The Proper Structure of Dormant Commerce Clause Review

R. Randall Kelso

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THE PROPER STRUCTURE OF DORMANT COMMERCE CLAUSE REVIEW

R. Randall Kelso*

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I. INTRODUCTION

From the nation’s founding, the Court has always applied some version of Dormant Commerce Clause review analysis.¹ That doctrine evolved during the first 200

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years of the nation’s history, but at the Supreme Court level has remained relatively unchanged since 1980. At the lower federal court level, however, a number of variations in Dormant Commerce Clause (“DCC”) doctrine have emerged. The intent of this article is to discuss those variations, place them within the context of the Supreme Court’s DCC doctrine, and suggest ways in which the Supreme Court in some later DCC case could resolve the lower court disagreements and provide a consistent, principled DCC doctrine going forward, since in the Court’s most recent DCC case, Nat’l Pork Producers Council v. Ross, these issues were not directly addressed.

In pursuit of this goal, Part II of this article will discuss the Supreme Court’s development of DCC doctrine. Part III will discuss variations emerging in the lower federal courts since 1980, particularly the precise nature of DCC review in Part III. A, and when to apply the various DCC doctrinal tests in Part III. B. Part IV will then discuss the best way to clarify DCC doctrine in a later case, and the best way to resolve the differences in lower federal court DCC decision-making that have emerged since 1980. Part V will discuss a number of collateral issues surrounding DCC doctrine. Part VI will provide a conclusion, including discussion of the National Pork case.

To summarize the main points of this article, there are three basic issues for the Court to consider regarding current DCC review. Issue one (1) is whether to continue using Maine v. Taylor as a “third-order reasonableness balancing” test with “legitimate” interests being used to justify state regulation or to reformulate Maine v. Taylor as a strict scrutiny test, requiring “compelling” government interests to regulate and the state having to use the “least burdensome effective alternative.” Issue two (2) is whether to continue the current doctrine where facial discrimination, discriminatory purpose, or discriminatory effects trigger Maine v. Taylor, and only even-handed regulation that nonetheless has some burden on interstate commerce triggers the Pike v. Bruce Church test, or whether to switch cases involving discriminatory effects to apply only the Pike v. Bruce Church test. Issue three (3) is whether even-handed regulations that place some burden on interstate commerce should continue to trigger the Pike v. Bruce Church test or whether to abandon any DCC review in such cases, as some lower federal courts of appeals have done.

The conclusion reached in this article is that the Court should (1) clarify that Maine v. Taylor is a “third-order reasonableness balancing” test, not strict scrutiny; (2)

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3. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 454 (5th Ed. 2015) (“[t]he overall approach to dormant commerce clause doctrine thus can be simply summarized”) (citing Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425 (1982)). See also Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT’s Eye View of the Dormant Commerce Clause, 47 VAND. L. REV. 1401, 1411–18 (1994) (discussing the three different “categories” of discrimination in relation to state legislation that regulates commerce, as well as a list of factors that the Court has identified as signs of discrimination when analyzing facially neutral regulations).
4. See infra Part III.
5. 143 S. Ct. 1142 (2023). Because the issues were not directly addressed, a discussion of the relationship between issues raised in this article and the plurality, multiple concurring, and dissenting in part opinions in National Pork is reserved for the end of this article. See infra Part VI.
6. See infra Part II.
7. See infra Part III.A.
8. See infra Part III.B.
9. See infra Part IV.A.
10. See infra Part IV.B.
11. See infra Part V.
12. See infra Part VI.
15. Seeinfra Part III.B.2; see, e.g., Park Pet Shop, Inc. v. City of Chicago, 872 F.3d 495, 502 (7th Cir. 2017).
16. See infra Part IV.A.
that only discriminatory effects should trigger the *Pike v. Bruce Church* test, leaving only *Maine v. Taylor* for cases of facial discrimination or discriminatory purpose;\(^{17}\) and (3) the Court should continue to support using *Pike v. Bruce Church* for cases of even-handed regulations that burden both intrastate and interstate commerce equally, as well as extend the *Pike v. Bruce Church* test to cases of discriminatory effects, as recommended for issue (2) above.\(^ {18}\)

II. DORMANT COMMERCE CLAUSE REVIEW GENERALLY

A. Earlier Dormant Commerce Clause Doctrine

The Dormant Commerce Clause doctrine is based on the Court’s view of an implied, or silent, purpose behind the Commerce Clause.\(^ {19}\) As stated in *Bos. Stock Exch. v. State Tax Comm’n*, that implied purpose is to ensure that the basic purpose of the Commerce Clause, to ensure national economic solutions to national economic problems, is not frustrated by state or local parochial legislation.\(^ {20}\) Such a purpose of the Commerce Clause was identified by the Supreme Court in a unanimous opinion authored by Chief Justice Marshall in 1824 in *Gibbons v. Ogden*.\(^ {21}\)

Concurring in *Gibbons*, Justice Johnson argued that where Congress has the power to regulate commerce, states have no power to regulate at all.\(^ {22}\) The majority in *Gibbons* in 1824 acknowledged that this position “has some force,” but instead adopted the view, consistent with the “dual theory of sovereignty,” and that even where Congress has the power to regulate commerce, states retain their own power to regulate commerce for local purposes as well.\(^ {23}\) The Marshall Court similarly held in 1829 in *Willson v. Black Bird Creek Marsh Co.* that states are not barred by the Commerce Clause from interfering with free trade when legislating for local purposes, in this case placing a dam across a local river, unless the state law “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.”\(^ {24}\) The Court rejected the challenger’s argument that the state law was invalid because the dam obstructed navigation on the river and that an unfeathered right of “full and free navigation thereof” is constitutionally required.\(^ {25}\)

The Taney Court clarified in 1837 that the power of the state to regulate commerce derives from the state’s own police powers, not from a delegated grant of power.

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17. See infra Part IV.B.I.
18. See infra Part IV.B.II.
20. See *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977); see also CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW §§ 20.3.2.1.C, at 878 n.178; 20.3.2.1.D, at 882 n.201–03 (2007) (explaining that the Supreme Court has interpreted the Commerce Clause to limit the power of the states regarding economic legislation and noting that the Supreme Court has invalidated state legislation when it attempts to regulate transactions in other states or when its primary purpose or effect is to favor the local economy).
21. 22 U.S. 1, 195, 203–04 (1824) (“The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally. . . . [While inspection laws, quarantine laws, health laws of very description, as well as laws for regulating the internal commerce of a State, and those which respect turnpikes, ferries, etc., are components parts of this mass of subject matters for state regulation . . . the] legislative power of the Union can reach them . . . for national purposes.”).
22. Id. at 235–36 (Johnson, J., concurring). This is consistent with a theory of strong federal supremacy, discussed at KELSO & KELSO, supra note 19, §§ 18.1 & 18.1.1.
24. 27 U.S. 245, 252 (1829).
25. Id. at 252 n.1.
from the Commerce Clause. This power regulation was true unless, as indicated in Cooley v. Board of Wardens, the subject was “of such a nature as to require exclusive legislation by Congress” and thus appropriate only for federal regulation. In contrast, some subjects are “drawn from local knowledge and experience” such that they are subject only to state regulation, and over some subjects there is concurrent state and federal power.

The Taney Court noted in 1855 that while the Court will make an initial determination in DCC cases as to whether a particular state statute impermissibly burdens commerce, Congress is the ultimate decisionmaker on whether a conflict exists between state and federal law. Thus, where Congress has constitutional power to regulate under the Commerce Clause, Congress can consent to any state regulation of commerce it wishes; and, as stated in Article I, § 10, cl. 3, with the consent of Congress, any state can enter into an interstate “Agreement or Compact” with other states. If Congress has consented, no DCC challenge can be brought.

B. Modern Dormant Commerce Clause Doctrine

Since 1937, the Court adopted a two-tiered approach to Dormant Commerce Clause doctrine. Under the approach following Maine v. Taylor, state laws which discriminate against interstate commerce are subjected to a heightened level of scrutiny when the law is “affirmatively discriminatory against transactions rather than “only incidentally” discriminatory.” Such “rank discrimination,” such as applying strict scrutiny against state laws that “affirmatively discriminate” interstate commerce, clearly violates the purpose behind the Commerce Clause. Along with this, applying the Pike v. Bruce Church balancing test, a test that requires a lower burden for incidental transaction discrimination than affirmative discrimination, to evenhanded legislation, has caused some Justices great concern.

Like most judicially created doctrines, the Court has elaborated the dormant DCC doctrine to respond to nuances presented by later factual cases coming before the Court. The Court has noted that there are four kinds of DCC cases: (1) the state legislation burdens

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27. Cooley v. Bd. of Wardens, 55 U.S. 299, 319–20 (1851); see e.g., Veazie v. Moor, 55 U.S. 568, 571–75 (1852), (holding that Maine’s grant of an exclusive license of navigation on the upper part of the Penobscot River, which is located entirely within Maine, was a proper exercise of state regulation). But see Woodruff v. Parham, 75 U.S. 123, 138–40 (1868), (holding that a state may not regulate commerce purely external to the state, nor impose a discriminatory tax on an article brought into it from another state).
33. Taylor, 477 U.S. at 138; see also Tyler Pipe Indus., Inc. v. Wash. Dept. of Revenue, 483 U.S. 231, 266 (1987).
interstate commerce on its face; (2) the state legislation is the product of a purpose to discriminate against interstate commerce; (3) the state legislation has a discriminatory effect on interstate commerce; and (4) the state regulates in-state and out-of-state commerce even-handedly and only involves an incidental effect on interstate commerce. In the first three kinds of cases, the Court indicated that the state bears the burden to justify its regulation. For state regulation that burdens interstate commerce on its face, the Court squarely places the burden on the state to establish the validity of the enactment. The Court has stated that the same approach applies to regulations that have a discriminatory purpose or discriminatory effect.

In determining whether the regulation was passed with a discriminatory purpose, the Court uses the same considerations used in equal protection cases to determine discriminatory purpose: Discriminatory effects, background circumstances, legislative history, and other evidence of motive. This can involve both direct and indirect evidence of purpose.

Regarding the fourth kind of case, the Court held in Pike v. Bruce Church, Inc.: If a state statute has only indirect effects on interstate commerce and regulates even-handedly, the DCC is violated only if plaintiff shows that the burden on interstate commerce is clearly excessive in relation to local interests. When making that determination, the Court considers the “nature of the local interest and . . . whether it could be promoted as well [by laws having] a lesser impact on interstate activities.”

The balancing test is the same in all sets of cases, with only the burden shifting from being on the challenger in Pike v. Bruce Church to being on the State in Maine v. Taylor. For example, in Bendix Autolite Corp. v. Midwesco Enterprises, Inc., the Court considered whether an Ohio statute, in which Ohio tolled a four-year statute of limitations on breach of contract and fraud cases for persons or corporations who are not “present” in the state, was facially discriminatory. The Court acknowledged that the statute “might have been held to be a discrimination that invalidates without extended inquiry.” Instead, the Court did a full Pike v. Bruce Church balancing test, but with the burden on the State to justify the regulation. Given that balance, the Court concluded the regulation failed post-
1937 DCC review balancing as an excessive burden on interstate commerce.\textsuperscript{48} Similarly, in \textit{Brown-Forman Distillers Co. v. New York State Liquor Auth.}, the Court noted:

This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. 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 even-handedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually \textit{per se} invalid under the Commerce Clause, and the category subject to the \textit{Pike v. Bruce Church} balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.\textsuperscript{49}

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In practice, however, the Court stated that there is “a virtual \textit{per se} rule of invalidity” for state legislation facially discriminating against interstate commerce or involving a discriminatory purpose or effect.\textsuperscript{50} As the “virtual \textit{per se}” language suggests, it can prove very difficult for the state to meet its burden in cases of discriminatory legislation. For example, in \textit{Wyoming v. Oklahoma},\textsuperscript{51} Oklahoma legislation required that coal-fired electric generating plants producing power for sale in Oklahoma must burn a mixture of coal containing at least ten percent Oklahoma-mined coal. Oklahoma's concern to lessen the state's reliance on a single source of coal delivered over a single rail line was held inadequate to justify the law in terms of the local benefits and the unavailability of nondiscriminatory alternatives because the state was using the illegitimate means of attempting to

\textsuperscript{48} Id. at 894–95.
isolate itself from the national economy. Further, Congress had not unambiguously manifested an intent to permit such a violation of the Commerce Clause as Oklahoma here attempted to justify. However, in Maine v. Taylor, the Court held that Maine could bar the import of baitfish in order to protect a fragile fishery environment from parasites, there being no reasonably available alternative testing mechanism to keep non-indigenous species from harming Maine's rivers.

As these cases suggest, the Court has continued to reflect the basic principle of free trade among the States. As stated, in 1977, the Court in Boston Stock Exch. v. State Tax Comm'n, stated:

[W]e begin with the principle that “[t]he very purpose of the Commerce Clause was to create an area of free trade among the several states . . . . It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States . . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.”

The Court continues to use the tests derived from Pike v. Bruce Church and Maine v. Taylor, echoing Maine v. Taylor in stating that a state law that discriminates against interstate commerce by putting burdens on interstate commerce not shared by local interests favored by the legislation must be justified by the state through showing that the law serves a legitimate local interest, unrelated to economic protectionism, that cannot be served as well by reasonable nondiscriminatory means. Of course, federal law, if "unmistakably clear," can sanction state laws that burden interstate commerce in ways the Court would otherwise hold invalid because DCC review, like preemption, is ultimately a matter of deciphering congressional intent.

III. QUESTIONS EMERGING THE LAST 30 YEARS

A. The Nature of Dormant Commerce Clause Review

i. The Nature of Maine v. Taylor Review

One issue regarding DCC review is whether the Maine v. Taylor test for facial discrimination or discriminatory purpose or effect is a strict scrutiny kind of test or rather just a version of the Pike v. Bruce Church balancing test but with the burden shifted from the challenger to show the government regulation is “clearly excessive” to the burden on

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52. Id. at 454–57.
53. Id. at 457–59.
54. 477 U.S. at 131, 144–52 (1986).
the government to prove that the regulation is not “excessive.” The Court phased the relevant test in Maine v. Taylor as follows:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to “place itself in a position of economic isolation,” it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live bait-fish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, “apart from their origin, to treat [out-of-state baitfish] differently.”

Despite this language, in some later cases the Court has indicated that the facial discrimination cases like Maine v. Taylor involve “the strictest scrutiny” and in practice can involve “a virtual per se rule” of invalidity, which suggests an approach akin to a strict scrutiny approach. However, the cases did not require the states to advance “compelling governmental interests” to support their laws. They only adopted the standard of “legitimate governmental interests” used under Pike v. Bruce Church, as indicated in the quote from Maine v. Taylor above. Further, despite language in some cases suggesting that under Maine v. Taylor the “less discriminatory alternatives” component of DCC review is a strict scrutiny “least restrictive alternative” test, the Court has never indicated consideration of less discriminatory alternatives is necessarily different under Maine v. Taylor than in Pike v. Bruce Church.
Conversely, some lower federal courts seem to note that Maine is merely Pike balancing, but with the burden applied to the State.\textsuperscript{65} For example, in McNeilus Truck & Mfg., Inc. v. Ohio, the Sixth Circuit Court of Appeals cited Supreme Court opinions suggesting that in both Pike and Taylor kinds of cases, the “critical consideration is the overall effect of the statute on both local and interstate activity.”\textsuperscript{66} The McNeilus court also noted that in a Taylor kind of case, which involves discrimination against interstate commerce, the state’s burden to justify their statute “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.”\textsuperscript{67} The Court then related that part of the analysis to the similar focus on less discriminatory alternatives in Pike.\textsuperscript{68}

Despite this conclusion, some lower courts, based on the “strictest scrutiny” and “virtual per se rule of invalidity” language have begun to apply a version of strict scrutiny when Maine v. Taylor applies, as the Fourth Circuit Court of Appeals did in Waste Mgmt. Holdings, Inc. v. Gilmore.\textsuperscript{69} The Seventh Circuit has similarly found that when laws “explicitly discriminate against interstate commerce[,]” then these laws are “presumptively unconstitutional” and trigger strict scrutiny.\textsuperscript{70} So, too, has the Eighth Circuit.\textsuperscript{71}

Although applying strict scrutiny, the Gilmore court would have permitted the state to satisfy the first prong of strict scrutiny based not on showing a compelling governmental interest, the normal strict scrutiny standard, but rather only by showing a “legitimate” governmental interest “other than economic protectionism.”\textsuperscript{72} The same is true of the other Circuit Court of Appeals using the “strict scrutiny” language.\textsuperscript{73} In Maine v. Taylor, the Supreme Court did indicate that “legitimate local purpose” could be considered for the State to meet its burden.\textsuperscript{74} This less than strict scrutiny kind of approach is supported by Supreme Court precedents, as the Gilmore court noted.\textsuperscript{75}

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uniform safety regulations enacted without the object to discriminate.” Id. at 393. Thus, Carbone was not a case where despite using a very narrowly tailored approach the regulation was not the “least restrictive alternative.” It was a case where many less burdensome alternatives existed. This is similar to Pike v. Bruce Church balancing. See generally CHEREMINSKY, supra note 3, at 464 (noting that where Pike balancing is applied, the Court has never solely “invalidated a nondiscriminatory state law on the ground that the goal could have been achieved through a means less burdensome on interstate commerce.”). If solely invalidated on such a ground that would suggest a “least burdensome effective alternative” test was being applied.

\textsuperscript{65} See, e.g. McNeilus Truck & Manufacturing, Inc. v. Ohio, 226 F.3d 429 (6th Cir. 2002).


\textsuperscript{67} Id. at 443 (citing Hunt v. Washington State Apple Advert. Comm’n, 432 U.S. 333, 353 (1977); Taylor, 477 U.S. at 141; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Reflecting some of the confusion, despite this language in McNeilus that both Pike and Maine involve balancing the overall effect on interstate commerce, the Court referred to Maine as a “strict scrutiny” approach. McNeilus, 226 F.3d at 444.

\textsuperscript{68} Id. at 443 (citing Hunt v. Washington State Apple Advert. Comm’n, 432 U.S. 333, 353 (1977); Taylor, 477 U.S. at 141; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Reflecting some of the confusion, despite this language in McNeilus that both Pike and Maine involve balancing the overall effect on interstate commerce, the Court referred to Maine as a “strict scrutiny” approach. McNeilus, 226 F.3d at 444.

\textsuperscript{69} 252 F.3d 316, 333–34, 342 (4th Cir. 2001) (characterizing Maine v. Taylor as a “strict scrutiny” test and applying a “least discriminatory means” requirement.).

\textsuperscript{70} Park Pet Shop, Inc. v. City of Chi., 872 F.3d 495, 501 (7th Cir. 2017) (discussing “presumptive unconstitutional” language); Legato Vapors, LLC v. Cook, 847 F.3d 825, 834–35 & n.1 (7th Cir. 2017) (noting Maine v. Taylor is a “strict scrutiny” approach).

\textsuperscript{71} 477 U.S. at 138.

\textsuperscript{72} Gilmore, 252 F.3d at 341–42.

\textsuperscript{73} See, e.g., Legato Vapors, 847 F.3d at 830, 835.

\textsuperscript{74} 477 U.S. at 138.

\textsuperscript{75} Gilmore, 252 F.3d at 341.
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Regarding the “less restrictive alternative” analysis, the Fourth Circuit did apply in Gilmore a rigorous, strict scrutiny “least discriminatory alternative” analysis. However, in Maine v. Taylor the Court only said, “[a] State must make reasonable efforts to avoid restraining the free flow of commerce across its borders . . . .” At some point, the Supreme Court will need to decide which approach to adopt.

ii. The Nature of Pike v. Bruce Church Review

The Pike v. Bruce Church, Inc. test for even-handed state regulations, which nevertheless incidentally burden interstate commerce, is more stringent than the minimum rational basis review test used under the Equal Protection Clause. Under minimum rational basis review, courts should substantially defer to legislative judgment concerning the weight given to the statute’s conceivable purposes and the rationality of the statutory means to advance that end. Instead, because of the suspicion of state legislative motives in cases involving DCC review, no such deference is given under the DCC. Instead, courts determine for themselves the extent of the legislature’s legitimate purposes, and whether the means adopted reflect a “clearly excessive” burden on interstate commerce. By engaging in DCC review, the district court hears the evidence concerning the state’s alleged legitimate interest, as well as evidence concerning the burden on interstate commerce. The district court then balances the extent of the state’s benefits against the degree of interference with interstate commerce. As a factual decision made by the district court, this conclusion will be entitled to deference on appeal and subject to being reversed on appeal only if it is “clearly erroneous.”

76. Id. at 342–45.
77. 477 U.S. at 147.
78. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); see also U.S. CONST. amend. XIV, § 1.
79. See, e.g., Heller v. Doe, 509 U.S. 312, 320–21 (1993) (noting that a statutory classification need not be supported by empirical evidence and must be upheld if it is based on any rational speculation).

[a] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality," . . . . [On the other hand,] even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.

82. See, e.g., Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670–71 (1981). Reflecting their predisposition to favor states, conservative Holmesian Justices Stewart and Rehnquist, along with conservative formalist Chief Justice Burger, dissented from this conclusion in Kassel, stating that if “a traffic safety law is not merely a pretext for discrimination the Court should ask only whether it is rational. Id. at 691–93 (Rehnquist, J., joined by Burger, C.J., and Stewart, J., dissenting). The rest of the Court, however, rejected this view.
83. Id. at 667.
84. Id. at 670–71.
85. Maine v. Taylor, 477 U.S. 131, 144–46 (1986). See also Bibb v. Navajo, 359 U.S. 520, 524–30 (1959) (balancing test of Southern Pacific was used to invalidate an Illinois ban on straight mudflaps, which were held to have inconclusive safety benefits while being inconsistent with laws in 45 other states.); Kassel, 450 U.S. 662, 669–76 (1981) (finding Iowa’s ban on 65-foot doubles invalid). Mark V. Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. REV. 125, 126–30 (1979). On recent Pike review, see Rocky Mountain Farmers
Because of the lack of substantial deference to the legislature and the Court balancing for itself the amount of the benefits and burdens to determine if the burdens are “clearly excessive,” the *Pike v. Bruce Church* test reflects what can be called a kind of “second-order” reasonableness review, rather than minimum rational review. Because the burden shifts to the government in the other three kinds of dormant commerce clause cases, these cases can be called a kind of “third-order” reasonableness review. This is not a form of heightened strict scrutiny, however, because the Court will not restrict itself to “actual purposes” as occurs at strict scrutiny, in spite of Justices Brennan and Marshall’s attempt to support the “actual purpose” standard, and the Court will allow the state to use “legitimate” government interests to support the statute rather than “compelling” government interests of strict scrutiny.

**B. When to Apply Maine v. Taylor or Pike v. Bruce Church**

i. Standards for Discriminatory Burdens to Trigger *Maine v. Taylor*

Under prevailing doctrine, the *Maine v. Taylor* test is clearly triggered if the state regulation involves facial discrimination against interstate commerce or was passed based on a court conclusion that it involves a discriminatory purpose. The remaining question involves whether the *Maine v. Taylor* test is triggered when the state regulation, although neutral on its face and lacking a discriminatory purpose, nonetheless has the effect of imposing discriminatory burdens on interstate commerce. While the traditional phrasing of the test indicates that *Maine v. Taylor* should be applied in such circumstances, a number of Circuit Courts of Appeals have departed from this understanding over the last thirty years.

For example, while acknowledging that facial discrimination triggers the higher *Maine v. Taylor* kind of review, the Seventh Circuit has said that when considering “[f]acially nondiscriminatory laws” that “have a discriminatory effect on interstate commerce,” one must subcategorize the case according to the strength of their effects. If the discriminatory effect is powerful—“acting as an embargo on interstate commerce without hindering intrastate sales”—the Court treats the law as if it were a first-category, facially discriminatory statute. If the facially nondiscriminatory law imposes only “mild disparate effects” and has prospective justifications that are “neutral” between interstate and intrastate commerce.

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86. For discussion of “second-order” reasonableness review generally, see KELSO & KELSO, supra note 19, § 7.2.1, at 185.
87. For discussion of “third-order” reasonableness review generally, see KELSO & KELSO, supra note 19, § 7.2.1, at 185.
88. *Id.* at § 20.3.2.1 (Brennan, J., joined by Marshall, J., concurring). On use of “actual purposes” only at strict scrutiny, see, e.g., *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (“To be a compelling interest [under strict scrutiny], the State must show that the alleged objective was the legislature’s ‘actual purpose.’”).
90. *See supra* notes 35–37 and accompanying text.
92. *Id.*
94. *Park Pet Shop, Inc. v. City of Chi.*, 872 F.3d 495, 501 (7th Cir. 2017) (citation omitted) (citing Nat'l Paint & Coatings Ass'n v. City of Chi., 45 F.3d 1124, 1130–31 (7th Cir. 1995)).
intrastate commerce, then the Court applies *Pike v. Bruce Church*. The Court balances the “burden on interstate commerce against the nature and strength of the state or local interest at stake,” all the while keeping keenly aware of the dangers of such an all-things-considered analysis. The Second Circuit has similarly stated that *Pike*, not *Maine v. Taylor*, only applies to any claim that the statute imposes “a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.” Similarly, under the Third Circuit’s formulation, when an out-of-state plaintiff shows discriminatory effects against out-of-state commerce, *Pike* is triggered because the Third Circuit reads the “incidental burdens” language of *Pike* to mean “incidental burdens . . . that discriminate against interstate commerce.”

ii. Standards to Trigger *Pike v. Bruce Church* Review

a. Some Kind of Discrimination Against Interstate Commerce Needed Even to Trigger *Pike*

The language in *Pike v. Bruce Church* states that it applies to regulations that “regulate evenhandedly” and only have “indirect effects on interstate commerce.” The “evenhandedly” language suggests that such regulation does not discriminate in any way against interstate commerce, but merely has the “indirect” or “incidental” effect of burdening interstate commerce, although its operation applies both to in-state and out-of-state activities. Under Supreme Court precedents, such regulation is still a problem under the DCC because such regulation still harms the underlying commitment to free trade among the states.

Despite this fact, a number of Circuit Courts of Appeals have limited *Pike v. Bruce Church* balancing test to circumstances with some discriminatory effect and have stated that absent such effects no heightened DCC analysis need be done. The only analysis is the standard, minimum rational basis review applicable to any economic regulation under the Due Process or Equal Protection Clauses. As stated by the Seventh Circuit, where nondiscriminatory economic regulations simply affect interstate commerce, “without any reallocation [of commerce] among jurisdictions” or, in other words, without

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95. Id. at 501–02 (quoting *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970)).
96. Id. at 501–02 (quoting *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970)).
97. See, e.g., Wiesmueller v. Kosobucki, 571 F.3d 699, 704 (7th Cir. 2009) (“The judiciary lacks the time and the knowledge to be able to strike a fine balance” between a law’s burdens and benefits under *Pike*).
100. 397 U.S. 137, 142 (1970).
101. See, e.g., Dorrance v. McCarthy, 957 F.2d 761, 764 (10th Cir. 1992) (“By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce” and “the *Pike* analysis” still applies).
103. Park Pet Shop, Inc. v. City of Chi., 872 F.3d 495, 502 (7th Cir. 2017).
104. Id.
“giv[ing] local firms any competitive advantage over those located elsewhere,” these laws comply with the DCC if they satisfy “the normal rational-basis standard.”

Similarly, the Second Circuit will not entertain a dormant Commerce Clause claim where those burdens do not disparately impact out-of-state interests, even where the burdens on interstate commerce are demonstrably significant. Further, the Second Circuit has indicated that only certain types of burdens will be considered as disparately affecting out-of-state commerce. The Third Circuit has also refused to rule on *Pike* claims even where the district court made findings that the burdens on interstate commerce were real and significant. The Fifth Circuit also requires a threshold showing of disparate impact on interstate commerce before it will undertake *Pike* balancing.

Although such tests have been met with criticism even within the relevant Circuits, they remain a bar to otherwise valid DCC claims. Under such formulations, Circuit Courts of Appeals have even rejected claims where the effect of a local ordinance would only be felt by out-of-state interests, because the law was facially neutral and

105. *Id.*

> The focus of our disparate burden analysis is a state’s shifting the costs of regulation to other states. “State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted.” Such circumstances raise the risk that state policymakers will not bear the true political costs of their decisions, because those costs will fall in some measure on the residents of other political jurisdictions. “[T]he Court has often recognized 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.” Accordingly, the justification for judicial intervention in the absence of congressional action may outweigh the strong tradition of judicial deference to legislative decisions, and the strain on judicial competence imposed by comprehensive cost/benefit balancing.


> A review of recent Supreme Court cases reveals that certain types of impacts on interstate commerce are of special importance in the balance with the state’s putative interest. These impacts include the disruption of travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant state, and impacts that fall more heavily on out-of-state interests. Because the purpose of the Commerce Clause is to protect the nation against economic Balkanization legitimate regulations that have none of these effects arguably are not subject to invalidation under the Commerce Clause.

108. *See* Ford Motor Co. v. Ins. Comm’r of Pa., 874 F.2d 926, 943–44 (3d Cir. 1989); *see also* Instructional Sys., Inc. v. Comput. Curriculum Corp., 35 F.3d 813, 827 (3d Cir. 1994) (“devastating” interstate consequences not sufficient to raise a claim under *Pike*).

109. Nat’l Solid Waste Mgmt. Ass’n v. Pine Belt Reg’l Solid Waste Mgmt. Auth., 389 F.3d 491, 502 (5th Cir. 2004) (citing Automated Salvage Transp., Inc. v. Wheelabrator Ev’t. Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998)). Unlike the Second Circuit, however, the Fifth Circuit focuses its disparate impact analysis to instances where the statute or regulation “inhibits the flow of goods interstate.” Allstate Ins. Co. v. Abbott, 495 F.3d 151, 163 (5th Cir. 2007).

110. *See* Park Pet Shop, Inc. v. City of Chi., 872 F.3d 495, 504–05 (7th Cir. 2017) (Hamilton, J., dissenting) (”[T]he Supreme Court itself has not yet confined the balancing test under *Pike*, 397 U.S. 137 (1970), as narrowly as my colleagues suggest.”).
non-discriminatory.\(^1\) In these Circuits, laws alleged to burden ordinary commercial interests are tested only by the most lenient form of judicial review: The rational-basis test.\(^1\)

\section*{b. No Discrimination Needed to Trigger \textit{Pike} if Burden Exists on Interstate Commerce}

Other Circuit Court of Appeals have followed the traditional approach of applying \textit{Pike v. Bruce Church} balancing to even-handed regulations which, while not imposing discriminatory effects on out-of-state commerce, still burden interstate commerce.\(^3\) Thus, while the Fourth Circuit has expressed skepticism towards \textit{Pike} balancing, it refuses to adopt the discrimination/disparate impact framework adopted in other circuits.\(^4\) The Sixth Circuit's approach is also faithful to the Supreme Court's language.\(^5\) The Eighth Circuit's approach to \textit{Pike} claims also does not incorporate a threshold discrimination/disparate impact requirement.\(^6\) The Tenth Circuit has expressly rejected and criticized the "discrimination" and "disparate impact" approach to \textit{Pike} balancing.\(^7\)

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\(^1\) See Park Pet Shop, Inc., 872 F.3d at 495. Unsurprisingly, this hyper-restrictive formulation of \textit{Pike} has been criticized within the Circuit. See id. at 504–05 (Hamilton, J., dissenting).

\(^2\) Monarch Beverage Co., Inc. v. Cook, 861 F.3d 678, 681 (7th Cir. 2017) ("Monarch's equal-protection challenge triggers only the most lenient form of judicial review: the law is valid unless it lacks a rational basis.").

\(^3\) Under this familiar standard, a challenger must prove that the law is not rationally related to a legitimate government interest. This is "a notoriously heavy legal lift," id. (citation omitted), especially for litigants targeting economic regulations, which enjoy a "strong presumption of validity." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993). See also Saukstelis v. City of Chicago, 932 F.2d 1171, 1174 (7th Cir. 1991) ("Courts [properly] bend over backward to explain why even the strangest rules are not that far gone."). (emphasis in original). Thus, it falls to the challenger to "negative every conceivable basis which might support [the law]." Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook, 808 F.3d 318, 322 (7th Cir. 2015).


\(^5\) See Colon Health Ctrs. of America, LLC v. Hazel, 733 F.3d 535, 546–47 (4th Cir. 2013). Instead, the Fourth Circuit applies the \textit{Pike} test as this Court has explained it, closely scrutinizing the putative local benefits and weighing them against the costs imposed upon interstate commerce. Indeed, the Fourth Circuit has twice struck down regulations under \textit{Pike} in \textit{Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.}, the court struck down a statute that allowed any existing franchised dealer in Virginia to protest the establishment of a new dealership for the same brand anywhere in the state. 401 F.3d 560, 563, 574 (4th Cir. 2005). Although the law applied equally to intrastate and interstate firms, the court held that the "the statute's burdens clearly exceed its benefits." Id. at 573. Similarly, in \textit{Medigen of Kentucky, Inc. v. Public Service Comm'n of W. Va.}, the court held that the government's purported benefits were too speculative to survive a challenge under \textit{Pike}. 985 F.2d 164, 165–67 (4th Cir. 1993).

\(^6\) See Eastern Kentucky Res. v. Fiscal Court of Magoffin Cty., Ky., 127 F.3d 532, 545 (6th Cir. 1997). In \textit{Eastern Kentucky Res.}, the court upheld a regulation of solid waste management because the "the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce." Id. The Sixth Circuit has followed this straightforward approach to a claim that a regulation unconstitutionally burdened the interstate scrap metal market, as well as to a statute preventing milk sellers from disclosing the absence of hormones in their milk products. See also \textit{Tennessee Scrap Recyclers Ass'n v. Bredesen}, 556 F.3d 442 (6th Cir. 2009); \textit{Int'l Dairy Foods Ass'n v. Boggs}, 622 F.3d 628 (6th Cir. 2010).

\(^7\) See \textit{U & I Sanitation v. City of Columbus}, 205 F.3d 1063, 1070–72 (8th Cir. 2000); see also \textit{United Waste Sys. of Iowa, Inc. v. Wilson}, 189 F.3d 762, 768 (8th Cir. 1999) (noting that \textit{Pike} balancing is "far more deferential to the states"). Yet, the court has also recognized that \textit{Pike} is not toothless and has struck down a regulation where the effects on interstate commerce were "far from trivial." \textit{U & I Sanitation}, 205 F.3d at 1072.

\(^8\) Dorrance v. McCarthy, 957 F.2d 761, 764 (10th Cir. 1992). In \textit{Dorrance}, the defendants contended "that when a statute regulates even-handedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce." Id. In holding that defendant's argument was "not only circular," but that it "completely misstate[d] the \textit{Pike} analysis," the Tenth Circuit expressly rejected the "differential impact" or "discrimination" threshold of the Second, Third, Fifth, and Seventh Circuits. Id. The court concluded that "by definition, a statute that regulates even-handedly does not impose a different burden on interstate commerce than it does on intrastate commerce." Id.
So, too, the Eleventh Circuit has declined to incorporate the discrimination/disparate impact prerequisite into its analysis of Pike claims.\footnote{118}

Regarding the other Circuit Courts of Appeals, the First Circuit applies Pike to non-discriminatory burdens on interstate commerce, but has cited approvingly the Third Circuit’s explanation that “the fact that a law may have ‘devastating economic consequences’ on a particular interstate firm is not sufficient to rise to a Commerce Clause burden.”\footnote{119} The Ninth Circuit has recognized the Circuit split on whether Pike claims require a threshold showing of discrimination or disparate impact.\footnote{120} However, the Ninth Circuit has also repeatedly declined to pick a side in the debate, instead focusing on discrimination in the cases and thus avoiding the controversy.\footnote{121} The D.C. Circuit does not appear to have ruled on a Pike claim in over thirty years.\footnote{122}

IV. THE BEST APPROACH TO DORMANT COMMERCE CLAUSE REVIEW

A. The Nature of Dormant Commerce Clause Review

The better analysis of the DCC cases is that in cases where Maine v. Taylor standard of review applies, the burden of proof shifts from the challenger in Pike v. Bruce Church to the state under Maine v. Taylor, but otherwise the review is similar.\footnote{123} The language in Supreme Court opinions concerning the “virtual per se rule of invalidity” in cases that apply Taylor would then reflect that when the state is engaged in such discrimination against interstate commerce, the state’s interests would likely be sufficiently weak and the burden on interstate commerce sufficiently great; meaning, it would be almost inevitable that the burden on interstate commerce would be “clearly excessive,” a

\footnote{118. See Diamond Waste, Inc. v. Monroe Cty., Ga., 939 F.3d 941, 944–45 (11th Cir. 1991). In Diamond Waste, the court struck down a county ordinance because it “could have achieved its objectives as well with a lesser impact on interstate activities.” Id. at 945. The Eleventh Circuit has also expressed concern over deferring to local judgments in a proper Pike analysis. Florida Transp. Servs., Inc. v. Miami-Dade Cty., 703 F.3d 1230, 1261 (11th Cir. 2012). In a challenge to stevedore permits, the court held that “deference is not absolute,” and struck down the scheme because although the benefits claimed were legitimate, the record AA shows no local benefit rationally furthered by the permitting scheme. Id. at 1260–61. However, the court has also demonstrated that it will uphold a statute or regulation where the burdens on interstate commerce are minimal. See Locke v. Shore, 634 F.3d 1185, 1193–95 (11th Cir. 2011).


120. See Pacific NW. Venison Producers v. Smitch, 20 F.3d 1008, 1014–15 (9th Cir. 1994) (explaining the circuit split).


122. The last Pike case in the D.C. Circuit involved a challenge to the constitutionality of a District of Columbia ordinance which banned the sale, use, or possession of “any device designed to detect or counteract” a police radar. Electrolet Corp. v. Barry, 737 F.2d 110 (D.C. Cir. 1984). The court upheld the ordinance simply because “the local government's safety rationale [was] not ‘illusory’ or ‘nonexistent.’” Id. at 113.

123. McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery, 226 F.3d 429, 443 (6th Cir. 2000) (citing Hunt, 432 U.S. at 353). That level adopts the same kind of reasonableness review balancing test as “second-order” reasonableness review of Pike v. Bruce Church, but shifts the burden from the challenger to the state, as is true of the Taylor test. This can be called “third-order” reasonableness review, which is a more vigorous kind of scrutiny since the burden is now on the government to justify its action. On this point, see generally KELSO & KELSO, supra note 19, § 7.2.1.

conclusion that could be reached without an extensive court analysis. In reaching this conclusion, the Court would apply not the strict scrutiny “least restrictive alternative” analysis, but would merely consider less discriminatory alternatives in the context of deciding whether the state’s statute represented a clearly excessive burden on interstate commerce, as occurs under Pike v. Bruce Church analysis.

It is difficult to draw a line between a state law, even-handed on its face, which has discriminatory effects on interstate commerce (to which the more stringent Maine v. Taylor dormant commerce clause review currently applies), and a state law, even-handed on its face with only incidental effects on interstate commerce (to which the Pike v. Bruce Church test applies). Given this difficulty, it would be somewhat anomalous for that difficult line-drawing task to result in a shift from the “second-order” reasonableness review of Pike to a strict scrutiny approach. Even under such reasonableness review, the Court can easily hold that state laws that directly regulate interstate commerce, as by regulating transactions in other states, are invalid.

B. When to Apply Maine v. Taylor or Pike v. Bruce Church

i. Discriminatory Effects Doctrine

In the absence of facial discrimination or proving that the regulation was passed with a discriminatory purpose, to which the heightened review standard of Maine v. Taylor clearly applies, deciding whether a particular regulation involves a discriminatory effect on interstate commerce or merely an indirect burden on interstate commerce can be tricky.

For example, in Exxon Corp. v. Governor of Maryland, the Court considered a regulation barring producers and refiners of petroleum products—all of which were


126. The source of some of the confusion may be C & A Carbone, Inc. v. Town of Clarkson, 511 U.S. 383, 392 (1994). There, the Court said, “[d]iscrimination against interstate commerce in favor of local businesses 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.” Id. (citing Maine v. Taylor, 477 U.S. 131 (1986) (upholding Maine’s ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species). But Taylor did not necessarily involve a “least restrictive alternative” approach, as the Court indicated only that a “State must make reasonable efforts to avoid restraining the free flow of commerce across its borders . . . .” 477 U.S. at 147. Even in Carbone the Court recognized that the town of “Clarkson has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question. The most obvious would be uniform safety regulations enacted without the object to discriminate.” Carbone, 511 U.S. at 393. Thus, Carbone was not a case where despite using a very narrowly tailored approach the regulation was not the “least restrictive alternative.” It was a case where many less burdensome alternatives existed. This is similar to Pike v. Bruce Church balancing.


128. Cf. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (prohibiting bar distillers from selling in New York at prices higher than the lowest price to be charged elsewhere, per a posted price list for future sales); Healy v. Beer Institute, Inc., 491 U.S. 324 (1989) (finding local prices tied to the lowest prices charged in other states had the illegitimate practical effect of controlling conduct beyond the state’s borders; also, the statute was discriminatory on its face because it applied only to brewers and shippers of beer in interstate commerce and, thus, created a disincentive for companies doing business in the state to engage in interstate commerce).

out-of-state business—from retailing gasoline in the state. The Court concluded that the Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations,” and a nondiscriminatory regulation is not invalid simply because it causes some businesses to shift from a predominantly out-of-state industry to a predominantly in-state industry if the regulation is based on sufficiently strong legitimate interests. As Justice Blackmun noted in his separate opinion, the Court could easily have concluded the statute did create discriminatory effects, and thus could have concluded that Maine v. Taylor should have applied. The Court majority refused to do so, rejecting Justice Blackmun’s argument that the burden should be on the State since the case involved a discriminatory effect on interstate commerce.

A similar case is Minnesota v. Clover Leaf Creamery Co. There, the Court decided the validity of a Minnesota law that prohibited all milk retailers from selling their products in plastic containers, without regarding whether the milk, the containers, or the sellers are inside or outside the State. The Court concluded the statute did not discriminate “between interstate and intrastate commerce,” and thus applied Pike v. Bruce Church review. The Court acknowledged that the out-of-state plastics industry was burdened relatively more heavily than Minnesotan industries, which could have been used to find a discriminatory effect. However, the Court concluded that this “incidental burden” was “not ‘clearly excessive’ in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems.” There was also a possibility of finding a discriminatory purpose, which the Court majority ignored. Even if discriminatory effects can be established, determining whether that effect is “powerful” or “mild”, as required by a Seventh Circuit case is another level of...
tricky, unpredictable decision-making. Reasoned decision-making suggests it would be useful to avoid all these potentially unnecessary lines of inquiry.141

Given these considerations, it would probably be best to clarify the standards for proving a discriminatory purpose versus an effect. Perhaps it would be useful to make the doctrine more similar to that under the Equal Protection Clause, where only a discriminatory purpose triggers strict scrutiny, not mere discriminatory effects. In the Equal Protection context, facial discrimination based upon race,142 or a discriminatory intent to engage in racial discrimination,143 triggers a strict scrutiny approach. Mere discriminatory effects, however, without a finding of discriminatory intent, do not trigger strict scrutiny.144 It would be somewhat anomalous for mere discriminatory effects to trigger strict scrutiny in the dormant commerce clause context. But not in the context of racial discrimination, particularly given the difficult line to draw between a state law, even-handed on its face, which has discriminatory effects on interstate commerce (to which the more stringent Maine v. Taylor DCC review applies), and a state law, even-handed on its face with only incidental effects on interstate commerce (to which the Pike v. Bruce Church test applies).145

ii. Non-Discriminatory Effects, but Burdens on Interstate Commerce

As indicated in Part III.B.2.b, there is an issue among the Appellate Courts whether Pike only applies when state statute has a disparate impact on interstate commerce— as the Second, Third, Fifth, and Seventh Circuits have held— or does it apply if the law’s burdens on interstate commerce plainly outweigh its local benefits— as the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have held.146 This latter approach is more consistent with Court opinions147 and the purposes behind Dormant Commerce Clause analysis to create an area of free trade among the states.148

As the Tenth Circuit has noted, the language of Supreme Court opinions requires courts to balance the costs of interstate commerce against the putative local benefits.149 As noted in Dorrance v. McCarthy, the defendants contended “that when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant. The only inquiry is whether the statute imposes a different burden on interstate

141. See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (“[T]here is no clear line separating the category of regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the Pike v. Bruce Church balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.”); U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1068 (8th Cir. 2000) (“To be sure, the distinction between laws that overly discriminate against interstate commerce and laws that place impermissible burdens upon interstate commerce is an illusive one.”).

142. See generally KELSO & KELSO, supra note 19, at § 26.2.1.1 (“Facial Discrimination Cases”).

143. Id. at § 26.2.1.2 (“Non-Facial Race Discrimination: The Intent Requirement”).

144. Id. at § 26.2.1.2 & n.147 (discussing the factors relevant to make a prima facie case that race was a motivating factor in the government’ decision, including “the impact or effect of the official action”; the “historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes”; “legislative or administrative history”; and “any other evidence of discriminatory motive.”).


146. See supra text accompanying notes 100–08.

147. See supra note 91 and accompanying text.


149. Clover Leaf Creamery Co., 449 U.S. at 472.
commerce than it does on intrastate commerce.”\textsuperscript{150} In holding that defendant's argument was “not only circular,” but that it “completely misstate[d] the \textit{Pike} analysis,” the Tenth Circuit expressly rejected the “differential impact” or “discrimination” threshold of the Second, Third, Fifth, and Seventh Circuits.\textsuperscript{151} The court concluded that “[b]y definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce.”\textsuperscript{152} And yet, \textit{Pike} balancing still applies.\textsuperscript{153}

V. ADDITIONAL CONSIDERATIONS UNDER DORMANT COMMERCE CLAUSE REVIEW

A. Is Economic Protectionism Ever a Legitimate Interest?

Where the state regulation has the purpose or primary effect to favor local economic interests, it is likely to be viewed as invalid. This is true if the regulation discriminates against interstate commerce on its face,\textsuperscript{154} or the purpose is to discriminate,\textsuperscript{155} or merely has discriminatory effects.\textsuperscript{156} There is a question, however, whether economic protectionism can ever be a legitimate interest to require at least a balancing of benefits and burdens, particularly if the law regulates “even-handedly” in its operation.

Outside the DCC, in cases of economic regulation under the Due Process Clause which triggers minimum rationality review, there is some support for concluding economic protectionism can be a legitimate interest.\textsuperscript{157} Other courts conclude economic protectionism can never be a legitimate government interest.\textsuperscript{158} For those Circuits that do not apply \textit{Pike} to nondiscriminatory burdens, and thus apply minimum rationality review, there is some support for the view that economic protectionism for local interests is a legitimate government interest.\textsuperscript{159} In contrast, cases involving traditional DCC review do not give simple economic protectionism much weight.\textsuperscript{160}

\textsuperscript{150} Philadelphia v. New Jersey, 437 U.S. 617 (1978) (barring import of waste to preserve local landfill space, the Court noting that there was no other reason than their origin for treating them differently; the state was merely trying to isolated itself from a problem shared by all); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (barring export of electricity until local users were served); Wyoming v. Oklahoma, 502 U.S. 437 (1992) (resident coal-fired electric generating plans serving Oklahoma customers were required to burn at least 10% Oklahoma-mined coal).
\textsuperscript{153} See, e.g., Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) (economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment); Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (“[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.”).
\textsuperscript{154} See, e.g., St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (“[N]either precedent nor broader principles suggest that mere economic protectionism of a particular industry is a legitimate government purpose.”); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.").
\textsuperscript{155} See, e.g., Minerva Dairy, Inc. v. Harsdorf, 905 F.3d 1047, 1060 (7th Cir. 2018) (noting that favoring local economic interests by passing a statute that “discriminates against long-distance commerce” does not raise due process, equal protection, or dormant commerce clause problems as long as the statute “does not categorically discriminate against out-of-state commerce.”)
\textsuperscript{156} See, e.g., Brown-Forman Distillers. Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (the Court has “generally struck down the statute without further inquiry” when the statute either “directly regulates
Under the intermediate review applicable to Art. IV, Section 2 Privileges and Immunities Clause analysis, there is at least some support that regulation to favor local interests must be considered in the application of that doctrine. For example, writing for the Court in *United Building and Constr. Trades Council v. Camden*, Justice Rehnquist considered whether the Clause was violated by a municipal ordinance which, as part of a state-wide affirmative action program, required that at least forty percent of the employees of contractors and subcontractors working on city construction projects be local residents. Thus, the city had to show a substantial reason for the difference in treatment, and a trial should be held on its claim that (1) persons who "live off" the city without living in it are a source of the economic and social ills against which the ordinance was aimed and (2) the law is closely related to that end. To the extent cases like *Maine v. Taylor* are viewed as a species of strict scrutiny, it is unlikely that "simple economic protectionism" would ever be viewed as a compelling government interest, thus supporting the "virtual[] per se" rule of invalid sometimes attributed to those cases.

**B. Can Pike v. Bruce Church Balancing be Done in a Principled Manner?**

Concurring in *Bendix Autolite Corp. v. Midwesco Enterprisers, Inc.*, Justice Scalia said the Court should engage in DCC review only if a state statute is discriminatory, and thus, the *Taylor* test applies, or creates an impermissible risk of inconsistent regulation by more than one state, and thus, implied preemption principles would apply. Justice Scalia charged that determining whether interstate commerce is excessively burdened by state law, as called for by the *Pike* balancing test, is an inquiry ill-suited to the judicial function because it is like asking whether a particular line is longer than a particular rock is heavy. Justice Thomas has joined Justice Scalia in his criticism of *Pike*.

Chief Justice Rehnquist has not joined with this rejection of the *Pike v. Bruce Church* test. However, his conservative preference for states’ rights meant that he was)

161. See Kelso & Kelso, supra note 19, at § 20.3.3.2, at 892 nn.295-97.
162. 465 U.S. 208, 214–15 (1984). The Court first held that the Privileges and Immunities Clause applies to city ordinances since cities are merely subdivisions of a state. Id. Second, the ordinance was not immune from review simply because some in-state residents were disadvantaged. Id. This result is consistent with *Dean Milk*, where the city of Madison’s discrimination against both out-of-city and out-of-state milk refineries raised problems under the Dormant Commerce Clause, discussed at Kelso & Kelso, supra note 19, at § 20.3.2.1.C, at 869 n.184. Third, the ordinance burdened the pursuit of a common calling, and that is a privilege sufficiently basic for interstate harmony to fall within the clause. *Camden*, 465 U.S. at 219. Justice Blackmun, dissenting, said that an extension of the clause to discrimination based on municipal residence has little practical justification and no historical or textual support. New Jersey residents living outside Camden can protect themselves by state political processes and this will further the interest of residents in other states. 465 U.S. at 223–35 (Blackmun, J., dissenting). However, just as the Equal Protection Clause, see Kelso & Kelso, supra note 19, at § 26.1, at 1083 nn.1-4, and the Dormant Commerce Clause, as in *Dean Milk*, see Kelso & Kelso, supra note 19, at § 20.3.2.1.C, at 869 n.184, apply to state and local action, so does the Privileges and Immunities Clause.
164. See supra text accompanying notes 61–64.
165. See supra text accompanying notes 50–55.
167. *Id.* at 897 (1988) (Scalia, J., concurring in the judgment) ("judging whether a particular line is longer than a particular rock is heavy"). See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) (under balancing tests "predictability is destroyed; judicial arbitrariness is facilitated").
169. See Kelso & Kelso, supra note 19, at § 10.3.3, at 321 nn.68–73 (noting that in 10th and 11th Amendment cases dealing with federalism issues Chief Justice Rehnquist was typically on the side of greater protection for
reluctant to invalidate state laws under DCC review. His reasoning techniques included pushing for greater use of minimum rational basis scrutiny in cases of traditional local concern, such as highway safety cases, and overlooking an appearance of discrimination if the state could have reached the same result by using nondiscriminatory means.\(^{170}\) It may be that similarly conservative Justices on the current Supreme Court may have similar views either to those of Justice Scalia or Chief Justice Rehnquist.\(^{171}\)

To be precise, the proper issue is not whether the Court can engage in DCC balancing, as phrased by Justice Scalia in *Bendix*,\(^ {172}\) but whether it is a useful enterprise. The Court does cost/benefit balancing in lots of areas and finds it is workable in those areas.\(^ {173}\) For example, we typically think a person behaves “reasonably” when the person engages sensibly in a “cost-benefit” analysis. That is why the Court requires administrative agencies to balance benefits against burdens in cases under the Administrative Procedures Act.\(^ {174}\) Similarly, the Court balances benefits and burdens to determine under the *BMW v. Gore* test whether a punitive damage award is “grossly excessive.”\(^ {175}\) Under Contract Clause review for government action burdening the state’s own contract obligations, the Court balances benefits and burdens to determine whether the government action is “reasonable and necessary” under the *U.S. Tr. v. New Jersey* test.\(^ {176}\) A similar balancing test is done under the Takings Clause for purposes of the *Penn Central* test.\(^ {177}\)

The same balancing is done in other constitutional doctrines. That is why the Court analyzes both benefits and burdens under the Procedural Due Process doctrine of


\(^{172}\) See supra note 168 and accompanying text.


\(^{174}\) Under the Administrative Procedure Act, the Court has required administrative agencies explicitly to balance “costs” versus “benefits” in deciding whether to adopt regulations in order to satisfy their obligation to engage in “reasoned decisionmaking.” *Michigan v. EPA*, 135 S. Ct, 2699, 2706–07 (2015) (unreasonable for EPA not explicitly to consider “costs” before deciding “whether” regulation is “appropriate and necessary” under the Clean Air Act); id. at 2714–15 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (taking “costs” into account in deciding “how much to regulate” adequate without an independent explicit cost analysis).

\(^{175}\) Under BMW, the Court considers: (1) the degree of reprehensibility of the conduct; (2) the ratio between the punitive damage award and the compensatory damage award; and (3) sanctions for comparable misconduct in the law, to determine whether the challenger can show the punitive damage award is “grossly excessive. *Id.* at 559, 575–85 (1996).

\(^{176}\) Under U.S. Trust, the challenger has the burden of showing — given a three-part factor balancing of the state’s “legitimate” interest; the statute’s means, including whether the benefits of the statute could be served “equally well” by an “evident and more moderate course”; and the “burden” on individual contract rights — that the burden was not “reasonable and necessary” given the statute’s benefit. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22, 31 (1977).

\(^{177}\) Under Penn Central, the Court balances the burden on the individual in terms of the economic impact of the regulation, its interference with reasonable investment backed expectations, and whether it leaves the individual with a reasonable rate of return on the investment against the benefits of the government action to determine whether the regulation is a “taking” as a too “sever[e]” burden on the individual. Penn Cent. Transp. Co v. City of New York, 438 U.S. 104, 124–25, 136–38 (1978).
Mathews v. Eldridge.178 The right of government workers to speak on matters of public concern also involves a balancing test of benefits and burdens under the Pickering test.179 A similar balancing takes places under the access to ballot/right to vote cases of Burdick v. Takushi and Anderson v. Celebrezze.180 Even the “reasonableness” test used by Chief Justice Roberts in Morse v. Frederick involved considering whether the burden on free speech rights was determined to be “reasonable” in light of the “important” benefit of “educating students of the dangers of illegal drug use.”181

In each of these cases, the Court balances the benefits of the government action against the burdens to determine whether the government action is “reasonable” or “excessive.”182 The Court has shown over the decades such balancing can be done. That is part of the act of judging. Over time, the balance becomes more predictable as cases get decided.183 Thus, in deciding whether a state law is a “clearly excessive” burden under the DCC Pike v. Bruce Church test,184 that balancing can be done, as the Court has done for decades.

A majority of the Supreme Court Justices appear to believe that after decades of close judicial review, congressional silence manifests an intent that the Court's free trade policy as implemented by DCC review should be maintained. Or they may believe that without the Court's review of state commercial laws, Congress might overreact to state laws that burden interstate commerce and thus produce negative results for state "sovereignty." Or they may be working from implications. Justice Kennedy said in Carbone v. Clarkstown,185 “[t]he Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." The Court has shown no interest to reconsider its basic DCC jurisprudence.186 The Court did recently reconsider one kind of DCC case,187 but that was in the context of applying standard DCC doctrine.

178. Under Mathews, the Court considers: (1) “the private interest” that will be burdened by the governmental action; (2) the means by which existing procedures achieve the government’s ends, including “the risk of an erroneous deprivation through present procedures and the probable value, if any, of additional or substitute procedures”; and (3) “the Government’s interest” or ends in the case. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

179. Under Pickering, the Court considers: (1) the government’s legitimate ends in “promoting the efficiency of the public services it performs through its employees”; (2) prevails in a balance against “the interests of the employee” in free speech; (3) including whether the government could act with more “narrowly drawn grievance procedures.” Pickering v. Bd. of Educ. of Will County, Ill., 391 U.S. 563, 568, 572 n.4 (1968).

180. Under Burdick and Celebrezze, “the state’s important regulatory interests are generally sufficient to justify” reasonable, nondiscriminatory restrictions. [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court . . . also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983).

181. Under Morse, the Court balanced the “burden” on free speech rights in light of the “important” benefit of “educating students of the dangers of illegal drug use” to determine whether the principal’s action was “reasonable.” Morse v. Frederick, 551 U.S. 393, 405–10 (2007).

182. See supra notes 175–83.

183. As another example, the theory of modern negligence law in torts is based on such a “cost-benefit” analysis. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (“If the probability be called P; the injury L; and the burden B; liability depends on whether B is less than L multiplied by P.”).

184. Under Pike, the Court considers: (1) the state’s “legitimate local public interest”; (2) the means by which the statute achieves these ends, including whether the benefits of the statute could be promoted “as well with a lesser impact on interstate activities”; and (3) given this, whether the “burden” on inter-state commerce is “clearly excessive” given the statute’s benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).


186. South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 171 (1999) (request not made until a brief was filed on the merits); id. (O’Connor, J., concurring) (no reason given to reconsider or abandon the Court’s well-established body of Commerce Clause jurisprudence).

187. In Quill Corp. v. North Dakota, 504 U.S. 298 (1992), the Court reaffirmed the rule from National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), that under Dormant Commerce Clause
C. The Market Participant Doctrine

The Court has created an exception to DCC review under the “market participant” exception. Beginning in 1976, in Hughes v. Alexandria Scrap Corp., the Court decided that there is no DCC review at all if a state acts as a participant in the marketplace, rather than as a regulator or taxing authority. The analytic justification for this development was that a state should be treated equally as a business when the state is running a business. Since private businesses can choose to discriminate against interstate commerce in their choice of customers or choice of business partners, states should not be put at a competitive disadvantage in such an enterprise. The specific facts in Hughes v. Alexandria Scrap involved the state of Maryland paying bounties for every Maryland-titled junk car converted to scrap. Maryland used higher document requirements for out-of-state processors. Rejecting a DCC challenge, Justice Powell wrote for the Court that the state's action, as a market participant, was not the kind of action with which the Clause is concerned.

The market participant theory was elaborated further in 1980 in Reeves, Inc. v. Stake, where the Court held that South Dakota could prefer its residents in the sale of cement from a state-owned cement plant. For a five-four Court, Justice Blackmun said that the framers did not intend to limit the ability of states to operate freely in the open market. Moreover, state proprietary activities often are burdened with the same restrictions imposed on private business. A four-Justice dissent said the market participant doctrine should be limited to procuring goods and services for government operations.

An outer limit to the market participant doctrine was noted in South Central Timber Development, Inc. v. Wunnick. In this case, the Justices most skeptical of the mar-

analysis a state cannot require a retailer having no physical presence in that state to collect and remit sales taxes on the sales it makes. Id. Quill thus gave a real competitive advantage to Internet sellers, who were in their infancy at the time. For example, Amazon started selling books in 1995. Makeda Easter & Paresh Dave, Remember When Amazon Only Sold Books?, L.A. TIMES (June 18, 2017, 12:40 PM), https://www.latimes.com/business/la-fi-amazon-history-20170618-htmlstory.html. In Quill, Justices Scalia, Kennedy, and Thomas indicated they ruled in Quill based on precedent, while noting that Congress could overturn National Bellas Hess by statute at any time. 504 U.S. 319–20. Justice White dissented from the holding. Quill, 504 U.S. at 321. After Quill, states and lower federal courts struggled with the competitive advantage given by Quill. Cf. Brohl v. Direct Marketing Ass'n, 814 F.3d 1129 (10th Cir. 2016) (law requiring out-of-state retailers to report such sales to the state and notify their customers of their obligation to pay state sales tax, including an “annual purchase summary” if the customer bought more than $500 during the year, constitutional as not excessive burden under Pike v. Bruce Church). More recently, Justices called for the Court to reexamine Quill. See District Marketing Ass’n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (“The legal system should find an appropriate case for this Court to reexamine Quill . . . .”). In 2018, the Supreme Court overruled Quill in South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (Roberts, C.J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting based on following Quill as precedent without regard to the fairness of the doctrine). This decision now permits states to implement sales tax regimes for both in-state and out-of-state sales.

189. See id.
190. See Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980) (“There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”); id. at 439 (“Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.”).
192. Id. at 800–01.
193. Id. at 805–10.
194. 447 U.S. at 432–40 (1980); id. at 452–54 (Powell, J., dissenting).
195. Id. at 437.
196. Id. at 439.
197. Id. at 450–51 (Powell, J., dissenting).
ket participant doctrine, Justices White, Brennan, Blackmun and Stevens (though not Justice Marshall who took no part in the decision of the case), joined in a plurality opinion, which concluded: (1) Congress did not implicitly authorize Alaska to require that timber taken from state lands and sold by the state be processed within the state prior to export; (2) in making such a rule, Alaska was a regulator rather than a market participant; and (3) the Commerce Clause barred the local-processing requirement. Justice White distinguished Hughes on the ground that Alaska participated in the timber market, but imposed conditions "downstream" in a different market—the timber-processing market. Also, while the state had a market participant interest as a private trader in the immediate sales transaction, the antitrust laws place limits on vertical restraints, and downstream restrictions have a greater regulatory effect than do limits on the immediate transaction.

In Wannicke, Justices Powell and Chief Justice Burger agreed with the "regulator/market participant" distinction, but would have remanded the case to the district court to apply that test in the first instance. Justices Rehnquist and O'Connor, dissenting, said Alaska was only doing indirectly what it could do directly, i.e., selling only processed logs.

The Court has also had to consider whether to extend the market participant exception to other constitutional doctrines, such as the Article IV, section 2 Privileges and Immunities Clause, which the Court so far has declined to do. The Court has also never really considered that while private businesses have strong profit incentives not to engage in discrimination against interstate commerce, except in unusual circumstances, and thus court review of their activities is not particularly necessary, a state-run business entity does not have the same kind of profit incentive. Thus, a doctrine based on the equivalence of state-run and private businesses may be a doctrine not based on adequate empirical premises.

D. Dormant Commerce Clause is Mostly Statutory Interpretation, Not Constitutional Law

The question remains whether Justice Scalia is correct in his criticism of the Pike balancing test. Would his view better contribute to constructive long-run systemic consequences? One's answer may depend on evaluating cases that have invalidated state laws by using Pike balancing and whether one believes those decisions have usefully promoted free trade or it is more important for states to be free to experiment when Congress has not acted.

Persons may disagree, but on balance the Nation's interests appear to have been advanced by striking down state laws that are viewed as excessively burdening interstate commerce. Certainly, the framers and ratifiers were concerned about state protectionist

199. Id. at 95–99; id. at 101 (noting that Justice Marshall took no part in the decision of this case).
200. Id. at 93–95.
201. Id. at 98–99.
202. Id. at 101 (Powell, J., concurring).
203. Id. at 101–03 (Rehnquist, J., dissenting). In another case to comment on the market participant doctrine, the Court held in 1988 that an Ohio motor vehicle fuel sales tax, which gave a tax credit for the sale of ethanol produced in Ohio, was regulatory rather than proprietary government activity, even though the purpose and effect of the credit was to subsidize a local industry. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 271, 277–78 (1988). Therefore, the market participant doctrine did not apply to protect the tax from Commerce Clause scrutiny. Id. at 278.
206. On the market participant doctrine generally, see Treg A. Julander, State Resident Preference Statutes and the Market Participant Exception, 24 Whittier L. Rev. 541, 544–61 (2002); Anson & Schenkkan, supra note 207, at 88 (arguing that "the doctrine plainly needs development").
It must be remembered that under the Articles of Confederation of 1783 there was no federal power to prevent protectionist legislation passed by various states after the end of the Revolutionary War in 1783, when a deep recession in 1784-85, caused in part by England closing markets and limiting importation of American goods into England in retaliation for losing the Revolutionary War, prompted state protectionism in response. Such protectionist legislation, passed by states to protect their own state’s commerce from competition, had the effect of retarding economic growth in the United States generally.

Faced with this reality, a meeting in Annapolis, Maryland was called and held in the summer of 1786, particularly to focus on the need to amend the Articles to deal with this economic problem and provide for uniform rules regarding trade. Although only five States sent delegates—New York, New Jersey, Pennsylvania, Delaware, and Virginia—the problems raised at that meeting convinced the participants, including James Madison and Alexander Hamilton, to petition the states for a broader Constitutional Convention the following year. This led to the Constitutional Convention in 1787 in Philadelphia, which framed the current United States Constitution.

Without Pike review, Congress would be forced to become more regularly involved in reviewing state legislation that interfered with free trade. It has been noted that there is some concern with institutional mechanisms and inertia of Congress under the current DCC doctrine, where if Congress disagrees with the court balance, Congress must pay legislation to reverse that decision. How much greater is the concern if Congress were to have to overcome legislative inertia in every case of the thousands of state economic laws passed each year. Of course, whether the current doctrine is a good idea depends upon whether the Court’s performance seems consistent enough with a background commitment to free trade or whether Congress would do a better job than the Court in considering these issues.

It may be a justifiable system for Congress to rely on the state and federal courts, with the Supreme Court power of review as the first line of defense against excessive state
regulation of interstate commerce. The institutional mechanisms and inertia associated with Congress are ill-suited to review thousands of state statutes that get passed each year relating to commercial matters.\textsuperscript{215} A more effective institutional response may well be the current system where individual litigants, if burdened by a state law, choose to bring that complaint to a court for initial review under the DCC.\textsuperscript{216} If there was no such DCC review, states might vigorously regulate commerce, and Congress either might not react at all or might be goaded into a strong counter-reaction that could deprive the states of all independence in the matter.

Congress, of course, can always overturn any court decision on DCC grounds if it so wishes.\textsuperscript{217} Thus, the doctrine is ultimately based not on the Constitution, but rather on Court attempts to determine implied congressional intent where Congress has been silent.\textsuperscript{218} Indeed, Congress could direct the Court to stop engaging in DCC review,\textsuperscript{219} or to adopt Justice Scalia’s version of the DCC doctrine\textsuperscript{220} if Congress so wished. Congress has shown no interest to do either.

VI. CONCLUSION

As this article has indicated, there are three main issues for the Court to consider regarding current DCC review. Issue one is whether to continue with Maine v. Taylor as a

\textsuperscript{215} This observation has certainly been true since the advent of modern economic regulation, and perhaps is even more true today. See generally Sam Kalen, Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause, 65 OKLA. L. REV. 381, 382 (2013) (“Today’s Congress lacks the congeniality that existed fifty years ago, and any suggestion that its members can achieve consensus through rational, interest group pluralism appears dominated instead by . . . partisan gridlock.”).

\textsuperscript{216} For the vast majority of state laws that do not burden individual business sufficiently to trigger a dormant commerce clause lawsuit, the state law prevails under current doctrine. Thus, there is a preliminary sorting of possible cases even before a court gets an opportunity to review some particularly burdensome state regulation. See, e.g., Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (Congress may confer “upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.”). See generally CHEMERINSKY, supra note 3, at 473 (“[S]tate laws burdening commerce are permissible, even when they otherwise would violate the dormant commerce clause, if they have been approved by Congress.”). It should be noted that the Court has stated that any such congressional intent must be expressed by Congress in a clear, unambiguous fashion. As stated in Maine v. Taylor, 477 U.S. 131, 139 (1986), “[a]n unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny.”

\textsuperscript{217} In his Treatise, Professor Chemerinsky phrases Congress’ ability to overrule any dormant commerce clause cases as “this is one of the few areas where Congress has the clear authority to overrule a Supreme Court decision interpreting the Constitution.” CHEMERINSKY, supra note 3, at 474. Perhaps a better way to make the same point is just to acknowledge that dormant commerce clause analysis, like whether some congressional statute preempts a state law under preemption analysis, is not strictly speaking a constitutional doctrine, but rather ultimately a matter of express or implied/dormant congressional intent. This is true even though one author has argued that the Court should view dormant commerce clause doctrine not as implied congressional intent, but as a categorical constitutional rule denying states ability to regulate, as under the Cooley approach that some things are in their nature national. See Norman R. Williams, Why Congress May Not “Overrule” the Dormant Commerce Clause, 53 UCLA L. REV. 153 (2005).

\textsuperscript{218} For example, Congress has done that in a particular area under the McCarran-Ferguson Act of 1945. Under the Act, Congress has exempted from Dormant Commerce Clause review state regulation and taxing of the business of insurance. See W. and S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 653 (1981). As a separate exception where Congress can overrule any Dormant Commerce Clause decision, under Article I, § 10, cl. 3, with the consent of Congress, states can “enter into any Agreement or Compact with another State,” even one that might involve burdening interstate commerce. U.S. CONST. art. I, § 10, cl. 3. The 1996 Northeast Dairy Compact, which permits the six New England states power to regulate the price of milk, is a prime example. See generally Redish & Nugent, supra note 215, at 589 (acknowledging the argument that “Congress’s failure to overrule the Court’s Dormant Commerce Clause decisions can be viewed as manifesting Congress’s intention to condone both the judicial exercise of the power and the propriety of the result.”)

“third-order reasonableness balancing” test with “legitimate” interests being used to justify state regulation, or to reformulate *Maine v. Taylor* as a strict scrutiny test, requiring “compelling” government interests to regulate and the state having to use the “least burdensome effective alternative.” 221 Issue two is whether to continue the current doctrine where facial discrimination, discriminatory purposes, or discriminatory effects trigger *Maine v. Taylor*, and only even-handed regulation that nonetheless has some burden on interstate commerce triggers the *Pike v. Bruce Church* test, or whether to switch cases involving discriminatory effects to apply only the *Pike v. Bruce Church* test. 222 Issue three is whether even-handed regulations that place some burden on interstate commerce should continue to trigger *Pike v. Bruce Church* or whether to abandon any Dormant Commerce Clause review in such cases, as some lower federal Courts of Appeals have done.223

The view of this article is that the Court should (1) clarify that *Maine v. Taylor* is a “third-order reasonableness balancing” test, not strict scrutiny;224 (2) that discriminatory effects should only trigger the *Pike v. Bruce Church* test, leaving *Maine v. Taylor* only for cases of facial discrimination or a discriminatory purpose;225 and (3) the Court should continue to support using *Pike v Bruce Church* for cases of even-handed regulations that burden both intrastate and interstate commerce equally, as well as extend *Pike v. Bruce Church* to cases of discriminatory effects, as recommended for issue two above. 226

In *National Pork Producers Council v. Ross*, 227 a five-four Court upheld the power of California to ban in-state sales of whole pork meat if it comes from breeding pigs confined

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222. See Park Pet Shop, Inc. v. City of Chicago, 872 F.3d 495, 502 (7th Cir. 2017).
223. Id. at 504.
225. See generally Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1084–90 (2002) (discussing the related problem with determining discriminatory purpose in Dormant Commerce Clause cases, particularly in cases where they may be little evidence of discriminatory effects).
226. See Dorrance v. McCarthy, 957 F.2d 761, 764 (10th Cir. 1992). It should be noted that if recommendation (2) is adopted, and only facial discrimination or discriminatory purpose trigger *Maine v. Taylor*, as is true for the analysis of facial discrimination, discriminatory intent, and discriminatory effects under the Equal Protection Clause, see *generally* KELSO & KELSO, supra note 19, at § 26.2.1.1 (“Facial Discrimination Cases”), then the argument to reformulate *Maine v. Taylor* as a strict scrutiny test under issue (1) becomes stronger, as facial discrimination or discriminatory intent does trigger strict scrutiny for race, ethnic, or national origin discrimination under the Equal Protection Clause. Id. On the other hand, the burden on interstate commerce from state legislation engaged in facial discrimination may not be viewed as sufficiently troublesome from the Court’s perspective as burdening individuals based on race, ethnicity, or national origin, and so “third-order reasonableness balancing” may still be appropriate, similar to the way in which the less than strict scrutiny standard of review of intermediate review is applied to cases of racial discrimination or discriminatory purpose based on gender under the Equal Protection Clause. See *generally* KELSO & KELSO, supra note 19, at § 26.3.1.2 (“Gender Discrimination Cases After 1970: Movement to Intermediate Review”).

My view is that facial discrimination against interstate commerce arising from state legislation is not as troubling as race discrimination, but is a similarly troubling kind of action as government’s singling out individuals for individualized special economic burdens under *Dolan* v. City of Tigard, 512 U.S. 374, 385–91 (1994), under Takings Clause analysis. That analysis is also a version of “third-order reasonableness balancing,” with the government having the burden to demonstrate a legitimate “nexus” between its action and individual economic behavior and that the government’s burden on individual economic behavior is not excessive, but “roughly proportional” to the problem the government is facing in the economic marketplace. See *generally* KELSO & KELSO, supra note 19, at § 22.2.5.1, at 975 nn.97–103 (“Standards of Review in Modern Takings Clause Cases”). On the specific issue of *Dolan* being a “third-order reasonableness balancing” test, but regular Takings Clause review under Penn Cent.I Transp. Co. v. City of New York, 438 U.S. 104, 124, 130–36 (1978), being a “second-order reasonableness” balancing test, similar to *Pike v. Bruce Church*, see R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 SOUTHERN ILL. U.L.J. 415, 460–63, 667–68 (2021). See also CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2, at § 18.3.4, at 748 nn.57–58 (2014) (ebook) (available at: http://libguides.scl.edu/kelesomaterials). Thus, without regard to how issue two is resolved, my view is that under issue one *Maine v. Taylor* should be viewed as a species of “third-order reasonableness balancing,” not “strict scrutiny” review, as discussed in this article. See *Maine*, 477 U.S. at 147.
in stalls so small they cannot lie down, stand up, or turn around. Because all parties stipulated that the law did not involve discrimination against interstate commerce, the *Maine v. Taylor* line of cases did not directly apply. Nevertheless, a number of justices commented on the relationship between *Maine v. Taylor* and *Pike v. Bruce Church*. Five justices specifically noted that “‘no clear line’ separates the *Pike* line of cases from our core antidiscrimination precedents.” This is consistent with the view taken in this article that both *Pike v. Bruce Church* and *Maine v. Taylor* are similar approaches with only the burden of persuasion shifting from the challenger to the government in the *Maine v. Taylor* line of cases.

Six justices on the Court clearly indicated that *Pike v. Bruce Church* should continue to be used for cases of even-handed regulations which nonetheless have a burden on interstate commerce. Their view that *Pike* balancing should be done in these kind of cases is also consistent with the view taken in this article. Three justices did adopt versions of DCC doctrines consistent with the views of Justices Scalia and Thomas that, absent discrimination, the *Pike* balancing is inappropriate for the Court to undertake. While such a view is consistent with some of the Court of Appeals cases discussed in this article, that approach only commanded three votes in *National Pork*— Justices Thomas, Gorsuch, and Barrett, in part.

On the third main issue discussed in this article, five justices noted that “the *Pike* line serves as an important reminder that a law’s practical effects may also disclose the presence of a discriminatory purpose.” In her concurrence, Justice Sotomayor underscores the importance of this point, saying, “*Pike’s* balancing and tailoring principles are most frequently deployed to detect the presence or absence of latent economic protectionism.” This language suggests the Court may be willing to view cases not involving facial discrimination or provable discriminatory purposes, but merely inferences from discriminatory effects, as properly triggering only the *Pike v. Bruce Church* line of cases, as suggested in this article.

One final point about *National Pork*. The two justices essential to supporting the result in the case, but not all of Justice Gorsuch’s reasoning, upheld the law on the grounds that the *Pike v. Bruce Church* balancing test is only triggered for “substantial burdens” on interstate commerce and the burden here was not substantial. While such a requirement

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228. *Id.* at 1153.
229. *Id.* at 1157, citing General Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997).
231. *Nat’l Pork Producers Council*, 598 U.S. at 390–93 (Sotomayor, J., joined by Kagan, J., concurring in part) (no substantial burden in this case and thus no further *Pike* balancing need be done); *id.* at 393–95 (Roberts, C.J., joined by Alito, Kavanaugh & Jackson, J., concurring in part and dissenting in part) (petitioners “plausibly alleged a substantial burden against interstate commerce” by the effect of this law on producer’s ability to sell in the lucrative California market, and thus would remand the case to let the lower court do the *Pike* balancing test).
234. *See* Monarch Beverage Co., Inc. v. Cook, 861 F.3d 678, 681 (7th Cir. 2017) (“Monarch’s equal-protection challenge triggers only the most lenient form of judicial review: the law is valid unless it lacks a rational basis.”).
235. *Nat’l Pork Producers Council*, 598 U.S. at 380–90 (Gorsuch, J., joined unreservedly only by Thomas, J., announcing judgment of the Court) (adopting the position of Justice Scalia that a cost-benefit analysis for “clearly excessive burdens” can never be done and is not a proper role for the courts); *id.* at 391–95 (Barrett, J., concurring in part) (balancing could not be done in this case given the issue involved weighing a moral judgment about eliminating allegedly inhumane products from the market versus cost of production.)
236. *Id.* at 376–77.
237. *Id.* at 391–93 (Sotomayor, J., joined by Kagan, J., concurring in part).
238. *See generally* Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1084–90 (2002) (discussing the related problem with determining discriminatory purpose in Dormant Commerce Clause cases, particularly in cases where they may be little evidence of discriminatory effects).
of a “substantial burden” has never been part of the *Pike* test, it is part of the modern test under the Contract Clause. In practice, this slight alteration of the *Pike* test may make little difference, since if the burden is not “substantial,” the burden would only be “clearly excessive,” in which the state’s interests were so small that the burden was “clearly excessive” even though the burden was not “substantial.” This would be true only in a very unusual case. Since the four justices dissenting in part concluded there was a “substantial burden” on these facts, they did not question that phrasing of the *Pike* test in their opinion. Candor requires acknowledging that if adopted in the future it would be a slight departure from the language of *Pike* and its progeny.

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240. See *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970) (finding no requirement that the burden be “substantial”, only that it be “clearly excessive” in relation to the benefit).


Such a “substantial burden” requirement creates a need to draw a line between “any” burden and a “substantial burden.” In the religious context this has caused difficulties. To determine “substantial burden” under RFRA, lower federal courts have tended to split between two tests: (1) does the burden have to involve a religious exercise which is “compelled” by the religion or otherwise forces the individual to a “stark choice”; or (2) is it enough if objection to following regulation is “religiously motivated” or otherwise “important” to religious practice. See, e.g., *United States v. Sterling*, 75 M.J. 407, 417–19 (U.S. Ct. App. Armed Forces 2016) (under either approach no substantial burden to remove from desk sign stating, “no weapon formed against me shall prosper”; option (1) above adopted by Third, Fourth, Ninth, and District of Columbia Circuits; option (2) adopted by First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits), cert. denied, 137 S. Ct. 2212 (2017). A third test, mentioned in passing in the Supreme Court case of *Burwell v. Hobby Lobby*, 573 U.S. 682, 724–727 (2014), is (3) whether the plaintiff has a “sincere” and “honest” belief the burden is “substantial.” That language tracks the usual phrasing in Free Exercise cases that free exercise doctrine in triggered by “sincerely held religious beliefs.” See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1728 (2018). Although the issues regarding burdens are different in the Dormant Commerce Clause context, a similar problem would exist if a preliminary finding that the burden was “substantial” was necessary to trigger the *Pike v. Bruce Church* test, rather than just doing a *Pike* balancing in every case of a burden, with an easy conclusion that the burden is not “clearly excessive” if the burden is relatively small.