TOWARD A MORE COHERENT DORMANT COMMERCE CLAUSE: A PROPOSED UNITARY FRAMEWORK

MICHAEL A. LAWRENCE*

* Associate Professor of Law, Detroit College of Law at Michigan State University. The author would like to thank Deanne A. Lawrence and Professors Susan H. Bitensky, Jesse H. Choper, Richard H. Fallon, Jr., Earl M. Maltz, Ronald D. Rotunda, Mark V. Tushnet, and Winkfield F. Twyman, Jr., for their very helpful comments on earlier drafts of this Article. The research assistance of Janet Wyatt is also greatly appreciated. This Article is dedicated to A.J., David, and William Lawrence.

I. INTRODUCTION

The Commerce Clause of the U.S. Constitution explicitly gives Congress the power to regulate interstate commerce.[1] If Congress does *not* legislate in a particular substantive area involving interstate commerce, however, the Commerce Clause is silent on the extent to which States may regulate activities in that substantive area.[2] Thus, when the U.S. Supreme Court is asked to define the scope of the "Dormant" Commerce Clause, it faces the fundamental dilemma of trying to interpret the meaning of congressional silence.[3] In interpreting this silence, the Court must decide between the extremes of interpreting the Dormant Commerce Clause on one hand as granting Congress exclusive power to regulate commerce[4] and, on the other hand, as granting States virtually unlimited power to regulate interstate commerce.[5] The Court has responded to these uncertainties "by

1. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

2. Congress's power to limit impliedly state regulation of interstate commerce is known as the "dormant" or "negative" aspect of the Commerce Clause.

3. *See infra* notes 4-5, 46, and accompanying text.

4. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring) (suggesting that the commerce "power must be exclusive; it can reside but in one potentate"). Where Congress's commerce power is exclusive, States have no right to regulate in any way an activity that affects interstate commerce, even if Congress remains silent on the particular subject matter.

5. Some have argued that "[c]ongressional silence in any area always represent[s] an intent to defer to state regulation." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 282 (5th ed. 1995) (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 587 (1852) (Taney, J., dissenting); Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812)). Applying this approach, States would have unfettered power, in the absence of congressional intervention, to regulate even those activities that directly and significantly impact interstate commerce. Stated another way, "[w]ithout a dormant commerce clause, states would be free to enact legislation favoring local commerce and discriminating against out-of-state commerce in all cases where Congress

interpreting the affirmative grant of commerce powers to [Congress] as imposing *some* self-executing limitations on the scope of permissible state regulation."[6] In short, the Court has determined that, "[i]n effect, sometimes the commerce clause is exclusive, and sometimes it is not."[7]

In its current state, the Court's dormant-commerce-clause jurisprudence consists of "plainly manipulable and at times anachronistically metaphysical . . . doctrines," with complex exceptions that are applied with only "dubious consistency."[8] The Court's doctrine has become so riddled with exceptions that it "often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."[9] Several Justices have expressed their frustrations with the dormant-commerce-clause doctrine, describing it at various times as "hopelessly confused,"[10] a "quagmire,"[11] "not predictable"[12] and in a classic understatement, "not always . . . easy to follow."[13] Commentators agree: "It seems that the only thing consistently predictable about the Court['s interpretation of the Dormant Commerce Clause] is its continued unpredictability."[14] Why does the Court perpetuate such a scattered approach? One commentator speculates that the Supreme Court has preserved this unpredictable doctrine "with an eye to [its] discretionary application in order to prevent

---

had not legislated on a particular matter." NOWAK & ROTUNDA, *supra*, at 281 (citing SAUL LEVMORE, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569).

6. NOWAK & ROTUNDA, *supra* note 5, at 281. *See infra* notes 57-94 and accompanying text.

7. *Id.* at 282.

8. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 440 (2d ed. 1988).

9. *Id.* at 439.

10. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

11. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring); *see also* Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., dissenting) (averring that the Court's "applications of the [dormant-commerce-clause] doctrine have, not to put too fine a point on the matter, made no sense").

12. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring).

13. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987).

14. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 479 (1982).

what appear to be instances of intolerable local or state interference with interstate markets."[15]

When the Court lacks a cogent, consistently applied analytical methodology in a substantive area of the law, the jurisprudence in that area is likely to be erratic. Where the Court's jurisprudence is erratic, there will be a large measure of uncertainty about how future cases in that area will be decided. So it is with the Court's current dormant-commerce-clause jurisprudence. The lack of a coherent dormant-commerce-clause doctrine leaves individual States with much uncertainty about how far they may go in regulating activities that might implicate interstate commerce. Under the current doctrine, lawmakers and others at the state level are left with far too little idea of which state laws will and which will not withstand judicial scrutiny. This lack of predictability hinders States' efforts to regulate matters within their own borders, thus potentially disturbing in a basic sense their sovereignty.[16] A State that is uncertain about the limits of its authority in regulating activities that might affect interstate commerce may be hesitant to enact novel and possibly visionary laws[17] out of fear that they will be struck down in court.[18] Or, on the other hand, a State might

15. TRIBE, *supra* note 8, at 440.

16. *See, e.g.*, Earl M. Maltz, *How Much Regulation is Too Much: An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 61 (1981). Maltz notes that

> [a]lthough the term "state sovereignty" is never directly mentioned in the Constitution, the policy of maintaining the quasi-sovereign status of the states is implicit not only in the tenth amendment, but also in the entire federal structure of American government. Thus, in commerce clause litigation, a state decision that implicates concerns close to the core of the sovereignty concept should at least arguably be entitled to greater deference.

Id.

17. *See infra* note 47 and accompanying text for Justice Brandeis's eloquent statement regarding the dangers of discouraging state experimentation.

One might argue that to the extent that "novel and possibly visionary laws" happen to be unconstitutional, such a chilling effect on the State may not be such a bad thing. *See* Letter from Winkfield F. Twyman, Jr., to the author (January 23, 1997) (on file with author). Although there is a certain logic to this argument, this Article maintains that greater certainty and clarity in themselves are virtues. Indeed, "clarity is a virtue that cannot be valued too much in constitutional law." Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 150.

18. Certainly, the same could be said if the Court had in place a cogent methodology consistently applied—that is, that the State would not enact novel or even visionary laws that it felt relatively certain would fail the Court's test. It is not in the easy cases where the certainty would make a difference. Rather, the certainty engendered by a consistently applied, coherent methodology would have its greatest effect in the marginal cases—those cases where it is a closer question whether a state measure unacceptably regulates interstate commerce. And, of course, some uncertainty will remain even with the clearest of methodologies. Indeed, retaining at least a minimum of flexibility is desirable; the

blindly proceed in enacting a law that unacceptably regulates interstate commerce when it might have been dissuaded from proceeding had it known with greater certainty what the Court's position would be on the matter. Either way, if the State has the benefit of a cogent, consistently applied analytical framework within which to test its legislation, it can decide with greater confidence whether or not to proceed.

Clearly, a dormant-commerce-clause approach that is more coherent and functionally consolidated than the Court's sometimes scattered approach would be helpful. Currently, however, there is no one analytical framework that adequately consolidates the Court's dormant-commerce-clause jurisprudence into a coherent whole.[19] This Article proposes such a cohesive approach with its new "Unitary Framework."[20] The Unitary Framework does just what its name suggests—it incorporates the various dormant-commerce-clause principles laid out by the Court[21] and leading scholarly works and consolidates them into a hybrid unitary taxonomy suitable for use with both existing and prospective cases. The Unitary Framework is not a reform proposal as such, supported by a normative theory; rather, it is a distillation of the hidden order reflected in the Supreme Court's current approach to

---

Court must have the discretion to consider the unique case-specific facts in determining the constitutionality of a given statute.

19. A number of important scholarly works have addressed various aspects of the Dormant Commerce Clause and have factored into the overall development and structure of this Article's Unitary Framework. Among those that factor most prominently are: Eule, *supra* note 14; Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); and Tushnet, *supra* note 17.

20. This Article's Unitary Framework has been well "road-tested." After introducing and discussing the prevailing dormant-commerce-clause doctrine in my Constitutional Law I classes, it became clear that the doctrine was indeed, in the words of Chief Justice Rehnquist, "hopelessly confused." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting). Students in the classes were befuddled by the multiplicity and complexity of the rules and exceptions in the dormant-commerce-clause materials. This Article's Unitary Framework springs from efforts over time to find some order in what appears to be a chaotic jurisprudence and to develop a new, more coherent way of presenting the material. It has been gratifying to observe that student comprehension of the material has greatly increased as a result of students' use of the Unitary Framework.

21. Beyond the occasional cursory comment, this Article takes the Court's jurisprudence as it finds it. The Article's primary purpose is not to argue the substantive merits of more or less congressional commerce power vis-a-vis the power of the States to regulate interstate commerce; those arguments will be saved for another day. To the extent this Article comes down one way or the other on the matter, however, it finds especially persuasive the arguments of those advocating a limited judicial role in dormant-commerce-clause cases. *See infra* notes 31-54 and accompanying text.

dormant-commerce-clause questions.[22] Specifically, the Unitary Framework involves two major levels of inquiry: (1) whether the state statute or regulation at issue pursues a legitimate state purpose; and, if so, (2) whether this legitimate state purpose is so outweighed by the burdens imposed by the statute on interstate commerce that the statute must be struck down.

By consolidating the Court's array of dormant-commerce-clause pronouncements and leading scholarly commentary on the subject under one roof, the Unitary Framework brings order—and improved certainty and predictability—to this currently muddled area. At the same time, the Unitary Framework retains the flexibility to allow for a particularized approach with adequate sensitivity to factual nuance—an important characteristic for any framework if it is to useful to courts, which need to retain discretion to consider the unique circumstances of individual cases.[23]

This Article proceeds in stages. Part II provides an historical look at the development of the Constitution and the Commerce Clause, with a special eye toward federalism and separation-of-powers issues. In particular, this Part looks at the judiciary's role in regulating the impact of state actions under the Commerce Clause. Part III discusses the Dormant Commerce Clause—the Commerce Clause's implied restriction on States from regulating interstate commerce.[24] Part IV introduces and develops this Article's "Unitary Framework" for use in analyzing current and prospective dormant-commerce-clause cases. This

22. This point is illustrated by the facts that: (a) the Unitary Framework "tracks the Court's formulae pretty closely; and (b) most if not all of the cases discuss[ed] come out the same way as the Court decided them." E-mail letter from Professor Richard Fallon to the author (September 19, 1997) (on file with author).

23. This Article does not presume to argue that the Unitary Framework will provide a quick-fix for *every* dormant-commerce-clause case. As noted by one commentator,

> [t]he general problem we are addressing has resisted the best efforts of the Supreme Court (for over 150 years) . . . and a host of talented legal scholars. The reason, we believe, is that in some ultimate sense the problem is unsolvable. Taken to their logical conclusion, either free trade or local autonomy could virtually eliminate the other, and negotiating a workable border between the two depends as much on history, politics, and local terrain as on any overarching vision. No matter how a legal test is articulated, it cannot satisfactorily resolve the tensions between local autonomy and free trade in all conceivable cases. In the end, the law must have a certain irreducible messiness in dealing with such fundamental tensions.

Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1438 (1994).

24. The Constitution's explicit grant of power to Congress to regulate interstate commerce is sometimes termed the "active" Commerce Clause.

Part discusses the Court's existing dormant-commerce-clause jurisprudence in the context of the Unitary Framework, demonstrating the Unitary Framework's practical application and utility in bringing order to the Court's dormant-commerce-clause doctrine.

II. THE COMMERCE CLAUSE: BACKGROUND

A. *Federalism and the Constitution*

A primary task of the Framers at the Constitutional Convention of 1789 was deciding how power should be allocated between the federal and state governments.[25] The balance of power that ultimately resulted from the Constitutional Convention can be viewed conceptually as two sides of the same coin. On one side, the Constitution gives the national government specifically enumerated powers.[26] Most of

25. The impetus for the Convention was the belief held by many that the original Articles of Confederation were inadequate because they gave too little power to the national government to control trade wars among the States. *See* Eule, *supra* note 14, at 430 (citing Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (stating that commercial warfare among the States "threatened both the viability and peace of the union, and is almost uniformly conceded to be the primary, if not sole, catalyst for the convention of 1787"); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1338 (1934)). Specifically, the Articles of Confederation provided for only a Congress—that is, there was no executive and no significant federal judiciary—and, for its part, Congress was something of a paper tiger because of its inability to tax and its dependence upon the States for its funding. *See* NOWAK & ROTUNDA, *supra* note 5, at 138. That said, the Framers in no way were interested in vesting unlimited power in the national government. Rather, they envisioned a federalist system, a system where power would be divided among the state and federal governments so as to allow the inherent benefits of both while preventing either from oppressing the other.

26. The Constitution also gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the [enumerated powers of Article I, § 8,] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

James Madison suggested that the Necessary and Proper Clause might be structurally unnecessary:

> Had the Constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it is included.

THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Professor Tribe, however, suggests that even if the Necessary and Proper Clause is structurally superfluous, it remains important as an explicit incorporation within the language of the Constitution of the doctrine of implied power: "*The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power*

Congress's powers are enumerated in Article I, Section 8 of the Constitution.[27] The decision by the delegates to the Constitutional Convention to give Congress specific, enumerated powers, rather than a broad, inclusive power, was in keeping with the Articles of Confederation, which gave Congress certain enumerated powers in Article IX.[28] In a textual sense, then, Congress's commerce power is limited to those activities expressed or implied within the text of the Constitution. On the other side, pursuant to the Tenth Amendment, the Constitution makes state actions valid as a matter of law—in effect, it gives state actions a presumption of validity—unless expressly or impliedly prohibited by the Constitution.[29]

The Court succinctly explained the advantages of the federalist system of shared powers and dual sovereignty in the 1991 case of *Gregory v. Ashcroft*:

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . .
>
> Perhaps the principal benefit of the federalist system is a check on abuses of government power . . . . Just as the separation and independence of the coordinate Branches of

---

does not conflict with external limitations such as those of the Bill of Rights and of federalism." TRIBE, *supra* note 8, at 301 (emphasis in original).

27. Among the powers enumerated in Article I, Section 8 are the power to lay and collect taxes (Clause 1); to borrow money on behalf of the United States (Clause 2); to regulate commerce with foreign nations, the States, and Indian tribes (Clause 3); to coin money (Clause 5); to establish post offices (Clause 7); to provide protections to authors and inventors (Clause 8); to establish lower federal courts (Clause 9); to declare war (Clause 11); to establish and regulate military forces (Clauses 12-16); and to make laws "necessary and proper" for implementing all of the other enumerated powers in Article I, Section 8 (Clause 18).

28. ARTICLES OF CONFEDERATION, art. IX. Article IX did *not* grant Congress the power to tax or the power to regulate commerce; these omissions, many believe, led to the need for the Constitutional Convention in the first place. *See supra* note 25 and accompanying text.

29. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment, although reserving significant power to the States, does not approach the broad power given by Article II of the Articles of Confederation, which reserved to the States "every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States." ARTICLES OF CONFEDERATION art. II. The "expressly delegated" language of the Articles of Confederation gave the States significantly broader power than they enjoy presently under the Tenth Amendment.

> the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal government will reduce the risk of tyranny and abuse from either front.[30]

B. *The Judiciary's Role*

This Article's primary purpose is to provide a coherent analytical framework for a constitutional provision that is not really there—that is, the Dormant Commerce Clause's limitation on state regulation of interstate commerce, a limitation not expressly stated in the text, but found by the Court to be *implied* by the text and structure[31] of the Constitution.[32] By what authority does the Court make such determinations in the first place?

Ever since *Marbury v. Madison*,[33] the Court has assumed an active role in interpreting the Constitution and "say[ing] what the law is."[34] Some suggest, however, that the role of regulating the impact of state actions under the Commerce Clause is a task better left to Congress than to the judiciary. Justice Scalia in particular is a proponent of this view. He notes "the lack of any clear theoretical underpinning for judicial 'enforcement' of the Commerce Clause" and suggests that the proper reading of the Commerce Clause is as "a charter for Congress, not the courts, to ensure 'an area of trade free from interference by the States.'"[35] Further:

> [T]o the extent that we have gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause . . . the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it

30. 501 U.S. 452, 458 (1991).

31. *See infra* note 51.

32. *See infra* notes 57-88 and accompanying text.

33. 5 U.S. (1 Cranch) 137 (1803).

34. *Id.* at 177. Chief Justice John Marshall explained that "it is, emphatically, the province and duty of the judicial department to say what the law is." *Id.* Further, "[t]he judicial power of the United States is extended to all cases arising under the constitution." *Id.* at 178.

35. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., dissenting) (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977)).

> was almost certainly not intended to undertake, and that it has not undertaken very well.[36]

Finally, Justice Scalia argues that

> a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not [the Court] to determine it is not significant enough to justify the burden on commerce.[37]

This viewpoint has roots in earlier Commerce Clause decisions. In *South Carolina State Highway Department v. Barnwell Brothers, Inc.*,[38] for example, the Court unanimously sustained a South Carolina statute imposing height and weight restrictions on trucks traveling within the State, asserting that it is Congress's responsibility, and not the Court's, to determine when "local interests should be required to yield to the national authority and interest.... [C]ourts do not sit as legislatures."[39] Specifically,

> [s]ince the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard.[40]

In other words, "[C]ourts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment."[41]

For his part, Chief Justice Rehnquist argues that

> [t]he wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes

36. *Id.* at 265 (Scalia, J., dissenting).
37. Bendix Autolite Corp. v. Midwesco Enterprises, Inc. 486 U.S. 888, 898 (1988).
38. 303 U.S. 177 (1938).
39. *Id.* at 190.
40. *Id* at 191.
41. *Id.*

> ill for the values of federalism which have long animated our constitutional jurisprudence.[42]

Justice Rehnquist adds that

> [t]he Commerce Clause is, after all, a grant of authority to Congress, not to the courts. Although the Court when it interprets the "dormant" aspect of the Commerce Clause will invalidate unwarranted state intrusion, such action is a far cry from simply undertaking to regulate when Congress has not because we believe such regulation would facilitate interstate commerce.[43]

A key element of this viewpoint, of course, is the belief that States have the right in the first place to regulate, in a nonprotectionist manner, activities impacting interstate commerce in the absence of congressional action.[44] Justice Scalia suggests that "the language of the Commerce Clause gives no indication of exclusivity,"[45] and concludes that "[t]here is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only congressional action. There, as elsewhere, 'Congress' silence is just that—silence . . . .'"[46] This State-oriented approach has certain real advantages. As argued by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebman,*

> [t]o stay experimentation in things social and economic is a grave responsibility. Denial of the rights to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single

42. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting). The Court in *West Lynn Creamery* struck down a Massachusetts tax-subsidy program that imposed a tax on all milk sold by dealers to Massachusetts retailers and distributed the revenues exclusively to Massachusetts dairy farmers. *See infra* notes 291-95 and accompanying text.

43. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting).

44. *See supra* notes 5-7 and accompanying text.

45. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting). Justice Scalia argues that

> [n]or can one assume generally that Congress' Article I powers are exclusive; many of them plainly coexist with concurrent authority in the States. Furthermore, there is no correlative denial of power over commerce to the States in Art. I, §10, as there is, for example, with the power to coin money or make treaties. And both the States and Congress assumed from the date of ratification that at least some state laws regulating commerce were valid.

Id. (Scalia, J., dissenting).

46. *Id.* at 262 (Scalia, J., dissenting) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

> courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[47]

A number of modern commentators have argued this viewpoint as well. For example, Professor Tushnet suggests that "the role played by the courts should be far smaller than it has been. Congressional action, buttressed by judicial intervention in those limited circumstances where Congress is unlikely to act, will protect all interests worthy of consideration."[48] Judicial displacement of a State's legislation is called for only "when it seems that the legislative process has operated in a distorted way—for example, by excluding some affected interest from influence on the legislative process."[49] Steven Breker-Cooper bases his approach on democratic theory, arguing that

> [b]y intervening when Congress has not acted, the Court allows two separate political branches to evade electoral accountability: the state legislature which passes a statute that burdens interstate commerce, and Congress which does nothing about it. Congress and state legislatures should be forced to implement positive policy, rather than lying dormant, secure in the knowledge that the Court will implement policies that Congress should have enacted, or, in the case of state legislatures, strike down policies they should not have enacted.[50]

Other modern commentators disagree, arguing that the idea of a strong congressional dormant-commerce-clause power to limit States is justified on structural grounds,[51] even if it is not justified on textual and historical grounds. One influential jurist has described the negative commerce clause as "one device . . . for preventing states from abusing their 'market power,'" which protects against the "danger that, like independent nations, states might be pressured by interest

47. 285 U.S. 262, 311 (1932).

48. Tushnet, *supra* note 17, at 125-26.

49. *Id.* at 125.

50. Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 935-36 (1990).

51. Structural reasoning in constitutional argument and decisionmaking deals with "the *interrelationships* among the institutions created or recognized by the Constitution, the goals behind the manner in which they are supposed to relate, and sometimes the individual interests affected by those patterns." MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 129 (1993). Such reasoning "involves drawing inferences from the governmental structures and relationships created by the Constitution." *Id.*

groups to establish trade barriers" against out-of-state commerce.[52] Another commentator asserts that the Constitution in general reflects a "compromise between unlimited state autonomy and perfect national unity"[53] and that this compromise is "no doubt the strongest argument for forbidding state protectionism."[54]

III. THE DORMANT COMMERCE CLAUSE: THE IMPLIED LIMITATION ON STATE REGULATION OF MATTERS INVOLVING INTERSTATE COMMERCE

It is analytically convenient to consider two separate aspects of the Commerce Clause: (1) the grant of power to Congress to regulate interstate commerce; and (2) the implied limitation[55] on States from regulating matters that interfere with interstate commerce—the so-called "Dormant" Commerce Clause.[56] This Article concerns the latter.

A. *History*

The Supreme Court's earliest consideration of the Dormant Commerce Clause came in 1824 in *Gibbons v. Ogden*,[57] a case that also considered the extent of Congress's regulatory power under

52. Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 17 (1987).

53. Regan, *supra* note 19, at 1091.

54. *Id.* at 1111.

55. Although the Commerce Clause is phrased as an affirmative grant of power to Congress, *see supra* notes 1-3 and accompanying text, nowhere does the Constitution explicitly limit state interference with interstate commerce. It is important to note that because any constitutional limitations on state regulation of interstate commerce are *implied*, rather than expressly stated, any Supreme Court limitation (or grant) of such state power is subject to congressional revision. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100 (1890) (stating that a State may not ban the sale of liquor from another State unless Congress were to pass a law allowing States to do so) (note that Congress thereafter enacted the Wilson Act (26 Stat. 313 (1890)), providing that States could regulate the transport of liquors into a State).

56. James Madison actually regarded the "negative" aspect of the Commerce Clause—the implied restriction on States from regulating interstate commerce—as the more important, writing that the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, 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." 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (1911), *quoted in* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994).

57. 22 U.S. (9 Wheat.) 1 (1824).

the "active" Commerce Clause.[58] In *Gibbons,* Chief Justice John Marshall examined the individual words and phrases of the Commerce Clause and concluded that the Commerce Clause gives Congress broad plenary power to regulate commercial intercourse having *any* interstate impact, however indirect.[59] As such, Chief Justice Marshall asserted that Congress's power to regulate interstate commerce is virtually unlimited, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority.

In *Gibbons,* Chief Justice Marshall considered, but did not definitively decide, whether Congress's power to regulate interstate commerce was exclusive—that is, whether, in the absence of congressional action, a State could regulate a certain activity impacting interstate commerce. On one hand, Chief Justice Marshall noted that there is "great force"[60] in the argument that States have no right to regulate activities affecting interstate commerce because "the word 'to regulate' implies in its nature full power over the thing to be regulated, [and thus] excludes, necessarily, the action of all others that would perform the same operation on the same thing."[61] Indeed, when a State regulates commerce with foreign nations or among the several States, "it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[62] On the other hand, Chief Justice Marshall

58. *See supra* note 1 and accompanying text.

59. Chief Justice Marshall broadly defined "commerce" as any activity involving commercial intercourse (including navigation, the activity at issue in *Gibbons*); thus, commerce goes well beyond the mere buying and selling or interchange of commodities. *See Gibbons,* 22 U.S. (9 Wheat.) at 189. He then considered what the Commerce Clause means when it says that Congress has the power to regulate "among the several States" and determined that Congress can regulate even those activities that are primarily *intra*state in nature if those activities affect commerce with other States and if such regulation is necessary to execute the general powers of the national government. *See id.* at 195. Under this reading, only that commerce that is exclusively internal to a State and that affects no other State would be out of Congress's reach. *See id.* Finally, Chief Justice Marshall defined "regulate" as "the power to prescribe the rule by which commerce is to be governed." *Id.* at 196. This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*

60. *Id.* at 209.

61. *Id.* Chief Justice Marshall stated that he was not convinced that the strong argument in favor of congressional exclusivity was refuted. *See id.* Justice Johnson was more emphatic: the commerce "power must be exclusive; it can reside in but one potentate." *Id.* at 227 (Johnson, J., concurring).

62. *Id.* at 199-200 (majority opinion). Chief Justice Marshall contrasted Congress's power to lay and collect taxes, which "has never been understood to interfere with the exercise of the same power by the States" because "neither is exercising the power of the

suggested that States *may* sometimes enact laws to regulate commerce, as long as the regulation does not interfere with, or is not contrary to, an Act of Congress passed pursuant to the Constitution.[63] In *Gibbons*, because there was indeed actual conflict between the state law at issue and an Act of Congress, it was unnecessary to reach the question of how far a State may go in regulating interstate commerce in the absence of congressional action, and Chief Justice Marshall left it unanswered.

Thereafter, when Congress failed to act in a number of areas, the Court developed various mechanisms to uphold States' rights to regulate certain activities that might be found to affect interstate commerce. In *Willson v. Black-Bird Creek Marsh Co.*,[64] for example, the Court held that in the absence of a conflicting Act of Congress, States may regulate pursuant to the police power activities affecting interstate commerce;[65] and in the *License Cases*,[66] the Court held that in cases of necessity, long usage, and acquiescence, States may regulate interstate commerce.[67] Then, in *Cooley v. Board of Wardens of the Port of Philadelphia*,[68] the Court attempted to merge its previous dormant-commerce-clause holdings into a single doctrine standing for the proposition that, in the absence of conflicting congressional action, States may regulate those aspects of interstate commerce that are so local as to require diverse treatment, whereas Congress alone may regulate those aspects of the same that require a single, uniform rule.[69]

---

other," *id.* at 198, 199, and thus concluded that the commerce power cannot be analogized to the taxing power. *See id.* at 200.

63. *See id.* at 209-10.

64. 27 U.S. (2 Pet.) 245 (1829).

65. In *Willson*, the Court upheld a Delaware statute allowing the damming of a marshy creek, notwithstanding the fact that such damming blocked federally licensed boating. *See id.* at 252; *see also* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) (upholding a Virginia statute regulating out-of-state insurance companies, reasoning that the act of issuing an insurance policy does not constitute an interstate commercial transaction), *overruled by* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (finding that the act of underwriting insurance *does* constitute interstate commerce); Coe v. Town of Errol, 116 U.S. 517 (1886) (upholding New Hampshire tax on cut logs, holding that mere *intent* to export does not constitute interstate commerce).

66. 46 U.S. (5 How.) 504 (1847). In these cases, the Court upheld various state laws requiring licenses for the sale of intoxicating liquor. One of the *License Cases*, *Pierce v. New Hampshire*, was overruled by *Leisy v. Hardin*, 135 U.S. 100 (1890).

67. In so holding, the Court necessarily found that Congress's power to regulate interstate commerce was *not* exclusive. *See License Cases*, 46 U.S. (5 How.) at 579.

68. 53 U.S. (12 How.) 299 (1851).

69. *See id.* at 320.

The local-national subject distinction as laid out in *Cooley* has been minimized due to the lack of adequate criteria for determining what matters are "national" as opposed to "local" in character and because the *subject* of a regulation is not the sole meaningful determinant in deciding whether a uniform national rule as opposed to a diversified local approach is needed—that is, a regulation's *purpose* and *effect* are also relevant in determining how extensively the regulation affects interstate commerce.[70] The Court's reasoning in *Cooley* endures, however, in the sense that the resolution of a particular case today will turn in large part on a consideration of the local (state) interest in regulating local affairs as it relates to the national interest in promoting interstate commerce.[71]

Replacing the *Cooley* local-national subject distinction in the Supreme Court's late-nineteenth and early-twentieth-century decisions was the distinction between state regulations having a "direct" and "indirect" effect on interstate commerce. Those state regulations that directly affected interstate commerce were held to violate the Dormant Commerce Clause,[72] whereas those that "only indirectly, incidentally, and remotely" affected interstate commerce were held to be acceptable.[73] Then, by the late 1930s and early 1940s, the Court had rejected the direct-indirect distinction in favor of a methodology that persists to this day—a balancing of the State's interest in enforcing a state

70. *Cf.* TRIBE, *supra* note 8, at 408 (stating that, in the years following *Cooley*, "*[w]hat the states did*, and not *what subject they did it to*, came to be seen as the crucial question in deciding whether state action was compatible with the commerce clause").

71. *See* TRIBE, *supra* note 8, at 437 ("[I]t is plain that those state regulations provoked by purely local aspects of interstate commerce are accorded a deference not granted to state actions stimulated by problems of more obviously national dimension.").

72. *See, e.g.*, DiSanto v. Pennsylvania, 273 U.S. 34, 37 (1927) (holding that because a state law requiring licensing of steamboat ticket sellers was a "direct burden" on interstate commerce, Congress had exclusive authority to regulate the activity, and the state law was hence unconstitutional); *see also* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (striking down a state law requiring trains to stop at public crossings as many as 124 times within 123 miles). *But see* Southern Railway Co. v. King, 217 U.S. 524 (1910) (upholding a state law requiring trains to slow down at fewer crossings).

73. Smith v. Alabama, 124 U.S. 465, 482 (1888) (upholding a state train-engineer licensing law); *accord* Atchison Topeka & Santa Fe Ry. Co. v. Railroad Comm'n, 283 U.S. 380 (1931) (upholding a state law requiring that interstate carriers construct a union passenger station); Chicago, Rock Island & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911) (upholding a state law requiring three brakemen on longer freight trains); Erb v. Morasch, 177 U.S. 584 (1900) (upholding a local ordinance restricting train speed while within city limits).

regulation against the burden the regulation imposes on interstate commerce.[74]

The development of the Court's modern dormant-commerce-clause doctrine[75] has been guided by two theories operating either individually or in tandem. One theory is that the purpose of the Dormant Commerce Clause is to provide an *economic blueprint* for the nation's economic functioning. The second theory is that the purpose of the Clause is to fulfill a *political vision* of a federal government responsive to the needs of all citizens while at the same time respecting and honoring the institutional interests of the States.[76]

The economic-blueprint theory is based on the notion that protectionist state laws "interfere with the efficient disposition of resources throughout the country. By excluding some commerce from a State, these statutes may lead to a lower level of economic performance than would be possible in the absence of the statutes."[77] In the words of another commentator, "[t]he recognition of the framers' goal of establishing a unified, national economy has permeated judicial interpretations of the commerce clause."[78] As recently articulated by the Court, "[t]he

74. The practice of using the "balancing test" as the analytical touchstone in dormant-commerce-clause cases has its roots in the dissent in *DiSanto*, *see supra* note 72 and accompanying text, in which Justice Stone observed:

> [T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In this making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached . . . .
>
> [I]t seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

DiSanto, 273 U.S. at 44 (Stone, J., dissenting); *see also* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). Professor Dowling argued that the Court should bring out into the open what it had really been attempting to do all along: "deliberately balancing national and local interest and making a choice as to which of the two *should* prevail." *Id.* at 21.

75. *See infra* notes 89-94 and accompanying text.

76. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 293-94 (3rd ed. 1996).

77. *Id.* at 293.

78. NOWAK & ROTUNDA, *supra* note 5, at 283. Further, "[t]he Court has recognized, for the most part, that the rationale of the commerce clause was to create and foster the development of a common market among the States, eradicating internal trade barriers, and prohibiting the economic Balkanization of the Union." *Id.* at 282. In adopting this

central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[79]

The political-vision theory is based on the principle that, above all, individual residents of the several States are citizens of a nation, and that some state statutes are incompatible with this ideal.[80] According to the Court, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[81] Any state commercial regulation that discriminates in favor of an in-state resident at the expense of an out-of-state resident is thus viewed critically.[82] As the Court noted in a 1938 case,

> state regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted.[83]

Underlying the Court's approach in this field is the notion that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when

---

rationale, the Court has looked to the problems experienced by the States before the Constitutional Convention as justification for prohibiting discriminatory state measures that might cause the country to turn into a collection of separate nation-states trying to exploit and rival each other economically.

79. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (citing THE FEDERALIST NO. 22, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JAMES MADISON, *Vices of the Political System of the United States, reprinted in* 2 WRITINGS OF JAMES MADISON 362-63 (G. Hunt ed., 1901)).

80. *See* STONE ET AL., *supra* note 76, at 293.

81. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935); *see also infra* notes 237-42 and accompanying text.

82. Some, however, including Justice Scalia, disagree with the Court's practice of using the Commerce Clause as justification for striking down discriminatory state laws, arguing instead that the Privileges and Immunities Clause of Article IV offers such protection. *See supra* notes 35-37 and accompanying text; *see also* Eule, *supra* note 14, at 428, 446-55 ("proffer[ing] a radically diminished role for both the Dormant Commerce Clause and the Court as its interpreter").

83. South Carolina State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177, 184-85 n.2 (1938).

interests within the state are affected."[84] In other words, the Court will view critically any regulation that does not allow those primarily affected by the regulation to register their approval or disapproval about the measure through the political process directly by voting.[85]

Moreover, to the extent that Congress's intervention in matters of interstate commerce threatens the autonomy of individual States, the Court has reasoned that States are adequately protected by the political structure of the government itself.[86] In the Court's words, "State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on the federal power."[87] The Court notes that the effectiveness of the political process in protecting the States' interest is evident from the fact that States have been able to receive substantial federal monies in the form of specific and general grants through the federal legislative process. It concludes that substantive limitations on Congress's commerce power "must be tailored to compensate for possible failings in the national political process [to protect against violations of state sovereignty] rather than to dictate a 'sacred province of state autonomy' [for example, under the Tenth Amendment]."[88]

84. Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945); *see also Barnwell Bros.*, 303 U.S. at 185 n.2 (stating that "when the [state] regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state").

85. *See generally,* Ronald D. Rotunda, *The Doctrine of the Inner Political Check, the Dormant Commerce Clause, and Federal Preemption*, 53 TRANSP. PRAC. J. 263 (1986).

86. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) (noting that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress"); *see also* THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

87. *Garcia,* 469 U.S. at 552. Specifically, the Constitution gives the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the presidency by their control of electoral qualifications and their role in presidential elections. *See* U.S. CONST. art. I, § 2; art. II, § 1.

88. *Garcia,* 469 U.S. at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)); *see generally* Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

B. *The Modern Approach*

It is difficult to ascertain precisely the Court's current approach to the Dormant Commerce Clause.[89] Much of the scholarly analysis of the Court's current dormant-commerce-clause jurisprudence classifies the cases into categories according to the subject matter affected by the state regulation at issue. Under this approach, the Court's analysis of the various cases presumably depends at least in part upon the substantive category into which the case is placed.

That the analytical approach used by the Court should depend upon the substantive area affected creates the possibility for confusion. Further complicating the matter, however, is the fact that the authorities do not agree on what should be the proper substantive categories. For instance, one influential constitutional law treatise discusses the cases according to whether the state measures involve, for example, transportation; limits on incoming commerce; restrictions on outgoing commerce; or hindrances of personal mobility.[90] By contrast, a seminal constitutional law hornbook provides the following categories of state measures that might implicate the Dormant Commerce Clause: restrictions on access to local markets; restrictions on access to local transportation facilities; restrictions on access to local resources; restrictions that put pressure on out-of-state businesses to relocate within the State; state ownership of natural resources; or regulations discouraging multi-state business structures.[91] Finally, a popular law-school casebook breaks its treatment of the Dormant Commerce Clause into sections depending upon, among other factors, whether the state regulation involves transportation (and if so, whether such transportation regulation is designed to protect safety); whether the state regulation involves production and trade; whether the regulation involves state quarantine and inspection laws; whether the regulation requires business operations to be performed in the home State; whether the regulation is

89. In addition to lacking a clear methodology that can be consistently applied in case after case, *see infra* Part IV, the Court has been inconsistent in its statements regarding how the various types of discrimination (that is, discriminatory purpose, discriminatory effect, and facial discrimination) should be analyzed. *See infra* note 109 and accompanying text.

90. *See* NOWAK & ROTUNDA, *supra* note 5, at 284-302.

91. *See* TRIBE, *supra* note 8, at 413-36.

designed to preserve resources for in-state consumption; and whether the regulation is designed to limit business entry or personal mobility.[92] To be sure, there is overlap in these authorities' classifications, and commentators in fact adopt a "unitary approach" of sorts to the extent that they condemn discrimination generally, but it quickly becomes clear upon even a cursory study of these sources that there is much divergence of opinion on how best to describe the Court's current dormant-commerce-clause methodology.

As it stands today, it is difficult to know with any certainty what approach the Court will use in viewing a particular state measure potentially affecting interstate commerce.[93] The nub of the matter is that the Court's current approach to dormant-commerce-clause cases is so scattered that nobody—not state legislators, not law students, not the academic authorities, not the lower courts, nor, indeed, the Court itself—knows clearly what the Court's rules are concerning the Dormant Commerce Clause.[94]

IV. A NEW UNITARY FRAMEWORK

This Article introduces and develops a "Unitary Framework" for dormant-commerce-clause cases.[95] Under the Unitary Framework, it is not necessary to first classify the cases according to the subject matter affected by a particular state measure.[96] It is irrelevant whether the subject matter affected is transportation, restrictions on location of business, incoming commerce, quarantines, outgoing commerce, or whatever—the same

92. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 251-338 (10th ed. 1997).

93. "[T]he outcome of any particular still-undecided issue under the current [dormant-commerce-clause] methodology is in my view not predictable." Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring); *see also* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (describing the Court's current dormant-commerce-clause approach as "a quagmire"); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987) (asserting that the Court's dormant-commerce-clause methodology has "not always been easy to follow"); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (complaining that "the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"); Eule, *supra* note 14, at 479 (stating that "[i]t seems that the only thing consistently predictable about the Court is its continued unpredictability").

94. *See supra* notes 16-18 and accompanying text.

95. *See supra* note 23 and accompanying text.

96. *See supra* text accompanying notes 90-92.

general analytical approach will apply. When measured against the template of the Unitary Framework, some state regulations will survive, and others will drop out as impermissibly discriminatory against interstate commerce.

The Unitary Framework exposes the hidden order of the Court's dormant-commerce-clause jurisprudence and consolidates it into one functionally coherent, consistent approach, expressed by the following flowchart:

Stage 1: *Legitimate State Purpose*

Inquiry: Does the measure pursue a legitimate (that is, nondiscriminatory) state purpose? (The state measure is presumed valid; the challenger has the burden of showing a discriminatory purpose.)

a. If YES, proceed to Stage 2.

b. If NO, measure is absolutely per se invalid an struck down; inquiry is ended.

Stage 2: *Balancing*

Inquiry: As applied, is the measure unacceptably discriminatory in effect (first, to determine burden of proof, ask if the measure is evenhanded in application or discriminatory in application)?[97] Is the measure discriminatory on its face?

a. If EVENHANDED IN APPLICATION, the measure is presumed valid; the challenger has the burden of proving that the measure's burden on interstate commerce is clearly excessive in relation to state benefits.

b. If DISCRIMINATORY IN APPLICATION, the measure is presumed invalid.

97. When the Unitary Framework speaks of statutes that are "evenhanded in application," it refers to laws that apply to in-staters and out-of-staters equally, without regard to their in-state or out-of-state status; when it speaks of statutes "discriminatory in application," the Framework refers to those that by their nature apply to a greater degree to out-of-staters than to in-staters. To be sure, although an evenhanded statute may *apply* equally to in-staters and out-of-staters, it can often *affect* out-of-staters disproportionately if in-state interests have adapted to the statute in some way that out-of-state interests have not. This adaptation by in-state interests to the statute does not change the fact that the statute is written evenhandedly to apply equally to both in-staters and out-of-staters. The possibility of disproportionate effect upon out-of-staters is adequately considered in the Unitary Framework's test for evenhanded-in-application statutes.

(1) Where a measure imposes a burden *mostly*, although not exclusively, on out-of-state interests, the State has the burden of justifying that the measure is likely to achieve its legitimate purpose; the challenger then has the burden of either rebutting the State's justification or of showing that the purpose can be served as well by available nondiscriminatory alternatives?

(2) Where the measure imposes a burden *exclusively* on out-of-state interests, the State has the burden of proving that the measure is *highly* likely to achieve its legitimate purpose *and* that the purpose cannot be served as well by available nondiscriminatory alternatives.

c. If FACIALLY DISCRIMINATORY, the measure is virtually *per se* invalid. The State has the heavy burden of proving that the measure is virtually certain to achieve its legitimate purpose and that the purpose cannot be served as well by available *less* discriminatory means.[98]

As suggested by the flowchart, the Unitary Framework involves two major levels of inquiry: (1) whether the state measure pursues a "legitimate state purpose"[99]; and, if so, (2) whether this legitimate state purpose is so outweighed by the burdens imposed by the statute on interstate commerce[100] that the statute must be struck down.

A. *The "Legitimate-State-Purpose" Stage*

The first line of inquiry in this Article's Unitary Framework is the "legitimate-state-purpose" stage (Step 1), where the Court

98. *See infra* notes 128, 139 for discussion of the distinction between the terms *non*discriminatory and *less* discriminatory.

99. Whether the statute pursues a "legitimate state purpose" depends on whether the statute's purpose is to discriminate against out-of-state competitors (not legitimate), *see infra* notes 105-07 and accompanying text, or to provide for the health, safety, or welfare of the State's citizens (legitimate), *see infra* notes 102-04 and accompanying text.

100. As we will see, in conducting this balancing test, the scales on either side of the balancing mechanism are more heavily weighted one way or the other depending on whether the statute is evenhanded or discriminatory in its application, which in turn determines the nature of the burden of proof. *See infra* notes 146-47 and accompanying text.

asks whether the statute or regulation pursues a legitimate state purpose.[101] A legitimate state purpose is one that is nondiscriminatory. It may have been enacted, for example, in a valid exercise of the State's police power to provide for the health, safety, or welfare of its citizens.[102] The Court gives a high level of deference to such state legislation; as long as the State has articulated a legitimate purpose,[103] the statute is presumed to be valid, and the inquiry proceeds to the next step.[104]

101. *See* Eule, *supra* note 14, at 457 ("Judicial scrutiny of any legislative act should begin with the search for a legitimate end. The Court must decide whether there is a legitimate purpose under the state's police power, or whether the state legislature has merely attempted discrimination to achieve commercial advantage for its constituents.").

102. The Court has long recognized the idea that States have an inherent "police power" that allows them to regulate for the health, safety, and welfare of its citizens. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986) (asserting that "'the States retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected'" (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980))). The "police power" can be described as "the residual prerogatives of sovereignty which the States had not surrendered to the federal government." TRIBE, *supra* note 8, at 405 (citing R. ROETTINGER, THE SUPREME COURT AND THE STATE POLICE POWER 10 (1957)). As early as 1824, Chief Justice Marshall referred to "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824); *see also* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952) (noting that "the police power is not confined to a narrow category; it extends . . . to all the great public needs"); *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847) (asserting that the police powers of a State "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions").

103. *See* Eule, *supra* note 14, at 457 (noting that "the state need not convince the court of the veracity of its articulated end. It will, at this point, be taken at its word."). The State has the initial "burden of articulating a valid purpose . . . . This burden, however, is one of production, not persuasion." *Id.* at 457. On the other hand, post-hoc fabrication of purpose by the State's counsel is *not* sufficient to satisfy the state burden of production; "little reason exists to defer to a legislative product for which a legitimate state purpose derives only from the imagination." *Id.* at 459. Regarding what would constitute adequate articulation of purpose by the State, "[w]here the legislature has set forth its goals in the preamble to, or body of, the enactment, the State's burden is easily satisfied." *Id.*

Despite Justice Scalia's point, in another context, that merely accepting the legislature's articulation of purpose at face value might amount to "a test of whether the legislature has a stupid staff," Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992), the Unitary Framework adopts Professor Eule's highly deferential posture. After all, "no sound justification exists for approaching all proffered purposes as though they masked sinister ends." Eule, *supra* note 14, at 460. This posture is in keeping with the underlying premise that the role of regulating the impact of state actions is a task better left to Congress than to the judiciary and that the Court should thus resolve hard questions in the States' favor. *See, e.g.*, Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 302 (1944) (Black, J., concurring) (stating that "[t]he Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution"); *see also supra* notes 35-50 and accompanying text.

104. Under Justice Scalia's proposed dormant-commerce-clause formulation, the inquiry ends right at this point, once the Court answers the question of whether there exists a legitimate state purpose: "When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on

By contrast, in the relatively rare case where the State's purpose is shown to be discriminatory[105]—that is, it is designed to improve the competitive position of in-state interests at the expense of its out-of-state competitors, or to regulate directly out-of-state activity—the statute does *not* have a legitimate purpose. Such a statute so offends fundamental notions of economic and political union[106] that it is said to be, in the words of the Unitary Framework, absolutely *per se* invalid,[107] and is summarily struck down.

It is important to make the point that discriminatory *purpose* is to be distinguished from discriminatory *effect* and from *facial* discrimination.[108] The Court has not clearly stated which of these three types of discrimination—facial discrimination; discriminatory purpose; or a discriminatory effect—should be given the most weight in determining the validity of a state statute or, for that matter, how these three types should interrelate.[109] Commentators also disagree on which type is the

---

commerce." Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring).

105. As noted by Professor Eule, "[s]eldom will scrutiny of legislative language, history, or authoritative state interpretations fail to reveal any permissible state end. Few statutes are so inartfully drafted that they boldly reveal an intent to discriminate against non-citizens." Eule, *supra* note 14, at 460; *see also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (stating that few statutes "artlessly disclose an avowed purpose to discriminate against interstate goods").

106. *See supra* notes 76-85 and accompanying text.

107. In the words of one commentator, "discriminations in purpose are so harmful that no state interest, no matter how legitimate and substantial, can ever serve to justify them." Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV. 1203, 1245 (1986); *see also* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (stating that "a state statute is invalid if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state *purpose*") (emphasis added); Regan, *supra* note 19, at 1126 (stating that statutes that are discriminatory in purpose are "antithetical to the very idea of federal union").

108. Facially discriminatory legislation is legislation that discriminates in its very language in favor of in-state interests at the expense of out-of-state interests.

109. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981) (stating that "[a] court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory *effect* or of discriminatory *purpose*" (citations omitted) (emphasis added)); *cf., e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986) (explaining that "once a state law is shown to discriminate against interstate commerce 'either on its *face* or in practical *effect*,' the burden falls on the State to demonstrate . . . that the statute 'serves a legitimate local purpose'" (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (emphasis added))); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (explaining that "[a statute] designed [that is, with a *purpose*] to gain an economic advantage for [local] citizens at the expense of [competing citizens] in neighboring states" is "precisely the sort of protectionist regulation that the commerce clause declares off-limits to the states").

most harmful and should therefore be given the most weight. One commentator argues, "[P]rotectionist effect does not make a statute protectionist . . . nor does protectionist effect have any constitutional significance in itself. The Court both is and should be concerned with *purpose.* Protectionist effect is significant evidence on the issue of protectionist purpose; but it is just that, evidence and no more."[110] By contrast, another commentator argues that the Court "should approach all commercial activity with an inquiry about the real discrimination in *effect,*" which would provide a clearer definition of the permissible limits of state discrimination.[111]

Under the Unitary Framework, discriminatory purpose, discriminatory effect, and facial discrimination all are considered in determining the validity of a state measure that affects interstate commerce. These different types of discrimination are considered at different stages of the inquiry and lead to different evidentiary outcomes. The heaviest weight is given to discriminatory purpose, evidence of which renders the statute absolutely *per se* invalid during the "legitimate-state-purpose" step of the inquiry.[112] Statutes that are discriminatory in purpose are "antithetical to the very idea of federal union,"[113]

110. Regan, *supra* note 19, at 1095 (emphasis added). "Protectionist" is Professor Regan's term for a discriminatory statute that satisfies several characteristics. *See id.* at 1094-95. Professor Regan notes that "not just any purpose to advantage local economic actors at the expense of [out-of-state] actors is protectionist. The purpose must be to advantage local actors at the expense of their [out-of-state] competitors." Regan, *supra* note 19, at 1095; *see also* Smith, *supra* note 107, at 1245.

111. Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce,* 46 S.C. L. REV. 381, 438 (1995) (emphasis added).

112. *See supra* notes 105-07 and accompanying text.

113. Regan, *supra* note 19, at 1126. Professor Regan argues that there are three basic objections to a state statute that is discriminatory in any way. They are: (1) it upsets notions of "concept-of-union"; that is, a discriminatory state statute "is unacceptable because it is inconsistent with the very idea of political union," *id.* at 1113; (2) it propagates "resentment-retaliation" among the States; that is, discriminatory legislation "cause[s] resentment and invite[s] protectionist retaliation . . . [and] is likely to generate a cycle of escalating animosity and isolation . . . eventually imperiling the political viability of the union itself," *id.* at 1114; and (3) it is "inefficient"; that is, state "protectionism is inefficient because it diverts business away from presumptively low-cost producers without any colorable justification in terms of a 'federally cognizable benefit,'" *id.* at 1118. All three of these objections are implicated by a statute that is specifically discriminatory in *purpose.* First, regarding the "political-union" objection, "the unvarnished intention of taking something away from other states just to enjoy it at home" is the feature that makes discriminatory legislation "antithetical to the very idea of federal union." *Id.* at 1126. Second, regarding the "resentment-retaliation" objection, "protectionist purpose involves a pure preference for local residents on the part of the legislating state," which "will certainly inspire resentment in victim states, probably even in the unlikely but imaginable case where the protectionist purpose produces no

and are summarily struck down under the Unitary Framework's first step. As we shall see, the next-heaviest weight is given to *facial* discrimination, evidence of which renders the statute virtually *per se* invalid in the second stage "balancing" step of the inquiry.[114] The Unitary Framework assigns discriminatory *effect* the least weight,[115] in the second-stage "balancing" step of the inquiry. By considering discriminatory effect in the second-stage balancing step, the Unitary Framework tacitly acknowledges that discriminatory effect does not rise to the level of discriminatory purpose, but that it can still render a statute invalid *even absent* discriminatory purpose or facial discrimination.[116]

---

protectionist effect." *Id.* at 1133. Such resentment can lead to a cycle of retaliation by the victim State and further retaliation by the original enacting State, a situation "that poses the greatest danger to the nation's political life." *Id.* at 1137. Third, regarding the "inefficiency" objection, "[i]f a law which diverts business from foreign producers to local producers is motivated by protectionist purpose, it aims only at transferring welfare from foreigners to their local counterparts . . . which is not a federally cognizable benefit." *Id.* at 1130.

114. *See infra* notes 135-40 and accompanying text.

115. Statutes that are discriminatory in effect do not have the heavy stage-one presumption of absolute *per-se* invalidity because they are not as onerous as statutes that are discriminatory in purpose when measured in the context of the "concept-of-union," "resentment-retaliation," and "efficiency" objections discussed above. *See supra* note 113. As ably argued by Professor Regan regarding the "concept-of-union" objection, "[t]here is nothing in the idea of federal union that suggests [a state's] laws must be as favorable as possible to foreign [competitors] in their overall effect," for a State "cannot be forbidden to follow a sensible and innocent policy for its internal regulation just because implementing the policy causes some harm in neighboring states." Regan, *supra* note 19, at 1127. From the standpoint of the "resentment-retaliation" objection, statutes that are discriminatory in effect "seem[ ] less likely to cause resentment [and retaliation] . . . than protectionist purpose. Protectionist purpose involves a pure preference for local residents on the part of the legislating state; protectionist effect arising from a law without protectionist purpose does not." *Id.* at 1133. Finally, from an "efficiency" standpoint, just because a statute has some incidental discriminatory effect does not mean that it does not pursue certain federally cognizable benefits. *See id.* at 1129-30.

One commentator speculates that the Court only in certain circumstances applies a presumption of invalidity to statutes that are discriminatory in effect—that is, only when the Court has a substantial suspicion that the regulation is also discriminatory in *purpose* but lacks sufficient evidence to characterize it as such. *See* Smith, *supra* note 107, at 1249.

116. Although evidence of discriminatory effect is given less weight in the Unitary Framework than evidence of discriminatory purpose or facial discrimination, it still has importance aside from simply providing "evidence on the issue of protectionist purpose . . . and no more." Regan, *supra* note 19, at 1095. A statute may have an altogether legitimate state purpose, yet have discriminatory effects so onerous that the Court would feel compelled to strike it down. Consider, for example, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), where in an avowed effort to eliminate the dangers of deception and confusion in the marketplace caused by the multiplicity of apple grading systems among various States, the North Carolina legislature enacted a statute requiring that all closed containers of apples sold or shipped into the State bear "no grade other than the applicable U.S. grade or standard." *Hunt*, 432 U.S. at 335 (quoting N.C. GEN. STAT. §§ 106-189.1 (1973)). The effect of the statute was to prohibit the sale of apples that displayed a grade other than the applicable U.S.

B. *The "Balancing" Step*

Once a statute "passes" the first-stage "legitimate-state-purpose" step, the inquiry proceeds to the "balancing" step.[117] This step involves a consideration of the burdening *effect*[118] of the statute on interstate commerce and of the statute's benefits to the State. In conducting this inquiry, it is necessary first to "calibrate" the scales to account for whether the statute is *evenhanded* or *discriminatory*[119] in its application.[120] The challenger has the initial burden of showing that the statute is discriminatory.

---

grade (including apples from Washington State, which were required by Washington state law to provide *more* information than that required by U.S. law).

Finding that it was not necessary to find facial discrimination or discriminatory purpose—evidence of discriminatory *effect* was enough—the Court struck down the statute:

> [W]e need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

Id. at 352-53. Had the Court been inclined to conduct a more thorough examination of intent, it may well have found evidence of economic motive since North Carolina had *no* system of grading apples. In light of this fact, the State's avowed purpose of protecting its citizens from the dangers of more stringent labeling requirements rings more than a little hollow.

Under the Regan approach, the discriminatory effect of this statute could only be considered as evidence of discriminatory purpose and would not be struck down if such purpose could not be found. Regardless of whether one believes the Court should be involved in regulating interstate commerce rather than leaving such matters to Congress, the plain fact is that the Court *does* get involved. Any workable analytical framework must be able to accommodate the Court as it is, not only as we wish it were. By retaining the currency of discriminatory effect in the analytical mix, the Unitary Framework accommodates the Court's existing jurisprudence while leaving ample room for the Court to refrain from deciding such issues should it so desire.

117. See *infra* notes 141-47 and accompanying text for a discussion of the Unitary Framework's use of the term "balancing" during this stage.

118. If the statute had been found to have had a discriminatory *purpose*, it would have been found invalid under the first step of this Article's Unitary Framework, and the inquiry would have ended at that point. *See supra* notes 105-07 and accompanying text.

119. *See supra* note 97.

120. This calibration is performed in order to determine the proper level of deference to be given the statute and, correspondingly, where the burden of proof shall lie—with the State or with the challenger. *See infra* notes 121-34 and accompanying text. Professor Eule developed a useful system for measuring the level of a state statute's disproportionate effect (if any) on out-of-state interests, which he called "Outsider Impact Percentage" (OIP). A statute "whose effects fall exclusively on nonrepresented [that is, out-of-state] interests, for example, would have an OIP of 100%. A legislative enactment that cast its weight equally upon those within and without the State [that is, an "evenhanded" measure] would have an OIP of 50%." Eule, *supra* note 14, at 460-61. A measure whose burdens fall mostly, but not exclusively, on out-of-state interests would have an OIP of between 50 percent and 100 percent, and a measure which primarily burdens in-state interests would have an OIP of less than 50 percent. *See id.*

Evenhanded[121] measures, because "[t]here is little reason to doubt the motives underlying a legislative measure that falls solely, predominately, or equally on interests actually represented in the regulating body,"[122] and because there is no disproportionate impact on out-of-state interests, will be given a strong presumption of validity. Under the Unitary Framework, the challenger will have the burden of proving that the damage caused by the measure to interstate commerce is clearly excessive in relation to the benefits gained by the State.[123] If the challenger fails to meet this burden, the measure will be upheld as falling within the State's prerogative to regulate matters impacting interstate commerce.[124]

By contrast, if the statute is *discriminatory* in its application,[125] under the Unitary Framework, the Court will apply a presumption of invalidity. The strength of this presumption depends upon the magnitude of the measure's "disproportionality." Where the burden of the measure falls

121. For the sake of clarity in developing the Unitary Framework, the "evenhanded" line of inquiry will be referred to as "Step 2(a)."

122. Eule, *supra* note 14, at 461.

123. For development of this standard, see Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986); Hughes v. Oklahoma, 441 U.S. 322, 331 (1979). For an example of the rare case where the challenger meets its burden of demonstrating that the damaging impact on interstate commerce of an evenhanded statute clearly exceeds the benefits to the State, see Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (striking down an Illinois statute requiring that all trucks, regardless of origin, be equipped with contoured mudflaps); *see also infra* notes 172-80 and accompanying text.

124. As argued by Professor Eule, "[t]his deferential stance is mandated by prudential concerns. Our system of government counsels against second-guessing the legislative resolutions of these questions. The judiciary, in this instance, should not demand more than a legitimate, articulated end and the selection of a means rationally designed to achieve such a goal." Eule, *supra* note 14, at 469 (footnote omitted). Further,

> [w]hen legislation is evenhanded in its effects, it is not for the courts to scrutinize whether the state has adopted the least burdensome statutory scheme. In such instances the "wisdom" of the legislature, its "identity with the people, and the influence which [its] constituents possess at elections" ought be enough to prevent abuse. A state legislature is unlikely to burden its own citizenry beyond the degree needed to achieve the desired benefit.

Id. at 473 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824)); *see also, e.g.*, Breard v. City of Alexandria, 341 U.S. 622 (1951) (upholding local ordinance prohibiting door-to-door sales by any solicitor, regardless of origin).

125. The "discriminatory-in-application" line of inquiry will be referred to in the Unitary Framework as "Step 2(b)." Step 2(b)(1) involves discriminatory statutes whose burden affects out-of-state interests disproportionally, but not exclusively, *see infra* notes 126-29 and accompanying text; Step 2(b)(2) involves discriminatory statutes whose burden affects out-of-state interests exclusively, *see infra* notes 130-34 and accompanying text.

mostly, although not exclusively, on foreign interests,[126] under the Unitary Framework, the State must justify the measure with an explanation of "the extent to which its selected means are likely to achieve the legitimate end it has articulated."[127] If the State is able to meet this burden, the burden shifts back to the challenger either to rebut the State's justification or to demonstrate that the purpose can be served as well by available nondiscriminatory alternatives.[128] If either can be done, the statute will be struck down.[129]

126. Such a measure would have an OIP of between 50 percent and 100 percent under Professor Eule's formulation. *See supra* note 120.

127. Eule, *supra* note 14, at 472. The burden placed on the State to justify its measure increases incrementally as the OIP ranges upward from 51 percent to 99 percent. That is, as the OIP increases, the State is required to demonstrate a correspondingly increased likelihood that the measure will in fact achieve the desired legitimate end. *See id.* "At the lower levels of disproportionality the state's burden will be easily carried. At the upper reaches, proof will not come without some difficulty." *Id.* (footnotes omitted).

In one of the first articles to advance the idea of imposing a form of "graduated burden of proof" on States depending on the nature of the discriminatory effect, Professor Tushnet suggested that cases involving measures whose burdens would fall exclusively on out-of-state ("foreign") interests "would call for skepticism about asserted nondiscriminatory goals." Tushnet, *supra* note 17, at 141. By contrast, cases involving measures whose burdens fall both on foreign and local interests, but whose benefits inure solely to local interests "would use a somewhat more generous approach." *Id.* Cases involving measures whose burdens fall disproportionately on foreign interests and whose benefits are disproportionately local "would call for a test requiring something like a 'fair and substantial' relation between the state's nondiscriminatory purpose and the regulation adopted." *Id.* Cases involving measures that burden and benefit both local and foreign interests "would use a simple rationality test." *Id.*

The requirement that the State proffer a legitimate reason for the specific measure should be distinguished from the step-one requirement of demonstrating a legitimate purpose. The former addresses the *means* used; the latter addresses the *end.*

128. The Unitary Framework requires the challenger to demonstrate that no reasonable, "*non*discriminatory" alternatives are available, whereas the Court and commentators have spoken at times in terms of "*less* discriminatory" alternatives. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 143 (1986) (upholding a lower-court decision "conclud[ing] that *less* discriminatory means of protecting against these threats were currently unavailable") (emphasis added); Eule, *supra* note 14, at 473 (stating that "[w]hen the effect of the statute is exclusively on out-of-state interests, the state must convince the court that no *less* disproportional scheme would have worked as well") (emphasis added).

There is much precedent for the "nondiscriminatory" language, as well—indeed, the Court usually has spoken in terms of requiring the State to show no available reasonable nondiscriminatory alternatives. *See infra* note 133. With the exception of one type of state measure, *see infra* notes 135-40 and accompanying text, the Unitary Framework adopts the more consistent "*non*discriminatory" language, in keeping with this Article's underlying theme of encouraging the Court to leave the responsibility for answering close questions concerning the regulation of interstate commerce to Congress, where it properly belongs. *See supra* notes 35-50. By applying the more lenient "nondiscriminatory" standard, the Court will be more likely to uphold a statute that is marginally discriminatory (that is, a statute that has an OIP of between 51 percent and 99 percent). *See supra* note 120. It is certainly within the power of Congress to legislate on

Where, however, the burden of the measure falls *exclusively* on out-of-state ("foreign") interests,[130] the State has a greater burden. In such a case, the measure would be struck down unless the State meets its burden of proving that the measure is highly likely[131] to achieve its legitimate purpose and that the purpose cannot be served as well by available nondiscriminatory[132] alternatives.[133] Note that the burden stays with the State and does not shift back to the challenger in this

---

the particular matter if it so desires, but the Court should not assume this legislative function.

129. This shift of burden from the State to the challenger in cases where the burden of the state measure falls disproportionally, although not exclusively, on foreign interests was first proposed by Professor Eule. *See* Eule, *supra* note 14, at 473-74. To date, the Court has not applied this technique.

130. Such a measure would have an OIP of 100 percent under Professor Eule's formulation. *See supra* note 120.

131. This follows from the State's burden to demonstrate increased likelihood that the measure will in fact achieve the desired legitimate end as the OIP increases from 51 percent to 99 percent. *See supra* note 120. The State's burden to demonstrate the likely success of the measure in achieving the desired purpose would be correspondingly higher when the OIP reaches 100 percent (hence the requirement that success be "highly" likely). "At the upper reaches [of disproportionality], proof will not come without some difficulty." Eule, *supra* note 14, at 472.

132. For the reason explained above, *see supra* note 128, the Unitary Framework adopts the "*non*discriminatory" language for the burden placed on the challenger in this step.

133. *See, e.g.*, New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) (explaining that "a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives"); Maine v. Taylor, 477 U.S. 131, 138 (1986) (explaining that once a state law is shown to discriminate, the burden falls on the State to demonstrate both that the statute "serve[s] a legitimate local purpose, and that [the] purpose . . . could not be served as well by available nondiscriminatory means") (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (internal quotations omitted)); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (noting that "'when discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake'" (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977))); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (reasoning that a State cannot discriminate "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available"); *see also* Eule, *supra* note 14, at 473. Professor Eule suggests that

> [w]hen a showing of disproportionality has been made by the statute's challenger, . . . inquiry into the existence of less disproportional schemes is warranted. . . . When the effect of the statute is exclusively on out-of-state interests, the state must convince the court that no less disproportional scheme would have worked as well.

Id.

Professor Eule also proposes that the State "will be unable to satisfy this burden in the absence of proof 'that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Id.* (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948)).

case. As it has been applied by the Court, this standard has proved to be a high bar indeed for the States.[134]

The Unitary Framework retains a heightened "virtually *per se* invalid" standard for one class of discriminatory statute. If the statute discriminates on its *face*,[135] in the unlikely event it has survived Step 1 and has been shown to have a legitimate purpose,[136] it is considered to be virtually *per se* invalid.[137] At this point, the State may overcome the heavy presumption of invalidity only upon a showing that the measure is virtually

134. In the words of one commentator, "the strict scrutiny applied to 'discriminatory' statutes usually has proved fatal. . . . Only a few statutes have survived this test." Farber & Hudec, *supra* note 23, at 1415. Indeed, the Court on occasion has stated that the scrutiny of such a statute rises to a level where the statute is considered to be "virtually *per se* invalid." *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (stating that "where simple economic protectionism is effected by state legislation, a virtually *per-se rule* of invalidity has been erected") (citing, *e.g.*, H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1949); Toomer v. Witsell, 334 U.S. 385, 403-06 (1948); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

Although the Unitary Framework will accommodate a heavy strict-scrutiny, virtually *per-se* invalid presumption for exclusively discriminatory-in-application statutes if the Court so chooses, the Unitary Framework is also designed to allow the Court to develop a practice of allowing States greater opportunity to meet their burden in such cases. In particular, with one exception, *see infra* notes 135-40 and accompanying text, the Unitary Framework does not raise the negative presumption for discriminatory-in-application statutes to a virtually-*per-se* invalid level. Rather, the statute is presumed to be invalid, but that presumption can be rebutted if a State adequately meets its burden of proof. The latter approach of lessening the State's burden is preferred as in keeping with this Article's underlying theme of encouraging less judicial intervention in an area where the Constitution has given Congress explicit authority to act but where Congress has not in fact acted. *See supra* notes 35-50 and accompanying text. The Framework, however, is flexible enough to accommodate whichever approach the Court should decide to take.

135. The facial-discrimination line of inquiry will be referred to in the Unitary Framework as "Step 2(c)."

136. In actuality, due to the very high correlation between facial discrimination and discriminatory purpose, a facially discriminatory statute usually will be found to have a discriminatory purpose and will be summarily struck down in the Unitary Framework's stage-one legitimate-state-purpose step without ever reaching the stage-two balancing step. Facial discrimination is highly probative evidence of discriminatory purpose.

137. In support of the *per se* rule [instead of a more lenient rule] there is not merely the statistical point that explicitness in a law will reflect bad [that is, discriminatory] purpose much more often than not; there is the equally important point that the existence of the *per se* rule will stop many explicit laws with bad purpose from being passed.

Regan, *supra* note 19, at 1134. A facially discriminatory measure is not absolutely *per-se* invalid (as is a statute with a discriminatory *purpose, see supra* note 107 and accompanying text) because it is at least remotely possible that a facially discriminatory statute may have a nondiscriminatory purpose. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346 (1933) (requiring inspections of out-of-state cows in an effort to contain Bang's Disease). As we have seen, the Unitary Framework regards discriminatory *purpose* as the touchstone for a statute's invalidity under the Dormant Commerce Clause. *See supra* notes 105-07, 112, and accompanying text.

certain to achieve the legitimate purpose[138] and that the purpose could not be served as well by available *less*[139] discriminatory means.[140] Under this Step 2(c) of the Unitary Framework analysis for facially discriminatory measures, if the State fails to make the requisite showing, the facially discriminatory measure will be struck down.

A couple of points of explanation and clarification are in order regarding "balancing." A number of Supreme Court Justices and legal commentators have argued that the process of balancing is too uncertain in its application and is thus not appropriate in the dormant-commerce-clause context, despite its resilience and widespread use. Justice Scalia, for one, has advocated "abandon[ing] the 'balancing' approach to these negative commerce clause cases . . . and leav[ing] essentially legislative judgments to the Congress."[141] One commentator

138. This requirement is the natural extension of the requirement, set out in Steps 2(b)(1) and 2(b)(2), that the State show an increasing likelihood of the success of the measure as the disproportionality increases. *See supra* notes 127, 131. The State's burden to demonstrate the likely success of the measure in achieving the desired purpose would be at its highest with facially discriminatory statutes.

139. The importance of the "less-discriminatory" language here is that the State will be less likely to be able to overcome the presumption of invalidity. The State would have to show not only that the legitimate purpose could not be served as well by an available nondiscriminatory (that is, evenhanded) measure, but also that it could not be served as well by other less discriminatory statutes. In short, the universe of measures the State would be required to rebut is considerably larger when the "less" discriminatory language is used. See *supra* note 128 for additional discussion of the distinction between the "*non*discriminatory" and "*less*-discriminatory" language.

The Unitary Framework applies the less-discriminatory standard in the case of facially discriminatory measures on the reasoning that facial discrimination comes very close to offending basic economic and political notions of national unity that the Commerce Clause was designed to promote. *See supra* notes 76-88 and accompanying text; *see also supra* notes 136-37 (explaining the notion that facially discriminatory statutes usually reflect discriminatory purpose and that the stricter "less-discriminatory" requirement "will stop many explicit laws with bad purpose from being passed").

140. This approach is consistent with the Court's actual treatment of facially discriminatory statutes. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986) (holding that "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means" (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979))); Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979) (holding that "facial discrimination by itself may be a fatal defect, regardless of the State's purpose. . . . At a minimum such facial discrimination invokes the strictest scrutiny").

141. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (stating also that balancing the burden to interstate commerce against the State's interest in negative-commerce-clause cases is somewhat akin to "judging whether a particular line is longer than a particular rock is heavy"); *see also* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (stating that "[balancing] is ill suited to the judicial function and should be undertaken rarely if at all").

argues that the "Court's use of the ad hoc balancing test in commerce clause cases has failed to generate the kind of consistent, principled decisionmaking that is essential to the orderly development of constitutional law."[142] Another asserts that the Court's "modern balancing approach has fallen short of its early promise to instill order in dormant Commerce Clause jurisprudence .... [and] fails to provide state lawmakers with a clear guide to the difference between permissible and impermissible regulation."[143]

Indeed, some commentators and several Justices have argued that what the Court is doing is not really "balancing" at all. Three dissenting Justices recently asserted that,

> [a]lthough this analysis of competing interests has sometimes been called a "balancing test," it is not so much an open-ended weighing of an ordinance's pros and cons, as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State's economy from the national common market.[144]

Professor Regan argues in his influential article that,

> [f]or almost fifty years, scholars have urged the Court to "balance" in dormant commerce clause cases; and the scholars have imagined that the Court was following their advice. The Court has indeed claimed to balance, winning scholarly approval. But the Court knows better than the scholars. Despite what the Court has said, it has not been balancing.... [Rather, the Court] has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.[145]

---

142. Maltz, *supra* note 16, at 89.

143. Twyman, *supra* note 111, at 393-94.

144. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 423 (1994) (Souter, J., dissenting); *see also infra* notes 224-35 and accompanying text.

145. Regan, *supra* note 19, at 1092. Justice Scalia has cited Professor Regan's article on this point, noting that

> [o]ne commentator has suggested that, at least much of the time, we do not in fact mean what we say when we declare that... [we are using] a "balancing" test. If he is not correct, he ought to be. As long as a State's ... law ... does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause.... Beyond that, it is for Congress to prescribe its validity.

CTS Corp., 481 U.S. at 95-96 (Scalia, J., concurring) (internal citations omitted).

Professor Regan limits his assertion to so-called "movement of goods" cases, as opposed to transportation cases and taxation cases (in which he concedes the Court "engage[s] in a very particular balancing task"). Regan, *supra* note 19, at 1093.

Clearly, any "balancing" the Court has done has been accomplished with a very heavy thumb on the scales and cannot accurately be characterized as an "open-ended balancing" process. The outcome of the Court's inquiry is highly correlated with where lies the presumption (and burden-of-proof), which in turn depends upon whether the Court considers the statute evenhanded or discriminatory in application.[146] After an objective determination of whether a statute is evenhanded or discriminatory in application, the resultant heavy presumption and placement of burden of proof on either the State or the challenger heavily influences the ultimate disposition of the case.

Despite all of this, the Unitary Framework retains the "balancing" moniker for what occurs when the Court passes on the validity of a state statute that in some way regulates interstate commerce. Even if we accept the proposition that the Court's primary objective in deciding dormant-commerce-clause cases is to prevent States from engaging in protectionist behavior, this does not negate the reality that the Court often considers competing state and national interests in *relative terms,* which qualifies as a form of "balancing" under most definitions, even if one side of the scale is heavily favored. Until a majority of the Court itself decides to change its terminology for what it does when it analyzes competing national and local interests, the Unitary Framework will refer to the process as "balancing."[147]

C. *The Unitary Framework Applied to Existing Supreme Court Jurisprudence*

Perhaps the best way to illustrate how the Unitary Framework simplifies dormant-commerce-clause analysis is to classify the existing dormant-commerce-clause cases by subject matter[148] and

146. *See supra* notes 119-34 and accompanying text.

147. In practice, because the outcome of the Unitary Framework's stage-two dormant-commerce-clause inquiry *is* so dependent on whether the Court considers the statute evenhanded or discriminatory in its application, what we decide to call the stage-two inquiry is largely irrelevant; the Framework will operate regardless of what stage two is labeled. This is in keeping with the premise that the Unitary Framework does not propose reform, so much as it is intended to expose the hidden order reflected in the Supreme Court's current approach to dormant-commerce-clause questions. *See supra* note 22 and accompanying text.

148. *See supra* note 89-92 and accompanying text.

then to explain how the cases would be viewed under the Unitary Framework.[149]

1. *State Regulations Involving Transportation*

A number of Supreme Court dormant-commerce-clause cases in the last seventy-five years have involved state transportation regulations or, more precisely, regulations restricting access to transportation facilities by out-of-state users. A threshold question in these cases has been the State's *intent* in enacting the regulation because the Supreme Court has long accepted the proposition that States may regulate their transportation facilities as long as the legislative intent was to protect public safety.[150] If the statute was enacted to protect the health and safety of its citizens, it would be given a high measure of deference;[151] but if the statute was enacted primarily to protect in-state economic interests at the expense of out-of-state interests, the Court would view it much more critically.[152]

In the early case of *South Carolina State Highway Department v. Barnwell Brothers,*[153] Justice Stone explained the Court's approach when reviewing state safety regulations[154] involving highways and motor vehicles: "[T]he judicial function, under the commerce clause . . . stops with the inquiry [of] whether the state legislature in adopting regulations . . . has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought . . . ."[155] In answering the first part of the inquiry—whether the state legislature acted

149. This discussion concentrates within the modern era (approximately 1930s to present) on the more recent Supreme Court dormant-commerce-clause cases and a number of the older landmark cases. In so doing, the discussion focuses on the Court's *existing* dormant-commerce-clause jurisprudence.

150. *See, e.g.,* Bradley v. Public Utils. Comm'n, 289 U.S. 92 (1933) (finding acceptable an Ohio statute requiring licensure of truckers on the grounds that the statute was intended to promote safety); Smith v. Alabama, 124 U.S. 465 (1888) (finding acceptable an Alabama law requiring that locomotive engineers be licensed on the grounds that it was intended to promote safety).

151. In essence, in such circumstances, the Court is deferring to the State's police power—that is, the State's sovereign right to provide for the health, safety, and welfare of its citizens. *See supra* note 102.

152. *See, e.g.,* Buck v. Kuykendall, 267 U.S. 307 (1925) (holding unconstitutional a Washington statute requiring certification of all common carriers because the underlying motivation for the statute was protectionist); *see generally,* TRIBE, *supra* note 8, at 437.

153. 303 U.S. 177 (1938).

154. The statute at issue set maximum weight and width requirements for trucks operated on South Carolina highways. *See id.* at 181 n.1.

155. *Id.* at 190.

within its authority—the Court noted that it had repeatedly affirmed the principle that a State "'may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.'"[156] In answering the second part of the inquiry—whether the means were reasonably related to the end—the Court noted that

> courts do not sit as legislatures, either state or national . . . . When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . . It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment . . . .[157]

In other words, under the formulation set out in *Barnwell,* as long as the State acts within its established police power right to regulate motor vehicles for safety purposes,[158] the Court will give a high level of deference to the regulation, overturning it only if the regulation is not plausibly "reasonably related" to the safety goal.

When viewed through this Article's proposed Unitary Framework, the statute in *Barnwell* passes the stage-one legitimate-state-purpose test because the statute's purpose is to regulate highway safety, and as such is worthy of a high degree of deference at this stage.[159] The analysis thus proceeds to the stage-two balancing step, where the statute is analyzed within the

156. *Id.* at 189 (quoting Morris v. Duby, 274 U.S. 135, 143 (1927), and citing Sproles v. Binford, 286 U.S. 374, 389, 390 (1932); Sprout v. South Bend, 277 U.S. 163, 169 (1928); Clark v. Poor, 274 U.S. 554, 557 (1927)).

157. *Id.* at 190-91 (internal citations omitted).

158. The Court suggested that "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways." *Id.* at 187. In this regard, the Court's deference to state regulation of highways is greater than that given state regulation of railroads, a distinction explained in *Barnwell*: "Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration." *Id.* By contrast, railroads are mostly privately built. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 783 (1945) (distinguishing *Barnacle* on the grounds that the State had constructed the highways in that case and thus had "far more extensive control [over the highways] than over interstate railroads").

159. *See supra* notes 102-04 and accompanying text.

Unitary Framework's "evenhanded-in-application" step (Step 2(a)) because it regulates maximum weight and width requirements for *all* trucks, whether from out-of-state or inside the State.[160] The statute is presumed to be valid and is upheld unless its challenger can demonstrate that the burden on interstate commerce is clearly excessive in relation to the state benefits.[161] Although the statute undeniably affects interstate commerce,[162] because the State's interest is so significant,[163] the challenger is not able to meet its burden of demonstrating a "clearly excessive" burden on interstate commerce, and the statute is upheld under the Unitary Framework.

In *Southern Pacific v. Arizona,*[164] by contrast, the Court struck down a state statute that prohibited trains of more than fourteen passenger or seventy freight cars from operating within the State, reasoning that the "'convenient apologetics of the police power'" would not allow a State to regulate interstate commerce "so substantially as to affect its flow or deprive it of needed uniformity in its regulation . . . ."[165] In arriving at its decision, the

160. The Court noted the existence of an "inner political check": that is, the fact that the statute "affects alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse." *Barnwell,* 303 U.S. at 187; *see also supra* notes 84-85 and accompanying text.

It can be argued that, after some period of time, South Carolina trucks almost certainly will be affected by the statute to a lesser degree than out-of-state trucks, due to the fact that in-state trucks will have had time to adjust to the State's limits, thereby making this statute *not* evenhanded. The fact that the *effect* may not be evenhanded does not change the fact that the statute is evenhandedly *applied* to both in-staters and out-of-staters. *See supra* note 97. As noted by the Court in a later case, "[a] nondiscriminatory [that is, evenhanded] regulation . . . is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause." Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474 (1981). The "clearly excessive" language of the Unitary Framework's evenhanded-in-application step closely tracks the Court's "clearly outweighs" language in *Clover Leaf.*

161. *See supra* note 123 and accompanying text; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also, e.g.,* Maine v. Taylor, 477 U.S. 131, 138 (1986); Hughes v. Oklahoma, 441 U.S. 322, 331 (1979).

162. The Court noted that state regulations concerning the use of state highways are "inseparable from [having] a substantial effect on interstate commerce." *Barnwell,* 303 U.S. at 187. The Court explained, however, that it has upheld many sorts of state regulations materially affecting interstate commerce. *See id.* at 188 n.5.

163. "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways . . . . The state has a primary and immediate concern in their safe and economical administration." *Barnwell,* 303 U.S. at 187.

164. 325 U.S. 761 (1945).

165. *Id.* at 779-80 (quoting Buck v. Kuykendall, 267 U.S. 307, 15 (1925); Kansas City S. Ry. Co. v. Kaw Valley Dist., 233 U.S. 75, 79 (1914)). Ninety-three to ninety-five percent of the Arizona rail traffic affected by the statute was interstate rail traffic. *See* Southern Pac.

Court averred that a state safety statute should be upheld unless its total effect as a safety measure is so slight that it does not outweigh the national interest in protecting unimpeded interstate commerce.[166] On the facts of the case, the Court determined that the statute's burden on interstate commerce outweighed the State's safety considerations in limiting train-length.[167] The Court thus, for the first time, in *Southern Pacific* explicitly balanced the State's interest in maintaining a regulation against the burden that the regulation would work on interstate commerce.[168]

Under the Unitary Framework, *Southern Pacific* is overturned in the stage-two evenhanded balancing step (Step 2(a)).[169] The Arizona statute's safety purpose is legitimate,[170] and the analysis

---

Co. v. Arizona, 325 U.S. at 771. The Court distinguished *Barnwell* by observing that the matter at issue in that case involved the regulation of highways and noted that

> [u]nlike the railroads local highways are built, owned and maintained by the state or its municipal subdivisions. The state is responsible for their safe and economical administration. Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic. The fact that they affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses.

Id. at 783.

166. *See Southern Pacific*, 325 U.S. at 775-76.

167. Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident.... The state interest cannot be preserved at the expense of the national interest....

Id. at 781-82.

168. The Justices were not unanimous in their agreement that the Court should use this new balancing test. Specifically, the dissents argued that by getting involved in balancing equities, the Court was improperly taking on the role of a "super-legislature," *id.* at 788 (Black, J., dissenting), and that the matter of determining train-length safety was more appropriately left to the political process than to the judicial process, *see id.* at 795 (Douglas, J., dissenting). Justice Douglas suggested that it was improper for the Court to get involved in balancing in light of the fact that

> Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. It is in a position to police the field. And if its powers prove inadequate for the task, Congress, which is the paramount authority in this field, can implement them.

Id. (Douglas, J., dissenting).

169. The statute was evenhanded in its application because it prohibited all trains of more than fourteen passenger or seventy freight cars from operating within the State, regardless of origin.

170. *See Southern Pacific*, 325 U.S. at 770 (stating that "the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, *adopted as a safety measure*, imposes on interstate commerce..." (emphasis added)).

proceeds to the stage-two balancing step. Because the statute imposes its burdens evenhandedly against both in-state and out-of-state railroads, the statute carries, under the Unitary Framework, a strong presumption of validity, and the challenger carries a heavy burden of proving that the burden on interstate commerce is clearly excessive *vis-a-vis* the benefits to the State. In this case, the challenger in fact meets its burden by clearly demonstrating that the statute is "obstructive to interstate train operation, and ha[s] a seriously adverse effect on transportation efficiency and economy," while not improving train safety.[171] Accordingly, the statute is struck down.

In *Bibb v. Navajo Freight Lines, Inc.*,[172] the Supreme Court acknowledged the principle established in *Barnwell* that individual state legislatures should be given great deference in matters involving highway safety.[173] Nonetheless, the Court held an Illinois highway safety statute[174] unconstitutional on the evidence of a "massive showing of burden on interstate commerce"[175] as balanced against the State's relatively inconclusive showing that the statute resulted in greater safety on its highways.[176]

The purpose of the statute in *Bibb,* providing for highway safety, was clearly legitimate,[177] and the analysis under the Unitary Framework proceeds to the stage-two evenhanded

171. *Id.* at 781; *see also supra* note 167.

172. 359 U.S. 520 (1959).

173. The Court noted that

> [t]hese safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it," we must uphold the statute.

Id. at 524 (quoting *Southern Pacific,* 325 U.S. at 775-76) (internal citations omitted).

174. The Illinois statute required that all trucks be equipped with contoured mudflaps, thus making illegal in Illinois the use of straight mudflaps that were legal in forty-five States and actually required in one State. *See id.* at 523.

175. *Id.* at 528. Among the burdens created by the statute are the significant delays caused by the necessity of changing mudflaps when traveling between Arkansas (which requires straight mudflaps) and Illinois; the danger involved in changing the mudflaps on trucks carrying explosive loads; and the serious interference with "interline" operations, which would particularly affect the shipment of perishables. *See id.* at 527-28.

176. *See id.* at 530.

177. *See supra* note 173 and accompanying text.

balancing step (Step 2(a)).[178] Because the challenger in *Bibb* is able to demonstrate that the burden of the statute on interstate commerce is clearly excessive when compared to its benefits to the State,[179] the statute is struck down under Step 2(a). Like *Southern Pacific, Bibb* "is one of those cases—few in number—where local safety measures that are nondiscriminatory [that is, evenhanded-in-application] place an unconstitutional burden on interstate commerce."[180]

The Court's traditionally high level of deference for state highway safety regulations[181] was further eroded in more recent transportation cases. In *Raymond Motor Transportation, Inc. v. Rice,*[182] the Court held unconstitutional Wisconsin safety regulations limiting truck length to fifty-five feet.[183] The Court found unconvincing Wisconsin's argument that the proper test for highway safety statutes was the "rational relation" test set out earlier in *Barnwell,*[184] opting instead to balance the State's interest against the burden to interstate commerce according to the test set out in *Pike v. Bruce Church, Inc.*[185] In conducting its balancing, the Court noted that Wisconsin, in response to the "massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety . . . virtually defaulted in its defense of the regulations as a safety measure . . . . [In addition,] the regulations impose a substantial burden on the interstate movement of goods."[186]

178. The statute is evenhanded because it requires the mudflap on all trucks, regardless of whether they originate from in-state or out-of-state. *See Bibb,* 359 U.S. at 529.

179. *See supra* note 175 and accompanying text.

180. *Bibb,* 359 U.S. at 529.

181. *See supra* note 158 and accompanying text.

182. 434 U.S. 429 (1978).

183. *See id.* at 447-48.

184. *See supra* notes 157-58 and accompanying text.

185. 397 U.S. 137, 142 (1970) (holding that "[w]here the statute regulates evenhandedly 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"); *see also infra* note 219 and accompanying text.

186. *Raymond,* 434 U.S. at 444, 447. An important consideration in the Court's balancing was the fact that Wisconsin had given numerous exceptions to in-state manufacturers and industries, casting further doubt on the State's safety claim and "undermin[ing] the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." *Id.* at 446-47. In other words, the beneficiaries of the exemptions, who might otherwise be able to change the adverse effects of the law through the political process, would now have no incentive to do so because they are exempt from the law. *See supra* notes 84-85 for discussion of the "inner political check."

Reasoning that the regulations "place a substantial burden on interstate commerce and . . . cannot be said to make more than the most speculative contribution to highway safety," the Court struck down the statute.[187]

Under the Unitary Framework, the state highway-safety measures in *Raymond* are presumed to further a "legitimate state purpose,"[188] and the analysis proceeds to the stage-two balancing step of the inquiry. Because the regulations impose their burdens in a discriminatory fashion mostly, but not exclusively, against out-of-state interests,[189] they are analyzed under the Unitary Framework's stage-two discriminatory-in-application (non-exclusive) step (Step 2(b)(1)).[190] As such, the regulations are presumed to be invalid, and the State has the burden of proving that the regulations are likely to lead to the achievement of the legitimate goal. If the State is able to meet its burden, the

187. *Raymond*, 434 U.S. at 447. Although the Court was unanimous in its conclusion that the Wisconsin statute was unconstitutional, four concurring Justices were hesitant to characterize the means by which the Court reached its decision as a "balancing" of interests; rather, the concurring Justices argued that here "the Court does not engage in a balance of policies; it does not make a legislative choice. Instead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law." *Id.* at 450 (Blackmun, J., concurring). The concurring Justices explained: "[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." *Id.* at 449 (Blackmun, J., concurring). Harking back to *Bibb*, the concurring opinion suggested that the Court had "been presented with another of those cases—'few in number'—in which highway safety regulations unconstitutionally burden interstate commerce." *Id.* at 451 (Blackmun, J., concurring) (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959)).

188. As noted previously, under the Unitary Framework, the historical deference to state highway statutes has currency *only* during the first-stage "legitimate-state-purpose" step. Once the inquiry proceeds to the Unitary Framework's second-stage balancing step, the statute is analyzed as is any statute with a legitimate purpose—simply by whether it is "evenhanded" or "discriminatory" in its application.

In light of the deference given a State's articulated purpose in stage one of the analysis, the *Raymond* regulations are passed to the Unitary Framework's stage-two balancing despite the Court's doubts regarding Wisconsin's true purpose in enacting the regulations. *See supra* note 186.

189. The Court noted that "[a]t least one of the exceptions [to enforcement of the regulations] discriminates on its face in favor of Wisconsin industries and against the industries of other states, . . . and a number of the other exceptions, although neutral on their face, were enacted at the instance of, and primarily benefit, important Wisconsin industries." *Raymond*, 434 U.S. at 446-47. Accordingly, under Professor Eule's OIP formulation, *see supra* note 120, these regulations taken in total might have an OIP of 80 percent to 90 percent.

190. Because the statute, after all of the exceptions are factored in, in effect favors in-staters, it is properly analyzed under Step 2(b) of the Unitary Framework. *See infra* notes 212-14 and accompanying text for further discussion of why *Raymond* is properly analyzed under Step 2(b) of the Unitary Framework rather than under the evenhandedness inquiry of Step 2(a).

challenger then has the burden either of rebutting the State's justification or of demonstrating that the legitimate purpose can be served as well by available nondiscriminatory alternatives. Viewed through the Unitary Framework, because Wisconsin does not come close to meeting its initial burden of proving that the regulations are likely to lead to the achievement of the State's goal,[191] the burden does not shift back to the challenger and the regulations are struck down in Step 2(b)(1).

In *Kassel v. Consolidated Freightways Corp.*,[192] a plurality of the Court found that an Iowa state statute forbidding the use of sixty-five-foot tractor trailers on Iowa highways was an unconstitutional burden on interstate commerce.[193] The plurality opinion again acknowledged the traditional deference given to state highway-safety regulations, but suggested that "less deference to the legislative judgment is due . . . where the local regulation bears disproportionately on out-of-state residents and businesses."[194] The Court balanced the burden to interstate commerce[195] against the State's safety interest in maintaining the regulation, but seemed to require a heightened safety interest

191. Indeed, the Court noted that Wisconsin "virtually defaulted in its defense of the regulations . . . ." *Raymond*, 434 U.S. at 444.

192. 450 U.S. 662 (1981).

193. *See id.* at 669.

194. *Id.* at 675-76. The Court concluded that such a disproportionate effect existed in this case, given the several exemptions that allowed many Iowans to use sixty-five-foot doubles or longer singles on Iowa highways. *See id.* at 676. The Court opined that the exemptions may indeed have been enacted for discriminatory purposes instead of for safety purposes, pointing to the Governor's statement while vetoing a bill that would have allowed sixty-five-foot doubles in the State: "[W]ith this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." *Id.* at 677.

195. It is worth noting that one factor the Court has long considered important in ascertaining the magnitude of a state statute's burden on interstate commerce is to what degree the statute subjects activities to inconsistent regulations. In *Kassel*, the Court found important the fact that

> [u]nlike all other States in the West and Midwest, Iowa generally prohibits the use of 65-foot doubles within its borders . . . . Iowa's law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck. In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated.

Id. at 665, 671 (internal citations omitted); *see also* E.G. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion of White, J.); Southern Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

vis-a-vis the balancing test originally set out in *Southern Pacific*.[196] Finding that Iowa had imposed the substantial burden on interstate commerce "without any significant countervailing safety interest,"[197] the Court struck down the Iowa statute.

Kassel is marked by its divergence of opinion among the Justices, to the point where the dissent complains that the decision leaves "the jurisprudence of the 'negative side' of the Commerce Clause . . . hopelessly confused."[198] In his concurring opinion, Justice Brennan argued that in deciding dormant-commerce-clause cases involving state safety statutes, the Court should inquire into the State's motives in enacting the statute instead of engaging in a factual balancing.[199] In this case, because the Court found that Iowa's actual motivation had nothing to do with safety and everything to do with discouraging interstate truck traffic on Iowa's highways[200] and because "[p]rotectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics,"[201] the Court found the safety advantages of the statute insufficient.[202] By contrast, the dissent argued that because state safety measures are properly given a strong presumption of validity,[203] and because, in this case, the

196. Specifically, whereas in *Southern Pacific* the state transportation-safety statute would be upheld unless its total effect as a safety measure were *so slight* as to not outweigh the national interest in unimpeded interstate commerce, *see Southern Pac.*, 325 U.S. at 775-76, the *Kassel* Court's "'weighing of the asserted safety purpose against the degree of interference with interstate commerce,'" *Kassel*, 450 U.S. at 670 (quoting *Raymond*, 434 U.S. at 443), seems to require something significantly greater than a "so slight" safety interest. *See Kassel*, 450 U.S. at 693-95 (Rehnquist, J., dissenting) (arguing that the Iowa statute has clear safety benefits); *see also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959) (stating that the "strong presumption of validity" given state highway-safety measures may be overcome only when the safety benefits were "'slight or problematical'" (quoting *Southern Pacific*, 325 U.S. at 776)); *Raymond*, 434 U.S. at 449 (Blackmun, J., concurring) (stating that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce").

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

198. *Id.* at 706 (Rehnquist, J., dissenting).

199. *See id.* at 680, 681 n.1 (Brennan, J., concurring). A corollary to the inquiry into the State's motives is the matter of court deference to the state legislative process: "[O]nce the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests." *Id.* at 681 n.1 (Brennan, J., concurring).

200. *See id.* at 681 (Brennan, J., concurring).

201. *Id.* at 680 (Brennan, J., concurring).

202. *See Kassel*, 450 U.S. at 681 (Brennan, J., concurring).

203. *See id.* at 691 (Rehnquist, J., dissenting).

State's safety justification was legitimate and not illusory,[204] the Court should defer to the state legislation.[205] Justice Rehnquist complained that "[t]he result in this case suggests . . . that the only state truck-length limit 'that is valid is one which this Court has not been able to get its hands on.'"[206]

Under the Unitary Framework, because Iowa is deemed to have a legitimate state purpose in promoting highway safety,[207] the analysis of the *Kassel* statute proceeds to the stage-two balancing step. Because of the "disproportionate burden" on out-of-state residents and business[208] and because the regulations impose their burdens primarily, but not exclusively, on out-of-state interests,[209] they are analyzed under the Unitary Framework's stage-two discriminatory-in-application (non-exclusive) step (Step 2(b)(1)). Under this step, Iowa is unable to meet its burden of demonstrating that its regulations restricting 65-foot doubles are substantially[210] likely to lead to the legitimate goal of improved safety,[211] and the measure is struck down without reaching the question of whether the challenger is able

204. *See id.* at 692-95 (Rehnquist, J., dissenting).

205. *Id.* at 687 (Rehnquist, J., dissenting).

206. *Id.* (Rehnquist, J., dissenting) (quoting Jungerson v. Ostby & Barton Co., 335 U.S. 560, 572 (1949) (Jackson, J., dissenting)).

207. The Court had its doubts as to Iowa's true purpose in enacting the statute: "Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic . . . . It is thus far from clear that Iowa was motivated primarily by [safety considerations]." *Kassel*, 450 U.S. at 677 (plurality opinion). Had the Court been more definite in its assertions than noting merely that "Iowa's statute *may* not have been designed . . . " and "[i]t is thus *far from clear* . . . ," *see supra*, the statute might be struck down in the Unitary Framework's stage-one legitimate-state-interest step instead of stage two. In the end, however, the statute is deemed to have a legitimate state purpose due to the traditional deference given state highway safety statutes. *See supra* note 158.

208. *Kassel*, 450 U.S. at 676.

209. The Court concluded that "the local regulation bears disproportionally on out-of-state residents and businesses," given the exemptions allowing many (but not all) Iowans to use sixty-five-foot trucks on Iowa's highways. *Id.* at 675-76. These regulations, when considered with their exemptions, might, like those in *Raymond*, have an OIP of 80 percent to 90 percent. *See supra* note 120.

210. With an OIP of 80 percent to 90 percent, the State has a relatively heavy burden of showing with some degree of certainty that the desired safety goal is likely to be attained. *See supra* note 127.

211. The Court agreed with the district court's conclusion that the "evidence clearly establishes that the twin is as safe as the semi," pointing to several statistical studies and to strong expert testimony supporting this conclusion. *Kassel*, 450 U.S. at 672-73. The Court concluded that "Iowa made a more serious effort to support the safety rationale of its law than did Wisconsin in *Raymond*, but its effort was no more persuasive." *Id.* at 671-72. Accordingly, Iowa does not meet its burden under Step 2(b)(2).

to demonstrate the existence of equally effective nondiscriminatory means.

It should be explained that *Raymond* and *Kassel* are properly analyzed under the stage-two "discriminatory-in-application" step of the Unitary Framework (Step 2(b)) despite the standards the Court actually set out in deciding the cases. Specifically, in *Raymond,* the Court cited *Southern Pacific* and *Bibb* for the proposition that the Court must give a state highway measure a high degree of deference and uphold the measure unless the safety benefits are "'so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.'"[212] In *Kassel,* the Court explained that to determine the constitutionality of a state safety statute, it is necessary to conduct a "'weighing of the asserted safety purpose against the degree of interference with interstate commerce.'"[213] Although it might appear at first blush that these standards are more in keeping with the standard set out in the Unitary Framework's evenhanded-balancing step—that is, an evenhanded statute will be "upheld unless the burden is clearly excessive in relation to the state benefits"—the plain fact is that the Court found that the measures at issue in these two cases were *not* evenhanded.[214] Thus, to apply the *Pike* test for evenhanded statutes makes little sense, and, in the interest of achieving the consistent judicial approach advocated by the Unitary Framework, the measures must be analyzed in the discriminatory-in-application step.

2. *State Regulations Requiring Business Operations to Be Done In-State*

Another class of dormant-commerce-clause cases involves state regulations which require business operations to be conducted in the regulating State. In the leading case in this area, *Pike v. Bruce Church, Inc.,*[215] an Arizona agricultural official issued an order, pursuant to a state deceptive-packaging statute, forbidding a company that grew superior-quality cantaloupes in Arizona from shipping the fruit across state borders without first

212. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-44 (1978) (internal citations omitted) (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)).

213. *Kassel,* 450 U.S. at 670 (quoting *Raymond,* 434 U.S. at 443).

214. *See supra* notes 189, 194.

215. 397 U.S. 137 (1970).

packaging them in approved containers bearing the Arizona state name. The effect of the order on the company, which normally shipped the cantaloupes to its California packaging plant, would have been to force it to spend $200,000 to build a packaging plant in Arizona and to do the packaging in Arizona instead of in its existing California facility.[216] The Court stated that it "view[s] with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere," and that "[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."[217] Suggesting that the presumption could have been overcome had Arizona's interest been more compelling,[218] the Court in the end held that the order was unconstitutional because the burden it imposed on interstate commerce outweighed the State's interest.[219]

Analyzed under the Unitary Framework, the order in *Pike* has a legitimate state purpose,[220] and the inquiry proceeds to the

---

216. *See id.*

217. *Id.* at 145; *see also* Toomer v. Witsell, 334 U.S. 385, 405 (1948) (striking down a South Carolina statute requiring that shrimp caught off its coast be unloaded, packed, and stamped at a South Carolina port, reasoning that the State's true purpose was "to stimulate interstate shipments and sales as a means of increasing the employment and income of its shrimp industry"); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928) (holding invalid a Louisiana statute forbidding the export of shrimp heads and hulls on grounds that the State's true purpose was to force packing and canning processors to operate within Louisiana).

218. The Court conceded that the State's interest in "requir[ing] that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona" was legitimate, but termed it "minimal at best." *Pike*, 397 U.S. at 144-46.

219. *See id.* at 145. Ironically, although *Pike* sets out the test that has become famous as the proper approach to be used in determining the validity of *evenhanded* measures (indeed, the Unitary Framework's stage-two analysis for evenhanded statutes is based upon the *Pike* test), the order actually at issue in the case was itself *discriminatory*-in-application, and the case was thus not decided according to the "*Pike* test." The Court's oft-cited *Pike* balancing test states:

> 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (internal citations omitted).

220. The Court grudgingly accepts as legitimate the purpose of the order at issue in *Pike*, noting that Arizona's stated purpose for the order was to inform "interstate cantaloupe purchasers . . . that [the appellee cantaloupe grower's] high quality . . . fruit was grown in Arizona." *Id.* at 144. The Court concluded: "Although it is not easy to see

stage-two balancing step. Because the order imposes its discriminatory burden exclusively on out-of-state interests,[221] it is analyzed under the Unitary Framework's stage-two discriminatory-in-application (exclusive) step (Step 2(b)(2)). Under this step, a measure that is discriminatory in application is presumed to be invalid and will be struck down unless the State meets its burden of demonstrating that the measure is highly likely to achieve its legitimate purpose and that the purpose cannot be served as well by available nondiscriminatory alternatives. Arizona easily would be able to demonstrate that the order is highly likely to achieve its purpose,[222] but it would *not* meet its heightened burden of demonstrating that the order's purpose cannot be served as well by available nondiscriminatory alternatives.[223] Accordingly, the statute is struck down under Step 2(b)(2) of the Unitary Framework.

In a particularly fractured and incoherent opinion, a majority of the Court in the recent *C & A Carbone, Inc. v. Town of Clarkstown*[224] decision found unconstitutional a municipal ordinance requiring that all trash generated or brought into the community be processed at a local treatment plant.[225] The avowed purpose of the ordinance was to provide for the financing of the waste treatment plant through the retention of collected fees.[226] The Court explained that when faced with the task of determining the validity of a state or local ordinance that affects interstate commerce, it is necessary to consider two lines of analysis: "first, whether the ordinance discriminates against

---

why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one." *Id.* at 145.

221. An order requiring companies to conduct packaging operations within the Sate clearly is not evenhanded in application, because it discriminates against companies that might otherwise conduct these activities out-of-state, whereas in-state companies would not be affected.

222. Clearly, an order requiring that cantaloupes grown in Arizona be packaged in approved containers bearing the Arizona state name when they are to be shipped out-of-state will achieve its purpose of informing "interstate cantaloupe purchasers . . . that [the appellee cantaloupe grower's] high quality . . . fruit was grown in Arizona." *Pike*, 397 U.S. at 144.

223. For example, the State could offer a tax credit or other incentive to the grower to include the words "Grown in Arizona" on its shipping cartons. This alternative would be much less restrictive in that the grower would not be placed in the position of having to invest $200,000 in new packaging facilities.

224. 511 U.S. 383 (1994).

225. *See id.* at 386.

226. *See id.*

interstate commerce; and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'"[227] Because in conducting the first line of inquiry the Court found that the ordinance was discriminatory,[228] the Court immediately struck down the ordinance and declared that it was unnecessary to proceed to the second line of analysis.[229] It is worthy of note that it mattered not to the majority that many *in*-state trash processors were also deprived of the right to process the community's trash. To the majority, "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition .... Discrimination against interstate commerce in favor of local business or investment is *per se* invalid...."[230]

Adopting the findings of the majority in *C & A Carbone,* the Clarkstown ordinance would be struck down in the first-stage "legitimate-state-purpose" step (Step 1) of the Unitary Framework. According to the majority, the ordinance had a discriminatory purpose: "The avowed purpose of the ordinance is to retain the processing fees... by depriving competitors, including out-of-state firms, of access to a local market."[231] Under the Unitary Framework, statutes having a clearly discriminatory purpose are absolutely *per se* invalid, and the Clarkstown ordinance is struck down without reaching stage two.

By contrast, if we accept the contention of four of the nine Justices in *C & A Carbone* that the ordinance's purpose of retaining fees to pay for the construction of a waste treatment facility was legitimate because it "[did] not give more favorable

227. *Id.* at 390 (internal citations omitted) (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (regarding the first line of inquiry), and quoting *Pike,* 397 U.S. at 142 (1970) (regarding the second line of inquiry)).

228. The Court found that the ordinance was discriminatory both in purpose and effect: "The avowed purpose of the ordinance is to retain the processing fees.... Because it attains this goal by depriving competitors, including out-of-state firms, of access to a local market, we hold that the... ordinance violates the Commerce Clause." *Id.* at 386.

229. *See C & A Carbone,* 511 U.S. at 390.

230. *Id.* at 391-92. The concurring and dissenting opinions disagreed, suggesting that because the ordinance "[did] not give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests," it was improper to characterize the ordinance as discriminatory against interstate commerce. *Id.* at 404 (O'Connor, J., concurring); *see id.* at 416 (Souter, J., dissenting).

231. *Id.* at 386 (majority opinion). Also, "though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design," that is, by its purpose." *Id.* at 394.

treatment to local interests as a group as compared to out-of-state or out-of-town economic interests,"[232] the ordinance would proceed to the Unitary Framework's stage-two balancing step. Because the ordinance imposes its burdens mostly, but not exclusively, on out-of-state interests,[233] it is analyzed under the Unitary Framework's stage-two discriminatory-in-application (non-exclusive) step (Step 2(b)(1)). Viewed as such, Clarkstown clearly meets its burden of demonstrating that its ordinance is likely to lead to the legitimate goal of collection of fees;[234] however, the challenger likely would be successful in demonstrating that the legitimate purpose can be served as well by available nondiscriminatory alternatives,[235] and the measure is struck down under the Unitary Framework's Step 2(b)(1).

3. *State Regulations Involving Incoming Commerce*

Another type of dormant-commerce-clause case involves state statutes that restrict access to local markets in some way. The Court has determined that the threshold analytical issue in this "incoming commerce" class of cases is whether the state measure has a discriminatory purpose or effect.[236]

---

232. *Id.* at 404 (O'Connor, J., concurring); *see also id.* at 416 (Souter, J., dissenting).

233. Many local and in-state trash processors, in addition to out-of-state processors, were deprived of the right to process the community's trash. *See infra* note 230 and accompanying text. Because virtually all in-state processors (all except for one, that is) along with all out-of-state trash processors were prohibited from processing Clarkstown's trash, this ordinance is not as disproportionally discriminatory as some. Accordingly, it might have an OIP of 55 percent to 60 percent. *See supra* note 120.

234. With an OIP of 55 percent to 60 percent, the State has a relatively light burden of showing that the desired legitimate purpose is likely to be attained. *See supra* note 127. Here, the adopted means (retention of fees collected at the facility) are all but certain to achieve the desired legitimate purpose (to help pay for the facility).

235. The Court notes that

> Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question. The most obvious would be uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety.

C & A Carbone, 511 U.S. at 393. Also, "the town could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities." *Id.* at 405-406 (O'Connor, J., concurring).

236. The Court has spoken at times of discriminatory *purpose* and at other times of discriminatory *effect*. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981) (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (regarding discriminatory effect); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352-53 (1977) (regarding discriminatory purpose)) (stating that "[a] court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect,

In *Baldwin v. G.A.F. Seelig, Inc.*,[237] a unanimous Court struck down a New York statute that barred the retail sale within the State of out-of-state milk that had been purchased for less than a fixed minimum price,[238] reasoning that to allow such a measure would "set a barrier to traffic between one State and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."[239] Responding to New York's argument that the law was allowable under the State's police power because its primary purpose was to protect the supply of pure milk,[240] the Court asserted that "the police power may [not] be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another State or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce."[241] In short, the Court looked to the true *purpose* and *effect* of the statute, found them discriminatory, and thus struck down the statute.[242]

---

or of discriminatory purpose"(citations omitted)); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) (holding unconstitutional a statute whose "aim and effect" was to establish an economic barrier against out-of-state competition).

As we have seen, discriminatory purpose and discriminatory effect are treated quite separately and distinctly under the Unitary Framework. *See supra* notes 112-16 and accompanying text.

237. 294 U.S. 511 (1935).

238. *See id.* at 519. "The substance of the provision is that . . . there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state." *Id.* The effect of the provision was to protect New York milk producers from lower out-of-state prices.

239. *Id.* at 521.

240. New York argued that the statute's purpose was "to make its inhabitants healthy, and not to make them rich." *Id.* at 523. Specifically, the State argued that

> [t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Price security . . . is only a special form of sanitary security; the economic motive is secondary and subordinate.

Id. (citation omitted). The Court noted New York's argument that "[e]conomic welfare is always related to health, for there can be no health if men are starving"; but if the Court allowed such reasoning to prevail, "all that a state w[ould] have to do in times of stress and strain [would be] to say that its farmers and merchants and workmen must be protected against competition from without . . . . To give entrance to that excuse would be to invite a speedy end of our national solidarity." *Id.*

241. *Id.* at 527.

242. *See also* Edwards v. California, 314 U.S. 160, 173-74 (1941) (striking down a California statute whose "express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border," reasoning that "any single State [may not] isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

Under the Unitary Framework, the New York statute in *Seelig* would be struck down as absolutely *per se* illegal in the Framework's stage-one legitimate-state-purpose step (Step 1(b)), due to the statute's clearly discriminatory purpose.[243] This early case clearly illustrates the Court's aversion to statutes that are "hostile in conception": "[To allow such statutes would] invite a speedy end of our national solidarity. The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[244] Indeed, where there exists a discriminatory purpose, the statute is summarily struck down *even if* it might be evenhanded in its application.[245]

In *Dean Milk Co. v. City of Madison*,[246] the Court explained that a regulation that discriminates against interstate commerce will be struck down, even if it has a legitimate purpose, *unless* there are no reasonable nondiscriminatory alternatives available that will protect those interests.[247] At issue was a Madison ordinance requiring that any milk sold as pasteurized in Madison must have been processed and bottled at an approved pasteurization plant within a five-mile radius of Madison.[248] The Court noted that the avowed purpose of the ordinance, to protect consumers' health and safety by providing for proper sanitary conditions in the processing of milk and milk products, was legitimate, but concluded that the ordinance was unacceptable nonetheless because its practical *effect* was to exclude milk originating in Illinois from the Madison market.[249] Because reasonable and adequate alternatives were available,[250] the Court found the Madison ordinance unconstitutional.

243. "New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition." *Seelig*, 294 U.S. at 527.

244. *Id.* at 523.

245. Although the *Seelig* Court did not address the issue, the New York statute at issue arguably was evenhanded in application because it set up a system of minimum prices to be paid by dealers to producers regardless of the milk's origin. *Id.* at 519.

246. 340 U.S. 349 (1951).

247. *See id.* at 353-54 (citing *Seelig*, 294 U.S. at 527; Minnesota v. Barber, 136 U.S. 313, 328 (1890)).

248. *See id.* at 350.

249. *See id.* at 353-54.

250. For example, the Court explained that Madison could charge the Illinois producers actual costs for the Madison inspectors to travel to the Illinois production sites and that the standards set forth in the United States Public Health Service's Model Milk Ordinance would adequately protect the milk supply while not discriminating against Illinois producers. *See id.* at 354-55. Indeed, the Court noted that the Madison Health

The Madison ordinance has a legitimate purpose,[251] so, under the Unitary Framework, the analysis proceeds to the stage-two balancing step. Because the ordinance imposes its burdens primarily, but not exclusively, on out-of-state interests,[252] it is analyzed under the Unitary Framework's stage-two discriminatory-in-application (non-exclusive) step (Step 2(b)(1)). Here, Madison meets its burden of demonstrating that its ordinance is likely to lead to the achievement of the legitimate goal of protecting consumers' health and safety;[253] but the challenger likely would be successful in demonstrating that the legitimate purpose can be served as well by available nondiscriminatory alternatives,[254] and the measure is struck down under the Unitary Framework's Step 2(b)(1).

By contrast, when the Court has found that the purpose and effect of a state measure concerning incoming commerce are nondiscriminatory, it has been more likely to uphold the measure. For example, in *Minnesota v. Clover Leaf Creamery Co.*,[255] the Court reviewed the validity of a Minnesota statute that banned the retail sale of milk in plastic, non-returnable containers. The statute had been enacted for the stated purposes of promoting resource conservation, easing solid-waste disposal problems, and conserving energy.[256] Concluding that the statute was nondiscriminatory in purpose as well as in

---

Commissioner testified that Madison consumers "would be safeguarded adequately" under either the disputed Madison ordinance or the Model Ordinance. *Id.* at 356.

251. "Nor can there be objection to the avowed purpose of this enactment . . . , '[which] may appropriately be regulated in the interest of the safety, health and well-being of local communities . . . .'" *Dean Milk*, 340 U.S. at 353 (quoting Parker v. Brown, 317 U.S. 341, 362 (1943)).

252. The ordinance has the "practical effect [of] exclud[ing] from distribution in Madison wholesome milk produced and pasteurized in Illinois." *Id.* at 354. That said, a great many in-state producers (all those whose processing and bottling facilities were located outside a five-mile radius of Madison), along with out-of-state producers, were prohibited from selling their milk in Madison. Accordingly, this ordinance is moderately disproportional in its discriminatory effect and might be said to have an OIP of 65 percent to 70 percent. *See supra* note 120.

253. There is an adequate correlation between the adopted means (prohibiting the sale of milk from outside a five-mile radius of the city) and the desired legitimate purpose (enhanced consumer health and safety) to enable Madison to meet its burden here. With an OIP of 65 percent to 70 percent, the State has a moderate burden of showing that the desired legitimate purpose is likely to be attained. *See supra* note 127 and accompanying text.

254. *See supra* note 250 for the Court's description of two reasonable and adequate nondiscriminatory alternatives to the Madison ordinance.

255. 449 U.S. 456 (1981).

256. *See id.* at 458-59.

effect,[257] the Court proceeded to another line of inquiry—that is, "whether the incidental burden imposed on interstate commerce by the Minnesota Act is 'clearly excessive in relation to the putative local benefits.'"[258] The Court concluded that the burden imposed by the statute was not clearly excessive in relation to the local benefit and, moreover, that there was no viable nondiscriminatory alternative available,[259] and it thus upheld the statute.[260]

Viewed in the context of the Unitary Framework, *Clover Leaf Creamery* is upheld under the stage-two evenhanded balancing step (Step 2(a)). First, the statute serves the legitimate state purpose of promoting conservation and easing solid-waste disposal problems,[261] and the inquiry proceeds to the stage-two balancing step. The statute is evenhanded in its application,[262] and, under the Unitary Framework, it is presumed valid and is upheld unless the statute's challenger proves that the burden on interstate commerce is clearly excessive in relation to the State benefits.[263] Because "[t]he burden imposed on interstate commerce by the statute is relatively minor. . . . [and the] burden [on out-of-state competitors] is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste

257. The Court concluded that the statute in effect "'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers or the sellers are from outside the State." *Id.* at 471-72.

258. *See id.* at 472 (quoting Pike v. Bruce Church, Inc., 397 U.S. 132, 142 (1970)).

259. *See id.* at 473-74.

260. *Id.* at 474. The Court acknowledged that the Act might affect the out-of-state plastics industry relatively more than the Minnesota pulpwood industry, but explained that

> [a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.

Id. In short, the Commerce Clause "'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" *Id.* (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978)). *But see* Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) (striking down a Florida statute that barred out-of-state banks from controlling in-state investment advisory firms).

261. *See Clover Leaf Creamery*, 449 U.S. at 463 n.7, 471 n.15.

262. *See id.* at 471-72; *see also supra* note 257.

263. *See Pike* at 142; *see also, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986); Hughes v. Oklahoma, 441 U.S. 322, 331 (1979); note 123 and accompanying text.

disposal problems,"[264] the statute is upheld under the Unitary Framework.

4. *State Regulations Involving Quarantines or Public Health*

Another type of dormant-commerce-clause case involves state quarantine or public health statutes. The early case of *Mintz v. Baldwin*,[265] for example, dealt with a New York law requiring that cattle over six months old that were imported into New York for breeding or dairy purposes come from herds certified to be free from Bang's disease.[266] In considering this state order, the Court asserted:

> Undoubtedly [the order] was promulgated in good faith and is appropriate for the prevention of further spread of the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause. Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order.[267]

In so holding, the Court established a standard of virtual *per se* validity for such inspection measures; under *Mintz*, as long as the statute has a legitimate public health purpose and effect, the Court will uphold it.[268]

Analyzed under the Unitary Framework, the statute in *Mintz* passes the stage-one legitimate-state-interest test[269] and proceeds to the stage-two balancing step. There the statute is analyzed under the Unitary Framework's stage-two discriminatory-in-application (exclusive) test (Step 2(b)(2)), because its practical effect is to require that all cows coming into New York from outside the State be inspected for Bang's disease, whereas no

---

264. *Clover Leaf Creamery*, 449 U.S. at 472-73.

265. 289 U.S. 346 (1933).

266. *See id.* at 347 n.1.

267. *Id.* at 349-50 (citations omitted).

268. It is important to note that *Mintz* was decided before the Court explicitly began to balance the local interest against the burden to interstate commerce. *See supra* notes 167-71 and accompanying text (discussing the balancing test as set out explicitly for the first time in *Southern Pacific*). It is likely that the Court would engage in some sort of balancing if this case were decided today.

269. The statute at issue is an inspection measure that seeks to prevent the "further spread of [Bang's] disease among dairy cattle and to safeguard public health" and is "undoubtedly . . . promulgated in good faith." *Mintz*, 289 U.S. at 349-50.

such requirement exists for in-state cows.[270] A statute that discriminates exclusively against out-of-state interests is presumed to be invalid and will be struck down unless the State meets its burden of demonstrating that the measure is highly likely to achieve its legitimate purpose and that the purpose cannot be served as well by available nondiscriminatory alternatives. New York would be able to demonstrate that its measure is highly likely to achieve its purpose.[271] Moreover, because there is presumably no available means of preventing the importation of cows with Bang's disease other than requiring them to be certified as free from disease before they are allowed into the State, New York likely would meet its burden of demonstrating the absence of available nondiscriminatory alternatives. Accordingly, the statute is upheld under Step 2(b)(2) of the Unitary Framework. The *Mintz*-type quarantine thus is an example of the somewhat unusual case where a measure that discriminates exclusively against out-of-state interests will be upheld under the Unitary Framework.

More recently, in *Philadelphia v. New Jersey*,[272] the Court considered the validity of a New Jersey statute that prohibited the importation of solid or liquid waste from outside the State. The statute's avowed purpose was to protect public health, safety, and welfare,[273] but appellants asserted that the statute's

270. *See id.* at 347 n.1. Measures that discriminate exclusively against out-of-state interests have an OIP of 100 percent. *See supra* note 120.

Indeed, the statute at issue in *Mintz* might be analyzed under the Step 2(c) test for facially discriminatory statutes because the statute on its face only requires out-of-state cows to be certified as disease-free. *Mintz* is the rare case where a statute discriminatory on its face nonetheless has a legitimate purpose and ultimately survives Step 2(c) scrutiny.

271. A measure requiring that cows be certified as coming from disease-free herds (the means) is highly likely to result in a reduction in the further spread of disease among cattle and in a corresponding safeguarding of public health (the legitimate purpose).

272. 437 U.S. 617 (1978).

273. *See id.* at 625. In justifying the statute, the New Jersey legislature reasoned:

> [T]hat the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

Id. at 625 (quoting N.J. STAT. ANN. § 13:1I-9 (West Supp. 1978)).

actual purpose was primarily economic.[274] According to the Court, however, the statute's *purpose* was immaterial; that is, it mattered not whether the statute was enacted for public health or economic purposes. Rather, the relevant inquiry was whether the statute in plain *effect* discriminated against articles of commerce coming from outside the State,[275] because the Court had earlier established the principle that "where simple economic protectionism is effected by state legislation, a virtually *per-se rule* of invalidity has been erected."[276] By contrast, the Court explained that, where the state law is *not* overtly discriminatory, the applicable test is the one laid out in *Pike*.[277] The Court determined that the New Jersey statute *was* discriminatory both on its face and in its plain effect, because "[o]n its face, [the statute] imposes on out-of-state commercial interests the full

274. *See id.* at 625-26. Specifically, appellants argued that the statute, "while outwardly cloaked 'in the currently fashionable garb of environmental protection,' . . . is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents." *Id.* (quoting appellants' brief).

275. *See id.* at 626-27.

276. *Id.* at 624 (citing H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1949); Toomer v. Witsell, 334 U.S. 385, 403-06 (1948); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935); Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925)).

Moreover, the Court more recently has clarified the principle that once a state measure is determined to be patently discriminatory, from an analytical standpoint the *magnitude* of the discrimination does not matter—the measure is invalid in any case. In striking down an Oklahoma law requiring Oklahoma power plants serving state customers to burn at least ten percent Oklahoma coal, for example, the Court explained: "The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." Wyoming v. Oklahoma, 502 U.S. 437, 455-56 (1992) (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268-69 (1984); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 39-42 (1980)). The Court has also affirmed that

> where discrimination is patent, . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown. . . . Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field.

New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 276-77 (1988).

277. *See Philadelphia*, 437 U.S. at 624 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Quoting verbatim the *Pike* balancing test, the Court said:

> Where the statute regulates evenhandedly 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. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

burden of conserving the State's remaining landfill space .... What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[278] Accordingly, the Court applied a virtual *per-se rule* of invalidity and struck down the New Jersey statute.[279]

Although *Philadelphia* and *Mintz* may appear to be inconsistent, one important distinction lies in the nature of the burden imposed on excluded out-of-state interests. In *Mintz*, the burden was, at most, the necessity of disposing of a few diseased cattle, whereas in *Philadelphia*, the burden on the neighboring State would be ever-growing mountains of trash with nowhere to go.[280] The key in determining the validity of a quarantine or health measure under the Court's existing doctrine is thus to consider the nature of the burden: whereas a State certainly may impose a quarantine-type measure,[281] at the point the quarantine

278. *Id.* at 628.

279. *See id; see also* Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) (striking down an Alabama statute charging an additional fee for disposing of non-Alabama waste at commercial landfills in the State, reasoning that Alabama could use less restrictive means to accomplish its legitimate state health, safety, and environmental interests); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) (finding invalid a state law prohibiting out-of-county waste generators from using private landfills without the county's prior approval, explaining that the statute's discriminatory character was not excused simply because it affected *intra*state in addition to interstate movement of solid waste).

280. The court distinguished *Philadelphia* from other quarantine cases by noting:

> It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.... [By contrast,] [t]he New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

Philadelphia, 437 U.S. at 628-29 (citations omitted); *see generally* TRIBE, *supra* note 8; NOWAK & ROTUNDA, *supra* note 5.

281. Indeed, the dissent in *Philadelphia* argued that the New Jersey statute at issue was a valid quarantine law of the sort previously upheld in numerous other cases and that "such 'quarantine laws have not been considered forbidden protectionist measures, *even though they were directed against out-of-state commerce.*'" *Philadelphia*, 437 U.S. at 631 (Rehnquist, J., dissenting) (emphasis added) (quoting *id.* at 626 (majority opinion), and citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 525 (1935); Sligh v. Kirkwood, 237 U.S. 52, 59-60 (1915); Asbell v. Kansas, 209 U.S. 251 (1908); Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 489 (1888); Railroad Co. v. Husen, 95 U.S. 465, 472 (1878)). Accordingly, argued the dissent, the Court should have given the state legislation great deference. *See id.* (Rehnquist, J., dissenting).

imposes a certain onerous burden on its neighbors, it becomes unacceptable. Simply put, States may not "fence out national problems."[282] The Court's position is summed up well in one commentator's adaptation of Justice Cardozo's famous maxim: "'[T]he peoples of the several states must sink or swim together,' even in their collective garbage."[283]

When *Philadelphia* is viewed under the Unitary Framework, because the State does not demonstrate a legitimate purpose,[284] the statute is struck down in the stage-one legitimate-state-purpose step without reaching stage two. Assuming, for the sake of illustration, that New Jersey's avowed safety purpose is legitimate,[285] the facially discriminatory statute[286] is considered under the Unitary Framework's stage-two facially discriminatory step (Step 2(c)). The statute is held to be virtually *per se* invalid and will be struck down unless the State is able to meet its heavy burden of demonstrating that the measure is virtually certain to achieve the legitimate purpose and that the purpose cannot be served as well by available less discriminatory means. Here, the State likely would fail to meet its burden on both counts. Regarding the State's burden to demonstrate that the measure is virtually certain to achieve the desired health and safety purpose, the Court notes that "[t]here has been no claim here that the very movement of waste into or through New Jersey endangers health."[287] Moreover, the State likely would be unable

282. TRIBE, *supra* note 8, at 425.

283. *Id.* at 426 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)); *see also supra* note 244 and accompanying text.

284. After stating that it was not necessary to determine the actual purpose of the statute, the Court noted the illegitimacy of purpose:

> There has been no claim here that the very movement of waste into or through New Jersey endangers health. . . . The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible . . . .

Philadelphia, 437 U.S. at 626-27, 629.

285. Recall New Jersey's avowed purpose of protecting public health, safety, and welfare. *See supra* note 273 and accompanying text. Where there is any question on the matter of legitimacy of purpose, the Unitary Framework presumes the purpose is legitimate and passes the measure on to the stage-two balancing step.

286. *See supra* note 278 and accompanying text.

287. *Philadelphia v. New Jersey*, 437 U.S. at 629. Moreover, waste from New Jersey has no restrictions placed upon it, even though "there is no basis to distinguish out-of-state waste from domestic waste." *Id.*

to prove that the purpose cannot be served as well by available less discriminatory means.[288]

5. *State Regulations Involving Tax Subsidies and Credits*

Generally speaking, the Commerce Clause does not prohibit a State from subsidizing an industry out of funds collected from within the State.[289] In such a case, the political process provides those paying for the subsidy—that is, the residents and other interests within the State—the opportunity to express their views regarding the wisdom of providing the subsidy.[290] When the subsidy is funded from moneys collected from *out-of-state* interests, however, the Court will view it more critically. For example, in *West Lynn Creamery, Inc. v. Healy*,[291] yet another case involving milk producers,[292] the Court considered the validity of a Massachusetts tax-subsidy program imposing a tax on all milk sold by dealers to Massachusetts retailers[293] and distributing the revenues exclusively to Massachusetts dairy farmers.[294] The Court found the state program "clearly unconstitutional," explaining that it was discriminatory because its express purpose and effect were to enable higher-cost Massachusetts farmers to compete with lower-cost out-of-state farmers.[295]

---

288. For example, the State could further its goal of decreasing the burden on its landfills by imposing higher dumping fees on in-state and out-of-state generators alike, which would encourage the generators to find ways to lessen the amount of garbage (for example, through more aggressive recycling programs, more diligent pre-sorting, and so on) to be dumped in New Jersey's landfills.

289. *See, e.g.*, New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988) (noting that "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Dormant Commerce Clause]"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) (affirming that "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry"). *But see* West Lynn Creamery v. Healy, 512 U.S. 186 (1994) (implying that subsidies may be invalid under the Commerce Clause); *infra* note 295 and accompanying text.

290. See *supra* notes 84-85 and accompanying text for a discussion of political policy considerations (the "inner political check") in the commerce-clause context.

291. 512 U.S. 186 (1994).

292. A disproportionate number of dormant-commerce-clause cases considered by the Supreme Court have involved state regulations affecting the dairy industry. *See id.* at 206 n.22 (observing that "[a] surprisingly large number of our Commerce Clause cases arose out of attempts to protect local dairy farmers" (citing Geoffrey P. Miller, *The Industrial Organization of Political Production: A Case Study*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 769 (1993))).

293. About two-thirds of the milk so taxed came from out-of-state. *See id.* at 188.

294. *See id.*

295. *Id.* at 194. In so holding, the Court rejected Massachusetts's principal argument that the overall state program was valid because each of its constituent elements was valid standing alone—that is, that the subsidies were constitutional exercises of state power

Under the Unitary Framework, the *West Lynn Creamery* program would be struck down as absolutely *per se* illegal in the stage-one legitimate-state-purpose step (Step 1(a)), due to the program's clearly discriminatory purpose.[296] Accordingly, it is unnecessary to reach the stage-two balancing step. This recent case highlights the Court's aversion to statutes that would "violat[e] the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors,'"[297] and its continued fidelity to fundamental notions of national unity.[298]

Similarly, in *New Energy Co. of Indiana v. Limbach*,[299] the Court struck down an Ohio tax-credit measure that operated as a subsidy to in-state and certain out-of-state fuel dealers.[300] The

---

and that the tax was nondiscriminatory—explaining that the tax-subsidy program "violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 199 (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988)).

Notably, the Court's holding in *West Lynn Creamery* comes perilously close to banning in-state subsidies, a fact that was not lost on the Court's conservative wing. In dissent, Chief Justice Rehnquist argued that the Massachusetts measure was a state subsidy, plain and simple, of the sort that the Court has approved "[i]n case after case." *Id.* at 213 (Rehnquist, C.J., dissenting). For his part, Justice Scalia argued in his concurrence that the majority's reasoning went too far in that it would find invalid virtually any state measure, such as a state subsidy, that "'artificially encourag[es] in-state production even when the same goods could be produced at lower cost in other States.'" *Id.* at 207 (Scalia, J., concurring) (quoting *id.* at 193 (majority opinion)).

296. "[The statute's] avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower-cost dairy farmers in other States.... [by] mak[ing] milk produced out-of-state more expensive." *West Lynn Creamery*, 114 S. Ct. at 194 (majority opinion).

297. *Id.* at 199 (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-73 (1988)).

298. The Court quoted classic passages from earlier Supreme Court dormant-commerce-clause cases in support of its "overriding interest in [protecting] the free flow of commerce across state lines." *Id.* at 206. The Court noted:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 206-07 (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949)); *see also id.* at 2218 ("'The Constitution was framed under the dominion of a political philosophy ... that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" (quoting Baldwin v. G.A.F. Seelig, 294 U.S. 511, 522-23 (1935))).

299. 486 U.S. 269 (1988).

300. The Ohio measure awarded a tax credit against the Ohio fuel sales tax for each gallon of ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in

Court repeated the rule that state measures clearly discriminating against interstate commerce will be struck down[301] unless the State is able to show that the measure "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[302] Finding first that the tax credit was facially discriminatory,[303] the Court concluded that Ohio's avowed purpose[304] was "no more than implausible speculation, which does not suffice to validate this plain discrimination against products of out-of-state manufacture."[305]

Under the Unitary Framework, because Ohio does not demonstrate a legitimate purpose,[306] the statute is said to be absolutely *per se* invalid under the stage-one legitimate-state-purpose step. Accordingly, the statute is summarily struck down without reaching stage two.

---

a State that granted reciprocal tax credits for fuel produced in Ohio. The tax credit thus operated in effect as a subsidy to in-state and certain out-of-state fuel dealers. *See id.* at 271.

301. *See id.* at 274 (citing Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980); Dean Milk Co. v. Madison, 340 U.S. 349 (1951)).

302. *Id.* at 278 (citing Maine v. Taylor, 477 U.S. 131 (1986); *Sporhase,* 458 U.S. at 958; Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979); *Dean Milk,* 340 U.S. at 354). The Court noted that the standards for such justification are high, "'at a minimum . . . invok[ing] the strictest scrutiny.'" *Id.* at 279 (quoting *Hughes,* 441 U.S. at 337).

303. The provision was discriminatory on its face, the Court explained, because it "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States." *Id.* at 274. The Court rejected the State's contention that the availability of the tax credit to out-of-state manufacturers from reciprocating States made this a non-discriminatory statute, noting that similar reciprocal arrangements had been found discriminatory elsewhere. *See Sporhase,* 458 U.S. at 958 (striking down a Nebraska statute requiring reciprocity for the export of groundwater from the State as "facially discriminatory legislation" meriting the "'strictest scrutiny'" (internal citations omitted)); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 379 (1976) (striking down a Mississippi regulation permitting out-of-state milk to be sold in Mississippi only if the other State accepted Mississippi milk on a reciprocal basis, reasoning that "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement").

304. Ohio argued that its purpose in enacting the ethanol tax-credit program was twofold: one, that the program would promote health by reducing harmful exhaust emissions; and two, that the program would increase commerce in ethanol by encouraging other States to enact ethanol subsidies. *See Limbach,* 486 U.S. at 279-80.

305. *Id.* at 280. In finding that the local purposes were not legitimate, the Court did not reach the second part of the test it had laid out—that is, whether there was a less restrictive alternative available.

306. The Court noted that Ohio's avowed purpose, *see supra* note 304, was "no more than implausible speculation, which does not suffice to validate this plain discrimination against products of out-of-state manufacture." *Limbach,* 486 U.S. at 280.

6. *State Regulations Involving Outgoing Commerce and Preserving Resources for In-State Consumption*

Another group of state regulations affected by dormant-commerce-clause considerations are those that seek to place restrictions on the export of local products to other States. The statute at issue in *Hughes v. Oklahoma*[307] prohibited all persons from exporting natural minnows out of Oklahoma for sale.[308] The Court stated that such state measures are subject to the test originally expressed in *Pike*,[309] to wit: an evenhanded statute that is designed to serve a legitimate local interest and that only incidentally burdens interstate commerce will be upheld unless the burden to interstate commerce is clearly excessive *vis-a-vis* the local benefits.[310] The Court interpreted the *Pike* test to require the following line of inquiry:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or instead discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[311]

Because it found that the Oklahoma statute facially discriminated against interstate commerce,[312] the Court declared

---

307. 441 U.S. 322 (1979).

308. *See id.* at 323.

309. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also supra* notes 215-19 and accompanying text.

310. *Hughes*, 441 U.S. at 331 (quoting the *Pike* balancing test, *see supra* note 219). Under the *Pike* balancing test, once a legitimate local purpose is found, the extent of the burden that will be tolerated depends on two factors: (1) the nature of the local interest involved, and (2) whether the local interest could be promoted as well with a less restrictive alternative. *Id.*

311. *Id.* at 336. The Court noted:

> [T]he burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.'

Id. (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)).

312. The Court explained that the statute was facially discriminatory because it "forbids the transportation of natural minnows out of the State for purposes of sale, and thus 'overtly blocks the flow of interstate commerce at [the] State's borders.'" *Id.* at 336-37 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). By contrast, Justice Rehnquist argued in dissent that the statute is not in fact facially discriminatory, nor even discriminatory in effect: "This is not a case where a State's regulation permits residents to export naturally seined minnows but prohibits nonresidents from so doing. No person is

that the rest of the inquiry would be subject to a standard of strictest scrutiny.[313] The Court then found that Oklahoma's "interest in maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows may well qualify as a legitimate local purpose,"[314] thus satisfying part two of the inquiry. But the Court struck down the statute because it failed part three of the inquiry—that is, "[f]ar from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce."[315]

The statute involved in *Hughes*, the avowed purpose of which is to provide for the conservation and protection of wild animals,[316] passes the Unitary Framework's step-one legitimate-state-purpose test, and it is considered under the stage-two facially discriminatory test (Step 2(c)).[317] The statute is held to be virtually *per se* invalid and will be struck down unless the State is able to meet its heavy burden of demonstrating that the measure is virtually certain to achieve the legitimate purpose and that the purpose cannot be served as well by available less discriminatory means. Here, the State's burden to demonstrate that the measure is virtually certain to achieve the desired health and safety purpose is met, because a prohibition on the export of minnows will serve to "avoid[] the removal of inordinate numbers of minnows . . . ."[318] The statute fails and is struck down under the second part of the Step 2(c) test, however, because

---

allowed to export natural minnows for sale outside of Oklahoma; the statute is evenhanded in its application." *Id.* at 344 (Rehnquist, J., dissenting).

313. *See id.* at 337 (majority opinion).

314. *Id.* The Court explained that it considers "States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Id.*

315. *Hughes*, 441 U.S. at 337-38. The Court observed that Oklahoma

> places no limits on the numbers of minnows that can be taken by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State. Yet it forbids the transportation of any commercially significant number of natural minnows out of the State for sale.

Id. at 338.

316. *Id.* at 337. Because the Court considers such measures "as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens," *id.*, under the Unitary Framework, the statute is given a heightened level of deference similar to that given other legitimate police power statutes. *See supra* note 151 and accompanying text.

317. *See supra* note 312.

318. *Hughes*, 441 U.S. at 337.

the State is unable to show that the purpose cannot be served as well by available nondiscriminatory alternatives.[319]

By contrast, in *Maine v. Taylor*,[320] the Court upheld a facially discriminatory statute explicitly prohibiting the importation of live baitfish into Maine from out of state,[321] explaining that "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."[322] The Court applied the interpretation of the *Pike* test, developed in *Hughes v. Oklahoma*,[323] whereby

> once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.[324]

Reasoning that Maine satisfied its burden by demonstrating that the statute had a legitimate purpose of guarding against the "imperfectly understood environmental risk" of introducing baitfish parasites and non-native species of fish,[325] and that less-discriminatory means were not currently available,[326] the Court upheld the statute.

---

319. "Far from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce." *Id.* at 337-38; *see also supra* note 315 and accompanying text.

320. 477 U.S. 131 (1986).

321. *See id.*

322. *Id.* at 138 (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980)).

323. *See supra* note 311 and accompanying text.

324. *Taylor*, 477 U.S. at 138 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

325. *Id.* at 148. The Court explained that:

> "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences."

Id. at (quoting United States v. Taylor, 585 F. Supp. 393, 397 (Me. 1984)).

326. *See id.* at 143. The Court explained that the

> "abstract possibility" of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "available nondiscriminatory alternative" for purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.

Id. at 147 (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)).

Like the measure at issue in *Hughes*,[327] the statute in *Taylor* is analyzed first under the Unitary Framework's stage-one legitimate-state-purpose test (Step 1) and then under the stage-two test for facially discriminatory statutes (Step 2(c)).[328] With its legitimate purpose of protecting the State's fish population from the unknown environmental risks of introducing baitfish parasites and non-native species of fish into state waters, the statute passes the step-one legitimate-state-purpose test and moves on to the Unitary Framework's Step 2(c) facially discriminatory test. The statute, which totally prohibits the importation of live baitfish from outside the State, is indeed virtually certain to achieve the purpose of protecting Maine's fish population from unknown environmental risks, and therefore the first part of Step 2(c) is satisfied; the State then meets the second part of the test by showing the unavailability of reasonable, nondiscriminatory alternatives.[329] *Maine v. Taylor* is thus one of the rare cases where a facially discriminatory measure is upheld under the Unitary Framework.

7. *State Regulations Involving Limits on Business Entry*

Still another type of state regulation that the Court has considered under the Commerce Clause are those measures that in some way limit out-of-state businesses from entering the home State. In *Lewis v. BT Investment Managers*,[330] the Court suggested that the initial point of inquiry in determining the validity of a law banning out-of-state banking holding companies from controlling in-state investment advisory firms is whether the effects of the state measure cause outright economic protectionism, in which case a virtually *per-se rule* of invalidity applies,[331] or whether the statute "visits its effects equally upon both interstate and local business," in which case it may be found valid if narrowly drawn.[332] Having set out the framework, the Court then concluded that the statute was protectionist in effect, but declined to decide whether the statute should be held

327. *See supra* notes 316-17 and accompanying text

328. *See supra* text accompanying note 321 (noting the statute's explicit prohibition of the importation of live baitfish into Maine).

329. *See supra* note 326 and accompanying text.

330. 447 U.S. 27 (1980).

331. *See id.* at 36 (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

332. *Id.* at 36-37 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

to be virtually *per se* invalid.[333] Instead, the Court conducted a *de facto* balancing of the State's interest against the burden on interstate commerce and declared the statute unconstitutional.[334]

The statute in *BT Investment Managers*, the avowed purpose of which is to prevent economic concentration and to protect the State's citizens from fraud, passes the Unitary Framework's legitimate-state-purpose test,[335] and it is considered under the stage-two facially discriminatory test (Step 2(c)).[336] The State likely fails both counts of Step 2(c). First, although banning out-of-state banking holding companies from controlling in-state investment advisory firms may offer *some* measure of protection to consumers, it clearly does not rise to the level of a virtual certainty. Moreover, the State is unable to show that the purpose cannot be served as well by available less discriminatory alternatives,[337] and the statute is struck down under Step 2(c).[338]

---

333. *See id.* at 42.

334. "[W]e are not persuaded that [the State's] interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State." *Id.* at 43; *see also* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 891 (1988) (striking down an Ohio statute suspending statute-of-limitation protections to out-of-state corporations or persons by tolling the running of the statute for any period during which the corporation or person was not "present" in the State, reasoning that "the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the State might advance").

335. "Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests." *BT Investment Managers*, 447 U.S. at 43. This avowed purpose, part of which clearly is to favor in-state *economic* interests, arguably is discriminatory in purpose and might be struck down as precisely the sort of regulation the Commerce Clause was designed to prevent. On the other hand, the State's purpose does have legitimate aspects—protection of citizens from fraud, for example. Because the measure does have some legitimacy, it is proper to allow it to proceed to the next part of the burden.

336. The Florida measure creates an outright ban on out-of-state banking holding companies from controlling in-state investment advisory firms. *See id.* at 31. "Both on its face and in actual effect, [the statute] thus displays a local favoritism or protectionism . . . ." *Id.* at 42.

337. Possible less-discriminatory alternatives that would serve the purpose of protecting residents from fraud include licensing requirements or posting of bonds for *all* holding companies, whether from in-state or out-of-state.

338. If the reader is left with the impression after reviewing the Unitary Framework's treatment of the individual dormant-commerce-clause cases that the analysis is redundant or repetitive, that is precisely the point. Virtually all of the Court's dormant-commerce-clause cases are capable of being analyzed under the single Unitary Framework.

8. *Points of Departure*

It should be noted that the Unitary Framework does not apply in the exact form presented here to two sorts of state regulations impacting interstate commerce: (1) state regulations involving taxation; and (2) state regulations where the State is a "market participant." First, where the state regulation at issue involves a state tax, the Court has developed a separate doctrinal test whereby discrimination against interstate commerce is but one of several criteria used in determining if the tax is permissible.[339] The Unitary Framework analysis is embedded, in effect, within the third element of the *Complete Auto* test. Secondly, the Court has determined that the Dormant Commerce Clause does *not* apply when a State is acting as a "market participant,"[340] at which point it becomes a moot point whether the regulation at issue violates the Dormant Commerce Clause.[341] Accordingly, once the State has been determined to be a "market participant," it is unnecessary to apply the Unitary Framework.

D. *The Unitary Framework Applied to Prospective Jurisprudence*

Finally, any analytical framework that professes to be an accurate descriptor and predictor of a body of jurisprudence must be capable of withstanding a strict scrutiny of its own. In particular, it must be able to accommodate the Court's existing jurisprudence and to provide a useful template for courts to use

339. A state tax is permissible "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). At issue in *Complete Auto Transit* was a Mississippi sales tax that was imposed on businesses "for the privilege of engaging or continuing in business or doing business within this state . . . ." *Id.* at 275 (quoting MISS. CODE ANN., 1942 § 10105 (1972 Supp.), as amended).

340. *Compare, e.g.*, White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) (holding that a city spending its own funds on construction contracts for a public project is acting as a market participant and is not subject to the Dormant Commerce Clause); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (holding that a State owning and operating a cement plant is a market participant and is thus outside the purview of the Dormant Commerce Clause); *with* South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) (concluding that where the State merely *regulates* the market, it is not a market participant and dormant-commerce-clause limitations do apply).

341. *See, generally*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 397 (1989) (explaining that in the last two decades, "the Court has lifted [dormant-commerce-clause] prohibitions when states act as 'market participants' rather than as 'market regulators,' . . . [and] has shielded from commerce clause attack blatant favoritism of local interests").

in future decisions. This Article's Unitary Framework succeeds on both counts.

As a paradigm for applying the Unitary Framework to prospective dormant-commerce-clause cases, consider seven possible different discriminatory statutes: (1) discriminatory in *purpose* only; (2) discriminatory in *purpose* and in *effect*; (3) discriminatory in *purpose*, in *effect*, and *on its face*; (4) discriminatory in *effect* and *on its face*; (5) discriminatory *on its face* only; (6) discriminatory in *effect* only, imposing its burden mostly, although not exclusively, on out-of-state interests; (7) discriminatory in *effect* only, imposing its burden exclusively on out-of-state interests.

The statutes in scenarios (1), (2), and (3) would be struck down immediately in the Unitary Framework's stage-one "legitimate-state-purpose" step (Step 1), because, by Unitary-Framework definition, a statute that has a discriminatory purpose does not further a legitimate state purpose and is absolutely *per se* invalid. Beyond the fact that discriminatory effect or facial discrimination is highly probative evidence of discriminatory purpose, it is immaterial that a statute discriminatory in purpose may or may not also be discriminatory in effect and on its face (as in scenarios (2) and (3)); once it is determined that the statute's *purpose* is discriminatory, the statute is struck down.

The statutes in scenarios (4)[342] and (5) would be struck down under the Unitary Framework's stage-two facial discrimination test (Step 2(c)) unless the State were able to overcome the statute's virtual per-se-invalid status. To do this, the State must demonstrate that the statute is virtually certain to achieve its desired legitimate purpose[343] *and* that the purpose could not be served as well by available less discriminatory alternatives.

342. Beyond any probative value that evidence of discriminatory effect might have in proving facial discrimination, it is immaterial that a facially discriminatory statute may also be discriminatory in effect (as in scenario (4)). If it is determined that the statute is *facially* discriminatory, and the State is unable to overcome the heavy presumption of virtual *per-se* invalidity, the statute is struck down in the Unitary Framework's facial discrimination step (step 2(c)).

343. Recall that it is unlikely that a facially discriminatory statute will ever get to the Unitary Framework's stage-two balancing step because it likely will have been found not to have a legitimate state purpose and will have been struck down in the stage-one legitimate-state-purpose step (Step 1). *See supra* note 136 and accompanying text. Facial discrimination is highly probative evidence of discriminatory purpose.

The statute in scenario (6) would more likely than not be struck down in the Unitary Framework's stage-two discriminatory-in-application (not exclusive) balancing inquiry (Step 2(b)(1)). The statute is presumed to be invalid and is struck down unless the State meets its burden of demonstrating that the measure is likely to achieve the desired legitimate purpose, and (if the State is able to meet its burden) unless the challenger either rebuts the State's justification or demonstrates that the State's purpose can be served as well by available nondiscriminatory alternatives.

The statute in scenario (7) would most likely be struck down in the Unitary Framework's discriminatory-in-application (exclusive) balancing inquiry (Step 2(b)(2)). The statute is presumed to be invalid and is struck down unless the State is able to meet its heightened burden of demonstrating that the measure is highly likely to achieve its legitimate purpose and that the purpose cannot be served as well by available nondiscriminatory alternatives.

To further develop the paradigm, consider the following evenhanded-in-application statutes: (8) evenhanded with small adverse impact on interstate commerce and small benefit to the State; (9) evenhanded with small adverse impact on interstate commerce and large benefit to the State; (10) evenhanded with some adverse impact on interstate commerce and some benefit to the State; (11) evenhanded with large adverse impact on interstate commerce and little benefit to the State. The statutes in scenarios (8), (9) and (10) would be upheld under the Unitary Framework Step 2(a) because the challenger would have great difficulty in meeting its burden of proving that the harm caused by the statute to interstate commerce is clearly excessive in relation to the benefits gained by the State. Statute (11) may well be the rare case where the measure is struck down under Step 2(a), so long as the challenger proves that the burden imposed by the statute is indeed clearly excessive in relation to the benefits gained by the State.

V. CONCLUSION

Generations of law students, judges, practicing lawyers, and legal commentators have struggled to understand exactly what the Supreme Court does when it decides cases involving the Dormant Commerce Clause. Dormant-commerce-clause

doctrine clearly is a complex constitutional area that defies easy explanation. Even various Supreme Court Justices have characterized the Court's doctrine as "hopelessly confused," "a quagmire," and, at the very least, "not predictable."

This Article has attempted to clarify matters. It provides a single, comprehensive "Unitary Framework" for analyzing the Supreme Court's dormant-commerce-clause jurisprudence, making it at once more cogent and accessible. The Unitary Framework exposes the hidden order of the Court's current approach to dormant-commerce-clause questions and incorporates it with leading scholarly commentary into one functionally coherent, consistent approach, thus bringing order and improved certainty and predictability to the Court's dormant-commerce-clause doctrine.