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Unbundling Undue Burdens

Ruth Mason & Michael Knoll

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Vanderbilt Hall – 208
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Session 5

SCHEDULE FOR FALL 2021 NYU TAX POLICY COLLOQUIUM
(All sessions meet from 2:15 - 4:15 pm in Vanderbilt 208, NYU Law School)

1. Tuesday, September 14 – Jake Brooks and David Gamage, The Indirect Tax Canon, Apportionment, and Drafting a Constitutional Wealth Tax.

2. Tuesday, September 28 – Daniel Hemel, Law and the New Dynamic Public Finance.

3. Tuesday, October 12 – Jennifer Blouin, Does Tax Planning Affect Organizational Complexity: Evidence from Check-the-Box

4. Tuesday, October 26 – Manoj Viswanathan, Retheorizing Progressive Taxation

5. Tuesday, November 9 – Ruth Mason & Michael Knoll, [Unbundling Undue Burdens]

6. Tuesday, November 23 – Mindy Herzfeld, Taxes Are Not Binary: The Unfortunate Consequences of Splitting Taxes Into Arbitrary Categories.

7. Tuesday, November 30 – Alan Auerbach, Taxes and Low Interest Rates.

UNBUNDLING UNDUE BURDENS

Michael S. Knoll & Ruth Mason *

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INTRODUCTION

Dormant Commerce Clause doctrine has long been criticized for, among other reasons, involving arbitrary distinctions and inviting excessive judicial discretion and even judicial lawmaking.[1] Critics of the doctrine, which has two major strands—discrimination and undue burdens—have focused their most severe criticisms on the doctrine's undue burden strand and that strand's main doctrinal test, made famous in *Pike v. Bruce Church, Inc*.[2] *Pike* directs courts to weigh the burden

[1] For the leading critical accounts, *see e.g.*, Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000); Brannon Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008) [hereinafter Denning, *Reconstructing*]; Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1 (2019); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J. L. & POL'Y (2016); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) [hereinafter Regan, *Protectionism*]; Michael E. Smith, State Discriminations Against Interstate Commerce, 74 CAL. L. REV. 1203 (1986); Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

[2] 397 U.S. 137 (1970). West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) ("once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire"). See, e.g., Eule, *supra* note ___, at 485 ("If democracy means anything, it is that the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges."); Goldsmith & Sykes,

a state regulation imposes on interstate commerce against the state's legitimate interest in the regulation.[3] Relying on these criticism, jurists and commentators have advocated for abandonment or severe curtailment of dormant Commerce Clause doctrine.[4]

This Article reframes dormant Commerce Clause doctrine by introducing a new distinction. Whereas the courts and commentators typically have divided the doctrine into two categories—discrimination and undue burden—we put forth a different categorization that reflects the type of burden the regulation imposes on interstate commerce; the inclusion of this more nuanced categorization, we argue, helps to better explain the different types of judicial review applied in dormant Commerce Clause cases, goes a long way in answering the doctrine's critics, and provides the court with clear alternative paths forward to produce a more rational dormant Commerce Clause doctrine.

We identify two primary categories of burdens (or costs) on interstate commerce: those arising from a single state's law and those arising from interactions among two or more states' laws. A single-state burden arises when regulation burdens interstate commerce more than in-state commerce *irrespective* of what other states do. In contrast, interaction burdens arise from the interaction of multiple states' laws.[5] The defining feature of an interaction burden is that the presence or absence of similar regulation by *other states* affects the cost to comply with the first state's rule. Put simply, interaction burdens arise from *mismatches* among states' regulations.

Our typology of burdens reveals a series of doctrinal differentiations that have either gone unnoticed or have been misunderstood by prior commentators who have concluded that the Supreme Court's approach is incoherent or unprincipled. For example, although the Court claims to apply *Pike* balancing in both single-state and interaction cases, we show that its balancing analysis differs significantly in each.[6] Furthermore, our framework explains why some cases receive strict scrutiny whereas other cases receive more deferential treatment. And our approach can explain why taxes are treated differently that non-tax regulations.

Although dormant Commerce Clause doctrine reflects that Supreme Court justices have intuitively grasped the distinction between single-state and interaction cases, treating them appropriately for the most part, the Court has not articulated the reasons for apparent

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supra note ___, at 813 (writing of the dormant Commerce Clause that "judicial cost-benefit analyses to date have been seriously flawed").

[3] 397 U.S. 137 (1970).

[4] X-ref [I.C.]

[5] The existence of such cases is no secret. See, e.g., Goldberg & Sykes, supra note ___, at 788 (referring to the "'inconsistent regulations prong[] of the dormant Commerce Clause"). We refer to "interactions" to convey neutrality about the constitutional status of such regulations.

[6] pike

differences in doctrinal approaches across cases. Once we clarify that different *types* of burdens demand different types of scrutiny, the doctrine becomes less ad hoc and haphazard, and more connected to its justifications, which lie in federalism and the need to preserve a smoothly functioning national market.

Armed with our doctrinal reframing, we argue that much of the criticism of the dormant Commerce Clause can be traced to *Bibb* cases, rather than *Pike* cases. As one example, we argue that *Bibb* cases are more susceptible than are *Pike* cases to charges of judicial legislation. The reason for this has to do with a phenomenon we call "legislating by preclusion," which arises only in interaction cases. The remedy in any dormant Commerce Clause case is preclusion, but preclusion can take on special meaning in *Bibb* cases. Specifically, when the Supreme Court precludes an interaction burden, that preclusion may implicitly endorse another regulation that the Court considered in the case. Thus, we argue that such cases may have the effect of imposing a harmonized substantive rule. Consider *Bibb*. The Court held that diversity in mudflap rules unduly burdened interstate commerce. Although the formal remedy in *Bibb* was preclusion of Illinois's curved mudflap rule, the implication of the Court's decision was clear; Illinois had to conform its rule to the straight-mudflap rule of neighboring states.[7] In contrast, in single-state cases, the typical remedy does not involve conformity with *another state's* law. Instead, if the constitutional infirmity involves a single-state burden, the remedy typically involves equalizing the treatment of in-state and interstate economic actors.

Relatedly, we explain why judicial preclusion of regulatory interactions will tend, over time, towards deregulation. Preclusion results in a deregulatory bias because private commercial actors will tend to challenge stricter rules, but not less strict rules. Preclusion in interaction cases therefore mimics the so-called Delaware Effect, under which states adopt lax regulation to compete with each other for inbound commercial activity. In contrast, non-intervention in regulatory mismatches—for example, by upholding rather than precluding regulatory mismatches—could lead to the so-called California Effect, under which the rules of strict states spillover to other states as multistate commercial actors formulate a single product that can meet the demands of the strictest states. More troublingly, upholding rules in interaction cases can lead to what might be called the Balkans Effect, under which, rather than one rule being stricter than the other, the various rules differ such that the same product or service cannot satisfy both. Such a situation would promote market segmentation. Thus, the two polar positions on *Bibb* cases present the Court with a stark contrast: embrace either judicial legislation or market segmentation.

[7] from the dissent

Given that criticism of dormant Commerce Clause doctrine attaches more to *Bibb* than *Pike* balancing, we offer suggestions for how the Court might minimize the adverse impact of such cases—without completely refusing to consider *Bibb* cases. We urge the Court to limit the impact of *Bibb* cases by deferring where possible to trial court findings on factual matters (such as whether the regulation was adopted for a protectionist purpose), narrowing the preclusive effect of decisions in *Bibb* cases, and adhering only weakly to *stare decisis* in such cases.

Now is an important time to clarify the dormant Commerce Clause. Nascent interaction cases involve regulatory areas as diverse as cage-free eggs and corporate-board composition.[8] More importantly, despite academic criticism, a six-justice majority of the Supreme Court has shown no signs of abandoning the dormant Commerce Clause,[9] and, after not invoking it to invalidate a state statute for "a generation,"[10] the Court recently renewed its commitment to *Pike* balancing.[11] At the same time, however, the views of the newer

[8] Daniel Greene, Vincent Intintoli & Kathleen M. Kahle, *California Senate Bill No. 826: List of Non-Compliant Firms* (Jan. 13, 2020) (working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3514041 (according to a recent report, at the end of 2019, 16 firms were in violation of the law).

[9] In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), only Justices Gorsuch and Thomas dissented from the majority opinion that applied the dormant Commerce Clause. Justice Thomas's opposition to the dormant Commerce Clause is well-known and long held. *See, e.g.*, *Wynne*, 135 S. Ct. at 1811–12 (Thomas, J., dissenting). Justice Gorsuch has expressed skepticism about the dormant Commerce Clause, noting that it "cannot be found in the text of any constitutional provision but is (at best) an implication from one." *See Tennessee Wine*, at 2478. Nevertheless, he has concurred in interpreting it as a matter of *stare decisis*. Direct Marketing Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) ("the whole field in which we are asked to operate today—dormant commerce clause doctrine— might be said to be an artifact of judicial precedent"). After *Tennessee Wine*, Justice Barrett replaced Justice Ginsburg on the Court. Whereas Justice Ginsburg regularly applied the dormant Commerce Clause, Justice Barrett's views on it are as yet unknown. Tax Foundation, Potential Supreme Court Nominees on Taxpayer Rights, State Taxes, and Interstate Commerce, (Jul. 9, 2018) (observing that as a circuit court judge, Barrett had not had occasion to decide a dormant Commerce Clause issue, but that her academic writing was supportive of *stare decisis. See id.* (speculating that Barrett might view dormant Commerce Clause doctrine similarly to her mentor, Justice Scalia, who applied it on *stare decisis* grounds).

[10] Denning/Bittker treaties on dormant Commerce Clause, §6.05

[11] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018) (referring to *Pike* as the standard to be used in issues it remanded). Perhaps reflecting a perception of the obsolescence of *Pike*, of the forty-seven amicus and party briefs filed in *Wayfair*, only five, including our amicus, suggested applying *Pike*. See Brief of Brill, Knoll, Mason, and Viard in Support of Petitioner, 3, 17-20, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, (2018) (No. 17-494) [hereinafter Brill Brief]. The paucity of references to *Pike* in *Wayfair* may also reflect views that tax cases receive different treatment from regulations under the dormant Commerce Clause, a view we refute *infra*, in Part III.C.

Supreme Court justices on the scope of the dormant Commerce Clause are unknown and may be unformed.[12] Thus, our approach to the dormant Commerce Clause, which cabins judicial discretion and reduces the number of cases that require *Bibb* balancing, could be particularly pertinent. Our Article improves doctrinal clarity, and it traces it's the doctrine's most problematic aspects from a legitimacy perspective to *Bibb*, rather than *Pike*, cases. It thus constitutes a rare defense of a doctrinal area that has been excoriated as both illegitimate and unclear, including by members of the Court itself.[13]

We organize the discussion as follows: Part I provides background on and criticisms of the dormant Commerce Clause. Part II reframes the dormant Commerce Clause, supplementing the "discrimination-and-undue-burden" distinction with a distinction that looks to the type of burden—single-state or interacting—imposed by the challenged regulation. We show that this distinction helps to readily explain much of the Court's dormant Commerce Clause doctrine. Part III argues that the most trenchant criticisms of the dormant Commerce Clause—among them arbitrariness, unbridled judicial discretion, and judicial legislation—can be traced to interaction cases, rather than single-state cases. Thus, reform efforts should focus on *Bibb*, not *Pike*, cases. Part III also includes a rejoinder to those academic critics of the dormant Commerce Clause, who have argued in favor of major retrenchments of the Clause. We argue, at least outside of *Bibb* cases, that the Court is largely on the right track, but we need a description oof the doctrine that is more faithful to the cases as well as a better explanation of the doctrine's underlying logic. Part IV offers our account of how to cabin the impact of *Bibb* cases. Part V concludes.

I. THE DORMANT COMMERCE CLAUSE AND ITS CRITICS

This Part briefly reviews dormant Commerce Clause doctrine and the most important criticisms of that doctrine.

A. The Dormant Commerce Clause

The Commerce Clause of the Constitution grants Congress the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."[14] The Supreme Court has interpreted the Commerce Clause to express both an affirmative grant of power to

[12] X-ref

[13] *Wynne*, at 1809 (Scalia, J., dissenting) (referring to a "bestiary of ad hoc tests and ad hoc exceptions"); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (the doctrine "makes little sense, and has proved virtually unworkable in application."); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (calling the doctrine "hopelessly confused")

[14] U.S. CONST. art. I, § 8, cl.3.

the federal government and an implicit restraint on the states.[15] For two centuries, the Supreme Court has employed this "dormant" aspect of the Commerce Clause to strike a balance between state regulatory authority and national and federal interests.

Among the national interests at stake are a smoothly functioning national market. The dormant Commerce Clause doctrine promotes and protects a multistate marketplace where economic actors from different states compete on a level playing field.[16] As such, the dormant Commerce Clause advances *free trade* in the sense that it bars protectionism.[17] Despite what proponents and detractors sometimes incorrectly assert, however, the doctrine promotes neither a *free market* or *free-market ideology*, in the sense of an absence of regulation, nor any other specific conception of efficiency or economic welfare.[18] Instead, the Court's dormant Commerce Clause doctrine merely promotes the notions that state regulation of commerce should be even-handed in both content and effect between in-state and interstate commerce.[19] The Court has given various reasons for insisting on both a level playing field among states and elimination of undue burdens on interstate commerce. The level playing field dampens interstate "rivalries and dislocations and reprisals"[20] that "threaten at once the

[15] Gibbons v. Ogden, 9 Wheat. 1, 1-14 (1824).

[16] justice Jackson dormant Commerce Clause quote

[17] *See*, *e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 617 (1978) (the "crucial inquiry here must be directed to determining whether [the challenged statute] is basically an economic protectionist measure, and thus virtually *per se* invalid"); Comptroller of Treasury of Maryland v. Wynne 575 U.S. 542, 549 ("By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened state commerce"); Regan, Protectionist, *supra* note ___ (arguing that the dormant Commerce Clause exclusively concerns intentional protectionism); Norman R. Williams & Brannon Denning, *The New Protectionism and the American Common Market*, 85 NOTRE DAME L. REV. 247, 248 (2013) (the "one constant has been a strict prohibition on protectionist measures that seek to insulate in-state economic activity from out-of-state competition").

[18] See, e.g., H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (referring to "this federal free trade unit"). *Cf.* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955) ("[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"). *But see, e.g.,* Goldsmith & Sykes, *supra* note ___ (arguing for a general welfarist interpretation of the dormant Commerce Clause).

[19] *See, e.g., Wayfair*, at 2094 (2018) ("the Commerce Clause was intended to put businesses on an even playing field"); Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984) (stating that a state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.").

[20] *Hood*, at 539.

peace and safety of the Union."[21] And the Court supports the undue-burden doctrine by pointing to a need for "national uniformity" in some regulatory areas.[22]

To a lesser extent, the Supreme Court has interpreted the dormant Commerce Clause to protect out-of-state political interests that are not represented in the regulating state's political process.[23] This "representation reinforcement" justification for the dormant Commerce Clause was endorsed by John Hart Ely, among others.[24]

The standards and tests used to strike the balance between state autonomy and federal and national interests have evolved over time, but modern doctrine distinguishes between tax and non-tax regulations and recognizes two types of dormant Commerce Clause violations involving non-tax regulations: facial discrimination and undue burdens.[25] Facially discriminatory laws overtly treat cross-border commerce worse than comparable domestic commerce, and such discrimination receives strict scrutiny.[26] For example, in *Tennessee Wine*, its most recent pronouncement on the dormant Commerce Clause, the Supreme Court struck down a regulation that prohibited a corporation from operating a liquor store within Tennessee unless all of the corporation's officers, directors, and shareholders had resided within that state for two years.[27] *Tennessee Wine* was an easy case because it overtly distinguished between residents of Tennessee and nonresidents of Tennessee. Although some commentators criticize

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[21] *Hood*, at 533 (quoting JOSEPH STORY, THE CONSTITUTION).

[22] Cite (from Part II.B, infra)

[23] *See e.g., Southern Pacific* fullcite, at 768, n. 2 ("the Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"); Hood, at 539 ("every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any").

[24] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 83 (1980) (describing the dormant Commerce Clause as needed "to protect the politically powerless"). Tushnet, *supra* note ___, at ___; Eule, *supra* note ___, at 441. *See also id.* at 435 (calling the free-trade interpretation of the dormant Commerce Clause an "historical vestige," and asserting that a more appropriate federalism goal was representation reinforcement).

[25] *Wynne*, 135 S. Ct. at 1794 (stating that the dormant Commerce Clause doctrine prohibits "States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval"); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 86 (1987) (noting that "as the volume and complexity of commerce and regulation have grown in this country, the Court has articulated a variety of tests"). *See generally* Denning, *Reconstructing*, *supra* note ___ (giving the doctrine's history).

[26] Hughes v. Oklahoma, 441 U.S. 322 (1979) ("facial discrimination invokes the strictest scrutiny"). For a rare case finding an exception to the virtual *per se* rule of invalidity of discrimination see Maine v. Taylor, 477 U.S. 131 (1986) (state could exclude possibly diseased baitfish).

[27] Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

facial discrimination doctrine,[28] nearly all accept it as either consistent with our overall federal structure and the vision of the Constitution's founders, or applicable as a manner of precedent, or both.[29]

A state law that does not facially discriminate may nevertheless violate the dormant Commerce Clause by imposing an "undue burden" on interstate commerce.[30] For the better part of a century, undue-burdens analysis has involved judicial balancing.[31] The modern description of this balancing derives from *Pike v. Bruce Church*:

> 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.[32]

Ultimately, judges have the same goals when they apply discrimination analysis and undue-burden analysis, namely, to balance federal and national interests against state interests. But whereas discriminatory regulations rarely survive dormant Commerce Clause analysis, courts regularly uphold statutes against claims that they unduly burden interstate commerce.[33] To put it mildly, the Supreme Court has not always been clear about why it permitted or precluded particular "even-handed" regulations under its undue-burdens standard, generating significant criticism.[34]

B. Criticisms of Dormant Commerce Clause Doctrine

This Subpart reviews criticisms of the dormant Commerce Clause. Although many have argued that the dormant Commerce

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[28] *See* McGreal, *supra* note ___ (arguing that courts should not strike even discriminatory state laws in areas where in-state and out-of-state commerce do not compete).

[29] Direct Marketing Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) ("to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it even as they suggest it might find a more textually comfortable home in other constitutional provisions").

[30] Pike v. Bruce Church, 397 U.S. 137, 152 (1970).

[31] *See* Denning, *Reconstructing*, *supra* note ___, at 443-448 (tracing balancing back to 1938).

[32] *Pike*, at 142 (internal citations omitted).

[33] *See infra* Part ____ for examples.

[34] X-ref

Clause lacks a sufficient textual or prudential basis,[35] those criticisms are beyond the scope of this Article. Given that a solid majority of the sitting justices appear to hew to dormant Commerce Clause doctrine, we direct our inquiry to improvement rather than abolition.[36] Thus, we focus on criticism lodged by those who, although they accept the doctrine in principle, argue that its approach or subdoctrines are confusing or ungrounded.

1. Arbitrary Distinctions

A persistent frustration with the dormant Commerce Clause is that seemingly similar cases garner sharply different outcomes, leaving the impression that the Court's dormant Commerce Clause analysis is, in Justice Scalia's terms, "ad hocery."[37] Although discrimination against interstate commerce has a clear intuitive meaning, the same cannot be said of undue burdens on interstate commerce. For example, in one case, the Supreme Court held that a state that imposed more stringent train-length limits than did neighboring states unduly burdened interstate commerce, but in another, it held that a state that imposed more stringent truck weights limits than did neighboring states did not.[38]

2. Unjustified Tax Exceptionalism

One type of seemingly arbitrary distinction warrants lengthier treatment. A large portion of the Supreme Court's dormant Commerce Clause docket has been tax cases, and the Supreme Court long has garnered criticism for analyzing tax cases differently from non-tax cases.[39]

Whereas the Court divides non-tax cases into those involving discrimination and those involving undue burdens, the Supreme Court analyzes taxes under a four-prong test announced in *Complete Auto Transit v. Brady*.[40] Under *Complete Auto*, a state tax must: (i) apply only to taxpayers with a substantial nexus to the taxing state; (ii) be fairly apportioned; (iii) not discriminate; and (iv) be fairly related to the services provided by the state.[41]

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[35] X-ref

[36] X-ref

[37] Comptroller of the Treasury of Maryland v. Wynne*,* 575 U.S. 542, 574 (2015) (Scalia, J., concurring). Id. (referring to a "bestiary of ad hoc tests and ad hoc exceptions" which is the consequence of a "lack of governing principle" in the "negative Commerce Clause").

[38] Compare Southern Pacific with Barnwell

[39] *See, e,g.,* Thimmesch, *supra* note ___, at 378 (the "current tax/nontax distinction in the Court's dormant Commerce Clause doctrine is formalistic, unjustifiable, and harmful").

[40] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[41] *Complete Auto*, at 280.

Almost from the beginning, the fourth prong of the *Complete Auto* test was of limited significance.[42] The third prong subsumes the second; that is, unfair apportionment is just a specific kind of discrimination against cross-border commerce.[43] Thus, for some time, the decisive factors in tax cases have been substantial nexus and discrimination. Because dormant Commerce Clause nexus is a permissive standard that does not seem to differ much, if at all, from Due Process nexus,[44] discrimination is not only the most important factor for analysis of taxes under the dormant Commerce Clause, it is the only meaningful factor.[45] But commentators have criticized the Court for not subjecting taxes—like regulations—to undue-burden analysis.[46]

A second unique aspect of tax cases involves how the Supreme Court determines whether a tax discriminates against interstate commerce. Facially discriminatory taxes are rare, but they are easy to identify and resolve under strict scrutiny. For facially neutral tax rules, however, the Supreme Court identifies discrimination by applying the internal consistency test, under which the Court poses the following hypothetical: *If all 50 states imposed the challenged tax rule, would interstate commerce bear more tax than purely domestic commerce?*[47]

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[42] Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (observing that this factor had to be evaluated through the political process, not by courts). See also Thimmesch, Unified, *supra* note ___, at 359, n. 231 (describing widespread academic views that the prong does not represent a meaningful bar on state taxation).

[43] Apportionment is about how much of an interstate economic actor's income or activities are taxed by a state. Although it is not the only way for a state to discriminate, one way a state can discriminate against out-of-state commerce is by apportioning to itself the entitlement to tax too much income or activity of a multistate taxpayer. The Supreme Court uses the same test, the internal consistency test, for both prongs. For more on the overlap between these two prongs, see, e.g., Michael S. Knoll & Ruth Mason, *How the Massachusetts Supreme Judicial Court Should Interpret Wynne*, 78 State Tax Notes 921, 927–28 (2015).

[44] [add Wayfair quote about "not identical" ___] The nexus prong forbids only "a grossly distorted result." *Container*, at 170 (quoting Norfolk & Western R. Co. v. State Tax Comm'n, 390 U.S. 317, 326 (1968)). The Court occasionally elides apportionment inquires with nexus inquiries. *See, e.g.,* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165–66 (1983) (quoting Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 219–20 (1980) (identifying an inquiry into whether "there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State" as a necessary component of its inquiry into the challenged apportionment method used by California).

[45] *See, e.g.,* Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on Wynne and Direct Marketing Association*, 100 MINN. L. REV. 103, 114-15 (2016) (noting that after *Wynne*, the Court's approach in tax cases appears to focus only on discrimination, to the exclusion of the other *Complete Auto* factors). See also Thimmesch, *Unified*, *supra* note ___, at 367 (making similar points).

[46] *See, e.g.,* Thimmesch, *Unified*, *supra* note ___ at 354–55.

[47] *See*, *e.g.*, *Wynne*, 575 U.S. at 563 (tracing the formal origins of the internal consistency test to *Container* in 1983 and the informal origins to *J.D. Adams* in 1938).

If the answer is yes, then the tax is deemed to discriminate against cross-border commerce and consequently to violate the dormant Commerce Clause.[48] Thus, like facially discriminatory taxes, internally inconsistent taxes receive strict scrutiny.[49] Commentators have struggled to make sense of why the Supreme Court has elevated the internal consistency test to a constitutional mandate. For example, in the 1980s, when the Court formally established the internal consistency test, Walter Hellerstein observed that the test might "introduce confusion and uncertainty."[50] Likewise, Adam Thimmesch and Edward Zelinsky separately questioned the Supreme Court's strong endorsement of internal consistency as a test for tax discrimination in the 2015 case *Comptroller of Maryland v. Wynne*.[51]

3. Unbridled Judicial Discretion and Legislation

Perhaps the harshest criticism of the dormant Commerce Clause focuses on *Pike* balancing in undue-burden cases. Critics complain that *Pike* demands the Court to compare incommensurables, namely, the challenged state's regulatory interest and the broader national interest in interstate commerce.[52] Because it involves an open-ended inquiry, such balancing has been condemned for inviting judges to indulge their own preferences when deciding whether to uphold or a strike a state regulation.[53] Opponents of robust dormant Commerce Clause analysis argue that, when invalidating state regulations as undue burdens, courts inappropriately restrain state autonomy guaranteed by the Constitution, thereby limiting states' ability to govern flexibly, satisfy preferences, and act as laboratories of democracy.[54] Closely related to the last criticism is the complaint that courts inappropriately usurp a legislative role in dormant Commerce Clause cases. Critics,

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[48] *See* Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542, 562 (2015) (stating that the internal consistency test allows courts to identify tax schemes that inherently discriminate against interstate commerce, which schemes are "typically unconstitutional").

[49] Wynne

[50] Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 188 (1988).

[51] *See, e.g.,* Thimmesch, *supra* note ___, at 372–78 (2020) (arguing that the internal consistency test "might under-identify problematic state taxes" and "might also overidentify problematic state taxes"); Edward A. Zelinsky, *The Enigma of* Wynne, 7 WM. & MARY BUS. L. REV. 797, 808–12 (2016) (describing the Court's application of the internal consistency test in *Wynne* as "paradoxical[] and enigmatic[]", and as potentially a "radical transformation" of the precedent).

[52] See, e.g., CTS Corp v. Dynamics Corp of America, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in pat) ("[*Pike*] inquiry is ill suited to the judicial function and should be undertaken rarely if at all"); Regan, Protectionism, *supra* note ___, at 1103–04 ("there is no place for national interest balancing in movement-of-goods cases").

[53] Cites

[54] See, e.g., Regan, *supra* note ___, at ___; Eule, *supra* note ___, at ___

including on the Court, complain that balancing in undue-burdens cases invites judicial legislation.[55] Critics argue that choosing among competing state's laws is not a proper role for courts.[56]

C. The Importance of the Dormant Commerce Clause

The criticisms described in this Part have motivated commentators and jurists to advocate abolition or significant curtailment of dormant Commerce Clause review. Justice Thomas has argued that courts should not invalidate regulations under the dormant Commerce Clause at all.[57] Julian Eule argued for a scaled back version of review that would occur under the Privileges & Immunities Clause;[58] Mark Tushnet argued that state regulations should be invalidated under the dormant Commerce Clause only when the legislative process leading to their passage displayed dysfunction, as when the legislative process leading to their passage displayed dysfunction, as when narrow, well-organized in-state commercial interests seek rents at the expanse of, for example, consumers.[59] In a highly influential 1986 article, Donald Regan argued that courts should eschew *Pike* balancing altogether, limiting preclusion under the dormant Commerce Clause to cases of intentional discrimination.[60] More recently, Brannon Denning argued that courts should invalidate facially neutral regulations only when there is a risk of retaliation by other states.[61]

One response to these criticisms is to observe that, so far, they have not persuaded a majority of the Supreme Court to abandon the dormant Commerce Clause, because the doctrine still counts a solid six-justice majority in its favor.[62] Because it seems the dormant Commerce Clause will persist, it is worthwhile to explore whether the doctrine can be made clearer. Additionally, although Justice Thomas is unlikely ever to be convinced of the advisability or legitimacy of the doctrine, Justice Gorsuch has expressed a need to reconsider it in the

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[55] Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 618–19 (1997) (Thomas, J., dissenting) ("such balancing surely invites us, if not compels us, to function more as legislators than as judges"); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 354 (2008) (Souter, J.) (questioning whether courts are capable of *Pike* balancing).

[56] Cites

[57] The most prominent advocate of this view is Justice Thomas. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349, (2007) ("I would discard the Court's negative Commerce Clause jurisprudence."). *See also* Redish & Nugent, *supra* note at 573 (the Constitution provides "no textual basis" for dormant Commerce Clause doctrine).

[58] Eule cite ___

[59] Tushnet, *supra* note ___, at (arguing that review should focus on the political process).

[60] Regan, *Protectionist*, *supra* note ___.

[61] Denning, *Reconstructing*, *supra* note ___, at 477-78.

[62] X-ref

future, and we do not yet know the views of Justice Barrett.[63] The views of these newer justices will influence the future of the doctrine, and this Article in part aims to convince the new justices that it is possible to apply the doctrine in a legitimate, clear, and predictable way.

Setting aside that we need to understand the dormant Commerce Clause because the doctrine does not seem to be going away, there are affirmative reasons to resist its demise. Since the 1980s, commentators have argued that the dormant Commerce Clause was obsolete: because the states were by then thoroughly unified, doctrine's prohibition of nondiscrimination was not needed.[64] Of course, it is impossible to know to what extent that knowledge that discriminatory legislation will be challenged and struck down dissuades state legislators from enacting such regulations in the first place, and thus is it impossible to know to what extent the work of the dormant Commerce Clause performs is prescriptive and modifies legislative behavior. But even to this day, examples of dormant Commerce Clause challenges involving even facial discrimination against nonresidents or interstate commerce are not especially hard to find.[65] These examples suggest that there is still a vital role for the Supreme Court to play in protecting the national marketplace and preventing discrimination.

Moreover, although opponents of dormant Commerce Clause doctrine observe that Congress can fix discriminatory or unduly burdensome state regulations, there may be significant barriers to such congressional fixes. For example, the Supreme Court's most recent facial discrimination case involved a Tennessee statute that conditioned liquor licenses on state residence. It seems unlikely that a gridlocked Congress would intervene to legislate nationally uniform liquor-licensing standards to prevent such state discrimination. Thus, states may require "a multitude of minor regulations… [that] Congress amid its great concerns could never find time to consider and provide."[66] Other recent dormant Commerce Clause cases have

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[63] X-ref

[64] Eule

[65] See, e.g., Tennessee Wine fullcite (invaliding a facially discriminatory statute in 2019. Two prominent examples of blatantly unconstitutional taxes have been discussed recently. Knoll & Mason (something on Steiner from tax notes that also talks about the unconstitutional NY tax residence rule). The Covid pandemic has inspired a raft of such facially discriminatory rules. See, e.g., Vikram David Amar, *Why It is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, VERDICT (May 21, 2020), https://verdict.justia.com/2020/05/21/why-it-is-unconstitutional-for-state-bars-when-doling-out-bar-exam-seats-to-favor-in-state-law-schools (describing discrimination in administering the bar exam).

[66] The License Cases, 5 How. 504, 578, 579, 12 L.Ed. 256. See also Southern Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761, 767 (1945) ("the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress"). *See also* Brian Galle, *Kill* Quill*, Keep the*

involved disputes about whether states were favoring cable companies over satellite companies.[67] The presence of well-heeled interests on both sides of a discrimination issue likewise could stymie congressional intervention. Finally, partisan loyalties between federal and state legislators could prevent the federal-level fixes for state-level injuries.[68]

Moreover, in some cases, states discriminate even in the presence of uniform federal law, which means that, even if the Court narrowed dormant Commerce Clause doctrine, some of its work would merely be shifted to other judicial doctrines, such as preemption, or to other constitutional provisions, such as the Privileges and Immunities Clause.[69] To the extent that the issues discussed here were shifted to other doctrinal areas in the future, the analysis we present would be relevant there.

II. REFRAMING THE DORMANT COMMERCE CLAUSE

This Part addresses the core of dormant Commerce Clause review: burden analysis.[70] Commentators and jurists have long understood the dormant Commerce Clause to involve two types of cases: discrimination and undue burden.[71] Each type of case was paired to a method of judicial review—discrimination received strict scrutiny; undue burdens were analyzed under *Pike* balancing. But that framework does not accurately reflect the doctrine, which is significantly more nuanced. The disconnect between the actual doctrine and its description by the Supreme Court and commentators has bolstered claims that dormant Commerce Clause is confusing and incoherent and therefore should be severely cut back, if not eliminated outright. In this Part, we advocate for a conception of the doctrine that is more faithful to the actual cases; one that explicitly takes into

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Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation, 70 STAN. L. REV. ONLINE 158, 160, 166 (2018) (arguing that Congress lacks the appropriate incentives to address certain issues and that yielding resolution of such issues "wholly to Congress, with no judicial influence, seems unlikely to produce the best results.").

[67] Direct marketing v Brohl

[68] Cf. Larry Kramer ___ (arguing that party loyalty represents a political safeguard of federalism by preventing undue inference by either level in their other's affairs).

[69] See, e.g., Florida Lime, full cite . Eule or Justice Thomas or Denning arguing you can do it all under P&I. Denning has a good article on how P&I is insufficient to do all the dcc does. Please put that here as a but see… and you can probably get the other cites you need for this note from the denning)

[70] Because it seeks to address the core of the dormant Commerce Clause, this Article does not address a number of subdoctrines, including the market-participation doctrine, etc.

[71] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79 (1986) (describing discrimination and undue burden as the "two-tiered approach" to dormant Commerce Clause doctrine).

account the *type of burden* a regulation imposes on interstate commerce and acknowledges the balancing that undergirds all dormant Commerce Clause doctrine.

We begin by describing the phenomenon that is at the center of burden analysis. Not all regulations impose burdens that are relevant under the dormant Commerce Clause. Consider regulations that impose what we call symmetrical burdens. Symmetrical burdens fall evenly on in-state and interstate commerce. For example, although they undoubtedly impose costs and impact cross-border commerce, some local regulations—such as opening hours, minimum wage laws, and building codes—are symmetrical; compliance costs no more for outsiders than for insiders. Accordingly, any legitimate state interest should be enough to sustain symmetrical burdens under the dormant Commerce Clause.[72] But for dormant Commerce Clause cases, only what we will call *asymmetrical burdens* matter. Asymmetrical burdens impose a disproportionately greater burden on interstate commerce than on intrastate commerce, hence discouraging interstate commerce relative to intrastate commerce. Restraining such asymmetric effects is at the heart of the dormant Commerce Clause. But maintaining a level playing field that promotes the national market is not the only value that arises in dormant Commerce Clause cases. The regulating state's interest in its own regulation is also at issue, and when a regulation imposes an asymmetric burden, these interests are in conflict. Mediating between or balancing those interests is the focus of the Court's dormant Commerce Clause doctrine.

In this Subpart, we frame dormant Commerce Clause around two categories of asymmetrical burdens on interstate commerce: those arising from a single state's law and those arising from interactions among states' laws. Then we further divide those burdens into subcategories and pair each subcategory with the mode of judicial review that burden type receives. Thinking about burden type clarifies the doctrine—it allows us to not only see the logic hidden in the cases but, as we show in Part III, it allows us to provide answers to many of the doctrine's critics.

A. Single-State Burdens

We define as imposing a single-state burden a regulation that burdens interstate commerce more than in-state commerce *irrespective* of what other states do. Specifically, a regulation imposes a single-state burden when: (i) it would discourage cross-border commerce relative to in-state commerce assuming no other states regulated in the area, and (ii) it would discourage cross-border commerce relative to in-state commerce if all other states were to adopt *the same* regulation as the

[72] See, e.g., Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (rational-basis review).

challenged state. For example, a rule that nonresidents must pay twice the commercial registration fee owed by residents would impose a single-state burden. It would discourage cross-border commerce if no other state adopted it, and it would discourage interstate commerce if all other states adopted the same rule.

One can think of single-state burdens as being functionally equivalent in compliance-costs terms to an entry toll. If the state has an entry toll, that toll imposes an asymmetrical cost that is higher for cross-border commercial actors than for commercial actors operating wholly within the state, but the cost associated with that toll does not rise or fall depending on any other state's toll.

Within the larger category of single-state burdens, we identify several subcategories of burdens that receive strict scrutiny, including facially discriminatory regulations, facially discriminatory taxes, and internally inconsistent taxes. The Court subjects single-state burdens falling outside these more specific categories to *Pike* balancing. We also show that within *Pike* balancing, burdens are subject to differing levels of scrutiny depending on how likely the state is to be able to justify its regulation.

1. Facial Discrimination

We begin with *facial* discrimination. Cases involving facial discrimination have never been controversial or difficult for courts to resolve. Facial discrimination occurs when a state expressly treats cross-border commerce worse than in-state commerce.[73] Consider a state that charges a higher fee to dispose of imported than domestic waste. Such a fee structure would impose an asymmetric burden on interstate commerce, and this burden would be traceable solely to the challenged state's rule.[74] A total ban on waste importation would be worse; it would stop cross-border commerce in its tracks.

In addition to prohibitions on (or higher fees for) disposal of out-of-state waste,[75] the Supreme Court has considered a wide variety

[73] *See e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down a statute prohibiting the importation into New Jersey of waste originating outside the territory of the state); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (striking down a Mississippi statute prohibiting the sale of out-of-state milk in Mississippi unless its source state accepted the sale of Mississippi milk in its territory); Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down an Oklahoma law prohibiting the export of certain fish for sale outside the state); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (striking down a Florida statute prohibiting out-of-state banks, holding companies, and corporations from certain financial activities in Florida); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (striking down a Hawaii law exempting certain local liquors from a general liquor tax).

[74] [Caveat: a reciprocal subsidy.]

[75] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Fort Gratiot Sanitary Landfill, Inc., 504 U.S. 353 (1992) (ban on solid waste importation at the country level without pre-approval). Several cases involved higher fees for imported

of facially discriminatory state regulations, including prohibitions on operations by out-of-state commercial actors,[76] bans on direct shipment of alcohol by out-of-state producers,[77] and more.[78] Facially discriminatory rules are easy to identify, and courts subject them to strict scrutiny.[79] Few commentators dispute that courts act properly when they preclude facially discriminatory rules.[80] This outcome is appropriate because facially discriminatory rules are obviously protectionist, and, as the Court has regularly acknowledged, protectionism undermines the national interest in free trade. [81]

2. Discriminatory Taxes

Courts treat facially discriminatory taxes as they do discriminatory regulations; such taxes receive strict scrutiny and rarely, if ever, survive.[82] Again, courts have found such cases easy to resolve and commentators have widely accepted preclusion in such cases.

3. Internally Consistent Taxes

Next, we turn to facially neutral taxes. Earlier, we described the *Complete Auto* test, and we explained that although it nominally comprises four parts, most cases turn exclusively on discrimination.[83] *Complete Auto's* discrimination prong targets state taxes that disproportionately discourage cross-border commerce.[84] Such protectionist taxes take at least two forms. One is facial discriminatory

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waste. See, e.g., Chemical Waste Mgm't, Inc. v. Hunt, 504 U.S. 334 (1992); Oregon Waste Systems, Inc. v. Oregon, 511 U.S. 93 (1994).

[76] Tennessee Wine and Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019). Add the Florida bank case ____

[77] Granholm v. Heald, 544 U.S. 460 (2005) (striking a Michigan law allowing in-state, but not out-of-state, wineries to ship directly to Michigan customers).

[78] *See e.g.,* Sporhase v. Nebraska *ex rel.* Douglas 458 U.S. 941 (1982) (striking down a Nebraska statute prohibiting the withdrawal of Nebraska groundwater for transport across state lines unless the destination state granted reciprocal rights of withdrawal and transport into Nebraska); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (striking down a New Hampshire law prohibiting the export of hydroelectric power).

[79] Hughes v. Oklahoma, 441 U.S. 322 (1979) ("facial discrimination invokes the strictest scrutiny").

[80] *But see* Eule, *supra* note ___, at 428 (arguing for a "radically diminished role" for the dormant Commerce Clause).

[81] X-ref.

[82] Cites

[83] X-ref. As noted above, we do not consider nexus issues in this Article. Nexus under the dormant Commerce Clause is a permissive standard that is similar, if not identical, to Due Process nexus. See generally, Holderness, *supra* note ___. [Do we want to call out external consistency here?]

[84] Case cite. Michael S. Knoll & Ruth Mason*, The Economic Foundation of the Dormant Commerce Clause* , 103 VA. L. REV. 309, 318 (2017).

taxes, which, as noted, are easy to identify and resolve.[85] But protectionist taxes may also take the form of what the Supreme Court calls internally inconsistent taxes, which also receive strict scrutiny.

The Supreme Court's most recent internal consistency case was *Comptroller of the Treasury of Maryland v. Wynne* in 2015.[86] *Wynne* involved a tax assessed by Maryland at an equal rate—3.2 percent—on income that Maryland residents earned within Maryland and income they earned in other states. Departing from state custom, Maryland did not credit taxes that other states imposed on Marylanders when they earned income in those other states. Maryland also taxed non-Maryland residents when they earned income in Maryland, at 1.25 percent. The Wynnes were a Maryland couple that paid tax to other states on income they earned in those states and then also paid tax to Maryland on the same income (with no credit) because they resided in Maryland.[87] The Wynnes argued that the double tax they faced discouraged them from earning income from other states and therefore violated the dormant Commerce Clause.[88] In response, Maryland argued that because the rates it imposed on its residents' in-state and out-of-state income were the same, and moreover that they were higher than the rates Maryland assessed on nonresidents' Maryland income, its tax regime did not discriminate against interstate commerce.[89] And, indeed, Maryland's regime did not facially discriminate.

Since at least 1983, the Supreme Court has used the internal consistency test to evaluate facially neutral taxes under the dormant Commerce Clause.[90] Under the test, the Court asks, if all states applied the challenged state's tax rule, would cross-border income face more tax than purely in-state income?[91] This inquiry is designed to determine whether the state's tax rule is *structurally* deficient. If the same rule, when adopted by all the states, would lead inevitably to multiple taxation, that is a problem inherent—that is, internal—to the rule itself; it does not depend on interactions between the *different* rules of different states.

If every state adopted the Maryland tax regime applicable in *Wynne*, then interstate commerce would always pay more tax than in-

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[85] Oregon Waste Systems, Inc. v. Oregon, 511 U.S. 93, ___ (1994) (describing facially discriminatory laws as subject to a "virtually per se rule of invalidity").

[86] See Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542 (2015). We simplified the facts of this case in a manner that does not affect the analysis here.

[87] *Wynne,* 546-47.

[88] *Wynne,* 545.

[89] *Wynne,* 566.

[90] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). *See also*, *Wynne*, at 1801 (tracing the internal consistency test back further, to 1938).

[91] *Container*, at 169 (1983) (a state's apportionment rule is internally consistent when "if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed").

state commerce.[92] Specifically, cross-border commerce would always pay 4.45 percent. The first element of this 4.45 percent would be Maryland's 3.2 percent tax on Marylanders' income from other states. The other element of the 4.45 percent would be the tax assessed by the source state on the income that Marylanders earned there. Under the hypothetical posed by the internal consistency test, the source state tax would be 1.25 percent; the same rate that Maryland would assess against Maryland nonresidents if they earned income in Maryland. The sum of the two taxes is 4.45 percent, and, consistently with the Maryland regime under examination, no tax credits would be available to relieve the resulting double taxation. In contrast with interstate income, which would always pay 4.45 percent, in-state income would always pay only 3.2 percent, the rate Maryland charged on its residents' in-state income. Maryland's regime was therefore internally inconsistent.[93]

As we have shown in prior work, internally inconsistent taxes disproportionately discourage cross-border commerce—even when other states do not tax—and so in the Court's language they operate economically equivalently to tariffs.[94] The Maryland regime, thus, had a clear protectionist effect. The Supreme Court specifically confirmed in *Wynne* that it used the internal consistency test because that test revealed the protectionism hidden in Maryland's otherwise facially neutral tax regime.[95] Given this protectionist effect, the *Wynne* Court made the legal determination that Maryland discriminated against interstate commerce in violation of the dormant Commerce Clause, even though its regime was facially neutral and no court in the case found Maryland to have protectionist intent.[96] In endorsing internal consistency as the principal test for discrimination (or, equivalently, protectionism) in tax cases, the Supreme Court cited our academic

[92] In the actual case, the taxes assessed by Maryland were more complicated; we simplified for expositional clarity.

[93] Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 564 (2015).

[94] Although we do not have space to rehearse this economics argument here, several academic papers have established that internally inconsistent taxes discriminate against cross-border commerce. *See*, *e.g.*, Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017); Lirette & Viard, *supra* note ___, at 506–08.

[95] *Wynne*, at 545 ("Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause." Id, at 565 ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff.").

[96] *Wynne,* at 545. *See also* Union Brokerage Co v. Jensen, 322 U.S. 202, 209 (noting that the "incidence of the particular state enactment must determine whether it transgressed the power left to the States").

work, an amicus brief we wrote in the case, and an amicus brief by a group of tax economists.[97]

Although prominent commentators expressed surprise at the decision in *Wynne*—and in particular the Court's commitment to internal consistency test,[98] that surprise to a large extent probably reflected that it was not yet common knowledge that the internal consistency test reliably identifies protectionist taxation. Although we cannot repeat here the analysis that shows that internally inconsistent taxes function economically equivalently to tariffs, it has been extensively documented by us and others, and the Supreme Court expressly accepted it in *Wynne*.[99] Thus, for facially neutral taxes, the internal consistency test provides a clear and easy-to-administer test for protectionism.

The internal consistency test generally represents the end of the inquiry for taxes, and the Court does not go on to consider whether internally consistent taxes otherwise impose undue burdens. Commentators have criticized this outcome, but as we explain in more detail in Part IV, internal consistency is the proper endpoint for dormant Commerce Clause analysis in tax cases.[100]

4. Other Single-State Burdens

Some commentators might advocate ending dormant Commerce Clause inquiries there. The problem with ending dormant Commerce Clause inquiry at internal consistency, however, is that it would prevent courts from considering many types of laws that impose asymmetrical burdens on interstate commerce.[101] That is, it would require courts to ignore facially neutral non-tax rules that have

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[97] See, e.g., *Wynne*, at 562, ___, ____. The tax economists' brief likewise relied on our academic work. See Brief of the Tax Economists as Amici Curiae in Support of Respondents, Comptroller of Md v. Wynne, 575 US _ (2015). *See also* Knoll & Mason, *Economic Foundation*, *supra* note (discussing the litigation and explaining why internally inconsistent taxes are protectionist).

[98] Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 364–65 (2020) (stating that the internal consistency test "can produce results that are surprising"); Zelinsky, *The Enigma of* Wynne, 7 WM. & MARY BUS. L. REV. 797, 810–12 (2016) (describing *Wynne*'s development of precedent as "dramatic," "paradoxical[] and enigmatic[]", and as potentially a "radical transformation"). *Cf.* Walter Hellerstein, *Deciphering the Court's Opinion in Wynne*, J. Tax'n, July 2015, at 9 (describing *Wynne*'s rejection of the principle that source-based taxes trump residence-based taxes as "perhaps the most specific—and surprising—aspect of *Wynne*").

[99] See citations in *supra* note ___. See also Lirette & Viard, *supra* note ___, at pincite.

[100] X-ref.

[101] The Court has already acknowledged that dormant Commerce Clause analysis cannot end with facial discrimination. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (acknowledging that review is not limited to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods").

protectionist effects, implicitly ranking states' parochial interests above the national interest in a smoothly functioning market free of discrimination against interstate commerce. As the Supreme Court put it, it "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[102] That courts have persisted in balancing, despite its subjectivity, is perhaps no surprise given that the most obvious alternative would be to uphold all facially neutral regulations, despite any asymmetric impact they may have on interstate commerce.

In this Subpart, we divide the remaining single-state cases—those involving facially neutral regulations—into subcategories, and we pair those subcategories to the appropriate level of judicial scrutiny—from strict to intermediate to rational basis. Focusing on modern jurisprudence, we identify subcategories including overt protectionism—which includes practices such as tying, price fixing, and price affirmation—and proxy discrimination, which includes the use by states of facially neutral classifications that closely correlate with interstate commerce (such as physical distance) to deny benefits to interstate commerce.[103]

a) Overt Protectionism

Many facially neutral rules have protectionist effects. For example, in *Pike v. Bruce Church*,[104] a cantaloupe grower challenged a regulation that required cantaloupes grown in Arizona to be packed there. The regulation involved "tying," a requirement that forces a commercial actor that conducts some commercial activity in a state to also conduct additional, related activity there. As the Supreme Court defined it, tying is the practice of "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."[105]

The cantaloupe grower in *Pike* argued that Arizona unconstitutionally limited its ability to use a packing facility it already owned in California.[106] The regulation challenged in *Pike* imposed an asymmetrical cost; it discouraged cross-border relative to purely in-state commerce because the regulation eliminated the opportunity for

[102] Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

[103] We do not, for example, discuss the old state-granted monopoly cases. *See, e.g.,* Gibbons v. Ogden, 22 U.S. 1 (1824) (steamboat monopoly); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851) (requirement to hire local pilots). Reviewing courts likely would regard these regulations as either facially discriminatory or facially neutral but overtly discriminatory, and courts would therefore strict scrutinize them. To the extent that courts regarded them as not overtly discriminatory, courts would analyze them as proxy discrimination, a topic we discuss in *infra* Part ___.

[104] *Pike*, 397 U.S. at 139.

[105] *Pike*, at 145.

[106] *Pike*, 397 U.S. at 138.

multistate producers to use their out-of-state packing facilities. The asymmetrical burden was also a single-state burden. Specifically, the cost to comply with Arizona's regulation did not depend on whether other states had the same rule. The Arizona rule, in effect, functioned as an entry toll.

The Supreme Court used balancing to resolve the case.[107] The Court analyzed the *burden* the state imposed on in-state growers versus interstate growers. Only the latter had to relinquish economies of scale that derived from using a single packing plant. The Court compared this asymmetrical burden to the state's claimed interest in the regulation, which was to ensure that the market understood that the grower's high-quality cantaloupes originated in Arizona.[108] The Supreme Court considered whether Arizona could achieve its local interest in a less burdensome fashion,[109] and it ultimately held that Arizona's interest, although legitimate, did not outweigh the burden the regulation imposed on interstate commerce.[110] Not every reader will be convinced by this balancing analysis, but that is the nature of balancing analysis; it is open-ended and subjective.[111] The Court, however, also went further.

Citing prior tying cases, the *Pike* Court declared that even when it pursued legitimate state interests, tying was "virtually per se illegal."[112] The *Pike* Court described in detail *Toomer v. Witsell*,[113] a 1948 case in which South Carolina required shrimpers licensed to fish off the state's coast to unload and pack their catch in South Carolina. The challenger was a multistate fisher that preferred to use its preexisting docking and warehousing facilities in Georgia.[114] Although neither *Toomer* nor *Pike* involved overt discrimination, they both involved plainly protectionist statutes. For example, the *Toomer* Court observed that an "inevitable concomitant" of the South Carolina tying statute was "to divert to South Carolina employment and business

[107] Pike v. Bruce Church, Inc., 397 U.S. 137, 142-3 (1970) (internal citations omitted). Interestingly, a quick way to measure this burden is by applying the internal consistency test to the *content* of the regulation, rather than to its jurisdictional basis. If all states required cantaloupes grown in the state also to be packed there, then multistate growers would incur duplicate costs (for example, to build packing plants in each state where they grow), while growers concentrated in a single state would not.

[108] Pike at pincite

[109] *Pike,* at 142.

[110] *Pike,* at 145.

[111] *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion - American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, ___ (2011) (reviewing, but ultimately rejecting, arguments that balancing is illegitimate or unsuited to the judicial function).

[112] *Pike*, at 145.

[113] Toomer v. Witsell, 334 U.S. 385 (1948).

[114] *Toomer*, at 388.

which might otherwise go to Georgia."[115] The Supreme Court held in both *Pike* and *Toomer* that the challenged statutes violated the dormant Commerce Clause.[116] The reason tying regulations receive close scrutiny is that their adverse effect on interstate commerce is direct and evident, and therefore difficult to overcome in the balancing analysis.

A unanimous Supreme Court struck down another overtly protectionist practice in *Baldwin v. Seelig*.[117] *Baldwin* involved a New York law that forbade the sale to consumers of milk bought outside New York, unless the dealer paid at least New York's statutory minimum price to the out-of-state producer.[118] Although the Court recognized that New York had the authority to control the sale price of milk between dealers and producers, both of which were in New York, it held that New York could not ban out-of-state milk that had been acquired more cheaply from being sold in New York. Emphasizing its protectionist function, the *Baldwin* Court likened the results of New York's rule to "customs duties," concluding that New York applied its rule for the "avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests."[119] Although *Baldwin* long pre-dated *Pike*, the Court considered, but rejected as speculative, New York's proffered state interest, which was that out-of-state producers that were not paid New York's minimum price would forgo sanitary precautions.[120]

The Supreme Court likewise has used balancing language to invalidate other facially neutral regulations that had clear protectionist effects, such as price fixing and price affirmation regulations.[121] These cases confirm, as others have observed, that *Pike* balancing is often a way for courts to root out state regulations that, although cast in facially neutral rules, are blatantly protectionist.[122] Such an approach also squarely addresses a concern at the heart of most dormant Commerce Clause analysis, namely, the need to avoid overtly protectionist state-level regulation that would undermine the national market.

b) Proxy Discrimination

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[115] *Toomer* at 403.

[116] *Toomer*, at 406; *Pike*, at 146.

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

[118] Baldwin at ___.

[119] *Baldwin*, at 527. *See id.* at 522 (describing New York as "guard[ing her farmers] against competition with the cheaper prices of Vermont")/

[120] *Baldwin*, at 530.

[121] Price-fixing statutes set minimum or maximum prices to be paid or charged. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (statute set minimum prices to be paid by milk dealers to New York milk producers). Price affirmation is the practice of requiring commercial actors to sell into a state at a price no higher than that charged in other states. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 575 (1986) (price affirmation). Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (price fixing).

[122] *See, e.g.,* Regan; Denning

The reviewing court faces a more difficult task when it confronts a facially neutral rule that is not overtly protectionist. Consider the practice of what might be called *proxy discrimination*, which involves using a facially neutral classification to discriminate against interstate commerce. In this section, we provide a few examples of cases in which a state used physical distance, product characteristics, or other proxies that closely correlated with interstate commerce to discriminate.

Decided in 1951, *Dean Milk* provides an example of what we would call proxy discrimination.[123] The city of Madison, Wisconsin banned the sale of milk in the city unless the milk was bottled within five miles of its central square. Although the ordinance did not overtly discriminate solely against interstate commerce—many Wisconsin dairy farmers were also disadvantaged, an Illinois milk distributor argued that the ordinance nevertheless violated the dormant Commerce Clause. Madison argued that the ordinance promoted "convenient, economical and efficient plant inspection."[124] The Supreme Court held that the ordinance had the "practical effect" of "exclude[ing] from distribution in Madison wholesome milk pasteurized in Illinois."[125] In this case, the proxy for interstate commerce was distance. By limiting milk sold in the city to milk bottled at a short distance from the city center, Madison—and by extension Wisconsin—discriminated against milk from other states.[126] Because the city had available to it "reasonable and nondiscriminatory alternatives"[127] to satisfy "its unquestioned power to protect the health and safety of its people," the Supreme Court held that the discrimination was not justified.[128] Such alternatives would have included a requirement that milk from points farther away be inspected to the same quality standards as those applicable in Madison.[129]

In 1963 in *Florida Lime and Avocado Growers, Inc. v. Paul,*[130] the state arguably used a characteristic of an out-of-state product to discriminate against it. California prohibited the shipment within California of avocados that did not meet a minimum fat threshold.[131] California defended the fat-content rule as needed to ensure ripeness, but Florida avocado growers complained that Florida avocado varietals were unlikely to reach the prescribed minimum fat content, even when

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[123] Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951).

[124] *Dean Milk*, at 352.

[125] *Dean Milk*, at 354.

[126] pincite

[127] *Dean Milk*, at 354.

[128] *Dean Milk*, at 354.

[129] *Dean Milk*, at 355 (noting that the city health inspector had suggested this option, which was based in a federal "model Milk Ordinance," to the city).

[130] *Cf.* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[131] *Florida Lime*, 373 U.S. at 133-34.

fully ripe according to federal standards.[132] The California rule effectively closed California to competition from Florida avocados, but it employed no facially discriminatory classification, and the Court found no discriminatory intent on the record before it.[133] *Florida Lime* posed a question of proxy discrimination: Did the fat-content rule, albeit facially neutral, operate to exclude out-of-state products? The Supreme Court remanded the case so that the "effect of the statute upon interstate commerce" could be determined.[134] In proxy discrimination cases, the parties produce evidence as to the impact of the regulation, and the Supreme Court typically has taken into account evidence of legislative intent to discriminate.[135]

In our final case, a claim of what we have been calling proxy discrimination failed. In in 1978 in *Exxon Corporation*,[136] Maine forbade petroleum producers and refiners from operating retail gas stations in the state. A group of companies subject to the ban argued that Maryland discriminated against interstate commerce because no Maryland-based companies were petroleum producers or refiners. These companies argued, and provided evidence, that Maryland's goal was to protect retailers from out-of-state competition.[137] The Court rebuffed this argument, concluding that the companies' argument amounted to a plea for deregulation—for free markets rather than free-trade.[138] Rather than promoting all manner of private competition, the Court emphasized that the dormant Commerce Clause only promotes level competition between insiders and outsiders.[139] The *Exxon* Court found no untoward impact on interstate commerce, noting that out-of-state companies that did not produce or refine petroleum were not required to divest from Maryland.[140] In contrast with the majority, Justice Blackmun would have found proxy discrimination. Justice Blackmun concluded that effect of the Maryland regulation was to "exclude a class of predominantly out-of-state gasoline retailers while

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[132] *Florida Lime*, 373 U.S. at 134-35.

[133] *Florida Lime*, 373 U.S. at 153.

[134] *Florida Lime*, 373 U.S. at 137. *See id.* at 154 (noting that the district court's evidentiary rulings had created confusion in the record).

[135] See *Florida Lime*, 373 U.S. at 154-55. On the question of how to prove legislative intent to discriminate against cross-border commerce, see Ruth Mason & Leopoldo Parada, *Company Size Matters*, 2019 BRIT. TAX. REV. 610 (2019) (discussing nationality discrimination effectuated through the use of facially neutral proxies, such as a company's size); see also Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. LAW REV. 1784 (2008) (giving history of judicial practices of evaluating legislative intent).

[136] Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

[137] Exxon (give a sense of the evidence, which was legis history and statements by legislators)

[138] *Exxon*, at 124.

[139] *Exxon*, at 126 ("the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce").

[140] *Exxon*, at 126.

providing protection from competition to a class … that is overwhelmingly composed of local businessmen."[141] He noted that 99% of the firms unaffected by the regulation were local, whereas 95% of those adversely affected were out-of-state firms.[142] He also cited statements of legislators and statements at public hearing that supported that the Maryland was enacted for protectionist purposes.[143]

Justice Blackmun acknowledged that determining whether facially neutral regulation discriminates in effect is a question of degree. In his view, "unconstitutional discrimination exists" when "the burden is significant, when it falls on the most numerous and effective group of out-of-state competitors, when a similar burden does not fall on all the class protected in-state, and when the state cannot justify the resulting disparity by showing that it's legislative interests cannot be vindicated by more evenhanded regulation."[144] To us, this is an accurate description of the standard in proxy discrimination cases. These cases turn on their facts, and they require balancing. As part of this balancing, courts in proxy discrimination cases regularly consider intent; they also consider whether the state could obtain its objective via less discriminatory means. At bottom, however, there is no easy resolution for proxy discrimination cases, which must be resolved on a case-by-case basis. Moreover, because that evaluation is to some extent subjective, such cases will inevitably generate controversy. The alternative to balancing in proxy discrimination cases, however, would be to forbid discrimination when forthright but not when ingenious.[145]

c) Other Cases

Outside of cases involving overt or proxy discrimination, judicial analysis will depend on the obviousness of the protectionist effect and the strength of the state's underlying interest. The presence of multiple state interests makes cases harder to evaluate, especially when the state has both protectionist and non-protectionist interests at stake. For example, in 1949 in *H.P. Hood & Sons*, the Supreme Court precluded New York from denying an out-of-state milk buyer a license to operate a milk depot. The Court held that the "avowed purpose" of the denial of the license was to "aid local economic interests."[146] If the Court was right in this determination, and the state had no other legitimate interest in *Hood*, then its decision to preclude would be easy—the case would essentially receive strict scrutiny. But four

[141] *Exxon,* at 138 (Blackmun, J., dissenting).

[142] *Exxon*, at 138.

[143] *Exxon*, at 140-45.

[144] *Exxon*, at 148.

[145] Best & Co. v. Maxwell, 311 U.S., 454, 455 (1940) ("the commerce clause forbids discrimination, whether forthright or ingenious"). For more on the difficulties raised by proxy discrimination, see Ruth Mason & Leopoldo Parada, *Company Size Matters*, 2019 BRIT. TAX REV. 610 (2019).

[146] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 530-31 (1949).

dissenters in the case identified an additional or alternative state interest in the case, namely New York's interest in reducing additional competition, regardless of whether it came from out-of-state or in-state interests.[147] Thus, *Pike* balancing requires proper identification of the state interest at stake in the case.

Finally, we note that single-state cases that involve none of facial discrimination, internally inconsistent taxes, or facially neutral rules that are either overtly protectionist or that are protectionist as applied receive only rational basis review.[148]

5. Understanding Single-State Cases

In concluding our analysis of single-state burdens, we make two observations.

First, even though single-state cases receive different levels of scrutiny—from strict to rational basis—depending on the obviousness of their protectionism, they all can be understood to involve balancing. Under strict scrutiny for facially discriminatory regulations and internally inconsistent taxes, the state needs a significant interest to outweigh the clear protectionist impact on interstate commerce. The same is true when, as in *Toomer* and *Pike*, the state imposes a regulation that, although facially neutral, is overtly protectionist. Other discrimination cases work on a sliding scale; the closer correlation between interstate commerce and the classification used by the state, the closer the scrutiny. Cases evincing no protectionist intent or effect receive rational-basis review, which essentially compares no asymmetrical burden on interstate commerce to the state's interest, which, in turn, need only be legitimate.

Second, it is never necessary for the Court to consider other states' regulations in single-state cases. By definition, a single-state burden is one that arises from only one state's law. Actions (or inactions) by other states do nothing to increase or decrease the costs on interstate commerce imposed by single-state burdens, and so it would be illogical for the Supreme Court to consider any other state's law in a single-state case.[149]

B. Interaction Burdens

We now consider interaction burdens. The defining feature of an interaction burden is that the presence or absence of similar regulation by *other states* affects the cost to comply with the first

[147] Because a state's interest in ensuring its residents a steady supply of wholesome milk is so strong, the Supreme Court has accepted stringent regulation of the milk industry, including price controls. Hood pincite

[148] See e.g., river boat slot machines case. s

[149] The sole exception among all the cases discussed in this Subpart was the principal dissent in *Wynne*, which, in our view, erroneously considered the taxes of other states. Knoll & Mason VTR at pincite (showing this mathematically)

state's rule. A regulation imposes an interaction burden if: (i) it would discourage cross-border commerce relative to in-state commerce if no other state regulated in the area, but (ii) it would *not* discourage cross-border commerce relative to in-state commerce if all other states adopted the same regulation as the challenged state. Put simply, interaction burdens arise from *mismatches* among states' regulations.

In this Subpart, we show that interaction cases raise unique concerns. Specifically, identifying and evaluating the burden they impose on interstate commerce requires consideration of *other states'* rules. When states' regulations interact, the cost to comply with a state's regulation can vary from zero (if the state's regulation is in no dimension stricter than or incompatible with other states' regulations) to infinite (if the state's rule is mutually exclusive with other states' rules). Thus, in some cases, compliance will be cheap; in others it could be so high that it stops cross-border commerce in its tracks. Moreover, the cost of such regulatory diversity is not immediately observable or calculable simply by examining the laws as they are written. Determining the magnitude of any disruptive effect requires, in addition to knowledge of the law, knowledge of the goods and services produced by different firms as well as knowledge, possibly deep knowledge, of the marketplace, including competing products, production techniques, marketing practices, and consumer perceptions. Moreover, the costs from interaction burdens can change over time, especially as states enact new regulations and revise old regulations, and as those affected by the regulations adjust their practices.

In this Subpart, we show how the Court's approach differs in interaction cases and single-state cases. The cases we examine fall into a few regulatory areas, including interstate transportation, product packaging, and tax. But interaction cases are in no way limited to these topics.[150]

1. [Interstate Transportation Cases]

a) [Barnwell]

The Supreme Court over the years has considered many interaction cases involving interstate transportation. For example, in 1938, in *State Highway Department v. Barnwell Bros.*,[151] South Carolina adopted truck weight and width limits that were stricter than those of neighboring states. Challengers argued that South Carolina's rule unconstitutionally burdened interstate commerce. Although the regulation imposed no asymmetrical single-state burden, it imposed an interaction burden because heavier and wider trucks that were

[150] We identify some modern regulatory interactions ripe for constitutional challenge. X-ref

[151] South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177 (1938).

permitted in other states could not enter South Carolina.[152] Thus, the asymmetric burden in *Barnwell* arose from regulatory diversity. Interaction burdens are always asymmetrical; because they arise from the application of two or more states' rules, they never affect purely in-state commerce.

South Carolina argued that it needed strict limits to protect its roads from wear. Even though the district court found that the limits were an unreasonable means to preserve highways, and that the limits conferred no safety advantage,[153] and even though the Supreme Court acknowledged that the vast majority of interstate trucking exceeded the South Carolina limits and therefore would be shut out of South Carolina,[154] the Supreme Court nevertheless held that state highways were of particularly local concern, and if uniform regulation of such highways were needed, Congress, not the Court, should impose it.[155] Expressly rejecting judicial balancing[156] to resolve "nondiscriminatory"[157] burdens, the Court applied rational-basis review.[158] The need for national uniformity in highway regulations played no role in *Barnwell*; indeed, the Court observed that precluding North Carolina's rule would be tantamount to "forc[ing] the states to conform to standards which Congress might, but has not, adopted."[159]

b) [Southern Pacific]

Decided seven years later, *Southern Pacific v. Arizona*[160] sharply contrasts with *Barnwell*. In *Southern Pacific*, the Court considered Arizona's facially neutral regulation that, for safety

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[152] Single-state burdens persist regardless of other states' rules. Although the regulation in *Barnwell* imposes a single-state burden, that burden is not asymmetrical because it applies to both in-state and cross-border traffic. In contrast, interaction burdens are contingent on other states' regulations; for instance, they disappear when other states have the same rule.

[153] *Barnwell Bros., Inc.*, 303 U.S. at 183.

[154] *Barnwell Bros., Inc.*, 303 U.S. at 182.

[155] *Barnwell Bros., Inc.*, 303 U.S. at 190 (burdens arising from conflicts may require "legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, [and] curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce"). Id. ("courts do not sit as Legislatures").

[156] *Barnwell Bros., Inc.*, 303 U.S. at 191-2 (the constitutionality of such highway regulation "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").

[157] *Barnwell Bros., Inc.*, 303 U.S. at 190.

[158] *Barnwell*, at 189 ("so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority"). Id at 192 (applying rational basis review in the absence of any finding of discrimination). See also Sproles v. Binford, 286 U.S. 374 (1932).

[159] *Barnwell*, at 187.

[160] Southern Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761 (1945).

reasons, placed upper bounds on the lengths of both passenger and freight trains. Neighboring states had less restrictive train-length standards, so challengers complained that the Arizona rule inhibited interstate commerce by requiring interstate train operators to remove cars at the border.[161] This is an interaction burden because if all states adopted Arizona's truck length rules, no trains would have to make adjustments at the border.[162] The *Southern Pacific* Court specifically identified the relevant burden as one associated with state regulatory diversity, and the Court noted that such diversity "impair[ed]" the "uniformity of efficient railroad operation."[163] Moreover, the Court singled out Arizona's practice as restrictive compared to the rules of other states, because at the time it was "standard practice" to use more train cars than the Arizona law permitted.[164] Thus, by *Southern Pacific*, the Court seemed to have abandoned its view in *Barnwell* that "the fact that many states have adopted a different standard is not persuasive."[165] Instead, the *Southern Pacific* Court measured the burden of the challenged regulation *by reference to* what happened in other states—including states that had no train-length limits at all.

Although what the *Southern Pacific* Court placed in the balance was different from what we saw in the single-state cases that applied *Pike*, the *Southern Pacific* Court did employ balancing. It framed the relevant legal question as whether Arizona's proffered justification for the law—which was to promote safety—outweighed "the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect."[166] Thus, it was not the *absolute* effect of the Arizona rule on interstate commerce that mattered, but rather its effect *relative* to rules (or lack thereof) imposed in other states. The Court concluded that the "slight and dubious advantage"[167] offered by length limitations could not justify Arizona's burden on interstate commerce. If a train-length limit were to be imposed, the Court declared that it could *only* be done by uniform congressional legislation.[168]

c) [Bibb]

Decided in 1959, *Bibb v. Navajo Freight Lines*[169] involved a challenge to a state regulation requiring trucks to have curved mudflaps

[161] *Southern Pacific*, 325 U.S. 774.

[162] The train-length rule imposed no asymmetrical single-state burden on interstate commerce. If all other states had the same rule as Arizona, then trains crossing Arizona's border would face no burden that trucks traveling exclusively within Illinois did not also face.

[163] *Southern Pacific*, at 773.

[164] *Southern Pacific*, at 771.

[165] *Barnwell Bros., Inc.*, 303 U.S. at 195.

[166] *Southern Pacific*, at 775.

[167] *Southern Pacific*, at 779.

[168] *Southern Pacific*, at 781.

[169] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

at a time when all other states either permitted or required straight mudflaps.[170] The Supreme Court focused on the regulatory interaction, identifying the "the question [as] whether one State could prescribe standards for interstate carriers that would conflict with the standards of another State."[171] In the Court's view, Illinois' deviating rule imposed costs on interstate truckers, which had to stop at the border to weld on new mudflaps.[172] Thus, as in *Southern Pacific*, the measure of the asymmetric burden in *Bibb* was contingent on other states' regulations. The Court weighed this burden against Illinois' proffered safety interest, but, citing findings by the district court, the Supreme Court held that the safety advantages of curved over straight mudflaps were insufficient to overcome "need for national uniformity in the regulations for interstate travel"[173] The *Bibb* Court thus weighed contingent interests on both sides of the balance scale; it calculated the burden imposed by the Illinois regulation against a baseline of other states' regulations, and it weighed the state's safety interest against a baseline of other states' safety measures.[174]

d) [Kassel]

In the same vein, in 1981 in *Kassel v. Consolidated Freightways Corp.*,[175] Iowa limited trucks on its highways to 55 feet in length. Observing that Iowa's rule was "out of step"[176] with those of many other states, which permitted 65-foot trucks on their highways, the Supreme Court measured the burden imposed by the Iowa rule against a baseline consisting of other states' preexisting regulations. Specifically, the Court regarded Iowa as causing interstate trucking to incur added costs of switching to smaller trucks or detouring around Iowa.[177] Iowa defended its rule on safety grounds, but in weighing the state's concern, the Court conducted a relative, not absolute, inquiry: it compared the safety of Iowa's 55-foot rule to other states' 65-foot rules, and, citing the trial court's findings, determined that the comparative safety benefit was "illusory."[178]

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[170] *Bibb*, at 521-22.

[171] *Bibb*, 359 U.S. at 526.

[172] Bibb, welding ___

[173] *Bibb*, at 527. *Id* at 530.

[174] This is a somewhat different approach than in Southern Pacific, where the Supreme Court accepted the district court's approach, which was to compare the safety gains of Arizona's rule to the absence of regulation. Southern Pacific at 777. That approach was appropriate in Southern Pacific because Arizona was the first to regulate train length.

[175] Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 696-99 (1981).

[176] *Kassel*, at 671.

[177] *Kassel*, at 667.

[178] *Kassel,* at 671.

2. [Product Packaging]

a) [Hunt]

As with interstate transportation, the Supreme Court also has considered several cases involving diversity in product regulation. For example, in the 1977 case *Hunt v. Washington Apple*,[179] North Carolina had a rule that required apple shipping containers to bear only either federal quality gradings or no grading at all; such containers could not bear other state grades.[180] North Carolina's requirement was "unique in the 50 States,"[181] and specifically, it was different from grading standards applicable in Washington that, because they were highly differentiated, conferred a marketplace advantage on Washington apples.[182] As in the other interaction cases, in *Hunt*, the Court understood and measured the burden North Carolina imposed on interstate commerce using a baseline that consisted of other states' preexisting regulations. For example, the *Hunt* Court noted that the North Carolina rule would require Washington growers to either repack their apples or "obliterate printed labels on containers shipped to North Carolina."[183]

As part of its balancing analysis in *Hunt*, the Court also rejected North Carolina's justification for the regulation, which North Carolina argued was to protect consumers from confusion.[184] In addition to concluding that the regulation would not succeed at its stated goal, the Court essentially held that North Carolina deliberately devised its regulatory mismatch to discriminate against Washington apples.[185] In this sense, *Hunt* resembles the proxy discrimination cases we surveyed earlier.[186] Although North Carolina did not single out a feature inherent to out-of-state products (such as their fat content or the physical place they were packaged), the state nevertheless imposed disproportionate costs on out-of-state products by targeting labels that were required under a competing origin state's regime. In the process, North Carolina deprived those out-of-state products of marketplace advantages conferred by their origin state's labeling regime. Thus, unlike in *Southern Pacific* or *Bibb*, *Hunt* turned on discriminatory intent rather

[179] Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352 (1977).

[180] *Hunt*, 432 U.S. at 352.

[181] *Hunt*, 432 U.S. at 337.

[182] Note on facts

[183] *Hunt*, 432 U.S. at 338.

[184] Cite (with EP)

[185] *Hunt*, at 351 ("Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers").

[186] *Hunt*, at 350-1 ("the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them"). *Id.* at 352 (the challenged regulations "discriminatory impact on interstate commerce was not an unintended byproduct").

than a perceived need for nationally uniform regulation. On the contrary, the *Hunt* Court held that North Carolina could not regulate away a competitive advantage conferred by another state's different regulatory regime.

b) [Clover Leaf]

In contrast, in another packaging case, the Supreme Court was unconvinced that protectionism motivated a state's divergent rule. In *Minnesota v. Clover Leaf Creamery Co.*,[187] Minnesota banned the sale of milk in plastic jugs, which challengers argued disproportionately burdened out-of-state dairies and out-of-state plastics manufacturers, thereby advantaging in-state dairies and in-state woodpulp manufacturers. The Court held that the regulation was "nondiscriminatory" and that the burden on interstate commerce imposed by the Minnesota's regulation was small relative to the state's environmental interest in banning plastic jugs.[188]

3. [Tax: Moorman]

Our final area of analysis concerns taxation. The definition of income for state tax purposes generally does not generate interaction effects because the states use harmonized rules; specifically, they borrow the federal tax base.[189] But conflicts arise when states divide income among themselves. For example, states use formulas to calculate the portion of the company's income that is taxable in each state; those formulas account for the relative presence in the state of the company's factors of production, such as payroll, property, and sales. In *Moorman*, a corporate taxpayer complained that it suffered unconstitutional double taxation when Iowa used a single-factor-sales formula at a time when all other states used a uniform three-factor formula.[190]

Although the *Moorman* Court acknowledged that different tax-apportionment formulas could lead to double taxation, the Court concluded that responsibility for the resulting burden was not attributable solely to Iowa. Rather, because the burden arose from a regulatory interaction, multiple states were responsible for it.[191] Because the Constitution is "neutral with respect to the content of any uniform rule," however, the Court reasoned that avoiding the burden would have required "the prevalent practice [to] be endorsed as the

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[187] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[188] *Clover Leaf* at ___

[189] Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013).

[190] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 283 (1978) (44 out of 45 states with income taxes used the three-factor formula).

[191] *Moorman*, at 227 ("we could not accept appellant's argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense").

constitutional rule."[192] But such an endorsement, reasoned the Court, would have involved "extensive judicial lawmaking."[193] Although the Court conceded that there may be "an overriding national interest in uniformity" in taxation, it disagreed that any uniform rule could be selected by the Supreme Court. Instead, it was to Congress, "and not this Court, that the Constitution has committed such policy decisions."[194]

Although the *Moorman* Court did not rely on *Barnwell*, the reasoning in the two cases is similar in the sense that the Court would not attribute the burden arising from a regulatory interaction to the challenged state alone (even when the challenged state had an outlier rule), and the Court demurred in imposing a nationally uniform rule. Interestingly, two of *Moorman's* dissenters cited *Bibb* to argue that the Supreme Court should have eliminated the interaction burden by precluding Iowa's outlier rule.[195]

4. [include corp cases?]

5. Understanding Interaction Cases

Like some single-state cases, some interaction cases are about overt protectionism, as when North Carolina manufactured a regulatory mismatch with protectionist intent and effect in *Hunt*. When interaction cases involve such overt or intentional protectionism, they are easy to dispose of because they implicate the most uncontroversial function performed by the dormant Commerce Clause—that it precludes overt or intentional protectionist state regulation.[196]

But when the Court does not decide interaction cases on such a basis,[197] it cycles between two distinctly different approaches.

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[192] *Moorman*, at 279.

[193] *Moorman*, at 278.

[194] *Moorman*, at 280. Similarly, in refusing to require that South Carolina conform its truck weight and width requirements, *Barnwell* Court reasoned that the construction of and demands made on the highways of various states were not uniform, and that South Carolina "being free to exercise its own judgment, is not bound by that of other Legislatures." *Barnwell Bros., Inc.*, 303 U.S. at 195. Dissenting from the decision in *Southern Pacific* to preclude Arizona's train-length limits, Justice Black described the majority as act as "a super-legislature." *Southern Pacific*, 325 U.S. at 788 (Black, J., dissenting). In his view, by deciding that the burden Arizona's safety regulation imposed on interstate commence was too high, the majority had essentially decided that "money costs outweigh human values," a judgment he thought better left to legislatures. *Southern Pacific*, at 794 (Black, J., dissenting).

[195] *Moorman*, at 295-6 (Powell, J., dissenting).

[196] Gorsuch quote.

[197] Many commentators have observed that interaction cases have involved protectionist intent or impact that the Court should have considered (but didn't). Some have argued that although the Court in interaction cases professed to reject

Interaction cases frequently split the Court, and under one view, reflected in the majority decisions in *Barnwell* in 1938 and *Moorman* in 1978,[198] it is not appropriate for the Supreme Court to eliminate interaction burdens, no matter how adverse their impact on interstate commerce. Although justices favoring this view acknowledge that regulatory diversity may impose significant costs on interstate commerce, they understand our constitutional order to accommodate the exercise by states of regulatory autonomy, even if it leads to inefficient diversity. Should such diversity become too burdensome, under this view, the states could harmonize their own rules, or Congress could affirmatively prescribe a nationwide rule. Courts, in contrast, do not possess such legislative powers, and so these justices apply rational-basis review in interaction cases.[199]

Under the second view, which won the majority in *Southern Pacific* in 1945, *Bibb* in 1959, and *Kassel* in 1981,[200] regulatory diversity can become so burdensome that the dormant Commerce Clause precludes it. When justices with this view are in the majority, they apply balancing analysis to determine when the burden must be precluded. Justices favoring this view acknowledge that states sometimes enter into multistate compacts, and that Congress has occasionally overruled the courts by enacting harmonized rules replacing diverse state rules. But they do not believe that the dormant Commerce Clause gives a pass to regulatory standards and other types of regulations that have the effect of unduly burdening interstate commerce, even if they were not passed with that motive. Although such decisions may cite *Pike* as the controlling authority,[201] our analysis shows that balancing in interaction cases differs significantly from balancing in single-state cases.

C. Pike *Balancing versus* Bibb *Balancing*

Our doctrinal analysis reveals that when the Supreme Court conducts balancing in interaction cases, that balancing analysis proceeds differently from balancing in single-state cases.[202]

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claims of protectionism in interaction cases, evidence of protectionism or protectionist intent explains why the Court struck down particular cases. See, e.g., Regan. Our goal in this Article is to try to understand the cases as the Court actually professed to decide them.

[198] cites and splits and make sure the decision dates in the text are correct)

[199] Southern Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761, 767 (1945) ("When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority").

[200] cites and splits (and make sure the decision dates in the text are correct)

[201] Cites, if any

[202] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

First, in single-state cases, the Court measures the burden via a benchmark that is *internal* to the challenged state's law. It compares the burden the state imposes on in-state commercial actors to the burden *the same state* imposes on cross-border commercial actors. Thus, the laws of other states are irrelevant in single-state cases. In interaction cases, by contrast, the benchmark is *external*. The Court measures the burden imposed by a challenged state's regulation against a baseline consisting of *other states'* regulations. This is particularly the case when the challenged state's rule represents an outlier position.[203]

Second, the Supreme Court also measures state interest differently in single-state and interaction cases. Whereas in *single-state* cases, the Court considers the state's absolute regulatory interest, in interaction cases, the Court considers whether a deviating regulation provides any benefit over and above the benefit conferred by other states' preexisting regulations. Thus, the *Bibb* Court compared the safety of curved mudflaps not to the safety of no mudflaps, but rather to the safety of straight mudflaps. Likewise, in *Kassel*, the Court expected the state to show that 55-foot trucks were markedly safer than the 65-foot trucks permitted on other states' roads. Use of external benchmarks in interaction cases invites judicial consideration of *other states'* regulatory interests when evaluating a given state's law.[204]

Third, in interaction cases, but not single-state cases, the Court regularly considers whether there is a national interest in regulatory uniformity.[205] The notion that regulatory diversity could generate burdens on interstate commerce that outweigh the benefits of that diversity is no surprise; indeed, it constitutes a justification for federal regulatory power under the *affirmative* Commerce Clause. But balancing in interaction cases takes the dormant Commerce Clause one step further; it stands for the proposition that the dormant Commerce Clause can preclude state regulation that unduly burdens interstate commerce, even when that regulation does not discriminate facially or intentionally.

Thus, the most important difference between single-state and interaction cases concerns the necessity and appropriateness of judicial consideration of the laws of *other states* in evaluating both the burden on interstate commerce and the challenged state's regulatory interest. Put differently, what really separates the two is that single-state

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[203] Cites from Southern Pacific, bibb, kassel, hunt,

[204] For example, in Bibb, in responding to Illinois' contention that it could not "weigh[] the relative merits of the contour mudguard against any other kind of mudguard," the Court suggest that other states' rules were relevant, noting that other states' rules stood on "equal footing" to those of Illinois and "all are entitled to the same presumption of validity." *Bibb*, at 529. The Court went on to note that "the various state regulatory statutes are of equal dignity when measured against the Commerce Clause." *Id*.

[205] Cites from any/ all cases in II.B. Also from *MITE*

balancing uses internal benchmarks, whereas interaction balancing uses external benchmarks. Consideration of external benchmarks—of other states' laws—is neither necessary nor appropriate in single-state cases, whereas it informs both sides of the balancing analysis in interaction cases. To distinguish the Supreme Court's approach to balancing in interaction cases, we refer to it as *Bibb* balancing.

III. RESPONDING TO THE CRITICS

Armed with our newly clarified doctrine, in this Part, we seek to answer the critics of the dormant Commerce Clause. We show where their criticisms hit the mark, and where they miss. We also argue that much of the criticism of the dormant Commerce Clause can be traced to *Bibb*, rather than *Pike*, cases. Thus, if reform of dormant Commerce Clause is needed, it should focus more heavily on *Bibb* cases. Finally, we argue that criticisms of the Supreme Court's tax doctrines largely miss their mark because there are solid reasons for treating tax rules not only differently from non-tax regulations, but largely as courts have done.

A. Single-State Cases and the Critics

Our overall conclusion regarding single-state cases is that analysis in them is not arbitrary. They all involve balancing of the same interests. Specifically, the Supreme Court always uses an internal benchmark to measure the burden in single-state cases; it compares the burden a state imposes on in-state commerce to the burden the same state imposes on interstate commerce. This comparison is the right one when the goal is to determine whether the challenged rule is protectionist.[206] Likewise, the Supreme Court always uses an internal benchmark to evaluate the state interest; the Court in single-state cases never evaluates the challenged state's rule by reference to what other states do. Using internal benchmarks to identify both the burden and the state interest—might be referred to as "narrow *Pike*." Thus, the Supreme Court takes fundamentally the same approach in all single-state cases. Although commentators are correct that the Supreme Court applies standards with different names in different cases—strict scrutiny, internal consistency, balancing—this Subpart shows that these different tiers of scrutiny emerge logically from an overall approach rooted in balancing with internal benchmarks.

1. Normative Agreement & Internal Benchmarks

In this Subsection, we explain our view that the Supreme Court can be understood to apply internal-benchmark balancing in all single-

[206] Knoll & Mason, *Economic Foundation*, *supra* note ___, at pincite.

state cases.[207] Specifically, to determine the burden on interstate commerce in a single-state cases, the Supreme Court takes a consistent approach; it compares the burden the challenged state imposes on purely in-state commerce to the burden the same state imposes on interstate commerce. That comparison makes sense if the goal of dormant Commerce Clause inquiry in single-state cases is to identify protectionism and to balance such protectionist effects against the state's interest in its own regulation. In single-state cases, such protectionist effects arise from the operation of a single state's law alone.[208] Likewise, on the state-interest side of the scale, the Supreme Court uses a purely internal benchmark—it considers the state's absolute interest in the regulation, not its interest relative to that of other states.

Strict Scrutiny. Two kinds of single-state cases receive what is essentially strict scrutiny under the dormant Commerce Clause—facially discriminatory rules and internally inconsistent taxes. In each, strict scrutiny represents balancing using internal benchmarks.

Facially discriminatory rules are those in which the state draws a *de jure* distinction between in-state and interstate commercial activities, and it treats the latter worse. Thus, using a purely internal benchmark consisting of only the challenged state's law, the Court can identify the burden on interstate commerce. It is simply the difference in treatment between the two cases, and the burden is asymmetric. If it conducted overt balancing in cases involving facial discrimination, the Court would place this asymmetric burden on one side of the scale and then compare it to the state interest in the regulation.

To determine the state's interest, we need to know what counts—and what does not—as a proper state interest. The Supreme Court has held that the state must specifically justify *the discriminating provision*.[209] Because the regulating state almost never has a legitimate

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[207] *Cf.* Mathews & Stone Sweet, *supra* note ___, pincite (arguing that dormant Commerce Clause review is, in substance, proportionality analysis); Darien Shanske, *Proportionality as Hidden (but Emerging) Touchstone of American Federalism: Reflections on the Wayfair Decision*, 22 Chap. L. Rev. 73 (2019) (same). Our analysis differs from that of Mathews & Stone Sweet because we emphasize the Supreme Court's reliance in single-state cases on internal benchmarking. The insight about internal benchmarking is important because it supports the conclusion—often made in the literature—that dormant Commerce Clause cases are about protectionism. Later, we show that not all interaction cases are about protectionism, because the Supreme Court does not use an internal benchmarks in all interaction cases. As a single-state burden, protectionism would be shown using internal benchmarks. K&M VLR

[208] K&M VLR.

[209] *See, e.g.,* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res., 504 U.S. 353, 354 (1992) (state could not rely on safety improvements arising from whole regulatory regime, rather, the state had to prove that the provision deemed discriminatory *itself* "further[ed] health and safety concerns that cannot be adequately

interest in specifically singling out interstate commerce for worse treatment than in-state commerce, there is typically nothing to place on the side of the scale that would weigh the state's regulatory interest under balancing.[210] Thus, the burden on interstate commerce imposed by the regulation always outweighs the state's interest when the challenge involves a facially discriminatory rule. Facial discrimination cases thus represent what might be called an edge case of balancing. Because the state has no legitimate interest in discriminating, even a very small protectionist burden will tip the scales in favor of preclusion. Thus, the outcome of the balancing analysis in cases of facial discrimination is equivalent to strict scrutiny or even "per se invalid[ty]."[211]

The analysis for internally consistent taxes is the same as for facially discriminatory rules. Internal consistency measures the asymmetric burden a tax imposes on interstate commerce via an internal standard—it compares the challenged state's tax of purely in-state commerce to its tax of interstate commerce.[212] The appropriate conclusion—as an economics matter—to draw from the fact that a tax is internally inconsistent is that it is protectionist.[213] Against this protectionist burden, the Court would weigh the state's interest in the protectionist provision. Although states have compelling interests in raising revenue through taxes, they rarely or never have an interest in raising revenue via *internally inconsistent and therefore protectionist* taxes; states can always simply substitute an internally consistent tax

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served by nondiscriminatory alternatives"). For example, states have obvious and constitutionally recognized interests in regulating alcohol, but because they typically have no legitimate interest in discriminating in such regulation, facially discriminatory alcohol regulations generally do not survive dormant Commerce Clause review. See, e.g., Granholm v. Heald, 544 U.S. 460 (2005) (striking a Michigan law allowing in-state, but not out-of-state, wineries to ship directly to Michigan customers); Tennessee Wine and Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (striking down a strict period-of-residence requirement for liquor licenses on the grounds that it violated the dormant Commerce Clause).

[210] Rarely, states have managed to justify discrimination because interstate commerce was a specific source of harm, as when Maine banned imported baitfish because it could be diseased or invasive species. Maine v. Taylor, 477 U.S. 131 (1976).

[211] Oregon Waste Systems, Inc. v. Oregon, 511 U.S. 93, 100 (1994) (a "virtually per se rule of invalidity provides the proper legal standard here"); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 344 (1992) (in the face of discrimination, "invalidity under the Commerce Clause necessarily follows"); Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("facial discrimination invokes the strictest scrutiny"); City of Philadelphia v. New Jersey, 437 U.S. 617, 617 (1978) (the "crucial inquiry here must be directed to determining whether [the challenged statute] is basically an economic protectionist measure, and thus virtually *per se* invalid").

[212] Mason & Knoll, *Economic Foundation*, *supra* note ___; the Supreme Court accepted this argument in *Wynne*. Cite Wynne;

[213] Mason & Knoll, *Economic Foundation*, *supra* note ___; the Supreme Court accepted this argument in *Wynne*. Cite wynne.

for an internally inconsistent one. Thus, like facially discriminatory regulations, internally inconsistent taxes represent a kind of edge case in balancing. Although there is weight on the "burden" side of the scale, the "state interest" side is empty. When the justification for the tax is to raise revenue, the outcome of balancing in the cases involving internally inconsistent taxes is thus equivalent to strict scrutiny or even "per se invalid[ty]."[214]

Although the Supreme Court does not usually describe itself as balancing in cases involving facial discrimination or internally inconsistent taxes, if the Court did conduct outright balancing, the state would always fail it, an outcome identical to strict scrutiny. Thus, strict scrutiny in such cases can be understood as an instance of balancing, not a departure from it.

Rational-Basis Review. Facially neutral regulations that do not have protectionist effects represent the opposite phenomenon. If, using an internal benchmark consisting of the challenged state's own law, the Supreme Court identified no asymmetric burden on interstate commerce commerce—for example because the state treated in-state and interstate commerce the same—then there is no relevant burden to place on the "burden" side of the balancing scale. This scenario represents an edge case in which the state's regulation will prevail, provided the state has any legitimate interest in the underlying regulation. Thus, single-state cases evincing no protectionism (as measured by an internal benchmark) receive rational-basis review.

The analysis for internally *consistent* taxes is the same. Internally consistent taxes are not protectionist. Several papers have established that internally inconsistent taxes function economically as tariffs, and internally consistent taxes do not.[215] Although we do not have space to review that literature here, we have contributed to it, and the Supreme Court has accepted it.[216] Thus, there is simply no reason to subject internally consistent taxes to any further judicial inquiry—like narrow *Pike* balancing—meant to root out protectionist impacts.[217] Put differently, if the Court decided to subject internally consistent taxes to balancing, the *burden* side of the scale would have no weight, so any legitimate state interest in the tax would prevail.

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[214] Tax cite

[215] Mason & Knoll, *Economic Foundation*, *supra* note ___, at 347-52; Lirette & Viard, *supra* note ___, at 504-06.

[216] See *Wynne*, 135 S. Ct. at 1801-03. *Moorman Mfg. Co.*, 437 U.S. at 277-78 (upholding internally consistent apportionment formulas even if they lead to double taxation, or "some overlap" in tax). *Wynne*, 135 S. Ct. at 1803 (distinguishing between discriminatory double taxation, which is unconstitutional, and nondiscriminatory double taxation, which is not). *See id.* at 1804 (double taxation does not, by itself, violate the dormant Commerce Clause). *See also* Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014 (2012); Ruth Mason, *Made in America for European Tax: The Internal Consistency Test*, 49 B.C. L. REV. 1277 (2008).

[217] Equivalently, they impose no single-state burdens.

Non-Edge Cases. So far, we have encountered two types of edge cases. When the "state interest" side of the scale is empty—as it is for facially discriminatory rules and internally inconsistent taxes—the regulation always fails the balancing test, an outcome equivalent to strict scrutiny. When the "burden" side of the scale is empty—as it is for regulations that have no protectionist effect and for internally consistent taxes—the regulation always passes the balancing test, an outcome equivalent to rational-basis review. The difficult cases are in the middle, where both the "burden" and "state interest" sides of the scales contain weight. These are the cases in which the Supreme Court typically expressly describes itself as applying *Pike* balancing—these cases involve facially neutral regulations with protectionist effects. In such cases, the Court uses an internal benchmark to determine the burden on interstate commerce; it compares how the challenged state treats purely in-state commerce with how the state treats interstate commerce. When there is a difference, that difference represents the protectionist effect of the challenged regulation, and it also represents the burden side of narrow *Pike* analysis. Against this interest, the Court would weigh the state interest.

In some cases, the state will offer no legitimate interest to justify the burden. An example is *Hood*, in which New York justified its denial of a license to an out-of-state milk buyer on the grounds that granting the license would harm in-state commercial interests. A five-justice majority determined that New York's interest in the regulation, which the majority took to be pure protectionism, was "not sound."[218] When the Court completely rejects a state's proffered justification because the justification itself is protectionist, *Pike* balancing collapses to strict scrutiny.

In other cases, the outcome of *Pike* balancing is harder to predict, either because the protectionist impact is unclear, or because the state has a legitimate interest that supports the challenged regulation, or a combination of the two. In some cases, the protectionist impact of a challenged regulation will be clear. For example, physical distance from a town center is a very reliable proxy for in-state activities, and so a state regulation that treats economic activity that

[218] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949). *But see id.* at 565 (Frankfurter, J. dissenting) (arguing that the Majority had treated as an absolute an issue that required balancing). In our view, a proffered justification that specifically rests on protectionist goals is an edge case of balancing, one in which the state places an interest *that carries no weight* on its side of the scale. In Justice Frankfurter's view, New York had a legitimate, nonprotectonist justification for the license denial that the majority refused to consider, namely, it wanted to reduce competition of every kind, not specifically competition from out-of-state milk buyers. If a majority of the Court had agreed, the analysis in Hood would have looked less like struct scrutiny, and more like balancing, because it would not have been an edge case. Indeed, Justice Frankfurter would have remanded for greater fact-finding. *Hood*, at 574 (Frankfurter, J., dissenting).

takes place at a distance from the town center worse than economic activity that takes place close to the town center will clearly burden interstate commerce more than in-state commerce. But the fat content of an avocado is much more oblique as a proxy for in-state activities. To evaluate the correlation between the proxy classification and out-of-state status, the reviewing court may require evidence. Likewise, the reviewing court may consider evidence regarding the legislative purpose for the challenged regulation.

Non-edge cases demand judgment calls about whether or not state regulations have protectionist effects and whether or not, when such protectionist effects are present, they can be justified. Judicial hesitance to make these judgments may help explain why courts preclude regulations in non-edge cases only when they involve clear protectionism—such as when they involve facially neutral classifications that very closely correlate with interstate commerce.[219] It also may explain why intent seems to play such an important role in *Pike* cases; when the state evinces an intention to discriminate, it increases the reviewing court's confidence that the scale should tip against the state's interest. This difficulty of weighing a legitimate state interest against an interstate-commerce burden is precisely the source of dissatisfaction with *Pike* balancing.[220] Commentators will disagree about whether the Court made the right call. But notice that, even though it may use different terms to describe its analysis—rational-basis review, strict scrutiny, internal consistency, or *Pike* balancing—the Court follows the same approach across all single-state cases. Specifically, it weighs the burden of the regulation on interstate commerce (as determined against an internal benchmark consisting of the state's treatment of in-state commerce) against the state's justification for that regulation. Although one may disagree with the outcome of such analysis in a particular case, the approach is not arbitrary.

2. Protectionist Intent vs. Protectionist Impact

In his seminal article, Donald Regan argued that the Supreme Court never really engages in balancing dormant Commerce Clause decisions, rather, it merely inquires into whether the challenged state

[219] Many justices and judges have expressed reservations about open-ended balancing in undue burden cases. *See, e.g.*, Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 696-99 (1981) (Rehnquist, J., dissenting); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 203 (Scalia, J., concurring).

[220] Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). *See also* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia, J. concurring in part) ("[*Pike*] inquiry is ill suited to the judicial function and should be undertaken rarely if at all"). Many jurists have expressed reservations about open-ended balancing in undue burden cases. *See, e.g.*, Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 696-99 (1981) (Rehnquist, J., dissenting); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 203 (Scalia, J., concurring).

had protectionist intent when enacting the challenged rule.[221] If protectionist intent was present, the Court precludes the rule; otherwise, it upholds it. Although we agree that protectionist intent is important, we should understand precisely how the Court uses it.

Protectionist intent is important for two reasons, each going to a distinct side of the *Pike* balance scale. First, presence of protectionist intent will lead parties and courts to search for a protectionist impact, and protectionist impact constitutes the "burden" side of the *Pike* balance. Second, protectionist intent undermines a state's claims that it has a legitimate interest in the challenged regulation, which goes to the "state interest" side of the *Pike* balance. Thus, presence of protectionist intent works on both sides of the scale to make it less likely for the reviewing court to uphold challenged regulation. Thus, while we agree with Regan about the importance of protectionist intent, we disagree that the Court does not conduct balancing analysis in dormant Commerce Clause cases. Rather than never conducting balancing analysis, we argue that in single-state cases the Supreme Court is best understood as *always* conducting balancing analysis, even in strict-scrutiny cases involving facial discrimination or internally inconsistent taxes.[222]

Moreover, in the forty years since Regan's seminal work, Supreme Court doctrine has made clear that protectionist intent is not the *sine qua non* of preclusion in dormant Commerce Clause cases. For example, Maryland had no protectionist intent in *Wynne*, which the Supreme Court decided on the basis of impact alone.[223] Likewise, although Part II.B. showed that the occasional interaction case, such as *Hunt*, may be decided on the basis of intentional protectionism, the Supreme Court cycles in interaction cases between *Bibb* balancing, which makes use of external benchmarking, and rational-basis review, which uses an internal benchmark. Although Regan considered tax and interstate transportation cases to be exceptions from his overall approach,[224] a more satisfying account of the doctrine would include those cases. Dividing the doctrine into single-state and interacting cases, as we have done, provides not only a more satisfying, but a more

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[221] See, e.g., Regan, *supra* note ___ (arguing that intentional discrimination is all that matters).

[222] *Cf.* Mathews and Stone Sweet, *supra* note ___ (arguing that dormant Commerce Clause involves proportionality analysis); Shanske, *supra* note ___ (same).

[223] The Supreme Court's decision in *Wynne* to preclude the tax as discriminatory, despite both its facial neutrality and lack of evidence of other legislative intent to discriminate, likewise suggests that effect matters even in the absence of intent. Wynne pincite Inversely, in *Clover Leaf*, the Court ignored the lower court's finding of discriminatory *intent*; the Supreme Court upheld the rule because it found no discriminatory *effect*. *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456. 476 (1981) (Powell, J., dissenting) (arguing that the trial court's finding should control). Most of the time, both intent and effect will be present.

[224] Note on why

comprehensive, account of the doctrine; one that harmonizes better not only with the outcomes of the cases, but also with what the Supreme Court itself claims to be doing in the cases. Thus, rather than looking for *hidden motives* on the part of the justices that explain the doctrine, we identified *hidden distinctions among the cases* that explain the differences in the Court's analysis in the various case and harmonize better with the Court's own explanations for its decisions.

B. Interaction Cases and the Critics

In this Subpart, we explain why interaction cases are far more susceptible to claims concerning arbitrariness and judicial lawmaking than are single-state cases. Thus, calls to reform or curtail dormant Commerce Clause review should focus on *Bibb*, rather than *Pike*, cases.

1. Normative Disagreement & Uncertain Benchmarks

In Subpart A, we noted that the Supreme Court approaches single-state cases from a consistent normative perspective, namely that the dormant Commerce Clause precludes states from enacting unjustified protectionist legislation. Although such protectionism may be easier or harder to identify given the particular facts of the case, and although whether any such protectionism can be justified involves a judgment call, there is no meaningful disagreement about the Supreme Court's normative approach in single-state cases.[225] But shared understandings about the appropriateness of judicial inquiry are absent when it comes to interaction cases. Fundamental disagreements among the justices as to whether the Supreme Court is competent to cabin *nondiscriminatory* regulatory diversity has caused the Court to cycle between two distinct approaches to resolving interaction cases—one that uses internal benchmarking, and one that uses external benchmarking.

The first approach essentially rejects the idea that regulatory interactions could serve as a basis for precluding legislation under the dormant Commerce Clause. Instead of analyzing the burden as an interaction burden, a judge or justice taking the first approach would limit themselves to analyzing any single-state burden the challenged regulation imposes. The judge would therefore analyze the burden only under what we have been calling narrow *Pike.* The judge would compare the burden the challenged law imposes on in-state commerce

[225] Direct Marketing Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) ("to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it even as they suggest it might find a more textually comfortable home in other constitutional provisions"). Even Justice Thomas agrees that nondiscrimination is a constitutional value; he advocates that it should be enforced under the Privileges and Immunities Clause, rather than the dormant Commerce Clause. Cite

to the burden the same challenged law imposes on interstate commerce. At no point would the judge consider the laws of any other states. For many interaction cases, the outcome of such a comparison would reveal no difference in treatment, and therefore no burden cognizable under the dormant Commerce Clause.

Consider the curved-mudflap rule in *Bibb*. Illinois applied that rule identically to trucks traveling in-state and interstate. Thus, on an internal-benchmark approach, the regulation in *Bibb* does not burden interstate commerce any more than in-state commerce. A judge interested *only* in single-state burdens—for example, a judge that determined that the dormant Commerce Clause precludes only discriminatory (that is protectionist) legislation—would find none in *Bibb*. Thus, the "burden" side of the scale would be empty, and the state could justify its mudflap rule with any legitimate state interest. As discussed above, this describes rational-basis review.

The other approach involves what we have been calling *Bibb* balancing. Instead of measuring the burden a regulation imposes on interstate commerce against a baseline consisting of the challenged state's treatment of purely in-state commerce, *Bibb* balancing involves *external* benchmarking. Specifically, under *Bibb* balancing, the reviewing court measures the burden the challenged state imposes on interstate commerce against a benchmark consisting of *other states'* preexisting regulations. The majority in *Bibb* undertook such external benchmarking. Thus, the Court measured the burden imposed by Illinois' curved mudflap rule as the cost to switch to curved mudflaps, given that other states already required or permitted straight ones. Whereas narrow *Pike* with an internal benchmark consisting of the challenged state's treatment of in-state commerce would reveal no burden, use of an external benchmark consisting of other states' rules (or lack of rules) reveals a burden on interstate commerce that the *Bibb* majority found significant.[226]

Moreover, under *Bibb* balancing, the reviewing court also uses an external benchmark to evaluate the "state interest" side of the scale. Rather than having an absolute interest in the challenged regulation, to justify an interaction burden, the challenged state must show that it had an interest that cannot be satisfied by the regulatory regimes already in place in other states. Thus, in *Bibb*, Illinois had to show not that curved mudflaps offered a safety advantage over no mudflaps, but rather that they offered a safety advantage over straight mudflaps.

Once the Supreme Court decides to intervene in a regulatory-conflict case—once it decides to apply *Bibb* balancing—the Court's path is relatively clear: the Court tends to impose the dominant

[226] Welding pincite, or something else appropriate.

regulatory standard unless the state has a "compelling"[227] interest in its deviating regulation.[228] As Justice Powell explained in his *Moorman* dissent that advocated to remove the interaction burden generated by Illinois' outlier tax apportionment formula, "there can be no rule of 26 states, of 35, or of 45."[229] But it is equally clear that consensus among the other states matters for *Bibb* balancing. What the Supreme Court does not do is engage in a searching inquiry to determine the *best* state to regulate a particular matter or to determine the best regulation. The *Bibb* Court noted that cases that call for courts to strike down interaction burdens would be "few in number,"[230] but it provided no other limiting criteria.

The arbitrariness in interaction cases, then, arises from two sources. One is similar to that in *Pike*: it is hard to predict the outcome of balancing analysis. But there is an additional source of uncertainty in interaction cases, which involves whether the Court will engage in *Bibb* balancing at all. Moreover, this latter source of uncertainty arises from normative disagreement; the justices fundamentally disagree as to the appropriate approach in such cases. As a result, the decisions in *Bibb* cases depend closely on the personal composition of the Court deciding them, leading to justified charges of arbitrariness. The one exception—where the outcome of interaction cases is easier to predict—may be cases that involve both interactions and intentional discrimination—including cases like *Hunt* in which the state intentionally created a mismatch with the goal of excluding products from other states.

2. Legislating by Remedy

Another important difference between single-state and interaction burdens—this one related to remedy—also shows that criticism of dormant Commerce Clause doctrine apply with more force to *Bibb* than narrow *Pike* cases. On the surface, the remedy in the two types of cases is the same, namely, preclusion. But whereas burdens in single-state cases can be remedied by, for example, equalizing the treatment of insiders and outsiders (as in the case of facial

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[227] *Bibb*, 359 U.S. at 530. *See also id*. at 529 (noting that the "conflict between the Arkansas regulation and the Illinois regulation also suggests that this regulation of mudguards is not one of those matters 'admitting of diversity of treatment, according to the special requirements of local conditions'" (quoting Sproles v. Binford,286 U.S. 374, 390 (1932)).

[228] Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co., 382 U.S. 423 (1966) (upholding a regulation requiring a certain number and expertise of train staff for safety reasons); Chicago R.I. & P. Ry. Co. v. State of Ark., 219 U.S. 453 (1911) (upholding regulation requiring a minimum number of brakemen for safety reasons); New York, N.H. & H.R. Co. v. New York, 165 U.S. 628 (1897) (upholding safety regulations governing the operation of stoves in passenger cars).

[229] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 296 (1978) (Powell, J., dissenting).

[230] *Bibb*, 359 U.S. at 529.

discrimination), resolving interaction burdens requires eliminating regulatory diversity through forbearance, harmonization, or coordination. Specifically, a state could repeal the offending rule and replace it with no rule (forbearance), or it could adopt the same substantive rule as that used by other states (harmonization), or all states could adopt a rule that would govern which states' rule will apply nationwide in cases of conflict (coordination or mutual recognition). Thus, more so than in decisions in single-state cases, Supreme Court preclusion in *Bibb* cases may, as a practical matter, prescribe regulation.

It is worthwhile to understand precisely how courts "legislate" in interaction cases. When—as in *Bibb* or *Kassel*—two states' laws interact, and the Supreme Court precludes one state's law, it implicitly endorses the other state's law as a broader (perhaps national) rule. After *Bibb*, it was clear that Illinois could not bar out-of-state trucks with straight mudflaps; after *Kassel*, it was clear that Iowa had to permit 65-foot trucks licensed by other states. That *preclusion as a remedy* in interaction cases therefore amounts not merely to a requirement (as in discrimination cases) that a state must apply its own rule—whatever its content—equally to in-state and cross-border commerce, but rather that the state that must conform its regulation to regulations imposed by sister states. Such a requirement is tantamount to judicial endorsement of a particular substantive rule. This effect prompted Chief Justice Rehnquist in his *Kassel* dissent to criticize the plurality for "essentially… compelling Iowa to yield to the policy choices of neighboring States."[231]

The legislative effect of preclusion in interaction cases can be contrasted with that in single-state cases. Judicial preclusion of single-state burdens creates no implicit preference for any particular substantive rule. For example, resolving facial discrimination requires what trade law calls "national treatment,"[232] and what the Supreme Court calls "leveling;" the offending state must equalize the treatment of insiders and outsiders; it can level the outsiders up or the insiders down.[233] What a state need not do in a discrimination case, however, is take any note of how another state regulates or condition the amendment of its own unconstitutional law upon the treatment of the

[231] *Kassel*, 450 U.S. at 699 (Rehnquist, C.J., dissenting) (arguing that only Congress could prescribe a uniform national rule).

[232] *See, e.g.,* ANDREW D. MITCHELL, DAVID HEATON & CAROLINE HENCKELS, NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW 2 (2016) (noting that most international investment agreements require states to accord national treatment, treating foreign investors and investments no less favorably than similarly situated domestic investors and investments).

[233] Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1806 (2015).

same matter by sister states.[234] Likewise, infinite remedies are available to "cure" internal inconsistency in a tax.[235]

This brings us to our last type of single-state case, which involves facially neutral rules that have protectionist effects. Because the challenged state may have a legitimate interest at stake in in such a case, its outcome will be far less predictable than in a case involving a facially discriminatory rule or an internally inconsistent tax. The subjectivity and unpredictability of *Pike* cases are legitimate grounds for criticism. That said, at least *Pike* cases do not involve legislative remedies the way *Bibb* cases do. A major import of *Pike* analysis is that states cannot enact tying, price fixing, or rules that discriminate against out-of-state commerce. But preclusion in *Pike* cases does not require the state to conform its regulation with that of its neighbors. Indeed, remedies in single-state cases *never* depend on the regulations (or lack thereof) of other states.

Remedies in single-state cases prevent protectionism without raising serious issues of judicial legislation. Thus, complaints about judicial legislation in the dormant Commerce Clause apply far more forcefully to *Bibb* than *Pike* cases.

3. California, Delaware, and Balkans Effects

This Subpart explains that because dormant Commerce Clause cases arise from litigation brought by private actors, *Bibb* balancing will lead, over time to deregulation as stricter regulations become subject to challenge. *Bibb* balancing therefore will tend to enhance the Delaware Effect, a trend towards deregulation arising from regulatory competition among states. On the other hand, a necessary consequence of eschewing *Bibb* balancing would be to induce the California Effect, under which regulations in a state with strict regulations have impacts outside the state as multistate commercial actors formulate products to meet the rules of the strictest state. In the alternative, rather than expanding the influence of strict rules, eschewing *Bibb* balancing could induce what we call the Balkans Effects, which is segmentation of the market. These regulatory spillover effects are a special feature of *Bibb*, rather than narrow *Pike*, cases.

There are many reasons judges may be reluctant to engage in *Bibb* balancing. Imposing national uniformity through the dormant Commerce Clause seems to stand at odds with the federal interest in legal pluralism, and it could undermine the federalism values said to emerge from legal pluralism, such as improved policy through learning and experimentation, greater liberty and, as people move (or threaten

[234] *Cf.* Knoll & Mason, *supra* note 79, at 349-353 (explaining why this is so in tax cases).

[235] *Wynne*, 135 S.Ct. at 1806 ("But while Maryland could cure the problem with its current system by granting a credit for taxes paid to other States, we do not foreclose the possibility that it could comply with the Commerce Clause in some other way.").

to move) to escape overly burdensome regimes, more effective political representation and preference satisfaction as people assemble into state-level majorities that reflect their policy preferences, and more efficient delivery of public goods and services.[236] Justices refusing to engage in *Bibb* balancing have touched on these federalism concerns, as when the *Barnwell* Court noted a requirement of nationally uniformity would lead entrenched standards.[237] Although conceding that national uniformity may be important for efficient markets, justices declining to preclude nondiscriminatory rules under the dormant Commerce Clause have argued that the Constitution reserves the power to achieve such uniformity to the states acting collectively or to Congress, not the courts.[238]

Depending on who wins the majority, sometimes the Court tolerates interactions as a necessary adjunct of state autonomy, one curable only by the states through coordination or by Congress through federal legislative preemption. Other times, the Court analyzes interaction cases under *Bibb* balancing and that seeks to eliminate overly burdensome regulatory diversity. It is worth recognizing, however, that both alternatives open to reviewing courts—intervention or nonintervention, or equivalently, preclusion or upholding—involve regulatory spillovers. The question is not whether interaction cases involve regulatory spillovers—they inevitably do. Rather, proper analysis of such cases requires us to recognize that preclusion and upholding lead to different *kinds* of regulatory spillovers; preclusion tends to endorse the Delaware Effect while upholding tends to endorse the California and Balkans Effects.

Justices who apply *Bibb* balancing take the more interventionist approach—they invalidate interactions even when they are nondiscriminatory. In an interaction case, preclusion would tend to expand the regulatory reach of a state with laxer regulation. The reason for this has to do with how dormant Commerce Clause cases arise. They are brought by private parties that regard themselves as suffering undue burdens on their interstate commerce, and such interstate commercial actors are less likely to complain about lax regulations than about strict regulations. Second, and for the same reason, preclusion in interaction cases will tend to implicitly extend the regulatory reach of the state from which the commerce *originated*.[239] Commercial actors active in only one state comply with that state's regime and have no

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[236] *See, e.g.,* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1648-52 (2006) (reviewing federalism values).

[237] *Barnwell*, at 196. [Rehnquist dissent, Moorman majority, etc]

[238] See, e.g., Mooman at ___

[239] This is so because interstate commercial actors will tend to challenge states with stricter laws. Destination states are also more likely to be challenged for creating interaction burdens, since commercial actors do not experience the burden of interacting regulations until then enter another state with different laws.

dormant Commerce Clause claims. It is only when they enter a new state, and become subject to new and different regulation, that dormant Commerce Clause claims arise. Even though the source of the burden is that the two states' rules differ—and logically both states are responsible for that difference—because the commercial actor would have already invested in complying with its origin-state's rule, it will tend to initiate dormant Commerce Clause claims against destination states. Thus, intervention into regulatory conflicts—via judicial preclusion—will tend to endorse *laxer rules* and *origin rules* over stricter rules and destination rules.

For example, when the *Kassel* Court precluded Iowa's truck-length limit, it implicitly approved the spillover of other states' longer limits onto Iowa's roads. In time, a default of preclusion in interaction cases would tend to magnify the effect of the laxest state's rules, as commercial actors gain access to that state's (now portable) rule and then sue states with stricter rules. It thus would encourage a regulatory race to the bottom, sometimes called the Delaware Effect.[240]

In contrast, a non-interventionist approach tends to magnify the impact of stricter rules, which typically will apply in the *destination* state. The influence of the stricter state will expand because out-of-state producers that enter the strict state will have to comply with that state's regulation, even if it differs from that of other states. Thus, when the Supreme Court in *Cloverleaf Creamery*[241] upheld Minnesota's ban on plastic jugs for selling milk, it implicitly endorsed that rule's spillover effects outside the state. Specifically, the Court's holding would (if only marginally) encourage interstate milk sellers to change their behaviors outside of Minnesota (including their packaging practices) to comply with Minnesota's rules. This phenomenon has been called the California Effect; it tends to magnify the impact of the strictest rule because commercial actors that formulate only a single product for the entire national market will comply with the rules of the strictest state.[242]

Consider the Court's reasoning in *Southern Pacific*.[243] Because Arizona's train-length rule was stricter than that of other states, the Supreme Court recognized that "the practical effect of such regulation was to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up" trains at the border.[244] The Court noted that to avoid such border stops, the interstate

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[240] The name Delaware Effect nods to Delaware's success in corporate charter competition. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5 (1995). Much has been written on charter competition. See, e.g., ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 47 (1993).

[241] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[242] *See generally* VOGEL, *supra*.

[243] Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

[244] *Southern Pacific Co.*, 325 U.S. at 775.

carrier might "conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state."[245] Thus, the Arizona regulation had impacts outside of Arizona; in this case, the regulation displayed the California Effect, the tendency of stricter regulation to generate compliance effects outside of the regulating state's territory, and the Court expressly recognized this effect. But by precluding Arizona's rule, as it did in *Southern Pacific*, the Supreme Court enabled other states, those with laxer limits, to impose their own regulatory wishes on Arizona; it implicitly endorsed the Delaware Effect.

Thus, both the decision to uphold and the decision to preclude interacting regulations result in regulatory spillovers. Hence, the *Southern Pacific* Court could argue that prevention of "extraterritoriality" required the deviating Arizona train-length limit to give way,[246] whereas the *Barnwell* Court just as sincerely could argue that prevention of "extraterritorial effects" required the deviating South Carolina truck-weight limit to be *upheld*, lest other states' laws impermissibly intrude on South Carolina.[247]

There is also a second effect from nonintervention, that is, from upholding interacting regulations. Not all regulations can be ordinally ranked based on their strictness, such as the truck-length requirement at issue in *Kassel.* Consider, as an example, the mudguard regulation at issue in *Bibb*. Illinois required curved mudguards; Arkansas, in contrast, required straight mudguards.[248] Neither rule was stricter; they conflicted such that that trucks travelling between Illinois and Arkansas would have to change their mudflaps. Yet, if the Illinois rule were upheld, then presumably so would be the Arkansas rule. The interaction burden would persist, and it would stifle interstate trucking by requiring border stops to change mudflaps. The chilling effect on interstate commerce from a proliferation of different rules could be called the Balkans Effect.[249] For example, after *Moorman*, the states went from a situation in which 44 out of 45 states with income taxes used the same apportionment formula to the situation that obtains

[245] *Southern Pacific Co.*, 325 U.S. at 773.

[246] *Southern Pacific Co.*, 325 U.S. at ___ (quote).

[247] *Barnwell*, at 196 ("The Legislature, being free to exercise its own judgment, is not bound by that of other Legislatures.").

[248] Bibb __

[249] Cite SCOTUS case that talks about how point of dormant Commerce Clause is to prevent "balkanization". [Jens Frankenreiter's recent paper on EU data privacy response suggests that some instances of what we are calling the Balkans Effect may be unobjectionable, as when a company can easily comply with the conflicting regs; these may be cases where the reg would not be an undue burden under Bibb.]

today, in which only a bare majority of the states use the same formula.[250]

These regulatory spillovers, and their inescapability by either precluding or upholding the regulation, are a special feature of interacting burdens. Thus, it is hard to say as a general matter how courts should rule if they thought that federalism generally, and the dormant Commerce Clause in particular, demanded decisions that minimized "extraterritorial" effects. Although the dormant Commerce Clause value of protecting and promoting interstate commerce does not favor either the California or Delaware effect relative to the other, it does include reining in the Balkans effect. Moreover, as described above, restraining the segmentation of markets is neither simple nor easy, and it requires courts to use external benchmarks, which leads some judges and commentators to argue that courts should leave regulatory conflicts in place. These critics argue that keeping courts out of the conflict will promote regulatory diversity and experimentation,[251] motivate resolution by state consensus or by Congress, and because dormant Commerce Clause cases tend to be brought against destination states, which typically may have more significant regulatory interests at stake than do origin states, support more intensive regulation.[252]

C. Tax Exceptionalism

Finally, we address criticism of the Supreme Court's dormant Commerce Clause doctrine in tax cases. Earlier, we noted that the Supreme Court's analysis in tax cases ends with the internal consistency test. The Court strikes down internally inconsistent taxes; it upholds internally consistent taxes. Some commentators criticize this approach as tax exceptionalism and urge the courts to conform analysis of tax cases with that of regulations cases, for example, by giving states a chance to justify internally inconsistent taxes or by subjecting internally consistent taxes to what we would call *Bibb* balancing.[253] We now explain what ought to happen in tax cases.

First, giving states a chance to justify internally inconsistent taxes is unnecessary.[254] The justification phase of any dormant Commerce Clause case includes a consideration of whether there was

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[250] I have a cite for this

[251] *See, e.g.,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (federalism values regulatory diversity on grounds of efficiency, pluralism, accountability, experimentation, and preservation of liberty).

[252] For example, in *Bibb*, Arkansas as the destination state would seem to have a stronger regulatory interest than the truck's origin state in the equipment the truck deploys on Arkansas' roads.

[253] X-ref

[254] *But see* Thimmesch, *supra* note ___, at 367 (arguing that the Court should apply *Pike* balancing to internally inconsistent taxes, rather than automatically invalidating them because such taxes "are not necessarily that burdensome. Others?

any less discriminatory means the state could use to achieve its legitimate interests.[255] As explained above, however, if the state's policy goal is to raise revenue, there is *always* available to that state a method to reach its goal in a manner that is not internally inconsistent. The state can always eschew an internally inconsistent and therefore protectionist tax in favor of an internally consistent one to reach the identical policy outcome, at least when the desired policy outcome is simply to raise a given amount of tax revenue.[256] Because states can raise revenue via taxes that are not protectionist, internally inconsistent taxes imposed for the purpose of raising revenue are never proportionate. As noted above, internally inconsistent taxes represent an edge case in which it is simply too hard for the state's regulatory interests to overcome the excess burden the challenged rule imposes on interstate commerce. Thus, a finding of internal inconsistency leads directly to the legal conclusion that the state violated the dormant Commerce Clause. Thus, there is no need, as some commentators have argued, to conduct any additional analytical steps in a case involving internally inconsistent taxes.[257]

Although commentators have for some time had a clear vision for how to measure the protectionist burden of internally inconsistent taxes,[258] prior commentators (including us) have missed *why* it so easy for courts to evaluate taxes under the dormant Commerce Clause, and why a finding that a tax fails internal consistency leads *directly* to a finding of a dormant Commerce Clause violation.[259] Application of

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[255] See, e.g., *Pike,* 152 (considering whether the local benefits "could be promoted as well with a lesser impact on interstate activities").

[256] In our amicus brief in *Wynne*, we noted that there were infinite ways for Maryland to correct the internal inconsistency of its tax regime, merely by adjusting its tax rates. See Knoll & Mason, *supra* note ___, at 345-47 (discussing and expanding on the remedy arguments in our amicus brief). Any of those fixes could be done in a revenue-neutral fashion.

[257] [cites]

[258] In *Wynne*, the internal consistency test revealed the excess burden on interstate commerce from the Maryland regime to be the difference between (a) the tax Maryland assessed on the in-state income of Maryland residents (3.2 percent) and the (b) sum of the tax Maryland assessed on the out-of-state income of Maryland residents (3.2 percent) and the tax Maryland imposed on nonresidents' in-state income (1.25 percent). It was thus the difference between 3.2 and 4.45, or 1.25 percent.

[259] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) (a "failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes from the interstate transaction"). *See also Wynne*, 135 S. Ct. at 1803 ("[T]he internal consistency test allows courts… to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes."). For the argument that internal consistency test can measure the *quantum* of additional burden on interstate commerce, see Knoll & Mason, *Economic Foundation*, *supra* note ___, at 323-36.

strict scrutiny to internally inconsistent taxes is not an unmotivated deviation from other doctrinal approaches; rather it is a straightforward application of balancing in a situation in which states will never be able to place weight on the legitimate-interest side of the scale.

Notice, however, that if the state's policy objective were broader than (or other than) raising revenue, proportionality analysis would not always favor precluding the tax. Non-revenue-raising taxes, such as Pigouvian taxes meant to regulate behavior,[260] would be more complicated to analyze under proportionality because there may not be a way for the state to achieve its policy goal via a method that is less burdensome of cross-border commerce. These types of taxes do not represent edge cases, and to resolve them, the Court would have to engage in more extensive balancing analysis.[261] In such cases, the state would have to show its interest; the state would have to articulate what behavior the tax was intended to incentivize.[262] That articulation would allow a court to evaluate the legitimacy of the state's purpose, how effective the tax likely would be in advancing that purpose, and the availability of other more narrowly tailored means to achieve that purpose.

Now that we have established that it would be redundant to subject internally *inconsistent* taxes to a justification inquiry, we can ask whether dormant Commerce Clause analysis should end with a finding that a tax is internally *consistent*, or whether courts must go on to consider whether internally consistent taxes can nevertheless impose impermissible interaction burdens. Again, as noted above, there is no need to subject internally *consistent* taxes to narrow *Pike* balancing because internally consistent taxes (even if they differ across states) do

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[260] An example would be alcohol taxes intended to decrease alcohol consumption.

[261] The difference between revenue-raising and regulatory taxes could retrospectively help rationalize the result in *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005). In that case, the Court upheld an annual flat tax on trucks making trips within Michigan, despite its internal consistency. Arguably, the challenged tax did not have primary purpose of raising revenue, but rather to cover Michigan's registration and truck inspection costs. The *Wynne* majority and dissent revisited *American Trucking*. The dissent proclaimed that *American Trucking* proved that the Court did not consistently require internal consistency of taxes. For its part, the majority claimed, wrongly, that the tax in *American Trucking* was not internally inconsistent. Neither the *American Trucking* Court nor the *Wynne* Court discussed the difference between regulatory and revenue-raising taxes, or why that difference would be important for dormant Commerce Clause analysis. Nor have academics satisfyingly distinguished *American Trucking*, despite devoting considerable attention to the case. Hellerstein. See also Thimmesch, *supra* note ___, at 376-78 (arguing that *American Trucking* calls into question internal consistency test for tax discrimination).

[262] Incentivizing behavior is a different interest from any benefit that would arise from how the revenue was spent.

not asymmetrically discourage cross-border commerce.[263] That is, they are not protectionist.

In contrast with narrow *Pike* cases, *Bibb* cases are not only about protectionism. *Bibb* cases pose the question of whether regulatory diversity can impose unconstitutional burdens on interstate commerce. Although state conformity with the federal tax base means that interaction issues tend not to arise for revenue-raising taxes, one could imagine a federal court declaring that, given other states' preexisting tax laws, a particular state's different tax laws created burdens for cross-border commerce that did not exist for purely in-state commerce.[264] In other words, perhaps asymmetric burdens could arise from tax diversity.

Moorman presented such a regulatory mismatch, and the facts were highly sympathetic to the taxpayer.[265] Nevertheless, a six-justice majority the Court refused to engage in *Bibb* balancing in *Moorman*,[266] perhaps because decisions about how to divide tax revenue among the states seemed a touchier issue for the Court than decisions about mudflap curvature or truck lengths. As noted, the Court has been inconsistent in its approach to *Bibb* cases—sometimes it applies *Bibb* balancing with external benchmarking, but sometimes it eschews balancing, as it did here. However, both the majority and the dissent in *Moorman* failed to recognize that the challenged Iowa tax apportionment rule was not protectionist—it did not disadvantage out-of-state competitors relative to in-state competitors.[267] To be sure, elimination of the wage and property factors, and thus exclusive reliance on the sales factor, encouraged corporations to invest in Iowa and to hire employees there, but it did not disadvantage out-of-state businesses relative to in-state businesses. Both out-of-state corporations and in-state corporations faced the same incremental tax

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[263] *X-ref*

[264] Although such a decision may seem far-fetched to those steeped in tax doctrine, it might seem most plausible if the combination of multiple states' taxes resulted in more than 100 percent of the income being taxed.

[265] *Moorman Mfg. Co.*, 437 U.S. at 269. In *Moorman*, an Illinois animal feed manufacturer sold Illinois manufactured feed to Iowa customers. The Iowa sales accounted for 20% of the Moorman's sales. Iowa's statute employed a "single-factor sales formula" for apportioning income for state income tax purposes, under which income from sales of tangible personal property attributable to business within the State was deemed to be in that proportion of the corporation's gross sales within the State to its total gross sales.

[266] *Moorman Mfg. Co.*, 437 U.S. at 277-78 (upholding internally consistent apportionment formulas even if they lead to double taxation, or "some overlap" in tax). *Wynne*, 135 S. Ct. at 1803 (distinguishing between discriminatory double taxation, which is unconstitutional, and nondiscriminatory double taxation, which is not). *See id.* at 1804 (double taxation does not, by itself, violate the dormant Commerce Clause).

[267] This can be verified by applying internal consistency test—it tells you whether the challenged tax is protectionist. Iowa's sales-only apportionment formula is internally consistent, and therefore not protectionist. See generally K&M, VLR.

on sales into Iowa. This is a special feature of taxes because they are assessed in money.

With non-tax regulations (or regulations related to tax), this analysis changes. For example, in *Wayfair* and its predecessors, *Bellas Hess* and *Quill*, the Supreme Court conducted what we would call *Bibb* balancing. In all three cases, the parties seeking to prevent the states from imposing tax-collection-and-remission obligations on remote sellers argued that such obligations were unreasonable not because consumers should not have to pay sales or use taxes when they buy from remote sellers, but rather because the burden on remote sellers of having to simultaneously comply with so many different and changing state and local sales and use tax regimes—with potentially severe civil and even criminal penalties for even innocent mistakes—would place them at an unconstitutional disadvantage relative to traditional brick-and-mortar operations with fixed (and hence in-state) locations and simpler compliance obligations.

Expressed using our terminology, out-of-state interests were arguing that state sales tax regulations imposed undue interaction burdens on them that should be prohibited. And that is how the Court treated the issue in both *Bellas Hess* and *Quill*, and each time the Court roughly balanced the state's interest in collecting sales and use taxes from remote sellers against the burden imposing such an obligation on those sellers would have on interstate commerce. Each time, the Court held that the states could not impose such a burden. That is *Bibb* balancing. But instead of endorsing a particular state's rule, the Court declared that no state could regulate in the particular area.[268]

The same issue came up in *Wayfair*. After overturning *Bellas Hess* and *Quill* and holding that states could force remote sellers to collect and remit sales taxes, the Court went on to consider whether the imposition of such taxes could result in undue burdens. The majority in *Wayfair* endorsed—in dicta—a multi-state compact, the Streamlined Sales and Use Tax Agreement (SSUTA), which simplifies and modernizes the collection and administration of sales taxes, as meeting the constitutional requirements for imposing a collection obligation. This is another example of *Bibb* balancing, but instead of selecting one state's rule over another state's rule, the Court instead endorsed a broad standard. Many commentators were surprised by the Court's undue-burden analysis in *Wayfair*.[269] They should not have been because the Court engaged in similar analysis in *Bellas Hess* and *Quill*.

Still other commentators applauded the discussion of undue burdens in *Wayfair* because they took it as a signal of the convergence of the Court's dormant commerce Clause doctrine as applied to tax and non-tax regulations. In our view, this interpretation misses a key distinction. The imposition of sales or use taxes on purchases involving

[268] Similar to So Pacific and the internal-affairs doctrine cases.
[269] Cites

remote sellers is not problematic, provided the tax rates are the same for in-state and remote sales. That is to say, there was no challenge to the state sales tax laws *as taxes*. Rather, the challenge was to the state sales tax laws as a series of diverse *regulations* that mandated compliance and imposed penalties for the failure to do so. As the supporters of the *Bellas Hess* and *Quill* precedents emphasized repeatedly, a plethora of diverse and constantly changing state and local sales tax rules had the potential to trip up remote sellers, and thus, they argued, threatened to chill sales by remote sellers if the states were free to tax remote sellers that had no physical in-state presence. The Court recognized this distinction, even though it held that states could tax remote sellers. Although the Court recognized that the issue had not been briefed, the last substantive paragraph in Justice Kennedy's opinion for the majority in *Wayfair* noted that there are several elements in the South Dakota law, which is consistent with the SSUTA, "that appear designed to prevent discrimination against or undue burdens upon interstate commerce."[270] Thus, without explicitly using our terminology, the Court largely followed our approach in *Wayfair* and most other tax cases, correctly intuiting how and why tax cases are different.

Thus, in our view, taxes already receive essentially the same analysis as do regulations. Where taxes are treated differently, those differences have good justifications. For example, because taxes are assessed in money, the internal consistency test accurately identifies both protectionist taxes and non-protectionist taxes.[271] Thus, tax cases do not require analysis beyond the internal consistency test.

In contrast, although tax-base conformity makes regulations interactions related to taxation less likely, when tax-compliance rules interact, the Court may or may not subject them to what we call *Bibb* balancing, depending on which justices are in the majority. This, too, is consistent with the Court's uneven approach in regulation cases. We may not approve of this approach, but it is not significantly different from what the Court does in other types of regulation cases.

IV. THE FUTURE OF *BIBB* BALANCING

Given that the Court has struggled for so long with the question of whether it is entitled to eliminate burdensome regulatory diversity, and if so how, we suggest practical ways for the Court to minimize the impact of cases in which it decided to apply *Bibb* balancing. These include deference to trial courts, narrow preclusion, and weak *stare decisis*. However, before addressing how U.S. law might make small changes to better address *Bibb* cases, we describe how many such cases are eliminated in other fora, specifically the European Union (EU) and

[270] cite
[271] K&M VLR

the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO). [This part to be developed.]

A. Mutual Recognition as an Alternative Approach

We can contrast the approach of the Supreme Court, which cycles between narrow *Pike* and *Bibb* balancing, with that of the Court of Justice of the European Union (CJEU), which uses conflicts-of-laws principles to resolve interaction cases. In 1979, the CJEU faced a case of regulatory diversity that presented an unusually severe restriction on interstate commerce. In *Cassis de Dijon*, [272] one of the most famous cases ever decided by the CJEU, France required fruit liqueurs to contain *at most 20 percent alcohol*, whereas Germany required such liqueurs to contain *at least 25 percent alcohol*. As a result, products manufactured to French specifications could not be sold in Germany, and vice versa. Because the EU treaties unsurprisingly provide no guidance as to the appropriate alcohol content of liqueur, it was not clear which state's rule should prevail.

Interpreting a treaty regime that—like the dormant Commerce Clause—assured both state regulatory autonomy and free movement of goods throughout the common market,[273] the CJEU fashioned the celebrated "mutual recognition" requirement, under which products that comply with the regulation of their *state of manufacture* are putatively free to circulate in all other EU states. [274] Mutual-recognition rules specify the jurisdictional basis—call it the jurisdictional hook—that will govern a particular type of regulation for the whole European Union. The state that possesses that jurisdictional hook is called the *origin state*, while all other EU states are *destination states* for that type of regulation. Mutual recognition combines a uniform jurisdictional hook with limited preclusion of destination states' rules. The crucial assumption upon which mutual recognition relies is a fundamental consonance between different states' policies that regulate the same subject matter.[275] The notion is that the French and German alcohol-content rules are both designed to protect consumers, and that any EU state should be able to rely on any other EU state's rules to achieve that underlying purpose, even if its rules differ in specification. Thus, if the destination state can point to an important state interest that is not

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[272] Case 120/78, Rewe-Zentral v Bundesmonopolverwaltung für Branntwein *(Cassis de Dijon*), ECLI:EU:C:1979:42. Although the literature on mutual recognition is very substantial, especially in Europe, as far as we know, no one has argued that preclusion or affirmation under the dormant Commerce Clause doctrine may be understood to implicitly endorse mutual-recognition rules. See, e.g., Mathews & Stone Sweet, *supra* note ___.

[273] For similarities between the dormant Commerce Clause and the EU fundamental freedoms, see, e.g., [our YaleLJ or Tax L Revarticle if nothing better]

[274] *Cassis*, at para. 14.

[275] Jacques Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14 J. EUR'N PUB. POL'Y 699, 703 (2007).

addressed by the origin state's rule, then mutual recognition does not apply, and the destination state may apply its own rule. [276] To avoid unravelling the benefits of mutual recognition, the CJEU construes this exception narrowly.[277]

Mutual recognition solves the problem of interacting burdens not by harmonizing different state's substantive rules, but rather by specifying an EU-wide conflict-of-law rule—that is, it specifies an origin state— for a given type of regulation. Thus, mutual recognition represents a coordination rule. Mutual recognition represents a highly interventionist approach. Not only does the CJEU resolve the particular regulatory conflict before it, but it promulgates the functional equivalent of a conflict-of-law rule for the whole EU on the regulatory area that had been subject to conflict.

Although the parallels between the EU's fundamental freedoms and the Constitution's dormant Commerce Clause are obvious, the Supreme Court never has adopted the concept of origin and destination states, and it has never expressly adopted a mutual-recognition rule in a dormant Commerce Clause case, even when seized with severe regulatory conflicts.[278] Thus, even when the Supreme Court takes its more interventionist approach—Bibb balancing—it is still less interventionist than the CJEU in alleviating regulatory conflicts. We offer the European example for context; it shows that different common markets can navigate in different ways the tension between state regulatory autonomy and the need for a smoothly functioning common market.

B. "Like-Product" as a Restraint on Narrowly Tailored Regulations

[to come]

C. Minimizing the Impact of Bibb *Cases*

We argued in Part III that most of the criticisms of the dormant Commerce Clause apply more forcefully to cases applying *Bibb* balancing than to cases applying *Pike* balancing. This Subpart provides insights into how to constrain judicial analysis in, and the impact of, cases in which the Court applies *Bibb* balancing. These include deferring to the trial court on questions of fact, precluding regulations narrowly, and applying weak *stare decisis*.

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[276] *See, e.g., Cassis*, at para. 8 (recognizing exceptions related to tax, fairness, public health and consumer protection).

[277] Pelkmans, *supra* note 275, at 711.

[278] Indeed, SCOTUS is even moving away from a cont'l jurisprudence of conflict of laws

1. Deference to Trial Court

In several *Bibb* cases, the Supreme Court essentially conducted a *de novo* review of the evidence presented at trial, overturning findings at the trial court level regarding protectionism.[279] Since the largest area of agreement under the dormant Commerce Clause is that it prevents overt and intentional protectionism, it would seem particularly important for the Court to defer to trial court determinations regarding such findings as long as such determinations were truly independent, for example, from state legislatures. [Examples from cases in Part II.B where SCOTUS ignored trial court findings].

2. Narrow Preclusion

Given that *Bibb* cases involve an unavoidable element of judicial legislation by remedy, remedies in *Bibb* balancing cases should be phrased and interpreted as narrowly as possible to minimize disruption of the challenged state's regulatory autonomy. Like legislative preemption, judicial preclusion can be either broad or narrow, and *Bibb* balancing calls for narrow preclusion.

For example, in *Bibb*, the import of the Court's preclusion of Illinois's curved mudflap rule should be that Illinois must admit trucks with straight mudflaps, not that Illinois must adopt a straight mudflap rule for its own trucks. Thus, *Bibb* cases should not be understood to impose limited rules of mutual recognition, rather than to establish harmonized substantive rules for the entire nation.

3. Weak Stare Decisis

The analysis presented here also supports weak adherence to *stare decisis* in dormant Commerce Clause cases involving *Bibb* balancing.[280] Consider the long-running dispute involving the collection of sales tax on sales made by out-of-state sellers to in-state buyers. The saga began in 1967 in *National Bellas Hess*, when the Supreme Court announced a legal rule that, although arguably suitable when first articulated, became increasingly out of step with economic reality.[281] The Court held that both the Due Process Clause and the dormant Commerce Clause precluded a state from forcing an out-of-state seller with no physical presence in the state to collect sales tax on sales into the state.[282]

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[279] *Clover Leaf*, at 476 (Powell, J., concurring). (explanatory parenthetical) Other examples – Lawrence, there were a couple other cases like this, where the trial court had made a finding that the state adopted the rule for protectionist reasons, but SCOTUS did a de novo review—try searching the interaction cases from Part II.B on "de novo", cause the justices on the other side (whether dissent or majority) would usually call this out

[280] *Stare decisis* does not apply the same way in every type of case. *See* William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

[281] Nat. Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967).

[282] *Bellas Hess*, 386 U.S. at 760.

This decision was motivated, in part, by fears that permitting such nexus would lead to interacting tax-compliance burdens. For example, the *Bellas Hess* Court reasoned that permitting states to impose sales-tax collection obligations on out-of-state sellers would "entangle sellers… in a virtual welter of complicated obligations to local jurisdictions," thereby unduly burdening their multistate businesses.[283]

Twenty-five years later in *Quill Corp. v. North Dakota*, when the internet was still in its infancy, but catalog sales had skyrocketed, the Supreme Court again considered whether states could require out-of-state sellers to collect taxes on sales into a state. Although this time the Supreme Court held that there was no due process ban on such a tax-collection obligation, it reaffirmed its position on dormant Commerce Clause grounds; a state could not force a nonresident seller with no physical presence in the state to collect sales taxes.[284] Over the ensuring twenty-five years, the internet economy thrived, but *Quill* continued to preclude effective sales tax collection.

It took until 2018—fifty years after *Bellas Hess*—for a sharply divided Court to reverse *Quill* in *Wayfair*.[285] Although the majority regarded it as important to correct the *Quill* Court's "egregious and harmful" error,[286] four dissenters would have continued to uphold *Quill* on *stare decisis* grounds, even though they agreed with the majority that *Quill* was wrongly decided.[287] *Wayfair* is a triumph for common sense, but it is also a cautionary tale about balancing.[288] In addition to depriving states of an estimated $8 to $33 billion annually in sales tax revenue,[289] the physical-presence rule granted internet companies a competitive advantage over brick-and-mortar stores, significantly distorting interstate commerce for many years.[290] Dormant Commerce Clause decisions—especially those involving the type of multifactor balancing involved in interaction cases—are not an exact science and deeply factual.

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[283] *Bellas Hess*, 386 U.S. at 759.

[284] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Of the eight justices upholding *Bellas Hess*, three did so solely on the grounds of precedent, even though they thought the case wrongly decided. *See id.* at 2001. *See also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (explaining that though Congress had the authority to act, it was "inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.")

[285] *Wayfair* involved an internally and externally consistent jurisdictional hook, namely the location of the consumer. It was thus decided by balancing.

[286] *Wayfair*, 138 S. Ct. at 2086.

[287] *Wayfair*, 138 S. Ct. at 2102.

[288] The sales-tax collection cases raised many concerns, chief among them the concern that multistate sellers would have to learn about and comply with the sale-tax obligations of numerous state and municipal taxing authorities. Thus, they concerned both nexus and regulatory interactions.

[289] *Wayfair*, 138 S. Ct at 2097.

[290] *Wayfair*, 138 S. Ct. at 2092.

Fifty years ago, in a pre-digital era, the *Bellas Hess* Court contemplated neither that companies would soon engage in massive interstate selling without physical presence nor that they would be able to comply with arbitrarily complex tax rules at the touch of a button. Both of these developments—on-line selling and computerized compliance—were invented later. But both affect what we would call *Bibb* balancing. The state interest in compelling tax collection by out-of-state sellers increased proportionately as online sales did —as out-of-state sellers grew as a proportion of all sellers, states lost more revenue. At the same time, sellers' difficulties in complying with potentially diverse local rules decreased as computing power increased.[291]

The five-justice majority in *Wayfair* acknowledged that the "basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics."[292] What is dynamic in the dormant Commerce Clause is not so much our understanding of economics (although such changes can and do occur[293]), but rather the regulatory practices of the states and the business practices of commercial actors. Recognizing this, the *Wayfair* Court justified overruling *Quill* in part because "the *Quill* Court did not have before it the present realities of the interstate marketplace."[294] If the Supreme Court will engage in balancing that makes use of external benchmarks, then it should be prepared to update its decisions to take account of changed circumstances. To our perspective, this represents an argument against strict *stare decisis* in *Bibb* balancing cases. If courts insist on relying on actual dominant state practice to essentially endorse or preclude substantive rules, then courts also should be open to changing those rules as state practices change—and if states adopt—as the U.S. states did post *Quill*, harmonized rules for assessing sales taxes that minimized compliance burdens for interstate commercial actors, then those actions change the benchmark for *Bibb* balancing purposes. Because the Court in Bibb cases measures the burden a rule imposes against the regulations in place in other states, and because that

[291] *Wayfair* originally involved four named defendants, but upon receiving the State's complaint, one came into compliance with the state's rule by the next day. South Dakota v. Wayfair, Inc., 229 F. Supp. 3d 1026, 1029 (D.S.D. 2017). *See also Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting) (arguing that in striking down the sale-tax collection obligation as an undue burden, the majority "vastly underestimates the skill of contemporary man and his machines").

[292] Wayfair, 138 S. Ct. at 2095. *See id*. (referring to "dramatic technological and social changes of our increasingly interconnected economy").

[293] Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015) (relying upon economic analysis the authors of this Article provided in an amicus brief to find the challenged tax to have a protectionist, and therefore discriminatory, impact).

[294] *Wayfair*, 138 S. Ct. at 2097.

regulatory landscape can change, courts should be ready to reverse themselves.[295]

V. CONCLUSION

It is commonplace for both courts and commentators to describe dormant Commerce Clause doctrine as involving a two-part inquiry, namely discrimination and undue burden, with the former receiving strict scrutiny and the latter receiving *Pike* balancing. But our analysis shows that story to be incomplete and to obfuscate much of the logic undergirding the Supreme Court's dormant Commerce Clause doctrine, which doctrine has been heavily criticized by judges and commentators as ad hoc, unprincipled, and misdirected. In this Article, we introduced a second distinction—the distinction between single-state and interaction burdens—that complements the distinction between discrimination and undue burden, and thus helps to explain many of the doctrine's puzzles that have long confounded critics on and off the bench.

We demonstrated that both discrimination and undue-burden cases involve state laws that asymmetrically disadvantage interstate commerce relative to intrastate commerce and that, in both types of cases, courts balance the federal interest in the national marketplace against the state's regulatory interest. But we introduced a more nuanced distinction, that between single-state and interaction burdens. We showed that single-state burdens receive what we called narrow *Pike* balancing, which measures the burden on interstate commerce via an internal benchmark that compares the challenged state's treatment of interstate commerce to the same state's treatment of in-state commerce. We showed that although the level of scrutiny in narrow *Pike* cases varies, from rational basis to strict scrutiny, those variations are justified.

We also identified interaction burdens as those that arise from differences in the laws of different states. Due to persistent normative differences of opinions among the justices, the Supreme Court approaches such interaction cases in two fundamentally different ways. When non-interventionist justices are in the majority, the Court does not use the dormant Commerce Clause to eliminate state-to-state regulatory diversity, even when such diversity imposes significant burdens on interstate commerce. When interventionist justices are in the majority, however, we showed that the Court, while claiming to apply *Pike*, actually applies a significantly different approach to balancing; one that measures the burden a regulation imposes on

[295] This argument bolsters that made by Saul Levmore that because Congress can easily override dormant Commerce Clause decisions, courts should be willing to engage in active review of such cases. Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 569 (1983).

interstate commerce by reference to an external baseline consisting of other states' preexisting regulations. We dubbed this approach *Bibb* balancing. Whereas some justices regard *Bibb* balancing as an illegitimate judicial intrusion on state regulatory autonomy, others engage in *Bibb* balancing out of a concern that the failure to do so would hinder the national marketplace.

Our goal in this Article was not to argue that the justices should either abandon *Bibb* balancing or engage in more *Bibb* balancing. Instead, our goal was to clarify what is actually happening in dormant Commerce Clause cases, including interaction cases, and why it matters. This Article explored the burdens that taxes and regulations impose on interstate commerce and how courts applying the dormant Commerce Clause have resolved and could resolve such challenges.

Views diverge about whether taxes and regulations that are not facially discriminatory should be eliminated under the dormant Commerce Clause, or whether they are immune from scrutiny under that doctrine. That divergence is not surprising given the important federalism values on both sides—state autonomy and the national marketplace—one of which must give way to the other in almost all difficult cases. Although the Court's dormant Commerce Clause doctrine is far from perfect, we argued that there is more logic than critics acknowledge to the Court's jurisprudence, through which it has long sought to do right by our federal system by finding an appropriate balance between federal and state interests, one that subordinates neither federal nor state interests to the other.