C. The Police Power and the "Dormant" Commerce Clause

The Commerce Clause is an enumerated power which gives the federal government primary authority to regulate commerce among the states. The Commerce Clause has long been interpreted as having a "dormant" aspect or negative implication that acts as a limit on the states' authority to regulate commerce, though the limitation is not absolute. "In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.") *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). "Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *Sebelius.* at 557.

In its most recent decision addressing the Dormant Commerce Clause, *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2090-2091 (2018), the Supreme Court discussed the contours of the respective federal and state authorities to regulate commerce:

> Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually per se rule of invalidity." *Granholm v. Heald*, 544 U.S. 460, 476, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (internal quotation marks omitted). State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); see also *Southern Pacific*, supra, at 779, 65 S.Ct. 1515. Although subject to exceptions and variations, see, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Brown–Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

(1) Facial discrimination; Economic protectionism; Undue burden

(A) A State law that discriminates against interstate commerce on its face, e.g., the language of the statute treats similarly situated entities differently on the basis of geography, is usually found unconstitutional.

> To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
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> *United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, at 338-339 (2007).

(B) A state law is also *per se* invalid if its purpose is economic protectionism—to benefit in-state interests at the expense out-of-state interests.

"The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See, e. g., *H. P. Hood & Sons, Inc. v. Du Mond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167, 92 L.Ed. 1460; *Baldwin v. G. A. F. Seelig, Inc*., supra; *Buck v. Kuykendall*, 267 U.S. 307, 315-316, 45 S.Ct. 324, 325-326, 69 L.Ed. 623. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. Cf. *Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347."

City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978). See also *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980)(striking Florida law that prohibited investment activities within Florida by banks, bank holding companies, and trust companies with their principal place of operations outside of Florida).

(C) Undue Burden - see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805-806 (1976):

> In the most recent of those cases, *Pike v. Bruce Church*, supra, a burden was found to be imposed by an Arizona requirement that fresh fruit grown in the State be packed there before shipment interstate. The requirement prohibited the interstate shipment of fruit in bulk, no matter what the market demand for such shipments. In *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), a New York

> official denied a license to a milk distributor who wanted to open a new plant at which to receive raw milk from New York farmers for immediate shipment to Boston. The denial blocked a potential increase in the interstate movement of raw milk. Appellee also relies upon *Toomer v. Witsell*, 334 U.S. 385 (1948), in which this Court found interstate commerce in raw shrimp to be burdened by a South Carolina requirement that shrimp boats fishing off its coast dock in South Carolina and pack and pay taxes on their catches before transporting them interstate. The requirement increased the cost of shipping such shrimp interstate. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), a Louisiana statute forbade export of Louisiana shrimp until they had been shelled and beheaded, thus impeding the natural flow of freshly caught shrimp to canners in other States. Both *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), and *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922), involved efforts by North Dakota to regulate and thus disrupt the interstate market in grain by imposing burdensome regulations upon and controlling the profit margin of corporations that purchased grain in State for shipment and sale outside the State. And in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the Court found a burden upon the established interstate commerce in natural gas when a new West Virginia statute required domestic producers to supply all domestic needs before piping the surplus, if any, to other States.
>
> The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.

Id.

(2) Discriminatory Effect

A court may find that a law is discriminatory in effect if it provides for differential treatment of similarly situated entities based on their contacts with the state, or has the effect of providing a competitive advantage to in-state interests vis-à-vis similarly situated out-of-state interests. See *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333 (1977)(striking North Carolina law that in effect prohibited the display of Washington state apple grades on closed containers shipped into N.C.); *but cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)(upholding Maryland statute prohibiting refiners and producers of gasoline from operating retail gas outlets, even where majority of burden appeared to fall on out-of-state interests and benefit in-state independent retailers).

(3) Indirect Regulation - Analysis Under the *Pike* Balancing Test.

The U.S. Supreme Court provided in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, at 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found,

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

Thus, absent discrimination against interstate commerce, a State law may regulate commerce if it does so even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental—unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Id.*

An "incidental burden" is one that weighs more heavily on interstate commerce than intrastate commerce. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 50 (2nd Cir. 2007). The Second Circuit recognizes three types of incidental burdens:

i. *Disparate impact* - laws that have a disparate impact on in- versus out-of state entities.

ii. *Extraterritoriality* - laws that regulate economic activity beyond the state's borders. (The Second Circuit treats this as a type of incidental burden under the Pike balancing test; however, the Supreme Court treats extraterritoriality as a *per se* violation).

The extraterritoriality doctrine of the Commerce Clause is based on three principles: (1) A state statute may not apply to commerce wholly outside the state even if the commerce has effects within the state; (2) A state statute that regulates commerce wholly outside the state's borders is unconstitutional even if the legislature did not intend for the statute to apply extraterritorially; and (3) A state statute must be evaluated by considering how it would interact with legitimate regulation in other states, and what would happen if another state or every state enacted similar laws.

"Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

iii. *Regulatory inconsistency* – laws that are in substantial conflict with a common regulatory scheme in place in other states. *New York Pet Welfare Ass'n. Inc. v. City of New York*, 850 F.3d 79, 91-92. (2017). In the Second Circuit a plaintiff must show more than a theoretical conflict, but rather, must demonstrate an actual conflict between state laws.

(4) "Market Participant" Exception

From *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008):

> Some cases run a different course, however, and an exception covers States that go beyond regulation and themselves "participat[e] in the market" so as to "exercis[e] the right to favor [their] own citizens over others." *Alexandria Scrap, supra*, at 810, 96 S.Ct. 2488. This "market-participant" exception reflects a "basic distinction ... between States as market participants and States as market regulators," *Reeves*, 447 U.S., at 436, 100 S.Ct. 2271, "[t]here [being] no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market," *id.*, at 437, 100 S.Ct. 2271. See also *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983) ("[W]hen a state or local government enters the

market as a participant it is not subject to the restraints of the Commerce Clause"). Thus, in *Alexandria Scrap*, we found that a state law authorizing state payments to processors of automobile hulks validly burdened out-of-state processors with more onerous documentation requirements than their in-state counterparts. Likewise, *Reeves* accepted South Dakota's policy of giving in-state customers first dibs on cement produced by a state-owned plant, and *White* held that a Boston executive order requiring half the workers on city-financed construction projects to be city residents passed muster.

Our most recent look at the reach of the dormant Commerce Clause came just last Term, in a case decided independently of the market participation precedents. *United Haulers, supra,* upheld a "flow control" ordinance requiring *340 trash haulers to deliver solid waste to a processing plant owned and operated by a public authority in New York State. We found "[c]ompelling reasons" for "treating [the ordinance] differently from laws favoring particular private businesses over their competitors." *Id.,* at 342, 127 S.Ct., at 1795. State and local governments that provide public goods and services on their own, unlike private businesses, are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens," *ibid.,* and laws favoring such States and their subdivisions may "be directed toward any number of legitimate goals unrelated to protectionism," *id.,* at 343, 127 S.Ct., at 1796. That was true in *United Haulers,* where the ordinance addressed waste disposal, "both typically and traditionally a local government function." *Id.,* at 344, 127 S.Ct., at 1796 (quoting *United Haulers Assn., Inc. v. Oneida–Herkimer Solid Waste Management Authority,* 261 F.3d 245, 264 (C.A.2 2001) (Calabresi, J., concurring); internal quotation marks omitted). And if more had been needed to show that New York's object was consequently different from forbidden protectionism, we pointed out that "the most palpable harm imposed by the ordinances—more expensive trash removal—[was] likely to fall upon the very people who voted for the laws," rather than out-of-state interests. *United Haulers,* 550 U.S., at 345, 127 S.Ct. at 1797. Being concerned that a "contrary approach ... would lead to unprecedented and unbounded interference by the courts with state and local government," *id.,* at 343, 127 S.Ct., at 1796, we held that the ordinance did "not discriminate against interstate commerce for purposes of the dormant **1810 Commerce Clause," *id.,* at 342, 127 S.Ct., at 1795.[8]