STATE BENEFITS UNDER THE *PIKE* BALANCING TEST OF THE DORMANT COMMERCE CLAUSE: PUTATIVE OR ACTUAL?

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> This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?[1]

INTRODUCTION: CHAOS IS BETTER THAN RANDOMNESS

Pike balancing[2] in dormant Commerce Clause jurisprudence may always be chaotic, but it need not suffer from its current randomness. By simply adapting rational basis scrutiny to its state benefits analysis, the Supreme Court could greatly clarify the *Pike* balancing test.

Under our federal system of government the states must legitimately be able to regulate health, safety, and the general welfare. Problems arise when the states either enact protectionist regulations that discriminate against the commerce of other states, or when legitimate non-discriminatory regulations interfere with the harmony of national commerce. The Supreme Court developed dormant Commerce Clause jurisprudence to prevent such problems. Protectionist regulations, also known as discriminatory regulations, are virtually always struck down. The value of non-discriminatory regulations, on the other hand, is weighed against the impact on interstate commerce. Cases evaluated under this balancing rule are known as *Pike* balancing cases. The jurisprudence in this area,

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1. ROBERT BOLT, A MAN FOR ALL SEASONS 66 (1990).
2. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

though, is very murky. To see why requires an understanding of *Pike* jurisprudence as an analytical system; it is, however, difficult to come to such an understanding by merely reading the *Pike* cases or the literature on *Pike*. This is perhaps because the ostensibly simple *Pike* rule, that the burden on interstate commerce from a given state law cannot outweigh the law's benefits to the state, belies a far more complex analytical system.

Analogizing from the mathematical system of chaos theory may help us. Chaos theory holds that minor initial variations of an input into a system with predictable segments, and flows, will yield patterns of flow around so called "strange attractors," but nevertheless yield unpredictable results.[3] Take for example the path of an unmanned sled down a mogul-filled tract of mountain. Here there are a number of parameters, many of them fixed: the overall incline, the speed of the sled, the size and shape of the moguls, the force of gravity and inertia, etc. Any path the sled may take between moguls may be predicted based on the sled's previous velocity, rotation, and trajectory, but slight initial variations in the launch of the sled, in its velocity and trajectory, make predictions about where the sled will come out at the bottom virtually impossible. Despite clear parameters throughout the system and predictable paths within and between segments, the most significant factor remains the initial inputs into the system.[4] Nevertheless, the sled will eventually settle into a path between the moguls as though it were being "attracted" by the center point of each mogul. This is what chaos theorists call the "strange attractor" effect, and it is what separates chaos from randomness. We may not know the precise path the sled will take or where it will exit at the bottom, but we can say a good deal about the *kind* of path it will take. When we cannot see the "attractors," when the system lacks clear parameters, the outcome is no longer chaotic, but random.[5]

Now suppose a skier is to go down the mountain. At the top is a signpost that sends skiers of less than an expert rating to the lodge immediately rather than negotiating the moguls. Skiers that leave the mogul area prematurely are also sent to the lodge. The exit at the

3. *See generally* EDWARD N. LORENZ, THE ESSENCE OF CHAOS (1993).

4. *Id.* at 25-45. If this is hard to see at first, think of the infinite number of paths a pinball may take to the bottom of a pinball machine depending on its initial velocity, spin, and trajectory. *Id.* at 9-13.

5. *Id.* at 6. ("[A] *random* sequence of events is one in which anything that can ever happen can happen next.").

bottom of the moguls is divided into sections. Some sections direct the skier to the lodge while every other section allows the skier to continue. Thus, depending on where a skier comes out of the moguls he will either continue on the slopes or will be directed to the lodge for the rest of the day.

The dormant Commerce Clause is a little like this. If a state law discriminates against interstate commerce, it will not pass the first hurdle and will be struck down, or sent back to the legislative house so to speak. Once it passes the first hurdle, however, it still must negotiate its way through the courts, which will apply *Pike* and its progeny to determine whether to strike it down and send it back to the legislative house.

Pike analysis suffers from a lack of clear legal rules (our moguls in the chaos example) that shape the flow of a case (the "strange attractors" effect in the chaos example) as it careens down the *Pike* slopes, yielding unpredictable judicial outcomes. This is because "no single conceptual approach identifies all of the factors that may bear on a particular case."[6] The result is a much-decried randomness.[7] That is, the attractors, or legal rules, that should produce predictable analytical paths, given a certain starting set of facts, are not clear.

In this paper, I posit that the function of the "state benefits" analysis in the *Pike* balancing test is to be the "strange attractor" that, though unclear to legal analysts, actually determines the outcome of *Pike* balancing cases. The *Pike* test simply reads that "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[8]

The law is unsettled though, and the legal standard to be applied to the state benefits side of the *Pike* balancing scale is amorphous at best, resulting in unacknowledged splits between the courts of appeals. At the very least, a state law that is tested under *Pike* must be legitimately concerned with health, safety, or public welfare and must somehow further at least one of those ends. Just what constitutes a legitimate health, safety, or public welfare concern, however, is somewhat murky, and there is considerable, largely

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6. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978).

7. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3.5, at 424 (2d ed. 2002) ("[Pike balancing] has been criticized for being unpredictable and arbitrary.").

8. *Pike*, 397 U.S. at 142.

unacknowledged, disagreement over how strongly related a law must be to the state's goal. One member of the Supreme Court has championed this murkiness saying, "our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."[9] Presumably, such an approach is justified because it leaves the lower courts free to exercise judgment as the cases dictate.

The reality is far different. Different jurisdictions have adopted their own standards to avoid anarchy within the circuits in the wake of the vacuum left by the Court. Some circuits merely require that a law bear a rational basis to a legitimate state goal, others apply a stricter rational basis or rational basis "with bite" test, and still others subject state laws to intermediate scrutiny.[10] Thus, the Supreme Court's abdication of its responsibility to craft clear dormant Commerce Clause standards has produced, ironically, national disunity over a constitutional clause the very purpose of which was to bring about national unity.

Results under *Pike* may always be somewhat chaotic, but they need not be random. Like our mogul example, the particular set of facts may inevitably lead to unpredictable outcomes. If, however, the parameters governing moguls within the slope are all clearly defined, if we can see the shape of the "strange attractors," that is, if we can delineate the legal rules guiding the state benefits analysis, we can remove a great deal of the seeming randomness from the *Pike* system.

This paper demonstrates that more clarity in the Court's state benefits jurisprudence, through an examination of alternative state benefits analyses, makes *Pike* outcomes very predictable, as the state benefits analysis is often the determinative factor in *Pike* cases. I close by proposing a legal standard, namely rational basis scrutiny, with which to analyze state benefits in the *Pike* balancing scale that furthers the *Pike* tradition and purpose.

Part I argues that the Commerce Clause serves four distinct purposes. First, it provides a key structural component of a federal system of government. Second, it maximizes wealth and efficiency through free trade among the states. Third, it reduces trade wars among the states, and hence hostilities that could lead to outright war and disunion. Fourth, it serves representative democracy by ensuring that the citizens of a state do not suffer regulations without representation.

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9. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994).

10. *See infra* Part IV.

Part II describes the dormant Commerce Clause legal standard.

Part III argues that the state benefits side of *Pike* balancing is an especially poorly understood aspect of a not especially clear constitutional test and that the lack of clarity has forced judges to act as legislators weighing matters that they are ill-equipped to judge. One line of Supreme Court cases provides authority for applying a rational basis test to state laws. Another line, which distinguishes discriminatory from non-discriminatory *Pike* balancing cases, supports a rational basis "with bite" analysis.

Part IV demonstrates that the kind of scrutiny used in the state benefits analysis virtually determines how a circuit will rule in a *Pike* case. The varying degrees of scrutiny applied to the state benefits analysis have also caused fractures among the circuit courts. The degrees range from rational basis scrutiny to intermediate scrutiny. The majority of circuits adopts rational basis scrutiny for its state benefits analyses. The stricter the scrutiny of state benefits, though, the more likely it will be that the interstate commerce burden is found to outweigh the state benefits.

Part V argues that the Supreme Court should adopt rational basis scrutiny of state benefits, as it is most in keeping with the structure of the Constitution. It examines the alternatives of adopting intermediate scrutiny, rational basis "with bite" scrutiny, rational basis scrutiny, or simply doing away with *Pike* balancing altogether. It accepts the now common criticism that many of the cases in which *Pike* balancing has been used to invalidate a state law, including *Pike* itself, should be classified as state discrimination cases. Nevertheless, it argues that in non-discriminatory cases *Pike* serves the useful purpose of preventing excessive burdens on interstate commerce, and proposes that anything more than rational basis scrutiny on the state benefits side of the scale puts federal courts in the position of evaluating the wisdom and utility of state legislation, transforming the *Pike* test into one bordering on strict scrutiny.

I. A COMMON LAW THEORY OF COMMERCE CLAUSE JURISPRUDENCE: COMBINING ORIGINALISM, TEXTUALISM, AND THE LIVING CONSTITUTION.

No one theory explains dormant Commerce Clause jurisprudence; rather it arose out of a confluence of theories.[11] Further, dormant Commerce Clause jurisprudence, although stemming from Article 1, Section 8, Clause 3 of the Constitution,[12] has been refined through a common law process throughout its 175-year history.[13] The Founding Fathers' genius at political theory is demonstrated by the profound degree to which the Commerce Clause continues to serve numerous theoretical principles. Once one understands this unified theory of the clause's underpinnings, the seemingly disparate concerns courts bring to bear on Commerce Clause cases begin to make sense.[14]

The Commerce Clause serves four distinct purposes. First, it provides a key structural component of our federal system of government. Second, it maximizes wealth and efficiency through free trade among the states. Third, it reduces trade wars among the states, and hence hostilities that could lead to outright war and disunion. Fourth, it serves representative democracy by ensuring that the citizens of a state do not suffer regulations without representation.

The Federal Union

The federal system of American government establishes a delicate balance between the national government and the governments of the states. The Commerce Clause is a good example of this balance.

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11. *Cf.* Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocating Business*, 96 YALE L.J. 1343, 1350 n.33 (1987) ("A better vision of the dormant Commerce Clause combines notions of market efficiency, political representation, and local competence to legislate on matters affecting national interests.").

12. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); *see also* CHEMERINSKY, *supra* note 7, § 5.3.3, at 406. ("The dormant Commerce Clause can be traced back to *Gibbons v. Ogden*." 22 U.S. (9 Wheat.) 1 (1824)).

13. It is simply impossible to ground constitutional exegesis of the dormant Commerce Clause in any single theory of constitutional interpretation. Textualism does not work because the dormant Commerce Clause "does *not* appear in the Constitution." Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring in the judgment). Originalism does not work either, because the doctrine itself has evolved with the Court. Nor does the theory of a living Constitution work because the dormant Commerce Clause's roots are so firmly embedded in the founders' vision for the United States.

14. *See* CHEMERINSKY, *supra* note 7, § 5.3.2, at 403-404 (listing separate justifications for the Commerce Clause and noting that they are not mutually exclusive).

While the Commerce Clause grants Congress authority to regulate interstate commerce in the United States,[15] it has long been recognized that laws governing health, safety, and police power are best left in the hands of the people at the lower levels of government.[16] Our Constitution grants national powers where necessary and proper, leaving all other powers, such as police powers and matters of health and safety, to the states,[17] a principle well recognized in the jurisprudence of the Supreme Court over the nation's history.[18]

This reservation of power to the people in the states, and their elected representatives, gives the states a greater interest in promoting certain health, safety, and economic regulations.[19] Locally elected representatives are more highly responsive to the concerns of local citizens than are national leaders.[20] The benefit of local responsiveness, however, must be weighed against the interests of the nation as a whole; at times local interests may be detrimental to national interests.[21] These benefits and the attendant detriments of local versus national action under a federal system were well understood by the founders and have been expressed by our political leaders and jurists ever since.[22]

There is a delicate constitutional balance between the interests of the states and the national economy. The Supreme Court's dormant Commerce Clause jurisprudence attempts to preserve this delicate

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15. United States v. Morrison, 529 U.S. 598, 608-09 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995).

16. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 79 (1898) ("The power of the States to protect the lives, health, and property of their citizens, and to preserve good order and public morals, is a power originally and always belonging to the States, and not surrendered by them to the general government.").

17. *See* U.S. CONST. amend. X.

18. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 26-31 (1824). *But cf.* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Congressional regulation of wheat quotas extending even to personal consumption was a valid exercise of power under the Commerce Clause); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 142 (14th ed. 2001) (arguing that *Wickard* demonstrates "the outer limits of the 'affecting commerce' rationale.").

19. *See* JAMES Q. WILSON, AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES 46-48 (5th ed. 1992). Local governments are more responsive to local concerns precisely because people are more likely to become politically active at the local level where their individual influence on the government is greater than at the national level.

20. *See id.* at 46.

21. *Id.* at 46-48.

22. *See id.*

balance.[23] The Court has been reluctant to strike down local regulations of health and safety as unduly burdensome on interstate commerce, but has nearly always stricken those local laws that merely concern economic issues and that have an undue impact on the nation as a whole.[24]

Efficiency and Wealth

One key benefit of federalism is the maximization of economic efficiency and wealth.[25] The Commerce Clause rectified the systemic problem under the Articles of Confederation of "economic competition [that] was conducted more through political processes than through the marketplace."[26] Thus the Commerce Clause preserves "a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."[27] The benefit of such a market has been explained by a leader of the law and economics movement, Judge Richard Posner, as avoiding diseconomies of scale, encouraging experimentation, and putting competitive pressures on local governments.[28] It may be said without fear of contradiction that the enduring power and the very success of American commerce depend

23. S. Pac. Co. v. Arizona, 325 U.S. 761, 766-67 (1945) ("Ever since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Bd. of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.").

24. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6-13, at 1100 (3d ed. 2000).

25. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997); CHEMERINSKY, *supra* note 7, § 5.3.4, at 412 ("[I]t is thought that protectionist laws are most likely to interfere with the economy."). *But see* TRIBE, *supra* note 24, § 6-5, at 1057 ("[T]he negative implications of the Commerce Clause derive principally from a *political* theory of union, not from an *economic* theory of free trade."). *See generally* MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 289 (1986) (providing examples of the pervasive influence of Adam Smith on the United States); THE FEDERALIST NO. 11, at 118 (Alexander Hamilton) (John C. Hamilton ed., 1998) ("An unrestrained intercourse between the states themselves, will advance the trade of each, by an interchange of their respective productions.").

26. TRIBE, *supra* note 24, § 6-3, at 1044.

27. *Gen. Motors Corp.*, 519 U.S. at 299.

28. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 711 (Aspen 5th ed. 1998) ("Insofar as there are economic advantages to federalism (advantages not only in avoiding diseconomies of scale and encouraging experimentation but also in increasing the competitive pressure on government to perform efficiently), it is essential that the federal government be prevented from swallowing up state functions, which is a danger if activities are not required to have *substantial* effects on regional or national markets in order for federal regulation to be permissible.").

in no small part on the Commerce Clause,[29] and are intimately related to the peace among the states resulting from that clause.[30]

Peace and Harmony

Without the Commerce Clause, parochial interests would war with each other to the detriment of national harmony.[31] The impetus for the Constitution itself grew out of the failed experiences of the states under the Articles of Confederation.[32] That failure was thought, in part, to be the result of the states waging "destructive trade wars" against each other. The challenge for the Constitution's framers was to make the national government strong enough to reduce the potential for war between the states, while leaving to the states most local powers, i.e., those not granted by the Constitution to the federal government.[33]

This delicate balance is reflected in the Supreme Court's dormant Commerce Clause jurisprudence, which prevents states from interfering in interstate commerce in areas where Congress has taken no action. Thus the dormant Commerce Clause prevents the

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29. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 434 (1827) ("They looked to the exercise of this power of regulating commerce as a great source of national wealth and aggrandizement." (citing THE FEDERALIST NO. 11 (Alexander Hamilton))). How well the courts have maximized economic efficiency under the dormant Commerce Clause is another question. *See generally* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 794-808 (2001) (arguing that central purpose of the dormant commerce clause is to combat the trade protectionism that can result from decentralized regulation by individual states). Justice Scalia considers economic analysis by the Court to be "ill suited to the judicial function." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., dissenting). Justice Stevens similarly argues that such analysis "is beyond our institutional competence." *Gen. Motors Corp.*, 519 U.S. at 315 (Stevens, J., dissenting).

30. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 125 (1819) ("Before the adoption of the constitution, partial laws were enacted by the States on the subject of foreign commerce, of the commerce between the States, of the circulating medium, and respecting the collection of debts. These laws had created great embarrassments, and seriously affected public and private credit. One strong reason for a national constitution was, that these alarming evils might be corrected.").

31. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in the judgment) (commenting that the ability of the states to lay tariffs on each others goods under the Articles of Confederation produced a "conflict of commercial regulations, destructive to the harmony of the States.").

32. *Id.*

33. *See* THE FEDERALIST NO. 39, at 307 (James Madison) (John C. Hamilton ed., 1998) ("[The federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.").

Balkanization that is bound to result when state governments give priority to the local interests of citizens.

Representative Democracy

The Commerce Clause also serves to prevent the citizens of one state from imposing their laws on those who had no representation in the passage of the law.[34] Given the responsiveness of state governments to local interests, state governments are under great pressure to enact laws that benefit their citizens regardless of the effect on people outside the state's borders. The dormant Commerce Clause ensures that unrepresented, out-of-state economic interests are protected by preventing a state from acting to further its own interests, while simultaneously putting an undue burden on another state's economic interests.

The Court has been somewhat expansive in its understanding of representative democracy, not limiting representation to those elected to vote in legislative bodies. For example, when there is some in-state surrogate thought to adequately represent (and hence protect) the unenfranchised out-of-state interests, the Court has been less likely to find, or more likely to tolerate, discrimination against interstate commerce.[35]

Discrimination as a Surrogate for Commerce Clause Values

To preserve the benefits of union, the Court has developed ways to unmask protectionist efforts disguised as legitimate health, safety, or police measures.[36] Once "smoked-out" as an impermissible or

34. TRIBE, *supra* note 24, § 6-5, at 1057 ("[T]his political defect should be seen as *underlying* the forms of economic discrimination which the Supreme Court has treated as invalidating certain state actions with respect to interstate commerce.").

35. *See* S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1983) ("The fact that [the regulations] affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 675 (1981) (refusing to rely on in-state truckers to ameliorate the interstate burden because exceptions in the law reduced the impact on them); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (finding that in-state and out-of-state plastic milk container companies were equally burdened by a law banning the sale of milk in plastic bottles).

36. *See, e.g.*, Brimmer v. Rebman, 138 U.S. 78, 83 (1891) ("[T]he statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States."); Minnesota v.

discriminatory interference with interstate commerce, the law will be struck down.[37] The most often used surrogate for striking down laws that interfere with Commerce Clause values is "discrimination" against interstate commerce. As useful and as powerful as this surrogate is, however, it does not fully explain the Court's jurisprudence.[38] When discrimination cannot be demonstrated, courts may neverthless strike down a law for violating the structures of federal union, the benefits of a free national economy, the peace and harmony of union, or the principles of representative democracy.

Before striking down a state law because the state interest is outweighed by the burden on interstate commerce (that is, that it violates the principles preserved by the Commerce Clause), due weight must first be given to the state interests under *Pike* balancing. Clear standards for how to weigh the state benefits side of the scale are critical because whether the burden on interstate commerce will tip the scale depends on the weight that is first given to the state interest. So, how much deference do courts give to a state's qualitative judgments about its own health, safety, and welfare measures?

II. THE DORMANT COMMERCE CLAUSE: A VERY LIGHT SLEEPER

Standard Dormant Commerce Clause Analysis

The framers of the Constitution recognized the need for free trade between the states and thus granted Congress power "To regulate Commerce . . . among the several States" in the Commerce Clause.[39] This clause does not say that Congress has *exclusive* authority over

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Barber, 136 U.S. 313, 320 (1890) ("If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887))).

37. TRIBE, *supra* note 24, § 6-5, at 1052 (noting that problems arise because local democratic processes work too well in serving local interests).

38. *Cf. id.* § 6-5, at 1057 n.33 ("[I]t is by no means clear that the use of a surrogate criterion like 'discrimination' is a wholly satisfactory alternative.").

39. U.S. CONST. art. I, § 8, cl. 3; *see* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) ("In one of his letters, [James] Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'" (citation omitted)); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 317 (1852).

interstate commerce. Nevertheless, for over 150 years the clause has been thought to have negative implications that restrain the states from interfering with interstate commerce.[40] Unless Congress has explicitly granted the states a right to regulate matters affecting interstate commerce, regulations that unduly burden interstate commerce will be held by the courts to be an unconstitutional infringement of the power of Congress.[41] The courts have consistently recognized this implicit negative Commerce Clause doctrine, which prohibits states from interfering with interstate commerce even in the absence of congressional action.[42] This doctrine is known as the "dormant Commerce Clause."[43]

Under the dormant Commerce Clause, if a state law facially discriminates against out-of-staters,[44] either in its means or its purpose, it will be subject to rigorous scrutiny.[45] Such laws are nearly per se invalid.[46] To overcome this presumption of invalidity, the state must demonstrate that it has a legitimate purpose and that there is no less discriminatory means available to accomplish the state's goal.[47] If the law is not discriminatory on its face, it is presumptively constitutional. If there is a less discriminatory means available to the state to accomplish its legitimate purpose, however, the law *may* nevertheless be struck down as discriminatory under heightened scrutiny.[48]

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40. *See Cooley*, 53 U.S. (12 How.) at 318.

41. *See generally* S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (striking down an Arizona law that limited the length of trains that could pass through the state even though Congress had not regulated the matter).

42. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).

43. TRIBE, *supra* note 24, §§ 6-2 to 6-3 at 1029-46.

44. State and local laws are treated the same. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (striking down a Madison, Wisconsin city ordinance that barred the sale of milk that had not been pasteurized within five miles of the Madison central square).

45. City of Philadelphia v. New Jersey, 437 U.S. at 627.

46. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532-33 (1949).

47. Maine v. Taylor, 477 U.S. 131, 138 (1986) (holding constitutional a Maine law against the importation of non-native bait fish—some of which threatened Maine's ecosystem—as there was no other way to keep the contaminated bait out other than the outright ban on all out-of-state bait).

48. SULLIVAN, supra note 18, at 142 ("Dean Milk is frequently cited for requiring judicial inquiry into 'reasonable nondiscriminatory alternatives.'"); *see, e.g.*, Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

Pike *Balancing*

The *Pike* balancing test derives from *Pike v. Bruce Church, Inc.* in which the Court stated that "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[49] The *Pike* balancing test has its roots in *Southern Pacific Co. v. Arizona,*[50] *Huron Cement Co. v. Detroit,*[51] *Parker v. Brown,*[52] and *Bibb v. Navajo Freight Lines, Inc.*[53] Despite the test's development in these cases,[54] it is nevertheless referred to as coming from *Pike v. Bruce Church*.

Ironically, *Pike* itself is not a balancing case. The Court's decision, at least implicitly, was made on the basis that the law in question was discriminatory.[55] The Arizona Fruit and Vegetable Standardization Act required Arizona growers to package their cantaloupes in the state.[56] The parties stipulated that the law helped preserve the reputation of Arizona cantaloupes, thus benefiting Arizona growers.[57] Bruce Church, Inc., an Arizona grower of exceptionally high quality cantaloupes, complained that under the law it could no longer package its fruit across the border in California, and, given the distance to the nearest Arizona processor, to comply with the law it

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

50. 325 U.S. 761 (1945) (striking down a state law that prohibited trains with more than fourteen passenger cars or seventy freight cars).

51. 362 U.S. 440, 443 (1960) (upholding enforcement against ships emitting smoke in density and duration that exceeded the maximum standards allowable under the Detroit Smoke Abatement Code).

52. 317 U.S. 341 (1943) (upholding a California crop-protection law).

53. 359 U.S. 520 (1959) (striking down a contoured mud-flaps requirement as having too little safety benefit); TRIBE, *supra* note 24, § 6-5, at 1051 n.5.

54. *Compare* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987) (upholding a statute that gave shareholders of a corporation within the state the right to determine whether a purchaser of "control shares" would be given voting rights), *and* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (allowing a ban on plastic milk bottles for environmental reasons, despite the effect of benefiting local pulp manufactures who produced paper milk cartons), *with* Kassel v. Consol. Freightways, Corp., 450 U.S. 662 (1981) (striking down a ban on sixty-five-foot double truck trailers on state highways).

55. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 403 (1994) (O'Connor, J., concurring in the judgment) ("[I]n *Pike*, the Court held that an Arizona law . . . discriminated against interstate commerce."); Donald H. Regan, *The Supreme Court and Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1220 (1986).

56. *Pike*, 397 U.S. at 138.

57. *Id.* at 143.

would be required, to build its own processing facility at considerable expense.[58]

The exceptionally high quality of Bruce Church cantaloupes supposedly reflected favorably on other Arizona cantaloupes. The law, therefore, allegedly benefited other Arizona cantaloupe growers at Bruce Church's expense. Consumers, having eaten Bruce Church's excellent cantaloupes with the attendant appellation of "processed in Arizona," would consider other Arizona cantaloupes to be of likewise high quality and purchase them over cantaloupes from other states.[59]

The Court assumed the existence of this public relations windfall and assumed that it was a legitimate state benefit,[60] but struck down the statute on the basis that it discriminated against the interstate cantaloupe packaging business, a kind of burden on interstate commerce that had been declared "virtually *per se* illegal."[61] *Pike*, therefore, is not a balancing case, but a discrimination case, standing as it does for the proposition that in-state processing requirements discriminate against interstate processors.[62] The balancing test articulated in *Pike* would more clearly emerge in a series of subsequent Supreme Court decisions.[63]

III. BALANCING STATE BENEFITS: THE PUTATIVE, THE ILLUSIVE, AND THE ACTUAL

The balancing test expressed in *Pike* is neither well understood, nor very clear.[64] Especially unclear is exactly what standard should be used to analyze the state benefits side of the *Pike* scale. In applying its dormant Commerce Clause analysis, the Court has

58. *Id.* at 139-40 (stating that a new processing facility would cost approximately $200,000).

59. *Id.* at 144-45.

60. *Id.* at 145.

61. *Id.*

62. For an exhaustive exegesis of *Pike*, see Regan, *supra* note 55, at 1220. ("[I]n his final sentence [Justice Stewart] sums up his opinion by telling us with a rhetorical flourish that this protectionist purpose cannot be pursued by the protectionist technique of an embargo. . . . This, I submit, is not a balancing opinion.").

63. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Edgar v. Mite Corp., 457 U.S. 624 (1982); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

64. *See* CHEMERINSKY, *supra* note 7, § 5.3.5, at 424. ("[T]he test has been criticized for being unpredictable and arbitrary.").

sometimes looked at putative or supposed state benefits, sometimes looked at actual benefits, and sometimes said that the courts should not second-guess the choices of lawmakers.

It is difficult, if not impossible at times, to determine precisely when *Pike* balancing versus standard dormant Commerce Clause analysis is applicable. The Supreme Court has repeatedly stated that there is "no clear line separating" the two.[65]

Some commentators deny that the Court actually engages in balancing at all. Among them, Donald H. Regan, in his now famous article, *The Supreme Court and Protectionism: Making Sense of the Dormant Commerce Clause*, argues that most of the balancing cases are really discrimination cases.[66] Furthermore, a number of "balancing" cases are actually cases in which the state law was invalidated because it regulated activity outside its borders.[67]

A number of scholars and jurists therefore conclude that there are very few actual balancing cases. Justice Souter is among them, saying that only a small number of cases have employed true balancing.[68] In addition, since "there is no formula or standard for how to compare the burdens on interstate commerce with the benefits to the state or local government,"[69] some commentators and jurists say that non-discriminatory *Pike* balancing ought to be done away with altogether.[70] For the meantime, however, it is here to stay.[71]

Almost thirty years have passed since *Pike*, and despite attempts to portray many, if not most, *Pike* balancing cases, including *Pike* itself, as some other kind of case, hundreds of *Pike* cases have been decided on the basis of the *Pike* balancing test.[72] Given that history, a

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65. *See, e.g., Brown-Forman Distillers*, 476 U.S. at 579.

66. *See* Regan, *supra* note 55, at 1220. *See also* CHEMERINSKY, *supra* note 7, § 5.3.5, at 418-19; Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

67. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324 (1989); *Brown-Forman*, 476 U.S. 573; *Edgar*, 457 U.S. 624.

68. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298-99 n.12 (1997) (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); S. Pac. Co. v. Ariz. ex rel. Sullivan, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)).

69. CHEMERINSKY, *supra* note 7, § 5.3.5, at 418.

70. *Id.* at 424.

71. *Id.* ("[T]he majority of the Court has shown no indication of . . . abandoning dormant Commerce Clause analysis of nondiscriminatory laws.").

72. *See infra* Part III–IV.

precise notion should have emerged about what the courts ought to weigh on each side of the *Pike* scale.

The object of this paper is what to weigh on the state benefits side. An understanding of what is weighed on the state benefits side of the scale brings into clear focus this seemingly fuzzy test.[73]

The plethora of words and phrases employed by the courts when analyzing state benefits tempts one to compare *Pike* balancing cases to a tower (or at least a large pile) of Babel. The Supreme Court has never defined "putative state benefits" nor has it developed a single analytical standard for the state benefits side of the scale.[74] In analyzing state benefits lower courts have used all kinds of phrases such as: "state benefits," "putative state benefits," "advances" state benefits, "state purposes," "rational safety measure," "rationally furthers," "plausibility of the tendered purpose," "actual purpose," "declared purposes," "lawmaker's purposes," will not "second-guess" state legislatures, "not illusory," and "post hoc justification." These phrases can mean the same thing, or very different things, and often defy simple classification using interstate Commerce Clause language.

Due process and equal protection language (rational basis, intermediate scrutiny, and strict scrutiny), however, provides useful categories to classify the types of scrutiny used in state benefits analyses.[75] The virtue of such an approach is that these categories, while by no means perfect, are at least clear in principle—if not in practice.

Therefore, I will use due process and equal protection categories to classify the amount of scrutiny courts give to the *actuality* of state benefits.[76] As an initial matter, I wish to respond to the objection that utilizing classifications from due process and equal protection will further confuse matters. Perhaps so. The alternative, however, of having to create, define, and distinguish labels for disparate kinds of

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73. The burdens on interstate commerce are actual economic burdens measurable through the discipline of economics, albeit the *weight* to assign to such burdens deserves a thorough examination of its own. *See, e.g.*, Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 526 (1989).

74. *See* CHEMERINSKY, *supra* note 7, § 5.3.5, at 418-19.

75. *See* Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 427-28 (1993) (comparing *Pike* to intermediate scrutiny under the Due Process Clause).

76. I am not classifying state *purposes* as legitimate, important, or compelling, because no such classifications were readily apparent to me from my reading of the *Pike* cases.

Pike scrutiny, to make sense out of the current babble, seems plainly Sisyphean. In any event, for students and practitioners alike, the approach suggested here simplifies matters greatly. The levels of scrutiny borrowed are already well-developed, and thus the argument is only for consistency across a wider spectrum of cases. Therefore, I have categorized *Pike* cases according to whether the state benefits have been analyzed using tests such as rational basis,[77] rational basis "with bite,"[78] intermediate scrutiny,[79] and strict scrutiny.[80]

The Supreme Court Pike *Cases: Balancing and Discriminating*

In some cases the Court has followed a rational basis approach to the state benefits analysis. In these cases it merely accepts that a state or local law is legitimate. In others it has taken a rational basis "with bite" approach, looking to the actual purposes of the lawmakers.[81] In these latter cases it has required that the state law actually be shown

77. To pass the rational basis test a law must pursue a legitimate state objective. Further, there must at least be a rational relationship between these goals and the means chosen to preserve them; that is, the legislature must not have acted in a completely arbitrary or irrational way. A statute bears a strong presumption of validity, and those attacking its rationality have the burden to negative every conceivable basis that might support it. A legislative action will pass the rational basis test if it is supported by any "reasonably conceivable set of facts." FCC v. Beach Communications Co., 508 U.S. 307, 313-15 (1993).

78. To pass the rational basis "with bite" test a law must *advance* a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. The law must be narrow enough in scope and grounded in a sufficient factual context to ascertain some relation between the law and the purpose it serves. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632-33 (1996). While not a true equal protection or due process category, Justice Kennedy's statement of the legal standard and application in *Romer* is sufficiently different from standard equal protection cases, and describes the type of heightened analysis sometimes used in Commerce Clause cases.

79. To pass the intermediate scrutiny test the law must serve "important governmental objectives" and must be "substantially related to the achievement of those objectives." United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted).

80. To pass the strict scrutiny test a law must be justified by a compelling state interest, and the means employed to meet this interest must be substantially effective, necessary, and the least restrictive means available of accomplishing the goal. The burden is on the state to demonstrate that these elements have been satisfied. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224-26, 237 (1995).

81. But see the exchange in Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981), between Justices Brennan and Rehnquist. Brennan stated in his concurrence that "the judicial task is to balance the burden imposed on commerce against the local benefits sought to be achieved by the State's *lawmakers*." *Id.* at 680. Rehnquist responded in his dissent that "[this] argument has been consistently rejected by the Court in other contexts." *Id.* at 702.

to be beneficial or effective. Those hoping to find a clear and consistent approach, however, are not likely to find one.

Rational Relationships

The clearest approach to the state benefits analysis is a rational basis or rational relationship analysis. As discussed above, when applying rational basis scrutiny the Court does not examine the efficacy of a state law once a rational relationship between the law and a legitimate state goal is established. Generally, the Court has not seconded-guessed state legislatures about the efficacy of their state laws. On occasion, however, it has inquired into the degree to which a law actually furthers the stated purpose. This type of inquiry evinces a willingness to apply heightened scrutiny to state benefits.

In *Pike v. Bruce Church, Inc.*, the parties had stipulated that the state's benefit was preservation of the reputation of its cantaloupe growers.[82] The Court assumed that the law as applied benefited other Arizona growers.[83] No empirical evidence, in the way of market studies, or survey research, was marshaled to support this alleged benefit. Nor did the Court concern itself with analyzing the degree or the actual contours of the benefit. Applying rational basis scrutiny, the Court merely "assume[d] that the asserted state interest is a legitimate one."[84]

In *Exxon Corp. v. Governor of Maryland*, the Court also adapted the rational basis Due Process analysis to its state benefits analysis in the Commerce Clause challenge.[85] Maryland had prohibited vertical integration of petroleum producers and retailers.[86] The Court said that the evidence presented some doubt about the "wisdom of the statute."[87] The Court upheld the statute, however, adding that "Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose."[88]

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82. 397 U.S. at 143.

83. *Id.* at 145.

84. *Id.*

85. 437 U.S. 117, 124-26 (1978). *But see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 476 (1981) (Powell, J., dissenting) (objecting to applying the Minnesota Supreme Court's equal protection analysis to a Commerce Clause challenge).

86. *Exxon*, 437 U.S. at 119-21.

87. *Id.* at 124.

88. *Id.* at 124-25.

Kassel v. Consolidated Freightways Corp.[89] firmly enshrined the rational basis principle, making it "clear that courts must weigh the state's *asserted* interests . . . whenever they are substantiated by more than . . . hollow claims. . . ."[90] In *Kassel*, the Court struck down an Iowa law that prohibited the use of sixty-five-foot double tractor trailers.[91] The Court, echoing *Bibb*, noted that "a State's power to regulate commerce is never greater than in matters traditionally of local concern," and that public health and safety concerns have a "strong presumption of validity."[92] Although striking down the law, the plurality carefully reiterated Justice Blackmun's rational basis language in *Raymond Motor Transportation, Inc. v. Rice* that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance."[93]

While only dicta in *Kassel*, the Court's repeated principle against second-guessing legislative judgment became a part of its Commerce Clause jurisprudence in *CTS Corp. v. Dynamics Corp. of America*.[94] In *CTS*, the Court struggled with an Indiana law that gave shareholders of Indiana corporations the ability to determine the voting strength of those who purchased "control shares" of the corporation.[95] The appellate court assumed that Indiana had the power to enact such a law.[96] In challenging the statute, Dynamics Corp. argued first that the state had no legitimate interest in protecting non-resident stakeholders and thus "there [was] nothing to be weighed in the balance," and second, that the law sought to protect against the "illusory" threat of coercive tender offers.[97] In response, the Court stated that, it was "not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.'"[98] The Court then proceeded to demonstrate that Indiana's asserted benefits were not illusory, saying first that the law

89. 450 U.S. 662.

90. TRIBE, *supra* note 24, § 6-7, at 1072 (emphasis added).

91. *Kassel*, 450 U.S. at 678-79.

92. *Id.* at 670 (citations omitted).

93. *Id.* (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978)). *Cf. id.* at 693 (Rehnquist, J., dissenting) ("[T]he safety benefits of a state law must be slight indeed before it will be struck down under the dormant Commerce Clause.").

94. 481 U.S. 69 (1987).

95. *Id.* at 73.

96. *Id.* at 78.

97. *Id.* at 92-93 (citations omitted).

98. *Id.* at 92 (quoting *Kassel*, 450 U.S. at 679 (Brennan, J., concurring in the judgment)).

would in fact protect the interests of Indiana shareholders,[99] and second that the problem of coercive takeovers had been recognized in academic literature and by the Securities and Exchange Commission.[100] Although there was no evidence that the law would achieve its intended purpose of actually benefiting local shareholders,[101] a legitimate purpose with some rational relationship between the law and the purpose was enough for the Court.

Likewise, in *Minnesota v. Clover Leaf Creamery Co.*, the Court explicitly adopted by reference its rational relationship state benefits analysis from its consideration of an equal protection challenge in the same case.[102] Minnesota had banned the sale of milk in plastic containers to protect the environment and conserve energy.[103] *Clover Leaf* produced "impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers [would] be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy."[104] The Court said, nevertheless, that it was not its role "to decide on the wisdom and utility of legislation,"[105] or to "substitute [its] evaluation of legislative facts for that of the legislature."[106] The efficacy of the law was "at least debatable,"[107] and "a legislature need not 'strike at all evils at the

99. *Id.* at 93.

100. *Id.* at 92 ("Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the SEC and by a number of scholarly commentators. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.' In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.") (citations omitted).

101. *See id.* at 95 (Scalia, J., concurring) (noting that even if there was such evidence, the Court was ill-equipped to judge the efficacy of state laws or to choose among them) ("Nothing in the Constitution says that the protection of entrenched management is any less important a 'putative local benefit' than the protection of entrenched shareholders, and I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other objective—or the ultimate (and most ineffable) judgment as to whether, given importance-level *x*, and effectiveness-level *y*, the worth of the statute is 'outweighed' by impact-on-commerce *z*.").

102. 449 U.S. 456, 473 (1981) ("[T]his burden is 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, which we have already reviewed in the context of equal protection analysis.").

103. *Id.* at 459.

104. *Id.* at 463.

105. *Id.* at 469.

106. *Id.* at 470.

107. *Id.* at 469 (quoting United States v. Carolene Products Co., 304 U.S. 144, 154 (1938)).

same time.'"[108] There can be little doubt, therefore, that in *Clover Leaf* at least, for a Commerce Clause challenge, the Court required no more than that state benefits be *rationally related* to the state's law.

Occassionally the Court has made an even stronger statement regarding its inability to second-guess the decisions of state legislatures. In *General Motors Corp. v. Tracy*, the Court upheld a complex state tax on utilities against a Commerce Clause challenge.[109] The Ohio Supreme Court had found the law to be ineffective. Justice Souter, however, writing for the majority, pointedly rejected both the approach of the Ohio Supreme Court, and a subsequent invitation to negate the judgment of the legislature concerning the economic effect of the tax, saying: "[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them."[110] Thus utilizing a rational basis analysis, the Court has been extremely deferential to the determinations of the state legislatures.

Rational Relationship "with bite" Cases

In two cases the Court has more strictly scrutinized state benefits, being somewhat less disposed to presume the state law to be valid.[111] The first, *Raymond Motor Transportation, Inc. v. Rice*,[112] may represent a barely perceptible shift. The second, *Edgar v. MITE Corp.*,[113] represents a somewhat clearer shift.

In *Raymond Motor*, the Court required that state benefits *actually* be furthered by the state law. For safety reasons, the state had passed a law prohibiting the in-state use of trucks over fifty-five feet long or with double trailers. The Court struck down the law without, strictly speaking, engaging in balancing,[114] saying, "The State of

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108. *Id.* at 466 (quoting Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935)).

109. 519 U.S. 278 (1997).

110. *Id.* at 308.

111. *See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 375 (1976) (finding Mississippi's stated purpose of preserving health by regulating the quality of milk to "border[] on the frivolous," given that the state was willing to allow inferior milk from Louisiana if Louisiana would agree to certain trade policies).

112. 434 U.S. 429 (1978). *See* Smith, *supra* note 66, at 1256 (directing the reader to *Raymond Motor*) (the state need only show "some significant evidence that the regulation serves its interests to a substantial extent.").

113. 457 U.S. 624 (1982).

114. It is possible to see the Court as engaging in balancing by suggesting that the Court put nothing on the state benefits side of the scale and thus the scale tipped to the side of burdens on

Wisconsin . . . failed to make even a colorable showing that its regulations contribute to highway safety."[115] Whether a "colorable showing" of a state benefit would have swung the balance in favor of the state is unclear. In any event the Court said that the evidence was "overwhelmingly one-sided"[116] that the law did not contribute to the state's putative interest. This analysis is indicative of a rational basis "with bite" or heightened rational basis test.[117]

In *Edgar*, the Court more closely examined the actual benefits of an Illinois business takeover statute that required a business to register in the state if more than ten percent of its stock was held by Illinois residents.[118] The law purported to protect Illinois shareholders by giving them enhanced opportunities to evaluate tender offers, which had the concomitant effect of delaying, and hence risking the success of, a tender offer. While recognizing the legitimacy of the state's interest in protecting local investors,[119] the Court struck down the statute on the grounds that it did not provide enhanced benefits to state citizens over those already provided by federal law,[120] and that its asserted benefits were "for the most part, speculative."[121] Even speculative benefits are rationally related, however, so the Court's actions in *Edgar* suggest that it was employing rational basis "with bite" scrutiny.

Finally, albeit in dicta, in two prominent Commerce Clause cases in which *Pike* has been cited, the word "putative" was dropped altogether, making the test whether there were clearly excessive

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interstate commerce. On the other hand, it is rather hard to see this as balancing, since the Court thought there was nothing to balance against the burden on interestate commerce.

115. *Raymond Motor Transp., Inc.*, 434 U.S. at 447-48; *id.* at 449 (Blackmun, J., concurring) ("[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.").

116. *Id.* at 447.

117. *But cf.* Smith, *supra* note 66, at 1256 (arguing that the test was more like intermediate scrutiny, requiring "some significant evidence that the regulation serves its interests to a substantial extent.").

118. 457 U.S. at 644.

119. *Id.*

120. *Id.* ("We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration, and equal consideration rights. However, the Williams Act provides these same substantive protections. . . .").

121. *Id.* at 645 ("We . . . conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.").

burdens on interstate commerce "in relation to the local benefits."[122] It remains to be seen, in future Commerce Clause challenges, how much deference the Court will give to a state's representations of the benefits derived from the state law in the state benefits analysis.

Ruling the Unruly

The Supreme Court has never defined "putative state benefits" nor has it developed a single analytical standard for the state benefits side of the *Pike* balancing test.[123] In most cases the Court has applied a rational basis test, but it has occasionally required that actual benefits or effectiveness be shown. The *Raymond Motor* and *Edgar* cases, despite the Court's expressed reticence to second-guess local legislatures, suggest that state benefits may be subject to slightly greater scrutiny than that which was employed in the *Pike, Exxon, Kassel, Clover Leaf, Tracy,* and *CTS* line of cases.

The best explanation of what the Court has done in *Pike* balancing cases is Justice Stevens's: "[O]ur cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."[124] If we limit our examination, however, to those cases that Justice Souter classifies as true balancing cases, *Bibb v. Navajo Freight Lines, Inc.*,[125] *Southern Pacific Co. v. Arizona*,[126] and *CTS Corp. v. Dynamics Corp. of America,*[127] a clearer picture of the problem emerges. In two of these cases, *Bibb* and *Southern Pacific*, the Court used a rational basis "with bite" analysis. The rule that emerged from them is best summed up in *Southern Pacific*: "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not

122. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring in the judgment); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

123. CHEMERINSKY, *supra* note 7, § 5.3.5, at 418.

124. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994).

125. 359 U.S. 520 (1959) (striking down a contoured mud-flaps requirement for trucks operating in the state, as it no more than minimally furthered the state's safety purpose while heavily burdening interstate commerce).

126. 325 U.S. 761 (1945).

127. 481 U.S. 69, 94 (1987) ("To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders."). *But see* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1866 (1987) (noting the "absence of any reference to balancing in any of the opinions.").

to outweigh the national interest."[128] In *CTS*, however, the Court employed rational basis scrutiny in its state benefits analysis. Thus, even limiting the examination to those cases classified by Justice Souter as balancing cases, reveals tension concerning the level of scrutiny to be used when weighing state benefits.

Given this tension between Supreme Court decisions, it is no surprise that the courts of appeals are likewise divided over how to analyze state benefits under *Pike*.

IV. SPLITS IN THE CIRCUITS

The lower courts have struggled with defining "putative local benefits." The key problem for the lower courts in addressing the state benefits side of the scale has been determining just how strictly to scrutinize the benefits of a state or local law, that is, how to evaluate the law's benefits. As my review of the circuit court cases below will show, some circuits avoid the whole question if they can.[129] Some look at only whether the legislative goals are legitimate. Some apply a rational basis test to the state benefits side of the scale,[130] others apply a rational basis "with bite" scrutiny,[131] still others seem to apply an intermediate scrutiny test.[132] A few examine the nature of the goals of the challenged state laws.[133] A few others look to see if there are alternative means to further the state's ends.[134]

The single greatest predictor of whether a state law will be upheld is the type of scrutiny used in the state benefits analysis. In recent cases, if a rational basis scrutiny is used to evaluate the state benefits, the state law will be upheld; if a rational basis "with bite" scrutiny is used, the case can go either way; and if intermediate scrutiny is employed, the state law will be struck down.

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128. S. Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945).

129. Grant's Dairy—Me., LLC v. Comm'r of Me. Dep't of Agric., 232 F.3d 8, 24 (1st Cir. 2000) ("We need not resolve this enigma today.").

130. The First, Third, Fourth, Fifth, Sixth, and Seventh Circuits. *See infra* notes 135-59 and accompanying text.

131. The Eighth and Ninth Circuits. *See infra* notes 160-66 and accompanying text.

132. The Second Circuit. *See infra* notes 167-72 and accompanying text.

133. *See, e.g.*, Chambers Med. Techs. of S.C., Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995).

134. The Tenth Circuit, *see infra* note 178.

Rational Basis

The First Circuit

The First Circuit accords great deference to the state that passed the challenged law. In *Pharmaceutical Research and Manufacturers of America v. Concannon,* the court upheld a Maine prescription rebate plan that would impact the profits of out-of-state pharmaceutical companies against a Commerce Clause challenge. [135] The state said that the program would "potentially provide prescription drugs to Maine citizens who could not otherwise afford them."[136] The court noted that it did not have empirical data of the program's actual effects, but was satisfied "for now" that the law was constitutional.[137]

Likewise, in *Philip Morris, Inc. v. Reilly*, the First Circuit upheld, against challenge, a Massachusetts law requiring tobacco companies to disclose to the state department of public health added ingredients and their quantities by brand.[138] The court found that the law would put consumers in a better position to know if their brand contained harmful additives, but did not find that disclosure to the state reduced smoking or that any fraction of the public actually benefited from the law.[139] Unconcerned about this lack of actual benefits, the court ended its analysis by citing Justice Brennan's concurrence in *Kassel*: "[C]ourts should refrain from attempting to 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'"[140]

The Third Circuit

The Third Circuit also requires that a state law only be rationally related to the intended benefit. In *Tolchin v. Supreme Court of New Jersey*, the court upheld a New Jersey law requiring attorneys wishing to practice law in the state to maintain an office in the state and to

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135. 249 F.3d 66 (1st Cir. 2001), *cert. granted* 122 S. Ct. 2657 (2002).

136. *Id.* at 84.

137. *Id.*

138. No. 00-2425, 2001 U.S. App. LEXIS 22348, at *3 (1st Cir. Oct. 16, 2001), *aff'd on reh'g*, 312 F.3d 24 (1st Cir. 2002).

139. *Philip Morris*, 2001 U.S. App. LEXIS, at *54.

140. *Id.* at *60 (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring).

attend continuing legal education courses against a Commerce Clause challenge.[141] Analyzing the state benefits, the court said there was a "satisfactory basis to find a rational relationship between the bona fide office requirement and the intended benefit of attorney accessibility."[142]

The Fourth Circuit

The Fourth Circuit has also adopted a rational basis standard for the state benefits side of *Pike* balancing. In S*tar Scientific, Inc. v. Beales,* the court upheld a statute that applied a tobacco settlement agreement to non-participating tobacco companies.[143] In analyzing the state benefits, the court adopted the highly deferential rational basis test it had applied in a due process and an equal protection challenge that was based on the same facts as the Commerce Clause challenge.[144]

The Fifth Circuit

The Fifth Circuit has said explicitly that it will not second-guess legislative judgments about the utility of legislation. In *Ford Motor Co. v. Texas Department of Transportation*, the court considered a Texas law that prevented automobile manufacturers from owning dealerships in the state.[145] The stated purpose of the law was to prevent unfair competition through vertical integration.

Ford unsuccessfully argued that even if the state's interests were legitimate, the law did "not further these interests."[146] The court said that it would "not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'"[147] The court went on

141. 111 F.3d 1099, 1102 (3d Cir. 1997).

142. *Id.* at 1109; *see also* Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd., 138 F. Supp. 2d 593, 609 n.9 (2001) ("*Tolchin* reveals that *Pike* balancing requires both a rational relation between the law and its intended benefits and a finding that the burden on interstate commerce does not clearly outweigh the benefits received."). *But cf.* A.S. Goldmen & Co., Inc. v. N.J. Bureau of Secs., 163 F.3d 780 (1999) (asking whether the state law in question "reasonably furthers" the state's interest, and finding that it did).

143. 278 F.3d 339 (4th Cir. 2002), *cert. denied*, No. 01-1719, 2002 U.S. LEXIS 5557 (Oct. 7, 2002).

144. *See id.* at 357.

145. Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 503 (5th Cir. 2001).

146. *Id.* at 503.

147. *Id.* (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 92 (1987)).

to quote favorably at length Justice Brennan's ode to judicial restraint in his *Kassel* concurrence: "It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes."[148]

The Sixth Circuit

The Sixth Circuit likewise has taken a rational relationship approach to the state benefits analysis. In *Maharg, Inc. v. Van Wert Solid Waste Management District*, a waste hauler challenged a bidding process, the result of which excluded an out-of-state landfill from designation as an authorized disposal site.[149] In considering a motion for summary judgment, the court thought it necessary to weigh only the "putative local benefits," which it later referred to as the "supposed local benefits" of the Ohio law.[150] Similarly, in *Eastern Kentucky Resources v. Fiscal Court*,[151] a landfill developer challenged a comprehensive landfill act, and the court limited itself to a determination of whether the state benefits from the act were "legitimate."[152]

The Seventh Circuit

The Seventh Circuit has been willing to weigh the state benefits in the balance, even if no actual state benefits have been proven and the purported benefits are challenged. In *Bowman v. Niagara Machine and Tool Works, Inc.*, the plaintiff brought a Commerce Clause challenge to an Indiana statute of repose.[153] The plaintiff claimed that the statute provided no benefits to Indiana citizens.[154] The court said, "these arguments address the wisdom of the repose statute rather than its rationality. The reduction of costs to product manufacturers doing business in Indiana is a legitimate state purpose, whatever

148. *Id.* at 503-04 (quoting Kassel v. Consol. Freightways Corp., 450 U.S. 662, 680-81 (1981) (Brennan, J., concurring) (citations omitted)).

149. 249 F.3d 544 (6th Cir. 2001), *cert. denied*, No. 01-615, 2002 U.S. LEXIS 234, (Jan. 7, 2002).

150. *Id.* at 555.

151. 127 F.3d 532 (6th Cir. 1997).

152. *Id.* at 545.

153. 832 F.2d 1052 (7th Cir. 1987).

154. *Id.* at 1055.

Bowman (or this court) might think of its advisability."[155] This is essentially rational basis language.

The court used even stronger rational basis language in *K-S Pharmacies, Inc. v. American Home Products Corp.*[156] In *K-S Pharmacies*, a Wisconsin law that forbade price discrimination in wholesale prescription drug sales was upheld under *Pike*.[157] Writing for the court, Judge Easterbrook said, "The dormant Commerce Clause does not call for proof of a law's benefits. . . . On the contrary, legislation regulating economic affairs is within public power unless the rules are so silly that a justification cannot even be imagined."[158]

Rational Basis "with Bite"

The Eighth Circuit

For a law to survive a Commerce Clause challenge, the Eighth Circuit requires sufficient evidence that the law actually produces the benefits it purports to produce, that is, that the putative benefits to the state are not "illusory." In *U & I Sanitation v. City of Columbus*, the court overturned a local ordinance requiring waste to be processed in a city-owned transfer station on the basis, inter alia, that its benefits were illusory.[159] The court stated that it was "sheer speculation to suppose that the ordinance has any effect upon the risk of hazardous waste accidents."[160]

In *R & M Oil & Supply, Inc. v. Saunders*, the Eighth Circuit struck down a Missouri law requiring in-state propane retailers to maintain 18,000-gallon storage facilities to protect Missouri citizens' propane supply during the winter months.[161] The statute did not, however, require distributors to keep any propane in the tanks.[162] The court

155. *Id.* at 1055, n.4.

156. 962 F.2d 728 (7th Cir. 1992).

157. *Id.* at 731-32.

158. *Id.* at 731.

159. 205 F.3d 1063, 1070 (8th Cir. 2000).

160. *Id.* at 1070-71. *See also* Burlington N.R.R. Co. v. Nebraska, 802 F.2d 994 (1987) ("[W]e remand the case. . . . to reevaluate whether the manned caboose requirement, in light of all the evidence, furthers a safety interest that is not slight, illusory, or problematical.").

161. 307 F.3d 731 (2002). The striking aspect of this case is the decision to apply *Pike* at all. In-state processing requirements are inherently discriminatory. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 99-100 (1984); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928).

162. 307 F.3d at 735.

found that, even assuming that the statute was sufficiently designed to promote the asserted interest of protecting citizens during the winter months, the actual benefit derived from the statute was minimal or non-existent.[163] In striking the statute because of the lack of demonstrable local benefit, the court utilized a rational basis "with bite" approach rather than a "minimal scrutiny in theory and virtually none in fact,"[164] rational basis analysis.

The Ninth Circuit

The Ninth Circuit also utilizes a rational basis "with bite" analysis, requiring evidence that the actual benefits are not "illusory."[165] In *Alaska Airlines v. City of Long Beach,* the Ninth Circuit upheld a city airport noise ordinance on the grounds that the asserted benefits of "reducing airport noise to control liability and improve the aesthetics of the environment" were legitimate and not illusory.[166]

Intermediate Scrutiny

The Second Circuit

The Second Circuit seems disposed to second-guess the utility of legislation and considers *Pike* to require an examination of whether a state or local act is effective at meeting its stated objectives. In *Association of International Automobile Manufacturers, Inc. v. Abrams*, the appellate court remanded a case involving a challenge to New York's bumper law.[167] The legislature found that the law would reduce damage and lower insurance rates. The court, however, was unconvinced and remanded on the basis that there were "genuine

163. *Id.*

164. Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

165. Ala. Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 983 (9th Cir. 1991); *see also* S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 471 (9th Cir. 2001), *aff'd in part and remanded in part* Air Transp. Ass'n of Am. v. City and County of San Francisco, 266 F.3d 1064 (2001) ("[C]ourts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.") (quoting Pac. Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1017 (9th Cir. 1994)). Courts, however, will strike legislation down "if the 'asserted benefits of the statute are in fact illusory.'" *S.D. Myers, Inc.*, 253 F.3d at 471 (quoting *Ala. Airlines*, 951 F.2d at 983).

166. 951 F.2d at 984.

167. 84 F.3d 602 (2d Cir. 1996).

factual issues as to both the claimed burdens and the putative benefits."[168]

In two published opinions since *Association of International Automobile Manufacturers*,[169] at least one district court in the Second Circuit clearly understood that case to require an examination of actual benefits from a state statute. In *Santa Fe Natural Tobacco Co., Inc. v. Spitzer*, the defendants asked the court to defer to the legislative judgment that a cigarette tax would reduce access to cigarettes, and hence incidence of smoking.[170] The court responded that *Pike* directs a review of whether the law actually "advances legitimates [sic] goals."[171] In an earlier case, *American Libraries Ass'n v. Pataki*, the same court conducted a similarly exhaustive analysis of the effectiveness of an internet child pornography law and found that the statute violated the Commerce Clause.[172]

A Note on the Nature of State Purposes and Alternative Means of Accomplishing Them

In *Pike*, Justice Stewart also wrote that whether a burden on interstate commerce would be tolerated depended on the "nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[173] Although language about the nature of the state purpose continues to be

168. *Id.* at 613.

169. No. 00-2425, 2001 U.S. App. LEXIS 22348 (1st Cir. Oct. 16, 2001), *aff'd on reh'g*, No. 00-2425, 2002 U.S. App. LEXIS 24403 (1st Cir. Dec. 2, 2002).

170. No. 00 Civ. 7274 (LAP), 2001 U.S. Dist. LEXIS 7548, at *94 (S.D.N.Y. June 8, 2001).

171. *Id.* at *95.

172. *See* 969 F. Supp. 160 (S.D.N.Y. 1997). Amazingly, the court even cited evidence of the few authenticated violations of the statute to "bolster" its finding that the statute's benefit was limited, a finding that goes to the quantity but not the quality of the benefit the legislature sought, and which says nothing about what will happen now that the law has been invalidated. The *Pataki* methodology has influenced at least one author in a leading internet law journal. *See* Sabra-Anne Kelin, *State Regulation of Unsolicited Commercial E-Mail*, 16 BERKELEY TECH. L.J. 435 (2001). The article says that *Pike* balancing on the local benefits side requires a two-step process. "First, the court examines the legitimacy of the state's interest." Second, it "considers the effectiveness of the statute." *Id.* at 456. The article's only cited authority for this proposition is *Pataki*. *Id.* at 456 n.147.

173. 397 U.S. at 142; *see also* Smith, *supra* note 66, at 1234 ("Occasionally, however, the Court has suggested that health and safety are weightier than other legitimate state interests.").

quoted,[174] the nature of the state regulation, whether it is a health, safety, or police regulation, is not crucial.[175]

Despite strong language in *Kassel* and *CTS* about not second-guessing the legislative bodies,[176] however, the troublesome "alternatives" language, which seemingly authorizes the courts to act as a legislature investigating and weighing other legislative options, crops up in cases.[177] A number of courts still consider an examination of alternatives to be part of their balancing task.[178] Many ignore it. Others interpret the "lesser impact" alternatives language simply to be another means of determining whether a statute is discriminatory.[179] This latter view seems the better one, as the Supreme Court has never invalidated a law on this criterion unless the law was found to be discriminatory.[180]

In addition, the no-less-discriminatory-alternative language of *Pike* has deep roots in the Court's strict scrutiny jurisprudence and is particularly ill-suited to the lower standard of scrutiny to be applied in *Pike*.[181] The nature of the benefits and the alternative "lesser impact" factors of the *Pike* balancing test are probably best thought of as decisive only in very close cases, or under unusual circumstances.[182] The single best predictor of whether a law will be

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174. *See, e.g.*, Chambers Med. Techns. of S.C., Inc. v. Bryant, 52 F.3d 1252, 1261 (4th Cir. 1995).

175. The reason for this is that the Supreme Court has long since abandoned such distinctions. S*ee* TRIBE, *supra* note 24, § 6-13, at 1100 (noting that purely economic regulations are more likely to be struck down).

176. For a classic work on judicial review see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. Yale Univ. Press 1986) (1962).

177. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (upholding a state environmental law in part because "no approach with 'a lesser impact on interstate activities' is available." (quoting *Pike*, 397 U.S. at 142)) (citation omitted); *Pike*, 397 U.S. at 142 ("[T]he extent of the burden that will be tolerated will of course depend on . . . whether it could be promoted as well with a lesser impact on interstate activities.").

178. *See, e.g.*, Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000) ("Thus, we must consider whether the identified public purpose could 'be promoted as well with a lesser impact on interstate activities.'" (quoting *Pike*, 397 U.S. at 142)).

179. *See, e.g.*, Regan, *supra* note 55, at 1220.

180. CHEMERINSKY, *supra* note 7, § 5.3.5, at 420 ("[T]he Court never has invalidated a nondiscriminatory state law on the ground that the goal could be achieved through a means that is less burdensome on interstate commerce.").

181. *See* Wyoming v. Oklahoma, 502 U.S. 437, 455 n.12 (1992) ("There are circumstances in which a less strict scrutiny is appropriate under our Commerce Clause decisions.").

182. *Cf.* Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 428 (1993) ("Regulations or laws 'unnecessary' to the legitimate goal, that could be written so as to impose a lesser burden on the power and still achieve the legitimate

upheld, however, is the type of scrutiny with which the state benefits will be weighed. It is, therefore, critical that this examination be in keeping with constitutional principles.

V. A RATIONAL BASIS: THE COURT AS ADJUDICATOR NOT LEGISLATOR

The current muddle over state benefits and the *Pike* balancing test cries out for clarity and consistency. There are essentially three approaches to the state benefits side of the *Pike* balancing scale. First, the Court could adopt the highly deferential rational basis test used in due process and equal protection cases. Second, the Court could adopt a rational basis "with bite" approach, requiring that some actual benefits accrue to the state from the legislation, or that the purported benefits are not illusory. Third, the Court could engage in intermediate or strict scrutiny of state benefits, independently reviewing legislation, weighing economic considerations and possible alternatives, and examining a state law's wisdom and utility.

The Current State of Affairs

Pike balancing garners much criticism. Commentators are uniform in pointing out the "problematic character" of the *Pike* balancing test.[183] The standard is described as squishy,[184] impossibly imprecise,[185] often economically unsound,[186] and even "all wrong."[187]

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goal, may be struck as 'undue.' Here, the Court does not impose the least restrictive alternative standard of strict scrutiny, but rather, takes this 'factor' into consideration as one of several to be considered.").

183. *See, e.g.*, TRIBE, *supra* note 24, § 6-6, at 1059 n.5; Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981) (criticizing *Pike* balancing approach because of difficulties of measurement of state's interest and suggesting 'free location principle' as premise for Commerce Clause analysis).

184. *See* CHEMERINSKY, *supra* note 7, § 5.3.5, at 418 ("The balancing test obviously gives courts enormous discretion because there is no formula or standard for how to compare the burdens on interstate commerce with the benefits to the state or local government."); Tushnet, *supra* note 66 (criticizing the 'isolation and incoherence' of Commerce Clause jurisprudence and suggesting an analysis based upon political theory).

185. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (describing *Pike* as requiring a "most ineffable" judgment "as to whether, given importance-level *x*, and effectiveness-level *y*, the worth of the statute is 'outweighed' by impact-on-commerce *z*.").

186. *See* Goldsmith & Sykes, *supra* note 29, at 813 ("[J]udicial cost-benefit analyses to date have been seriously flawed.").

187. Regan, *Siamese Essays*, *supra* note 127, at 1867.

Justices of the Supreme Court have been perhaps even more merciless in their criticism of the dormant Commerce Clause.[188] Justice Scalia, the most trenchant critic, scorns the very idea of balancing.[189] It is, he says, like "judging whether a particular line is longer than a particular rock is heavy."[190] Such judgments are more suited to the legislature.[191] He has concurred in decisions that apply the analysis, only to provide stability to the law.[192] More recently, he expressed doubts whether such stability was ever possible given the vagueness of the test.[193]

Attempts to reform *Pike*, or to do away with it, however, have met with little success, and some proposals, such as those asking the Court to act as a group of economists,[194] are of dubious merit.[195] Clarifying

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188. For an extended critique of the Supreme Court's negative Commerce Clause jurisprudence, see Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

189. *E.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

190. *Id.*

191. *Id.* ("I would therefore abandon the 'balancing' approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike v. Bruce Church, Inc.*, and leave essentially legislative judgments to the Congress.") (citation omitted).

192. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 203 (1990) (Scalia, J., concurring in the judgment) ("That also explains why our exercise of the 'negative' Commerce Clause function has ultimately cast us in the essentially legislative role of weighing the imponderable—balancing the importance of the State's interest in this or that (an importance that different citizens would assess differently) against the degree of impairment of commerce. The 'negative' Commerce Clause is inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate, like a legislature, the inevitably shifting variables of a national economy. Whatever it is that we are expounding in this area, it is not a Constitution. Because our 'negative' Commerce Clause jurisprudence is inherently unstable, it will repeatedly result in the upsetting of settled expectations.") (citations omitted).

193. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("These acknowledgments of precedent serve the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law. I do not believe, however, that either of those purposes is significantly furthered by continuing to apply the vague and open-ended tests that are the current content of our negative Commerce Clause jurisprudence, such as . . . the 'balancing' approach of *Pike v. Bruce Church, Inc.*") (citations omitted).

194. *See* Goldsmith & Sykes, *supra* note 29, at 813; *but cf.* Case Comment, *Washington Supreme Court Upholds State Anti-Spamming Law*: Washington v. Heckel, 115 HARV. L. REV. 931 (2002) (arguing that Goldsmith and Sykes's definition of costs is "too simple").

195. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 308-09 (1997) ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them. . . . We are consequently ill qualified to develop Commerce Clause doctrine dependent on any such predictive judgments, and it behooves us to

the meaning of "putative local benefits" under the *Pike* balancing test would at least bring clarity and concomitant stability to the state benefits side of the scale.

It is no easy task, however, to determine what the standard of review should be. The state benefits side of the *Pike* balancing scale is especially difficult to delineate, as neither *Pike* nor its progeny define "putative local benefits." Nor in any subsequent case has the Court defined them,[196] but clearly the plain language of *Pike* does not call for an investigation into actual state benefits.[197]

A good rule may be derived from the Constitution's broad structural principle of federalism. The Constitution was founded in part on the principle that the states should refrain from interfering with interstate commerce. Limiting the dormant Commerce Clause simply to invalidating discriminatory laws creates the risk that state laws could seriously disrupt interstate commerce. Suppose, for example, that in the interest of protecting children a state were to pass an internet regulation of no effectiveness but that imposes millions of dollars of economic costs on the other states. The Court should neither allow the states easily to thwart constitutional principles with illusory incantations of legitimate state purposes, nor should it act as a super legislature strictly scrutinizing state laws that are not protectionist. A true balancing rule, therefore, must protect the delicate balance of federalism, between protection of interstate commerce and a due respect for the safety, health, and police powers of the state.

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be as reticent about projecting the effect of applying the Commerce Clause here, as we customarily are in declining to engage in elaborate analysis of real-world economic effects.) (citations omitted); *see also* Howard O. Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 Emory L.J. 89, 108 (1983) ("It is virtually impossible for a court, with its limited resources, to determine with any degree of accuracy the costs to a town, county, or state of a particular industry."); Smith, *supra* note 66, at 1211 (noting that "even expert economists" may have difficulty determining "whether the overall economic benefits and burdens of a regulation favor local inhabitants against outsiders.").

196. Further complicating matters, occasionally the court has dropped the word "putative" altogether. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring in the judgment); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

197. *See* Nat'l Kerosene Heater Ass'n, Inc. v. Massachusetts, 653 F. Supp. 1079, 1095 n.5 (D. Mass. 1986) ("As this definition makes clear, courts will uphold state police legislation even where a state cannot empirically demonstrate that the law will be beneficial. The sentence used by Webster's to illustrate the meaning of putative suggests that use of the modifier implies that in fact the matter asserted may not be true. In other words, as long as a state can plausibly assert that a statute will effectuate some police purpose, it need not demonstrate that the statute will in fact succeed in furthering the purpose.").

The Case for Rational Basis Unless Rationally Baseless

The Court should adopt a rational basis standard for analyzing state benefits under the *Pike* balancing test for three reasons.[198] First, because of the nature of a balancing test, when rational basis scrutiny is used to analyze state benefits, the *Pike* test already resembles a form of "heightened scrutiny"; accordingly subjecting the state benefits side of the equation to a more rigorous scrutiny transforms the entire test into an even stricter form of scrutiny. Second, rational basis "with bite" scrutiny is too strict because the courts are ill-equipped, relative to representative bodies, to weigh the disparate factors involved in determining the wisdom and utility of legislation, and should therefore refrain from potential usurpation of legitimate state authority. Third, rational basis "with bite" scrutiny for the state benefits portion of the *Pike* test is too strict, because use of such scrutiny results in the usurpation of the collective wisdom of duly enacted state legislatures, supplanting it with the individual judgment of unelected judges who are largely unresponsive to democratic judgments about the weight of various state matters. Additionally, such scrutiny removes reasonable expectations about the weight that a court will give to the benefits of a state law. I will discuss these three points in order.

Scrutiny: Strict Disguised as Intermediate

As an initial matter, it should be noted that the *Pike* balancing test itself is not as strict a standard of scrutiny as that which per se invalidates discriminatory laws.[199] Given the kind of examination of state benefits and burdens on interstate commerce the courts perform, the overall *Pike* standard is "heightened" or intermediate scrutiny.[200] The trouble with applying an intermediate or rational basis "with bite" scrutiny to the state benefits analysis in *Pike* balancing cases is

198. A fourth reason could be offered: such an approach is consistent with the Court's pre-1945 approach to such cases. *See, e.g.*, S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 192 (1938) (finding that they were supported by a rational basis, the Court upheld width and weight restrictions that prevented eighty-five percent of the nation's trucks from operating in the state).

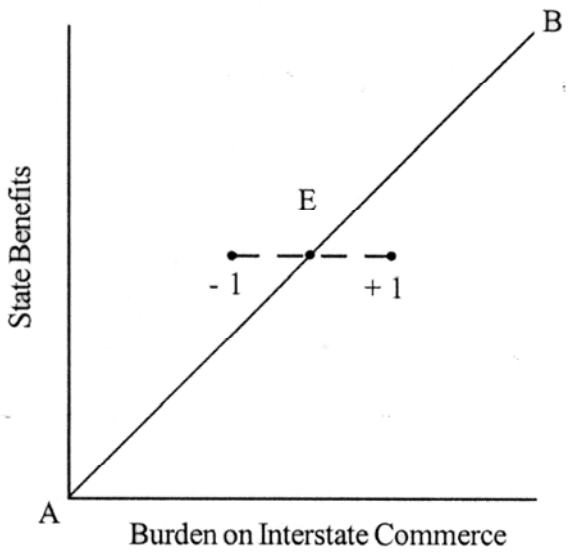
199. Wyoming v. Oklahoma, 502 U.S. 437, 455 n.12 (1992) ("There are circumstances in which a less strict scrutiny is appropriate under our Commerce Clause decisions.").

200. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

that this raises the scrutiny level of the test too high. This is not easy to see at first.

What makes the *Pike* test an intermediate scrutiny test is that it consists of three-stages. The test requires exacting determinations of weights in the first two stages so as not to prejudice the way in which the scale is balanced or tipped in the third stage. First, a state law must be legitimate and rationally related to the state's end; and the putative benefits of the law, those desired by the state, determine the weight courts give to the state benefits. Second, courts must determine the burdens the law places on interstate commerce. Finally, courts must weigh the benefits to the state against the burden on interstate commerce. If intermediate scrutiny is first applied to the state benefits side of the scale, then the overall scrutiny is more rigorous, as if a finger were being placed *on the interstate commerce side of the scale*.

Another way to see this is represented by the following chart:



Point E represents a point along an equilibrium line, AB, where the benefits of a state law are, theoretically, equal to its burdens on interstate commerce. The area below the line includes all points at which the burden on interstate commerce is greater than the state

benefits. The area above the line indicates all points at which the benefits to the state are greater than the burden on interstate commerce. Watch what happens when point E is moved along the state benefits line. If the scrutiny on state benefits is lessened, as represented by –1, the benefits to the state are greater than the burden on interstate commerce. If, however, the scrutiny on state benefits is increased, represented by +1, the law becomes excessively burdensome on state laws, *without the burden on interstate commerce increasing one iota*. Therefore, if *Pike* is to remain merely a heightened or intermediate kind of scrutiny overall, intermediate scrutiny cannot be applied at the outset to the state benefits side of the scale.

Second Order Rational Basis That Really Bites

Using second order rational basis scrutiny or rational basis "with bite" scrutiny on state benefits reduces concerns about the strictness of the test. The trouble, however, with a rational basis "with bite" scrutiny, like the trouble with its cousins, strict and intermediate scrutiny, is that the scale is still tipped too much against the state. It results in unelected judges substituting their judgment for that of the legislature.[201]

There is little difference between what the Supreme Court objected to in *Clover Leaf*, where it prevented the Minnesota Supreme Court from substituting its evaluation of legislative facts for that of the state legislature,[202] and what federal courts do when rational basis "with bite" scrutiny is applied on the state benefits side of the *Pike* scale.

The judiciary, with its limited resources, is the most poorly positioned of the branches of the government to evaluate adequately the wisdom and utility of state legislation. It has neither the access to a wide range of experts, nor the funding to commission studies, nor the interaction with the public at large, necessary to weigh legislation.

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201. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 301 (1992) ("Intermediate scrutiny requires far more evaluative work after the threshold has been crossed. This has three consequences. First, it tends to make the articulation and comparison of competing rights and interests more explicit. Second, it makes outcomes far less predictable—either the rightholder or the government may win. And third, it makes the Court more vulnerable to the charge of legislating from the bench. No amount of bureaucratic lingo in the formulas of intermediate scrutiny . . . can wholly dispel that Lochnerian feeling one can get from intermediate scrutiny's shifting bottom line.").

202. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469-70 (1981).

Allowing judges thus to evaluate legislation undermines fundamental democratic principles. If a state should not impose laws on those who have no say in their making, why are the judgments of unelected federal judges any better? The federal judiciary, with lifetime appointments, is by design supposed to be the branch of government least responsive to the people.[203] It defies all logic to prevent a state from passing laws that affect those who are not represented in the state's lawmaking body, and yet hand the power to strike down a law on efficacy grounds to someone who does not represent the people of the state. At the very least, due deference to the principle of self-government that underlies the dormant Commerce Clause[204] demands that on the state benefits side of the *Pike* balancing scale courts should be highly deferential.

Furthermore, there are sound principles of political theory that militate against judicial determinations of the effectiveness of state laws. Both the natural law principle of subsidiarity[205] and the Constitution's own structure of reserving power to the states,[206] counsel the federal courts against second-guessing the wisdom and utility of state legislation.

In any event, the second and third steps of the *Pike* test protect against the states encroaching on interstate commerce. It may be argued that if courts are too deferential to the states, state laws will disrupt and interfere with interstate commerce to the detriment of the nation as whole. In response, it may be said that the *Pike* test requires the court to determine the actual burdens on interstate commerce *and to weigh these* against the state's putative benefit. In this way a proper balance may still be struck.

Another objection, more easily discarded, is that courts must intercede to prevent the states from subjecting interstate commerce to inconsistent regulations. The first response is: "So what?" Except in transportation cases and tax cases, there is simply no reason to believe that the Constitution prevents states from subjecting interstate commerce to inconsistent regulations.[207] If it did, California's auto

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203. THE FEDERALIST NO. 79 (Alexander Hamilton).

204. *See infra* notes 34-35 and accompanying text.

205. *See generally* CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 277 (rev. ed. 1999).

206. *See generally* Cooley, *supra* note 16, at 79; THE FEDERALIST NO. 10 (James Madison), NO. 51 (Alexander Hamilton).

207. *See* Regan, *Siamese Essays, supra* note 127, at 1880-84.

emissions standards would long since have fallen to a Constitutional attack.

Finally, concern that the states will interfere too much with interstate commerce puts too little trust in the democratic processes the Founding Fathers established precisely to deal with such problems. Congress always has the authority to intervene at any time to protect the national interests, and will presumably do so when necessary.

Reasonable Expectations: Stability and Chaos

Contrary to the view of some commentators and jurists, the *Pike* balancing test should not be scrapped. It continues to serve a useful function, albeit in a narrow array of cases. Its function, however, is currently undermined by an ad hoc, case-by-case, approach to *Pike* balancing. This approach provides guidance neither to courts nor to state legislatures. It is especially vulnerable to the charge that it results in judges—whose competence in legislating is at least questionable—substituting their judgments concerning the benefits of a law for that of the people as expressed through their elected representatives. The law should not be so uncertain. To return to our chaos theory example, at least the size and shape of the moguls, that is the legal rules, those "strange attractors" that determine the path a state law may traverse down the judicial slope, can and should be clearly identified. Adopting a clear rational basis rule for the state law analysis will at least clarify the state benefits side of the scale. This will make *Pike* balancing cases less random, more predictable, and ultimately will better suit both the states and interstate commerce.