# National Pork is a *Bibb* Case, Not a *Pike* Case

*Michael S. Knoll and Ruth Mason*[*]

TABLE OF CONTENTS



In October 2022, the U.S. Supreme Court heard oral argument in *National Pork Producers Council v. Ross*,[1] a Ninth Circuit case out of California, dismissing a challenge to Proposition 12,[2] which, inter alia, bans the sale of wholesome pork (without regard to where it was produced) from the offspring of breeding sows confined in a manner California voters consider "cruel."[3] *National Pork* thus puts the Court in the position of choosing between the often-criticized undue-burden strand of the dormant Commerce Clause and California's request that the Court approve its ban on out-of-state pork not because of the products' qualities, but merely because Californians are offended by the manner in which such pork was produced. The parties in the case and most of the amici rightly argue that the case must be analyzed using undue-burden balancing,. Relying on *Bibb Balancing,* an article we wrote that is forthcoming in this Journal,[4] this Note explains that regulatory mismatch cases receive a different kind of balancing analysis

* Michael S. Knoll is the Theodore Warner Professor, University of Pennsylvania Carey Law School, Professor of Real Estate, Wharton, and Co-Director, Center for Tax Law and Policy, University of Pennsylvania. Ruth Mason is the Edwin S. Cohen Distinguished Professor of Law and Taxation, University of Virginia School of Law.

1 6 F.4th 1021 (9th Cir. 2021).

2 Cal. Proposition 12, codified at CAL. HEALTH & SAFETY CODE § 25990 (West 2018).

3 CAL. HEALTH & SAFETY CODE § 25990(b)(2) (West 2018) ("covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner").

4 Michael S. Knoll & Ruth Mason, *Bibb Balancing*, 91 GEO. WASH. L. REV. (forthcoming 2023).

from the Supreme Court than do more run-of-the-mill cases. Because *National Pork* is a regulatory mismatch case, in our view, *Bibb v. Navajo Freight Lines, Inc.*[5] is a more relevant precedent than is *Pike v. Bruce Church, Inc.*[6]

## I. THE *NATIONAL PORK* CASE

In December 2019, the National Pork Producers Council and the American Farm Bureau Federation (collectively referred to as Pork Council) filed an action for declaratory and injunctive relief alleging that Proposition 12 violates the dormant Commerce Clause because it impermissibly regulates extraterritorial conduct and imposes an undue burden on interstate commerce. Before trial, the district court granted California's motion to dismiss on the grounds that Pork Council failed to state a claim, and the Ninth Circuit affirmed. The Supreme Court granted certiarori.

Although both lower court decisions and most of the amicus briefs filed in the case focused on the extraterritoriality claim, this Note focuses on Petitioner's undue-burden claim. Citing the balancing standard most famously described in *Pike v. Bruce Church*, Pork Council argues that Proposition 12 violates the dormant Commerce Clause because it imposes a burden on interstate commerce that is excessive in relation to its local benefits.[7] In support of its position, Pork Council maintained that complying with the California law would require a major and very expensive restructuring of the entire national industry because pork for retail sale presently cannot be traced throughout the production process back to its mother. Pork Council also presented a study showing that the California law would increase the cost of producing pork nationwide by almost ten percent and that any health benefits were illusory at best.

## II. BACKGROUND ON THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause limits state regulatory diversity for two reasons. The first is the interest in a smoothly functioning national marketplace.[8] Although the primary, and most familiar national-market concern under the dormant Commerce Clause is with intentional protectionism, the dormant Commerce Clause goes beyond prohibiting

---

5 359 U.S. 520 (1959).

6 397 U.S. 137 (1970).

7 *Id.*

8 *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 527 (1959); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770–71 (1945); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981).

intentionally protectionist state taxes and regulations. In addition, at least occasionally, the Supreme Court has precluded regulations that involved what we refer to as "regulatory mismatches."[9] Mismatches arise when different states adopt different regulations, and as a result of those differences, cross-border commerce faces higher burdens than does in-state commerce. Mismatched regulations split the national marketplace along state boundaries, an effect the Court has decried as economic Balkanization.[10]

The second reason for the dormant Commerce Clause is the need to appropriately safeguard the regulatory autonomy of each state. Put differently, the dormant Commerce Clause limits the extent to which states' regulations may spillover to other states.[11] Although the dormant Commerce Clause does not completely ban regulatory spillovers, limits are important to maintain the independence and autonomy of each state—particularly to protect smaller states from incursion by larger states that can leverage access to their markets to regulate the smaller states' markets and infringe on smaller states' ability to regulate activities occurring in their own territories. In our view, *National Pork* implicates both of these justifications for dormant Commerce Clause review.

## III. DORMANT COMMERCE CLAUSE LIMITS ON REGULATORY DIVERSITY

In *Bibb Balancing*, we augment the familiar discrimination-versus-undue-burden distinction under the dormant Commerce Clause with an additional distinction among burdens. We argue that the Supreme Court's undue-burden doctrine can be divided based on the type of burden a challenged regulation imposes. Single-state burdens are those that arise from one state's regulation without regard to the regulations of any other state. A law that imposes a single-state burden would still burden interstate commerce even if all other states adopted the same law.

We describe a regulation as imposing a *single-state burden* if it imposes a greater burden on interstate commerce than on in-state commerce and that burden would still exist if all states adopted that same regulation. In contrast, a regulation imposes a *mismatch burden* when the asymmetric burden it

---

9 Bibb *Balancing*, *supra* note 4, at Part II (describing balancing in mismatch cases).

10 *Bibb*, 359 U.S. at 529 ("A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers . . . .").

11 *Morgan v. Virginia*, 328 U.S. 373, 382, 386 (1946) (precluding on dormant Commerce Clause grounds a Virginia regulation requiring race segregation on trains at a time when other states forbade it, noting that "no state law can reach beyond its own border nor bar transportation of passengers across its boundaries . . . .").

imposes on interstate commerce would disappear if all states adopted the same regulation.

*Pike v. Bruce Church* is a classic example of a single-state burden. The Arizona law struck down in that case required cantaloupes grown in Arizona also to be packed there. This requirement burdened interstate companies that already possessed packing facilities in nearby states because it prevented those companies from using their out-of-state facilities to pack Arizona cantaloupes. Moreover, the burden in *Pike* would not lessen if other states enacted the same law. On the contrary, adoption by, say, California of the same law would only compound the burden to interstate growers. When such single-state burdens display no facial discrimination, the Court analyzes them under *Pike*, which balances the state's local interest in the regulation against the burden the regulation imposes on interstate commerce.[12] This is the familiar *Pike* balancing test, and resolution of *Pike* cases does not require the Court to examine the law of any state other than the challenged state.

The second type of undue burden dormant Commerce Clause case—which we call a mismatch case—involves a burden on interstate commerce that arises not from a single state's law but rather from interactions among the laws of multiple states. Our federal system affords states regulatory autonomy, which sometimes leads to interstate regulatory mismatches. Such mismatches occur when two or more states regulate the same person or action in *different* ways. In contrast with single-state burdens, with mismatch burdens, if all states adopted the same regulation, there would be no adverse effect on interstate commerce—the excess burden on interstate commerce compared to in-state commerce would disappear. Regulatory mismatches inhibit interstate commerce by increasing compliance costs for entities doing business in more than one state. When the Supreme Court finds a regulatory mismatch to be "discriminatory," by which it means the mismatch was enacted to protect local interests, the challenged regulation is unconstitutional. .[13] Even in cases where such intent is disputed, unclear, or absent, the Court has held that the dormant Commerce Clause precludes regulatory mismatches when they unduly burden interstate commerce.[14]

---

12 397 U.S. at 142.

13 *E.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977) (writing, of a facially neutral statute, that it had the "effect of an embargo" and therefore constituted "discrimination against commerce"); cf. *Bacchus v. Dias*, 468 U.S. 263, 270 (1984) (single-state case noting that "a finding that state legislation constitutes economic protectionism [and hence is subject to a stricter rule of invalidity] may be made on the basis of either discriminatory purpose or discriminatory effect") (quotation marks and citations, including to *Hunt*, omitted).

14 *E.g.*, *Bibb*, 359 U.S. 520 (1959); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981).

The Court conducts balancing analysis—which it usually describes as *Pike* balancing—in both single-state and mismatch cases. But balancing analysis has long reflected—if not explicitly acknowledged—important differences between single-state cases and mismatch cases.

First, in mismatch cases, but not single-state cases, the Supreme Court determines the burden the challenged regulation imposes on interstate commerce against an external benchmark consisting of another state's or states' laws. For example, in *Bibb*, Illinois required trucks driving on its highways to have curved mudflaps, while all other states either permitted or required straight mudflaps.[15] The Court used other states' laws as a baseline when it stated that the burden of Illinois's rule included the need to change mudflaps at the Illinois border.[16] Similarly, in *Kassel* when Iowa limited the length of trucks on its roads to fifty-five feet, but other states permitted longer trucks, the Court calculated the burden as the need for interstate truckers to unload their products into smaller trucks or divert around Iowa.[17] This analysis implicitly took other states' laws as the benchmark for determining the burden imposed by Iowa's law. By contrast, in single-state cases, such as facial discrimination cases, the Court measures the state's treatment of interstate commerce against an *internal* benchmark: the state's own treatment of in-state commerce.[18]

Second, in mismatch cases, the Court also calculates the state interest by reference to other states' regulations and interests, whereas in single-state cases, the Court considers only the interests of the challenged state. For example, in *Bibb*, Illinois had to show that curved mudflaps presented a safety advantage over and above that derived from the straight mudflaps permitted by other states.[19] Additionally, in mismatch (but not single-state) cases, the Court considers the ways in which the challenged regulation impinges upon other states' abilities to effectuate their own regulatory preferences. Specifically, in mismatch (but not single-state) cases, the Court has considered the extent to which the challenged regulation spills over to other states, thereby constraining those states' abilities to regulate.[20]

---

15 359 U.S. at 523.

16 *Id.* at 525.

17 *Kassel*, 450 U.S. at 662, 671.

18 Bibb *Balancing*, *supra* note 4, at Part III (explaining the differences between undue burden balancing in single-state and mismatch cases).

19 *Bibb*, 359 U.S. at 525. Likewise in *Kassel*, Iowa had to show that shorter trucks would provide safety advantages over the longer trucks permitted in other states. *Kassel*, 450 U.S. at 672.

20 *See, e.g.*, *S. Pac.*, 325 U.S. at 774–75 (precluding an "Arizona limitation . . . [that] controls the length of passenger trains all the way from Los Angeles to El Paso."); *Bibb*, 359 U.S. at 527; *Kassel*, 450 U.S. at 675–76.

Mismatch cases thus raise additional horizontal federalism issues that single-state cases do not raise.

To highlight the differences, we refer to balancing in single-state cases as *Pike* balancing, and we refer to balancing in mismatch cases as *Bibb* balancing.[21] When the reviewing court decides to preclude in a mismatch case, that decision tends to involve either (1) an implicit decision about *which state's* rule will prevail to eliminate the mismatch or (2) a judgment that no state may regulate the disputed matter because it requires nationally uniform regulation that only Congress can provide.[22] For example, when the Supreme Court struck Illinois's curved-mudflap rule in *Bibb*, it implicitly endorsed the straight mudflap rules of other states. As we discuss in *Bibb Balancing*, because the Supreme Court tends to use the dominant rule adopted by other states as the benchmark, *Bibb* balancing tends to privilege existing rules over novel rules and places a heavy onus on innovating states.

## IV. *NATIONAL PORK* AS A MISMATCH CASE

*National Pork* is a mismatch case, not a single-state case. There is a mismatch between the new California regulation regarding hog pen sizes and other states' preexisting and more permissive regulations. The incompatibility of the standards burdens interstate commerce because it segments, or in the Court's terms "Balkanizes," the national marketplace. Hog farmers, virtually all of whom are outside California, claim they will have higher costs from complying with the mismatched state standards and from the loss of economies of scale, and they will have to manage and segregate inventory based on importing states' laws. Under *Bibb*, and more recently *Kassel*, the Supreme Court analyzes such mismatches under the dormant Commerce Clause using balancing with external benchmarks, , which we have been calling *Bibb* balancing.[23]

### *A. Measuring the Burden in* National Pork

In a mismatch case, the Supreme Court weighs the burden on interstate commerce arising from the mismatched regulation against the regulating state's interest in the regulation. The balancing procedure is thus formally similar to that in *Pike*, and typically described by the Court as *Pike*

---

21 See generally Bibb *Balancing*, *supra* note 9.

22 *Compare Bibb*, 359 U.S. at 529–30 (de facto choosing a straight mudflap rule over a curved mudflap rule), *with S. Pac.*, 325 U.S. at 781–82 (precluding any state from regulating train length).

23 *But see* S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190 (1938) (upholding a mismatched regulation against a dormant Commerce Clause challenge on the grounds that mismatch burdens were not judicially cognizable).

balancing.[24] But, as noted above, mismatch cases differ from single-state cases because the Court evaluates both sides of the scale—burden and state interest—by employing benchmarks consisting of other states' rules. By contrast, single-state cases involve no such external benchmarking.

The main burden at issue in any dormant Commerce Clause case is the cost to comply with the challenged regulation. Specifically, under the Court's precedent, costs incurred by multistate commercial actors to comply with regulations that *differ* in content across states are relevant costs under the dormant Commerce Clause.[25] The Supreme Court uses an external benchmark consisting of other states' laws to measure burdens in mismatch cases, and typically, but not always, the relevant external benchmark is the dominant rule in place in other states. Measured this way, Proposition 12—because it is a more stringent standard—imposes higher costs and therefore a larger burden on interstate commerce.

### *B. Measuring California's Interest in Proposition 12*

If the Supreme Court decided to engage in *Bibb* balancing in *National Pork*, it would weigh the burden on interstate commerce that arises from regulatory diversity against California's interest in its divergent regulation. This interest would also be benchmarked against other states' interests in their own regulations. Before arriving at that benchmarking process, however, the Court faces a novel legal issue, namely, whether California's proffered interest is a relevant interest under the dormant Commerce Clause. Typical mismatch cases have implicated obvious health, safety, or environmental concerns that raised no serious questions about the legitimacy of the challenged state's proffered interest. For example, in *Bibb*, Illinois argued that curved mudflaps produced a safety advantage over straight mudflaps, and in *Southern Pacific* and *Kassel*, respectively, the states argued that shorter trains and trucks were safer than longer trains and trucks. In *Clover Leaf*, which involved mismatched product packaging standards, the challenged state argued that banning plastic milk jugs was needed to advance environmental concerns.[26]

---

24 *See* Bibb *Balancing*, *supra* note 4, at Part II (identifying and explaining the distinctions between *Pike* and *Bibb* balancing).

25 *See Wayfair*, 138 S. Ct. at 2093 (acknowledging compliance costs from "subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions" as relevant costs to the dormant Commerce Clause); *Kassel*, 450 U.S. at 667 (identifying as the relevant burden under the dormant Commerce Clause the need to switch to smaller trucks or to divert around the challenged state); *Bibb*, 359 U.S. at 527 (burden was the need to switch mudflaps).

26 *See* Bibb *Balancing*, *supra* note 4, at Section II.B.1 (discussing mismatch cases).

### *1. Protectionism*

Outside of health, safety, and the environment, the Supreme Court has not had much occasion to opine on what constitutes a legitimate state interest for dormant Commerce Clause purposes. The Court has made clear that economic protection is not a legitimate state interest,[27] so if the Court concluded that California adopted Proposition 12 in order to protect local economic interests, then the Court would likely preclude the regulation. Proposition 12 is not overtly protectionist, but the history of anti-animal cruelty legislation in California supports Petitioner's allegation that at least in part protectionist intent motivated Proposition 12. Specifically, the regulation challenged in this case began with Proposition 2, which applied strict animal husbandry rules to hens, pigs, and calves *raised in California*.[28] Because Proposition 2 applied to only California producers, out-of-state producers not subject to its strictures would be able to undersell California producers in the California market. The California legislature responded via Assembly Bill 1437 (AB 1437), which expanded Proposition 2 to eggs *sold* in California.[29] The bill's analysis stated that the "intent of this legislation is to "level the playing field" so that in-state producers are not disadvantaged."[30] The expansion of Proposition 2's scope stripped out-of-state producers of comparative advantages offered by their home state's regulatory regime. Such a purpose is impermissible under the dormant Commerce Clause.[31] Given the history of AB 1437, it is plausible that the basis for Proposition 12's application to sales in California was protectionist in intent.

### *2. Preventing Offense as a Legitimate State Interest*

A more interesting legal question arises if the Supreme Court concludes that California did not adopt Proposition 12 with protectionist intent. The parties in this case disagree as to what constitutes California's state interest.

---

27 *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 352–53 (1977).

28 Petition for Writ of Certiorari at 192a ¶ 213, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *petition for cert. filed*, No. 21-428 (9th Cir. Sept 27, 2021) .

29 *Id.* at 193a ¶ 216.

30 Brief for the United States as Amicus Curiae Supporting Petitioners at 6, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631); *see also* Petition for Writ of Certiorari at 193a ¶ 216, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *petition for cert. filed*, No. 21-428 (9th Cir. Sept 27, 2021).

31 *Hunt*, 432 U.S. at 351 (identifying one form of the statute's discriminatory nature as its "effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system").

California argues that "the law's clearly stated purpose is 'to prevent animal cruelty.'"[32] Intervening in support of California, the Humane Society of the United States characterizes California's interest as ensuring that Californians buying meat do not become morally complicit in the cruel treatment of animals.[33] Pork Council argues that California's true goal with Proposition 12 was to use the state's market power to impose the moral preferences of Californians on commerce outside the state, which Pork Council characterizes as an impermissible purpose under the dormant Commerce Clause.[34] No matter which of these characterizations prevails, all parties agree that Proposition 12 is motivated by the offense California voters take at the commonplace treatment of breeding sows, practically all of which are located outside California.

Thus, one novel question presented by *National Pork* is whether a state may exclude an out-of-state product due to moral objections to its production process, notwithstanding that the excluded product satisfied the standards of its state of production. In considering this question, the Court should bear in mind that if California can exclude goods because Californians are offended by some aspect of the out-of-state production process, there would seem to be no principled limit as to what goods a state could exclude from other states, and no limit to a state's ability to target offending products, practices, and parties. California could embargo goods and services from any state or locality that has a policy of which Californians disapprove. That the embargoed product met the standards (animal welfare or otherwise) of its state of production would not matter.

Moreover, there would seem to be no aspect of the production process that could not serve as a basis for exclusion. Although Proposition 12 raises a novel issue for the Supreme Court to decide, the Court previously addressed the issue in dicta. In *Baldwin v. Seelig*, a 1935 case striking down a New York law that prohibited the importation into New York of milk that was purchased for less than the minimum New York sale price, New York defended its prohibition as rationally related to health. Lower prices, New York claimed, could indicate or otherwise be correlated with corner cutting and thus unsanitary products. In rejecting New York's defense and striking the law, Justice Cardozo analogized New York's argument to the defense of

---

32 Notice of Motion and Motion for Judgment on the Pleadings; Memorandum of Points and Authorities at 14, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-02324).

33 Defendant-Intervenors' Reply in Support of Motion for Judgment on the Pleadings at 10, *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-02324).

34 Reply Brief for Petitioners at 15, *Nat'l Pork Producers Council v. Ross*, No. 21-468 (U.S. filed September 7, 2022).

a hypothetical law that prohibited imports from states with low wages because low wages might be correlated with less sanitary products (say by attracting and retaining a less talented and conscientious work force). Such connection, the Court said, was too remote and speculative to be accepted.

Analogously, as *Baldwin* suggests, if states can exclude goods and services from other states because they disapprove of some aspect of the production process, presumably they could also exclude goods and services produced by workers earning wages that Californians deem unreasonable. And there is no reason to believe that embargoes would cease with different wage scales and minimum-wage provisions. In these highly polarized and contentious times, most anything would be fair game.

Furthermore, it seems to us that allowing states to ban products because their residents are *offended* by some aspect of the production process is likely to engender greater anger and lead to more retaliation than standards based on more tangible health and safety concerns. Accordingly, even if one were to grant that Proposition 12 was based solely on Californians' honestly held ethical concerns, the risk, if the Court upheld *National Pork*, of subsequent interstate retaliation would increase. But a principal goal of dormant Commerce Clause doctrine is to prevent such interstate retaliation in the marketplace.

If the Supreme Court wanted to prevent states from excluding products based on offense or based on their desire to regulate out-of-state production practices, it could hold either that such concerns are—like economic protection—not legitimate state interests for undue-burden balancing purposes. Such a ruling would dovetail with Court holdings—in cases dealing with extraterritoriality—that states have no legitimate interest in regulating activities that take place wholly outside the state.[35]

Rather than concluding that satisfying voter moral preferences regarding out-of-state production processes constitutes an *illegitimate* local interest under the dormant Commerce Clause, the Court could reach the same legal conclusion—preclusion of Proposition 12—as a result of more fulsome balancing analysis, under which it weighed California's interest in protecting the moral values of Californians against the burden Proposition 12 imposes on interstate commerce. In other words, the Court could conduct *Bibb* balancing. In past mismatch cases, the Supreme Court has considered not whether the challenged law achieves *absolute* benefits for the challenged state, but rather whether the challenged law achieves any local benefit *over and above* the benefits conveyed by the other preexisting regulatory regimes in other states. Thus, in *Southern Pacific*, the Court asked whether the shorter

---

35 Healy v. Beer Inst., 491 U.S. 324 (1989).

trains demanded by Arizona offered meaningful safety advances over the longer trains permitted by other states.[36] In *Bibb*, the Court asked whether curved mudflaps provided safety benefits over straight mudflaps permitted in other states.[37] Similarly, in *Kassel*, the Court asked whether shorter trucks conferred safety benefits over the longer trucks allowed in other states.[38]

Because *National Pork* is a mismatch case, not a single-state case, undue burden balancing would involve a comparison of California's interest with the interests of other states whose regulations differ from California's. In this regard, Pork Council's allegations regarding the relative well-being of animals kept in different types of living conditions are relevant. Pork Council alleged that, as measured by cortisol levels, injuries to hogs, loss of pregnancy, and mortality, conforming to Proposition 12 would injure hog welfare more than would retaining the current cage regulations applicable in other states.[39] If past cases are a guide, such empirical evidence is relevant to the evaluation of the state's *relative* interest in a deviating regulation. If other states' regulations promote hog welfare better than would the proposed California regulation, then California's state interest in animal welfare would not outweigh the interstate commerce burden Proposition 12 imposes.

And even if California's law promoted hog welfare better than other states' laws, California's interest in animal welfare does not necessarily outweigh other states' interests. The interests of other states go beyond "hog welfare" and include the wealth created by hog production and the incremental benefits (such as cheaper pork) of producing hogs more efficiently.

## V. FEDERALISM IMPLICATIONS OF *NATIONAL PORK*

Our federal system values regulatory diversity as a means of satisfying voter preferences, which may differ by state. Thus, we typically judge variety in regulation to be a virtue, not a vice, of our law. As we argue in *Bibb Balancing*, however, that the Court occasionally precludes regulatory diversitywhich is to say, that it sometimes requires states to conform to sister states' regulatory regimes shows that our constitutional order also contemplates limits on legal diversity and experimentation. Most of the time, these limits take the form of preemptive federal legislation that sets nationally uniform standards. But even absent such federal regulation, the

---

36 S. Pac. Co. v. Ariz., 325 U.S. 761, 774–76 (1945).

37 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 525 (1959)

38 Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 672–73 (1981).

39 Petition for Writ of Certiorari App. G at 190a-91a, 219a, Nat'l Pork Producers Council v. Ross, No. 21-468 (filed Sept. 27, 2021).

Supreme Court sometimes steps in to limit diversity. The decision to limit diversity arises from the Court's desire to protect another essential element of our federalism, namely, state autonomy. Thus, a crucial difference between mismatch cases like Bibb and more common single-state cases like *Pike* is that only mismatch cases implicate the ability of *states other than the challenged state* to govern their own residents.

For example, what the pork producers—as well as the states that support them as amici—complain about in this case is that California's regulation will spillover to other states, essentially crowding out those other states' ability to regulate pork production in their own territory. Although the dormant Commerce Clause does not completely ban regulatory spillovers, limits on such spillovers are important to maintain the independence and autonomy of each state—such limits protect smaller states from incursion by larger states that can leverage access to their large consumer markets to impose their policy goals on smaller states. This effect threatens smaller states' ability to regulate activities occurring in their own territories. The structure of the Constitution and the federal system it established entitles the individual states to equal footing, and maintaining this equality requires the states to respect one another.[40] Preservation of state equality and autonomy, in turn, may require limits on the extent to which states in general (and California most of all) can leverage their consumer markets to regulate outside their borders.

In the absence of dormant Commerce Clause review of undue burdens caused by mismatches, the nation's largest states could de facto regulate the entire nation. Even recourse to Congress would not always be availing, as harmonized federal legislation—for example that specifies a national square footage requirement for breeding hogs—would not return power to states with small markets. This is not to say that small states must be shielded from all regulatory spillovers. As we explain in *Bibb Balancing*, the Court also has sustained regulatory mismatches against dormant Commerce Clause challenges.[41] The dormant Commerce Clause does not require national uniformity in all regulation. Instead, it requires that states imposing mismatched regulations that generate significant burdens on interstate commerce justify those burdens. Such balancing requires a highly fact-based

---

40 Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019) (holding that a forum state's courts had to respect the sovereign immunity of sister states due to a constitutional obligation for states to respect sister states). See also Erin Delaney & Ruth Mason, Solidarity Federalism, Notre Dame L. Rev. (forthcoming 2023).

41 *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (upholding regulation requiring milk to be sold in paper cartons, even though other states permitted plastic jugs, because the state's environmental goals outweighed the burden on interstate commerce arising from the mismatch).

inquiry. The district court in *National Pork* failed to conduct that inquiry, and it remains to be seen whether the newly constituted Supreme Court will follow the precedents set by *Bibb*, *Kassel*, and other cases, or whether it will instead eschew the messy business of balancing state interests against national and federal interests.