barnwell*. The Court easily rejected the state's defense. The state did not attempt to show that a law limiting the length of

rational basis test because the rational basis test is fundamentally unsuited to resolve Dormant Commerce Clause issues. Under the rational basis test used in due process and equal protection cases,[52] the Court will uphold any law if there is a conceivable basis for it. The Court assumes that the political process within the state will be used to correct any abuses.[53] For Dormant Commerce Clause issues, the conflict between state interests and harm to interstate commerce cannot be left to individual states. The Court makes this clear in *Southern Pacific*; "[T]his Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."[54]

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trucks to fifty-five feet, the length of a single trailer, when the typical limit for interstate trucks was sixty-five feet, the length of double trailers, was justified by some state safety interest—"The State, for reasons unexplained, made no effort to contradict this evidence of comparative safety with evidence of its own." *Id.* at 437. Instead, the state simply claimed "that *Barnwell Bros.* applied a rational relation test rather than a balancing test, and argues that its regulations bear a rational relation to highway safety: Longer trucks take longer to pass or be passed than shorter trucks." *Id.* at 442–43 (internal quotation marks omitted). The Court found "that the challenged regulations unconstitutionally burden interstate commerce." *Id.* at 444. As to the failure of the State to offer some practical evidence as to the safety needs of its law, the Court was not kind, "The State, for its part, virtually defaulted in its defense of the regulations as a safety measure." *Id.* To be fair to the attorneys for Wisconsin, it is not clear that any argument would have sufficed. As to essentially the same truck length limits, Iowa's "more serious effort to support the safety rationale of its law" in Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981), led to the same conclusion: "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.* at 670.

52. The Court also uses the rational basis test in cases involving Congress' enumerated power to regulate interstate commerce. *See generally* Gonzales v. Raich, 545 U.S. 1 (2005). *But see* James M. McGoldrick, Jr, *The Commerce Clause, the Preposition, and the Rational Basis Test,* 14 U. MASS. L. REV. 182 (arguing that the rational basis test is the wrong test for determining federal enumerated power).

53. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'").

54. S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (emphasis added). Assistant federal defender F. Italia Patti acknowledges this difference, "The Supreme Court takes two divergent approaches to Fourteenth Amendment and dormant

III. The factors used in the balancing test to determine undue burdens on interstate commerce

The *Southern Pacific* Court stated what the modern undue burdens balancing test encompasses. The "relative weights of the state and national interest involved" have to be balanced against each other.[55] The "nature and extent of the burden" on "the free flow of interstate commerce" has to be balanced against "the state regulation of interstate trains, adopted as a safety measure."[56] *Pike v. Bruce Church*,[57] which is discussed in detail later, has the more widely quoted version of the balancing test. *Pike* stated that "evenhanded" and "incidental" burdens on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[58] *Pike* is

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Commerce Clause cases. The Court takes a passive approach in Fourteenth Amendment cases, deferring substantially to legislatures, and an active approach in dormant Commerce clause cases, deferring little to legislatures." F. Italia Patti, *Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases*, 56 SAN DIEGO L. REV. 221, 223 (2019). But Patti argues that the Court has the level of review just the opposite of what it should be, that ordinary people need more protection than the kinds of businesses often involved in Dormant Commerce Clause cases; "Therefore, the Court should be more active in Fourteenth Amendment cases because the plaintiffs generally have less political power and more passive in dormant Commerce Clause cases because the plaintiffs have more political power." *Id.* at 244–45.

55. *S. Pac. Co.*, 325 U.S. at 770.

56. *Id.* at 770–71 ("Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."). Justice Scalia ridicules this approach, stating that "It is more like judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enter.'s, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

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

58. *Id.*

important to the balancing test in that the Court introduces the relevance of considering whether some alternative law might hurt interstate commerce less.[59]

Southern Pacific involved the constitutionality of the Arizona Train Limit Law of 1912, which made it unlawful to operate a train within the state of Arizona "of more than fourteen passenger or seventy freight cars."[60] *Southern Pacific* anticipated almost all of the factors involved in the modern balancing test.[61] Among the important factors considered by *Southern Pacific* are the following: (1) What is the "nature and extent of the burden" on interstate commerce? The "extent" of the burden is a practical factual evaluation. In *Southern Pacific*, the interstate impact on interstate commerce was obvious and far-reaching. (2) What is the nature and extent of the state and local interests burdening interstate commerce? The extent of the local interests also involves a practical factual evaluation. In *Southern Pacific*, the state's safety interests were at best problematic. The protection of railroad employees was largely offset by the incremental danger to employees and the public from the increased number of trains crossing public roads within the state. (3) Are state and local laws politically self-correcting? This is determined by the degree to which the burden of any particular local law falls on interstate commerce. The logic is that if the burden falls mostly in state, then the political processes within the state would lead to a lessening of the restrictions of the law and if the burden was primarily out of state, then there was the greater need for the courts to step in. (4) Is there a significant danger of multiplicity of inconsistent local regulations? If the thing being regulated is subject to different regulations by several different states, then interstate companies might find it impossible or difficult to comply with various inconsistent regulations. This was a significant issue in *Southern Pacific*. (5) Is there a need for uniformity versus a need for diversity? Although *Cooley* is no longer the primary test, the

59. *Pike* seems to place the burden on the person claiming an undue burden in that it says the burdens have to be "clearly excessive in relation to the putative local benefits. *Id.*

60. S. *Pac. Co.*, 325 U.S. at 763.

61. I use a version of this list in an earlier article. *See generally* James M. McGoldrick, Jr, *Why Does Justice Thomas Hate the Commerce Clause?*, Loy. New Orleans (forthcoming).

need for uniformity versus diversity is still very much a part of the modern balancing test. Because of the inherently interstate nature of railroads, there was a great need for uniformity in *Southern Pacific*. (6) Is the impact on interstate commerce direct or indirect? While the direct/indirect burdens test is at best an ambiguous concept, the concept may have some usefulness as part of the balancing test. This issue is raised only marginally in *Southern Pacific*. (7) Is there any federal legislation indicating Congress' desire? This is a more important issue in later cases than it was in *Southern Pacific*, but it was one factor in *Southern Pacific*. (8) Are there reasonable alternatives to advancing the legitimate state interest without undue harm to interstate commerce? This is the only element of a modern test not considered in *Southern Pacific*. It is *Pike's* main contribution to the balancing test of *Southern Pacific.* More specifically, this is how *Southern Pacific* and related cases applied these factors.[62]

A. What is the "nature and extent of the burden" on interstate commerce?

Of primary importance in the undue burdens balancing approach is the practical evaluation of the importance of the state interest versus the actual impact on interstate commerce.[63] In *Southern Pacific*, the extent of the harm to interstate commerce was obvious. Compared to comparable routes in other states, up to eighty-five percent of all interstate freight trains, and forty-three percent of passenger trains, would have been longer than the Arizona limits.[64] The Arizona law meant that longer interstate trains had to be broken up into shorter trains, costing the two railroads crossing in Arizona about $1,000,000 per year,[65] and impacting railroad traffic from El Paso, Texas to Los Angeles, California.[66] The Court said that there was "no doubt" that the Arizona law "imposes a serious burden on the

62. This list is intended to be exhaustive, but I would settle for comprehensive.

63. Although the Court could have conducted its own factual findings as to a matter of constitutional law, the Court relied on the findings of facts of the state trial court. *S. Pac. Co.*, 325 U.S. at 771.

64. *Id.*

65. *Id.* at 772.

66. *Id.* at 774–75.

interstate commerce," "materially impedes the movement of appellant's interstate trains" and "interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service."[67]

It is not clear what the Court meant by "nature" when it referred to "nature and extent" as to the burden on interstate commerce.[68] In most of the cases, the focus is on the actual harm to interstate commerce without any distinction between what might be the "nature" versus what might be the "extent." But in some cases, the nature of the harm was deemed more important than the extent. In referring to a clear type of discrimination where the state requires that a particular business be done within the state, the Court in *Pike* said, "The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." In *Wyoming v. Oklahoma*, Oklahoma discriminated against interstate commerce by imposing a requirement that ten percent of the coal used in coal fired electrical plants come from Oklahoma.[69] Oklahoma defended the requirement because it was only ten percent. The Court stated that the extent of the harm was not controlling; "The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce."[70] In cases not involving discrimination, it is not clear that the nature of the

67. *Id.* at 773.

68. The Court in its conclusion in *Southern Pacific* referenced the "nature" of the burden on interstate commerce, "The contrast between the present regulation and the full train crew laws in point of their effects on the commerce, and the like contrast with the highway safety regulations, in point of the *nature of the subject of regulation* and the state's interest in it, illustrate and emphasize the considerations which enter into a determination of the relative weights of state and national interests where state regulation affecting interstate commerce is attempted." *Id.* at 783 (emphasis added).

69. Wyoming v. Oklahoma, 502 U.S. 437, 440 (1992).

70. *Id.* at 455. (emphasis in the original). It is somewhat hard to accept the claim that the extent of the burden was an irrelevancy. Even diverting only ten percent of Wyoming coal to Oklahoma would have been a staggering amount of money. Wyoming lost over half a million dollars per year in severance taxes alone. *Id.* at 445.

burden has any special significance. Certainly, in the cases involving evenhanded legislation, the practical extent of the burden seems more important than the nature of the harm.

B. What is the nature and extent of the state interests burdening interstate commerce?

As to extent, *Southern Pacific* is a good illustration of the Court looking closely at the practical importance of the actual state interest. The state's interest in shorter trains was a concern for something called "slack action." Slack action is an example of one of Sir Isaac Newton's laws—that for every action there is an opposite and equal reaction. A common illustration of Newton's law is found in the desktop toy called Newton's Cradle,[71] where five balls are hung from a cradle and can be made to swing in different combinations. Under the same principle, the longer the train, the more energy—slack action—was transferred to the end cars resulting in potential injuries to train employees. This may have been a real danger when the Arizona law was passed in 1912. At one point, railroad employees had to run across the top of railroad cars to set breaks and release couplings, but with the passage of The Railroad Safety Appliance Act of 1893, improved brakes and couplers made it less necessary for railroad employees to run across the tops of railroad cars.[72] Nonetheless, statistics from 1939 indicated that 399 train employees had been injured by slack action, including three fatalities.[73]

It was not necessary for the Court to directly confront whether the number of injuries and fatalities to railroad employees justified the harm to interstate commerce. In a somewhat unusual twist, the Court found that whatever the validity of the concern for slack action, the slack action concerns were more than offset by the increased injuries as a result of the need for railroads to operate almost one third more trains in Arizona. It is a fact of life that trains crossing intersections with cars and pedestrians kill people, and in 1939, 1,398 persons were

71. For an example of Newton's Cradle in use, *see generally The Office: Michael Scott Paper Company* (NBC television broadcast Apr. 9, 2009).

72. Railroad Safety Appliance Act, 27 Stat. 531 (1893) (current version at 49 U.S.C. § 20302 (1994)).

73. *S. Pac. Co.*, 325 U.S. at 777 n.6.

killed and 3,999 injured in Arizona.[74] The Arizona law meant thirty percent more crossings, leading to the real possibility that a third of those being killed or injured were as a result of the train limits.[75] The additional trains also contributed to more injuries to railroad employees, because of the greater number of stops and starts, perhaps even leading to more slack action injuries.[76]

The nature of the state interest is harder to discern.[77] The nature of the state interest, while not entirely clear, seems to suggest that certain interests are accorded more weight than others. The Court has said that local safety matters, particularly related to roads, have to be given considerable weight heavily in favor of the state in justifying a burden on interstate commerce; "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways."[78] *Southern Pacific* seemed to address the nature of the state interest in rejecting *Barnwell Brothers* as a controlling precedent. The Court said that "the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads."[79] The presumption that safety regulation

74. In about 1958, I avoided being a statistic when I tried to beat a train on my bicycle on my way home from the Manteca, California public library. I made it; the library books bungee-corded in a cardboard box to the back of my bicycle did not.

75. *S. Pac. Co*., 325 U.S. at 772.

76. *Id.* at 777–78.

77. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). *Pike's* statement of its balancing test balances the "nature of the local interest" versus "extent of the burden" but does not attempt to develop what it means by "nature of the local interest" as opposed to the practical importance of the state interest. *Id.* In *Pike* itself the state had claimed an interest in protecting Arizona's reputation for quality cantaloupe, hardly an earth shattering interest, but not something in its nature clearly inappropriate. *Id*. Unlike burdens on interstate commerce, the courts do not typically refer to the "nature and extent" of the local interest. There are occasional exceptions. Underhill Assocs. Inc. v. Bradshaw, 674 F.2d 293, 295 (4th Cir. 1982) (citations omitted) ("To determine Virginia's power to regulate the activities of nonresidents, we must look to the extent of these nonresidents' contacts with Virginia and to the nature and extent of the state's interest in exercising its authority."). *Underhill*, 674 F.2d at 295, cited to Travelers Health Ass'n v. Virgina *ex rel.* State Corp. Com'n, 339 U.S. 643 (1950), which did not actually use the compound phrase "nature and extent" but did discuss "nature" and "extent" separately a number of times.

78. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938).

79. *S. Pac. Co.*, 325 U.S. at 783.

of public highways was by the nature of the interest inherently weighty is one of the lasting by-products of the *Barnwell Brother's* case, and is referenced in a number of cases.[80]

Two early Twentieth Century cases involving certificate of conveniences for interstate trucks recognizes that the Court is more willing to accept the nature of the state interest in public safety than as to economic competition.[81] In one case, Ohio expressed concern for traffic congestion in denying a certificate of convenience to an out of state trucking company, which seemed to be important in the Court finding no Dormant Commerce Clause violation.[82] In the other case, the Court found a violation of the Dormant Commerce Clause from the state of Washington's denial of a certificate of convenience to an out of state company, because of the state's concern for destructive competition.[83] Although a concern for competition is not a per se violation of the Dormant Commerce Clause,[84] the Court would

80. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959) ("The power of the State to regulate the use of its highways is broad and pervasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce.").

81. A District Court took this as the lesson from *Pike*, "[W]hen it comes to the dormant Commerce Clause, health and safety regulations are more tenable than standard economic regulation. When these concerns are at issue, somewhat greater burdens may be placed on interstate commerce than might otherwise be acceptable." All. of Auto. Mfrs. v. Kirkpatrick, No. CIV. 02-149-B-W, 2003 WL 21684464, at *12 (D. Me. July 17, 2003), *report and recommendation adopted*, No. CIV. 02-149-B-W, 2004 WL 305598 (D. Me. Feb. 17, 2004)

82. Bradley v. Pub. Utilities Comm'n of Ohio, 289 U.S. 92, 95 (1933) ("In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway.").

83. Buck v. Kuykendall, 267 U.S. 307, 315 (1925) ("Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition."); The Fourth Circuit remanded a case to the District Court where "competition" was one factor in granting a "certificate of public need" to operate a medical enterprise in the state of Virginia. Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 540 (4th Cir. 2013).

84. *See* Parker v. Brown, 317 U.S. 341 (1943). In *Parker*, in order to lessen the destructive price competition between California raisin growers, California created a brokerage system whereby California raisin growers had to turn over most of their crops to a state agency that would bargain with buyers of raisins. *Id.* The end result was to get a higher price for the raisin growers with the bulk of the burden of that higher price falling on interstate purchasers of raisins. *Id.* Despite the harm to interstate commerce from the state's attempt to give California raisin growers a competitive advantage, the Court upheld the law.

seem to be more accepting of a safety rationale than a competition rationale for burdens on interstate commerce.[85]

In *Southern Pacific*, all things considered, the actual importance of the state interest—slack action injuries and deaths versus crossing intersection injuries and deaths—was, the Court concluded, "at most slight and dubious."[86] Based upon these first two factors alone, nature and extent of the burden on interstate commerce versus the nature and extent of the local interest, the Arizona Train Limit Law would have likely failed the balancing test. As the *Southern Pacific* Court said, it had a "seriously adverse effect on transportation efficiency and economy" and did not appear to "lessen rather than increase the danger of accident."[87] Nonetheless, *Southern Pacific* considered other factors that might very well be important in deciding factually closer cases.

C. Are state and local laws politically self-correcting?[88]

In *Southern Pacific*, the Court stated that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."[89] Factually, it would be harder to find a case with

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Id.

85. Auclair Transp., Inc. v. State, 305 A.2d 662, 664 (N.H. 1973). The New Hampshire Supreme Court nicely summarized this difference, "But in the absence of such federal authorization, a State public utilities commission has no constitutional power to permit or prohibit interstate carriage by motor freight carrier on grounds primarily related to competition and not highway safety and conservation." *Id.*

86. The Arizona trial court "found that the Arizona law had no reasonable relation to safety." S. Pac. Co. v. Arizona, 325 U.S. 761, 779 (1945).

87. *Id.* at 781–82.

88. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 582–83 (1997) (the doctrine is sometimes called the "inner political check doctrine.").

89. *S. Pac. Co.*, 325 U.S. at 767 n.2. The concept of state law impacting interstate commerce being politically self-correcting dates as far back as 1865, "If a State exercise unwisely the power here in question [building a bridge affecting interstate commerce], the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other State. Hence, there is as little danger of the abuse of this power as of any other reserved to the States." *See* Gilman v. City of Philadelphia, 70 U.S. 713, 731

more of a disproportionate impact on interstate commerce; "approximately 93% of the freight traffic and 95% of the passenger traffic in Arizona was interstate."[90] To the degree that the Court's theory that the political processes will work less well if the burdens are out of state, then Arizona would have little incentive to correct the abuses of the Train Limit Law. The law was unlikely to be politically self-correcting.[91]

In *Southern Pacific*, the Court reasoned that because the burden fell primarily on interstate commerce, there was little in-state political incentive to revise the 1912 law to lessen the impact.[92] The concern for whether a particular law might be politically self-correcting was raised by Justice Stone, the author of *Southern Pacific*, in another footnote in the 1938 *Barnwell* case, "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[93]

D. Is there a significant danger of multiplicity of inconsistent local regulations?

In *Southern Pacific*, many other states had either considered or passed maximum train lengths, and the Court recognized the issues that may arise due to inconsistent regulations across state lines: "[T]he confusion and difficulty

(1865).

90. *S. Pac. Co.* 325 U.S., at 771.

91. Perhaps the Court's view of what would be politically self-correcting is somewhat narrow. It would seem that the affected railroad companies might have used their spending power to influence legislation in Arizona even if the impact was out of state. But the reality in the case seems to have been otherwise. It may be that the Train Limit Law had advantages to the economy of Arizona not mentioned in the case, such as the employment within the state of the railroad employees used to transfer the nearly one-third additional trains across the state. In another case considering the political processes, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) the Court found that the number of exceptions to a law limiting the length of trucks "weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce."

92. *S. Pac. Co.*, 325 U.S. at 771–72.

93. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 186 (1938). *Barnwell* made no effort to apply the concept.

with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident."[94] The facts of *Southern Pacific* could hardly have been clearer in establishing the danger of inconsistent train limit regulations. Although only three such laws had actually been passed since 1920, over 164 such laws had been introduced to state legislatures.[95] While it would not be strictly true that an interstate railroad would be physically unable to comply with the different laws, it would have been exceedingly difficult.[96] Among the examples the Court gave had the various proposed laws passed, "A train from Arkansas to Wisconsin might be subjected to a fifty car maximum (Arkansas), one-half mile (Mississippi), three thousand feet (Iowa), one and a half miles (Minnesota), and thirty-three hundred feet (Wisconsin)."[97] Or another example:

> A train running from Nebraska to California might be subject to a sixty, seventy-five or eighty-five maximum in Nebraska, to a limit fixed by commission in Kansas, to a sixty-five car limit in Colorado, to a seventy-five car limit in New Mexico, to a seventy car limit in Arizona, and to a seventy-four car limit in California.[98]

Had the balance between the harm to interstate commerce and importance of the state safety interest been closer in *Southern Pacific*, the multiplicity of inconsistent state regulations might very well have made a difference.

One case where the danger of the multiplicity of inconsistent burdens seemed to be the deciding factor was *Bibb*

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94. *S. Pac. Co.*, 325 U.S. at 774. *See also* Bibb v. Navajo Freight Lines, Inc. 359 U.S. 520 (1959).

95. *S. Pac. Co.*, 325 U.S. at 773, n.3.

96. One of the other concerns is that in the face of inconsistent state laws, a dominant state's laws will become the national standard by default. Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1006 (2013) ("A related fear was that one state might establish a rule that was more strict than any other state's rule and that an interstate actor might comply with the strict rule, thus permitting a single state to establish a de facto national standard.").

97. *S. Pac. Co.*, 325 U.S. at 774, n.4.

98. *Id.*

v. Navajo Freight Lines, Inc.[99] In *Bibb*, the state of Illinois required trucks operating in Illinois, including interstate trucks with certificates from the Interstate Commerce Commission, to have curved mudflaps. Almost all of the other continental states allowed the conventional straight mudflaps, and Arkansas disallowed curved mudflaps.[100] Interstate trucks often saved time in loading and unloading trailers from other trucking companies by switching trailers in lieu of actually loading and unloading, a practice called interlining. As a result of interlining, the trailer might be allowed in a state in which the truck cabin was not. The conflict between the Illinois law and the Arkansas law meant that the same trailer could not be used in both Illinois and Arkansas, which because of interlining might be quite common.[101] The Court in an opinion by Justice Douglas said that if the only issue was the cost of compliance, up to $45,840,[102] or of the much-disputed safety advantages,[103] he would rule in favor of Illinois. But because the conflict between Illinois and Arkansas disrupted interlining, one of the bedrocks of the trucking industry, he found the burden on interstate commerce to be too great. In *Southern Pacific*, Justice Douglas had argued that only discriminatory laws violate the Dormant Commerce Clause,[104] but *Bibb* he said was "one of those cases—

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99. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

100. *Id*. at 523.

101. One can see the practice of interlining in the railroad industry anytime one is stopped at a railroad crossing. During even the briefest of stops, one will observe railroad cars from a multitude of different railroad lines. I personally consider it a lucky day when I see a car from the Wabash Cannonball, more formally called the Rock Island Line, because my dad loved country western legend Roy Acuff's 1938 version of a song about the line: *"Hear the mighty rush of the engine hear those lonesome hoboes call Traveling through the jungle on the Wabash Cannonball."* ROY ACUFF, *Wabash Cannonball, on* THE ESSENTIAL ROY ACUFF (Sony BMG Music Ent. 2004).

102. *Bibb*, 359 U.S. at 525.

103. *Id.* Illinois claimed that curved mudflaps help prevent gravel and other debris from being tossed into the windshield of trailing cars. Among other things on the other side of the argument, the curved flaps were said to make the truck breaks less effective because of heat accumulation.

104. S. Pac. Co. v. Arizona, 325 U.S. 761, 795 (Douglas, J., dissenting) (citations omitted):

> I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce. My view has been that the courts should intervene

few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[105]

E. Is there a need for uniformity versus a need for diversity?

Although the test in *Cooley* is no longer the primary test, the need for uniformity versus diversity is still very much a part of the balancing test in *Southern Pacific*. *Southern Pacific* dated the concern for uniformity from the earliest recognition of Dormant Commerce Clause concerns:

> But ever since *Gibbons v. Ogden*, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any,

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only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted.

Professor Eule agrees with this view of Justice Douglas, "It no longer makes sense for the Court to invalidate evenhanded state legislation merely because it burdens interstate commerce too heavily." Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 436 (1982).

105. *Bibb*, 359 U.S. at 529. In Edgar v. Mite Corp., 457 U.S. 624 (1982), Justice White's plurality opinion struck down on direct/indirect Dormant Commerce Clause grounds an Illinois law that regulated hostile takeovers in any attempt that involved a target company where ten percent of the target company's shares were owned by shareholders located in Illinois, whereas "The Commerce Clause, permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited." *Id.* at 640. Justice White concluded that the Illinois law was a direct regulation because of its "sweeping extraterritorial effect." *Id.* at 642. Under the ten percent standard, at least ten different states could regulate the same hostile takeover. Other members of the Court agreed that the law violated the Dormant Commerce Clause, but based upon the balancing test, "for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." *Id.* at 643. In CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987), the Court upheld an Indiana regulation of hostile takeovers that applied only to companies incorporated in Indiana. Although the plurality in *Mite* emphasized the direct versus indirect burden, *Mite* presented a real danger of inconsistent state regulations while *CTS* presented none, because it only applied to corporations incorporated in the home state.

be prescribed by a single authority.[106]

Southern Pacific recognized the state's ability to regulate some matters affecting interstate commerce "provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."[107] In the Court's statement of its balancing test, it emphasized that one of the purposes of the balancing was to ensure "that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."[108] As to the facts of *Southern Pacific*, the Court emphasized the need for uniformity at least three times. First, it noted that most interstate trains were longer than the Arizona limits and that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system."[109] Second, it concluded, "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application."[110] Third, as to train limit laws generally, it said, "With such laws in force in states which are interspersed with those having no limit on train lengths, the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such

106. *S. Pac. Co.*, 325 U.S. at 767 (citations omitted). The Court also cited to *Cooley* for this proposition. *See* Cooley v. Bd. of Wardens 53 U.S. 299 (1851).

107. *S. Pac. Co.*, 325 U.S at 770.

108. *Id.* at 770–71.

109. *Id.* at 771.

110. *Id.* at 773. Justice Thomas in a 2007 case said that the Court's reliance on *Cooley* "is curious because the Court has abandoned the reasoning of those cases in its more recent jurisprudence." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 350 (2007). He later double downs and says the *Cooley* test has "been rejected entirely." *Id.* at 351. *Southern Pacific* seems more of an evolution than abandonment, and it hardly seems a rejection in its entirety.

regulation, if any, are evident."[111]

F. Is the impact on interstate commerce direct or indirect?

The concerns for direct versus indirect impact on interstate commerce can be traced to one of the earliest Dormant Commerce Clause cases. In *Black Bird Creek*, a state law permitted the building of a dam to address the local matter of troublesome swamplands, which impacted interstate commerce by obstructing navigation as to a minor interstate tributary. Chief Justice Marshall dismissed any Dormant Commerce Clause concerns leading to the later proposition that local laws that incidentally or indirectly impacted interstate commerce might be presumptively less harmful to interstate commerce than a local law that intended to directly regulate commerce in another state.[112] *Southern Pacific* did not use the term "direct" or "indirect," but it seemed to refer to this concern:

> When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.[113]

While this language seems to refer to the same concerns as in *Black Bird Creek*, *Southern Pacific* may have been mildly praised or criticized—it is hard to know which—in *Pike v. Bruce Church* for using a balancing test as opposed to the direct/indirect approach: "Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, but more frequently it

111. *S. Pac. Co.*, 325 U.S at 774, n.4. Note four of the Court's opinion summarized at this point the impact on interstate commerce if various proposed laws regulating train lengths had actually been passed.

112. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980) ("Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade.").

113. *S. Pac. Co.*, 325 U.S. at 767.

has spoken in terms of 'direct' and 'indirect' effects and burdens."[114]

The *Pike* Court was surely correct that prior to *Southern Pacific* the Court was more likely to refer to direct or indirect burdens as opposed to undue burdens balancing. To the degree that direct or indirect has any meaning,[115] the *Southern Pacific* Court seems to refer to "indirect" burdens when it uses the phrases "matters of local concern" and "local in character and effect." In short, burdens on interstate commerce are indirect when the state attempts to address a local problem but in so doing incidentally or indirectly impacts interstate commerce. In *Black Bird Creek*, the state was trying to address a concern for the economic and health aspects of a local marsh,[116] and in allowing a dam to be built that addressed that local concern, it incidentally or indirectly obstructed an interstate stream.

"Incidental," is the watchword for virtually every modern Supreme Court statement about the Dormant Commerce Clause. Generally, as in *Pike v. Bruce Church*, statements of the balancing rule require that the law be both "evenhanded" and "incidental."[117] This is almost always the preface to what is commonly called the *Pike* balancing test.[118] It has become almost the mantra for lower courts.[119] The meaning of

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114. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

115. Professor Denning refers to the "ultimate sterility of the direct/indirect test." Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 441 (2008).

116. See Chief Justice Marshall's speculation, "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved." Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 251 (1829).

117. *Pike*, 397 U.S. at 142. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) ("Under that general rule, we must inquire whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce...").

118. Alliant Energy Corp. v. Bie, 330 F.3d 904, 911 (7th Cir. 2003) ("This test has become known as the *Pike* balancing test."). According to Westlaw, over 1,000 cases cite to *Pike*, using both the terms "evenhanded" and "incidental." *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (see citing references).

119. *See, e.g.*, Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 11 (1st Cir. 2007) (internal quotation marks omitted) ("A statute that regulates evenhandedly and has only incidental effects on interstate commerce engenders a lower level of scrutiny."); Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) (internal quotation marks omitted) ("A state statute that regulates evenhandedly and has

"evenhanded" is clear enough as a synonym for "nondiscriminatory."[120] The meaning of "incidental" seems to be a synonym for "indirect." The Court has restated the *Pike* balancing test and cited to *Pike* using the term "indirect" in place of "incidental."[121]

The bigger question is why it matters whether a state law that burdens interstate commerce in an evenhanded kind of way is "indirect" or "incidental." If the state of Missouri dams up the Mississippi river, it is of no consequence that such was the direct intent of the State or that the State built a dam to address local flooding with the incidental impact of shutting down the Mississippi river. It is the extent of the impact, not whether it is incidental or not, that should be important. It is arguable that the damming of Black Bird Creek did not violate the Dormant Commerce Clause because it was incidental, but because it only impacted a minor interstate tributary.[122]

Maybe the Court uses the term "incidental" to signal their concern for direct regulations.[123] Direct burdens are presumed

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only incidental effects on interstate commerce" engenders a lower level of scrutiny."); Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1013 (9th Cir. 1994) ("[W]e apply the test for evenhanded regulations with incidental burdens on interstate and foreign commerce.").

120. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994) (citations omitted) ("By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"). The Court used the term "legitimate" as a synonym for "evenhanded," in Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978), "The crucial inquiry, therefore, must be directed to determining whether [the state law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

121. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) ("When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

122. See Justice McLean's comment about Black Bird Creek: "The chief justice was speaking of a creek which falls into the Delaware, and admitted in the pleadings to be navigable, but of so limited an extent that it might well be doubted whether the general regulation of commerce could apply to it. Hundreds of creeks within the flow of the tide were similarly situated." Smith v. Turner, 48 U.S. 283, 398 (1849).

123. For "direct," the Court in Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) used the term "extraterritorial effects of state economic regulation." *Healy* also has one of the Court's most careful discussions of the modern

to burden interstate commerce more than indirect burdens.[124]

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meaning of "direct." *Id.* at 336. *Healy* said, "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336–37. *See also* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497 (2016).

124. Some cases equate "direct" with "discrimination" and "indirect" with "evenhanded." *Brown-Forman*., 476 U.S. at 579 (citations omitted) (emphasis added):

> When 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. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Accord Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 523 (1989). While some of the cases support equating direct with discrimination, this seems a mistake of the highest order. Professor Rosen makes this same point:

> The Dormant Commerce Clause jurisprudence that speaks of a near per se prohibition of extraterritoriality likewise should be understood as applying only to protectionist state statutes; some lower-level balancing of the local interests against the costs imposed on interstate commerce is appropriate in respect of statutes emanating from the state's historical police powers that regulate extraterritorially.

Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 923 (2002). *See* Baldwin v. G.A.F. Seelig, Inc, 294 U.S. 511 (1935), where New York's attempt to regulate the price at which milk was sold in other states was an attempt at equality, not discrimination. In order to help New York farmers, New York fixed a minimum price that milk dealers had to pay to dairy farmers in state and out of state. It was a direct or intentional regulation of the price of milk sold by out of state farmers, but it was not discriminatory. Also, in *Brown-Forman*, New York wanted equal treatment of New York alcohol dealers, not any discriminatory advantage. *Brown*-Forman, 476 U.S. 573. Even if the law is not viewed as discriminatory, the fact that it intentionally tries to regulate commerce in other states may be enough to strike the law down. BlueHippo Funding, LLC v. McGraw, 609 F. Supp. 2d 576, 586 (S.D.W. Va. 2009) ("In this circuit, the rule of virtual *per se* invalidity used within the discrimination tier extends beyond discriminatory laws and reaches as well those state laws that operate extraterritorially."). Professor Martin seems to endorse this approach, "The extraterritorial doctrine applies when a state regulates conduct that is wholly outside its own borders and, under the doctrine, unconstitutionality

Direct burdens are viewed as a deliberate attempt by a state to regulate commerce in another state.[125] In *Baldwin v. Seelig*, the state of New York, as part of a program to give farmers a higher income, fixed the minimum price at which milk had to be purchased. The law, if intentionally applied to farmers in other states, would be viewed as a direct burden. It was not a discriminatory tariff as the Court claimed,[126] but it might very well have dried up the interstate market.[127] A milk dealer in New York would have no incentive to pursue bargains in another state if she had to pay the same amount for her milk whether in state or out of state. *Brown-Forman v. New York State Liquor Authority*[128] is perhaps the best modern case illustrating a direct

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does not depend on the regulation's discriminating against out-of-staters." Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 501 (2016).

125. *Brown-Forman*, 476 U.S. at 582 ("Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.").

126. *Baldwin*, 294 U.S. at 521 ("Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."). The higher price to the farmers was not similar to a customs duties or tariff in that the difference between the market price and the higher price New York required went to the out of state farmer, not to the state as would be the case with a tariff. It would be like a tariff in that consumers in New York would ultimately have to pay for the higher costs.

127. Professor McGreal nicely summarizes the effect of cases like *Baldwin*, 294 U.S. 511, stating that:

> The detrimental effect of New York's milk laws on the single milk dealer in Baldwin or Hood might not have had a significant effect on the national economy, but allowing state action of that type would put the nation on a slippery slope to interstate trade barriers and other anticompetitive measures.

Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1222 (1998).

128. Brown-Foreman v. N.Y. State Liquor Authority, 476 U.S. 573 (1986). In one of the more famous cases involving a direct burden, *Baldwin*, 294 U.S. at 522, the Court struck down a law as a "direct" burden because of its regulation of the price at which milk could be sold in other states. In *Seelig*, New York law required milk dealers in New York to pay a fixed minimum price for milk purchased from farmers, including both in state and out of state farmers. *Id.* New York was attempting to provide dairy farmers a reasonable rate of return in a time of oversupply of milk. *Id.* The closeness of New York to neighboring states also producing milk made it impractical to apply its law to only in-state purchases. *Id.* The Court then addressed the argument as to

burden. In *Brown-Forman,* the Court struck down a New York law that required liquor distributors throughout the United States to sell to New York wholesalers at the lowest price that the liquor was sold anywhere in the United States. New York had a fixed retail price at which liquor had to be sold in New York, and it did not want distributors gaming the system with unfair profits. The Court accepted the argument of Brown-Forman, a distiller of liquor, that the law was a direct burden on interstate commerce because it "effectively regulates the price at which liquor is sold in other States."[129] It meant that distillers could not run special deals in other states without offering the dealers in New York the same price.

Historically, the direct/indirect test was a separate test all of its own. Whether after *Wayfair*, the direct/indirect test is still a separate test is at least debatable, but the test's exclusion from a general statement of the law is hardly conclusive. Even if it is not a separate test, the test still seems to have relevancy as one of the factors in the balancing test.[130] Incidental or indirect

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whether the New York law was a direct or indirect burden:

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.

Id. at 522; One of the earliest cases finding a "direct" burden was Hall v. De Cuir., 95 U.S. 485, 488 (1877). The Court struck down a Louisiana law barring segregation on trains in Louisiana, including interstate trains, stating that "But we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress." *Id.* The law, as the Court saw it, acted "directly upon the business as it comes into the State from without or goes out from within." *Id.* at 489. Although its ostensible purpose was to regulate only train travel within the state, "it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage." *Id.*

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

130. Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 268 (2017) (Professor Francis agrees, stating that: "It may be right, as Goldsmith and Sykes seem to suggest, that the "extraterritoriality" cases may be best assimilated to the Dormant Commerce Clause doctrine, if at all, under the rubric of burden review."); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 804

burdens in a balancing test might be presumed to be less harmful to commerce than a direct burden. Direct burdens might be presumed to be more harmful to interstate commerce than indirect burdens. But as a factor in the balancing test, "direct" would be only one of the considerations, not the decisive factor that it might have been when direct/indirect was its own separate test, and direct burdens were presumptively invalid.

G. Is there any federal legislation indicating Congress' desire?

Congressional laws can impact the Dormant Commerce Clause in three different ways. First, Congress can permit the states to regulate interstate commerce in a way that would otherwise violate the Dormant Commerce Clause. Second, Congress, pursuant to the doctrine of preemption,[131] can prevent the states from regulating anything affecting interstate commerce, even if such regulations would not run afoul of the Dormant Commerce Clause. As the Court put in in *Southern Pacific:*

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible" or Congress can "exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.[132]

Southern Pacific seemed to recognize a third aspect of

(2001) ("[We] submit that the appropriate statement of the extraterritoriality concern is that states may not impose burdens on out-of-state actors that outweigh the in-state benefits in the sense that we described above.").

131. Under the Supremacy Clause, federal law preempts inconsistent state law. U.S. CONST. art. VI. In 1942, Congress specifically suspended all state train limit laws as an emergency measure during World War II. S. Pac. Co. v. Arizona, 325 U.S. 761 (1945). *Southern Pacific* also stated the general rule for preemption: "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested." *Id.* at 766.

132. *Id.* at 769 (citations omitted).

federal law. Even if a federal law does not permit state burdens on interstate commerce or preempt state law that would not violate the Dormant Commerce Clause, federal law can be a factor in the balancing test as further evidence that Congress believed that a subject was either one of national importance needing uniformity or a local matter needing diversity of regulation.

Under the third factor, the federal law is but one aspect of the balancing test, not a determinative factor all by itself. In *Southern Pacific*, the Court said that the Arizona law "interposes a substantial obstruction to the national policy proclaimed by Congress [in the Interstate Commerce Act], to promote adequate, economical and efficient railway transportation service."[133] Federal law, though not specifically controlling, was one factor indicating that Congress believed that there was a need for uniformity of regulations as to railways. Admittedly, the federal law was not a major part of the balancing test in *Southern Pacific*, but it does appear to be one factor. In *Huron Portland Cement v. Detroit* the Court referred, though not by name, to the federal Air Pollution Control Act of 1955 as having "recently recognized the importance and legitimacy" of "elimination of air pollution to protect the health and enhance the cleanliness of the local community."[134] The Court said that the legislation was recognition that Congress believed that "air pollution is peculiarly a matter of state and local concern is manifest in this legislation. "[135] The Senate Committee Report had underlined that point; "The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution."[136] The Court's primary issue in *Huron Portland Cement* was a preemption issue, but in summary fashion, it also dismissed the Dormant Commerce Clause issue.[137]

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133. *Id.* at 773 (citing to Interstate Commerce Act, 49 U.S.C. §§ 3-22 (Suppl. 2 1925)).

134. Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 445 (1960).

135. *Id.* at 446.

136. *Id.*

137. *See* Parker v. Brown, 317 U.S. 341, 354 (1943), upholding California's brokerage form of selling its raisins in part because Congress had authorized similar laws as to other farm commodities. ("It is evident, therefore, that the

8. Are there reasonable alternatives to advancing the legitimate state interest without undue harm to interstate commerce?

Pike introduces consideration of whether there might be some state regulation with a "lesser impact" on interstate commerce. This was likely an unstated part of *Southern Pacific's* balancing test. The balancing test for the Dormant Commerce Clause is what would be called in Constitutional Law circles[138] an intermediate test, which is variously framed, but will often include some version of a "lesser impact" or reasonable alternative requirement,[139] sometimes if only obliquely with the requirement that the law be "narrowly tailored"[140] or "be

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[federal] Marketing Act contemplates the existence of state programs at least until such time as the Secretary [of Agriculture] shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act."). *Id.*

138. Each region of the country will have its own rituals for these circle gatherings, but in California, brie and chardonnay are usually served.

139. A common intermediate test for content neutral regulations of speech is found in United States v. O'Brien, 391 U.S. 367(1968). There, the Court upheld laws impacting content neutral speech, including symbolic speech, "if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is *no greater than is essential* to the furtherance of that interest." *Id.* at 377 (emphasis added). The phrase "no greater than essential" would be similar to no "lesser impact."

140. The Court's intermediate test for content neutral time, place, and manner regulations required that any law restricting such speech must be "*narrowly tailored* to serve a significant governmental interest, and that they *leave open ample alternative channels for communication* of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added) (citations omitted) (internal quotes omitted). Both the "narrowly tailored" and "alternative channels" suggest something similar to "lesser impact." *Id.*

substantially related"[141] to the purpose.[142] As to state laws that "plainly discriminate against interstate commerce," the Court in *Dean Milk v. Madison*[143] said that the state could not pursue even "its unquestioned power to protect the health and safety of its people, if *reasonable nondiscriminatory alternatives*, adequate to conserve legitimate local interests, are available." "Lesser impact" and "reasonable alternatives" appear similar in construct to the intermediate test. In cases not involving discrimination, the Court will consider reasonable alternatives, and if there are reasonable alternatives without the same harm to interstate commerce, they will fail the "lesser impact" portion of the test. The Court in *Maine v. Taylor* upheld a discriminatory law in large part because there were no reasonable alternatives.[144]

IV. State regulations that discriminate against interstate commerce

A. Defining discrimination

The Court summarized its rule against discrimination in *United Haulers v. Oneida-Herkimer Solid Waste Management* in 2007; "To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. In this context, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the

141. Craig v. Boren, 429 U.S. 190, 197 (1976) (emphasis added) (citations omitted) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be *substantially related* to achievement of those objectives."). Justice Douglas, discussing "substantial relationship" stated, "And the State cannot meet that burden without showing that a gender-neutral statute would be a less effective means of achieving that goal." *M. v. Superior Ct.*, 450 U.S. 464, 490 (1981) (Douglas, J., dissenting) (citations omitted).

142. The strict scrutiny compelling state interest test requires that a law be the least restrictive alternative. The rational basis permissive scrutiny test does not consider alternatives at all.

143. Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951) (emphasis added).

144. Maine v. Taylor, 477 U.S. 131, 151(1986).

former and burdens the latter."[145] The Court in *New Energy Co. of Indiana v. Limbach*[146] equated discrimination with "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," and concluded that "state statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[147]

Whatever the definition of "discrimination," the most common phrase used by the Court to describe its approach to Dormant Commerce Clause discrimination issues is that state laws that discriminate against interstate commerce are "virtually per se invalid."[148] *Pike v. Bruce Church* was the first

145. The definition of *discrimination* in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) is derived from Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994); "As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." The Court's rules require that the party claiming discrimination bears the burden of proving it, but once discrimination is shown, the State has the burden of justifying it. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)), ("The burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce. . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'").

146. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988). Even a relatively straightforward discrimination case such as *Limbach* has its critics. Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 32–33 (2002), ("No decision of the Supreme Court better exemplifies the doctrinal problems of the dormant Commerce Clause nondiscrimination principle than New Energy Company of Indiana v. Limbach."). Professor Zelinsky is primarily concerned with the Court's different treatment of discriminatory taxes versus its treatment of discriminatory subsidies. *Id.*

147. *New Energy Co.*, 486 U.S. at 273. Professor O'Grady argues that discrimination and economic protections are different concepts. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 587 (1997).

148. Including Pike v. Bruce Church, 397 U.S. 137, 145 (1970), twenty-six Supreme Court Dormant Commerce Clause cases have used the phrase "virtually per se"; *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091

case to use the adverb "virtually" as part of a Dormant Commerce Clause per se test; "Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be *virtually per se* illegal."[149] Despite the seeming ease of the rule, the Court's decisions as to discrimination are a morass.[150] With the adverb "virtually" the

(2018); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) (Davis said that a virtually per se invalid discriminatory law "will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives' Oregon Waste." *Id.* (citations omitted); Granholm v. Heald, 544 U.S. 460, 476, 125 S. Ct. 1885, 1897, (2005); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 671 (2003) (Breyer, J., concurring); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 565 (1997); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997); Fulton Corp. v. Faulkner, 516 U.S. 325, 331–32 (1996); Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 647 (1994); C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 389–90 (1994) (O'Connor, J., concurring); Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344, n. 6 (1992) (citations omitted) (the Court said, The "virtually per se rule of invalidity," applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade."); Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 523 (1989); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988) (*Limbach* says that state laws requiring the "virtually per se" test may be a "fatal defect" or at least require strict scrutiny); Maine v. Taylor, 477 U.S. 131, 148 (1986) (the Court offered an example of the rule—"Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose."); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984); White v. Mass. Council of Const. Employers, Inc., 460 U.S. 204, 223 (1983) (Blackman, J., concurring in part and dissenting in part); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 686 (1981) (Brennan, J., concurring on discrimination grounds as to the judgment; the majority opinion found an undue burden); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471(1981); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980); City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978) (only City of Philadelphia attempts any explanation of the phrase); Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 336 (1977); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 821 (1976) (Brennan, J., dissenting).

149. *Pike*, 397 U.S. at 145 (emphasis added).

150. Julian Cyril Zebot, *Awakening A Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063 (2002). ("As a legal doctrine, the dormant Commerce Clause has often proven to be a difficult specimen. In applying the doctrine, the Supreme Court has labeled it a 'quagmire,' 'not

rule against discrimination is anything but a clear and simple black and white rule. Among the difficulties captured by that adverb, the line between the two seemingly very different tests—the undue burdens balancing test and the per se discrimination test—became murky and obscure.[151] But the qualifying adverb "virtually" did not cause the problem; rather the adverb is the shortcut reference to the fact that the Court has made the rule against discrimination unnecessarily complex. The adverb is the Court's "go to" reference to its Dormant Commerce Clause rule against discrimination, but the adverb substitutes jargon for any attempt to explain or defend the Court's approach to state laws that discriminate against interstate commerce.

As will be discussed later, there are cases where there is some difficulty in determining if there was discrimination, but those cases are not the biggest problem. The Court's approach to cases where the fact of discrimination is undeniable manages to complicate what should be simpler rules against local discrimination. The Court seems to have lost sight of just how simple this rule should be. Discrimination is classification based upon origin.[152] It is "originism." It is as contrary to the Dormant Commerce Clause as racism and sexism are to the Equal Protection Clause. Discrimination based upon origin means treating out of state commerce differently than in-state commerce because it is out of state. It is economic protectionism designed to benefit in-state economic interest over out-of-state economic interests. The Court has made a basic mistake in construing obvious discrimination as perhaps being part of a valid state concern, leading to the introduction of the adverb

predictable,' 'hopelessly confused,' and 'not always . . . easy to follow.'"). *Contra*, Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1205 (1986) ("This Article contends that the Supreme Court's rules concerning state discrimination against interstate commerce are reasonably clear; that they fit together and rest on tenable reasons; and that they have produced reasonably uniform results.").

151. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986), ("We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.").

152. *C & A Carbone*, 511 U.S. at 390 ("We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.").

"virtually" to a per se test. There is no part of a "per se" test that needs a modifier, let alone one as imprecise as "virtually."[153]

In truth, there are two lines of discrimination cases that parallel each other, those in which the state discrimination against interstate commerce is "per se" invalid and those in which the discrimination is "virtually per se" invalid. In these latter cases, the Court will generally engage in some form of balancing, and thus I call the approach in these cases "virtually per se balancing." The Court itself has not acknowledged that it is applying two distinct tests. In those lines of cases that apply the "per se" test, once the discrimination is found, all of the elements required for a violation of the Dormant Commerce Clause are presumed. The law is found invalid. No consideration is given to the state's justification for its discrimination. The state is given no chance to defend its discrimination. The state can only hang is head, take its legal briefs back home, and try to come up with a better defense in the future. Occasionally, in these "per se" line of cases, the Court will say that it is applying a "per se" test, but just as often it will say

153. Professor O'Grady points out the irony that *Pike* itself did not apply the "virtually per se" test to what appeared to be a discriminatory law. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 613 (1997); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). In discrimination cases after *Pike*, not all of them used the "virtually per se" invalidity phrase. *Id.* In Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 375 (1976), the Court conceded that a Mississippi bar of the sale of out of state milk unless the other state had a reciprocity clause effectively excluded the sales of out-of-state milk in Mississippi. The Court without any mention of discrimination or the "virtually per se" test concluded that the Mississippi law "unduly burdens the free flow of interstate commerce and cannot be justified as a permissible exercise of any state power." *Id.* at 381. Again not using the "virtually per se" phrase, the Court in Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977), found that North Carolina's law preventing the sale of apples in North Carolina with any quality grade other than applicable United States Department of Agriculture had "the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." The Court concluded, "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 353.

that it is applying a "virtually per se" test.[154] In another line of discrimination cases, the state discrimination is "virtually per se" invalid. The State will offer some local self-interest in treating interstate commerce differently than in state commerce, and the Court will undertake some form of balancing before concluding that the law violates the Dormant Commerce Clause. The Court may call this a "per se" test,[155] but more likely a "virtually per se" test. It does not matter what the test is called. In the true "per se" line of cases, there will be no balancing. In the true "virtually per se balancing" line of cases, there will be some type of balancing. The distinction is not what the Court calls it, but rather whether the Court simply strikes the law down or engages in some form of balancing before likely striking it down.

Just the one term between *Wayfair* in 2018, and *Tennessee Wine* in 2019, captures the divide in the Supreme Court as to the "per se" and what I call the "virtually per se balancing" test for state laws discriminating against interstate commerce. The Court in *Wayfair* stated it bluntly, "[S]tate regulations may not discriminate against interstate commerce;"[156] discriminatory state rules faced "a virtually *per se* rule of invalidity."[157] In the 2019 term of the Court, Justice Alito in *Tennessee Wine & Spirits Retailers v. Thomas* suggested more of a balancing approach then a per se rule, that a state law discriminating against interstate commerce would be sustained only on a showing that it was "narrowly tailored to advance a legitimate local purpose."[158] In the case, "The State of Tennessee imposes demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license

154. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984), where the Court found that Alaska's requirement that timber taken from state lands be processed within the state a per se violation without any balancing, but it referred to the test as "the rule of virtual per se invalidity."

155. *C & A Carbone*, 511 U.S., at 392.

156. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018) (citations omitted).

157. *Id.* (citations omitted). To be fair, *Wayfair* was not a discrimination case, so no more complete statement of the rule against discrimination was necessarily called for. *Id.* Still, its summary statement made no mention of any balancing after a finding of discrimination. *Id.*

158. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) (internal quotations and brackets omitted).

to operate a liquor store." The Court found the residency requirement "ill-suited to promote responsible sales and consumption practices but there are obvious alternatives that better serve that goal without discriminating against nonresidents."[159] Better, the Court finds discriminatory rules invalid simply because they are discriminatory without suggesting that the discrimination might be defended in some way. This is a true "per se" approach. *Tennessee Wine* required no more than that the law be narrowly tailored to advance some legitimate end. This suggests, at best, an intermediate balancing test and, as discussed later, not even a strong version of an intermediate balancing test. Now, in actual practice, as the Court did in *Tennessee Wine*, the Court will almost always find discriminatory laws invalid no matter which test is used.

In short, no matter what the Court calls the test, there are "per se" cases where the Court will strike down a discriminatory law without any actual balancing of competing interests. There are another group of "virtually per se balancing" cases where the Court will undertake some form of balancing.

B. A "per se" approach to discrimination

In the early cases, the Court seemed to see obvious discrimination for what it was. *Pennsylvania v. West Virginia*[160] is typical of such an early discrimination case. There, West Virginia, then the leading producer of natural gas in the United States but whose fields were in decline, required that gas companies meet the demands of all in-state customers before any natural gas could be imported into other states such as nearby Pennsylvania and Ohio. The Court said that Dormant Commerce Clause principles were intended to protect interstate commerce "from invidious restraints" and "conflicting or hostile state laws."[161] The Court gave the basic rationale, "It means that in the matter of interstate commerce we are a single nation—

159. *Id.* at 2476 (parenthetical reference to dissenting opinion omitted).

160. Pennsylvania v. West Virginia, 262 U.S. 553 (1923), aff'd *sub nom.* Pennsylvania v. West Virginia, 263 U.S. 350 (1923).

161. *Id.* at 596. The Court noted that what West Virginia might legally do "others may, and there are 10 states from which natural gas is exported for consumption in other states." *Id.*

one and the same people."[162] Even with regard to a state power as comprehensive as the laying and collecting taxes, the State could not exercise that power "in a way which involves a discrimination against such commerce."[163]

West Virginia asserted that its supply was waning and that it could not meet both local needs and those in other states. That made its law, West Virginia argued, "a legitimate measure of conservation in the interest of the people of the state,"[164] that if natural gas companies "were permitted to carry gas into other states the supply would be speedily exhausted."[165] This is a common state's justification for discrimination.[166]

The Court's response relied solely on a long quotation from a 1911 case, *West v. Kansas Nat. Gas Co.,*[167] where Oklahoma law prevented pipelines from transmitting natural gas out of state.[168] The *West* Court said Oklahoma's claim that it had the right to conserve natural gas was not a claim of the right "to conserve" but "the right to reserve," to reserve natural gas for state inhabitants now and in the future.[169] The state's conservation purpose was in fact a purpose to advance the "commercial, -the business welfare of the state."[170] If Oklahoma had the right to reserve its natural gas, the *West* Court continued, "Pennsylvania might keep its coal, the Northwest its

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162. *Id.* The Court continued, "All the states have assented to it, all are alike bound by it, and all are equally protected by it." This is a nice point; sometimes the Dormant Commerce Clause limits a state, but sometimes it protects a state.

163. *Id.* West Virginia, the Court said, was attempting to subvert commerce in natural gas in other states to "the local business within her borders", "in effect an attempt to regulate the interstate business to the advantage of the local consumers." *Id.* at 597, 597–98. The Court's conclusion was firm: "But this she may not do." *Id.* at 598. It would be no different, the Court reasoned, if the state instructed one of its railroads to "haul intrastate coal to the exclusion of interstate coal." *Id.*

164. *Id.*

165. *Id.*

166. *See e.g.*, City of Phila. v. New Jersey, 437 U.S. 617 (1978), where New Jersey sought to protect its in-state landfills from being filled up by the exclusion of out of state waste, but it imposed no limits on in state waste.

167. West v. Kan. Nat. Gas Co., 221 U.S. 229 (1911).

168. *Id.* at 249–50.

169. *Id.* at 250.

170. *Id.* at 255.

timber, the mining states their minerals."[171] And as the *West* Court saw it, the slippery slope would be worse from there, "To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."[172] But the Commerce Clause, not the welfare of individual states, the *West* Court continued, was to be preeminent and that benefited all of the states, "[T]he welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it."[173] *Pennsylvania* v. *West Virginia* quoted in full this reasoning of the *West* Court for good reason;[174] few cases have stated better than the *West* Court the importance of preventing a state from favoring its own citizens over those of other states. We are the *United* States; we stand or fall together.

There are many modern cases that follow the per se approach of the *Pennsylvania* v. *West Virginia* case, including perhaps the most noteworthy *Philadelphia v. New Jersey*.[175] The

171. *Id.* In my own courses, I claim that if Texas tried to keep its gasoline to itself, then California could say to Texas, "Okay; no more raisins for you! Let's see how you like your 'Bran' cereal." *California Raisins*, https://calraisins.org/about/the-raisin-industry/ (last visited Sept. 14, 2019) ("On approximately 200,000 acres, the 2,000 California Raisin growers produce 100% of the U.S. raisins, totaling approximately 300,000 tons annually in an area within a 60 mile radius of Fresno, California – known as the central San Joaquin Valley.").

172. *Kan. Nat. Gas Co.*, 221 U.S. at 255.

173. *Id.*

174. Pennsylvania v. West Virginia, 262 U.S. 553, 599–600 (1923).

175. City of Phila. v. New Jersey, 437 U.S. 617 (1978). There are a number of other true "per se" cases where the Court does no balancing. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (the Court struck down as discriminatory a Massachusetts assessment on all fluid milk sold by dealers to Massachusetts retailers, two-thirds of them out of state, but the entire assessment was distributed to Massachusetts dairy farmers. The Court found that the purpose was to allow higher cost in-state dairies to compete with lower-cost out of state dairies.); Wyoming v. Oklahoma, 502 U.S. 437 (1992) (the Court found that Oklahoma's requirement that all coal-fired electric generating plants in Oklahoma use at least 10% Oklahoma coal discriminated against Wyoming coal producers. The evidence showed that the law "on its face and in practical effect" discriminated. *Id.* at 455. The Court held, "Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Id.* Oklahoma's defense that it was taking only a "small portion" led the Court to quote one of its then

recent cases, "Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field." *Id.* at 456 (quoting New Energy Co. v. Limbach, 486 U.S., at 276–77). The Court gave some serious shade to Oklahoma's attempt to defend its discrimination, "We have often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by 'the illegitimate means of isolating the State from the national economy.'" *Id.* at 456–57. And Oklahoma proved that it deserved the shade by offering one of the lamest defenses of discrimination in any case by claiming that it was only helping Wyoming conserve its cleaner coal for Wyoming's future use. *Id.* at 547. Wyoming was able to show fairly convincingly that it did not need Oklahoma's help, that it had enough of its cleaner coal for the next several hundreds of years. *Id*. The Court did not balance in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (where the Court struck down Hawaii's 20% excise tax on sale of liquor at wholesale, except for okeolehao, a brandy made from the ti plant, an indigenous plant also used to make hula skirts, and pineapple wine, two wines likely made only in Hawaii (if at all). Hawaii argued for an application of the undue burdens balancing test since its purpose was to encourage "struggling" local wine production not to discriminate against wine from other states. *Id.* at 272. The Court would have none of it, finding both discrimination in purpose and effect, "[I]t is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers." *Id.* at 273. The State, of course, could encourage its domestic industry, the Court said, but not contrary to the Commerce Clause, "One of the fundamental purposes of the Clause "was to insure. . . against discriminating State legislation." *Id.* at 271. Another straightforward case for the Court was S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) where the Court found that Alaska's requirement that timber taken from state lands be processed within the state, was "a naked restraint on export of unprocessed logs." *Id.* at 99. It said that such a law could not "survive scrutiny" under the Court's precedents and concluded "that it falls within the rule of virtual per se invalidity of laws that 'bloc[k] the flow of interstate commerce at a State's borders.'" *Id.* at 100 (citations omitted). Alaska wrongly believed that its law fell within the "market participant" exception. *Id.* at 98. One of the straightforward Supreme Court per se discrimination cases is New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (New Hampshire disallowed the exportation of hydroelectricity generated by one of its many rivers, a particularly cheap and clean form of energy. *Id.* at 339. The Court identified "preferred right of access" as a classic form of discrimination. *Id.* at 338. New Hampshire was open about its purpose to "reserve for its own citizens the 'economic benefit' of such hydroelectric power," because it wrongly believed that federal law permitted the discrimination. *Id.* at 333, 342–43. This openness made the case one of the few actually involving "simple economic protectionism." *Id.* at 339); Maryland v. Louisiana 451 U.S. 725, 728 (1981) (where the Court struck down a discriminatory Louisiana tax on natural gas taken from U.S. territorial waters in the Gulf of Mexico. The Court said, "A state tax must be assessed in

Court in 1978 in *Philadelphia v. New Jersey* barred most out of state waste from landfills in New Jersey.[176] The Court summarized its rules, "The crucial inquiry, therefore, must be directed to determining whether [the state landfill law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[177] New Jersey said its purpose was to protect the environment by extending the lifespan of its current landfills. The Court said that it did not matter what New Jersey's purpose was; under the Dormant Commerce Clause, "the evil of protectionism can reside in legislative means as well as legislative ends.[178] Even assuming a valid New Jersey purpose, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[179] It could be accepted that New Jersey was legitimately concerned about overcapacity in its landfills, but even accepting that as a legitimate purpose, New Jersey also had as its purpose to discriminate against interstate commerce in addressing the environmental issue. As the Court put it, "On its face, it imposes

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light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'") *Id.* at 756.

176. There were a number of other landfill cases where City of Phila. v. New Jersey, 437 U.S. 617 (1978) was followed, including in a Michigan case, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992), where each Michigan county was allowed to exclude waste from other counties within the state as well as interstate. In Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 343 (1992), decided the same day as *Fort Gratiot*, the Court struck down on discrimination grounds Alabama's higher fees for disposal of hazardous out of state waste then such in state waste. Although Justice Thomas for the Court in Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93 (1994), came close to balancing when he engaged in an extensive discussion as to whether the state had justified a discriminatory pricing structure for disposal of out of state waste in Oregon, the Court's conclusion was that the state law was "facially invalid." *Id.* at 108.

177. *City of Phila.,* 437 U.S. at 624.

178. *Id.* at 626. As the Court said after listing the kinds of states acts found to be discriminatory in the past, "In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *Id.* at 627.

179. *Id.* at 626–27.

on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Other than origin, there was no reason to exclude all Philadelphia garbage and accept all New Jersey garbage.[180]

The New Jersey law was not like a valid quarantine law where the state was trying to keep out some diseased commodity because it was diseased. A ton of either Philadelphia or New Jersey garbage took up exactly the same space in the landfill. New Jersey, the Court said, could address the issue by "slowing the flow of all waste into the State's remaining landfills."[181] For example, the state could require that all waste, in state and out of state, be sorted so that no recyclables were placed in the landfills. That incidental impact on out of state waste might lead to an undue burdens challenge, but it would not be discriminatory.[182]

For the *Philadelphia* Court, the New Jersey's law, however admirable, its underlying purpose was not shown to be "apart from their origin."[183] It was "economic isolation,"[184] and "protectionist,"[185] in that it put the full burden of the conservation program on interstate commerce, not because it was different but because it was interstate commerce. That is

180. The Court in a later landfill case following City of Phila. v. New Jersey, 437 U.S. 617 (1978) was even more direct. *See* Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 343 (1992) (emphasis in the original), where Alabama tried to justify higher fees imposed on out of state companies for disposal of hazardous then for in state companies by listing all of the dangers of hazardous waste, but that justification did not go to the difference between in state and out of state hazardous waste; "These may all be legitimate local interests, and petitioner has not attacked them. But only rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate hazardous waste to meet these goals."

181. *City of Phila.*, 437 U.S. at 626.

182. For an example of a case where an evenhanded burden was imposed to protect landfills, Al Turi Landfill, Inc. v. Goshen, 556 F. Supp. 231, 238 (S.D.N.Y. 1982), aff'd, 697 F.2d 287 (2d Cir. 1982), the Court stated "The most significant factor leading to this conclusion is that the Ordinance is not directed towards landfills that accept refuse originating outside of the Town or the State. Rather, it is a non-discriminatory, across-the-board limitation on the construction or expansion of all landfills within the Town.".

183. *City of Phila.*, 437 U.S. at 626–27. The Court concluded on this count, "Both on its face and in its plain effect, [the New Jersey landfill law] violates this principle of nondiscrimination." *Id.* at 626.

184. *Id.* at 623.

185. *Id.* at 628.

the very definition of discrimination; it was "virtually per se invalid," and there was no need for any type of balancing. No matter what the Court called it, the case was an application of a "per se" approach.

States almost always have a good reason for discriminating against interstate commerce, which partially shields its economic protectionism, but if the reason does not go to some difference between in state and out of state, it should be nonetheless per se invalid. Sometimes the Court recognizes this as they did in *Philadelphia v. New Jersey*. The state, the Court said, cannot impose a disproportionate burden on an out-of-state interest even in the pursuit of an otherwise valid interest. Out-of-state interests bore a disproportionate burden in advancing a New Jersey interest. That is the very essence of economic protectionism, no matter the validity of the underlying environmental interest. In other cases, the Court will undertake a "virtually per se balancing" approach, which only confuses the issue.

C. The "virtually per se balancing" approach in discrimination cases

In many of the other more modern cases, the Court has made a simple test difficult by letting claims of valid state interests distract it from the simple economic discrimination. *Dean Milk v. Madison*,[186] decided in 1952 just a few years after *Southern Pacific*, is the best example of the Court becoming distracted by this sleight of hand. *Dean Milk* in effect, though not in words, introduced the "virtually per se balancing" test to the Dormant Commerce Clause cases. In *Dean Milk*, a local statute limited milk sold for human consumption in Madison, Wisconsin to milk from cows within twenty-five miles of Madison and pasteurized within five miles of Madison.[187] The end result

186. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

187. *Id.* Since the Court struck down the law because of the five-mile rule, it did not discuss the twenty-five-mile rule, which was even more restrictive. *Id.* In theory, an out of state dairy company could have its milk pasteurized within five miles of Madison. *Id.* The twenty-five-mile rule required that the milk come from herds inspected by Madison inspectors and, in effect, limited inspection to herds within twenty-five miles of Madison. *Id.* Out of state firms could not comply with this rule. *Id.*

was that milk from Dean Milk's Illinois dairy herds was excluded from the Madison market. Madison was engaged in clear and obvious discrimination,[188] but after a statement of the facts, the Court telegraphed its intention to apply an undue burdens balancing test, "Upon these facts we find it necessary to determine only the issue raised under the Commerce Clause, for we agree with appellant that the ordinance imposes an undue burden on interstate commerce."[189] There was no mention of the *Southern Pacific* balancing approach, but neither did the Court rely on a finding of per se invalid discrimination. What seemed to be controlling was that Madison claimed it was concerned about its healthy supply of milk, or as the Court put it, "Nor can there be objection to the *avowed purpose* of this enactment."[190]

The Court then turned from the city's non-objectionable purpose to the effect of the law and compared it to *Baldwin v. Seelig*,[191] where New York fixed the minimum price at which milk dealers had to pay both in and out of state farmers. The Court said that the Madison regulation, like that in *Baldwin*, had "in practical effect" excluded wholesome Illinois milk from being sold in Madison.[192] The Court was blunt that Madison was "erecting an economic barrier protecting a major local industry against competition from without the State," that "Madison "plainly discriminates against interstate commerce."[193] But that was the intended purpose of the law, not just the effect of an

188. Regan, *supra* note 34, at 1229 ("The crucial point is that the ordinance in *Dean Milk* is an explicit embargo, or the equivalent of an explicit embargo.").

189. *Dean Milk Co.*, 340 U.S. at 353.

190. *Id.* (emphasis added).

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

192. *Dean Milk Co.*, 340 U.S. at 354.

193. *Id.* In a footnote to its comment about the discrimination, the Court said, "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354, n.4. The fact that Madison also discriminated against dairy cattle from other parts of Wisconsin would not violate the Dormant Commerce Clause, but neither would discrimination against in state interest immunize Madison from it's out of state discrimination. Regan, *supra* note 34, at 1230 ("A government cannot validate discrimination against a protected class (in this case non-Wisconsin firms) simply by subjecting some members of the non-protected class to the same burden."). In a balancing test, the fact that the burden fell on both in state and out of state would have been a relevant factor.

otherwise innocent regulation of a local problem. The Court even openly recognized the fallacy of its reasoning that the claimed purpose might somehow insulate a law. That an "ordinance is valid simply because it professes to be a health measure" would make the Commerce Clause meaningless "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[194] Still the

194. *Dean Milk Co.,* 340 U.S. at 354. In later cases, the Supreme Court reaffirmed that the state's claimed purpose was not controlling, "Furthermore, when considering the purpose of a challenged statute, this Court is not bound by the name, description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (citations omitted) (internal quotation marks, ellipsis, and brackets omitted). Justice Powell, in a concurring opinion to a later case, cited *Dean Milk* for the proposition that the Court was not required to accept pretextual purposes, "Commerce Clause analysis differs from analysis under the "rational basis" test. Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 476 n.2 (1981) (Powell, J., concurring). But, the claimed purpose not being controlling was not a new concept. *See* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928) ("One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce."). *See also* Minnesota v. Barber, 136 U.S. 313, 319 (1890) ("There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution."). The *Barber* Court said that as a "principle of constitutional interpretation" "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Id.* (citations omitted) (internal quotation marks omitted). In *Barber*, Minnesota required that meat sold for human consumption within the state of Minnesota had to be butchered within twenty-four hours of its sale, which in effect required that all out of state cattle be butchered in the state of Minnesota. The Court did not mince words, stating that:

> Our duty to maintain the constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that result.

Court did not make the obvious conclusion that Madison's claim of a health concern was patently bogus and its true discriminatory purpose was contrary to the Dormant Commerce Clause. There was no need to consider the effect of the law—it had a discriminatory purpose and was invalid for that reason alone. As to the law's discriminatory effect, the Court in summary fashion applied an undue burden balancing approach.[195] The Court ruled that even in the pursuit of a valid local health interest, the state could not discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." The Court said that the issue was "whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them."[196]

In applying the "reasonable alternatives" part of the test, the Court easily found that there were alternatives to the requirement that all milk for Madison be pasteurized within five-miles of Madison; the state could rely on out of state inspections that were consistent with federal rules, and even higher standard than that of Madison. The Court's conclusion was strongly against discrimination, "To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade

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Id. at 323.

195. Professor Regan calls this "protectionist effect balancing" and explains why it might be tempting:

> If we distrust the courts' ability to ascertain legislative purpose, or if we think inquiry into purpose is improper for some other reason, we might recommend protectionist effect balancing as a rule of decision that would approximate the results of successful inquiry into purpose while avoiding some of the attendant problems.

Regan, *supra* note 34, at 1103, 1106. What Professor Regan calls "protectionist effect balancing" bears some close resemblance to what I call "virtually per se balancing." *Id.* at 1103. It is, however, not clear to me that the Court limits its use of the balancing test in discrimination cases only to those instances involving discriminatory effect.

196. *Dean Milk Co.*, 340 U.S. at 354.

areas destructive of the very purpose of the Commerce Clause."[197] But despite this clear statement against discrimination, the Court had introduced a balancing approach, and the damage was done.[198] Because the state had claimed a valid local interest, the Court without seeming to recognize what it was doing had converted a case involving per se invalid discrimination into a case requiring very much the same kind of balancing as the undue burdens test, though with an emphasis on reasonable nondiscriminatory alternatives as part of that balance. There is no exact pattern, but it appears that in cases involving discrimination where the state asserts a valid purpose, the Court is likely to engage in some type of balancing.[199]

Many discrimination cases after *Dean Milk* followed its approach, applying a "virtually per se balancing" test to a case involving discrimination.[200] Perhaps the most famous of the

197. *Id.* at 356.

198. Professor McGreal has a unique position, "*Dean Milk* is important because it is the first dormant Commerce Clause antidiscrimination case to drop the focus on harm to the national economy." Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1224 (1998). His article argues that not all discrimination against interstate commerce has an impact on the national economy, and only laws that hurt the national economy ought to violate the Dormant Commerce Clause. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581–83 (1997), which seems to support Professor McGreal's theory. The state of Maine gave a property tax exemption to state based charities, but only if they served primarily in-state residents. *Id.* The charity in the case treated inner-city kids, primarily from other states, to the glories of outdoor life in Maine, America's vacationland. *Id.* It is hard to see how Maine's obvious discrimination against out of state persons hurt the national economy or any other Dormant Commerce Clause interest. It is also hard to believe that Maine thinks "Dirigo," either Latin for "I lead" or the name of an obscure Quentin Tarantino movie, is a better state motto than "America's Vacationland", https://www.inspirational-quotes-short-funny-stuff.com/maine-state-motto.html.

199. The state is likely to assert some valid underlying purpose in every case except those where it believes that it is exempt from the normal rules such as the Market Participant exception or the congressional approval exception type of case. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984), where the state of Alaska unsuccessfully claimed both of these defenses.

200. This approach is not to be confused with the normal approach that even if a law adversely impacting interstate commerce is found not to be discriminatory, it still must pass the undue burdens test. *See* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 525 (1989), where the Court concluded that Kansas's regulation did not violate either part of the

cases following the *Dean Milk* approach was *Pike v. Bruce Church*,[201] although *Pike* did not actually cite to *Dean Milk*. In *Pike*, the State of Arizona required that all cantaloupes grown in Arizona had to be packed in Arizona. Bruce Church processed its Parker, Arizona-grown cantaloupes in Blythe, California, just thirty-one miles to the west, where they were sorted, inspected, packed and shipped in containers bearing the name of their California shipper, not the state of Arizona. It would cost Bruce Church $200,000 to build a packing shed in Parker. Arizona "stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging."[202] By "deceptive," Arizona meant that consumers were deceived into believing that Arizona' cantaloupes came from California, not that the packaging contained any false claims as to the quality of cantaloupes.

It seems that Bruce Church's Parker, Arizona-grown cantaloupes were "of exceptionally high quality,"[203] and Arizona wanted them identified on the packing labels as being from Arizona, not from California. The Court accepted Arizona's claim that it had a legitimate interest in protecting its reputation for having superior cantaloupe,[204] but balancing the competing interests, it called the state interest "tenuous"[205] and

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Dormant Commerce Clause. "Even if not *per se* unconstitutional, a state law may violate the Commerce Clause if it fails to pass muster under the balancing test outlined in *Pike v. Bruce Church, Inc." Id.* (emphasis in original).

201. *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

202. *Id.* at 143.

203. *Id.* at 144.

204. A 1915 Supreme Court Dormant Commerce Clause case had recognized the validity of a state's interest in protecting the reputation of an important commodity. *See* Sligh v. Kirkwood, 237 U.S. 52, 61 (1915), where Florida excluded less than perfect citrus products from interstate shipment, which lowered the supply and drove up the interstate price.

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market.

Sligh v. Kirkwood, 237 U.S. 52, 61 (1915).

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

"minimal at best."[206] The Court said that it was more concerned about "the nature"[207] of the injury to interstate commerce than the extent of the $200,000 cost to Bruce Church. As for the "nature," the Court said that it viewed with "particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."[208] The Court continued, "Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be *virtually per se* illegal."[209] It then concluded that the impact on interstate commerce "could perhaps be tolerated if a more *compelling state interest* were involved."[210]

Pike has all the sins of *Dean Milk*, perhaps even compounded. The Court recognized that Arizona was trying to keep the packing business in Arizona, but it felt compelled to except Arizona's claim that it was concerned about protecting its reputation for quality cantaloupes.[211] The frivolous nature of that assertion was surely enough for the Court to acknowledge that Arizona was just engaged in keeping a business within the state, what the Court in past cases had labeled clear discrimination against interstate commerce.[212] But like *Dean Milk*, in the face of a claimed valid state purpose, the Court undertook a superficial balance before finding the law invalid.[213]

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206. *Id.* at 146.

207. *Id.* at 145.

208. *Id.*

209. *Id.* (emphasis added).

210. *Id.* at 146 (emphasis added) (The Court somewhat generously called the impact of the state law on interstate commerce the "incidental consequence of a regulatory scheme.")

211. *See* Pike v. Bruce Church, 397 U.S. 137, 145 (1970), where the Court seemed a bit peevish in suggesting that Arizona appeared to be claiming the superiority of Bruce Church's Parker, Arizona cantaloupes for all of Arizona cantaloupes.

212. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

213. *See also* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977), where the Court said that the District Court had "correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." In *Hunt*, a North Carolina law prevented apples sold in North Carolina from having any grading references other than the ones required by federal law. *Id.* North Carolina had no state grading. *Id.* This took away a marketing advantage from Washington apples, which had extensive Washington state ratings as to quality. *Id.* The Court said that despite the facial neutrality of North Carolina's

It included in the balance that the "nature" of the burden on interstate commerce was important. Even if a state law was not discriminatory, the fact that it was of that nature was part of the balancing. The case contributed "virtually per se" and "compelling state interest" to the Dormant Commerce Clause vocabulary, but only the former stuck. The *Pike* Court's use of the phrase "compelling state interest" has not carried the day in other Dormant Commerce Clause cases.[214] The "compelling

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laws, some evidence "suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect." *Id.* at 352. Nonetheless, the Court did not feel the need to ascribe to North Carolina "an economic protection motive." *Id.* Even if the law was passed for the valid

> declared purpose of protecting consumers from deception and fraud in the marketplace. . .discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

Id. at 352–53 (citations omitted). The Court then undertook an undue burdens balancing approach and found the marginal state interests outweighed by the harm to interstate commerce. *Id.*

214. *Hunt*, 432 U.S. 333. In the fifty Supreme Court cases that cite to *Pike*, not one uses the term "compelling state interest." The First Circuit recognized this in a case involving discrimination against interstate commerce, stating that:

> Though this standard is stringent, it is also quite different from a standard requiring the state to demonstrate a 'compelling state interest' that cannot be served through a non-discriminatory alternative. We reject plaintiffs' contention that the 'compelling interest' standard applies here and is required by *Maine v. Taylor*. *Maine v. Taylor*, like subsequent Supreme Court precedents, required states to demonstrate only that the statute 'serves a legitimate local purpose' that 'could not be served as well by available non-discriminatory means.'

Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 9 n.8 (1st Cir. 2010) (citations omitted).

A few lower courts have applied the compelling state interest test. Starlight Sugar Inc. v. Soto, 909 F. Supp. 853, 858 (D.P.R. 1995), aff'd, 114 F.3d 330 (1st Cir. 1997) ("Under this approach, courts must first determine if a state's

state interest" term is consistent with the claim of "strict scrutiny" for discriminatory laws, but as discussed elsewhere, the Court tends to use what is at best an intermediate test, not a compelling state interest test.

In 1979, in *Hughes v. Oklahoma,*[215] the Court also used a "virtually per se balancing" test; "[W]hen discrimination against commerce is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[216] The Court struck down an Oklahoma law that prevented the shipping of minnows from Oklahoma streams to other states for resale, such

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regulation discriminates on its face by giving economic protection to in-state entities at the expense of out-of-state entities. If so, the statute is deemed per se invalid, justifiable only by a compelling state interest."). The Court of Appeals in *Starlight Sugar* affirmed but did not use the "compelling state interest" term: "[F]acially discriminatory regulations are presumptively invalid and are routinely struck down, unless it can be shown that they serve a legitimate local interest unrelated to economic protectionism—an interest, furthermore, that cannot be served through non-discriminatory means." Starlight Sugar, Inc. v. Soto, 114 F.3d 330, 331–32 (citations omitted) (internal quotation marks omitted). Another District Court found that the compelling state interest test was required but found it satisfied since the state interest passed the *Pike* balancing test, "Regulation of commercial debt collection practices is a sufficiently compelling state interest to meet the *Pike* balancing test, and consequently, justifies the state's adopted policy." Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257, 263–64 (D. Idaho 1983); Can Mfrs. Inst., Inc. v. State, 289 N.W.2d 416, 421 (Minn. 1979). ("The environmental interests in this case clearly involve compelling state interests reasonably analogous to safety regulations.").

215. Hughes v. Oklahoma, 441 U.S. 322 (1979). *Hughes* is also noteworthy for Justice Brennan's widely quoted defense of the Dormant Commerce Clause,

> The few simple words of the Commerce Clause—'The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .' —reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Id. at 325.

216. *Id.* at 336 (internal quotation marks, ellipsis, and brackets omitted).

as to Hughes who operated a commercial minnow business in Wichita Falls, Texas. The Court found that the Oklahoma law "on its face discriminates against interstate commerce."[217] The Court said, "[F]acial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends.'"[218] But the Court had an alternative test, "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[219]

The Court in *Hughes* said that Oklahoma's conservation claim "may well qualify as a legitimate local purpose,"[220] but instead of choosing the "least discriminatory alternative" Oklahoma chose "to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce." Oklahoma did not limit at all the use of in-state minnows but prevented almost all commercial transportations of minnows out of state. Instead of choosing discrimination against interstate commerce as a "last ditch" method after nondiscriminatory alternatives had failed, it chose the most discriminatory methods when there were likely nondiscriminatory alternatives.[221]

The Court in *Hughes* did not help the problem by calling its

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217. *Id.* The Court reversed as no longer good law an 1896 case, Geer v. Connecticut, 161 U.S. 519 (1896), which allowed states to discriminate in favor of in-state citizens as to game birds, and presumably other natural resources based upon the fiction that the State owned all of the natural resources in the state. *Hughes,* 441 U.S. 322 at 325.

218. *Id.* at 337.

219. *Id.*

220. *Id.*

221. *Id.* at 338. *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980), where the Court struck down Florida's ban on out of state bank holding companies from having separate investment banking subsidiaries but allowed in state banks to have such services. The lower court had struck the law down on discrimination grounds. *Id.* The Supreme Court said that it did not need to "render the Florida legislation *per se* invalid" because it was "convinced that the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." *Id.* at 42. The Court recognized the validity of the claimed state interests, "Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests." *Id.* at 43. But there was no reason to believe that out of state bank holding companies were more likely than in state bank holding companies "to engage in sharp practices than bank holding companies that are locally based." *Id.*

approach "strictest scrutiny."[222] *Hughes* did not attempt to

222. Thirty-seven Supreme Court cases have cited to *Hughes*, and eight of those cases have quoted some version of the "strictest scrutiny" test. *See* Maine v. Taylor, 477 U.S. 131, 144–45 (1986) (citations deleted) (internal quotation marks omitted) ("Although the proffered justification for any local discrimination against interstate commerce must be subjected to the strictest scrutiny, the empirical component of that scrutiny, like any other form of factfinding, is the basic responsibility of district courts, rather than appellate courts."); Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 958 (1982) ("The reciprocity requirement does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation."). The Court in *Maine v. Taylor* also referred to "more demanding scrutiny." *Id.* at 138. *See also* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 366–67 (2007) (Alito, J., dissenting) (Justice Alito was joined by Justice Stevens and Justice Kennedy) ("Thus, if the legislative means are themselves discriminatory, then regardless of how legitimate and nonprotectionist the underlying legislative goals may be, the legislation is subject to strict scrutiny."); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 581–83 (1997) (citations omitted),

> We recognize that the Town might have attempted to defend the Maine law under the per se rule by demonstrating that it "'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" In assessing respondents' arguments, we would have applied our "strictest scrutiny." This is an extremely difficult burden, "so heavy that 'facial discrimination by itself may be a fatal defect.'" ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). Perhaps realizing the weight of its burden, the Town has made no effort to defend the statute under the per se rule, and so we do not address this question;

Fulton Corp. v. Faulkner, 516 U.S. 325, 344, 796 (1996) (the Court rejected the state's claim that its discriminatory tax was compensatory like use taxes.); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 100–01 (1994) (citations omitted).

> Because the Oregon surcharge is discriminatory, the virtually per se rule of invalidity provides the proper legal standard here, not the *Pike* balancing test. As a result, the surcharge must be invalidated unless respondents can 'sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' Our cases require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.' The State's burden of

define "strictest scrutiny," but strict scrutiny of any *legitimate* purpose is at best an oxymoron like "virtual reality" or perhaps even "virtually per se,"[223] and at worst a test inconsistent with its purpose. "Strict scrutiny" usually refers to the "compelling state interest" test. Nonetheless, the Court has never actually used the "compelling state interest" test as the standard of scrutiny in any Dormant Commerce Clause case. Even in *Pike,* which did use the phrase, the Court only referred to the fact that a "more compelling state interest" might have offset the harm to interstate commerce; it did not say that such a test was required.

In *New Energy Co. of Indiana v. Limbach*[224] Justice Scalia for the Court gave different inconsistent versions of the test for discrimination. In *Limbach*, Ohio had a tax on all fuels, but exempted ethanol made from Ohio corn or corn from a state that had a reciprocity agreement with Ohio. The Court rejected Ohio's claim that it was not discriminating, but only encouraging

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> justification is so heavy that 'facial discrimination by itself may be a fatal defect.'

Wyoming v. Oklahoma, 502 U.S. 437, 456 (1992); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342–43 (1992) (citations omitted) (The Court also said, "Because the additional fee discriminates both on its face and in practical effect, the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'"); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274–75 (1988) (internal quotation marks omitted) (citations omitted) ("More recently, we characterized a Nebraska reciprocity requirement for the export of ground water from the State as facially discriminatory legislation which merited strictest scrutiny."); *Camps Newfound/Owatonna* is the most recent majority opinion in a Supreme Court Dormant Commerce Clause case to use the "strictest scrutiny" language. Five Supreme Court cases since *Camps Newfound/Owatonna* cited to *Hughes* but do not use the term "strictest scrutiny." *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018); Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008); Granholm v. Heald, 544 U.S. 460, 472 (2005) (citations omitted) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' This rule is essential to the foundations of the Union.").

223. Professor Regan calls the phrase "mildly oxymoronic." Regan, *supra* note 34, at 1134.

224. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988) (citations omitted).

free trade by waiving its tax on any state that gave the same advantages to Ohio-produced ethanol that it gave to ethanol of the reciprocating state.[225] The Court said that a state could not use reciprocal requirements as a "'threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement.'"[226] The Court cited *Sporhase v. Nebraska* as finding a state reciprocity requirement facially discriminatory legislation, which merited "strictest scrutiny."[227]

Justice Scalia initially gave a strongly protective statement of the Court's approach, "Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." This would be basically a per se approach. In Justice Scalia's summary, the justification had to be "unrelated to economic protectionism" a much narrower justification than *Hughes'* "some purported legitimate purpose." Justice Scalia then qualified this protective statement and stated a "virtually per se balancing" test; "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[228] Justice Scalia hedged his bets moving from a

225. The Court acknowledged that Indiana discriminated in favor of Indiana companies by giving a cash subsidy to those that used Indiana corn for ethanol, but it said that a state could advantage local residents as long as it did not regulate interstate commerce, "Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does." *Id.* at 278. But even if Indiana's subsidy violated the Commerce Clause, "retaliatory violation of the Commerce Clause by Ohio would not be acceptable." *Id.* The Court's message was clear; the remedy for violations of the Dormant Commerce Clause was to seek redress from the courts, not through retaliatory self-help measures. The implicit purpose of the Commerce Clause was to prevent such internal economic warfare.

226. *Id.* at 274 (quoting Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 379 (1976)) as to Mississippi's requirement for the sale of Louisiana milk in Mississippi).

227. *Id.* at 274–75 (internal quotation marks omitted) (quoting Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958 (1982)).

228. *Id.* at 278 (citations omitted). Justice Thomas quotes this language and applies it in Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 100–01 (1994).

"per se" test to the cop-out "our cases leave open," and he gave a version of a balancing that was very similar to *Dean Milk*.[229] Justice Scalia then referred to all of the standard discrimination tropes—"simple economic protectionism" "a virtually per se rule of invalidity," "a fatal defect," and "strictest scrutiny"—tropes all inconsistent with a balancing approach.

In his balancing, Justice Scalia easily rejected both Ohio's health and commerce rationales for their discriminatory exemptions. As for health, assuming ethanol was healthier than regular gasoline, ethanol from Indiana corn was no less healthy than from Ohio corn.[230] And as for commerce, the law did not encourage favorable treatment of ethanol generally, "but only favorable treatment for Ohio-produced ethanol."[231] And in typical Justice Scalia fashion, his conclusion approached scathing, "In sum, appellees' health and commerce justifications amount to no more than implausible speculation, which does not suffice to validate this plain discrimination against products of out-of-state manufacture."[232]

D. How did the Court come to both a per se and a balancing test in discrimination cases?

The Court's use of phrases like "virtually per se," "fatal defect" and "strictest scrutiny," all seem like a death sentence for discrimination against interstate commerce, and indeed they may be in that the Court almost universally strikes down such state laws. Nonetheless, as noted above in some detail, the Court has variously stated its specific rule against discrimination. The Court's attempt to define what "virtually per se" might mean has led to inconsistent results. The Court's approach has morphed from "strictest scrutiny" to what seems like at most an intermediate test.

The first test, and the easiest to apply, is the per se approach. Under the per se approach, when discrimination is proven, the law is invalid. There is no defending discrimination, except by a form of strict scrutiny, that is, by showing that it was

229. As discussed elsewhere, Justice Scalia at this point then suggested that maybe a law that passed this test was not discriminatory at all.

230. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988).

231. *Id.* at 280.

232. *Id.*

not based upon origin or economic protectionism. The requirement of *Philadelphia v. New Jersey* that discrimination must be justified by something "apart from origin"[233] and *Limbach's* holding that it had to be "justified by a valid factor unrelated to economic protectionism"[234] seems to capture the strict scrutiny required for discrimination. The per se approach should inherently include the "origin" or "economic protectionism" approach. But, if the discrimination is shown to be unrelated to origin or economic discrimination, it also seems to be a way of saying that discrimination did not exist. If the basis of the state's classification is "apart from origin" or "unrelated to economic protectionism," then it is not discriminatory. If New York kept out Pennsylvania dairy cattle in *Mintz* because of the fear of Bang's disease, the law was not discriminatory. Or if it was discriminatory because only out of state cattle was excluded, then the discrimination did not violate the Commerce Clause because Pennsylvania cattle was not excluded because of its origin nor because of economic protectionism but because the cattle was diseased. This is the "Catch 22" of the per se approach. The Dormant Commerce Clause forbids discrimination based upon origin or economic protectionism. If a state law that seems to discriminate against origin is shown to be related to something other than origin or economic protectionism, it is not discriminatory. In short, discrimination is not allowed unless it is shown to be nondiscriminatory.

The second approach is the "virtually per se balancing" test. In these cases, the Court states some version of a low-level intermediate test.[235] An example of this is *Sporhase v.*

233. City of Phila. v. New Jersey, 437 U.S. 617, 626–27 (1978) ("But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.").

234. *Limbach*, 486 U.S. at 274 ("Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.").

235. *Dean Milk* is the beginning of this approach. The Court in *Dean Milk* said that a state could not discriminate "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." Dean Milk Co. v. City of Madison, Wisc., 340 U.S. 349, 354 (1951). This rule

Nebraska[236] where the Court found that a Colorado reciprocity requirement for the use of groundwater was a facially discriminatory burden on interstate commerce. The Court said that Colorado had failed to show that the burden was "a close fit,"[237] "narrowly tailored"[238] or even that it "significantly advances the State's legitimate conservation and preservation interest."[239] There is a bit of a mixed message here, but the

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was modestly tweaked in *Hunt v. Washington State Apple*, which required the state to justify discrimination, "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington State Apple Adv. Comm'n., 432 U.S. 333, 353 (1977). The Court in *Maine v. Taylor,* echoing *Dean Milk*, said that discriminatory laws had to "'serve a legitimate local purpose'" and that "this purpose could not be served as well by available nondiscriminatory means." Maine v. Taylor, 477 U.S. 131, 138 (1986). In *Limbach*, the Court referred to a reformulated *Dean Milk* test when *Limbach* said that the Court's prior cases left open the possibility that a state might justify discrimination "by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Limbach,* 486 U.S. at 278. The *Court in C & A Carbone, Inc. v. Town of Clarkstown,* N.Y., 511 U.S. 383, 392 (1994), dropped the adverb "virtually" but nonetheless made the per se test conditional, "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Professor Smith restates the *Dean Milk* test, stating that:

> It is settled Supreme Court doctrine that if a regulation is discriminatory, the state bears the burden of justifying it. First, the state must prove that it has a legitimate interest to be served by the regulation. Second, it must show that the regulation serves this interest to a substantial extent. Third, it must prove that it has no available alternatives to the regulation that are less discriminatory.

Smith, *supra* note 150, at 1231.

236. Sporhase v. Nebraska, 458 U.S. 941(1982).

237. *Id.* at 957 ("The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose.").

238. *Id.* at 957–58.

239. *Id.* at 958. "Narrowly tailored" is part of the standard statement of the compelling state interest test. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve

latter part of the test is not strict scrutiny. "Significantly advances" the State's "legitimate interest" reads more like a low-level intermediate test.[240] "Significantly advances" is essentially the same as "substantially related" as used in the intermediate gender test.[241] "Legitimate interest" is the same as "permissible interest" used in rational basis permissive review cases.[242] Significantly advances legitimate interest is what I call a "soft" intermediate test. The *Sporhase* test is essentially the same as the one the Court uses in equal protection cases involving classifications based upon legitimacy of birth. The Court has specifically said, "[C]lassifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not *substantially related to permissible state interests*."[243] It is a "soft" intermediate test

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compelling state interests."). "Close fit" is a less common phrase than narrowly tailored, but the Court has used it as a synonym for "narrowly tailored." McCullen v. Coakley, 573 U.S. 464, 486 (2014) ("But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.") *McCullen* used the "narrowly tailored" language in a content-neutral free speech case involving intermediate scrutiny. The Court has also used the term "close fit" to exclude the compelling state interest test. Thornburgh v. Abbott, 490 U.S. 401, 411 (1989). In a case involving prisoner rights, the Court said a close fit was required but not the "least restrictive test" used in compelling state interest cases.

240. *Limbach* continued the Court's mixed messages. It said that laws that "clearly discriminate . . . are routinely struck down" but then it qualified what would seem a fatal defect with "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Limbach*, 486 U.S. at 273 (citations omitted). Later even this was qualified; "Our cases *leave open the possibility* that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278 (emphasis added).

241. Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

242. Zablocki v. Redhail, 434 U.S. 374, 407 (1978) (Rehnquist, J., dissenting) ("[U]nder the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective."). *See* Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005), which applied the "rational basis" test in resolving the "legitimate" state end portion of the Dormant Commerce Clause test.

243. Lalli v. Lalli, 439 U.S. 259, 265 (1978) (emphasis added).

because the Court mixes elements of an intermediate test with elements of a rational basis test, which is permissive scrutiny. The Court in *Lalli* used the "substantially related" part of the intermediate test from gender cases. And it used "permissible state ends," which is synonymous with "legitimate" state ends typically used in rational basis cases. The Court in the 2019 case, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*,[244] seems to have confirmed that "soft" intermediate test. It said concisely that a state law discriminating against interstate commerce would be sustained only on a showing that it was "narrowly tailored to advance a legitimate local purpose."

The "virtually per se balancing" test used in the discrimination cases is not remarkably different, if at all, from the Court's undue burdens balancing test used in cases not involving discrimination.[245] The widely quoted *Pike* version of the undue burdens balancing test upholds evenhanded burdens on interstate commerce "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The *Pike* Court itself applied its balancing test to strike down what was an obviously discriminatory law, no matter the state's claim of a legitimate state interest. The *Dean Milk* version emphasizes that there must not be "reasonable nondiscriminatory alternatives" while the *Pike* undue burdens balancing test provides that whether the local interest "could be promoted as well with a lesser impact on interstate activities" is part of the balancing test. There is little apparent difference between "lesser impact" of evenhanded burdens and "reasonable alternatives" as to discriminatory burdens. It is not clear that the language of Court's most common statements of the "virtually per se balancing" test in its discrimination cases, adds much to the *Southern Pacific* or *Pike* undue burdens balancing test, but in actual operation, no matter how the Court states the test in a discrimination case, the state law is likely to be struck down.

244. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) (internal quotations and brackets omitted).

245. See the observation by the Fourth Circuit in Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 547 (4th Cir. 2013) ("[T]he factual material relevant to the *Pike* standard largely overlaps with evidence germane to the discrimination test.").

E. Discriminatory purposes, means, and effects

One of the complexities that the Court has added to its discrimination cases is that the Court says that it will find a law discriminatory if the purpose,[246] the means of accomplishing the purpose,[247] or the law's effects[248] are discriminatory.[249] If a discriminatory purpose were found, that would normally be conclusively fatal.[250] Discriminatory means are a little more ambiguous but are almost certainly fatal as well. Perhaps the best example of discriminatory means is *Philadelphia v. New Jersey*. The state of New Jersey may very well have had a nondiscriminatory environmental purpose in protecting landfills

246. Cases in which the State "artlessly discloses an avowed purpose to discriminate against interstate goods" demonstrates the Court's most obvious form of forbidden discrimination against interstate commerce. Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951).

247. City of Phila. v. New Jersey, 437 U.S. 617 (1978) ("[T]he evil of protectionism can reside in legislative means as well as legislative ends."); *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) ("No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."). In Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977), the Court said that it "need not ascribe an economic protection motive" because the state law singled out "the very means by which apples are transported in commerce."

248. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (citations omitted)("A finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, or discriminatory effect."). *See also* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), where the Court refers to laws that "discriminates against interstate commerce either on its face or in practical effect."; *Bacchus* 468 U.S. at 273 ("We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.").

249. Professor Zebot's frustration is clear, "The courts have taken a woefully dysfunctional approach to the discriminatory purpose prong of the current dormant Commerce Clause analysis." Julian Cyril Zebot, *Awakening A Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1094 (2002). Professor Eule prefers the term "disproportionalism rather than discrimination." Eule, *supra* note 104, at 460.

250. Although the Court will often refer to "facial" discrimination, the fatal purpose to discriminate can be found in other ways. *See* Dean Milk Co., 340 U.S. at 354, where the Court makes it clear that discrimination is not limited to some purpose the state "artlessly discloses."

within the state. But it chose a means that excluded all out of state waste and allowed all in-state waste; the means were discriminatory. Discriminatory means are actually the easiest type of discrimination for the Court to find. When the state describes the evil they are trying to prevent and offers an explanation as to why out of state commerce is treated differently in addressing that evil, but the explanation does not go to how out of state is a peculiar source of that evil, the exclusion of out of state commerce as a means is discriminatory. Sure, overreaching in selling financial products is an evil, but there is no reason to believe that out of state bankers are peculiar sources of overreaching.[251] Sure, hazardous wastes in landfills present serious problems to every states' economy, but out of state hazardous waste is not a peculiar source of those evils.[252]

Discriminatory effects are the most problematic.[253] The fact

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251. *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980).

252. Justice Thomas offered this advice in *Oregon Waste Systems:*

> At the outset, we note two justifications that respondents have *not* presented. No claim has been made that the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste. Also, respondents have not offered any safety or health reason unique to nonhazardous waste from other States for discouraging the flow of such waste into Oregon.

Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 101 (1994) (citations omitted). And he explained the importance of this absence:

> Of course, if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste, for then there would be a reason, apart from its origin, why solid waste coming from outside the State should be treated differently.

Id. at 101, n.5 (citations omitted) (internal quotation marks omitted) (brackets omitted). Oregon was unable to defend its claim that the higher surcharge for out of state waste was compensatory for the additional cost that in state companies paid in general taxes. *Id.*

253. Perhaps the best case emphasizing the importance of effect is Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (Maryland in the application of its personal income tax failed to give full credit for income taxes paid by its residents for income earned in other states. Maryland argued

that a state law happens to have a disproportionate impact or effect on interstate commerce does not alone make it discriminatory.[254] As was the case in *Southern Pacific*, eighty-five percent of overlong freight trains were interstate. This disparate effect on interstate commerce led the Court to say that the political processes within the state would not likely protect against abuses, but this was only one of the factors in the Court's undue burdens approach. It did not lead the Court to say that the state law was discriminatory.[255]

In its equal protection cases, the Court makes a clear distinction between discriminatory racial purposes and disproportionate racial effects, with only discriminatory racial purposes being subject to the compelling state interest test.[256] Disproportionate racial effects had to pass only the rational basis test.[257] The reason for the distinction between racially

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it could adopt any tax scheme, because it did not intend to purposely discriminate. The Court's rejection of that logic was firm, "The Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect." *Id.* at 1803 n.4 (citations omitted)).

254. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–18 (1981) where the Court rejected the claim that Montana's severance tax on coal was discriminatory "because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States." The Court said that both the tax rate and the way it was administered were even-handed based upon the amount of coal consumed. *Id.*

255. *Cf.* Parker v. Brown, 317 U.S. 341 (1943) (the Court upheld a California raisin brokerage scheme which its purpose and effect was to obtain higher prices from out of state purchasers of California grown raisins).

256. Washington v. Davis, 426 U.S. 229, 239 (1976) ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Calling purposes "discriminatory" and effects "disproportionate" is common, but "disproportionate" is just another way of saying "discriminatory." What is important is that racially discriminatory effects are treated differently than racially discriminatory purposes, with only the latter getting the strict scrutiny of the compelling state interest test).

257. In Jefferson v. Hackney, 406 U.S. 535, 545 (1972) a Texas welfare law gave one-hundred percent of determined need to the aged and seventy-five percent of determined need to those receiving Aid to Families with Dependent Children (AFDC). Because persons receiving AFDC were disproportionately racial minorities, the law had a racially disproportionate effect. *Id.* The Court held, "So long as its judgments are rational, and not invidious, the legislature's

discriminatory purposes and racially disproportionate effects is fairly obvious. A racially discriminatory purpose was overwhelming proof of racial hostility inconsistent with equal protection rights. A racially disproportionate effect might be found in the most innocent of laws, one wholly unrelated to any thought of race, let alone of racial hostility. A law raising the price of food stamps might have as its purpose providing benefits to a greater number of low-income persons. That would certainly be a valid purpose, but given the racial gap in our economic system, it would be common knowledge that any increase in cost might very well have a disproportionate racial impact. Disproportionate effects in equal protection cases, however, are not an irrelevancy. The racially disproportionate effect of a law, particularly a stark difference in effect,[258] would be evidence of a racially discriminatory purpose.[259]

The Court has adopted no such rule for laws with an

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efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Id.* at 546.

258. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886), where all 200 Chinese with wooden laundries were denied a permit to continue operations and all 80 whites with wooden laundries were granted a permit. The Court found,

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.

Id.

259. Washington v. Davis, 426 U.S. 229, 242 (1976), ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."). *Accord* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977), ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy.[13] But such cases are rare. Absent a pattern as stark as that in Gomillion [v. Lightfoot, 364 U.S. 339 (1960)] or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.").

economically disproportionate effect on interstate commerce.[260] And perhaps it does not need to. In equal protection cases, the distinction between discriminatory purposes and effects is the difference between the compelling state interest test and the rational basis test. In the Dormant Commerce Clause cases, the difference between what would likely be a "virtually per se balancing" test and undue burdens would be marginal at best. There is no easy way to distinguish a Dormant Commerce Clause case that the Court calls a discriminatory effect that is virtually per se invalid—but then only subject to an intermediate test—and one with disproportionate effect that will only get an undue burdens balancing test. But in most instances nothing much turns on the difference.

Dean Milk introduced the discriminatory effect into the discussion of discrimination. One can see its appeal. If a law is not discriminatory on its face, then it is very hard to determine discrimination. The fact of discrimination in *Dean Milk* was obvious, because none of Madison's nondiscriminatory explanations made any sense. The Court should have called it what it was, purposeful discrimination. It is not that Madison's exclusion of out of state milk was discriminatory in effect, rather it was discriminatory in its purpose, and Madison was clearly lying as to some neutral purpose. Despite the fact that the statement of the effect portion is difficult at best, when the Court believes that a state is fabricating its reasons for discriminating, ultimately it does not matter if the Court calls that a discriminatory purpose, a discriminatory means, or a discriminatory effect. In most of these types of cases, the Court

260. Following the pattern of the equal protection cases and racially discriminatory effect, Professor Regan argues that under the Dormant Commerce Clause state laws should be protectionist only if they have a protectionist purpose, that protectionist effect is only evidence of a protectionist purpose, "We can of course define the phrase 'protectionist effect,' and it will be useful to do so: a protectionist effect is any improvement (caused by the statute) in the competitive position of some class of local economic actors vis-à-vis their foreign competitors. But protectionist effect does not make a statute protectionist under my definition; nor does protectionist effect have any constitutional significance in itself. The Court both is and should be concerned with purpose. Protectionist effect is significant evidence on the issue of protectionist purpose; but it is just that, evidence and no more." Regan, *supra* note 34, at 1095.

hopefully knows it when it sees it.[261] *Maine v. Taylor* may be an exception to that hope.

The rules against discrimination would be infinitely easier if the Court adopted a strict "per se" test and if the Court were more willing to find that state laws were purposefully discriminatory, whatever the state's claimed justification. Still, the Court applies its discriminatory rules in such a protective way that for the most part the purposes of the Dormant Commerce Clause in protecting our national economy are fulfilled.

F. The factually difficult cases in finding discrimination

In most cases, no matter how the Court finds it, discrimination is clear. In a few cases, discrimination against interstate commerce is not easy to determine. In 1877, in one of the very first Dormant Commerce Clause cases finding a state law discriminatory, the Court in *Hannibal & St. J.R. Co. v. Husen*[262] found that a Missouri law, which effectively excluded Texas, Mexican, and Indian cattle from being off-loaded in Missouri during two-thirds of the year, was in violation of the dormant commerce clause because of its discrimination against interstate commerce: "The object and effect of the statute are, therefore, to obstruct inter-state commerce, and to discriminate between the property of citizens of one State and that of citizens of other States."[263] The Court just as recently as its current term referred to *Husen* as an example of the State imposing "protectionist measures clothed as police-power regulations."[264] But was it? Twelve years later in *Kimmish v. Ball*[265] the Court upheld an Iowa law that barred the importation of "Texas cattle," including Mexican and Indian cattle, that had not wintered north of Kansas' and Missouri's southern border. Effectively, the Iowa law excluded cattle in the same way as the

261. Any attempt to explain a rule which references Justice Stewart's famous comment in the pornography case, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), may illustrate the bankruptcy of the intended explanation.

262. Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465 (1877).

263. *Id.* at 470.

264. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2468 (2019).

265. Kimmish v. Ball, 129 U.S. 217 (1889).

Missouri law, but the Court viewed it as a valid health and safety measure. Texas cattle had fleas that carried destructive diseases, but the fleas were killed off if the cattle wintered in colder climes.[266] Although *Husen* was distinguished on the grounds that Missouri had failed to argue that it was only excluding diseased cattle,[267] both the Missouri and Iowa laws were in all likelihood valid regulations of a local concern and not simply discrimination against interest commerce.

In *Mintz v. Baldwin*[268] in 1933, it was hard to know whether the state had a legitimate concern for diseased cattle or whether it was protecting local dairy farmers from additional competition. In *Mintz*, the Court allowed New York to ban out of state cattle with Bang's disease out of concern for the spread of a disease of dairy cattle that affected the quality of their milk.[269] The Court accepted the findings of the lower court, stating, "Bang's disease prevails throughout the United States, and is one of the greatest limiting factors, both as to reproduction and milk yield." But it may have been just as likely that New York was trying to protect New York dairy farmers from competition from out of state farmers.[270] This is evidenced

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266. *Id*. (the Court mentions only disease, not the role of the fleas in spreading it).

267. *Id.*

268. Mintz v. Baldwin, 289 U.S. 346 (1933).

269. The dissenting judge in the lower court was less sure about New York's good faith:

> True, there is inspection provided by state law for New York state cattle, but there is no requirement in such inspection that to be sold in the state they shall come from a herd, all of whose members are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle.

Mintz v. Baldwin, 2 F. Supp. 700, 715 (N.D.N.Y. 1933) (Cooper, J., dissenting).

270. There is a bevy of cases illustrating New York's concern about the oversupply of milk in New York, so certainly New York had the motive to exclude additional competition from out of state dairy cattle. The most famous of the "Milk Law" cases are Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). In *Seelig*, the Court struck down a New York law that fixed the minimum price to be paid for in state and out of state farmers for their milk. *Seelig*, 294 U.S. 511. In *Hood & Sons*, the Court found that New York's area distribution centers for the sale of milk illegally favored New York regions over out of state areas, such as

by the fact that New York had stricter requirements for inspection of out of state cattle than in state cattle. The twenty head of Wisconsin cattle involved in the controversy had been certified free of Bang's disease, but New York required that out of state cattle but not in state cattle come from herds certified free of Bang's disease.[271] This could easily have been viewed as discriminatory. In *Maine v. Taylor*, the Court found the law discriminatory but allowed the state of Maine to bar the importation of golden shiners, a type of minnow, from neighboring states out of the State's claimed concerns for the spread of parasitic diseases and the spread of nonnative species.[272] In the case, Justice Stevens, in his dissenting opinion, saw "something fishy about this case."[273] The golden shiners barred from import already shared the interstate streams of New England with Maine golden shiners. Justice Stephens may have believed that there was little chance of any additional harm from additional importation.[274]

In *Mintz v. Baldwin*, the New York ban on the importation of cattle with Bang's disease fell entirely out of state, but the law was not viewed as discriminatory either as to its purpose or effect because the Court, rightly or wrongly, believed that the purpose of the law was to protect interstate commerce from something dangerous in other states. Interstate commerce was not being discriminated against because it was interstate commerce but because it presented a greater danger.

In *Maine v. Taylor*, Maine's ban on the importation of golden shiners because of the increased danger of disease and invasive species was viewed as discriminatory but nonetheless constitutional because of the threat from out of state Golden Shiners. But if Maine was correct that out of state golden shiners presented a unique danger to Maine, then, like *Mintz,*

Boston, Massachusetts. H.P. Hood & Sons, Inc., 336 U.S. 525. In both cases, New York was trying to provide a remedy for the excess supplies of milk, which was driving down the price that New York farmers received.

271. *Mintz*, 2 F. Supp. at 706 (Cooper, J., dissenting).

272. Maine v. Taylor, 477 U.S. 131, 142–43 (1986).

273. *Id.* at 152 (Stevens, J., dissenting).

274. In GMC v. Tracy, 519 U.S. 278 (1997), the Court concluded that out of state natural gas companies sold something different than in state and thus could be subject to a higher tax. Justice Stevens in dissent thought that part of the market was the same and found invalid discrimination as to that part of the market. *Id.* at 313 (Stevens, J., dissenting).

the law was not discriminatory. The Court made this distinction in *Philadelphia v. New Jersey* in talking about quarantine laws, "It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. . . Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."[275] Even though the full impact of a valid quarantine law fell out of state, it was not discriminatory because out of state was not being treated differently because of origin, but because it was the unique source of the noxious article being forbidden. Another way of putting it is that discriminatory state laws are per se invalid, unless interstate commerce is different in some way that justifies the discrimination, in which case the law is not in fact discriminatory. In those cases, interstate commerce is being discriminated against, not because it is interstate, but because it is different. Justice Scalia made the same point, that discrimination might be justified if it advanced a legitimate local purpose that could not be addressed by some reasonable nondiscriminatory purpose, but that, he said, was "perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so."[276]

In *Exxon v. Maryland*,[277] the full impact of the law fell on interstate commerce but it was not found to be discriminatory. A Maryland statute provided that refiners of gasoline could not operate any retail service station within the state of Maryland. This compelled divestiture between refiners and dealers of gasoline was passed during a time of fuel shortage. The State was trying to prevent refiners, all of them out of state, from favoritism towards their own service stations during this time of

275. City of Phila. v. New Jersey, 437 U.S. 617, 628–29 (1978) (citations omitted).

276. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (citations omitted). Justice Thomas quotes this language and applies it in Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 100–01 (1994) ("As a result, the surcharge must be invalidated unless respondents can 'sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'").

277. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 119 (1978).

shortage, which was thought to be destructive of competition.[278] Refiner-owned service stations made up five percent of the total number of service stations.[279] Not a single refiner of gasoline was located in Maryland. The full impact of the law fell on interstate companies. The Court rejected the claim of discrimination. There was, it said, no discrimination between in state and out of state refiners because there were no Maryland refiners of gasoline before or after the law. There was no discrimination between out of state owners of service stations and in state owners because most out of state owners of Maryland service stations were not impacted by the law in that they were not also refiners. The Court said that although the refiners were disadvantaged, "in-state independent dealers will have no competitive advantage over out-of-state dealers."[280] The fact that the burden fell "on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."[281] In short, there was no burden whatsoever on out of state independent dealers and in state independent dealers, only on refinery-operated dealers who happen to be out of state. The Court said that the Commerce Clause did not protect, "the particular structure or methods of operation in a retail market," that is, independent dealers versus refiner affiliated dealers.[282] Only Justice Blackman thought that the Maryland law was discriminatory.[283] *Exxon* illustrates that even when a burden

278. *Id.* at 121 ("The Maryland statute is an outgrowth of the 1973 shortage of petroleum. . . . The results of [a State] survey indicated that gasoline stations operated by producers or refiners had received preferential treatment during the period of short supply.").

279. *Id.* at 123.

280. *Id.* at 126.

281. *Id.*

282. It might be noted that the five percent ownership figure by out of state refineries cuts both ways. On the one hand, the law did not hurt most service stations owned by interstate companies. On the other hand, there was little evidence that favoritism by interstate companies who owned only five percent of the dealers would actually impact competition very much, or at least that could not be addressed with less discriminatory measures than a complete ban.

283. Exxon Corp. v. Governor of Maryland,437 U.S. 117, 135 (1978) (Blackman, J., concurring in part and dissenting in part) ("The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more evenhanded

falls entirely out of state,[284] it is not necessarily discriminatory.[285]

The problem with the Court's approach to discrimination is not primarily the difficulty of determining if any particular state law is discriminatory. Cases like *Mintz* and *Maine v. Taylor*, where the facts are inconclusive as to whether or not the law was invalid discrimination, are not the norm. The norm is the case where state discrimination is blatant and the invalid purpose obvious, but the Court refuses to see it.

V. Does it matter that there is no consistent definition or treatment of discrimination?

To some degree, it does not matter that the Supreme Court uses inconsistent tests in resolving Dormant Commerce Clause cases involving discrimination. First, it does not matter because discrimination is just the threshold test that has to be satisfied; the Court always has a back-up test. Even if a law is found to not be discriminatory or just assumed to not be, the law still has to pass the *Southern Pacific* or *Pike* balancing test, which is by itself an effective means of protecting interstate commerce.[286] And in the balancing test, the Court considers the nature of the state interest with anti-competitive laws, even if not discriminatory, being given lesser weight because of their nature. To the degree that the balancing test has fallen out of

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regulation."). Professor Smith calls the reasoning of the *Exxon* Court as to discrimination "abhorrent." Smith, *supra* note 150, at 1215.

284. The law also hurt Maryland residents in that it excluded smaller out-of-state refiners who operated high-volume, low-priced service stations in the state. The Court said that the harm to in-state residents went to the wisdom of the law, an apparent due process or equal protection issue, not the burden on interstate commerce. *Exxon*, 437 U.S. at 128.

285. The Court in *Exxon* also rejected the claim that the law imposed an undue burden on interstate commerce. *Id.*

286. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008), concluding that "a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike,* that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice."

favor with certain judges,[287] it has become a less good back up test. Second, the results in cases involving discrimination speak for themselves. In most of the cases, it does not matter in terms of results whether the Court applies a "per se" or a "virtually per se balancing" approach; discrimination is generally going to be struck down.[288] In the dozens of discrimination cases decided by the Supreme Court since *Southern Pacific*, no matter what test the Court used, only one, *Maine v. Taylor*, upheld what the Court called discrimination.[289] *Maine v. Taylor* found that there were

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287. *See* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988), where Justice Scalia limited his support of the balancing test to those cases with firm precedential support. Justice Thomas hates all of the Commerce Clause but especially balancing; and Justice Gorsuch has signaled that he shares some of Scalia's and Thomas' concerns about the Dormant Commerce Clause:

> My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day.

S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100-01 (2018) (Gorsuch J., concurring). There are certainly some scholars who do not support the balancing test. Professor Eule does not mince words, "It no longer makes sense for the Court to invalidate evenhanded state legislation merely because it burdens interstate commerce too heavily." Eule, *supra* note 104, at 436. He cites both Justices Black and Douglas as having supported his view. *Id.* at 436, n.57.

288. *See* Wyoming v. Oklahoma, 502 U.S. 437, 456–57 (1992), where the Court refers to examining a "presumably legitimate goal" that turns out to be an "illegitimate means" of economic isolation.

289. Professor Smith includes *Bhd. of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968), as an example of the Court upholding a discriminatory law. Smith, *supra* note 150, at 1232, n. 164. In the *Brotherhood* case, the Court upheld Arkansas' "full-crew" law that fixed the minimum number of railroad employees that had to serve as part of the train crew. *Id.* The law had exemptions based upon mileage of track that excluded all in state trains but included all but one out of state train from the full-crew

no reasonable nondiscriminatory alternatives to Maine's absolute exclusion of out of state golden shiners, that only exclusion protected Maine's legitimate local interest in preventing out of state parasites and invasive species.[290]

Third, even if there is some confusion about the definition of discrimination or the test for justifying it, there are some categories of state laws that are always going to be invalid. The Court in *Philadelphia v. New Jersey*[291] listed the kinds of state laws found to be discriminatory: to erect "barriers to allegedly ruinous outside competition;" "to create jobs by keeping industry within the State;" "to preserve the State's financial resources from depletion by fencing out indigent immigrants;" or to "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." In each of these cases, a presumably legitimate goal was achieved by the illegitimate means of isolating the State from the national economy. In *Maine v. Taylor,*[292] the Court offered a general statement, "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose."

In ways other than the final results, the definition of discrimination matters very much. First, the degree to which the Court has an ambiguous or weak definition of discrimination encourages the states to pass discriminatory laws. The Court has noted that clear rules against tariffs have led to virtually no states attempting to pass such tariffs.[293] Second, imprecise

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law. *Id.* The Court found that the exclusions were not discriminatory since the length of the tracks was relevant to the need for a full-crew. *See*, *Bhd. of Locomotive* 393 U.S. at 141–42. Even though the *Brotherhood* case found no discrimination, Professor Smith may very well be correct in his assessment since the Court's attempted justifications of the exclusions were dubious at best.

290. The Court was likely correct that there was no reasonable alternative to absolute exclusion if out of state Golden Shiners were a threat to Maine's environment, and the absence of any reasonable alternative appeared to be the focus of the Court's opinion. But the Court was likely incorrect that the state needed to exclude Golden Shiners at all. Because of the intertwining nature of New England's beautiful rivers, Maine Golden Shiners probably already hung out in all the same local hang out spots as Vermont and New Hampshire Golden Shiners; "Say, haven't I seen you before?"

291. Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978).

292. Maine v. Taylor, 477 U.S. 131, 148 (1986).

293. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) ("In fact, tariffs against the products of other States are so patently

definitions lead to confusions as to all of the litigants. Justice Rehnquist in a dissenting opinion in *Kassel v. Consolidated Freightways Corp*[294] called the Dormant Commerce Clause "hopelessly confused." He said, "The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them."[295] Nor did it give any guidance to the trucking company. His overall observation was almost country music like in its plaintiveness, "Perhaps, after all is said and done, the Court today neither says nor does very much at all."[296] Third, the lower courts may struggle to apply the appropriate test. For example, in a 2019 case, the District Court spent almost twenty pages discussing what test to apply and whether state highway tolls violated the Dormant Commerce Clause before concluding that the *Pike* test applied and that it was not violated.[297]

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unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means."). On the other hand, see the frustration of the Ninth Circuit in Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1150 n.5 (9th Cir. 2012):

> In some cases, *facial* discrimination draws the line, explicitly or in application, between: 1) laws that are considered discriminatory (*e.g.* not "even-handed" in the words of *Pike*) and therefore subject to stricter scrutiny and virtual *per se* invalidity; and 2) other laws imposing a burden on interstate commerce (including laws that are discriminatory in purpose and effect), which are subject to the *Pike* "clearly excessive" burden test.

294. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (Rehnquist, J., dissenting).

295. *Id.* at 706.

296. *Id.*

297. Owner Operator Indep. Drivers Ass'n, Inc. v. Pennsylvania Tpk. Comm'n, 383 F. Supp. 3d 353, 367–84 (M.D. Pa. 2019). And this was a case where the Court said that the "factual predicates" were for the most part not disputed and the underlying financial records and statutory origins were "a matter of public record." Nonetheless, the Court had to discern "five decades of slowly evolving federal law related to the dormant Commerce Clause." *Id.* at 379. The Court observed that "the legitimacy and parameters of the dormant Commerce Clause are the subject of continuous vigorous debate." *Id.*

VI. Conclusion

The much-criticized Dormant Commerce Clause could partially be redeemed if the Court would just make an effort to simplify its approach to state discriminatory laws. The *Southern Pacific* undue burdens balancing test is as clean and neat as any of the other tests that the Court uses.[298] Once the direct/indirect portion of the test is eliminated or incorporated as part of the balancing test, it is primarily a practical balancing of benefits to the state versus harm to interstate commerce. Despite Justice Scalia's claim that this is like trying to compare the length of a string with the heft of a rock,[299] the Court is actually pretty good at it, and litigants are given good directions at what to emphasize. The key is knowing what factors are important to the Court in the balancing, and as early as *Southern Pacific* the Court has identified most of those factors.

The Court's rules with regard to discriminatory state laws are a different story. The cases applying a strict scrutiny per se approach should be the Court's point of emphasis. There is no reason that justifies any state in trying to isolate itself as to any economic interest from any other states. Every state has its strengths and weaknesses, but it is that we stand together that gives us the economic power to face the increasingly international battle that confronts every American farmer, industrialist, professional, and worker. The Court's tendency in per se case to pull its punch and to suggest that discrimination might be justified by some inconsistently stated "virtually per se balancing" test just invites a state's shortsighted attempt to prefer itself over other states or the United States. We are stronger as a people when the Court has policies that bring us together as a nation. The Court needs to call discrimination per se invalid and leave balancing to those evenhanded cases where we need to know whether a string is longer than a rock is heavy.

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298. Chen, *supra* note 7, at 1793. ("Dormant Commerce Clause decisions no more constitute a quagmire than decisions on, say, affirmative action, the public forum doctrine, the religion clauses, and regulatory takings. When difficulty of its own accord becomes an excuse for judicial and intellectual abdication, the Republic very well might crumble.")

299. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).