Catholic University Law Review

Volume 68
Issue 1 *Winter 2019*

Article 10

3-7-2019

Deference vs. Evidence: An Exploration of the Appropriate Application of Putative Benefits to the Pike Balancing Test

Nathan Gniewek

DEFERENCE VS. EVIDENCE: AN EXPLORATION OF THE APPROPRIATE APPLICATION OF PUTATIVE BENEFITS TO THE *PIKE* BALANCING TEST

Nathan Gniewek[+]

Almost anyone, regardless of the degree to which he participates in the legal field, can recognize a depiction of Lady Justice. Despite her blindfold, she stands her ground confidently, holding her scales high. Her scales have long symbolized a kind of ideal in law: the impartial weighing of facts to render a decision. The average person often comes to depend on those very decisions, believing the scales of Lady Justice to be well-calibrated and the results therefrom to be consistent, trustworthy, and reliable. Sadly, that ideal is not always attainable. One example of a failure to achieve legal stability and consistency is evident in the realm of dormant Commerce Clause jurisprudence—specifically, in the use of the Supreme Court's *Pike* balancing test.

The "dormant" Commerce Clause—an inferential concept derived from the U.S. Constitution's Commerce Clause—has existed in some ethereal form since the early republic.[1] The dormant Commerce Clause is the idea that Congress's power to regulate interstate commerce precludes, at least to some extent, the power of the states to do the same.[2] This judicial doctrine—used to determine the constitutionality of state laws regulating or affecting interstate commerce—has evolved in fits and starts throughout the Supreme Court's history.[3] In its more modern jurisprudence, the Court has developed various tests to determine the constitutionality of state laws that have an impact on interstate commerce in some form or fashion.

One of the most famous frameworks is the *Pike* balancing test. The *Pike* test requires a court to weigh the burdens that a state law places on interstate

---

[+] BA Political Science & Economics, BA History, Christendom College, 2010; Juris Doctor Candidate, Catholic University of America, Columbus School of Law, 2019. I dedicate this work to my beloved late grandfathers, Felix Gniewek and Roman Welyczko, whose undying love for me helped to make me who I am. I also offer my eternal gratitude to Doctor Rafael Madan, who first sparked my interest in studying law.

"*Fiat justitia, ruat caelum*."

1. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

2. *See* Town of Southold v. Town of E. Hampton, 477 F.3d 38, 47 (2d Cir. 2007) (citing Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)) (stating that the dormant Commerce Clause "limits the power of local governments to enact laws affecting interstate commerce").

3. Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 571–72 (1997).

commerce against the law's "putative local benefits."[4] The major problem with *Pike* balancing, however, is that the Supreme Court has left the term "putative benefits" largely undefined. The lack of a definition has led to one of the longest-lived circuit splits in American legal history. Some federal circuit courts have attempted to rectify the lack of a solid definition of "putative benefits" by accepting a state's assertion concerning the alleged benefits of the law in question, largely out of respect for state sovereignty and overall deference to the legislature.[5] Other circuit courts have required substantive proof of the alleged benefits of a state's law, thereby placing the state's local interests under greater scrutiny.[6] For example, these circuit courts often require the state to produce evidence that the alleged benefits will, in fact, come to pass.[7] Until this circuit split is resolved, states are left in the dark—they are left to wonder what they should expect when courts examine their laws using the *Pike* test. Additionally, because of the different approaches taken by their respective circuit courts, the various states will adopt differing legislation to attempt to comply with the different standards.

The uncertainty that this circuit split generates has real-world consequences. This is not just some purely hypothetical or academic exercise. So long as this circuit split remains unresolved and states cannot properly anticipate what treatment their laws will receive, the businesses, corporations, and other economic entities within them will also remain in a state of regulatory limbo. If states' abilities to regulate their economic affairs remain hampered in this way, the American people employed at businesses both large and small may also be adversely affected. In a time where jobs and economic well-being are among the average person's top concerns, settling this circuit split is of utmost importance.[8] This Comment offers a resolution to the "dormant" Commerce Clause circuit split based on the more deferential approach. It proceeds as follows: Part I briefly explains and presents the *Pike* test, and fleshes out the current circuit split and various approaches taken in examining state putative benefits during the application of the *Pike* test. Part II examines the approaches that the circuits have employed, assessing and critiquing them. Part III draws

---

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

5. James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 199–202 (2003) (describing the various approaches to the scrutiny used by each of the United States Circuit Courts of Appeal, including those that have given great deference to state legislatures).

6. *Id.* at 202–03.

7. *See, e.g.*, R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 735–36 (8th Cir. 2002).

8. Heather Long, *The unhappy states of America: Despite an improving economy, Americans are glum*, THE WASH. POST (Mar. 30, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/30/the-unhappy-states-of-america-despite-an-improving-economy-americans-are-glum/?noredirect=on&utm_term=.a809f2f945c7 (stating that "[i]n 2017, half of Americans said one of their top fears was 'not having enough money for the future,' a reminder that even if people have jobs now, they remain anxious because they aren't sure how long that will last").

several critical distinctions and teases out some of the nuances within the *Pike* test in support of the proposition that courts should take a more deferential posture when using the *Pike* balancing test. Part III also offers support for the proposition that courts employing the more deferential posture have a more compelling basis in law for doing so than those taking a stricter approach. Additionally, Part III offers some suggestions for how to use and define "putative benefits." Finally, Part IV offers a brief conclusion.

I. A HISTORICAL MAP: THE HIKE TO *PIKE*

A. The Birth of Pike *Balancing.*

One of the few things that has remained consistent throughout the Supreme Court's dormant Commerce Clause jurisprudence is that the Court has maintained its status as "collaborator with Congress in the regulation of foreign and interstate commerce, . . . [which brings] before the Court questions inescapably implicating legislative policy."[9] Beginning with Chief Justice Marshall's tenure, the Supreme Court struggled with how to perform dormant Commerce Clause analysis.[10]

Then, in the 1920s, 1930s, and 1940s, the United States saw seismic economic changes. The Roaring Twenties brought about an unprecedented technological and economic expansion, but only a few short years thereafter—following the collapse of the stock market toward the end of 1929—the United States found itself in the throes of the Great Depression.[11] The subsequent election of Franklin D. Roosevelt in 1932 began a new era in American history, ushering in

---

9. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 21 (1964).

10. *See, e.g.*, S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 195–96 (1938) (upholding a state law that prohibited certain trucks from using the state's highways because the law was not discriminatory, the matter was one of local concern, and Congress had not passed a superseding statute); S. Ry. Co. v. King, 217 U.S. 524, 532–34 (1910) (commenting that the constitutionality of certain state laws will turn on what effect they have on interstate commerce); Smith v. Alabama, 124 U.S. 465, 482 (1888) (upholding a state law that concerned the regulation and licensing of locomotive engineers because the law affected interstate commerce only incidentally and did not conflict with an act of Congress); Welton v. Missouri, 91 U.S. 275, 282 (1875) (stressing that matters of a national nature or those requiring uniform regulation are outside the power of regulation by states and holding unconstitutional—despite the absence of a particular federal law on the matter—a Missouri law that taxed certain goods that were not produced in the state); Cooley v. Bd. of Wardens, 53 U.S. 299, 299–300 (1851) (upholding a state pilotage law because Congress had remained silent on the matter); Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (validating a state act that permitted building of a dam restricting the use of a particular creek because the act did not violate the dormant Commerce Clause or conflict with any law of Congress); Gibbons v. Ogden, 22 U.S. 1, 220–22 (1824) (holding that Congress's power to regulate commerce preempted a New York law that granted two men exclusive privileges to operate steamboats within its navigable waters).

11. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 273 (6th ed. 1999).

the rise of the modern administrative state, complete with an entire host of new economic programs and regulations in the form of the New Deal.[12] The Supreme Court's increasingly disjointed case law in the wake of such rapid growth in the regulatory power of government led to the adoption of "a methodology that persists to this day—a balancing of [a] State's interest in enforcing a state regulation against the burden the regulation imposes on interstate commerce."[13] These were the circumstances that set the stage for the development of the *Pike* balancing test.

The United States Supreme Court decided *Pike v. Bruce Church, Inc.*[14] in 1970. *Pike* employed phraseology and reasoning similar to the terms and analytical approaches that the Court used in its opinions in several cases decided during the preceding decades, including cases such as *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[15] *Bibb v. Navajo Freight Lines, Inc.*,[16] and *Huron Portland Cement Co. v. Detroit*.[17] *Southern Pacific Co.*—a case that concerned an Arizona law limiting the length of trains operating in the state—provided support for the Court's emphasis on comparing state and national economic interests.[18] The Court also borrowed the balancing aspect of *Bibb*,[19] a case that addressed an Illinois law requiring certain rear fender mudguards to be affixed

---

12. Barry Cushman, *The Great Depression and the New Deal*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–) 268, 268–69 (Michael Grossberg & Christopher Tomlins eds., 2008).

13. Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J. L. & PUB. POL'Y 395, 410–11 (1998). *See also* Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 VAL. U.L. REV. 723, 763–64 (2015); *see generally* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585 (1988) (providing an in-depth look at the nature and popularity of balancing tests).

14. 397 U.S. 137 (1970).

15. 325 U.S. 761 (1945).

16. 359 U.S. 520 (1959).

17. 362 U.S. 440 (1960).

18. *S. Pac. Co.*, 325 U.S. at 763.

> There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Id. at 770. "Here, examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." *Id.* at 783–84.

19. *Compare Pike*, 397 U.S. at 142 ("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."), *with Bibb*, 359 U.S. at 529–30 ("This is one of those cases . . . where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce . . . . [T]he present showing—balanced against the clear burden on commerce—is far too inconclusive to make this mudguard meet that test.").

to trucks operating on state highways.[20] Finally, the Court drew upon language concerning evenhanded regulation and legitimate local interests from *Huron Portland Cement Co.*,[21] a case that concerned a Detroit law setting limits on smoke emissions from ships operating in interstate commerce.[22]

Pike itself arose out of a dispute concerning an Arizona law that restricted the means through which cantaloupes could be sent to California for processing, thereby placing a strain on interstate commerce.[23] The cantaloupe grower challenged the law because it forbade the company from shipping its goods out of state unless the company packaged the fruits in specified containers via means that could only be done in a packing shed.[24] This was problematic for the grower, because it sent the fruits across state lines to California precisely *because* there were no such sheds available in Arizona.[25] If the cantaloupe grower complied with the law, the company would have lost all of its cantaloupe crop from that year.[26] The loss of that year's cantaloupe crop would have cost the company about $700,000.[27] The district court granted preliminary relief to

---

20. *Bibb*, 359 U.S. at 521–522.

21. *Compare Pike*, 397 U.S. at 142 ("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."), *with Huron Portland Cement*, 362 U.S. at 443 ("Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action, or unduly burdensome on maritime activities or interstate commerce.") (internal citations omitted).

22. *Huron Portland Cement*, 362 U.S. at 440–41.

23. *Pike*, 397 U.S. at 138–40. In 1964, Bruce Church, Inc. secured a lease to develop 6,400 acres of previously uncultivated land in Arizona, spending upwards of $3,000,000 to do so. *Id.* The company began growing cantaloupes on the newly-cultivated land in 1966, and it experienced great success; in the years that followed, they consistently yielded cantaloupes of superior quality. *Id.* Due to their highly perishable nature, however, the fruits had to be harvested, packed, and shipped to market quickly before they spoiled. *Id.* The cantaloupes could only be processed in packing sheds, none of which were available in Arizona. *Id.* The company would therefore transport the cantaloupes 31 miles away to California, where the necessary packing sheds were located. *Id.*

The challenged law, issued in 1968, would not let the company send the fruits out of state unless they were first packed in certain containers—a process that would require the use of the packing sheds located across state lines. Since the company was already on a tight schedule to avoid crop spoilage, compliance would have ensured the loss of the entirety of that year's harvest. *Id.* The company, therefore, filed suit in federal court, seeking an injunction to enjoin enforcement of the law. *Id.* The district court found that the enforcement of the law would effectively force the company to construct new packing sheds for itself at or near its Arizona operation. *Id.* Building such new sheds would take months and would cost the company about $200,000. *Id.* With these facts in mind, the district court sided with the company and granted injunctive relief, finding the law to be unlawfully burdensome upon interstate commerce. *Id.* Arizona petitioned the United States Supreme Court for certiorari, which the Court granted. *Id.*

24. *Id.* at 139–40.

25. *Id.* at 139.

26. *Id.* at 140.

27. *Id.*

prevent this loss.[28] After granting certiorari and reviewing the case, the Supreme Court ultimately affirmed the district court,[29] announcing a new rule in its opinion:

> 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, 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.[30]

Since then, the test, dubbed the "*Pike* balancing test," has played a major role in dormant Commerce Clause disputes.

B. The Circuit Split: Two Takes on One Problem.

As Supreme Court case law on *Pike* balancing has expanded, a circuit split has developed—and continued to widen—as to how to treat states' assertions concerning their respective laws' "putative benefits"[31]—the positive effects that will allegedly issue forth from a law or regulation. Some circuits advocate a kind of "fig leaf legitimacy," which takes states' assertions about their laws at

28. *Id.*

29. *Id.* at 146.

30. *Id.* at 142 (emphasis added) (internal citation omitted).

31. Given the longevity of this particular circuit split, it is important to keep in mind the individual cases' place in history (*i.e.*, in what year the courts decided them), because not all of the circuits had the luxury of working with the same body of Supreme Court case law or guidance. The cases used as examples herein span from as early as 1992 to as recent as 2008. It should also be noted that the cases chosen for this discussion are not exhaustive; rather, these cases tend to exemplify the circuit split most definitively. In a seminal law review article discussing putative benefits, the author, James D. Fox, argued that the Fourth and Sixth Circuits would also be among the circuits that use the more deferential approach. *See* Fox, *supra* note 5, at 200–01. Although the D.C. Circuit arguably also falls on this side of the controversy, it is not included in this analysis because D.C. is *federal* territory, and *Pike* itself stated that its general rule applied to "the validity of *state* statutes affecting interstate commerce[.]" *Pike*, 397 U.S. at 142 (emphasis added); *see also* Electrolert Corp. v. Barry, 737 F.2d 110, 113 (D.C. Cir. 1984) (upholding a D.C. ban on the possession of radar detectors, reasoning that the court need not "inquire closely into the validity of the local government's reasonable factual assumption[,]" because "the local government's safety rationale [was] not 'illusory' or 'nonexistent'"). Interestingly, one of the judges who decided *Barry* would end up on the Supreme Court a few short years later: Antonin Scalia.

face value.[32] Others require the states to put forward meaningful proof of the economic or other benefits that they claim their laws will induce.[33]

1. The First Approach: Fig Leaf Legitimacy.

The First, Fifth, Seventh, and Ninth Circuits employ fig leaf legitimacy—the more deferential approach toward states' local interests in cases that have employed *Pike* balancing.

In 2005, in *Pharmaceutical Care Management Ass'n v. Rowe*,[34] the First Circuit addressed a challenge to a statute that—in an effort to control the costs of medicine and expand access to prescription drugs—placed regulations on (often out-of-state) pharmacy benefit managers who formed contracts with health benefit providers in Maine.[35] Ultimately upholding the law, the First Circuit stated that "under *Pike*, it is the *putative* local benefits that matter. It matters not whether these benefits actually come into being at the end of the day."[36] The First Circuit's decision not to inquire into the effectiveness of the state's law exemplifies the fig leaf legitimacy approach.

Similarly, in its 2007 decision in *Allstate Insurance Co. v. Abbott*,[37] the Fifth Circuit applied a form of fig leaf legitimacy and upheld a Texas statute designed to address potential conflicts of interest that companies such as Allstate (a Delaware company) had in serving both as insurers and as owners of automotive body shops in the state.[38] The Fifth Circuit decided to defer to the legislature.[39] On the basis of *Pike* balancing, the Fifth Circuit concluded that "[a] reasonable legislator could have believed that [the law] would further legitimate interests in protecting consumers . . . . That reasonable belief is enough to confirm that [the law] has at least putative local benefits."[40] Consequently, the court's conclusion quintessentially embodied a fig leaf legitimacy approach.

In 1992, in *K-S Pharmacies, Inc. v. American Home Products Corp.*,[41] the Seventh Circuit considered an extraterritoriality challenge to a Wisconsin law

---

32. *See, e.g.,* Allstate Ins. Co. v. Albott, 495 F.3d 151, 164 (5th Cir. 2007); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 312–13 (1st Cir. 2005); Spoklie v. Montana, 411 F.3d 1051, 1059 (9th Cir. 2005); K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 731 (7th Cir. 1992).

33. *See* Leb. Farms Disposal, Inc. v. Cty. of Leb., 538 F.3d 241, 250–52 (3d Cir. 2008); Town of Southold v. Town of E. Hampton, 477 F.3d 38, 49–52 (2d Cir. 2007); R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 736–37 (8th Cir. 2002); Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs, 27 F.3d 1499, 1511–13 (10th Cir. 1994).

34. 429 F.3d 294 (1st Cir. 2005).

35. *Id.* at 298–99.

36. *Id.* at 313 (emphasis in original).

37. 495 F.3d 151 (5th Cir. 2007).

38. *Id.* at 154–56.

39. *Id.* at 164.

40. *Id.*

41. 962 F.2d 728 (7th Cir. 1992).

that barred price discrimination in sales of prescription medications.[42] Believing the law to be constitutional, the court unambiguously commented:

> Nothing remains for analysis under the balancing procedure of *Pike v. Bruce Church, Inc.* The dormant commerce clause does not call for proof of a law's benefits . . . whenever the subject is trade. On the contrary, legislation regulating economic affairs is within public power unless the rules are so silly that a justification cannot even be imagined.[43]

In 2005, the Ninth Circuit also deferred to legislative decisions in *Spoklie v. Montana*[44] when it performed the *Pike* test[45] upon a Montana law designed to restrict the spread of chronic wasting disease among livestock.[46] Among other things, the law forbade alternative livestock licensees from permitting the shooting—often by out-of-state hunters—of certain animals for fees on alternative livestock facilities.[47] The court reasoned that the state was in no way required to prove that its judgment concerning its law's putative benefits was in fact correct.[48]

The First, Fifth, Seventh, and Ninth Circuits' take on putative benefits embodies the fig leaf legitimacy approach. Other circuits, however, have used the alternative method.

2. The Alternative Approach: Requiring Substantive Evidence.

Unlike the First, Fifth, Seventh, and Ninth Circuits, the Second, Third, Eighth, and Tenth Circuits have required substantive evidence from states concerning the efficacy of their judgments about their laws' putative benefits.

In 2007, in *Town of Southold v. Town of East Hampton*,[49] the Second Circuit addressed a law that forbade ferry operators from docking certain classes of ferries within East Hampton limits, unless there was an emergency.[50] The law, which was a local zoning ordinance, effectively barred the provision of all but passenger-only ferry services.[51] The court remanded the case to the district court

---

42. *Id.* at 729–30.

43. *Id.* at 731. Notably, in making this decision, the court expressed its belief that the law regulated only in-state commerce. *Id.*

44. 411 F.3d 1051 (9th Cir. 2005).

45. *Id.* at 1059. To add further confusion to this Comment's analysis, this case may have signaled a change in the Ninth Circuit's approach to state putative benefits under a *Pike* balancing. *See* Alaska Airlines, Inc. v. Long Beach, 951 F.2d 977, 985 (9th Cir. 1992) (rejecting a Commerce Clause challenge and upholding a city ordinance aimed at reducing airport noise, but only after examining if its provisions were, as the district court held, "arbitrary, capricious or unrelated to any governmental purpose").

46. *Spoklie*, 411 F.3d at 1054.

47. *Id.* (quoting MONT. CODE ANN. § 87-4-414(2)).

48. *Id.* at 1059 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)).

49. 477 F.3d 38 (2d Cir. 2007).

50. *Id.* at 42.

51. *Id.*

for its failure to "engage in any meaningful examination of the claimed local benefits conferred by the Ferry Law" when applying the *Pike* test.[52]

In 2008, in *Lebanon Farms Disposal, Inc. v. County of Lebanon*,[53] the Third Circuit examined a county flow control ordinance regulating the licensing of trash haulers and their methods and locations of disposal.[54] Much of the issue was based on the transportation of waste across jurisdictional lines or to unapproved sites or facilities.[55] The court remanded the case to the district court with orders to perform the *Pike* test and "make findings of fact and conclusions of law for the record[,]" which it deemed "incomplete regarding the burden on interstate commerce and, more importantly, the putative local benefits."[56]

Similarly, in a 2002 case, *R & M Oil & Supply, Inc. v. Saunders*,[57] the Eighth Circuit affirmed a district court ruling enjoining enforcement of a Missouri statute that regulated the propane industry.[58] Part of what made the matter significant in the first place was that the demand for propane naturally tends to spike in the winter.[59] Missouri itself produces no propane, which forces it to import the good from other states that do.[60] The crux of the controversy was the state's claim that the anticipated propane supply shortages were its motivation for amending industry regulations, forcing bulk sellers of propane to maintain a storage capacity of at least 18,000 gallons within state lines.[61] After invoking *Pike*, the Eighth Circuit questioned whether the statute would actually tend to halt propane shortages, "because the State presented no evidence to the district court that the propane storage capacity in existence before the passage of the statute was insufficient."[62]

Finally, in its 1994 decision in *Blue Circle Cement, Inc. v. Board of County Commissioners*,[63] the Tenth Circuit reversed and remanded a district court's dismissal of an Alabama corporation's challenge to an Oklahoma zoning

52. *Id.* at 52.

53. 538 F.3d 241 (3d Cir. 2008).

54. *Id.* at 243–45. This circuit, like the Ninth, may have altered its position on how to address putative benefits under a *Pike* test. *See* Tolchin v. Sup. Ct., 111 F.3d 1099, 1102, 1109 (3d Cir. 1997) (deeming constitutional a New Jersey Supreme Court rule that forced lawyers to comply with certain course requirements and maintain a "bona fide office" to practice law in the state because there was "a rational relationship . . . between the [particular] benefit of attorney accessibility and the bona fide office requirement" and "there [was] a satisfactory basis to find a rational relationship between the bona fide office requirement and the intended benefit of attorney accessibility").

55. *Leb. Farms Disposal, Inc.*, 538 F.3d at 244–45.

56. *Id.* at 252.

57. 307 F.3d 731 (8th Cir. 2002).

58. *Id.* at 733.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 735.

63. 27 F.3d 1499 (10th Cir. 1994).

ordinance that regulated the conversion of hazardous waste fuels.[64] The Tenth Circuit found that the district court applied the *Pike* test incorrectly, because it failed to consider "evidence that the Ordinance's site requirements [were] excessive in relation to the putative local benefits," leaving unresolved "material fact issues[.]"[65]

The Second, Third, Eighth, and Tenth Circuits' take on putative benefits, therefore, requires that states not only assert their laws' benefits, but also submit substantive proof that those same benefits will materialize.

C. So . . . Why Is This Circuit Split Yet Unresolved?

The circuit split over the two major approaches to evaluating putative benefits in dormant Commerce Clause cases involves either great deference to state judgments (fig leaf legitimacy) or a demand for proof that a state law's benefits are genuine (substantive evidence). The question remains: Why has this circuit split persisted for so long? The answer is twofold. First, the amount of case law concerning the application of the *Pike* test has become so expansive, both at the Supreme Court and the circuit court levels, as to render the entire structure unstable, arbitrary, and arguably inconsistent in places.[66] Second, the Supreme Court repeatedly turns away chances to resolve the split.[67] For the time being, this difference of opinion among the circuits will persist into the foreseeable future. So long as this split remains unresolved, companies and state governments will not be able to tell what laws will remain valid and enforceable and the reign of economic and regulatory uncertainty will continue.

---

64. *Id.* at 1501–02.

65. *Id.* at 1512.

66. Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 28–29 (2006); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 454–55 (2008); *cf.* THE FEDERALIST NO. 62, at 359 (James Madison) (A.B.A. 2009) (commenting—albeit in the context of elected officials—that "[i]t will be of little avail to the people . . . if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow").

67. *See, e.g.*, Brown v. Hovatter, 561 F.3d 357, 367–68 (4th Cir.), *cert. denied* 558 U.S. 1048 (2009) (upholding Maryland's "Morticians Act"—a state law that placed restrictions on corporate and unlicensed individual ownership of funeral establishments—against a dormant Commerce Clause challenge). This case seems to indicate a fig leaf legitimacy approach on the part of the Fourth Circuit. *Id.* at 367.

II. PEEKING BEHIND THE CURTAIN: EXPLORING THE CIRCUITS' RATIONALE[68]

A. Analyzing the Fig Leaf Legitimacy Circuits' Reasoning.

The fig leaf legitimacy circuits tend to appeal to pieces of Supreme Court guidance that have similar themes. For instance, the First Circuit based its position of deference regarding putative benefits on Justice Brennan's concurrence in the plurality opinion of *Kassel v. Consolidated Freightways Corp.*[69] The Fifth Circuit did the same.[70] Placing such a critical portion of their analyses on a concurring opinion—rather than on the main opinion—of a case is, at minimum, potentially problematic for these circuits.

The Seventh Circuit also attempted to justify its deference to the legislature, making reference to a string of Supreme Court cases.[71] These supporting

---

68. Before embarking on this journey, it might be prudent to address a few concerns and forge the path that this Comment will take. To start, some are of the opinion that not only the *Pike* test, but also the dormant Commerce Clause *as a whole*, is anathema to the constitutional structure. *See, e.g.*, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) ("The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause."). There may not be a true dichotomy in the circuit split in question—that is, it may not necessarily be that one must choose between the two approaches presented above. There is a third option.

Indeed, the ideal third option might be to abandon the dormant Commerce Clause doctrine entirely and to leave it to Congress to assess what instances of states' regulation of interstate commerce are permissible. Although this idea is originalist, it is itself, ironically, hardly "original." Its advocates are members of an ever-growing chorus calling for the abandonment of the dormant Commerce Clause. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569 (1987); Amy M. Petragnani, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215 (1994); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745 (1991). Nevertheless, things cannot change overnight. As a practical matter, therefore, the ensuing examination of the circuit split will attempt to identify which of the approaches has a better foundation in the law *as it currently stands*. As a final caveat, it is important to emphasize just how narrow the focus of this Comment is and how scarce the sources upon which it is forced to draw are. The *Pike* test, being a child of the common law, can only be studied via the use of cases. Most positions that people seek to hold concerning *Pike* must find their foundations built on Supreme Court precedent. Even then, the cases cited herein spare but a few sentences on their treatment of putative local benefits.

69. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 312–13 (1st Cir. 2005) (citing Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring) (stating that courts ought not "second-guess the empirical judgments of lawmakers concerning the utility of legislation")).

70. Allstate Ins. Co. v. Abbott, 495 F.3d 151, 164 (5th Cir. 2007). A potential problem with the Fifth Circuit's citations here is that they failed to note that they were drawing from Brennan's concurrence at all. *See id.* at 164 n.49, 164 n.50.

71. K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 731 (7th Cir. 1992).

Supreme Court cases all indicate support for deference to *Congress* over matters clearly under federal control.[72] Those cases do not support deference to *states*.[73]

The Ninth Circuit's pithy support for its position may be the most structurally sound. Although it relied exclusively on one case for support in the relevant passage from its decision, the cited case was *Minnesota v. Clover Leaf Creamery Co.*[74]—a United States Supreme Court case that stated outright: "States are not required to convince the courts of the correctness of their legislative judgments."[75] Furthermore, the Ninth Circuit's position is strengthened because the Court in *Clover Leaf* made this statement in the context of a discussion of whether there was an empirical connection between the ordinance under scrutiny and the reasons that the legislature provided for its enactment.[76]

Given the preceding analysis, it appears that the fig leaf legitimacy circuits do not have an overall airtight case for their position, as there are several problems with it. How do the substantive evidence circuits compare?

B. Analyzing the Substantive Evidence Circuits' Reasoning.

The average reader may believe that the substantive evidence circuits have a more solid base of authority upon which to build. If that is so, these circuits do not appear to have made full use of that authority. In the boldest example from this side of the dispute, the Eighth Circuit did not cite to a single source in support of its position aside from its references to the exact statute in question.[77] It merely made its declaration and moved on.[78]

---

72. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 168, 179 (1980) (concerning Congress's restructuring the railroad retirement system and benefits classifications); Vance v. Bradley, 440 U.S. 93, 94–95, 110–12 (1979) (concerning Congress's forcing certain federal employees into retirement at age 60); Usery v. Turner Elkhorn Mining Co., 428 U.S 1, 5, 49 (1976) (concerning certain provisions in Congress's amendment—called The Black Lung Benefits Act of 1972—of Title IV of the Federal Coal Mine Health and Safety Act of 1969), *superseded by statute*.

73. In what can only be deemed either subtle genius or a stroke of sheer luck, the final case in the string cite referenced appears to support the Seventh Circuit's assertion on this count through a constitutional game of telephone. The final case that the circuit cited, *Northside Sanitary Landfill, Inc. v. Indianapolis*, through a chain of case references, lends some support. *See K-S Pharmacies*, 962 F.2d at 731 (citing Northside Sanitary Landfill, Inc. v. Indianapolis, 902 F.2d 521 (7th Cir. 1990) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (invoking and quoting *Vance*, 440 U.S. at 111))). Although the quote from *Vance* concerned deference to the *federal* legislature, the context in which *Clover Leaf* used it seemed to incorporate it in order to endorse deference to *state* legislatures.

74. 449 U.S. 456 (1981).

75. *Id.* at 464.

76. *Id.* at 463–64.

77. R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 735–36 (8th Cir. 2002) (taking a full two paragraphs to lay out its stance on the putative local benefits of the statute without using a single case citation, either from the Supreme Court or its own precedent). There is a touch of irony here in that while the *state* was not allowed to make an assertion about a law's putative benefits without evidence or support, the *court* did exactly that in its opinion. *Id.*

78. *Id.*

The Second Circuit largely relied on its own prior law. While the Second Circuit acknowledged that it should not sit in judgment over the wisdom of legislative policy judgments,[79] it automatically countered—using its own precedent—that "courts . . . must be wary of granting summary judgment when conflicting expert reports are presented[.]"[80]

The Tenth Circuit rested much of its argument upon the plurality opinion in *Kassel*.[81] The district court had found that the ordinance in question fell under the state's power to protect the health and safety of its residents,[82] which the Supreme Court has long recognized as a valid exercise of the states' police power.[83] However, the Tenth circuit stated that the simple "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."[84] What jeopardizes this circuit's approach is that the quoted source in no way seems to instruct courts as to how to treat states' assertions of their laws' putative benefits. It comments more on the nature of the balancing itself.[85]

Finally, the Third Circuit was remarkably thorough in its attempt to establish that the grounds on which it based its reasoning were solid. In dealing with the waste flow control ordinance in question, the court made extensive use of the

---

79. Town of Southold v. Town of E. Hampton, 477 F.3d 38, 52 (2d Cir. 2007). The proposition upon which the Second Circuit based this point is, in fact, from the Supreme Court. However, what is more surprising is that the circuit tried to override or at least sidestep it in its next citation, which happened to be from its *own* precedent.

80. *Id.* (citing Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 79 (2d Cir. 2002)). The circuit proceeded to cite to itself again when attempting to justify its decision not to accept at face value a law's proposed benefits when a credible expert affidavit challenged them. *Id.* (referencing Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams, 84 F.3d 602, 612–13 (2d Cir. 1996)).

81. Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs, 27 F.3d 1499, 1512 (10th Cir. 1994).

82. *Id.*

83. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (stating that "[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety"); Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 251 (1829) (stating that "[m]easures calculated to produce these objects [referring to enhancing property value and "the health of the inhabitants"], provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states"); Gibbons v. Ogden, 22 U.S. 1, 205 (1824) (stating, in the scope of a larger commentary, that it is an "acknowledged power of a State, to provide for the health of its citizens"). *See also* CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 377 (6th ed. 2013).

84. *Blue Circle Cement*, 27 F.3d at 1512 (quoting Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981)).

85. *See Kassel*, 450 U.S. at 670. To the Tenth Circuit's credit, however, it appears to be the only circuit—of the ones studied herein at least—that, when invoking *Kassel* in its discussions of putative state or local benefits, cites to the main opinion itself rather than merely to Justice Brennan's concurrence. *Id.*

Supreme Court case *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*.[86] While Part I and Parts II.A–C of *United Haulers* garnered a five-Justice majority, Part II.D was only a four-Justice plurality.[87] The Third Circuit went to great lengths to shore up its support for its reliance upon Part II.D of *United Haulers*.[88] Its remand came "with instructions to apply the *Pike* balancing test in accordance with Part II.D of *United Haulers*."[89] The effort to rely on Part II.D appears to have been in vain, however. That section of the opinion largely concerned a discussion about the *burden* side of the *Pike* balancing equation.[90]

With this analysis of the reasoning of the substantive evidence circuits now complete, it appears that these circuits' approach also has its share of issues. It should be increasingly clear why the *Pike* test has generated so much discord: not only has the Supreme Court granted little explicit guidance, but also the respective circuits' jurisprudence on the matter has thrown gas on an open flame.

III. MAKING THE CASE FOR THE MORE DEFERENTIAL APPROACH

A. The Root of All Evil: Failing to Distinguish the Steps of a Multi-Step Process.

A recurring theme in many of the cases that employ the *Pike* test is a failure to focus on the correct segment of the test that is pertinent to the issue at hand.[91]

---

86. 550 U.S. 330 (2007). *See* Leb. Farms Disposal, Inc. v. Cty. of Leb., 538 F.3d 241, 247–52 (3d Cir. 2008) (relying heavily upon *United Haulers*).

87. *See United Haulers*, 550 U.S. at 334.

88. *Leb. Farms Disposal, Inc.*, 538 F.3d at 247–48. The Third Circuit used various citations in this part of the opinion, arguing that "the plurality's conclusion in Part II.D is both the narrowest of the opinions and the common denominator of the Court's resulting opinion, thus representing the holding of the Court." *Id.* at 248.

89. *Id.* at 252.

90. *See generally United Haulers*, 550 U.S. at 346–47. The bulk of the discovery done on remand concerned whether the ordinances in question imposed a burden on interstate commerce at all. "After years of discovery, both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses." *Id.* at 346 (emphasis in original). If anything, the Court seemed to operate under a presumption of validity of the putative state benefits. "We find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances." *Id.* Even in the body of the opinion that garnered a majority, the Court commented on the case's procedural history, noting that

> [o]n remand and after protracted discovery, a Magistrate Judge and the District Court found that the haulers did not show that the ordinances imposed *any* cognizable burden on interstate commerce. The Second Circuit affirmed, assuming that the laws exacted some toll on interstate commerce, but finding any possible burden 'modest' compared to the 'clear and substantial' benefits of the ordinances.

Id. at 337–38 (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150, 160 (2d Cir. 2006)). *See also United Haulers*, 438 F.3d at 153–56 (detailing the background of the dispute as a whole).

91. Fox, *supra* note 5, at 177.

This is not an attack on the judges who handle the cases, but rather a commentary on the complexity of the *Pike* test. It is of the utmost importance that people understand the test's nature and structure.

The test has several parts. Step 1 is to find out whether to apply *Pike*.[92] The court must discern whether "the statute regulates even-handedly to effectuate a legitimate local public interest"[93]—that is, whether the statute is discriminatory.[94] This step is to establish whether the court will need to use the scales of a *Pike* balancing at all. The court will also take note of any other glaring constitutional issues, such as a state attempting to engage in extraterritorial regulation.[95] If the law is non-discriminatory—and part of this determination is whether the statute has a rational relationship with its end[96]—and does not suffer from an extraterritoriality concern, *then* the *Pike* test becomes relevant.[97]

Step 2 of the *Pike* analysis has two parts. It entails deciding what the burdens (Part 1) and benefits (Part 2) of the state law in question are. Essentially, the decision is *what to place on the scales*.[98] Step 3 is to perform the actual balancing itself.[99]

The courts' failure to use singular language when handling *Pike* balancing cases is a major problem plaguing this debate.[100] This may also be the reason

---

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

93. *Id.*

94. Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) and defining "discrimination" in the appropriate context). *See generally* Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844 (2003/2004) (giving insightful commentary on the various types of discrimination). If a statute *is* in fact discriminatory against out-of-state businesses, etc., the courts almost always deem it *per se* unconstitutional. To date, only once has the Supreme Court upheld an outright discriminatory state law that burdened interstate commerce in this manner. *See* Maine v. Taylor, 477 U.S. 131, 151–52 (1986) (deeming constitutional—because it was the least restrictive effective means available—a state statute that barred importation of out-of-state baitfish in an attempt to prevent infestation by particular parasites).

95. DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 272 (2004). "Identifying extraterritoriality problems is a tricky business because states seldom regulate activities with no intrastate attributes whatsoever; rather, constitutional difficulties arise when regulations that address local concerns have ripple effects on how firms conduct business in other jurisdictions." *Id.*

96. MAY & IDES, *supra* note 83, at 380.

97. *Id.* at 381, 393.

98. *See Pike*, 397 U.S. at 142. This is the decision of exactly what is "the burden imposed on [interstate] commerce" and "the putative local benefits," respectively. *Id.*

99. This is the determination of whether the burden "is clearly excessive in relation to" the benefits. *See id.*

100. Fox states:

> The plethora of words and phrases employed by the courts when analyzing state benefits tempts one to compare *Pike* balancing cases to a tower . . . of Babel. The Supreme Court has never defined "putative state benefits" nor has it developed a single analytical standard for the state benefits side of the scale. In analyzing state benefits lower courts have used all kinds of phrases such as: "state benefits," "putative state benefits,"

why many of the circuits appear to have a near-total disunity of thought on the matter. When they attempt to support their positions, there is a risk that they will not even necessarily focus on *the correct "step" in the Pike test*. If one uses the suggested labeling, this particular circuit split concerns a divergence only over Step 2, Part 2 of a *Pike* balancing.[101]

B. Separating the Wheat from the Chaff.[102]

To establish that the fig leaf legitimacy circuits have a better basis in the law for their position, it is best not only to examine those cases upon which they have (or *could* have) drawn, but also to distinguish those which might support their opposition.

1. The "Problem" Cases . . . Or Are They?

Among the cases that some might cite as examples of the Supreme Court taking a stricter position toward putative state benefits[103] is the Supreme Court's 1978 decision in *Raymond Motor Transportation, Inc. v. Rice*.[104] *Rice* concerned a Wisconsin regulation governing the length of transport trucks that operated within state boundaries, barring any truck longer than fifty-five feet, and forbidding the towing of more than one trailer at a time without a permit.[105] Wisconsin largely phrased the regulation in terms that made it a highway safety statute.[106] Ultimately, the Court found the evidence in the case "so overwhelmingly one-sided" in favor of the argument that the regulations made only a "speculative contribution to highway safety" that it found the statute unconstitutional.[107]

> "advances" state benefits, "state purposes," "rational safety measure," "rationally furthers," "plausibility of the tendered purpose," "actual purpose," "declared purposes," "lawmaker's purposes," will not "second-guess" state legislatures, "not illusory," and "post hoc justification." These phrases can mean the same thing, or very different things, and often defy simple classification using interstate Commerce Clause language.

Fox, *supra* note 5, at 190.

101. While the described delineation of the steps in the *Pike* test is original, it appears at least somewhat to trace James D. Fox's conceptualization. *See id.* at 210.

102. In the name of intellectual honesty, an assortment of the most pertinent Supreme Court cases follows, and not merely those cases cherry-picked to bolster the "pro-fig leaf legitimacy" position that this Comment espouses. It is prudent to evaluate many of the cases that courts—as well as lawyers and fellow scholars—tend to cite most commonly. Even those cases that seem at first glance not to support the position of this Comment may be helpful in resolving the circuit split in question.

103. *See* Fox, *supra* note 5, at 195–97 (identifying what the author claims are several "rational relationship 'with bite' cases").

104. 434 U.S. 429 (1978); *see* Fox, *supra* note 5, at 195–96 (discussing *Rice*).

105. *Rice*, 434 U.S. at 432–33.

106. *Id.* at 433–34.

107. *Id.* at 447–48.

While some might think that the Court's analysis in this case indicated a kind of "heightened rational basis test"[108] in dealing with putative state benefits, that assertion is contestable. The Court had to deal with some Step 1 *Pike* issues—such as discrimination—to start.[109] While the Court acknowledged that "those who would challenge state regulations said to promote highway safety must overcome a 'strong presumption of [their] validity[,]'" [110] it found that many of the various exemptions that the state tended to grant when applying this regulation were *discriminatory in effect*, and one of them was outright *discriminatory on its face*.[111] This certainly "weaken[ed] the presumption in favor of the validity of the general limit[.]"[112] The Court, therefore, had reason to abandon its usual Step 1 deference to the state legislature concerning the law's purpose.

While the discriminatory portions of the law could have been considered sufficient cause to enforce a *per se* rule of invalidity, the Court still employed the *Pike* test.[113] Nevertheless, it is difficult to say that *Rice* definitively employed a stricter standard once moving to Step 2 of the *Pike* analysis. While one may advocate for a presumption of validity concerning a state law's putative benefits, *no one* claims that the initial deference at this "step" is insurmountable.

In *Rice*, the "appellants produced a massive array of evidence to disprove the State's assertion that the regulations ma[d]e some contribution to highway safety[,]"[114] while the state made the odd move of "virtually default[ing] in its defense of the regulations as a safety measure."[115] This effectively forced the Court to conclude that the putative benefits were not even credible.[116] Had the state offered any evidence whatsoever, perhaps that would have been enough to keep the law's measures within the scope of being "rationally related" to its purpose. Because it did not, no one can ever really know. The moral of the story here is that while the Court may give a state tremendous deference on its law's putative benefits, a sure-fire way to withdraw that deference is to pass a law with discriminatory features and give the Court a "deer-in-the-headlights" look at trial. That was how bad it had to be before the appellants could give the

---

108. Fox, *supra* note 5, at 196.

109. *See Rice*, 434 U.S. at 441.

110. *Rice*, 434 U.S. at 444 (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)).

111. *Id.* at 446–47.

112. *Id.* at 447.

113. "[W]e cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." *Id.* at 443.

114. *Id.* at 444. *See also id.* at 436–37 (detailing the evidence offered that challenged the benefits of the law). To boot, the appellants also proffered voluminous evidence about the burdens—Step 2, Part 1—that the law would place on interstate commerce. *Id.* at 438–39.

115. *Id.* at 444. *See also id.* at 437–38 (commenting on the state's failure to attempt to contradict the appellants' evidence in any way).

116. *See id.* at 443–45.

Court everything it needed to tip the scales in their favor and show "the illusory nature of the safety interests[.]"[117]

Another case that could conceivably be a thorn in the sides of the fig leaf legitimacy circuits is the 1982 case of *Edgar v. MITE Corp.*[118] *Edgar* dealt with an Illinois law that commanded that "any takeover offer for the shares of a target company must be registered with the Secretary of State."[119] According to the state, the statute served "to protect resident security holders and . . . regulate[] the internal affairs of companies incorporated under Illinois law."[120] Describing the benefits of the law as "speculative," however,[121] the Court found the statute unconstitutional under the *Pike* test.[122]

Once again, however, the sentiment that this case signals that the Court "employ[ed a] rational basis 'with bite' scrutiny"[123] and therefore took a less deferential position concerning state putative benefits is not necessarily true. One issue to raise is that the statute had a "sweeping extraterritorial effect"[124] due to the fact that it regulated "transactions which [took] place across state lines, even if *wholly outside the State of Illinois*."[125] This would already place the law in jeopardy at the Step 1 stage. Admittedly, this portion of the analysis fell into Part V-A of the opinion, which was not part of the opinion of the Court.[126]

However, Part V-B, which *was* part of the Court's opinion, dealt with the *Pike* test and the examination of the state benefits.[127] In response to the claim that the law protected local investors, the Court simply observed that "the State ha[d] no legitimate interest in protecting *nonresident* shareholders. Insofar as the Illinois law burden[ed] out-of-state transactions [referring back to its extraterritorial effects], there [was] nothing to be weighed in the balance to sustain the law."[128] That is, while the state claimed that it was acting to support a *local* interest, the benefit here was to persons *outside* its jurisdiction.[129]

---

117. *Id.* at 450 (Blackmun, J., concurring).

118. 457 U.S. 624 (1982). *See* Fox, *supra* note 5, at 196 (discussing *Edgar*).

119. *Edgar*, 457 U.S. at 626–27.

120. *Id.* at 644.

121. *Id.* at 645.

122. *Id.* at 646.

123. Fox, *supra* note 5, at 196.

124. *Edgar*, 457 U.S. at 642.

125. *Id.* at 641 (emphasis added).

126. *Id.* at 626. This was a remarkably fractured opinion, as only Parts I (the case history), II (deciding that the case was not moot), and V-B were the "opinion of the Court."

127. *Id.*

128. *Id.* at 644 (emphasis added).

129. The Court used similar reasoning to reject the state's contention that it had "an interest in regulating the internal affairs of a corporation incorporated under its laws." *Id.* at 645. The Court stated:

> Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. Furthermore, the

As a final distinction, the Illinois law in question would, as a matter of fact (and law), *not* be what would bring about many of the alleged benefits because a federal statute (the Williams Act)[130] "provide[d the] same substantive protections,"[131] which, again, would be more of a Step 1 issue for a *Pike* analysis.[132] However, concerning those benefits that the Illinois law provided that went above and beyond the Williams Act,[133] the Court agreed with the Seventh Circuit (from which the case arose) that "the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management."[134] Even if one were to assume that this particular part of the Court's analysis served to call the state's assertion of benefits into question, that was the *only* portion of the law that seemed to have any substantive value concerning the benefits side of a *Pike* balancing—and, therefore, the law was likely to fail that test anyway by this point. Perhaps due to this and the extraterritoriality concerns, the Court had little trouble icing the cake with a declaration that the benefits were speculative to boot.[135]

2. Pillars of Support for the Fig Leaf Circuits.

In 1987, "[t]he holding of *Edgar* was somewhat limited . . . by *CTS Corp. v. Dynamics Corp. of America*."[136] The facts underlying *CTS Corp.*[137] were remarkably similar to those in *Edgar*,[138] yet the Court reached a different result, ultimately reversing the lower court and upholding the Indiana statute in

---

> proposed justification is somewhat incredible since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents[.] The Act thus applies to corporations *that are not incorporated in Illinois and have their principal place of business in other States*. Illinois has no interest in regulating the internal affairs of *foreign corporations*.

Id. at 645–46 (internal citations omitted) (emphasis added).

130. *See generally id.* at 632–34 (detailing the content and intent of the Williams Act, passed in 1968).

131. *Id.* at 644.

132. The odd thing to note here is that, in this particular respect, while the law itself might not have been "preempted," it seems in a sense that its *benefits* were. That is, when one speaks of preemption, he usually imagines a scenario in which a federal law and a state law are in *conflict*. Here, the laws were substantively similar in many ways. As such, one could argue that the form of "preemption" here was unique, insofar as the state law served more as a legal redundancy of sorts because its alleged benefits were already provided by a federal statute.

133. *Edgar*, 457 U.S. at 645.

134. *Id.*

135. *Id.*

136. William Lee Biddle, *State Regulation of the Internet: Where Does the Balance of Federalist Power Lie?*, 37 CAL. W. L. REV. 161, 179 (2000).

137. 481 U.S. 69 (1987).

138. *Compare Edgar*, 457 U.S. at 626–30, *with CTS Corp.*, 481 U.S. at 72–78 (dealing with a similar law and tracing an analysis through the issues of preemption, a Commerce Clause challenge, and the "internal affairs" doctrine).

question.[139] To start, "[t]he difference with the Illinois law in *Edgar* was that Indiana's law applied only to companies incorporated in the State[,]"[140] and "the Williams Act [did] not pre-empt the Indiana Act."[141] The Court also found that the Act did not discriminate against interstate commerce.[142] The statute, therefore, cruised right past Step 1 of a *Pike* analysis.

Further, while addressing the Commerce Clause challenge to the law—the point where the lower court had employed the *Pike* test[143]—the Supreme Court took a distinctly libertarian stance. It decided not to question Indiana's approach to regulating tender offers for corporations or whether benefits would definitely issue forth from them.[144] It also notably incorporated Justice Brennan's concurrence in *Kassel*, saying—in the context of the law's benefits—that the Court was not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation[.]"[145]

Finally, the 1981 decision in *Minnesota v. Clover Leaf Creamery Co.*[146] likely mirrors the fig leaf legitimacy circuits' reasoning most closely. The case revolved around a law that forbade the sale of milk in nonreturnable plastic containers while allowing its sale in nonreturnable paperboard cartons.[147] The purpose of the statute was to manage the state's solid waste management problem.[148]

A six-member majority of the Supreme Court first concluded—while examining the equal protection portion of the challenge to the law—that the state's purpose was legitimate—something on which the parties themselves agreed.[149] The Court decided that the ban on plastic milk containers was also rationally related to the state's purpose,[150] *despite* the lower court's finding that "plastic milk jugs in fact take up less space in landfills and present fewer solid

---

139. *CTS Corp.*, 481 U.S. at 94.

140. Biddle, *supra* note 136, at 180.

141. *CTS Corp.*, 481 U.S. at 87.

142. *Id.* at 88.

143. *Id.* at 77.

144. *See generally id.* at 91–92 (using phrases such as "[a] change of management *may* have important effects on the shareholders' interests[,]" "[t]he autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests *may* be especially beneficial where a hostile tender offer *may* coerce shareholders into tendering their shares[,]" and "the *potentially* coercive aspects of tender offers have been recognized by the SEC" (emphasis added)).

145. *Id.* at 92 (quoting Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring)).

146. 449 U.S. 456 (1981).

147. *Id.* at 458.

148. *Clover Leaf Creamery*, 449 U.S. at 458–59. In an amusing historical twist, the Minnesota state legislature ended up repealing the statute in controversy in this case—section 116F.22, as section 116F.21 was the statement of policy—just a few short months after the Court issued its opinion that ultimately upheld it. *See* 1981 MINN. LAWS, ch. 151, § 2.

149. *Clover Leaf Creamery*, 449 U.S. at 461–62.

150. *Id.* at 470.

waste disposal problems than do paperboard containers."[151] The Supreme Court commented that while the legislation may not have been "a sensible means of conserving energy[,]"[152] it was nevertheless the legislature's decision to make.[153]

Moving into the Commerce Clause portion of the challenge to the law, the Court further concluded that it was not discriminatory[154]—thus passing, in every way, Step 1 of a *Pike* analysis. In a surprisingly brief summary of its position on the law's putative benefits—Step 2, Part 2[155]—the Court said that the law's burdens on interstate commerce were

> not "clearly excessive" in light of the *substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems*, which we have already reviewed in the context of equal protection analysis. We find these local benefits ample to support Minnesota's decision under the Commerce Clause.[156]

That is, although the law's benefits were at best debatable, they were sufficient for purposes of a *Pike* test.

C. So, What Can We Glean?

Although not exhaustive, these cases help to illustrate a few general rules concerning the treatment of putative benefits in a *Pike* analysis and should help resolve this circuit split.

For one, while there are various terms and words used to refer to putative benefits, it is best to draw the critical distinction between a law's *purpose*—a Step 1 concern that might end up making a true *Pike* balancing unnecessary—and its *benefits*—a Step 2, Part 2 concern where *Pike*'s scales are actually employed. A law's "purpose" might be defined in this context as its "classification or type."[157] The "purpose" of the law must be a constitutionally valid one—usually one of traditional local concern—and a presumption of validity will stand unless it in fact violates constitutional principles.

---

151. *Id.*

152. *Id.* at 469.

153. *Id.* (quoting Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)).

154. *Id.* at 471–72.

155. The Court performed its "burden" analysis—Step 2, Part 1—in the immediately preceding portion of its opinion, deeming the burdens on interstate commerce to be relatively minor. *Id.* at 472–73.

156. *Id.* at 473 (internal citation omitted) (emphasis added).

157. The purpose of a law is often somewhat difficult to distinguish from its benefits simply *because* the latter tends to serve the former—at least for laws that are well-crafted and more likely to survive *Pike* balancing. Perhaps it would be better to conceptualize a law's "purpose" as the "genus" of benefits that it aims to induce, whereas the "benefits" are more of a "species" (to borrow some scientific and philosophical terminology from Aristotle and St. Thomas Aquinas).

In contradistinction, "putative benefits" could be defined as "those rationally-related positive effects that a law seeks to induce in service of a legally legitimate purpose."[158] Whether those effects come to fruition is irrelevant. So long as (1) there is a rational relationship between the asserted positive effects of the law and a legitimate purpose, and (2) the alleged benefits do not pass into the realm of the outright laughable—either in themselves or via an extreme amount of uncontroverted, voluminous, and convincing evidence that contradicts them—the court will consider the benefits at face value. To be clear, however, a court will *not* consider those benefits that arise from the pursuit of an illegitimate purpose or the use of unconstitutional means (*i.e.*, from laws that are discriminatory, seek to regulate extraterritorially, etc.), as they are not, properly speaking, "benefits" within the definition above.

IV. CONCLUSION

At this point in time, if the Supreme Court is not going to abandon the *Pike* test in its entirety, it is time that the Court resolved this circuit split. States could then finally know exactly what is expected of them when their laws are challenged in court and businesses and their employees could thrive in stable markets. While neither the fig leaf legitimacy approach nor the substantive evidence approach is perfect, the fig leaf legitimacy circuits have a stronger case in the law for their position on putative state benefits.

To return to where this Comment started, perhaps it would be best to make one last observation about Lady Justice before closing. Although her depiction is nearly ubiquitous, there is one small detail about her that almost no one notices.

She is not smiling. Perhaps now she can.

158. These definitions are entirely original. Any similarity to other definitions is unintentional and purely coincidental.