Note:

State Tolling Practices: The Future of Highway Finance or an Unconstitutional State Practice?

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I. INTRODUCTION

Interstate commerce consists of the commercial intercourses among the states.[1] "Commercial intercourse" includes the buying, selling, and *transporting* of goods.[2] Interstate highways are the main conduit used to ship goods across the United States,[3] and almost all goods have to travel along highways before reaching their final destination.[4] In 1998, interstate highways "account[ed] for 71 percent of total freight transportation by weight and 80 percent by value" of all goods shipped.[5] America's economy "depends on . . . interstate[ ] [highways] to move various goods."[6] So much wealth is generated as a result of interstate highways that Tom McDonald, former Chief of U.S. Bureau of Public Roads, declared, "[I]t was not our wealth that made our highways possible; rather, it was our highways that made our Nation's wealth possible."[7]

Interstate commerce includes transporting goods. Highways transport a disproportionately high amount of goods across the United States. Today, commercial intercourses among the States are dependent on highways and they are the most important channel of interstate commerce. Congress has plenary authority to ensure that the "channels" of com-

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

2. *Id.*

3. *Celebrating 50 Years: The Eisenhower Interstate System Before the H. Subcomm. on Highways, Transit, and Pipelines of the H. Comm. on Trans. and Infrastructure*, 109th Cong. 6 (2006) [hereinafter *Celebrating 50 Years*] (testimony of Richard J. Capka, Acting Adm'r, Federal Highway Admin.).

4. *Id.* at 19 (testimony of John Gifford, Professor, George Mason University).

5. *Id.* at 32 (testimony of Richard J. Capka, Acting Adm'r, Federal Highway Admin.).

6. *Id.* at 2 (statement of William Pascrell, Congressional Representative, Member, H. Comm. on Trans. & Infrastructure).

7. *Id.* at 5 (testimony of Richard J. Capka, Acting Adm'r, Federal Highway Admin. (quoting Thomas McDonald, former Chief, U.S. Bureau of Public Roads)).

merce, which include highways, stay unhindered.[8] Thus, States are prohibited from passing laws that would significantly hinder highway travel.[9] However, what if a State forces all interstate travelers to stop at its borders to pay a toll before they can travel through the State? Or, what if a city forces commuters to pay a "cover charge" before allowing passage through its boundaries? This Note will seek to address these issues. More specifically, this Note will examine the constitutionality of states' tolling practices through the lens of the dormant Commerce Clause. First, this Note will discuss recent developments in this area justifying a closer examination of toll roads[10] in light of the dormant Commerce Clause. Next, it will analyze whether the purported purpose behind toll roads survives dormant Commerce Clause scrutiny. Finally, it will conclude by emphasizing the need for further judicial action.

II. The Supreme Court and State Tolling Practices

1. Recognizing Toll Roads as Interstate Commerce

Traditionally, toll roads were considered an instrumentality of *intra*-state commerce, not interstate commerce. In *Gibbons v. Ogden*, the Supreme Court, per Chief Justice Marshall, stated that Congress has "[n]o direct general power over [toll roads] . . . and . . . they remain subject to State legislation."[11] The Court considered toll roads to be part of the "immense mass of legislation" not surrendered by the States to the Federal government.[12] The "immense mass of legislation" included areas that were intrastate in nature.[13] Thus, *Gibbons* supports the idea that toll roads were originally considered part of intrastate commerce.[14]

The *Gibbons* Court, relying on the intrastate nature of toll roads, found toll roads outside the scope of Federal legislation under the Commerce Clause.[15] Toll roads are products of state legislation and exist only

8. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

9. *See id.* (providing that the authority to "regulate the use of the channels of interstate commerce" resides with Congress).

10. Toll roads are roads in which "the public has the right to travel upon payment of toll." Black's Law Dictionary 1659 (4th ed. 1968).

11. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

12. *Id.*

13. *Id.* The court also included "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect . . . [ferries]." *Id.*

14. *See id.*("[The] immense mass of legislation . . . embraces every thing [sic] within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.").

15. *See id.* at 65 ("Internal commerce must be that which is wholly carried on within the limits of a State . . . . This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges . . . .").

within the territorial boundaries of the State that created the road. In addition, tolls are collected only along roadways travelling in the State. The revenue raised as a result of state tolling finances highway improvements and construction within the State. Also, in 1824 (the year *Gibbons* was decided), tolling primarily affected local traffic.[16] However, since *Gibbons* was decided, several advances in transportation demand reexamination of the intrastate nature of toll roads. Thus, *Gibbons* cannot be relied on to constitutionally validate modern tolling practices as being an intrastate activity. Even the *Gibbons* Court recognized that state tolling practices may become the subject of the Commerce Clause if "it . . . [is] for national purposes [and] . . . the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."[17]

Though *Gibbons* was not about a toll road's relationship with interstate commerce, the Supreme Court addressed that issue directly in *Overstreet v. North Shore Corp.*[18] The precise issue presented in *Overstreet* was "whether petitioners who are engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are 'engaged in commerce' within the meaning of [the Fair Labor Standards Act ("FLSA")]."[19] The FLSA applied to all businesses that engaged in interstate commerce.[20] However, it did not apply to occupations that only affected intrastate commerce.[21]

To determine whether toll road operators were subject to the FLSA, the court first had to determine if they were "engaged in commerce."[22] The court construed "engaged in commerce" to "extend . . . throughout the farthest reaches of the channels of interstate commerce."[23] The

16. *See generally* Daniel Klein & John Majewski, *Turnpikes and Toll Roads in Nineteenth-Century America*, EH.NET ENCYCLOPEDIA (Robert Whaples, ed.) (Feb. 5, 2008), http://eh.net/encyclopedia/article/Klein.Majewski.Turnpikes (discussing the local nature of toll roads and how they primarily serve local interests); Gerald Gunderson, *Privatization and the 19th-Century Turnpike*, 9 CATO JOURNAL 191, 196 (1989), *available at* http://www.cato.org/pubs/journal/cj9n1/cj9n1-9.pdf (stating that in the early 19th Century, more than half of the turnpikes in the United States were located in a few states in the upper northeast part of the country).

17. *Gibbons*, 22 U.S. at 203-04.

18. Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

Note that *Overstreet* was decided in 1943, six years after the "switch in time that saved nine" that changed commerce clause analysis. *See* 21 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 5002, n.222 (2d ed. 2010) (discussing the "switch in time that saved nine").

19. *Overstreet*, 318 U.S. at 126.

20. *Id.* at 128.

21. *Id.*

22. *Id.*

23. *Id.* (quoting Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943)).

Court determined that "engaged in commerce" included activities that were "closely related" to the instrumentalities of interstate commerce.[24] The Court also concluded "persons who are engaged in maintaining[,] repairing[, and operating toll] facilities should be considered as engaged in commerce."[25]

First, the court found that roads and bridges are "indispensable to the interstate movement of persons and goods."[26] However, in order for the FLSA to apply, the roads have to be instrumentalities of interstate commerce.[27] For a road or bridge to be "an instrumentalit[y] of interstate commerce," it must be used primarily "by persons and goods passing between the various States."[28] The Court found that the toll road at issue in *Overstreet* was an "instrumentalit[y] of interstate commerce" and that maintainers, repairers, and operators of the road are engaged in commerce "because without their services these instrumentalities would not be open to the passage of goods and persons across state lines."[29]

Overstreet is important in the dormant Commerce Clause context for two reasons. First, the Supreme Court directly held that toll roads were part of interstate commerce, thus making the FLSA applicable to tolling companies.[30] More importantly, *Overstreet's* conclusion is somewhat contrary to *Gibbons*. *Gibbons* included toll roads as part of the "immense mass of legislation" left to the states.[31] More specifically, *Gibbons* likely relied on the inherent intrastate nature of toll roads when it lumped them into the "immense mass of legislation."[32] Contrarily, *Overstreet* saw toll roads as an instrumentality of interstate commerce as long as they primarily supported interstate traffic.[33] Nevertheless, *Overstreet* did not completely foreclose the idea that a toll road which served only intrastate traffic would be exempt from the FLSA because it did not transport people or goods across state lines.[34]

The second important purpose *Overstreet* furthers is the changing at-

24. *Id.* at 128-29.
25. *Id.* at 129-30.
26. *Id.* at 129.
27. *Id.*
28. *Id.* at 129-30.
29. *Id.* at 130.
30. *See id.* ("The work of [the toll road operators] in providing a means of interstate transportation . . . is so intimately related to interstate commerce as to be in practice and in legal contemplation a part of it and justifies regarding [the toll road operators] as engaged in commerce within the meaning of the [FLSA]." (citation omitted) (internal quotation marks omitted)).
31. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).
32. *See id.*
33. *Overstreet*, 318 U.S. at 130.
34. *See generally id.* at 129-130. By only applying the FLSA to bridges, roads and railroads specifically utilized as "instrumentalities of interstate commerce," the Court leaves open the

titude towards interstate transportation. The 1824 *Gibbons* decision considered toll roads as intrastate instrumentalities because, primarily, the roads would serve intrastate travel.[35] The means of transportation, i.e. walking or horseback, limited how far a traveler could stray from his home or how far a manufacturer could ship his goods. Though some interstate travel still took place, local toll roads were used by local traffic. On the other hand, in 1943, the mode of traveling inter-state was growing exponentially.[36] Motor vehicles and airplanes made travelling further distances possible. Roads that traditionally only served intrastate traffic could now serve a higher volume of interstate traffic. Thus, *Overstreet* included toll roads as part of the instrumentalities of interstate commerce.[37]

2. *State Tolling Practices and the Three Bears: The Three Tests Used by the Supreme Court to Determine the Constitutionality of State Tolling Practices*

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the States."[38] Though the Commerce Clause does not speak to a State's authority to regulate interstate commerce, the Supreme Court has "interpreted the Commerce Clause as an implicit restraint on state authority."[39] This implicit restraint on state authority is commonly referred to as the dormant Commerce Clause because the commerce power can either be exercised by Congress, or in the absence of Congressional action, lie dormant.[40] The Supreme Court has, over the years, adopted three tests used to determine whether a State's tolling practice violates the dormant Commerce Clause. This section will discuss the three tests in turn and determine which test is best in assessing the constitutionality of state tolling practices.

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interpretation that bridges, roads and railroads solely used for intrastate purposes are exempt from the FSLA. *Id.*

35. *See Gibbons*, 22 U.S. at 65 ("Internal commerce must be that which is wholly carried on within the limits of a State . . . . This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges . . . .").

36. *See generally First Progress Report of the Highway Cost Allocation Study*, 85th Cong., 1st Sess. (1957) (letter from Secretary of Commerce), *available at* http://www.fhwa.dot.gov/interstate/freightb.htm (noting a growth in automobile travel by 460 percent between 1920 to 1936, and by 139 percent between 1936-1955).

37. *See Overstreet*, 318 U.S. at 129-30.

38. U.S. CONST. art. I § 8, cl. 3.

39. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

40. *Gibbons*, 22 U.S. at 189.

A. The Baltimore Presumption of Validity: The Supreme Court's Recognition of the Unlimited Tolling Power of the State

Overstreet merely decided that toll roads could be an instrumentality of interstate commerce.[41] *Overstreet* did not stand for the proposition that state tolling practices were a violation of the Commerce Clause. The Supreme Court addressed that issue in *Baltimore & Ohio Railroad v. Maryland*.[42] *Baltimore* was decided in 1874, seventy years prior to *Overstreet*'s declaration that toll roads can be an instrumentality of interstate commerce. Therefore, *Baltimore*'s reasoning is more akin to *Gibbons*' "immense mass of legislation" approach.[43]

Baltimore gave the States an almost limitless tolling power. The Court concluded that the Commerce Clause was originally intended to only cover water commerce, not land commerce.[44] Nevertheless, the Court recognized "[t]hat the road is one of the principal thoroughfares in the country for interstate travel."[45] Still, the Court did not consider roads as an instrumentality of interstate commerce. Rather, the Court found that roads were constructed by the States and, thus, the property of the State.[46] The Court relied on the fact that, unlike waterways, no artificial roads existed until the *States* financed the construction, maintenance, and repair of the roads.[47] To that end, the Court created a presumption that state tolling practices were valid and declared that States had an "unlimited right" to impose tolls along roads that it created.[48] The Court characterized this "unlimited right" as a "sovereign-discretion" of the State and the only check for excessive tolls was the political process.[49] The only limit to the State's "tolling right" that the Court recognized was that the toll imposed by the State cannot amount to a tax on goods or persons travelling in interstate commerce.[50] The Court does not devise any tests

41. *See Overstreet*, 318 U.S. at 129-30.

42. Balt. & Ohio R.R. v. Maryland, 88 U.S. (21 Wall.) 456 (1874), *aff'd*, 34 Md. 344 (Md. 1871).

43. *Id.* at 471; *Gibbons*, 22 U.S. at 203.

Baltimore neither cites nor relies on *Gibbons* for its analysis. Nevertheless, both cases come to the same conclusion: toll roads are the product of state law, thus they are intrastate and do not, on their face, pose a constitutional issue. *Baltimore*, 88 U.S. at 470-71; *Gibbons*, 22 U.S. at 203.

44. *Baltimore*, 88 U.S. at 470.

45. *Id.* at 469.

46. *Id.* at 470.

47. *Id.*

48. *Id.* at 471 ("This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority.").

49. *Id.*

50. *Id.* at 472 (*citing* Crandall v. Nevada, 73 U.S. 35, 46 (1867)).

In *Crandall*, the Court struck down as unconstitutional a Nevada law that charged a fee of one dollar to everyone travelling through the State by stage coach or train. *Crandall*, 73 U.S. at 46-

to distinguish between a "tax" and a "toll;" instead, the Court presumed that the State's toll was constitutional.[51]

Almost twenty-five years after *Baltimore*, the Supreme Court continued to recognize the unlimited tolling right of States.[52] However, the Court has never reexamined *Baltimore's* presumption since *Overstreet* was decided. *Baltimore* relied on the intrastate character of toll roads when it adopted a presumption of validity for state tolling practices.[53] However, *Overstreet* relied on the interstate nature of roads in general when it concluded that toll road operators were subject to the FLSA.[54] *Baltimore's* presumption is no longer valid in light of *Overstreet.* Where *Baltimore* presumes that state toll roads are not subject to the Commerce Clause because the roads were created, maintained, and operated by the State, *Overstreet* found the Commerce Clause applicable to toll roads because the roads were "instrumentalities of interstate commerce."[55] Thus, in light of *Overstreet*, *Baltimore's* presumption must be abandoned.

B. The Evansville Analysis

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.,* the Supreme Court adopted a three-part test to determine whether State tolling practices violated the dormant Commerce Clause.[56] Under the *Evansville* Test, a toll will be upheld as valid as long as it is reasonable.[57] A toll is reasonable "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce."[58]

The *Evansville* Test has been cited with approval in subsequent cases

47. The dissenting opinion in *Baltimore* found the tolling scheme in *Baltimore* to be indistinguishable from *Crandall. Baltimore*, 88 U.S. at 475 (Miller, J. dissenting). Justice Miller provided in *Crandall* that:

> [I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.

Crandall, 73 U.S. at 46.

51. *Baltimore*, 88 U.S. at 472-73.

52. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 334 (1893).

53. *Baltimore*, 88 U.S. at 470-71.

54. Overstreet v. North Shore Corp., 318 U.S. 125, 129-30 (1943).

55. *Id.* at 130.

56. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 715-17 (1972).

57. *Id.* at 714-15 (stating that a state toll is constitutional as long as it is "uniform, fair, and practical").

58. NORTHWEST AIRLINES, INC. v. CNTY. OF KENT, 510 U.S. 355, 369 (1994) (CITING *Evansville*, 405 U.S. at 716-17).

dealing with user fees.[59] Furthermore, it was a restatement of rules devised in state tolling cases.[60] Therefore, some courts have relied exclusively on the *Evansville* Test to determine the constitutionality of state tolling practices. However, if a State tolling practice survives *Evansville*, it only means that the tolling practice is reasonable, not constitutional. A closer examination of the three factors makes apparent that the *Evansville* Test cannot be an exclusive test for determining whether a State's tolling practice violates the dormant Commerce Clause. First, only the third prong relates to interstate commerce.[61] The other two prongs determine if the user fee is related to the "use" a user receives.[62] In *American Trucking Ass'n, v. Scheiner*, the Supreme Court struck down a Pennsylvania user fee because the fee charged was excessive to the benefit received.[63] The Court reasoned:

> [T]he amount of Pennsylvania's marker and axle taxes owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State. '[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'[64]

Thus, under the first two prongs, the Court will look at the relationship a fee has with the use and the benefit derived from that use in order to determine whether that fee was reasonable, not the user fee's relationship with interstate commerce.

Second, the *Evansville* Test does not examine neutral user fees' relationship with interstate commerce.[65] In fact, the *Evansville* Test may strike down a neutral user fee under the first two prongs because local motorists receive a greater benefit than out-of-state motorists, thereby receiving a disproportionate use for the fee charged.[66] Toll roads in urban centers are used primarily by local traffic. Local motorists would use the local toll roads almost every day in order to travel to work, go shop-

59. *See, e.g.*, Or. Waste Sys. Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 103 n.6 (1994) (stating that *Evansville* would apply if the defendant's scheme amounted to a user fee); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 289-92 (1987) (applying the *Evansville* Test to determine that Pennsylvania's flat tax scheme violated the dormant Commerce Clause).

60. *See Evansville*, 405 U.S. at 715, 717 (citing several rules announced in previous cases addressing highway tolling).

61. *Id.* at 717.

62. *See id.* at 715-17.

63. *American Trucking Ass'n*, 483 U.S. at 290.

64. *Id.* at 291 (quoting Commonwealth Edison Co. v. Montana 453 U.S. 609, 629 (1981)).

65. *See generally Evansville*, 405 U.S. at 707 (failing to address the impact of a neutral user's fee on interstate commerce).

66. *See id.* (because the first two prongs of the *Evansville* test address the relationship of the use derived and the fee charged, a neutral fee could fail under the first two prongs though not affecting interstate commerce).

ping, and return home. Local motorists may use the toll road several times a day. However, out-of-state motorists may use the local toll road only once to travel through the community. If out-of-state motorists and local motorists were charged the same toll for use of the highway, the toll may fail the first two prongs of the *Evansville* Test.[67] The out-of-state motorist had a disproportionally small benefit compared to local motorists. Furthermore, out-of-state motorists may only use *a* hotel, *a* gas station, or *a* restaurant near the toll road. However, local motorists will use multiple shops, restaurants, gas stations, and businesses. In addition, the wearing down of the roadway would be caused primarily by local traffic. Thus, a neutral toll would be found invalid under the first two prongs of the *Evansville* Test.[68] If anything, local traffic, under the *Evansville* Test, should be charged a higher user fee than out-of-state traffic.

Last, the *Evansville* Test's three prongs can really be reduced to one inquiry: whether the user fee discriminates against out-of-state users. The third prong asks this question outright.[69] However, the first two prongs implicitly ask this question. The first prong determines if the fee is "fair" while the second prong determines if the fee is "excessive."[70] Fairness, by the very word, implies discrimination. If two groups are treated unfairly, one group is being discriminated against. Likewise, excessive fees are invalid only when related to the benefit received.[71] As the above example illustrates, a casual user that is charged the same or greater fee as a daily user of a highway is always paying an excessive fee in relation to the benefit he receives. Therefore, the "excessive" fee standard is inherently discriminatory. Local traffic will always receive a greater benefit than out-of-state travelers.

However, the Supreme Court has consistently held the *Evansville* Test to be valid.[72] Still, the test only determines if the fee is *reasonable*.[73] As illustrated above, it is inefficient to determine whether the dormant Commerce Clause was violated. Only one prong analyzes a fee's relationship with interstate commerce and the first two prongs only determine if the "fee" is related to the "use." The modern dormant

67. *See id.* (due to local traffic deriving the most use out of highways, a toll road charging a uniform fee to local and out-of-state motorists could fail under *Evansville* because the benefits would primarily accrue to local users, though local users pay the same rate as out-of-state users).

68. *See id.* (a uniform fee against local and out-of-state highway users would fail under *Evansville* because more benefits of use would be conferred upon local users, thus, the benefits derived exceed the fee imposed).

69. *Id.* at 716-17.

70. *Id.*

71. *Id.*

72. *See, e.g.*, NORTHWEST AIRLINES, INC. v. CNTY. OF KENT, 510 U.S. 355, 368 (1994); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 289-290 (1987).

73. *Evansville*, 405 U.S. at 713.

Commerce Clause analysis is better equipped to determine the constitutionality of fees than the *Evansville* Test. Therefore, the *Evansville* Test should be abandoned in the context of State tolling practices and replaced with the modern dormant Commerce Clause analysis.

C. The Modern Dormant Commerce Clause Analysis

The modern dormant Commerce Clause analysis is a three step inquiry. First, the court must determine whether a State is acting as a market regulator or a market participant.[74] The dormant Commerce Clause is concerned only with state laws that attempt to regulate the market.[75] Hence, the Supreme Court has:

> [A]dhered strictly to the principle 'that the right to engage in interstate commerce is not the gift of a state, and that a state cannot *regulate* or restrain it' . . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from *participating* in the market and exercising the right to favor its own citizens over others.[76]

To determine whether state actions are participation or regulation, the court must answer "a single inquiry: whether the challenged program constituted direct state participation in the market."[77] If the inquiry is answered in the affirmative, state action qualifies as participation and the dormant Commerce Clause does not apply.[78] Requisite "state participation in the market" is satisfied when the State "buys or sells goods or services" in interstate commerce,[79] manufactures goods to be used in interstate commerce,[80] or provides public funds to finance public projects.[81] On the other hand, a State is a market regulator, and the dormant Commerce Clause applies if it "impose[s] conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of the particular market [in which it is participating]."[82] In addition, a State is a market regulator when it exercises its police powers to foreclose private competition in a particular market.[83] Hence, a State is acting as a regula-

74. *See* White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 210 (1983) (stating that disparate impacts on out-of-state businesses only factor in the dormant Commerce Clause equation after it is decided that the state is acting as a market regulator).

75. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808 (1976) (citing H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-535 (1949)).

76. *Id.* at 808, 810 (emphasis added) (quoting *H.P. Hood & Sons*, 336 U.S. at 535).

77. *White*, 460 U.S. at 208 (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 436 n.7 (1980)).

78. *Id.* at 210.

79. David S. Bogen, *The Market Participation Doctrine and the Clear Statement Rule*, 29 SEATTLE U. L. REV. 543, 543, 554 (2006).

80. *Reeves*, 447 U.S. at 439-40, 451.

81. *White*, 460 U.S. at 208, 214-15.

82. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

83. *See* Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 56 (2d Cir. 1998),

tor if it exerts control over a private business or forecloses a private business from participating in a market.

Second, if the court finds that the State is acting as a market regulator, it must then determine if the State regulation discriminates against interstate commerce.[84] State laws that discriminate against interstate commerce are subjected to the "strictest scrutiny."[85] As a result, all discriminatory laws are "virtually *per se* invalid."[86] A State regulation can be discriminatory in two ways. First, the State law can be facially discriminatory.[87] A facially discriminatory law places a burden on out-of-state businesses while providing some sort of benefit for in-state businesses.[88] State laws are also discriminatory if they are designed to promote economic protectionism.[89] Protectionist laws may appear facially neutral.[90] However, protectionist laws are inherently "designed to benefit in-state economic interests by burdening out-of-state competitors."[91]

If a law is either facially discriminatory or promotes economic protectionism, it can survive the "strictest scrutiny" if the State "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[92] In addition, a discriminatory law will be upheld as valid if it favors a government entity[93] that treats in-state and out-of-state businesses equally,[94] furthers a "traditional government

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cert. denied, 525 U.S. 923 (1998) ("A state or local government's actions constitute market participation only if a private party could have engaged in the same activity."); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995), *cert. denied*, 517 U.S. 923 (1998) (arguing that when a state exercises its governmental powers to restrict private entry into a market, the state is no longer acting as a market participant, but a market regulator).

84. *White*, 460 U.S. at 210; United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

85. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

86. Or. Waste Sys., Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).

87. *Id.* at 99 (citing Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342 (1992)).

88. *Id.*

89. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

90. *See* Dean Milk, Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that [in-state] milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.").

91. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

92. *New Energy*, 486 U.S. at 275, 278; *see also* Maine v. Taylor, 477 U.S. 138, 151-52 (1986) (finding discriminatory state action that survived strict scrutiny).

93. A government entity is a business that is owned and operated by the government. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007) ("[T]he laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant."). *See also id.* at 339-42 (finding that the determination of the waste disposal facility as being a government entity was crucial in deciding that the State law requiring all haulers to bring waste to that facility was not discriminatory).

94. *See id.* at 345 ("We hold that [when a State law] treat[s] in-state private business inter-

function,"[95] and can be repealed or amended through traditional political channels.[96]

Third, if the court determines that the State regulation does not discriminate against interstate commerce, the regulation will be upheld as valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[97] The third prong is often referred to as the *Pike* Balancing Test.[98] *Pike* balancing is not applied unless the State law promotes a legitimate local purpose.[99] "If a legitimate local purpose is found . . . the extent of the burden [on interstate commerce] that will be tolerated . . . will 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."[100] Unlike discriminatory laws, the *Pike* analysis is a minimal analysis, meaning most facially neutral laws will survive its scrutiny.[101]

The modern dormant Commerce Clause analysis, like the *Evansville* Test, is a three part test.[102] Unlike the *Evansville* Test, the modern dormant Commerce Clause analysis is able to account for both discriminatory laws and neutral laws. The *Evansville* Test only determines when a

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ests exactly the same as out-of-state ones, [it] do[es] not discriminate against interstate commerce for purposes of the dormant Commerce Clause." (internal quotation omitted)).

95. *Id.* at 334. "Traditional government functions" include "protect[ing] the lives, limbs, comfort, and quiet of all persons." *Id.* at 334, 342-43 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). In *United Haulers*, the Supreme Court was hesitant to interfere with who the state citizens decided should carry-out traditional government functions: "It is not the office of the Commerce Clause to control the decision of the [citizens] on whether [the] government or the private sector should [carry-out these traditional government functions]. *Id.* at 344.

96. *Id.* at 344-45. "[D]ormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States . . . ." *Id.* at 345. When the "costs of regulation" are shifted to other States, the parties most burdened by the State law are out-of-state businesses. *Id.* Out-of-State businesses do not have access to the political process to change the discriminatory law, therefore, the "costs of regulation" cannot be remedied through the political process. *Id.* (citing S. Pac. Co. v. Arizona, 325 U.S. 761, 767-68, n.2 (1945)). Instead, the dormant Commerce Clause serves as a substitute of the political process. *Id.* at 345. However, when the people who created the government entity are most burdened by it, they have the ability to challenge the law and change it through the dormant Commerce Clause. *Id.* Therefore, if the impacted group has access to the political process, the courts will not "step in and hand [them] a victory." *Id.*

97. *Id.* at 346 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

98. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339, 353-54 (2008) (plurality) (referring to the *Pike* Test as, alternately: *Pike* scrutiny, *Pike* enquiry, *Pike* balancing, *Pike* examination, *Pike* burden, and *Pike* comparison); *see also* James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 175 (2003) (referring to the inquiry as the *Pike* Balancing Test).

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

100. *Id.*

101. *See United Haulers*, 550 U.S. at 346 (citing *Pike*, 397 U.S. at 142).

102. *See* White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 209-10 (1983); *Pike*, 397 U.S. at 142.

law is not discriminatory. Since discriminatory laws are invalidated on their face or in their application in the modern dormant Commerce Clause analysis, the *Evansville* Test may be applied at the "discriminatory" inquiry. After all, the *Evansville* test is well equipped to determine whether a user fee discriminates against interstate commerce. In addition, the modern analysis does not employ any specific test to determine whether a State law is discriminatory. The only guidance the Supreme Court has given lower courts is that the law cannot favor in-state businesses and place a burden on out-of-state businesses.[103]

The *Evansville* Test's three prongs determine if user fees are discriminatory.[104] If *Evansville* is satisfied, the user fee is struck down as unconstitutional because it discriminates against interstate commerce.[105] The *Evansville* Test, like the modern dormant Commerce Clause analysis, uses the same standard for finding discriminatory laws. Therefore, the *Evansville* Test can be used in the scheme of the modern analysis in order to satisfy the "discriminatory prong." Thus, the *Evansville* Test is still a part of the analysis. It just isn't a determinative part. If the *Evansville* Test is satisfied, the Court must then apply the *Pike* Balancing Test to address whether the law's neutrality has an excessive burden on interstate commerce.[106] Thus, the modern dormant Commerce Clause analysis is best suited to address state tolling practices because it can incorporate the *Evansville* Test and address neutral laws that satisfy the *Evansville* Test.

3. Three Different Circuits, Three Different Tests?

In *Doran v. Massachusetts Turnpike Authority,* the First Circuit affirmed a district court ruling that a Massachusetts' tolling scheme did not violate the dormant Commerce Clause.[107] The scheme[108] charged motorists using a FAST LANE device a lesser fee than motorists using an E-Z Pass transponder.[109] The FAST LANE transponder was used almost exclusively by Massachusetts' residents.[110] The court upheld the scheme because, in its view, it treated in-state and out-of-state motorists the same

103. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).

104. *See* Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972).

105. *Or. Waste Sys.*, 511 U.S. at 103 n.6.

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

107. Doran v. Mass. Tpk. Auth., 348 F.3d 315, 322-23 (1st Cir. 2003), *cert. denied*, 541 U.S. 1031 (2004).

108. Originally, the scheme, known as the "Resident Only Discount Program," only applied to Massachusetts' residents. *Id.* at 317. However, the State amended the scheme to included nonresidents that used a FAST LANE transponder for fear of violating the dormant Commerce Clause. *Id.*

109. *Id.*

110. *See id.* (noting that only a "few thousand out-of-state FAST LANE subscribers" would be eligible for the in-state discount).

and did not place an undue burden on interstate commerce.[111] *Doran* relied on the modern dormant Commerce Clause analysis.[112]

Likewise, in *Wallach v. Brezenoff*, the Third Circuit upheld a cooperative tolling scheme employed by New York and New Jersey.[113] In a three-page opinion, the circuit court found that the plaintiffs' claim did not even trigger the dormant Commerce Clause analysis.[114] The tolling scheme raised the tolls of the main bridges that connected New Jersey with New York.[115] The plaintiffs argued that the toll amounted to a tax on interstate commerce.[116] The court asserted, with little analysis in support, that the plaintiffs' claim did not violate the dormant Commerce Clause.[117] *Wallach* dismissed the complaint without using either the modern dormant Commerce Clause analysis or the *Evansville* Test.[118]

In *Selevan v. New York Thruway Authority*, the Second Circuit found that the plaintiffs had stated a valid dormant Commerce Clause claim.[119] The New York Thruway Authority ("NYTA") operated a toll road that travelled through Grand Island, NY, along Interstate-190.[120] The NYTA adopted a tolling practice that charged Grand Island residents as little as nine cents to travel on the toll road, but non-Grand Island residents had to pay seventy-five cents to travel along the same stretch of highway.[121] The plaintiff challenged the tolling practice as a violation of the dormant Commerce Clause.[122] The district court dismissed the claim, at the defendant's request, for lack of standing and failure to state a claim.[123]

After the Second Circuit found that the plaintiff had standing,[124] it considered whether the plaintiff stated a valid dormant Commerce Clause claim.[125] The circuit court rejected that the tolling scheme was *per*

111. *Id.* at 322-23.

112. *Id.*

113. Wallach v. Brezenoff, 930 F.2d 1070, 1072-073 (3d Cir. 1991).

114. *See id.* at 1072 ("[P]laintiffs have failed to provide any basis to support their claim that [the dormant Commerce Clause analysis] has not been satisfied.").

115. *Id.* at 1071.

116. *Id.* at 1071-72.

117. *Id.* at 1072-73.

118. *See id.* ("[P]laintiffs have failed to present any basis to support their claim that the Port Authority's 1987 toll increase offended either a constitutionally protected right to travel or the Commerce Clause . . . .").

119. Selevan v. N.Y. Thruway Auth., 584 F.3d 84, 96 (2d Cir. 2009).

120. *Id.* at 87.

121. *Id.*

122. *Id.* at 86-87. Along with the dormant Commerce Clause claim, the plaintiff also alleged a violation of Article IV and the Fourteenth Amendment's Privileges and Immunities Clause and a violation of Equal Protection. *Id.*

123. *Id.* at 87-88.

124. *Id.* at 89.

125. *Id* at 89-90.

se invalid because the plaintiff failed to "identify an[ ] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors."[126] However, the court remanded the case because the district court failed to apply the *Evansville* Test.[127] The circuit court found the significantly higher toll nonresidents had to pay may place a disproportionate burden on interstate commerce.[128] Thus, the plaintiff's claim survived a motion to dismiss.[129]

The First Circuit relied on the modern dormant Commerce Clause analysis to dismiss a claim. The Second Circuit relied on *Evansville* in order to find that a claim may violate the dormant Commerce Clause. The Third Circuit, without any analysis upheld the State tolling practice (perhaps resurrecting the *Baltimore* Presumption). Therefore, three separate courts of appeals are possibly using three different standards to determine if State tolling practices violate the dormant Commerce Clause.

4. Selevan & Suprenant: *A Changing Attitude towards State Tolling Practices*

In *Surprenant v. Massachusetts Turnpike Authority*, the District Court of Massachusetts denied a motion to dismiss in a case with similar facts as *Doran*.[130] Like *Doran,* the tolling scheme at issue in *Surprenant* offered discounted toll rates to persons who purchased a FAST LANE transponder.[131] The FAST LANE program is sponsored by the Massachusetts Turnpike Authority ("MTA") and is available to both residents and nonresidents.[132] However, unlike the discount program at issue in

126. *Id.* at 95 (quoting Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 169 (2d Cir.2005)).

127. *Id.* at 95-96. Though remanding for application of the *Evansville* test, the circuit court instructs the district court to apply the "Northwest Airlines test" on remand. *Id.* at 96; *see* NORTHWEST AIRLINES, INC. v. CNTY. OF KENT, 510 U.S. 355, 369 (1994) (CITING Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972)).

128. *See Selevan*, 584 F.3d at 95-96.

"As noted, plaintiffs have alleged that NYTA's policy of charging non-residents of Grand Island tolls that are more than eight times greater than the tolls charged to Grand Island residents place[s] burdens on interstate commerce that exceed any local benefit that allegedly may be derived from them." *Id.* (internal quotations omitted).

129. *Id.*

130. Surprenant v. Mass. Tpk. Auth., No. 09-CV-10428-RGS, 2010 WL 785306, *1-2, *8 (D. Mass. Mar. 4, 2010), *dismissed on other grounds,* No. 09-CV-10428-RGS, 2011 WL 339217 (D. Mass. Feb. 4, 2011).

131. *Surprenant*, 2010 WL 785306, at *2 ("Those eligible to participate [in the resident discount program] are required to join the MTA's Fast Lane Program."); *see also* Doran v. Mass. Tpk. Auth., 348 F.3d 315, 317 (2003) (stating that to be eligible for toll discounts on Massachusetts' roads, motorists are required to purchase a Fast Lane transponder).

132. *See Surprenant*, 2010 WL 785306, at *2 ("The Fast Lane Program enrolls Massachusetts and out-of-state drivers on equal footing."); *see also Doran*, 348 F.3d at 317 (stating that the Fast Lane Program is for everyone who wishes to participate, not just residents).

Doran, *Surprenant's* discount program had a residency requirement.[133] Namely, participants had to be residents of certain Massachusetts communities in order to receive toll discounts at particular tolling stations.[134] A Rhode Island resident that frequently used the Massachusetts toll roads for business and tourism brought suit claiming that the residency requirement violated the dormant Commerce Clause.[135] The court denied the defendant's motion to dismiss, because the record needed more facts in order to properly apply the dormant Commerce Clause analysis.[136] Due to the factual similarities between *Doran* and *Surprenant*, the First Circuit would likely endorse *Surprenant's* holding.[137]

Surprenant is important for two reasons. First, *Surprenant* found a *plausible* violation of the dormant Commerce Clause.[138] Until *Selevan*,

133. *Surprenant*, 2010 WL 785306, at *2.

134. *Id.* at *2 ("The MTA implemented its Tunnel Communities Resident Discount Program in 1995 . . . . Residents of East Boston, South Boston, and the North End, as well as residents of Chelsea and Charlestown, receive discounted tolls when using the Sumner and Ted Williams Tunnels."). Recall that in *Doran*, residents and nonresidents were both eligible for the discount program being challenged – the Fast Lane Discount Program. *Doran*, 348 F.3d at 317. However, originally, the MTA intended only residents be eligible for the Fast Lane Discount Program. *See id.* ("In response to public opposition [to a toll increase], MTA . . . proposed to implement a Resident Only Discount Program [that would allow] state residents . . . [to] . . . receive toll discounts . . . ."). In the end, the MTA decided to allow residents and nonresidents alike to participate in the discount program after "a newspaper article questioned whether [a resident only program] violated the dormant Commerce Clause of the Constitution." *Id.*

135. *Surprenant*, 2010 WL 785306, at *1.

136. *Id.* at *7-8.

137. The *Doran* court seemed to focus on the fact that the Fast Lane Discount Program was available to both residents and nonresidents on an equal footing. *See Doran*, 348 F.3d at 319 (stating that plaintiff's argument that the Fast Lane Discount Program violated the dormant Commerce Clause is flawed because the program "is available on identical terms to drivers without regard to their residence.").

138. In 2007, the U.S. Supreme Court, in *Bell Atlantic Corporation v. Twombly*, raised the pleading standard needed to sufficiently state a claim to survive a 12(b)(6) motion to dismiss. 550 U.S. 544, 555-56 (2007). Previously, a plaintiff needed only to state "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . [sic] claim is and the grounds upon which it rests[.]'" *Id.* at 555 (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Now, under *Twombly*, the plaintiff's complaint must state "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the defendant's wrongdoing]." *Twombly*, 550 U.S. at 556. In other words, a plaintiff must include sufficient facts to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim [is facially plausible] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1940 (citing *Twombly*, 550 U.S. at 556). A complaint lacks plausibility if the facts pled "are 'merely consistent with' a defendant's liability." *Id.* at 1940 (quoting *Twombly*, 550 U.S. at 557). Given this higher factual inquiry, the District of Massachusetts believed that enough facts existed warranting a denial of a motion to dismiss the dormant Commerce Clause claim. *See Surprenant*, 2010 WL 785306, at *8 ("defendants' motion to dismiss is . . . DENIED as to the dormant Commerce Clause claim.").

virtually every dormant Commerce Clause challenge to a State's tolling practice ended with a dismissal.[139] Therefore, combined, *Surprenant* and *Selevan* may indicate a changing attitude towards state tolling practices as they relate to interstate commerce. Second, *Surprenant* found a *plausible* violation based on a separate analysis than *Selevan*. In fact, *Surprenant* expressly rejected *Selevan's* application of the *Evansville* Test.[140] Instead, *Surprenant* followed *Doran* and found that the *Pike* Balancing Test (a component of the modern dormant Commerce Clause analysis) applied.[141]

Surprenant and *Selevan* both found sufficient facts that state tolling practices *may* violate the dormant Commerce Clause.[142] However, each used different tests. *Surprenant* followed *Doran* and applied the modern dormant Commerce Clause analysis. On the other hand, *Selevan* believed that the *Evansville* Test, alone, is sufficient to decide the constitutionality of state tolling practices. Due to the similarities between *Doran* and *Surprenant*, the First Circuit would likely uphold *Surprenant's* reasoning.[143] Therefore, a circuit split exists as to which test is to be used, the *Evansville* Test or the modern dormant Commerce Clause analysis.

III. Toll Road's Purpose v. the Dormant Commerce Clause

The outcome of *Surprenant* and *Selevan* may prompt further lawsuits attacking the constitutionality of State tolling practices. Furthermore, the Supreme Court has included toll roads as part of the "instrumentalities of interstate commerce."[144] As such, Congress has the authority to exercise

139. *See* John Schwartz, *Toll Discounts for In-State Residents Draw Constitutional Challenge*, N.Y. Times (April 2, 2009), http://www.nytimes.com/2009/04/02/us/02ezpass.html (commenting that James Crawford, executive director for the E-Z Pass Interagency Group, "has seen no similar suits in which discounts were challenged on state discrimination grounds . . . aside from a 2007 case in Massachusetts that was dismissed."). *Selevan* was decided in October 2009, six months after Schwartz's article. Selevan v. N.Y. Thruway Auth., 584 F.3d 82 (2009).

140. *Surprenant*, 2010 WL 785306, at *6 & n.10.

141. *Id.* at *6.

142. *See id.* at *7-8; *see also Selevan*, 584 F.3d at 103 (holding that "plaintiffs have stated a claim under the dormant Commerce Clause").

143. The First Circuit will never get an opportunity to examine *Surprenant*'s dormant Commerce Clause claim. On February 4, 2011, the District of Massachusetts granted the defendant's motion for judgment on the pleadings and ordered the case closed. Surprenant v. Mass. Tpk. Auth., No. 09-CV-10428-RGS, 2011 WL 339217, *5 (D. Mass. Feb. 4, 2011). However, the case was not dismissed on dormant Commerce Clause grounds. Rather, the court dismissed the case under the Eleventh Amendment. *Id.* at *4-5. On November 1, 2009, Massachusetts dissolved the MTA and reassigned its duties to the Massachusetts Department of Transportation ("MDOT"). *Id.* at *1. MDOT is a state agency. *Id.* at *3. On April 5, 2010, the plaintiff amended her complaint, dismissing the MTA and naming MDOT as the defendant. *Id.* at *1. Since MDOT is a state agency, the Eleventh Amendment divested the federal court of jurisdiction, thus dismissing the action. *Id.* at *4-5.

144. *See supra* discussion Part I.A.

its commerce power over toll roads, and States do not have the authority under the dormant Commerce Clause to hinder the "instrumentalities of interstate commerce." However, the courts of appeals cannot agree on which test to employ. The Supreme Court has recognized three tests used to determine whether state tolling practices are constitutionally valid. However, the *Baltimore* Presumption is most likely abrogated. On the other hand, the Second Circuit believes the *Evansville* Test, alone, is a sufficient test to determine the constitutionality of state tolling practices. However, the First Circuit has adopted the modern dormant Commerce Clause analysis. Furthermore, at least one district in the First Circuit expressly rejected the use of the *Evansville* Test. After comparing the rules, the First Circuit is correct to use the dormant Commerce Clause analysis.[145]

1. The Modern Day Purpose of Toll Roads

In order to apply the modern dormant Commerce Clause analysis, the court must look to the purpose behind the State law.[146] Therefore, the analysis will begin by determining if state tolling practices further a "legitimate local purpose."[147] Modern tolling practices of highways began in England in 1650.[148] The English Crown authorized private companies to finance the construction and maintenance of a State highway system in order to accommodate the demands of the English Industrial Revolution.[149] The United States would soon follow suit and begin employing toll roads of its own.[150]

Originally, States created toll roads to further three main objectives. First, toll roads were created to promote commerce.[151] Most toll roads that support interstate commerce are designed after the Pennsylvania Turnpike Model ("Model").[152] The Model was specifically designed "to

145. *See supra* discussion Part I.B.3.

146. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (requiring the court to identify a legitimate local purpose before applying the *Pike* Balancing Test); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) (stating that a discriminatory law must advance a "legitimate local purpose.").

147. *See Pike*, 397 U.S. at 142.

148. *See* HARMER E. DAVIS ET AL., TOLL-ROAD DEVELOPMENTS AND THEIR SIGNIFICANCE IN THE PROVISION OF EXPRESSWAYS 6 (1953).

149. *Id.*

150. In 1772, Virginia chartered the first toll road. *Id.* The year 1800 marked the beginning of America's toll road revolution. *Id.* The revolution ended abruptly in 1837. *Id.* at 7. Most toll roads were converted to taken over by their respective state and converted to free roads. *Id.*

151. *See* Wilfred Owen & Charles L. Dearing, Toll Roads: and the Problem of Highway Modernization 44 (1951).

152. The Pennsylvania Turnpike Model is named after the Pennsylvania Turnpike. The Turnpike was financed in part by the federal government. *See* DAVIS ET AL., *supra* note 148, at 8 (the Federal-Aid Act of 1937 provided a federal grant of $29,250,000 and revenue bonds totaling

meet the needs of high-speed high-density traffic."[153] The Model called for four-lanes of traffic, divided by a median with easy grades.[154] Therefore, the Model could carry more motorists compared to adjacent free roads and motorists travelling along the Model could reach their destination faster and more efficiently.[155] In addition, despite the toll, traveling along the Model was a cheaper alternative than travelling on adjacent free roads.[156] Thus, toll roads were a better alternative to shipping goods in interstate commerce.

However, the advent of the modern Interstate Highway System has made toll roads a less viable means of shipping goods in interstate commerce. The Interstate Highway System consists of over 46,000 miles of road.[157] Over ninety-three percent of the Interstate Highway System is made up of free roads.[158] When the Interstate Highway System was built, it modeled its construction after the Model.[159] Hence, it could carry people and goods just as quickly and efficiently as Model toll roads. In fact, the Interstate Highway System doubled the distance a person could travel

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$40,800,000 to assist with constructing the Pennsylvania Turnpike). The Turnpike is largely responsible for the presence of toll roads in America today. Fed. Highway Admin., *Ask the Rambler: Why does the Interstate System include Toll Facilities?* (April 7, 2009), http://www.fhwa.dot.gov/infrastructure/tollroad.cfm [hereinafter Ask the Rambler]. Prior to the construction of the Turnpike, Congress did not believe that toll roads were a viable solution for highway construction and maintenance. *Id.* (basing its belief upon a 1939 U.S. Bureau of Public Roads report). Congress believed that most motorists would use adjacent free roads instead of traveling along tolled routes. *Id.; but see* OWEN & DEARING, *supra* note 151, at 139, 141 (arguing that the report concluded that the proposed tolled national highway would not alleviate current traffic problems and that is why it was abandoned). However, the Turnpike proved the viability of toll roads and prompted nine other states to implement toll roads of their own. *See Ask the Rambler* (noting that Florida, Indiana, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, and Oklahoma all had operational turnpikes by 1956). Eventually, the turnpikes were incorporated in the Federal Interstate Highway System. *Id.* Today, the interstate highway system has incorporated 2,900 miles of toll roads. *Id.*

153. OWEN & DEARING, *supra* note 151, at 8-9.

154. *Id.* at 8.

155. *Id.* at 8-9. A study conducted in 1950 over a twenty-five mile stretch of the Pennsylvania Turnpike found:

> [A] test truck, with gross weight of 50,000 pounds, consumed . . . 6.3 gallons of fuel on the Turnpike and 9.8 gallons on [the nearest adjacent free road]. And more than twice as much time was required to travel the 25-mile section of the [free road] – 1 hour 33 minutes compared to 41 minutes on the Turnpike.

Id. at 9.

156. *See id.* at 9-10 (noting that motorists travelling along the Pennsylvania Turnpike did not mind paying the toll because they were saving money on vehicle maintenance costs).

157. *Celebrating 50 Years*, *supra* note 3, at 2 (statement of Rep. Bill Pascrell, Jr., H. Comm. on Trans. & Infrastructure).

158. *See Ask the Rambler, supra* note 152 (noting that the interstate system has incorporated 2,900 miles of toll roads).

159. *See generally id.* (providing that the Model, and other Turnpikes based upon the Model's structure, were incorporated into the Interstate Highway System).

in a day from 300 miles to 600 miles.[160] Therefore, the free Interstate Highway System is a more viable option to ship goods in interstate commerce. Goods travel just as fast as if they were on toll roads. However, the goods can be shipped without the added expense of tolls. Thus, modern toll roads no longer serve the purpose of promoting commerce. The Interstate Highway System has supplanted that purpose.

Second, toll roads were created to promote highway safety.[161] The Model was specifically designed with safety in mind.[162] The Interstate Highway System has implemented the Model.[163] In 1956, before the Interstate Highway System was constructed, the highway fatality rate[164] was 6.05.[165] In 2004, the Interstate Highway System's highway fatality rate was 0.8, while all other roads, including toll roads not part of the interstate system, was 1.44.[166] The free Interstate Highway System's highway fatality rate is almost a whole unit lower than non-interstate roads. Based on the numbers alone, the Interstate Highway System is just as safe, if not safer, than toll roads. Therefore, free interstate highways better promote highway safety. Thus, modern toll roads no longer serve the purpose of promoting highway safety.

Last, toll roads were implemented in order to finance the construction and maintenance of the road itself.[167] Toll roads raise revenue through motorists using the road. Therefore, the road must have a sufficient volume of traffic to generate the necessary level of funds to make toll roads economically feasible.[168] Generally, a toll road must balance two competing interests in order to be financially stable and self-sufficient. First, the benefit a motorist receives from using the road must be great enough to induce the motorist to pay a toll to travel along the road.[169] Second, the price of the toll must be sufficient to offset the operation, construction, and maintenance costs of the road.[170] In other words, the price of the toll must be high enough to finance the operation of the road but low enough to induce a sufficient quantity of motorists to pay

160. *Celebrating 50 Years*, *supra* note 3, at 54-55 (testimony of Eugene McCormick, Chairman, Am. Road and Trans. Builder Ass'n).

161. *See* OWEN & DEARING, *supra* note 151, at 44.

162. *See id.* at 8-9.

163. *See generally Ask the Rambler*, *supra* note 152 (providing that the Model, and other Turnpikes based upon the Model's structure, were incorporated into the Interstate Highway System).

164. The fatality rate of a highway is the number of "[F]atalities per 100 million miles traveled." *Celebrating 50 Years*, *supra* note 3, at 32 (testimony of Richard J. Capka).

165. *Id.*

166. *Id.*

167. *See* OWEN & DEARING, *supra* note 151, at 44.

168. DAVIS ET AL., *supra* note 148, at 54.

169. *Id.*

170. *Id.*

the toll. Generally speaking, most toll roads find the right balance of toll rates.[171] However, the threat of a toll road failing due to under-financing is still a real concern.[172] In such an event, the State must step in to attempt to resurrect the failed road by expending public funds.[173]

The alternative to tolling as a means to finance and maintain highways is financing roads through federal and state funds.[174] As of 2001, the federal government had spent $370 billion to finance the Interstate Highway System.[175] Annually, the government must pay roughly $15 billion to maintain the Interstate Highway System as it exists today.[176] The Federal Government imposes an 18.4 cents per gallon gas tax in order to finance the Interstate Highway System.[177] However, the rising costs of material and labor will require the States to spend more money to maintain the roads or force the government to increase the gas tax.[178] Legislatures could raise the gas tax in order to meet the rising costs; however, legislatures would have to face the public outcry of higher prices at the pump. Currently, rising gas prices threaten to weaken the economic recovery.[179] Therefore, legislatures would likely be hesitant to raising prices beyond what they already are. Yet, if legislatures fail to act, they risk running out of money to maintain the current highway structure.

Toll roads have traditionally advanced three purposes: promote interstate commerce, promote highway safety, and economic self-sufficiency.[180] However, free roads can fulfill the first two purposes. Free roads are just as safe and efficient as toll roads at moving goods in inter-

171. *See id.* at 56-58 (analyzing the economics of various Turnpikes around the nation); *see also* OWEN & DEARING, *supra* note 151, at 105.

172. OWEN & DEARING, *supra* note 151, at 105 (noting that where "factors reduce the diversion of traffic from existing public ways," there is a concern that the toll road will be able to fund itself).

173. *See id.* at 105-06 (arguing that a State would not allow a toll road to fail, and would fund the road with the State's highway fund).

174. *See Celebrating 50 Years, supra* note 3, at 20 (testimony of Jonathan Gifford, Professor, George Mason University) (discussing the amount of federal and state funding the Interstate Highway System has received).

175. *Id.*

176. *Id.* at 22-23 (testimony of Eugene McCormick, Chairman, American Road and Transp. Builders Ass'n).

177. *See id.* at 24.

178. *Id.* at 22-24.

179. *See* Ronald D. White, *Oil Soars 2.1% to $86.61 a Barrel; Gasoline Prices Edge Higher*, L.A. TIMES, April 6, 2010, *available at* http://articles.latimes.com/2010/apr/06/business/la-fi-gas-oil6-2010apr06; Ryan Randazzo, *Rising Gas Prices Threaten to Limit Economic Recovery*, THE ARIZONA REPUBLIC, April 5, 2010, *available at* http://www.azcentral.com/business/articles/2010/04/05/20100405gas-prices-rising0406.html; John Stepek, *How High Oil Prices Could Scupper The Recovery*, MONEYWEEK , April 9, 2010, *available at*, http://www.moneyweek.com/news-and-charts/economics/how-high-oil-prices-could-scupper-the-recovery-01409.aspx.

180. *See* OWEN & DEARING, *supra* note 151, at 44.

state commerce. However, toll roads can become economically self-sufficient whereas free roads rely on public funding. Current economic conditions and rising costs make a higher gas tax an unlikely candidate to financing highway construction and maintenance. On the other hand, toll roads are financed by travelers. As long as toll roads continue to balance the price of the toll with the benefit users receive by paying the toll, toll roads will continue to be economically sufficient. Thus, toll roads serve only one legitimate purpose: offer the government a means other than a higher gas tax as a way of financing and maintaining highways. Hence, economic self-sufficiency will be the purpose scrutinized in the dormant Commerce Clause analysis.

2. *Economic Self-Sufficiency Scrutinized under the Dormant Commerce Clause Analysis*

A. Market Participant v. Market Regulator

When a State enacts a toll, it is acting as a market regulator, not a market participant. State tolling practices do not constitute "direct state participation" in a market. As already stated, a State is a market participant if it "buys or sells goods or services" in interstate commerce,[181] manufactures goods to be used in interstate commerce,[182] or provides public funds to finance public projects.[183] State tolling practices likely fall within any one of these categories. First, States must hire tolling companies and crews to operate the toll roads. *Overstreet* included such jobs as instrumentalities of interstate commerce.[184] Therefore, when a State "buys" the tolling company's services, it is buying services in interstate commerce. Second, roads must be constructed and maintained by the State. Asphalt, tar, concrete, and other highway building materials must be manufactured, moved, and finally assembled in order to construct, maintain, and repair toll roads. Again, *Overstreet* recognized that toll roads that primarily move goods and people in interstate commerce are instrumentalities of interstate commerce.[185] Therefore, when a State manufactures materials to construct highways, the State is manufacturing goods to be used in interstate commerce. Finally, States provide public funds to finance toll roads.[186] In addition, under certain circumstances, federal funds may be used to construct and maintain *publically* owned toll

181. Bogen, *supra* note 79, at 543.

182. Reeves, Inc. v. Stake, 447 U.S. 429, 439-40 (1980).

183. White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 214-15 (1983)

184. Overstreet v. North Shore Corp., 318 U.S. 125, 129-30 (1943).

185. *Id.*

186. *See* OWEN & DEARING, *supra* note 151, at 19-20 (stating that typically, revenue bonds issued by the State are secured for the construction and maintenance of toll roads).

roads.[187]

State tolling practices can satisfy all three categories of market participation. However, a State is a market regulator if it exercises its police powers to foreclose private competition in the toll road market.[188] In order for a business to toll a highway, it must first have the State's permission.[189] Furthermore, most state tolling practices are carried out by state-created tolling agencies.[190] The state-created tolling agencies are considered an arm of the State government. As such, the tolling agencies can exercise the State's police powers. The agencies have the power to impose criminal sanctions for failure to pay a toll and acquire land for highway construction through eminent domain. Private companies cannot exercise eminent domain and cannot employ criminal sanctions for failure to pay. In addition, a State has to give a private company the authority to impose tolls. Therefore, private competition is dependent on the State to open the market. Since private tolling companies cannot compete with the State on equal footing, the State is acting as a market regulator.

B. Per se Invalid: Discriminatory Statutes and Protectionist Purpose

States employ two separate tolling schemes. The first scheme charges every motorist similarly situated the same regardless of residency.[191] The second scheme charges in-state motorists a lower fee than

187. 23 U.S.C. § 129(2) (2006).

188. USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995), *cert. denied*, 517 U.S. 923 (1998) (arguing that when a state exercises its governmental powers to restrict private entry into a market, the State is no longer acting as a market participant, but a market regulator).

189. *See, e.g.*, El Dorado Cnty. v. Davison, 30 Cal. 520, 523-24 (1866) (requiring an "[a]ct of the Legislature of [the] State which invests the [tolling company] with [the] authority to convert a public highway into a toll road, and to grant to an individual the right to collect tolls of persons travelling the highway."); Application of Okla. Turnpike Auth., 359 P.2d 680, 697 (Okla. 1961) ("It should be noted that by law the [Oklahoma Turnpike] Authority may not construct any Turnpike without legislative approval and action.").

190. *See, e.g.*, ALA. CODE § 23-2-143 (2008) (creating the Alabama Toll Road, Bridge, and Tunnel Authority); ALASKA STAT. § 19.75.021 (2010) (creating the Knik Arm Bridge and Toll Authority); ARK. CODE ANN. § 27-90-202 (2010) (directing the State Highway Commission to establish toll roads); CAL. STS. & HIGH. CODE § 30100 (2005) (directing the California Transportation Commission the power to establish toll roads); FLA. STAT. § 338.2216 (2010) (creating the Florida Turnpike Enterprise); GA. CODE ANN. § 32-10-61(2009) (creating the Georgia State Tollway Authority); 605 ILL. COMP. STAT 10/3 (2010) (creating the Illinois State Toll Highway Authority); KAN. STAT. ANN. § 68-2003(2009) (creating the Kansas Turnpike Authority); LA. REV. STAT. ANN. § 48:1253 (authorizing the Department of Transportation and Development to levy and collect tolls); Me. REV. STAT. ANN. tit. 23 § 1963 (creating the Maine Turnpike Authority); OKLA. STAT. tit. 69, § 1703 (2010) (creating the Oklahoma Turnpike Authority).

191. *See* Wallach v. Brezenoff, 930 F.2d 1070, 1072 (3d Cir. 1991).

out-of-state motorists.[192] The touchstone for a discriminatory law requires in-state businesses to benefit while out-of-state businesses suffer. State tolling schemes that charge all motorists the same fee bestows equal burdens on in-state and out-of-state businesses. Therefore, such laws cannot be discriminatory. On the other hand, when in-state motorists are charged a lower fee than out-of-state motorists, the potential for discrimination is more readily apparent.

The *Evansville* Test was the product of the Supreme Court's toll road cases. Therefore, the *Evansville* Test will be applied to determine if State tolling schemes that charge out-of-state motorists a higher fee than in-state motorists are discriminatory. The first prong of the *Evansville* Test examines whether the user fee is a fair approximation of the facilities' use.[193] In *American Trucking*, the Supreme Court found that an imposition of a flat tax on vehicles traveling through Pennsylvania was not related to the facilities' used.[194] The Court found that the flat tax did not relate to the motorist's highway use.[195] Toll roads are distinguishable from the flat tax employed in *American Trucking*. Tolls are intended to charge motorists based on the distance travelled along the road. Therefore, motorists travelling along toll roads are only charged based on the facilities used. However, the toll must represent a "fair approximation." Local motorists are more likely to use an in-state toll road than out-of-state motorists. A local motorist may use the toll road several times a day to travel to work, home, restaurants, or stores. Out-of-state motorists may use the toll road rarely or as often as in-state motorists. Normally, out-of-state motorists will use the roads primarily to travel through a state. Therefore, in-state motorists will use tolling facilities more often and on a regular basis. On the other hand, out-of-state motorists will use tolling facilities sporadically. Charging out-of-state motorists a higher fee to use fewer facilities than in-state motorists is not a "fair approximation."

However, the difference in fees may be attributable to local traffic using the local toll roads on a regular basis. The lower fees may induce local traffic to use the toll roads instead of adjacent free roads. The frequency of use would mean that local traffic, using the road several times a day, may contribute the same, if not more, as the occasional out-of-state motorist over time. If so, state tolling schemes may offer a reduced rate for in-state motorists. Thus, disparate fees can be a "fair approximation" of the facilities used.

192. *See* Selevan v. N.Y. Thruway Auth., 584 F.3d 84, 87 (2d Cir. 2009).

193. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972).

194. American Trucking Ass'n v. Scheiner, 483 U.S. 266, 290 (1987).

195. *Id.* at 290-91.

The second prong of the *Evansville* Test requires that the fee is not excessive in relation to the benefits conferred.[196] The benefit conferred is the use of the road that includes higher speed limits, controlled access points, reduced traffic, roadside facilities, and well-maintained roads. Since out-of-state motorists will travel along the roadway less frequently than in-state motorists, out-of-state motorists must be reasonably charged for these facilities. On the other hand, in-state motorists may travel on the road several times a day. Therefore, an in-state motorist receives more of a benefit from the toll road and should be charged a fee proportional to that benefit. A reduced fee for in-state motorists means that they are receiving the majority of the benefit at a fraction of the cost. However, the standard requires the fee to be "excessive" to the benefit conferred.[197] Thus, if out-of-state motorists are charged a reasonable fee that is proportional to the benefits received by travelling along the toll road, the fee satisfies the second prong even though in-state motorists pay a discounted rate.

The last *Evansville* prong requires that the toll not discriminate against interstate commerce.[198] A law that burdens out-of-state businesses and benefits in-state businesses is discriminatory. State tolling schemes can be facially discriminatory. If States are allowed to charge out-of-state motorists a higher fee to use their highways, then a pricing war could erupt between States. Granted, a small difference between the tolls is insufficient to create a burden on interstate commerce. However, if local toll rates are discounted to the point of nullity and out-of-state toll rates are raised to a disproportionate level (i.e., seven times as much as the local rate), the tolling scheme may become discriminatory. Or, if the tolling scheme only charged motorists entering the State, the scheme could be found discriminatory. Therefore, some state tolling practices can be facially discriminatory. Such tolling schemes are *per se* invalid.

If a law is either facially discriminatory or promotes economic protectionism, it will be upheld if the State "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[199] Facially discriminatory laws will also be upheld where such laws favor a government entity[200] that treats in-state and out-of-

196. *Evansville,* 405 U.S. at 716-17.

197. *Id.*

198. *Id.*

199. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

200. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007) ("[T]he laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant."). *See also id.* at 339-42 (finding that the determination of the waste disposal facility as being a government entity was crucial in deciding that the state law requiring all haulers to bring waste to that facility was not discriminatory).

state businesses equally,[201] furthers a "traditional government function,"[202] and can be repealed or amended through traditional political channels.[203] The legitimate local purpose toll roads serve is an alternative to highway financing through taxing. Because of the current economic conditions, raising taxes to finance road construction is not a viable solution for legislatures. Raising a gas tax may hamper the economic recovery of the nation. There may be a day in which the nation has recovered and taxes may be increased in order to finance roads. If that day comes, tolling may no longer survive strict scrutiny. Until that day, state tolling practices that finance the construction and maintenance of roads is a legitimate local purpose. Therefore, toll roads must maintain economic viability. If the toll road fails, States would be forced to "flip the bill." Thus, tolling companies must set rates low enough to attract motorists yet high enough to ensure economic stability.

Toll roads primarily rely on local traffic for financing. Thus, tolls must be tailored to attract local motorists. Therefore, tolls must be low enough to induce local traffic to use the toll road. Reducing toll rates for local traffic ensures a steady stream of financing. The fees accumulate as to each in-state motorist. In other words, if a single motorist uses the toll road twice a day to travel to and from work, five days a week, each individual toll, insignificant to the motorist, eventually results in a steady, rapidly accumulating source of revenue. On the other hand, out-of-state motorists cannot be relied on for steady financing. Since an out-of-state motorist may use the toll road sporadically, the State could justify charging him a higher fee. Each out-state-motorist will contribute an insignifi-

201. *See id.* at 345 ("We hold that [when a state law] treat[s] in-state private business interests exactly the same as out-of-state ones, [it] do[es] not discriminate against interstate commerce for purposes of the dormant Commerce Clause." (internal quotation omitted)).

202. *Id.* at 334. "Traditional government functions" include "protect[ing] the lives, limbs, comfort, and quiet of all persons." *Id.* at 334, 342-43 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). In *United Haulers*, the Supreme Court was hesitant to interfere with who the state citizens decided should carry-out traditional government functions: "It is not the office of the Commerce Clause to control the decision of the [citizens] on whether [the] government or the private sector should [carry-out these traditional government functions]." *Id.* at 344.

203. *Id.* at 344-45. "[D]ormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States . . . ." *Id.* at 345. When the "costs of regulation" are shifted to other States, the parties most burdened by the State law are out-of-state businesses. *Id.* Out-of-state businesses do not have access to the political process to change the discriminatory law, therefore, the "costs of regulation" cannot be remedied through the political process. *Id.* (citing S. Pac. Co. v. Arizona, 325 U.S. 761, 767-68, n.2 (1945)). Instead, the dormant Commerce Clause serves as a substitute of the political process. *Id.* However, when the people who created the government entity are most burdened by it, they have the ability to challenge the law and change it through the dormant Commerce Clause. *Id.* Therefore, if the impacted group has access to the political process, the courts will not "step in and hand [them] a victory." *Id.*

cant amount compared to in-state motorists even if the in-state motorists pay a reduced fee.

However, the amount of out-of-state motorists is insignificant compared to local motorists. A State primarily relies on local traffic to finance its toll roads. Hence, States tailor tolls to local traffic. As long as the road receives a steady flow of local traffic, the toll road will succeed. Therefore, a State should not depend on out-of-state motorists to fund its highways. A State could charge in-state and out-of-state motorists the same fee and not undermine the sufficiency of its toll roads. Therefore, nondiscriminatory alternatives exist and discriminatory tolling schemes do not survive strict scrutiny.

In addition, discriminatory tolling schemes are not made valid because they favor a government entity carrying out a traditional government function.[204] First, the scheme does not treat in-state and out-of-state businesses equally. Second, the tolling scheme cannot be challenged through traditional political channels. Even though the group most affected by a State's tolling scheme is local motorists, local toll rates cannot be discounted so low as to make out-of-state motorists the primary financers of the toll road. To do so would allow one state to impose a *quasi*-highway tax on residents of another state that happens to be travelling through that state. Since the out-of-state motorists have no way to challenge the toll through the political process, the dormant Commerce Clause must be invoked to protect their interests. Therefore, toll roads that charge in-state motorists a discounted fee compared to out-of-state motorists may be discriminatory, and thus *per se* invalid. However, if the tolling schemes charge in-state residents and out-of-state residents the same fee, the scheme is facially neutral and must survive the *Pike* Balancing Test in order to be valid.

C. Pike Balancing Test

Since the *Pike* Balancing Test is a minimal scrutiny test, most state laws survive. *Pike* applies when the burden imposed on interstate commerce is proportional to the putative local benefit.[205] If the burden is excessive, the law will be invalid.[206] Again, toll roads serve a legitimate local purpose. Toll roads are an alternative to taxing and, if tolls are correctly set, a viable way to save money during this economic recession. Therefore, the state tolling practice will be upheld as long as it does not excessively burden interstate commerce.

204. *See*, e.g., Murray v. Milford, 380 F.2d 468, 470 (2d Cir. 1967) (stating that "[t]he construction and maintenance of roads is a governmental function" (internal quotations omitted)).

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

206. *Id.*

If a State tolling scheme regulates evenhandedly, interstate commerce is not burdened at all. In all actuality, local motorists would be more burdened due to the frequency that they use local toll roads. The minimal use of the toll road by out-of-state motorists is insignificant to the number of times local motorists will travel through the toll plazas. This factor alone indicates that intrastate commerce suffers greater at the hands of state tolling schemes than interstate commerce. In addition, toll roads are sparse in interstate travel. Toll roads make up less than one percent of the entire network of roads in the United States.[207] Hence, motorists travelling in interstate commerce are likely to find alternate routes that are not tolled. Taking these two factors alone, toll roads do not violate the *Pike* Balancing Test.

IV. CONCLUSION

The purpose of this Note was to analyze the constitutionality of state tolling practices in light of the dormant Commerce Clause. The Supreme Court has enunciated three rules when determining whether a State's tolling practice violates the dormant Commerce Clause.[208] First, the Court announced the *Baltimore* Presumption during the day when toll roads were still considered a part of intrastate commerce.[209] Second, the Court adopted the *Evansville* Test to assess the constitutionality of user fees after toll roads became an instrumentality of interstate commerce.[210] Finally, the Court has adopted a general analysis that is employed in all dormant Commerce Clause cases.[211]

In addition to the three tests, three separate circuits seem to be applying different tests. Most notably, the Second Circuit believes that the *Evansville* Test is sufficient.[212] On the other hand, the First Circuit believes that even if the *Evansville* Test is used, courts must still employ the *Pike* Balancing Test.[213] Because of the different tests and a split in the circuits, the Supreme Court should grant certiorari to clarify the proper

207. THE UNITED STATES HAS 4,059,352 MILES OF ROAD. FED. HIGHWAY ADMIN., *Highway Statistics 2008, Public Road Mileage - VMT - Lane Miles, 1920 - 2008* (2010), http://www.fhwa.dot.gov/policyinformation/statistics/2008/vmt421.cfm. Only 5,428.54 miles are toll roads. Fed. Highway Admin., *2009 Toll Facilities in the United States Facts*, http://www.fhwa.dot.gov/ohim/tollpage/facts.htm. In addition, toll roads are found in only 37 states. Fed. Highway Admin., *Toll Facilities in the United States* (2009), http://www.fhwa.dot.gov/ohim/tollpage/toll_list.pdf.

208. *See*, White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 210 (1983); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 715-17 (1972); Balt. & Ohio R.R. v. Maryland, 88 U.S. 456, 471 (1874).

209. *Baltimore*, 88 U.S. at 471.

210. *Evansville*, 405 U.S. at 716-17.

211. *See White*, 460 U.S. at 208-10 (citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

212. Selevan v. N.Y. Thruway Auth., 584 F.3d 84, 98 (2d Cir. 2009).

213. Doran v. Mass. Tpk. Auth., 348 F.3d 315, 320, 322 (1st Cir. 2003), *cert. denied*, 541 U.S. 1031 (2004).

standard. I have examined the approaches and believe that the First Circuit is correct. Therefore, this Note analyzed state tolling practices in light of the modern dormant Commerce Clause analysis. Though the analysis is meant to be applied to concrete facts, the analysis found that some state tolling schemes may violate the dormant Commerce Clause. Conversely, state tolling schemes that are not discriminatory do not violate the dormant Commerce Clause. Whether one loves toll roads or hates them, toll roads have been around since the dawn of human history[214] and are likely not to go away.

214. *See* DAVIS ET AL., *supra* note 148, at 6.