Bibb Balancing: Regulatory Mismatches Under the Dormant Commerce Clause

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Abstract

Courts and commentators have long understood dormant Commerce Clause doctrine to contain two types of cases: discrimination and undue burdens. This Article argues for a further distinction that divides cases into single-state burdens, which arise from the application of a single state's law alone, and mismatch burdens, which arise from legal diversity. Although the Supreme Court purports to apply Pike *balancing in all undue-burden cases, we show that the Court's approach in mismatch cases differs substantially. Specifically, unlike in single-state cases, balancing in mismatch cases involves an implicit and potentially problematic comparison by the Court between the challenged state's regulation and those of other states. We label this analysis "*Bibb *balancing," after the famous mudflaps case, and we show that mismatch cases present the Court with a more challenging set of issues than do other types of dormant Commerce Clause cases. Despite the criticisms that attach to* Bibb *balancing, failing to restrain regulatory mismatches would threaten the smooth functioning of the national marketplace and undercut important federalism values. Thus, in addition to clarifying the doctrine and acknowledging the drawbacks of* Bibb *balancing, this Article provides advice for achieving more consistent and defensible results in mismatch cases.*

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Introduction

Every law student learns that the dormant Commerce Clause has two major doctrinal strands—discrimination and undue burden. The doctrinal test for the latter involves balancing the burden a state imposes on interstate commerce against the state's legitimate interest in the challenged regulation. This balancing test has become synony-

mous with *Pike v. Bruce Church, Inc.*,[1] although it is actually much older.[2] For decades, commentators and jurists have condemned *Pike* balancing. Justice Scalia likened it to "judging whether a particular line is longer than a particular rock is heavy."[3] He also declared balancing a "quagmire"[4] that was "ill suited to the judicial function."[5] Justice Rehnquist complained that balancing "gives no guidance whatsoever to . . . [s]tates as to whether their laws are valid or how to defend them."[6]

Those criticisms find expression in today's Supreme Court. For example, Justice Thomas concluded that, because *Pike* balancing turns "solely on policy considerations," it involves legislative, not judicial, decision-making.[7] Lower courts have likewise remarked that such balancing is subjective and challenging to apply.[8] Heaping scorn upon *Pike* balancing, commentators have called it "fundamentally wrong,"[9]

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1 397 U.S. 137 (1970).

2 *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 445–46 (2008) [hereinafter Denning, *Reconstructing*] (describing *Southern Pacific Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761 (1945), as "the paradigmatic balancing opinion"). *Id.* at 445 n.150 (tracing balancing back to *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935)).

3 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

4 W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) ("[O]nce one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.").

5 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part).

6 Kassel v. Consol. Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting). *Id.* at 706 (calling the doctrine "hopelessly confused").

7 United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) (suggesting that such balancing "surely invites us, if not compels us, to function more as legislators than as judges"); *id.* at 610 (concluding that the doctrine "makes little sense, and has proved virtually unworkable in application"). In *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 354 (2008), a majority of the Court questioned whether courts are capable of such balancing.

8 Colon Health Ctrs. of Am., LLC v. Hazel, 813 F.3d 145, 155 (4th Cir. 2016) ("highly subjective"); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) ("ineffable test"); Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1149 (9th Cir. 2012) (balancing has "not turned out to be easy to apply"); Wiesmueller v. Kosobucki, 571 F.3d 699, 704 (7th Cir. 2009) ("The judiciary lacks the time and the knowledge to be able to strike a fine balance between the burden that a particular state regulation lays on interstate commerce and the benefit of that regulation to the state's legitimate interests."); Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 84 (1st Cir. 2001) (finding the "balancing test more challenging to apply").

9 Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 436 (1982). ("[T]he likelihood of judicial invalidation increases with the degree of burden imposed

a "historical vestige[]," [10] plagued by "severe conceptual problems," [11] incoherent and inconsistent, [12] "seriously flawed," [13] "illegitimate," [14] "reviled," [15] and "a disaster." [16]

Whereas a solid majority of the current Supreme Court supports the *discrimination* strand of the dormant Commerce Clause, [17] it is not clear where the Court stands on undue burdens. [18] Although the Su-

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by state law . . . . There is something fundamentally wrong with a judicial framework that prompts judicial intervention by the same trigger that induces political response.").

10 *Id.* at 435.

11 Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 59 (1981).

12 Denning, *Reconstructing*, *supra* note 2, at 417.

13 Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 813 (2001).

14 Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 599 (1987).

15 Brannon P. Denning, *Justice Thomas*, *The Import-Export Clause*, *and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 156–57 (1999) [hereinafter Denning, *Justice Thomas*] ("Almost universally reviled by academics and Justices on the Supreme Court as without solid foundation in text or intent, and altogether lacking a coherent application, it nevertheless endures and continues to be employed by the Court, when its members are not busy criticizing it." (citations omitted)).

16 Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 45 n.14 (1988) (quoting DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 342 (1985)); *id.* at 44 n.14 (skeptically noting arguments against the dormant Commerce Clause made by David Currie). For other leading critical accounts, see generally, Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

17 *See infra* note 51.

18 The paucity of undue-burden decisions makes it difficult to discern the views of the sitting Justices, which are discussed here in order of seniority, after describing the views of the Chief Justice. Chief Justice Roberts did not join the part of *United Haulers* that applied *Pike*. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007). At the same time, however, the part of the decision he authored and signed involved balancing under the dormant Commerce Clause. *See id.* at 342 (weighing the state's nonprotectionist interest in the challenged ordinance that required waste to be disposed only at a public facility). Justice Thomas's opposition to all aspects of the dormant Commerce Clause is well-known and unlikely to change. *See*, *e.g.*, Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 578 (2015) (Thomas, J., dissenting). Justice Alito would adhere to dormant Commerce Clause precedent. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 376 (2008) (Alito, J., dissenting) ("[T]he Court's established dormant Commerce Clause precedents should be followed . . . ."). Justice Alito joined Justice Kennedy's dissent in *Davis* that argued that "[t]he undue burden rule . . . remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act." *Id.* at 365, 376 (Kennedy, J., dissenting). In 2018, the major-

preme Court referenced *Pike* favorably in 2018,[19] it has not invalidated a state statute under *Pike* for "a generation,"[20] and Justice Thomas has even called for the termination of undue-burden analysis.[21]

At a time when important undue-burden cases are pending,[22] we clarify the dormant Commerce Clause and *Pike* balancing. We also provide principled methods to cabin judicial discretion in undue-burden cases as an alternative to abandoning this vital constitutional doctrine. This Article thus constitutes a rare defense of a doctrinal area that has been excoriated as both illegitimate and unclear, including by members of the Court itself.

Courts and commentators divide dormant Commerce Clause doctrine into facial discrimination cases and undue-burden cases. Laws

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ity in *South Dakota v. Wayfair* cited *Pike* as the applicable standard in dormant Commerce Clause cases. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018). Although Justices Sotomayor and Kagan joined Chief Justice Roberts' dissent in *Wayfair*, that dissent was grounded on the view that the Court should have hewed to precedent in *Wayfair* and not overturned a prior case. The dissenters therefore did not address *Pike* or the standard in undue-burdens cases at all. *See id.* at 2101–05 (Roberts, C.J., dissenting); *see also* Edward A. Zelinsky, *Comparing* Wayfair *and* Wynne*: Lessons for the Future of the Dormant Commerce Clause*, 22 CHAP. L. REV. 55, 58 (2019) (arguing that despite dissenting in *Wayfair*, none of Roberts, Breyer, Sotomayor, or Kagan "dispute[d] the fundamental legitimacy of the dormant Commerce Clause"). That all three of Roberts, Sotomayor, and Kagan joined the 2019 majority decision in *Tennessee Wine* to preclude a facially discriminatory state regulation for violating the dormant Commerce Clause confirms Professor Zelinsky's claim that those Justices continue to respect the fundamental legitimacy of the dormant Commerce Clause, but it does not indicate those Justices' views on the undue-burden doctrine specifically, as opposed to the nondiscrimination doctrine. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2456 (2019). Justice Gorsuch concurred in *Wayfair*, but he emphasized that his "agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence . . . should not be mistaken for agreement with all aspects of the doctrine." *Wayfair*, 138 S. Ct. at 2100 (Gorsuch, J., concurring). At the time this Article went to press, the views of Justices Kavanaugh, Barrett, and Jackson on *Pike* were unknown.

19 The majority in *Wayfair* cited *Pike* as the applicable standard in undue-burden cases. *Wayfair*, 138 S. Ct. at 2091. Justice Kennedy wrote the majority opinion, which Justices Thomas, Ginsburg, Alito, and Gorsuch joined. *Id.* at 2087. Perhaps reflecting a perception of the obsolescence of *Pike*, of the forty-seven amicus and party briefs filed in *Wayfair*, only five, including our amicus, discussed *Pike*. *See* Brief of Brill, Knoll, Mason & Viard in Support of Petitioner at 3, 17–20, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494).

20 BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.05 (Aspen Publishers 2022) (2d ed. 2013) (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) as the last time such preclusion occurred). Lower courts, however, regularly engage in such balancing and at times do invalidate state laws on such grounds. *Id.* ("*Pike* balancing is, however, alive and well in the lower courts.").

21 *See Wynne*, 575 U.S. at 578.

22 *See*, *e.g.*, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022) (challenging, under the dormant Commerce Clause, California's food product regulations that are stricter than those of other states).

that overtly treat cross-border commerce worse than in-state commerce are facially discriminatory and presumptively unconstitutional.[23] In contrast, courts examine facially neutral regulations for whether they impose undue burdens on cross-border commerce; that is, facially neutral regulations are ostensibly subject to *Pike* balancing. Although commentators have provided coherent explanations for the nondiscrimination strand of the dormant Commerce Clause, they have struggled to understand undue burdens. Rather than focusing on the discrimination cases, which are well understood and well justified, this Article focuses on the harder undue-burden cases.[24] Augmenting the traditional discrimination/undue-burden dichotomy, we offer a more nuanced account. Our account considers not only whether the challenged regulation explicitly discriminates, but also the *type* of burden the regulation imposes. We identify two types of burdens (or costs) on interstate commerce: (1) those arising from a single state's law, and (2) those arising from interactions—more specifically, mismatches—among two or more states' laws.

Single-state burdens arise when—*irrespective* of what other states do—a regulation impedes interstate commerce relative to in-state commerce. Thus, all facially discriminatory regulations impose single-state burdens; the excess burden on interstate commerce arises from the application of the challenged state's law *alone*.

Facially neutral regulations, in turn, can impose single-state or mismatch burdens. Consider the regulation challenged in *Pike*. In *Pike*, Arizona required cantaloupes grown in Arizona also to be packed there.[25] In our terms, this constituted a single-state burden because it did not depend on the packing regulations applicable in other states; instead, the burden arose from Arizona law *alone*. In balancing

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23 Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny.").

24 For example, in his leading account of the dormant Commerce Clause, which garners over 600 citations in Westlaw, Donald Regan argues that the Supreme Court decides dormant Commerce Clause cases by reference to a simple question: Was the state motivated to pass the challenged rule by intentional protectionism? If so, the Court strikes it down, and if not, the Court upholds it. *See* Regan, *supra* note 16. Regan noted, however, that many cases did not seem to fit into this paradigm, and so he excluded those cases from his analysis. *See id.* at 1104 (cabining cases in which "genuine national interests other than the interest in avoiding state protectionism" are at stake). This Article argues that certain undue-burden cases, namely, those involving regulatory diversity, are not necessarily about protectionism, and so they cannot be explained by a paradigm that relies exclusively on the presence or absence of intentional protectionism. *See* discussion *infra* Section III.A.2.

25 Pike v. Bruce Church, Inc., 397 U.S. 137, 138, 142 (1970) (noting that rule challenged was "even-handed[]").

in *Pike*, the Supreme Court thus examined *only* Arizona law, an approach we refer to as using an internal benchmark.[26]

Mismatch burdens, in contrast, arise from the interaction of *multiple* states' laws.[27] The defining feature of a mismatch burden is that the presence or absence of similar regulation by other states *does* affect the cost to comply with the first state's regulation. The paradigmatic mismatch case was *Bibb v. Navajo Freight Lines, Inc.*,[28] in which the Supreme Court precluded an Illinois law that required trucks on Illinois highways to have curved mudflaps at a time when other states permitted or required trucks to have straight mudflaps. As a result of the differences in the content of these regulations, trucks with straight mudflaps traveling interstate had to divert around Illinois or, if they wanted to enter Illinois, switch to curved mudflaps at the state border.[29] Although the Supreme Court purports to use *Pike* balancing in both single-state and mismatch cases—indeed, the Court does not expressly distinguish the two types of cases—this Article shows that the Supreme Court's approach to each type of case differs substantially. Specifically, in mismatch cases, the Court uses external benchmarks consisting of *other states' laws* to measure both the burden on interstate commerce and the challenged state's regulatory interest. In *Bibb*, for example, the Supreme Court understood the burden on interstate commerce to arise from Illinois's *departure* from the straight-mudflap rule applicable in other states.[30] Likewise, in defending its deviating rule, Illinois had to show that its curved-mudflap requirement produced a significant safety gain over and above that from the straight mudflaps permitted on roads in other states.[31] As this Article explains, such a posture can place a heavy burden on innovating states.

One purpose of this Article is simply to recognize that the Supreme Court uses different baselines for evaluating single-state and mismatch cases; namely, it uses internal benchmarks in single-state cases, whereas it uses external benchmarks consisting of other states' laws in mismatch cases. Dividing cases into those imposing single-state or mismatch burdens helps to explain dormant Commerce Clause doctrine—it represents an improvement over the traditional discrimina-

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26 *See id.* at 142.

27 The Supreme Court sometimes refers to "inconsistent" regulations. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987). We refer to "mismatches" to convey neutrality about the constitutional status of such regulations.

28 359 U.S. 520 (1959).

29 *Id.* at 527–28.

30 *Id.* at 529–30.

31 *Id.* at 523–24.

tion/undue-burden dichotomy and allows us to better understand the hard cases.

Armed with our doctrinal reframing, this Article also offers criticisms of judicial review in mismatch cases. First, the Supreme Court has not taken a consistent approach in mismatch cases. For example, at times, the Supreme Court refuses to intervene *at all* in mismatch cases on the grounds that courts lack institutional competence to preclude regulatory diversity.[32] Other times, the Court intervenes in mismatch cases on the theory that it is a duty of the Court to preclude state laws that otherwise would segment, or "Balkanize," the national marketplace.[33] Such doctrinal inconsistency generates justified claims of arbitrariness, and it stands in stark contrast with the Supreme Court's approach to single-state cases. The justices generally agree about *whether* and *how* to analyze single-state cases, although they sometimes disagree about the proper outcome of that analysis.

Second, in any case in which the Supreme Court decides to intervene to analyze a mismatch, it must then choose external benchmarks against which to measure both the burden on interstate commerce and the challenged state's interest. But justices do not always agree on the proper external benchmarks. Benchmark selection thus also generates claims of arbitrariness.[34]

Third, mismatch cases are more susceptible than are single-state cases to charges of "judicial legislation." The reason for this has to do with how states cure constitutional violations. The remedy in any dormant Commerce Clause case is preclusion, but preclusion takes on special meaning in mismatch cases. Specifically, when the Supreme Court precludes a mismatch burden, that preclusion may implicitly endorse the regulation that the Court used as the external benchmark in the case. Thus, this Article argues that mismatch cases may have the practical effect of imposing harmonized substantive rules. Consider *Bibb*. Although the formal remedy in *Bibb* was preclusion of Illinois's curved-mudflap rule, the implication of the Court's decision was clear;

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32 *See*, *e.g.*, S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 195–96 (1938).

33 *See*, *e.g.*, *Bibb*, 359 U.S. at 527 (emphasizing a need for national uniformity); *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) (noting a "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979))).

34 *See infra* Section III.A.2.a (discussing Justice Rehnquist's criticism of the selection of the benchmark in *Kassel*).

Illinois had to conform to the mudflap rules of neighboring states, a phenomenon we refer to as harmonization by preclusion.[35] In contrast, in single-state cases, the typical remedy involves *desisting* application of the offending regulation—as in *Pike*—or *equalizing* the treatment of in-state and interstate economic actors—as in facial discrimination cases—but it need not lead to harmonization. This Article also gives reasons why judicial intervention in mismatch cases is more likely than judicial intervention in single-state cases to lead to deregulation.[36]

Fourth, this Article demonstrates that because more constitutional values are at stake in mismatch cases than in single-state cases, mismatch cases are generally harder to resolve.

This Article proceeds as follows: Part I provides background on and criticisms of the dormant Commerce Clause. Part II reframes the dormant Commerce Clause by supplementing the discrimination-versus-undue-burden distinction with a distinction that looks to the type of burden—single-state or mismatch—imposed by the challenged regulation. Our framework augments, but does not supplant, the discrimination-versus-undue-burden dichotomy. Part III compares mismatch and single-state cases, explaining why certain well-known criticisms of the dormant Commerce Clause apply with more force to mismatch cases than to single-state cases. Part IV applies our new doctrinal framework to a pending case to illustrate that mismatch cases raise questions—such as *which state's rule prevails in cases of conflict?* and *who decides?*—that go to the core of federalism. Part IV also offers suggestions for how the Supreme Court could minimize the adverse impacts of mismatch cases, without completely refusing to consider them.

I. THE DORMANT COMMERCE CLAUSE AND ITS CRITICS

A. The Dormant Commerce Clause

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[37] The Supreme Court has interpreted the Commerce Clause to express not only an affirmative

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35 *Bibb*, 359 U.S. at 530 (observing that "a new safety device—out of line with the requirements of the other States—may be so compelling that [Illinois] need not be the one to give way. . . . [T]he present showing—balanced against the clear burden on commerce—is far too inconclusive to make [Illinois's] mudguard meet that test.").

36 *See infra* Section III.C.

37 U.S. CONST. art. I, § 8, cl. 3.

grant of power to Congress, but also an implicit restraint on the states.[38] For two centuries, the Supreme Court has employed this "dormant" aspect of the Commerce Clause to strike a balance between state and federal interests.[39]

The relevant state interest is regulatory autonomy. Autonomy enables states to govern flexibly, satisfy preferences, and act as laboratories of democracy.[40] The Court has identified various national and federal interests that limit state regulatory autonomy; for example, the Court often refers to free-trade values, such as "preserv[ing] 'the free flow of interstate commerce.'"[41] In the Court's view, forbidding protectionism by states is union-preserving because it prevents "rivalries and dislocations and reprisals"[42] that would "threaten at once the peace and safety of the Union."[43] Moreover, the Supreme Court has interpreted the dormant Commerce Clause to protect out-of-state political interests that are not directly represented in the regulating state's political process, a concept sometimes called representation reinforcement.[44] Importantly for this Article, the Court also has cited risks that state regulations might segment—or "Balkanize"[45]—the na-

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38 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 13–14 (1824).

39 For a history of the dormant Commerce Clause, see Denning, *Reconstructing*, *supra* note 2, at 421, 427–48.

40 Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (reciting federalism values); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) ("[T]he Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.").

41 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018) (quoting S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 770 (1945)).

42 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

43 *Id.* at 533. *See generally* Collins, *supra* note 16 (focusing on the dormant Commerce Clause's role in forging economic union).

44 *See*, *e.g.*, *Southern Pacific*, 325 U.S. at 767–68, n.2 ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."); *Hood*, 336 U.S. at 539 ("[E]very consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."). For commentary, see, e.g., Eule, *supra* note 9, at 428, 435 (discussing representation reinforcement); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 83 (1980) (describing the dormant Commerce Clause as needed "to protect the politically powerless"); Tushnet, *supra* note 16, at 133 (observing that, in addition to outsiders, "the general consumer interest is at a systematic disadvantage in legislative combat against organized groups").

45 The first reference to Balkanization by the Supreme Court was in a concurrence in *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) ("The practical result is that in default of action by us [state regulations] will go on suffocating and retarding and Balkanizing American commerce, trade and industry."). The first mention of Balkanization in the majority of a dormant Commerce Clause case was in 1979 in *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (noting the Framers' "conviction that in order to succeed, the new Union

tional market. Emphasizing the need for "national uniformity" in regulation, the Court at times has interpreted the dormant Commerce Clause to preclude market-segmenting regulations.[46] At other times, the Court declared it inappropriate to intervene to prevent states from enacting market-segmenting laws.

Given the vital, but often opposing, interests at stake in dormant Commerce Clause cases, it is perhaps no surprise that judicial standards in them have evolved over time.[47] Modern doctrine sees two principal types of challenges: facial discrimination and undue burdens.[48] Facial discrimination involves explicit distinctions between in-state and out-of-state economic actors or between in-state and interstate commerce. When states expressly discriminate, their regulations receive strict scrutiny.[49] Although some commentators criticize facial discrimination doctrine,[50] nearly all accept it as either consistent with our overall federal structure and the vision of the Constitution's founders, or applicable as a matter of precedent, or both.[51]

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would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). *Id.* at 326 (citing similar analysis, in *Hood*, 336 U.S. at 533–34, that did not employ the term "balkanization"). The Court's most recent use of the term was in 2019 in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (quoting *Hughes*, 441 U.S. at 325–26). The Court has employed the term in a number of other instances. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 577 (1997) ("Avoiding this sort of 'economic balkanization,' and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence." (citation omitted)); Fulton Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996) (referring to "'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) ("It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization.").

46 *See*, *e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 527 (1959) (quoting Morgan v. Virginia, 328 U.S. 373, 386 (1946)).

47 *See* Denning, *Reconstructing*, *supra* note 2, at 427–48 (giving history of dormant Commerce Clause jurisprudence).

48 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018) ("Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.' State laws that 'regulate[] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (citation omitted) (first quoting Granholm v. Heald, 544 U.S. 460, 476 (2005); then quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970))). Other dormant Commerce Clause challenges involve nexus and extraterritoriality, doctrines this Article does not consider.

49 *See*, *e.g.*, *id.*

50 *See generally* McGreal, *supra* note 16 (arguing that courts should not strike even facially discriminatory state laws in areas where in-state and out-of-state commerce do not compete).

51 Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concur-

A state law that does not facially discriminate may nevertheless violate the dormant Commerce Clause by imposing an "undue burden" on interstate commerce. For the better part of a century, undue-burdens analysis has involved judicial balancing.[52] The modern description of this balancing derives from *Pike v. Bruce Church*:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[53]

Ultimately, judges have the same goals when they apply undue-burden analysis as when they apply nondiscrimination analysis, namely, to weigh national and federal interests against state interests. But whereas facially discriminatory regulations rarely survive dormant Commerce Clause analysis, courts regularly uphold statutes against claims that they unduly burden interstate commerce. The Supreme Court has not always been clear about why it permitted or precluded

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ring) ("And to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it even as they suggest it might find a more textually comfortable home in other constitutional provisions."). In *Tennessee Wine*, Justices Alito, Breyer, Ginsburg, Kagan, Kavanaugh, Sotomayor, and Chief Justice Roberts joined in precluding a facially discriminatory state regulation for violating the dormant Commerce Clause. 139 S. Ct. 2449, 2456, 2476 (2019). Justices Gorsuch and Thomas dissented. Justice Gorsuch dissented because he concluded that the Twenty-first Amendment immunized the challenged regulation from dormant Commerce Clause review. *Id.* at 2484 (Gorsuch, J., dissenting). Even as he has concurred in judgments applying the dormant Commerce Clause, Justice Gorsuch has expressed skepticism about it. *See Wayfair*, 138 S. Ct. at 2100–01 (2018) (Gorsuch, J., concurring) ("Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day."). Justice Thomas opposes all aspects of the dormant Commerce Clause on grounds of its atextuality. *See*, *e.g.*, Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 578 (2015) (Thomas, J., dissenting) ("I continue to adhere to my view that the negative Commerce Clause . . . cannot serve as a basis for striking down a state statute." (quoting McBurney v. Young, 569 U.S. 221, 237 (2013) (Thomas, J., concurring))). Since *Tennessee Wine*, Justice Barrett filled the seat of the late Justice Ginsburg, and Justice Jackson filled the seat of retired Justice Breyer. As discussed *supra* note 18, their views as justices on dormant Commerce Clause doctrine are not yet known.

52 *See* Denning, *Reconstructing*, *supra* note 2, at 443–45 (tracing balancing back to 1938).

53 *Pike*, 397 U.S. at 142 (citation omitted).

particular "even-handed" regulations under its undue-burdens standard.[54] As the next Section explains, this lack of clarity has generated significant criticism.

B. Criticisms of Dormant Commerce Clause Doctrine

This Section reviews criticisms of the dormant Commerce Clause. Although some—including Justice Thomas—have argued that the dormant Commerce Clause is illegitimate because it lacks a sufficient textual basis,[55] this Article focuses on criticisms lodged by those who, although they accept dormant Commerce Clause doctrine in principle, argue that the Court's approach to deciding cases is deficient. The main criticisms are that the doctrine is arbitrary and invites courts to act as legislatures.

Discrimination against interstate commerce has a clear intuitive meaning, but the idea of "undue burdens" does not. Critics—on and off the bench—complain that *Pike* balancing usurps the legislative role by encouraging judges to indulge their own preferences when deciding whether to uphold or to preclude a state regulation.[56] Justice Scalia, for instance, disparaged the analysis as "ad hocery."[57] And a persistent frustration with undue-burdens doctrine is that seemingly similar cases garner sharply different outcomes. For example, in one case, the Supreme Court held that a state that imposed more stringent truck *length* limits than did neighboring states unduly burdened interstate commerce, but in another, it held that a state that imposed more stringent truck *weight* limits than did neighboring states did not violate the dormant Commerce Clause.[58]

Despite criticisms of arbitrariness, there are some settled doctrines. As Donald Regan observed in his seminal 1986 article criticizing the dormant Commerce Clause, many cases boil down to the question of whether the state enacted a regulation with protectionist

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54 For examples, see *infra* Part II; *see also* BITTKER & DENNING, *supra* note 20.

55 *See* Denning, *Justice Thomas*, *supra* note 15, at 157–59 (discussing views of Justice Thomas).

56 *See supra* notes 4–16 (describing criticisms).

57 Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 574 (2015) (Scalia, J., dissenting); *see also* Denning, *Reconstructing*, *supra* note 2, at 422 (describing "cases with similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions.").

58 *Compare* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677–79 (1981) (precluding a state from deviating from the truck-length rule implemented in contiguous states), *with* S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 195–96 (1938) (upholding ability of state to maintain truck width and weight limits that differed from those of neighboring states).

intent.[59] Although an express consideration of protectionist intent does not always form part of the Supreme Court's analysis, Regan argued that the outcome of most cases could be predicted based on the absence or presence of protectionist intent.[60] Specifically, where protectionist intent was present, the Court generally precluded the regulation; where such intent was absent, the Court generally sustained the regulation. A major problem with this account, as Regan readily acknowledged, was that it could not explain the decisions in a number of dormant Commerce Clause cases—involving, among other topics, cross-border transportation and tax—where the burden on interstate commerce did not arise from intentional protectionism.[61] Regan therefore cabined these cases as exceptions to the general rule that the dormant Commerce Clause targets only intentional protectionism.[62] This Article reveals what the cases excluded by Regan have in common—they are mismatch cases, which warrant, and receive, different doctrinal analysis.

II. Reframing The Dormant Commerce Clause

This Part reframes undue-burdens doctrine.[63] The Supreme Court's dormant Commerce Clause doctrine has long been understood to involve two principal types of cases: facial discrimination and

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59 Regan, *supra* note 16, at 1093.

60 *Id.* Regan summarized the dormant Commerce Clause by the simple statement that "[l]aws with protectionist purpose are invalid . . . laws without protectionist purpose . . . are valid." *Id.* at 1104. We think Regan overstates his claim, but it is important to note that he limited it to only what he called "movement-of-goods" cases. *Id.* at 1182. Regan readily acknowledged that interstate transportation, tax, and some other cases were not decided exclusively upon the absence or presence of intentional protectionism, but rather were based on other values, including "national interest." *Id.* (describing cases in which "the Court appears to do more under the dormant commerce clause than merely suppress state protectionism"). What the cases Regan excluded from his category of movement-of-goods have in common is that they are mismatch cases. Although Regan referred to cases by topical area, there is nothing special about transportation, tax, or even goods. Mismatches can occur in *any* area, including regulation of goods. Indeed, Regan was forced to define his category of movement-of-goods cases as including only "those cases in which no national interest other than the anti-protectionism interest is implicated," a definition he noted was "an interesting tautology." *Id.* at 1191.

61 *Id.* at 1182. Another problem with Regan's claim—which is that courts do *and should* decide dormant Commerce Clause cases based only on the absence or presence of protectionist intent—is that, except in cases of facial discrimination, it not only may be difficult to ascertain legislative intent, but disputes have arisen regarding what types of evidence legitimately can be used to ascertain legislative intent. *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1795–1858 (2008) (giving history of judicial practices in determining legislative intent).

62 *See* Regan, *supra* note 16, at 1184–86. These exceptions are important for our analysis, and for understanding the dormant Commerce Clause more generally. *See infra* Section II.B.

63 Because it seeks to address the core of the dormant Commerce Clause, this Article does

undue burdens.[64] Jurists and commentators paired each type of case with a method of judicial review: strict scrutiny for facial discrimination, and *Pike* balancing for undue burdens.[65] But that framework does not accurately reflect the doctrine, which is more nuanced. The disconnect between the actual doctrine and its description by courts and commentators has bolstered claims that the doctrine is confusing and incoherent and therefore should be limited or even eliminated.

This Part advocates for a conception of undue-burden doctrine that is more faithful to the cases; one that takes into account the type of burden the challenged rule imposes: single-state or mismatch. Section II.A defines single-state and mismatch burdens. Section II.B shows how the Supreme Court analyzes single-state burdens. Section II.C shows how the Supreme Court analyzes mismatch burdens. Thinking of cases in terms of single-state burdens and mismatch burdens allows us to see consistent, but unstated, differences in the Supreme Court's approaches to deciding these cases. Although the Supreme Court has not formally acknowledged a distinction between single-state and mismatch burdens, and even though the Court claims to apply the same doctrinal test—*Pike* balancing—to all cases involving facially neutral rules, this Part shows that the Court as a practical matter treats the two types of cases differently. For example, unlike with single-state cases, justices often express reluctance to intervene in mismatch cases, reasoning that because resolving mismatch cases involves picking one state's rule to prevail over another, it is essentially legislative, not judicial. Likewise, this Part shows that, in those mismatch cases in which the Court decides to intervene, it uses what we call external benchmarks. Specifically, it compares the challenged state's regulation to *other states'* regulation. No such cross-state comparisons are needed in single-state cases because, by definition, the burden in a single-state case arises from the regulation of a single state acting alone. Thinking about the cases in the way we suggest here clarifies and simplifies the doctrine and lays the groundwork for our normative arguments in the rest of the Article.

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not address several of its subdoctrines, including the market-participation exception, the government-function exception, the extraterritoriality doctrine, or dormant-Commerce-Clause nexus.

64 *See supra* text accompanying note 48.

65 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S 573, 579 (1986).

A. Defining Types of Burdens

Before diving into our doctrinal analysis, this Section reviews the types of burdens that matter under the dormant Commerce Clause, and it defines single-state and mismatch burdens.

1. Symmetrical Versus Asymmetrical Burdens

Not all regulations impose burdens relevant to dormant Commerce Clause analysis. Consider regulations that impose what we call symmetrical burdens. Symmetrical burdens fall evenly on in-state and interstate commerce. For example, although they undoubtedly impact cross-border commerce, some local regulations—such as minimum wage laws and building codes—are symmetrical; compliance is no more burdensome for out-of-staters than for in-staters, and hence the rules do not discourage interstate commerce relative to in-state commerce. Accordingly, *any* legitimate state interest should be enough to sustain them against dormant Commerce Clause challenges.[66]

Contrast *asymmetrical* burdens, which this Article defines as those that impose disproportionately greater costs on interstate commerce than on in-state commerce, hence discouraging interstate commerce *relative to* in-state commerce and potentially inspiring tit-for-tat retaliation among states. The dormant Commerce Clause restrains some, but not all, asymmetrical burdens. Specifically, it restrains only *unjustified* asymmetrical burdens. State autonomy interests—including states' need to protect residents, cater to local conditions, and achieve other legitimate ends—can justify asymmetrical burdens. Mediating between or balancing those interests is the heart of dormant Commerce Clause analysis.

2. Single-State Versus Mismatch Burdens

A principal insight of this Article is that to fully understand dormant Commerce Clause doctrine, we must first understand that regulations impose different *types* of asymmetrical burdens on interstate commerce. We can subdivide those burdens into two types: single-state burdens and mismatch burdens. Single-state burdens arise from the application of the challenged state's law alone. Mismatch burdens arise from the application of two or more states' laws.

A regulation imposes a *single-state burden* when it burdens interstate commerce more than in-state commerce *irrespective* of what

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66 *See*, *e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960) (applying rational-basis review).

other states do. Specifically, regulation imposes a single-state burden when: (1) it would discourage cross-border commerce relative to in-state commerce if no other states regulated in the area, and (2) it would also do so if all other states were to adopt *regulation identical to* that of the challenged state. Thus, one can think of single-state burdens as being functionally equivalent, in compliance-cost terms, to an entry toll. If a state has a flat annual entry toll, that toll imposes an asymmetrical cost that is higher for cross-border commercial actors than for commercial actors operating wholly within the state. And the cost associated with that toll is independent of other states' tolls; it does not rise or fall depending on any other state's toll.

Facially discriminatory rules impose single-state burdens—the asymmetrical burden on interstate commerce arises from the law of the discriminating state alone. But facially neutral rules can impose single-state or mismatch burdens.[67] For example, *Pike v. Bruce Church* involved a facially neutral rule that imposed a single-state burden. In *Pike*, Arizona required farmers who grew cantaloupes in the state also to pack them there.[68] Because the burden arising from Arizona's rule did not depend on the actions or regulations of other states, it was a single-state burden. Specifically, adoption by other states of rules similar to (or different from) the Arizona rule would not affect the cost to comply with the Arizona rule.

But facially neutral rules also may impose mismatch burdens. A regulation imposes a mismatch burden if: (1) it would discourage cross-border commerce relative to in-state commerce if no other state regulated in the area, but (2) it would *not* discourage cross-border commerce relative to in-state commerce if all other states adopted the same regulation as the challenged state. Mismatch burdens are contingent on other states' regulations; they disappear when other states have the same rule.

Mismatches can consist of substantive differences in the content of regulations, as when one state allows sixty-five-foot trucks while another prohibits them. Mismatches also occur when one state has a regulation, and another state has no corresponding regulation, such that an interstate economic actor becomes subject to new rules when it expands across the border. Mismatches thus either increase costs for cross-border, but not in-state, economic actors or strip out-of-state economic actors of comparative advantages they otherwise would possess. When state regulations interact, the cost to comply with one

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67 A state law can also impose *both* single-state and mismatch burdens. *See infra* note 70.

68 Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970).

state's regulation can vary from zero (if the state's regulation is in no dimension stricter than or incompatible with other states' regulations)[69] to infinite (if the state's rule is mutually exclusive with other states' rules). In some cases, compliance will be cheap; in others it could be so high that it stops cross-border commerce in its tracks.[70]

Consider the facially neutral mismatch in *Bibb*, in which cross-border truckers challenged an Illinois regulation that imposed a curved-mudflap requirement at a time when neighboring states permitted or required straight mudflaps.[71] If all other states adopted Illinois's curved-mudflap rule, then interstate truckers would experience no greater costs to comply with Illinois's rule than would in-state truckers because truckers everywhere would use only curved mudflaps. But because Illinois's rule was different from those of other states, out-of-state truckers had to stop at the border to change mudflaps. Therefore, the burden in *Bibb*, which arose from regulatory diversity, is a mismatch burden. The most important feature of mismatches is that they are *conditional*—the burden one state's rule imposes depends on the existence and content of other states' rules. Even when protectionist intent does not motivate the adoption of a regulatory mismatch, a mismatch may severely curtail interstate commerce. Worse, states may create regulatory mismatches with protec-

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69 Consider the existence of different opening-hours requirements for retailers. While technically the regulations are mismatched, opening-hours diversity would have a negligible asymmetrical burden on interstate commerce. Other examples might include local safety regulations that impose costs on both in-state and out-of-state economic interests. *See*, *e.g.*, Ray v. Atl. Ritchfield Co., 435 U.S. 151, 173 (1978) (upholding a facially neutral requirement that tankers exceeding certain size limits be accompanied by a tug escort in Puget Sound).

70 Regulations that impose mismatch burdens also can impose single-state burdens. The classic example of a regulation that imposes both single-state and mismatch burdens is the Illinois anti-takeover regulation struck down in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). That regulation, which permitted Illinois to prevent a merger or acquisition if as little as ten percent of the target corporation's shares were held by Illinois residents, would potentially create a mismatch with anti-takeover laws of other states. *Id.* at 72–75. The Illinois law also imposed a single-state burden in that the law allowed the Illinois Secretary of State almost unfettered ability to block such an acquisition. *Id.* at 81. Underscoring these two different types of burdens, the Court several years later in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) upheld an Indiana anti-takeover law that only applied to target corporations *chartered* in Indiana, thus reducing the possibility of overlapping jurisdictional claims (and hence reducing potential mismatch burdens). *Id.* at 626–27, 646. In contrast, the dissent would have struck the law because it gave Indiana broad authority to prevent takeovers, and takeovers overwhelmingly involved out-of-state acquirers and in-state targets. In our terms, the dissent determined that the challenged regulation imposed a severe single-state burden on interstate commerce. *Id.* at 656. This Article does not consider the corporate law cases here because they implicate extraterritoriality more than undue burdens.

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

tionist intent, as when North Carolina forbade apple growers from displaying quality-grading information from their state of origin in *Hunt v. Washington State Apple Advertising Commission*.[72] Section II.C will discuss both *Bibb* and *Hunt*.

B. Single-State Burdens and Pike *Balancing*

This Section illustrates how the Supreme Court analyzes single-state cases that allege discrimination against or undue burdens on interstate commerce.[73] Whereas facial discrimination receives strict scrutiny, facially neutral single-state burdens are subject to *Pike* balancing.

1. Facially Discriminatory Regulations

The easiest type of single-state burden to identify and understand involves facial discrimination, that is, regulation that *expressly* distinguishes between state residents and nonresidents or between in-state and interstate commerce. Facial discrimination imposes single-state burdens because the burden does not depend on the content of any other state's rule. Facial discrimination cases have never been controversial or difficult for courts to resolve under the dormant Commerce Clause. Subjected to strict scrutiny, facially discriminatory regulations almost never survive.[74] For example, in *Hughes v. Oklahoma*,[75] the Supreme Court held that Oklahoma could not forbid the out-of-state sale of minnows caught within Oklahoma, while at the same time permitting the in-state sale of such minnows; in *Lewis v. BT Investment Managers, Inc.*,[76] the Court held that Florida could not prohibit out-of-state business entities from conducting certain financial activities in Florida that the state permitted equivalent Florida entities to conduct;

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72 432 U.S. 333, 335–36 (1977).

73 The goal of this Article is to explain the most puzzling cases, namely facially neutral, but burdensome, regulations. Other types of single-state burdens, including facially discriminatory laws and taxes that fail the Court's internal-consistency test, are subject to strict scrutiny and are almost always precluded. The reason for strict scrutiny in cases of facial discrimination are obvious; reasons for strict scrutiny of internally inconsistent taxes less so. For explanation as to why internally inconsistent taxes properly receive strict scrutiny, see Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 329–33 (2017). Notwithstanding the technical nature of the explanation that underlies use of the internal consistency test, the actual application of that test is straightforward, and so it is easy to identify tax rules that are internally inconsistent and therefore discriminatory. *See generally id.*

74 Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny . . . .").

75 441 U.S. 332, 337–38 (1979).

76 447 U.S. 27, 27, 44 (1980).

and in *Boston Stock Exchange v. State Tax Commission*,[77] the Court held that New York could not tax stock sales at a lower rate when they took place in New York than when they took place elsewhere. The Supreme Court likewise has struck down facially discriminatory regulations that banned in-state operations by nonresidents,[78] banned direct shipment of alcohol to state residents by out-of-state producers,[79] and more.[80] Rarely has the Supreme Court found a facially discriminatory regulation to be justified.[81] Few commentators dispute that courts act properly when they preclude facially discriminatory rules.[82]

2. Facially Neutral Regulations

The dormant Commerce Clause also precludes facially neutral rules that discriminate in effect. The Supreme Court has stated that "[t]he commerce clause forbids discrimination, whether forthright or ingenious."[83] When evaluating a facially neutral rule, what matters to the Court is the rule's impact on interstate commerce.[84] Each case discussed in this Section involves a facially neutral regulation that imposed a single-state burden on interstate commerce; these cases involve *Pike* balancing.

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77 429 U.S. 318, 318–19, 336 (1977).

78 Tenn. Wine and Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2476 (2019).

79 Granholm v. Heald, 544 U.S. 460, 465–66 (2005) (precluding a Michigan law allowing in-state, but not out-of-state, wineries to ship directly to Michigan customers).

80 Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 367–68 (1976) (striking down a Mississippi statute prohibiting the sale of out-of-state milk in Mississippi unless its source state accepted the sale of Mississippi milk in its territory); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 943, 960 (1982) (precluding a Nebraska statute prohibiting the withdrawal of Nebraska groundwater for transport across state lines unless the destination state granted reciprocal rights of withdrawal and transport into Nebraska); *see*, *e.g.*, New England Power Co. v. New Hampshire, 455 U.S. 331, 333–34, 344 (1982) (precluding a New Hampshire law prohibiting the export of hydroelectric power).

81 *See* Maine v. Taylor, 477 U.S. 131, 132–33, 151–52 (1986) (finding complete ban on imported baitfish justified to prevent introduction of parasites and invasive species when no less restrictive preventative measures would be effective).

82 *But see* Eule, *supra* note 9, at 428 (arguing for a "radically diminished role" for the dormant Commerce Clause, even in discrimination cases).

83 W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994); *see also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (reasoning that limiting dormant Commerce Clause scrutiny to facially discriminatory regulation "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods").

84 *See W. Lynn Creamery*, 512 U.S. at 201 (referring to a rule's "practical operation").

a. Pike v. Bruce Church (1970)

In *Pike v. Bruce Church*, the challenged regulation involved tying, a requirement that forces a commercial actor that conducts some commercial activity in a state to also conduct additional commercial activity there.[85] A cantaloupe grower challenged Arizona's requirement that cantaloupes grown in Arizona also had to be packed there.[86] The asymmetrical burden in *Pike* arose because, by tying packing to growing, Arizona precluded multistate growers from obtaining economies of scale from using packing facilities that they may have already owned outside Arizona. For example, the challenger in *Pike* would have preferred to use a packing facility it already owned nearby, just across the border in California.[87] This asymmetrical burden was also a single-state burden. Specifically, the cost to comply with Arizona's regulation would not decrease if all other states adopted an identical rule. The Arizona rule, in effect, functioned as an entry toll.

To decide *Pike*, the Supreme Court invoked a preexisting doctrinal tool that has come to be known as *Pike* balancing. Under *Pike* balancing, the Court first compares the asymmetrical burden a state imposes on interstate commerce to the state's interest in the challenged regulation.[88] The Court then may engage in narrow tailoring by asking whether the state could have achieved its interest via a method that would burden interstate commerce less than does the challenged regulation.[89] In *Pike*, the Supreme Court compared the burden Arizona imposed on in-state growers to the burden Arizona imposed on interstate growers, and it concluded that only interstate growers had to relinquish economies of scale that derived from consolidating pack-

85 Pike v. Bruce Church, Inc., 397 U.S. 137, 138, 145 (1970) (defining tying as "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere"); *cf.* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 102, (1984) (Rehnquist, J., dissenting) (arguing that the majority should not have invalidated under the dormant Commerce Clause a state's "tying arrangement" that required timber harvested in a state also to be processed there).

86 *Pike*, 397 U.S. at 138. The Court considered the Arizona packing rule to be facially neutral because it did not draw a de jure distinction between in-state and out-of-state growers in order to treat them differently. On the contrary, by its terms, the Arizona statute applied to all growers the same way—if they grew cantaloupes in Arizona, they had to pack them there. *Id.* at 140–42.

87 *Id.* at 138. The parties in *Pike* stipulated that its practical effect was to "compel the company to build packing facilities in [Arizona]." *Id.* at 140.

88 *Id.* at 142–43.

89 The Supreme Court does not always engage in explicit narrow tailoring as part of *Pike* balancing, and in its most recent description of *Pike* balancing, it did not even mention it. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

ing into a single plant.[90] The Supreme Court weighed this burden against Arizona's justification for the regulation, which was to inform the market that the relevant cantaloupes had been grown in Arizona,[91] and the Court concluded that the burden outweighed Arizona's interest.[92] The Court also noted the relevance of alternative, less burdensome, regulations—such as labeling—by which Arizona could achieve its local interest.[93] It is not uncommon for courts striking a law that imposes a single-state burden under *Pike* to find both that the law's burden exceeds its benefit and that less burdensome means were available to achieve the state's legitimate ends.

Not every reader will be convinced by the Court's analysis in *Pike* that the asymmetric burden on interstate commerce outweighed the states' regulatory interest. Balancing involves a judgment call. The Court's decision in *Pike* rested in part on its long-held[94] attitude toward the practice of tying, which it saw as imposing a "straitjacket on the appellee company with respect to the allocation of its interstate resources."[95] The Court declared tying worthy of "particular suspicion"[96] and declared it "virtually *per se* illegal."[97]

b. H. P. Hood & Sons, Inc. v. Du Mond (1949)

Dormant Commerce Clause challenges also arise when states use facially neutral rules to limit market access. In *H. P. Hood & Sons,*

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90 *Pike*, 397 U.S. at 145–46.

91 *Id.* at 142.

92 *Id.* at 143, 145 (distinguishing Arizona's "tenuous" interest in the reputation of its produce from other types of interests that would have carried more weight, such as safety).

93 *Id.* at 142.

94 *See* Toomer v. Witsell, 334 U.S. 385, 403 (1948) (striking down a North Carolina statute that tied shrimp packing to shrimp fishing, concluding that "an inevitable concomitant of [this] statute . . . is to divert to South Carolina employment and business which might otherwise go to Georgia").

95 *Pike*, 397 U.S at 146; *id.* at 145 ("The *nature* of that burden is, constitutionally, more significant than its extent" (emphasis added)); *see also Toomer*, 334 U.S. at 403–04 (disapproving South Carolina's attempt to "impose an artificial rigidity on the economic pattern of the industry"); *id.* at 410 (Rutledge, J., concurring) (referring to the tying regulation as "aimed in terms directly at interstate commerce alone, and thus would seem to be discriminatory in intent and effect"). For other cases invalidating tying, see, e.g., Minnesota v. Barber, 136 U.S. 313, 329–30 (1890) (meat sold in-state had to be inspected there); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13–14 (1928) (requiring shrimp caught in-state to be processed there); Johnson v. Haydel, 278 U.S. 16, 16–17 (1928) (requiring oysters caught in-state to be processed there); S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 84–85 (1984) (requiring timber harvested in-state to be processed there).

96 *Pike*, 397 U.S. at 145.

97 *Id.*

Inc. v. Du Mond,[98] for example, the Supreme Court considered whether New York could deny an out-of-state milk buyer a license to operate an in-state milk depot because the state wanted to protect its in-state milk market from greater competition from *any* source, whether in-state or out-of-state. A majority of the Court held that New York violated the dormant Commerce Clause because, despite the absence of facial discrimination, the "avowed purpose" of the denial of the license was to "aid local economic interests"[99] and for the Court to permit such "prohibition of competition"[100] might spur "fantastic rivalries and dislocations and reprisals."[101] But the dissenters in the case would have struck a different balance.[102] They regarded as legitimate New York's interest in stabilizing the milk market by regulating *all* new entrants.[103] They viewed "the prevention of destructive competition [as] a permissible exercise of the police power,"[104] provided the state did not target out-of-state competition for special treatment.[105] Put differently, regulating to reduce competition was permissible, whereas regulating to reduce competition *specifically from out-of-staters* was impermissible. Thus, the dissenters would have remanded for more fact-finding on the state's intentions and its interests.

c. Dean Milk Co. v. City of Madison (1951)

In 1951, the Supreme Court decided another milk case, *Dean Milk Co. v. City of Madison*.[106] In *Dean Milk*, the City of Madison banned the sale of milk in the city unless the milk was bottled within

98 336 U.S. 525, 526–27 (1949).

99 *Id.* at 530–31, 538 ("[T]he state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.").

100 *Id.* at 538 (quoting Buck v. Kuykendall, 267 U.S. 307, 315 (1925)).

101 *Id.* at 539.

102 *Id.* at 564 (Frankfurter, J., dissenting) (refusing to join the majority because he could not "agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes"). Joined by Justice Murphy, Justice Black separately dissented, concluding that there was no discrimination, and that, on balance, the state's interest should have prevailed. *Id.* at 549 (Black, J., dissenting).

103 Because a state's interest in ensuring its residents a steady supply of wholesome milk is so strong, the Supreme Court has accepted stringent regulation of the milk industry, including price controls. *Id.* at 529.

104 *Id.* at 566 (Frankfurter, J., dissenting) (distinguishing state regulation of "competition from whatever source," which is permitted under the dormant Commerce Clause, from regulation of "out-of-state competition," which is not).

105 *Id.* at 570 (Frankfurter, J., dissenting).

106 340 U.S. 349 (1951).

five miles of Madison's central square.[107] Although the ordinance did not explicitly target interstate commerce—and many Wisconsin dairy farmers were also disadvantaged—an Illinois milk distributor argued that the ordinance nevertheless violated the dormant Commerce Clause. Madison responded that the ordinance promoted a legitimate state interest, namely "convenient, economical and efficient plant inspection."[108] But the Supreme Court held that the ordinance had the "practical effect" of "exclud[ing] from distribution in Madison wholesome milk produced and pasteurized in Illinois."[109] In this case, physical distance to the Madison town square operated as a proxy to discriminate against interstate commerce.[110] The Court concluded that by limiting milk sold in the city to only milk bottled at a short distance from the city center, Madison—and by extension Wisconsin—discriminated against milk from other states.[111] *Dean Milk* featured narrow tailoring: because the city had available to it "reasonable [and] nondiscriminatory alternatives" to satisfy "its unquestioned power to protect the health and safety of its people," the Supreme Court held that the ordinance was not justified.[112] Such more narrowly tailored alternatives would have included a requirement that milk from points farther away be inspected to the same quality standards as those applicable in Madison.[113]

d. Bendix Autolite Corp. v. Midwesco Enterprises, Inc. (1988)

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.[114] involved a challenge to an Ohio statute that tolled the statute of limitations for claims against out-of-state corporations that had not designated an agent for service.[115] The Supreme Court noted that the challenged statute imposed a heavy burden on interstate commerce.[116] The Ohio

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107 *Id.* at 350–51, 355.

108 *Id.* at 352.

109 *Id.* at 354.

110 Although the Court did not describe the challenged regulation in terms of tying, the regulation conditioned one economic activity in the city (selling milk) upon the economic actor's performance of additional economic activity in the city (inspection). *See id.* at 354–55.

111 *Id.* at 354.

112 *Id.*

113 *Id.* at 355 (noting that the city health inspector had suggested this option to the city based on a federal "Model Milk Ordinance").

114 486 U.S. 888 (1988).

115 *Id.* at 889–90.

116 *Id.* at 891 (the nature of the burden was that an out-of-state company had to either indefinitely toll the statute of limitations or indefinitely subject itself to suit in Ohio on any cause of action).

statute imposed a single-state burden—the adoption by other states of a tolling statute identical to Ohio's would do nothing to reduce the burden Ohio imposed on interstate commerce.

Although it did not cite *Pike*, in deciding *Bendix*, a majority of the Supreme Court engaged in balancing.[117] It compared the burden Ohio imposed on interstate commerce to Ohio's interest in enabling its residents to serve process on foreign corporations. The Court held that the challenged statute added little to Ohio's long-arm statute, and therefore the burden it imposed on interstate commerce could not be justified under the dormant Commerce Clause.[118] One may agree or disagree with the outcome in *Bendix*; we review it here to emphasize that, even though it did not expressly cite *Pike*, the *Bendix* Court used balancing to decide the case.

e. C & A Carbone, Inc. v. Town of Clarkstown (1994)

Like milk, waste disposal has generated many dormant Commerce Clause challenges. In the 1994 case *C & A Carbone, Inc. v. Town of Clarkstown*,[119] a majority of the Supreme Court held that a New York town violated the dormant Commerce Clause by requiring local companies to process solid waste at a particular commercial facility. The town had granted the commercial facility a monopoly to process local waste at above-market prices as part of a deal under which the monopolist would build the processing plant and later transfer it to the town for one dollar.[120] A majority of the Court held the arrangement violated the dormant Commerce Clause because it "deprive[d] out-of-state businesses of access to a local market"[121] and "squelche[d] competition."[122] Although the town had a legitimate, nonprotectionist, reason for granting the monopoly, namely, it was a way to fund the construction of a processing plant that would be transferred to the town, the Court held that the town could have achieved its goal through less protectionist measures, such as taxation.[123] Three

117 *See id.* at 897 (Scalia, J., concurring) (citing *Pike* and describing the majority opinion as "[h]aving evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called 'balancing.'").

118 *Id.* at 893–94 (majority opinion).

119 511 U.S. 383 (1994).

120 *Id.* at 386–87.

121 *Id.* at 389.

122 *Id.* at 392.

123 *Id.* at 393–94. The majority held the challenged ordinance to be discriminatory, but Justice O'Connor pointed out that it was not facially so, since all of the town's waste had to be processed by the monopolist. *See id.* 405–06 (O'Connor, J., concurring) (concluding that the ordinance was invalid under *Pike*).

dissenting justices concluded that the ordinance should have been upheld because the processing facility was so closely related to the town's governing function.[124]

f. Lloyd A. Fry Roofing Co. v. Wood (1952)

In contrast with the facially neutral cases just discussed, which involved obvious protectionist impacts, rules that impose only incidental single-state burdens and do not involve protectionist intent typically survive dormant Commerce Clause review. For example, in 1952 in *Lloyd A. Fry Roofing Co. v. Wood*,[125] the Supreme Court upheld a facially neutral state truck-licensing regime that required "driver-owners to do nothing except apply for a permit."[126] Although the permitting regime involved what we would call an asymmetrical single-state burden on interstate commerce,[127] the Supreme Court held that the burden was justified because it enabled the state to "properly apply [its] valid police, welfare, and safety regulations to motor carriers using its highways."[128] In other cases, the Supreme Court upheld regulations, despite the asymmetric burdens they imposed on interstate commerce, either because the asymmetric impact on interstate commerce was only incidental or because the burden was justified by the regulatory interest.

3. Understanding Single-State Cases

Balancing in some single-state cases is easy because one side of the scale—either adverse impact on interstate commerce or legitimate state interest—is essentially empty. For example, facially discriminatory rules almost never survive dormant Commerce Clause review for lack of a legitimate state interest in the discriminatory rule. Similarly, in *Hood*, a majority of the Court ultimately rejected the legitimacy of New York's proffered state interest, which was to reduce competition.[129] Such reasoning is equivalent to concluding that the state had no legitimate interest to weigh against the burden it imposed on inter-

124 *Id.* at 419 (Souter, J., dissenting).

125 344 U.S. 157 (1952).

126 *Id.* at 161; *id.* at 163 (upholding the regulation).

127 That is, the cost to comply did not depend on the rules of any other state, and in particular, the cost to comply would not decrease if other states adopted the same rule.

128 *Fry Roofing*, 344 U.S. at 161; *see also* California v. Thompson, 313 U.S. 109, 111, 116 (1941) (upholding a $1 licensing fee and $1000 bond requirement).

129 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 542 (1949) ("[H]ere the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause.").

state commerce. Other *Pike* balancing cases are likewise easy to resolve because the burden side of the balancing scale is essentially empty, such that any legitimate state interest can outweigh it. This is true of de minimis asymmetrical burdens on interstate commerce, such as the registration requirement in *Fry Roofing*.[130]

The remainder of cases involve more careful review. For example, regulations that impose significant asymmetrical burdens—such as the tying regulation in *Pike* or the statute of limitations in *Bendix*—can only be justified by legitimate state interests that cannot be satisfied via less burdensome regulation. Thus, it should come as no surprise when the Supreme Court strikes down regulations—such as those in *Dean Milk* and *Carbone*—that completely close the state's market to out-of-state competition. The Court upholds such stringent rules only in rare cases, as when needed to prevent contagion that cannot be stopped by other means.[131] Other cases involve close judgment calls. Although a majority of the Court in *Hood* thought that New York's refusal to grant a milk-depot permit to an out-of-state milk buyer was motivated by an illegitimate state interest—namely protectionism that would inspire retaliation—three dissenters regarded the state as motivated by an intent to stabilize competition in a way that did not impermissibly target out-of-state interests. Cases like *Hood* frustrate observers because it is difficult to predict their outcomes.[132] Likewise, in his concurrence in *Bendix*, Justice Scalia observed that the interests on each side of the *Pike* balancing scale were "incommensurate," and "an opinion could as persuasively have been written coming out the opposite way."[133] This Article will have more to say about *Pike* balancing in Part III, after we introduce the notion of mismatches.

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130 *See Fry Roofing*, 344 U.S. at 162 (citing precedent for the conclusion that "a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden").

131 *Compare* Maine v. Taylor, 477 U.S. 131, 151–52 (1986) (finding complete ban on imported baitfish was justified to prevent introduction of parasites and invasive species because no less restrictive means would be effective), *with* R.R. Co. v. Husen, 95 U.S. 465, 473–74 (1877) (precluding exclusion of out-of-state cattle to prevent contagion because less restrictive means, including quarantines and inspections, were available).

132 *See*, *e.g.*, Regan, *supra* note 16, at 1262 ("I am not certain *Hood* was correctly decided or, if it was, what is the best analysis.").

133 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (Scalia, J., concurring).

C. Mismatch Burdens and Bibb *Balancing*

We now consider mismatches.[134] The defining feature of a mismatch is that the presence or absence of similar regulation by *other states* affects the cost to comply with the first state's rule. Put simply, mismatch burdens arise from *differences* among states' regulations, and they either increase costs for cross-border, but not in-state, economic actors or strip out-of-state economic actors of comparative advantages they otherwise would possess.

Some dormant Commerce Clause concerns are common to both single-state and mismatch cases, whereas others are unique to mismatch cases. As with single-state cases, mismatches may raise questions about intentional protectionism. That is, mismatches may be designed deliberately to exclude out-of-state products or services or to otherwise increase costs for out-of-staters, and concerns about intentional protectionism may be present even when states also seem to have good reasons (e.g., safety or consumer protection) for regulating. When mismatches display intentional protectionism, the Court resolves them on that basis alone. But the Court may also closely scrutinize mismatch cases *even when it finds no protectionist intent*. In such cases, the Court employs what we call *Bibb* balancing. Unlike *Pike* balancing, *Bibb* balancing employs external benchmarks consisting of *other states'* laws as a baseline for evaluating the challenged state's rule. This approach is inevitable; mismatch burdens must be measured against other states' laws because the nature of a mismatch burden is that it arises from regulatory diversity.

1. Cases

a. Intentionally Protectionist Mismatches

When states enact regulatory mismatches with protectionist intent, courts have precluded them for that reason.[135] In this respect, mismatch and single-state cases are similar. Such cases pose the problem of establishing intent, but this problem is common to both single-state and mismatch cases.

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134 In general, our selection of cases is meant to be representative, rather than comprehensive, of the problem of mismatches.

135 *See*, *e.g.*, J. R. Brooks & Son, Inc. v. Reagan, No. C-71-1311 SC, 1973 U.S. Dist. LEXIS 15732, at *8, *20 (N.D. Cal. Sept. 18, 1973) (precluding an intentionally protectionist mismatch).

i. Florida Lime & Avocado Growers, Inc. v. Paul (1963)

For example, in *Florida Lime & Avocado Growers, Inc. v. Paul*,[136] California prohibited the shipment within California of avocados that did not meet a minimum fat threshold.[137] Florida's use of federal ripeness standards, which relied on picking date and fruit size, created a mismatch with California's use of fat content.[138] California defended the fat-content rule as needed to ensure ripeness, but Florida avocado growers complained that Florida avocado varietals were unlikely to reach California's prescribed minimum fat content, even when fully ripe according to federal standards.[139] Although California did not facially discriminate against Florida avocados, there was a question of whether California used fat content as a discriminatory proxy.[140] The trial record in *Florida Lime* did not enable the Supreme Court to conclude that California had protectionist intent to exclude Florida avocados. This was not only because the trial record contained conflicts and questions regarding the admissibility of certain evidence,[141] but also because the trial court assumed, apparently contrary to fact, that at the time California enacted the challenged regulation "California growers faced no meaningful competition from Florida growers."[142]

To get clarity on this question, the Supreme Court remanded the case for further fact finding.[143] The Court also confirmed that even if the regulation was not adopted for protectionist motives, given its disproportionate effect on Florida avocados, "the continued application" of the regulation might discriminate against or unduly burden or interstate commerce,[144] in a manner that outweighed what the Court regarded as California's legitimate interest in ensuring the ripeness of

136 373 U.S. 132 (1963).

137 *Id.* at 133–34.

138 *Id.* at 139.

139 *Id.* at 134–35 (federal standards were based on days of maturity).

140 *Florida Lime* is a mismatch case because, if all states implemented California's fat-content rule, then farmers would adjust to that regulation, and farmers in Florida would grow either no avocados or only avocados that could meet California's standard, which would also be Florida's standard. Thus, under conditions of uniform rules, the asymmetrical burden on interstate commerce would disappear. *See id.* at 133–134.

141 *Id.* at 155.

142 *Id.* at 153 n.19 (noting that this assumption was questionable because there not only "appear[ed] to have been vigorous competition" between the two states, but also because Florida growers "immediately and vigorously protested" the passage of the fat-content rule, and a U.S. senator representing Florida filed a complaint with the Department of Agriculture).

143 *Id.* at 136–37. *See id.* at 154 (noting that the district court's evidentiary rulings had created confusion in the record).

144 *Id.* at 153–54.

avocados for California consumers.[145] Interestingly, four dissenting justices would have held that federal avocado ripeness standards preempted conflicting California rules, in part on the grounds that a goal of the Secretary of Agriculture in prescribing national standards was to avoid "[l]ack of uniformity [that] tends to obstruct commerce [and] to divide the nation into many markets."[146] Although there is no published case on remand, in a subsequent case challenging the same regulation, a three-judge California district court precluded the fat-content rule on the grounds that it operated "as an embargo against Florida-grown avocados" that could not be justified by California's consumer-protection interests.[147] In striking the law, the panel underscored extensive evidence of intentional protectionism on the part of the California legislature, and it pointed to—as a less discriminatory alternative—the federal picking-date and size rules that Florida used.[148]

ii. Hunt v. Washington State Apple Advertising Commission (1977)

In 1977, the Supreme Court decided on the merits another case involving what the out-of-state challenger charged was an intentionally protectionist mismatch. In *Hunt v. Washington State Apple Advertising Commission*,[149] North Carolina had a rule that required apple shipping containers to bear only either federal quality gradings or no grades at all; such containers could not bear grades from other states' regulatory regimes.[150] North Carolina's requirement was "unique in

145 *Id.* at 154 (noting that "[o]ther state regulations raising similar problems have been found to be discriminatory or burdensome notwithstanding a legitimate state interest in some form of regulation—either because they exceeded the limits necessary to vindicate that interest or because they unreasonably favored local producers at the expense of competitors from other States") (citation omitted). Note, however, that the dissenters emphasized that there was no claim by California that the regulation advanced health or protected consumers against fraud or deceptive practices. *See id.* at 161 n.3 (White, J. dissenting).

146 *Id.* at 169 (White, J., dissenting).

147 J. R. Brooks & Son, Inc. v. Reagan, No. C-71-1311 SC, 1973 U.S. Dist. LEXIS 15732, at *8 (N.D. Cal. Sept. 18, 1973). The case involved a fourteen-day trial in which the court took evidence of asymmetrical effect and protectionist intent. Among other facts, the panel concluded that maintenance of the fat-content regulation was "the result of pressure from the California avocado industry, for the purpose, inter alia, of excluding competition from Florida avocados in California markets." *Id.* at *14–15 (holding that California's interest could be served by adopting the federal standards of ripeness, which were based on size and harvest date).

148 *Id.* at *10–11.

149 432 U.S. 333 (1977).

150 *Id.* at 352.

the 50 States,"[151] and specifically, it was different from grading standards applicable in Washington. Because Washington quality grading standards were stricter, they conferred a marketplace advantage on Washington apples.[152] Indeed, the Washington Apple Commission, which brought the case, suggested that North Carolina adopted its rule barring other states' labels specifically to strip Washington apples of their competitive advantage in the North Carolina market. The Commission insisted that the impact on Washington apples was "not an unintended byproduct" of the North Carolina regulation.[153] Although the Supreme Court acknowledged "some indications in the record"[154] that North Carolina sought to exclude or disadvantage Washington apples, the Court concluded that it "need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case."[155]

Instead, the Court noted that North Carolina's rule would require Washington growers to either repack their apples or to "obliterate the printed labels on containers shipped to North Carolina."[156] The Court thus took Washington law as a given, and framed North Carolina law as a deviation from it. Put differently, the Court used Washington's regime as a baseline for measuring the burden that the North Carolina regime imposed on interstate commerce. The use of other states' regimes as a baseline in measuring the burden on interstate commerce imposed by the challenged state's regulation is what we mean when we characterize the Supreme Court as using an "external benchmark" in mismatch cases.

Citing *Pike*, the Court weighed against this burden North Carolina's proffered interest, which was to protect consumers from confusion arising from a multiplicity of different apple grading standards.[157]

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151 *Id.* at 337.

152 *Id.* at 350–51 (noting that the market preferred Washington's grading system to the federal grading system because Washington's displayed "greater consistency, [due to] its emphasis on color, and its supporting mandatory inspections").

153 *Id.* at 352.

154 *Id.*

155 *Id.*

156 North Carolina required labels on closed containers of apples to either have the applicable USDA grade or no grade shown at all. This meant that Washington growers could not display Washington's own unique state grade on apple containers they shipped to North Carolina. Because Washington growers packed their apples into prelabeled containers before shipping to various states, North Carolina's "unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance," or face the significant logistical and financial cost of repacking apples specifically for sale in North Carolina. *Id.* at 337–38.

157 *See id.* at 350. North Carolina cited the fact that seven states used their own unique

The Court did not think the North Carolina statute would advance North Carolina's legitimate[158] consumer-protection goal.[159] And moreover, the Court reasoned that North Carolina buyers would experience less confusion from Washington's more precise labeling regime than from North Carolina's preferred alternative.[160] Such reasoning weighs not only the burden, but also North Carolina's regulatory interest against a baseline generated by Washington's labeling regime. Finally, the Court pointed to less restrictive alternatives by which North Carolina could achieve its consumer-protection goals, such as allowing Washington growers to display both Washington and federal grades.[161]

Ultimately, the *Hunt* Court engendered doctrinal confusion by mixing the discrimination and undue burden strands of dormant Commerce Clause when it concluded that "the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them."[162] We may be able to attribute this mixed legal conclusion to evidence that North Carolina intentionally created the mismatch to exclude Washington apples.[163] A better way to understand *Hunt* under the balancing standard might be to say that the burden on interstate commerce arising from the mismatch easily outweighed North Carolina's dubious[164]—or even impermissibly protectionist—interest in its labeling rule.

b. Nonprotectionist, or Arguably Nonprotectionist, Mismatches

When the Supreme Court cannot resolve a mismatch case based on intentional protectionism, it follows one of two major doctrinal approaches. Under the first, it summarily upholds the regulation. We call this approach *noninterventionist* because the Court justifies it by refer-

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apple grading system and argued that lack of uniformity could confuse the consumer as to the apple's actual quality. *Id.* at 349.

158 *Id.* at 350 (referring to "health and consumer protection" as legitimate goals).

159 *Id.* at 353 (North Carolina's rule can "hardly be thought to eliminate the problems of deception and confusion").

160 *Id.*

161 *Id.* at 354.

162 *Id.* at 350, 352 (noting the challenger's argument that the regulation's "discriminatory impact on interstate commerce was not an unintended byproduct").

163 *Id.* at 352 (acknowledging "some indications in the record" to the effect that North Carolina intentionally discriminated against Washington apples).

164 North Carolina's consumer protection interest was dubious both because the state sought to protect sophisticated bulk apple buyers who could be expected to know their business, and because there was no evidence of actual market confusion for the sixty years of operation of the Washington grading regime. *Id.* at 338.

ence to limits on its own institutional powers. The second approach, which is *interventionist*, involves *Bibb* balancing. Under *Bibb* balancing, the Court either precludes or sustains the challenged law after analysis. Both the interventionist and noninterventionist approaches appear to be alive and well, and which will prevail in a given case is unpredictable.

i. Nonintervention

1. State Highway Department v. Barnwell Bros., Inc. (1938)

In 1938, in *South Carolina State Highway Department v. Barnwell Bros., Inc.*,[165] South Carolina adopted truck weight and width limits that were stricter than those of neighboring states.[166] Challengers argued that South Carolina's rule unconstitutionally burdened interstate commerce. The South Carolina regulation imposed a mismatch burden; specifically, if all states had the same limits as South Carolina, truckers everywhere would comply with those limits, and so South Carolina's rule would not disproportionately burden (or exclude) out-of-state trucks.

South Carolina argued that it needed strict weight and width limits to protect its roads from wear.[167] Even though the district court found the limits were an unreasonable means to preserve highways and conferred no safety advantage,[168] and even though the Supreme Court acknowledged that the vast majority of interstate trucking exceeded the South Carolina limits and therefore would be shut out of South Carolina,[169] the Supreme Court nevertheless unanimously[170] upheld the regulation on the grounds that state highways were a particularly local concern.[171] Expressly rejecting judicial balancing[172] to resolve "non-discriminatory"[173] burdens, the Supreme Court applied rational-basis review.[174] Unlike in some other cases this Article discusses, a perceived need for national uniformity in highway regula-

165 303 U.S. 177 (1938).

166 *Id.* at 179.

167 *Id.* at 192–93.

168 *Id.* at 183.

169 *See id.* at 182.

170 The decision was 7–0. Justices Cardozo and Reed did not take part. *Id.* at 196.

171 *Id.* at 190.

172 *Id.* at 191–92 (noting that the constitutionality of such highway regulation "is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard").

173 *Id.* at 190.

174 *Id.* at 189 ("[S]o long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative

tions played no role in *Barnwell*; indeed, the Court observed that precluding South Carolina's rule would be tantamount to "forc[ing] the states to conform to standards which Congress might, but has not adopted."[175] Thus, if uniform regulation of highways were needed, Congress, not the Supreme Court, should impose them.[176]

2. Moorman Manufacturing Co. v. Bair (1978)

Moorman Manufacturing Co. v. Bair[177] was a 1978 case involving a state income tax. Before examining *Moorman*, however, we offer a word of qualification. In 2015, in *Comptroller of the Treasury of Maryland v. Wynne*,[178] the Supreme Court confirmed that mismatches in tax bases (as opposed to mismatches in tax compliance rules), do not violate the dormant Commerce Clause as long as they are what the Court calls "internally consistent" because internally consistent taxes do not asymmetrically burden interstate commerce.[179] Forty years ago, however, when the Supreme Court decided *Moorman*, the *Wynne* view of tax mismatches had not yet been developed. Thus, when judges, litigants, and commentators thought about mismatched tax bases, particularly when such mismatches produced double taxation, they generally assumed that mismatches produced asymmetric effects—that is, that they imposed greater costs on interstate than in-

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authority."). *Id.* at 192 (applying rational-basis review in the absence of any finding of discrimination).

175 *Id.* at 187.

176 *Id.* at 190 (deciding that burdens arising from conflicts may require "legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, [and] curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce . . . .").

177 437 U.S. 267, 283 (1978).

178 575 U.S. 542 (2014).

179 An internally consistent rule is one that, if adopted by all the states, would not result in higher taxation for interstate than for in-state commerce. *Id.* at 560 (2015). The Court is correct, as an economic matter, that—even when they lead to double taxation—tax base mismatches do not asymmetrically burden interstate commerce as long they are internally consistent. The reasons are technical and explained in our earlier work. *See* Knoll & Mason, *supra* note 73.

The Court recently gave an example of a tax-base mismatch that would not violate the dormant Commerce Clause. The Court stated that if one state taxed solely on the basis of residence—that is, it taxed its residents on their income regardless of where they earned that income—and another state taxed solely on the basis of source—that is, it taxed all income earned in the state regardless of where the owner of the income resided—then the simultaneous application of those two regimes to a single person engaged in interstate commerce would not violate the dormant Commerce Clause, notwithstanding resulting double taxation (or nontaxation). *See Wynne*, 575 U.S. at 565–66. For more on why this result makes sense as an economic matter—namely, because it would impose no asymmetric burden on interstate commerce—see Knoll & Mason, *supra* note 73.

state commerce.[180] Although the Supreme Court ultimately adopted a more sophisticated view of tax mismatches in *Wynne*—one that is supported by economic analysis—this Article nevertheless discusses *Moorman* because it provides insights into how justices think about mismatches that they perceive as imposing asymmetrical burdens on interstate commerce.[181]

Understanding *Moorman* also requires a little background on state taxation. The definition of income for state tax purposes generally does not generate mismatches because the states use harmonized rules; specifically, they borrow the federal definition of income.[182] But conflicts arise when states divide that income among themselves. For example, states use formulas to calculate the portion of a company's income that is taxable in each state; those formulas account for the relative presence in the state of the company's factors of production, such as payroll, property, and sales. In *Moorman*, a corporate taxpayer complained that it suffered unconstitutional double taxation when Iowa used a single-factor-sales formula at a time when all other states used a particular three-factor formula dubbed the Massachusetts formula.[183]

In a 6–3 decision, the *Moorman* Court acknowledged that diversity in tax-apportionment formulas could lead to double taxation, but it concluded that responsibility for any resulting burden was not attributable solely to any one state.[184] Different states adopted different tax apportionment rules. Iowa used sales; all other states used the Massachusetts formula. As a result, the Court regarded multiple states to be responsible for the mismatch.[185] Because the overlap could have been cured by Iowa adopting the Massachusetts formula, or by other states "us[ing] the Iowa formula,"[186] the Court could not conclude that "the Iowa formula was at fault for whatever overlap may have ex-

180 They did not yet understand that although internally inconsistent mismatches were protectionist, internally consistent mismatches are not. *See* Knoll & Mason, *supra* note 73, at 312 (explaining which types of tax mismatches are protectionist).

181 Incidentally, although it played no role in the decision in *Moorman*, the challenged regime in *Moorman* was internally consistent, and therefore also would be upheld under the Court's post-*Wynne* jurisprudence.

182 *See* Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1269 (2013).

183 Moorman Mfg. Co. v. Bair, 437 U.S. 267, 271–72 (1978); *id.* at 283 (Powell J., dissenting) (noting that forty-four out of forty-five states with income taxes used the three-factor formula).

184 *Id.* at 270, 276 (majority opinion).

185 *Id.* at 277 ("[W]e could not accept appellant's argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense.").

186 *Id.*

isted."[187] The Court specifically refused to use the dominant Massachusetts formula as a benchmark for evaluating Iowa's rule, reasoning that doing so would require "the prevalent practice [to] be endorsed as the constitutional rule."[188] The Court resisted such endorsement, even though it would have prevented double taxation, because the Constitution is "neutral with respect to the content of any uniform rule."[189] Endorsing the Massachusetts formula as a nationwide rule would have involved "extensive judicial lawmaking."[190] Although conceding that there may be "an overriding national interest in uniformity" in taxation, the majority disagreed that any uniform rule could be selected by the Supreme Court.[191] Instead, it was to Congress, "and not this Court, that the Constitution has committed such policy decisions."[192]

Like the Court's holding in *Barnwell*, the majority's reasoning in *Moorman* was that any burden on interstate commerce arising from legal diversity was not cognizable under the dormant Commerce Clause. Although forty years separated *Moorman* and *Barnwell*, and although the *Moorman* Court did not rely on *Barnwell*, the reasoning in the two cases is similar in the sense that the Supreme Court would not attribute the burden arising from a regulatory mismatch to the challenged state alone—even when the challenged state had an outlier rule. The Court refused to use other states' laws as a benchmark, and it refused to endorse a nationally uniform rule. In contrast, two dissenters in *Moorman* cited *Pike* and *Bibb* to argue that the Supreme Court should have eliminated the mismatch by precluding Iowa's outlier tax rule.[193]

ii. Intervention

When mismatch cases do not involve clear protectionism, the Court takes one of two approaches. Either it summarily upholds the mismatch on the grounds that doing otherwise would exceed its competence, as in *Barnwell* and *Moorman*, or it engages in more meaningful dormant Commerce Clause review—using *Bibb* balancing as distinct from *Pike* balancing—as in the cases discussed in this Section.

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187 *Id.*

188 *Id.* at 279.

189 *Id.*

190 *Id.* at 278.

191 *Id.* at 280.

192 *Id.*

193 *Id.* at 295–96 (Powell, J., dissenting) (citing *Bibb*); *id.* at 289 (Powell, J., dissenting) (citing *Pike*).

1. Southern Pacific v. Arizona (1945)

Our first interventionist case, *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[194] sharply contrasts with *Barnwell*. In *Southern Pacific*, the Supreme Court considered Arizona's facially neutral regulation that, for safety reasons, placed upper bounds on the lengths of passenger and freight trains.[195] Neighboring states had no (or less restrictive) train-length standards, so challengers complained that the Arizona rule inhibited interstate commerce by requiring interstate train operators to remove cars at the border.[196] This is a mismatch burden because if all states adopted Arizona's train-length rules, then all train operators in all states would comply with the Arizona rule everywhere, and cross-border train operators would face no special costs that in-state operators did not.[197] For example, there would be no border stops to remove train cars.

The *Southern Pacific* Court specifically identified the relevant burden as one associated with state regulatory diversity, and the Court noted that such diversity "impair[ed]" the "uniformity of efficient railroad operation."[198] Moreover, the Court singled out Arizona's practice as restrictive compared to the rules of other states, because, at the time, many other states had no length limits at all, so it was "standard practice" to use more train cars than the Arizona law permitted.[199] *Southern Pacific* marks a sharp contrast with the view expressed by the *Barnwell* Court that the content of other states' rules did not matter.[200]

Although the *Southern Pacific* Court employed balancing, the way it measured the burden and benefits of the Arizona regulation was different than in the single-state cases, such as *Pike*.[201] Acknowl-

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194 325 U.S. 761 (1945).

195 *Id.* at 763.

196 *Id.* at 774.

197 The mismatch burdens arose from differences between Arizona's rule and other states' rules (or, in this case, the absence of rules in other states). If all other states had the same rule as Arizona, then trains everywhere would comply with it, and so trains crossing Arizona's border would face no burden that trains traveling exclusively within Arizona did not also face. Because the burden would disappear upon harmonization, it is a mismatch burden.

198 *Southern Pacific*, 325 U.S. at 773.

199 *Id.* at 771.

200 S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 195 (1938) ("The fact that many states have adopted a different standard is not persuasive.").

201 *Southern Pacific*, 325 U.S. at 768–69 ("[R]egulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."). *Id.* at 783–84 (concluding the "state interest is out-

edging public safety as a compelling government interest, the Supreme Court concluded that Arizona attained only a "slight and dubious advantage"[202] in safety by implementing length limitations. And it concluded that the safety interest could not outweigh "the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect."[203] Thus, it was not the *absolute* effect of the Arizona rule on interstate commerce that mattered, but rather its effect *relative* to the rules—or lack thereof—of other states. In this way, the *Southern Pacific* Court weighed contingent interests on both sides of the balancing scale: it calculated the burden Arizona imposed on interstate commerce by reference to other states' regulation (or lack thereof), and it evaluated Arizona's improvement in safety relative to other states' rules.[204] Under this calculus, the Court concluded that the burden outweighed the state interest. The Court furthermore concluded that if safety concerns warranted train-length limits, only Congress could impose them.[205] Justice Black dissented from the decision, arguing that it was improper for the Supreme Court to act as a "super-legislature"[206] that second-guessed the safety judgments of the Arizona legislature.[207]

2. Bibb v. Navajo Freight Lines (1959)

Decided in 1959, *Bibb v. Navajo Freight Lines, Inc.*[208] involved a challenge to an Illinois regulation requiring trucks to have curved

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weighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail").

202 *Id.* at 779.

203 *Id.* at 776.

204 *See*, *e.g.*, *id.* at 778 (comparing Arizona's accident record after it regulated train lengths to that of other states without regulation). *Id.* at 779 (contrasting other measures, such as headlight, caboose, and full-crew requirements, where the safety gains justified the burden on interstate commerce).

205 *Id.* at 781 ("[W]hen a state goes beyond safety measures which are permissible because only local in their effect upon interstate commerce, . . . the State will encounter the principle that such requirements, if imposed at all, must be [imposed] through the action of Congress which can establish a uniform rule."). By contrast, in other cases in which the Supreme Court deemed train safety measures to be less burdensome, the Court permitted them. *See id.* at 782 (referencing prior cases in which the Court upheld train regulations requiring full crews, headlights, and more).

206 *Id.* at 788 (Black, J., dissenting).

207 *Id.* at 786 (noting also that Congress had considered imposing the same length limits that the Court now declared to confer inadequate safety benefits). Justice Douglas likewise dissented, on the grounds that "courts should intervene only where the state legislation discriminated against interstate commerce." *Id.* at 795 (Douglas, J., dissenting).

208 359 U.S. 520 (1959). The Court's interventionist opinion in *Bibb* was drafted by Justice

mudflaps at a time when all other states either permitted or required straight mudflaps.[209] The Supreme Court focused on the regulatory mismatch, identifying "the question [as] whether one State could prescribe standards for interstate carriers that would conflict with the standards of another State."[210] As in *Southern Pacific*, the *Bibb* Court took those other states' regulations as the benchmark in measuring the burden imposed by Illinois's different rule. As a result, it attributed *exclusively to Illinois* the costs truckers incurred to stop at the border to weld on new mudflaps, even though those costs arose from regulatory diversity traceable to at least two states.[211] The Supreme Court weighed this burden against Illinois's proffered safety interest, but, citing findings by the district court, the Court held that the purported safety advantages of curved over straight mudflaps were insufficient to overcome the "need for national uniformity in the regulations for interstate travel."[212] The *Bibb* Court, like the *Southern Pacific* Court, thus weighed contingent interests on both sides of the balance scale; it calculated the burden imposed by the Illinois regulation against a baseline of other states' regulations, and it weighed Illinois's safety interest against a baseline of other states' safety measures.[213]

3. Kassel v. Consolidated Freightways Corp. of Delaware (1981)

In *Kassel v. Consolidated Freightways Corp. of Delaware*,[214] Iowa limited trucks on its highways to fifty-five or sixty feet in length, depending on the type of truck.[215] The rule faced a dormant Commerce Clause challenge because it was "out of step"[216] with those of many other states, which permitted sixty-five-foot trucks on their highways. In evaluating the challenge to the mismatched rule, the Supreme Court used external benchmarks. For example, in determining that the

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Douglas, who fourteen years earlier dissented in *Southern Pacific*, arguing that the Court should not have intervened because the Arizona law was not discriminatory. *Id.* at 521.

209 *Id.* at 521–23.

210 *Id.* at 526.

211 *Id.* at 524–25, 527.

212 *Id.* at 527 (quoting Morgan v. Virginia, 328 U.S. 373, 386 (1946)); *id.* at 530.

213 The state relied on *Barnwell* to argue that "a federal court is precluded from weighing the relative merits of the contour mudguard against any other kind of mudguard." *Id.* at 528. In rejecting this argument, the Supreme Court referred to the "equal footing" of the states, whose statutes "are of equal dignity when measured against the Commerce Clause." *Id.* at 529.

214 450 U.S. 662 (1981).

215 *Id.* at 665–66. Each limit applied to a different kind of truck. *Id.*

216 *Id.* at 671.

burden on interstate commerce included the need to detour around Iowa or switch to smaller trucks, the Supreme Court implicitly used other states' preexisting regulations as a baseline.[217] The Court thus regarded Iowa alone as causing interstate truckers to incur switching and detour costs.[218] Iowa defended its rule on safety grounds, but in weighing the state's safety concerns, the Court again conducted a relative, not absolute, inquiry. Specifically, the Court used other states' regulations as a benchmark by comparing the safety of Iowa's rule to the safety of other states' rules.[219] Citing the trial court's findings, the Court concluded that the comparative safety benefit from Iowa's shorter length limits was "illusory."[220] Moreover, the Court found that because the regulation would "bear[] disproportionately on out-of-state residents and businesses," it was not due the typical deference shown by courts to safety regulations.[221] In striking down the regulation, the Court also noted that exceptions to Iowa's truck length limits were "helpful to local interests," while burdening out-of-state interests, which raised suspicion that Iowa's regulation "may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic."[222] Indeed, two concurring justices found the regulation protectionist. By contrast, citing *Barnwell*, three dissenters invoked the noninterventionist approach. They concluded that a court's role in dormant Commerce Clause cases was limited to determining whether the challenged regulation, "although rational, is merely a pretext for discrimination against interstate commerce."[223]

4. Minnesota v. Clover Leaf Creamery Co. (1981)

In 1981 in *Minnesota v. Clover Leaf Creamery Co.*,[224] Minnesota banned the sale of milk in plastic containers because use of such containers "presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources."[225] On an evidentiary record it described as mixed, the trial court held that Minnesota adopted the regulation to advantage the Minnesota pulp wood

217 *See id.* at 671, 674.

218 *See id.* at 667, 671.

219 *Id.* at 671; *id.* at 673 (citing studies and testimony comparing safety of fifty-five-foot to sixty-five-foot trucks).

220 *Id.* at 671.

221 *Id.* at 676–77.

222 *Id.* Iowa exempted from the regulation individuals and businesses in important border cities, which covered Iowa's ten largest cities. *Id.* at 676.

223 *Id.* at 692 (Rehnquist, J., dissenting).

224 449 U.S. 456 (1981).

225 *Id.* at 457 (quoting MINN. STAT. § 116F.21 (1978) (repealed 1981)).

industry, which made materials used in paper milk cartons.[226] The Minnesota Supreme Court, by contrast, found that although Minnesota passed the regulation for the legitimate purpose of "encouraging [] reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream," the regulation was not rationally related to achieving that purpose, and therefore the court struck the regulation under the Equal Protection Clause without reaching the dormant Commerce Clause.[227]

The Supreme Court reversed. On the equal protection claim, the Supreme Court concluded that the plastic container ban was rationally related to Minnesota's environmental goals.[228] The Supreme Court then turned to the dormant Commerce Clause and concluded, citing *Pike*, that "[e]ven granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems."[229] Interestingly, although the Supreme Court used external benchmarking to determine the burden of Minnesota's rule—it compared Minnesota's plastic-container ban to other states' laws permitting plastic—it did not benchmark Minnesota's environmental goals against the regulations of any other states. This choice may have been motivated by the difference in purposes animating Minnesota's plastic ban as compared to other states' packaging rules, which did not serve environmental goals. Ultimately, the Supreme Court held that the regulation was "nondiscriminatory" and that its burden on interstate commerce was small relative to Minnesota's interest in protecting the environment by banning plastic jugs.[230]

Although he agreed that the statute survived equal protection challenge, Justice Powell dissented from the dormant Commerce Clause decision in *Clover Leaf*. He would have remanded the case to

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226 *Id.* at 460.

227 Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 82 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981); *see also Clover Leaf*, 449 U.S. at 463–64 (noting that the challengers had "produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product").

228 *Clover Leaf*, 449 U.S. at 459, 466.

229 *Id.* at 473; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating "clearly excessive" standard for burdens on interstate commerce).

230 *Clover Leaf*, 449 U.S. at 472–74.

determine whether, as the trial court had found, the regulation was enacted with protectionist intent.[231] Also dissenting, Justice Stevens would have deferred to the factual findings of the lower courts, and therefore he concluded that the "the essential predicate for the majority's conclusion that the 'local benefits [are] ample to support Minnesota's decision under the Commerce Clause,' is absent."[232]

2. Understanding Mismatch Cases

Recognizing the differences between single-state and mismatch cases does not enable us to explain the different outcomes across the mismatch cases in a satisfying way. In three out of four of the interstate transportation cases this Article discussed—all but *Barnwell*—the Court balanced, which led it to preclude outlier interstate transportation rules regarding train lengths, mudflaps, and truck lengths. In *Barnwell*, however, the Court upheld state regulations involving truck weight and widths without balancing their adverse effects on interstate commerce against the challenged states' interests in enacting the regulations. Outcomes in the product-standards cases were also mixed. In *Hunt*, the Court held that the asymmetric burden on interstate commerce outweighed the state's proffered consumer-protection interest; the *Hunt* Court did not take seriously the consumer-protection justification for North Carolina's apple labeling rule, in part due to evidence that protectionism motivated the rule. Unsure of how to balance in *Florida Lime*, the Court remanded for a clearer determination of the state's interest in the avocado fat-content rule, and specifically, whether the state adopted the rule for protectionist purposes. In contrast, where the Court, as with the plastic-container ban in *Clover Leaf*, was convinced of the state's legitimate interests, it upheld deviating regulations notwithstanding their asymmetric burdens. In *Moorman*, the Court once again returned to the strong noninterventionist view it had expressed forty years earlier in *Barnwell* that it had no power to force a state to conform to the rules—here, the tax-apportionment rules—of other states.

Although separating out the mismatch cases from single-state cases does not enable us to explain the different outcomes across the mismatch cases in a satisfying way, it does enable us to draw several

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231 *Id.* at 476–77 (Powell, J., concurring in part and dissenting in part) ("[T]his Court has no basis for *inferring* a rejection of the quite specific factfindings by the trial court," which included the trial court's specific finding that the actual purpose of the regulation was to advantage the in-state pulpwood industry at the expense of nonresident commercial interests).

232 *Id.* at 488 (Stevens, J., dissenting) (citation omitted) (quoting majority opinion).

clarifying conclusions. First, as with single-state cases, if protectionist legislative intent is evident in a mismatch case, then that intent, coupled with protectionist effect, is usually dispositive, notwithstanding the facial neutrality of the rule.[233] This explains the ultimate preclusion by a California district court of the statute considered in *Florida Lime*. Arguably, the presence of protectionist intent also explains the result in *Hunt*. And even in cases like *Kassel* and *Clover Leaf*, where the Court went on to balance, some justices, having concluded that there was intentional protectionism, would have precluded the challenged regulation on that basis alone.[234] Second, sometimes the Court intervenes to prevent mismatches, but other times, it does not. Depending upon your perspective, nonintervention in mismatch cases reflects judicial modesty or judicial abdication. This Article will have more to say on this topic later.[235] Third, when it does balance in mismatch cases, to measure the extent of a mismatch burden, the Court has no choice but to look to the actual substantive laws applicable in other states. Mismatch burdens are *by definition* measured against other *states' actual laws (or lack thereof)* because the nature of a mismatch burden is that it arises from regulatory diversity.

III. The Special Problems of *Bibb* Balancing

To highlight the differences between dormant Commerce Clause balancing in single-state cases and mismatch cases, we have used "*Pike* balancing" to refer only to balancing in single-state cases and "*Bibb* balancing" to refer to balancing in mismatch cases. Several critical insights emerge from our distinction between *Pike* and *Bibb* balancing. Specifically, single-state and mismatch cases are different and therefore should be—*and are*—treated differently by the Supreme Court. This Part explains how our new doctrinal gloss bears on old criticisms of dormant Commerce Clause analysis, namely that it is arbitrary and invites "judicial legislation." To that end, this Part critically compares single-state and mismatch cases from four perspectives: (1) the initial decision whether or not the Court should intervene, (2) the selection of benchmarks against which to evaluate the burden on interstate commerce, (3) the tendency of preclusion in

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233 This is the same reason that we did not find any mismatch cases that involved *facial* discrimination. If a case involved facial discrimination, it usually would be summarily precluded, and so the Court would not engage in fulsome balancing.

234 *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 685 (1981) (Brennan, J., concurring); *Clover Leaf*, 449 U.S. at 475–76 (Powell, J., concurring).

235 *See infra* Section III.A.

each type of case to result in judicial legislation, and (4) the number and complexity of interests that the Court must balance in each type of case. The goal of this Part is to acknowledge that, although both single-state and mismatch cases are open to criticism, the criticisms differ in each type of case. Most importantly, in several respects, mismatch cases are subject to additional and more significant criticisms than are single-state cases.

A. Judicial Intervention or Nonintervention

There appears to be broad—albeit not universal[236]—agreement that courts are entitled to intervene in single-state cases. This Section explains, however, that no such consensus exists regarding judicial intervention in mismatch cases. As a result, the approach to mismatches is unsettled, providing little guidance to lower courts as to how to resolve cases and little guidance to states regarding how to formulate their laws to survive dormant Commerce Clause review.

1. Relative Consensus in Single-State Cases

Compared to mismatch cases, there seems to be much less controversy surrounding judicial intervention in single-state cases. First, intervention in facial discrimination cases has deep support.[237] Indeed, as a judge on the Tenth Circuit, now-Justice Gorsuch wrote "to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it even as they suggest it might find a more textually comfortable home in other constitutional provisions."[238] Similarly, with respect to facially neutral single-state regulations, justices gener-

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236 For example, Justice Thomas rejects the dormant Commerce Clause altogether, including in cases of facial discrimination. *See supra* note 18. Because he rejects the dormant Commerce Clause in its entirety, we cannot know whether Justice Thomas regards single-state cases differently from mismatch cases. In Justice Thomas's view, the Court acts improperly when considering either type of case under the dormant Commerce Clause.

237 For discussion of the current Supreme Court justices' views on discrimination doctrine, see *supra* note 51.

238 *See*, *e.g.*, Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). Supreme Court justices use the terms "discrimination" and "protectionism" interchangeably. For discussion of this, see *supra* Section II.A. Justice Thomas is the most consistent dissenter from the view described by Justice Gorsuch. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 352 (2007) (Thomas, J., concurring in the judgment) (referring to "the erroneous assumption that the Court must choose between economic protectionism and the free market. But the Constitution vests that fundamentally legislative choice in Congress.").

ally seem to regard intervention as appropriate, and justices decide those cases from a steady normative perspective, one that promotes free trade.[239] Consistent with the notion that the dormant Commerce Clause promotes free trade, analysis in cases involving facially neutral single-state regulation often reads as an attempt to "smoke out" protectionism.[240]

2. *Unsettled Approach to Mismatch Cases*

Although justices generally agree that "discriminatory" mismatches—mismatches that a state enacted to deliberately exclude or disadvantage interstate commerce compared to in-state commerce—should be struck down, no similar general agreement exists about other mismatch cases.[241] Specifically, justices disagree about whether the dormant Commerce Clause limits regulatory diversity when that diversity seems to be motivated by a legitimate state interest, rather than protectionism.

a. Noninterventionist View

Under the noninterventionist view, mismatches that do not involve intentional protectionism are subject to merely rational-basis review.[242] For noninterventionists, regulatory diversity is either normatively desirable—because, for instance, it promotes government efficiency, responsiveness, experimentation, and ultimately liberty[243]—or it is an inevitable concomitant of state autonomy that courts have no authority to curtail.[244] As such, regulatory mismatches

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239 *See* Regan, *supra* note 16, at 1097, 1269 (arguing that the Court is singularly focused on suppressing protectionist legislation, and highlighting that, although the suppression of protectionist legislation aids free trade, such suppression is not the same as supporting *laissez-faire* or free markets).

240 *Id.* (focusing on what Regan called free-movement-of-goods cases).

241 *See*, *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").

242 *See supra* note 174.

243 *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (claiming that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry").

244 Eule, *supra* note 9, at 442, 445 (arguing that "judicial invalidation of evenhanded state commercial legislation through the current weighing process is inconsistent with our constitutional system of representative democracy," and the "rejection of unfettered trade as an appropriate goal of judicial scrutiny of local legislative efforts" would allow for salutary state experimentation); Regan, *supra* note 16, at 1187 ("The existence of [regulatory] diversity can

are a permanent feature of federalism. To illustrate the noninterventionist view, this Section considers *Barnwell* and *Moorman*, cases in which the noninterventionist view prevailed, as well as noninterventionist dissents in *Southern Pacific* and *Kassel*.

In 1938, the *Barnwell* Court unanimously held that the burden arising from mismatched truck width and weight rules "is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."[245] Even when they acknowledge that mismatches significantly burden interstate commerce,[246] justices holding the noninterventionist view conclude that the Constitution provides no authority for courts to eliminate mismatches. The *Barnwell* Court expressed this view in typical fashion when it observed that "courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment."[247] Rather, because the "[State] legislature, being free to exercise its own judgment, is not bound by that of other legislatures,"[248] even the fact that "all [other] states had adopted a single standard" cannot force an outlier state to conform to that standard.[249] If regulatory diversity becomes too burdensome, the noninterventionist view holds that the states could take it upon themselves to harmonize their rules, or Congress could enact nationwide rules.[250]

In 1978 in *Moorman*, a six-justice majority held that the Supreme Court could not force a state to use the same tax-allocation rule as other states, even if leaving the deviating state's rule in place would lead to double taxation, which was presumed to burden interstate commerce. The *Moorman* Court emphasized that because mismatches arise from differences between different states' rules, no one state

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hardly be thought to create a constitutional problem. As I have argued previously, uniformity of commercial regulation is not a constitutional value.").

245 S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938).

246 *Id.* at 183 (reciting lower court finding that the challenged regulations "would seriously impede motor truck traffic passing to and through the state"); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277 (1978) (acknowledging risk of burdens due to tax "duplication").

247 *Barnwell*, 303 U.S. at 191.

248 *Id.* at 195.

249 *Id.* at 196.

250 *Id.* at 189–90 ("Congress . . . may determine whether the burdens . . . are too great, and may, by legislation designed to secure uniformity . . . curtail . . . the states' regulatory power."); *Moorman*, 437 U.S. at 280 ("It is to [Congress], and not this Court, that the Constitution has committed such policy decisions."); *id.* at 279 (noting that any uniform rule "would require a policy decision based on political and economic considerations that vary from State to State").

could be held responsible for them "in a constitutional sense."[251] Moreover, the *Moorman* Court observed that harmonizing state rules was a legislative, not a judicial, function.[252]

Dissenting in *Southern Pacific*, Justice Black likewise argued that courts had no authority to second-guess the state legislature regarding nondiscriminatory commercial regulations—particularly when the challenged regulation was designed to promote public safety.[253] In Justice Black's view, if interstate commerce truly required uniform regulation of train lengths, then Congress had the power to affirmatively establish such uniform rules. Until then, the Supreme Court could not "den[y] to the state . . . power to protect life and property within its borders."[254] Moreover, Justice Black argued that the correct inference to draw from congressional inaction in the area was that Congress chose to leave the regulatory decision to the states.[255] Likewise, in his view, the Supreme Court should "leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government."[256]

Dissenting for himself and two others in *Kassel*, Justice Rehnquist concluded that "a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected."[257] In Rehnquist's view, by striking down Iowa's truck-length limits, the majority "oversteps our 'limited authority to review state legislation

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251 *Moorman*, 437 U.S. at 277 (holding that the challenged state (Iowa) was no more at fault for the mismatch than was Illinois, the challenger's home state).

252 *Id.* at 280; *id.* at 279 (noting that the only way to prevent burdens arising from mismatches in apportionment formulas would be to "require national uniform rules. . . . The Constitution, however, is neutral with respect to the content of any uniform rule."); *Barnwell*, 303 U.S. at 189–90 ("Congress . . . may determine whether the burdens imposed on [interstate commerce] by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function . . . .").

253 S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 789 (1945) (Black, J., dissenting).

254 *Id.* at 791.

255 *Id.* at 792 ("[T]o leave the state free in this field was a deliberate choice, which was taken with a full knowledge of the complexities of the problems and the probable need for diverse regulations in different localities.").

256 *Id.* at 789; *see also* Eule, *supra* note 9, at 442 n.89 ("If democracy means anything, it is that the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges.").

257 Kassel v. Consol. Freightways Corp., 450 U.S. 662, 691 (1981) (Rehnquist, J., dissenting) (quoting *Barnwell*, 303 U.S. at 190).

under the commerce clause' and seriously intrudes upon the fundamental right of the States to pass laws to secure the safety of their citizens."[258] He emphasized that "[t]he Commerce Clause is, after all, a grant of authority to Congress, not to the courts."[259]

In addition, noninterventionists underscore other problems with what we call *Bibb* balancing—including the problem of choosing a benchmark and the phenomenon that intervention in such cases typically involves choosing one state's law over another. Sections III.B and III.C below discuss both of these issues. For all of these reasons, the noninterventionists would sustain state regulatory mismatches *regardless* of the magnitude of the burden they impose on interstate commerce, unless it was clear that a state devised a mismatch for protectionist purposes.[260]

b. Interventionist View

The interventionist view, by contrast, draws normative support from implicit and explicit limits the Constitution places on state power in the name of preserving the union. Justice Cardozo captured these themes in his frequently repeated line from *Baldwin v. G. A. F. Seelig, Inc.*[261] that "[t]he Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[262] This Cardozo quotation suggests that, more than merely preventing protectionism, a goal of our constitutional order is to actively forge the states into a federal union with a single national market, including by eliminating even non-tariff barriers to a free interstate market.[263]

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258 *Id.* at 687 (citation omitted) (quoting Locomotive Firemen v. Chi., Rock Island & Pac. R.R. Co., 393 U.S. 129, 136 (1968)).

259 *Id.* at 690.

260 For example, although Justice Rehnquist strongly backed the noninterventionist view in *Kassel*, he observed that intervention would be appropriate if the mismatch were a mere "pretext for discrimination against interstate commerce." *Id.* at 692 (Rehnquist, J., dissenting).

261 294 U.S. 511 (1935). In *Baldwin*, the Court precluded a New York regulation that required out-of-state milk sold into the state to have been purchased at not less than the New York statutory minimum price for milk. *Id.* at 528.

262 *Id.* at 523; *see also* Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 206 (1994); Healy v. Beer Inst., 491 U.S. 324, 336 n.12 (1989); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532 (1949); *Kassel*, 450 U.S. 662 at 687 (Brennan, J., concurring); Exxon Corp. v. Governor of Md., 437 U.S. 117, 152 (1978) (Blackmun, J., concurring in part, dissenting in part).

263 *See* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 809–811 (2004). For more on the implications of structural federalism for state obligations under the dormant Commerce Clause, see generally Erin F. Delaney &

Justices propounding the interventionist view have concluded that taking the federalism limits on state power seriously requires preclusion of mismatched regulations that—while not intentionally protectionist—nevertheless unduly burden interstate commerce. Interventionist justices emphasize the perils of "economic Balkanization,"[264] which refers to segmentation of the national marketplace into smaller markets delineated by state boundaries. Interventionists also emphasize the impropriety of leaving it to state legislatures to take adequate account of national and federal interests when enacting legislation. For instance, the Court in *Southern Pacific* wrote:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.[265]

Jurists taking the interventionist view would not preclude *all* mismatches, no matter how slight their effects on interstate commerce nor how compelling their justifications.[266] But interventionists do not see the dormant Commerce Clause as limited to protecting the national marketplace from only intentionally protectionist mismatches.

Ruth Mason, *Solidarity Federalism*, 98 NOTRE DAME L. REV. 617 (2022); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

264 *See*, *e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018).

265 S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 769 (1945) (citations omitted). Justice Kennedy, writing for the majority in 2018 in *Wayfair*, used almost the same language: "Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. But this Court has observed that 'in general Congress has left it to the courts to formulate the rules' to preserve 'the free flow of interstate commerce.'" *Wayfair*, 138 S. Ct. at 2089–90 (quoting *Southern Pacific*, 325 U.S. at 769).

266 For example, the *Southern Pacific* Court also contrasted its decision to preclude the challenged train-length rule with its holdings in other train-safety cases in which it upheld the challenged laws, either because the burden was lower than in *Southern Pacific*, the safety interest more compelling, or both. Upheld safety regulations, governed, for example, full crews, headlights, heated cabins, and the like. *Southern Pacific*, 325 U.S. at 782 ("While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here. In sustaining those laws the Court considered the restriction a minimal burden on the commerce comparable to the law requiring the licensing of engineers as a safeguard against those of reckless and intemperate habits . . . .").

Instead, as the *Southern Pacific* Court put it, when Congress has not acted, the Supreme Court must act as "the final arbiter of the competing demands of state and national interests."[267] The *Southern Pacific* Court also observed that "in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if [the courts'] protection were withdrawn."[268] And three dissenters in *Moorman* perceived it as the Court's "duty . . . 'to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States.'"[269] A majority of the modern Supreme Court endorsed the interventionist view taken in *Southern Pacific* as recently as 2018, noting that "'in general Congress has left it to the courts to formulate the rules' to preserve 'the free flow of interstate commerce.'"[270]

The interventionist and noninterventionist camps thus diverge based on their answer to the following question: in the *absence* of congressional action, should courts intervene in mismatch cases? Noninterventionists see congressional inaction as an implicit grant of regulatory power to the states, which the courts should not obstruct. But interventionists view congressional inaction as an implicit charter for the courts to carefully review state actions that adversely impact interstate commerce.

3. Comparing Intervention in Single-State and Mismatch Cases

That strong normative arguments support both the interventionist and noninterventionist approaches may help explain why the Supreme Court has not steadily committed to one approach over the other in mismatch cases. Indeed, in the mismatch cases described above, *individual justices* were not even consistent in following either an interventionist or noninterventionist approach. Specifically, more than half of the justices in the mismatch cases considered above signed

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267 *Id.* at 769.

268 *Id.* at 770; *see also* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) ("In the absence of congressional action to set uniform standards," the Court will not tolerate state regulations for which the "safety interest has been found to be illusory" and that "impair significantly the federal interest in efficient and safe interstate transportation.").

269 Moorman Mfg. Co. v. Bair, 437 U.S. 267, 283 (1978) (Powell, J., dissenting) (quoting Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977)).

270 *Wayfair*, 138 S. Ct. 2080, 2090 (2018) (quoting *Southern Pacific*, 325 U.S. at 770).

on to both decisions intervening and those not intervening.[271] There is no obvious partisan valence to the voting patterns in the mismatch cases described above; both views have been endorsed by justices appointed by Democrats and by Republicans.[272] Spread out over forty years, those cases reveal that individual members of the Court do not seem to regard the doctrinal approach in mismatch cases as a matter of stare decisis or settled law. This allows the Court—and even individual justices—to move back and forth between interventionist and noninterventionist approaches to mismatches.

In contrast, there seems to be much less normative disputation surrounding single-state cases, even though, for reasons we discuss presently, the outcome of single-state cases may not be easy to predict. Other than Justice Thomas, who rejects the dormant Commerce Clause outright, justices generally have accepted both that judicial intervention in single-state cases is appropriate and that the goal of such intervention is to prevent states from inhibiting free trade by enacting protectionist regulations. Hence the Court's focus in single-state cases on protectionist intent. A finding of protectionist intent, which the Court may feel comfortable ascribing to a state when the immediate effect of its regulation is to protect in-state economic actors from out-of-state competitors, enables the Court to resolve a single-state case easily under *Pike* balancing. Because protectionism is not a valid state interest, it supplies no counterweight to offset the challenged regulation's impact on interstate commerce, and so the Court can easily preclude the regulation. On the other hand, the absence of such immediately obvious protectionist intent forces the Court to engage in more robust *Pike* balancing. And because the justices' views may differ on how to evaluate the relevant considerations in the balance—including how much the challenged regulation burdens interstate commerce, whether and to what extent the regulation benefits the enacting state, and whether that benefit could be achieved with lesser impact on interstate commerce—the outcome of this more robust *Pike* balancing in single-state cases can be difficult to predict.[273] This is the difficulty the late Justice Scalia identified when he wrote in his *Bendix* concurrence that *Pike* balancing involved weighing "incom-

271 The seven cases, in chronological order, were: *Barnwell*, *Southern Pacific*, *Bibb*, *Hunt*, *Moorman*, *Clover Leaf*, and *Kassel*.

272 *See infra* Table.

273 Adding to the uncertainty, before they get to balancing, justices may disagree over whether the state had protectionist intent (which would trigger analysis akin to strict scrutiny) or whether the state had no such protectionist intent (which would trigger less searching review).

mensurables" against each other.[274] This criticism led Justice Scalia to urge the Court to abandon *Pike* balancing altogether as inappropriate for courts, as opposed to the legislature.[275] Justice Thomas shares this view, but would go further. Whereas Justice Scalia agreed that courts should preclude discriminatory state regulations, Justice Thomas entirely rejects the dormant Commerce Clause at all. Despite the views of these two justices, and notwithstanding that the outcome in a *Pike* balancing case can be difficult to predict, there otherwise appears to be little disagreement about whether the Supreme Court is entitled to consider single-state cases, whether balancing is the right approach to those cases, and whether the normative goal in such analysis is maintaining and promoting a national market.[276]

Appreciating the differences between single-state and mismatch cases allows us to conclude that the most biting scholarly criticisms of dormant Commerce Clause doctrine—that it is arbitrary and that its rationale is unstated or variable—apply with more force to mismatch than single-state cases.[277] The normative grounding of single-state cases has been consistent over time—the dormant Commerce Clause prevents states from interfering with free trade because such interference undermines the national market, erodes interstate unity, and inspires retaliation. Differences in outcomes and inability to predict outcomes reflect disagreement over how to apply the law to the facts of the particular case. Such differences generally do not reflect fundamental disagreement about whether courts are entitled to intervene in single-state cases.

In contrast, justices disagree over whether mismatch cases warrant judicial review at all. The clash between the interventionist and noninterventionist approaches in mismatch cases generates at least two problems. First, disagreement over how to resolve mismatch cases can lead (and has led) to diametrically opposed decisions in cases with similar facts. For example, the *Barnwell* Court, citing limits on its institutional authority, upheld South Carolina's mismatch on truck widths and weights,[278] whereas the *Kassel* Court, citing impediments to inter-

274 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

275 *Id.* at 898.

276 As noted previously, Justice Gorsuch raised concerns about undue-burden analysis, but we do not know whether, like Justice Thomas and the late Justice Scalia, he would eschew dormant Commerce Clause balancing, and if so, whether he would disapply it in both single-state and mismatch cases. *See supra* note 51.

277 *See supra* Section I.B.

278 *See* S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938).

state commerce arising from regulatory diversity, precluded Iowa's mismatch on truck lengths.[279] Second, the failure to settle whether balancing is or is not appropriate in mismatch cases does a disservice to both courts and state legislatures. State courts and inferior federal courts are required to follow Supreme Court precedent, and state legislatures are expected to enact constitutional laws. If the Supreme Court cannot resolve such a basic and fundamental question as whether intervention is appropriate in mismatch cases, how can inferior courts and legislatures fulfill their obligations?

B. Benchmarking

At a high level of generality, the analysis in every dormant Commerce Clause case is the same, namely, the Court balances the burden on interstate commerce against the state's interest in the regulation.[280] But significant differences characterize balancing in single-state and mismatch cases. This Section highlights that the Supreme Court uses internal benchmarking in single-state cases, but external benchmarking in mismatch cases. This Section also discusses special problems raised by external benchmarking.

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279 *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981); *see also* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445–46 (1978) (striking down a truck-length limit using reasoning similar to that in *Kassel*).

280 The Court also sometimes, but not always, engages in narrow tailoring, although such narrow tailoring is not a major focus of this Article. *See generally* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011). "In constitutional systems across the globe, proportionality balancing today constitutes the dominant, 'best practice' judicial standard for resolving disputes that involve either a conflict between (a) two rights claims or (b) a rights provision and a legitimate government interest." *Id.* at 802. Proportionality analysis, which can be traced to German law but has since spread widely, involves (1) *suitability*, or what Americans would call rational basis review, (2) *necessity*, including a least-restrictive-means test, which is equivalent to what Americans would call narrow tailoring, and lastly, (3) "balancing *stricto sensu*," or proportionality in which "the judge weighs, in light of the facts, the benefits of the act (already found to have been narrowly tailored) against the costs incurred by infringement of the right, in order to decide which side shall prevail." *Id.* at 802–03.

As with single-state cases, the Court uses narrow tailoring in some mismatch cases. Thus, the *Hunt* Court considered whether North Carolina could have fulfilled its interest in protecting consumers from confusion in a less restrictive manner than by forbidding the display of other states' apple grades. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 354 (1977) (suggesting that North Carolina allow Washington growers to display the Washington *and* federal grades). Likewise, when the California District Court examined the avocado fat-content rule that had been challenged in *Florida Lime*, it considered whether California could achieve its goal to assure that California consumers bought ripe avocados by less restrictive means, including by using federal days-to-maturity and size standards. Fla. Lime & Avocado Growers, Inc. v. Paul, 197 F. Supp. 780, 787 (N.D. Cal. 1961).

1. Single-State Cases

As in any dormant Commerce Clause case, in single-state cases, the Supreme Court must determine the asymmetrical burden the challenged regulation imposes on interstate commerce. To do so, it employs what we call an "internal benchmark," under which it compares the impact of the challenged state's rule on in-state commerce with the impact of the *same state's* rule on interstate commerce. For example, in a case involving facially discriminatory rules, the Court compares the state's (worse) treatment of nonresidents or interstate commerce with the same state's (better) treatment of residents or in-state commerce. The difference between the two constitutes the asymmetrical burden on interstate commerce. There is thus no need in a facial discrimination case for the Court to learn about or consider the laws of any state other than the challenged state.

Likewise, the Court need not use external benchmarks in single-state cases that involve facially neutral rules. For example, in *Pike*, the Supreme Court compared Arizona's interest in ensuring that the market understood that the cantaloupes were grown in Arizona to the burden on interstate commerce arising from the requirement to pack cantaloupes in Arizona. One may agree or disagree with the Court's judgment in *Pike* that the burden on interstate commerce outweighed the state's interest, but the balancing exercise did not require the Court to examine, or know, the law of any state other than Arizona to determine either the burden on interstate commerce or the strength of the state's proffered interest in the challenged regulation. By contrast, as the next Section discusses, balancing in mismatch cases *requires* the Court to refer to external benchmarks consisting of other states' actual laws.

2. Mismatch Cases

In contrast with dormant Commerce Clause balancing in single-state cases, balancing in mismatch cases uses external benchmarks consisting of other states' actual laws. By definition, the asymmetrical burden on interstate commerce in a mismatch case is conditional. It arises due to differences between two or more states' law. Thus, to know what the mismatch consists of, the Supreme Court must examine the laws of another state or states. Consider *Southern Pacific*, in which the Court expressly compared Arizona's regulation to that of other states, concluding that:

> Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in

> other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass.[281]

In this way, the Court measured the burden that Arizona imposed on interstate commerce by reference to the content of other state's rules. Likewise in *Bibb*, the Court understood Illinois's curved-mudflap requirement to require trucks traveling interstate to weld on curved mudflaps at the Illinois border.[282] This view of the issue implicitly takes other states' laws as the benchmark for measuring the burden imposed by Illinois's curved mudflap rule. Similarly, in *Kassel*, the Supreme Court understood the burden Iowa imposed on interstate commerce with its more restrictive truck-length rule to include the need for interstate truckers to switch trucks or to divert around Iowa.[283] Thus, the Court determined the burden Iowa imposed on interstate commerce against a background of other states' preexisting regulations. This kind of external benchmarking uses *other states' laws* as the standard for determining the burden the challenged rule imposes on interstate commerce.

Just as it uses external benchmarking to determine burdens, in mismatch cases the Supreme Court also uses external benchmarking to assess the state interest. Specifically, the Court considers whether a deviating regulation provides any benefit *over and above* the benefit conferred by other states' preexisting regulations. For example, the *Southern Pacific* Court measured Arizona's safety interest relative to other state's regimes before it concluded that Arizona's regulation "affords at most slight and dubious advantage, if any, over unregulated train lengths."[284] The *Bibb* Court likewise conducted a relative state-interest analysis, comparing the safety of curved mudflaps to the

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281 S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 773 (1945).

282 Bibb v. Navajo Freight Lines, 359 U.S. 520, 527 (1959) (noting that the case raised the question "whether one State could prescribe standards for interstate carriers that would conflict with the standards of another State, making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached").

283 *Kassel*, 450 U.S. at 667.

284 *Southern Pacific*, 325 U.S. at 779.

safety of straight mudflaps,[285] and it concluded that the advantage of curved mudflaps as "a new safety device—out of line with the requirements of the other States . . . [was] far too inconclusive" to justify its burden on interstate commerce.[286] Likewise, in *Kassel*, the Court expected Iowa to show that the fifty-five-foot trucks it permitted were markedly safer than the sixty-five-foot trucks permitted in other states.[287]

3. Comparing Benchmarking in Single-State and Mismatch Cases

External benchmarking raises at least three issues. First, judges may not agree about which external benchmark to use, which injects uncertainty into *Bibb* balancing. Most of the time, the Court uses the nationally dominant practice as the benchmark. Although Justice Powell explained that "there can be no rule of 26 States, of 35, or of 45,"[288] it is equally clear that consensus among the other states is important for choosing the external benchmark for *Bibb* balancing.[289] But such consensus is not always present. For example, in *Kassel*, the dissent noted that there was no real consensus among other states in their truck-length rules, which called into question whether sixty-five feet was the appropriate baseline for evaluating Iowa's rule.[290] Moreover, even if all other states had identical rules, the question arises as to why the challenged state's rule should have to be tested against the dominant rule. As Justice Rehnquist put it, "there is nothing in the laws of nature which make 65-foot doubles an obvious norm" for judging appropriate truck lengths.[291]

Identifying the baseline also seems to be problematic when one state has a rule, but other states have no rule. For example, in *Southern Pacific*, the Court used the *absence* of regulation in other states as a baseline to attribute to Arizona all the costs associated with Arizona's limits on train lengths. But in an interstate transportation case decided in 1960, *Huron Portland Cement Co. v. Detroit*,[292] the fact that other states had no regulation in the area covered by the challenged

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285 *Bibb*, 359 U.S. at 523–30.

286 *Id.* at 530.

287 *Kassel*, 450 U.S. at 677.

288 Moorman Mfg. Co. v. Bair, 437 U.S. 267, 296 (1978) (Powell, J., dissenting) (arguing that the majority should have removed the mismatch burden generated by Illinois's outlier tax apportionment formula).

289 *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 337 (1977); *Bibb*, 359 U.S. at 523; *Kassel*, 450 U.S. at 671; *Southern Pacific*, 325 U.S. at 774.

290 *Kassel*, 450 U.S. at 688 (Rehnquist, J., dissenting).

291 *Id.* at 699.

292 362 U.S. 440 (1960).

state's regulation meant that the Supreme Court failed to perceive that it was even dealing with a mismatch. In *Huron*, the Supreme Court considered whether Detroit violated the dormant Commerce Clause by forbidding ships docked in its ports from emitting more than a maximum amount of air pollution.[293] Complying with the regulation required ship owners to install pollution-mitigation equipment. Distinguishing *Huron* from *Bibb*, the Court concluded that although the challenger complained that "local governments might impose differing requirements as to air pollution, [the challenger] has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations."[294] Stating that the dormant Commerce Clause question "needs no extended discussion,"[295] the Court easily upheld Detroit's "[e]venhanded"[296] regulation, which had been "enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants."[297]

Notwithstanding the Court's conclusion that *Huron* involved no regulatory conflict, under our definition, Detroit's regulation created a mismatch burden in the same way that Arizona's did in *Southern Pacific*. Specifically, if all ports had Detroit's rule, then all ships everywhere would comply with it and out-of-state shippers would face no additional costs to dock in Detroit that they did not face in their home ports. But because other ports had not adopted the same rule as Detroit, out-of-state shippers had to buy special equipment just to dock in Detroit. Because the Detroit regulation did not affirmatively conflict with laws adopted by other states or cities, however, the Supreme Court was unable to perceive a mismatch burden.[298] In *Southern Pacific*, by contrast, the Court perceived the mismatch and employed an external reference base consisting of the absence of regulation to measure the burden Arizona imposed on interstate commerce. Because the choice of the benchmark often will be determinative under *Bibb*

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293 *Id.* at 448.

294 *Id.* (providing a "compare," that is, "*cf.*," reference to *Bibb*); *id.* at 444 (citing *Southern Pacific* and *Bibb* for the proposition that "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary").

295 *Id.* at 448.

296 *Id.* at 443.

297 *Id.* at 442.

298 If the Court had perceived the mismatch in *Huron*, and had it engaged in *Bibb* balancing, it presumably would have weighed the burden, which it would have calculated against an external benchmark consisting of other states' nonregulation, against Detroit's interest in reducing pollution and against other states' interests in nonregulation, which might include the interest in keeping costs low for shippers.

balancing, if that choice is unpredictable or arbitrary, so may be the outcome of the case.

Second, external benchmarking in *Bibb* cases is *properly* dynamic and depends on factors outside the control of any one state. This is due to the conditional nature of regulatory mismatches. Mismatches arise from differences between the laws of the challenged state and the *actual present configuration* of the laws of other states. As laws change, the benchmark also changes. Moreover, this is not only the proper, but the only way to analyze a mismatch case; the crux of a mismatch case is the difference between the challenged state's laws and those of other states. Thus, the exact same law may be constitutional today, but unconstitutional at some point in the future, depending on intervening changes to other states' laws. The reverse is also true: a law deemed unconstitutional today because it conflicts with the laws of other states could become constitutional in the future if more states adopted it. This seeming paradox—that widespread adoption of an unconstitutional regulation could transform it into a constitutional regulation—is a straightforward implication of the Court's willingness to engage in balancing with external benchmarks in mismatch cases. As with the normative uncertainty regarding whether or not courts should intervene in mismatch cases, the additional variables and contingencies that arise from external benchmarking make mismatch cases more vulnerable than are single-state cases to charges of arbitrariness.

Third, as the next Section explains, external benchmarking leads to greater policy impacts than does internal benchmarking.

C. Judicial Legislation

This Section explains that eliminating a mismatch requires some form of regulatory harmonization across the states, whereas no such harmonization is needed to cure a single-state burden. Thus, preclusion in mismatch—but not single-state—cases drives not only changes in law, but substantive regulatory harmonization. Moreover, for reasons explained here, this harmonization has a deregulatory bias; conversely, allowing mismatches to remain will tend to have a pro-regulatory bias, as discussed later.[299] These phenomena suggest that criticism that dormant Commerce Clause review leads to judicial law-

299 *See infra* text accompanying notes 303–04.

making applies with more force to mismatch than to single-state cases.[300]

On the surface, the remedy in single-state and mismatch cases is the same, namely, preclusion. Differences emerge after preclusion. In single-state cases, the state typically can cure the constitutional infirmity either by *equalizing* the treatment of insiders and outsiders—as in cases of facial discrimination—or by *reducing or eliminating* the offending state's barrier to interstate commerce—as for regulations that function equivalently to tolls, like *Pike*.[301] Preclusion thus creates no implicit preference for adopting any particular substantive rule. Curing mismatch burdens, by contrast, requires removing regulatory diversity through forbearance, conformity, or coordination. Specifically, a state could practice *forbearance* by repealing the offending regulation and replacing it with nothing, or it could *conform* by adopting the same substantive regulation as that used by other states. Finally, the states acting together could *coordinate* their regulations, for example, by adopting a rule that would determine which state's law should apply in cases of potential conflict.[302] As a practical matter, all three options involve some form of regulatory harmonization.

When the Court strikes a mismatched state law under the dormant Commerce Clause, in effect it forces the state to harmonize its rule with the rule of one or more sister states.[303] In particular, preclusion tends to force the challenged state to adopt—or at least permit—the benchmark rule, a phenomenon that could be called harmonization by preclusion. Regulatory harmonization is thus an important outcome of mismatch, but not necessarily single-state, cases. As in any dormant Commerce Clause case, preclusion in mismatch cases implic-

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300 For criticisms of dormant Commerce Clause cases for judicial lawmaking, see discussion *supra* Section I.B.

301 Trade law calls this "national treatment;" the Supreme Court calls it "leveling." *See* General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] ("National Treatment on Internal Taxation and Regulation."); Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 598 (2015) (Ginsburg, J., dissenting) ("Whenever government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.' Whenever a State impermissibly taxes interstate commerce at a higher rate than intrastate commerce, that infirmity could be cured by lowering the higher rate, raising the lower rate, or a combination of the two.").

302 The corporate internal-affairs doctrine, under which other states defer to the charter state regarding certain corporate regulations, represents a coordination rule. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987). For more on coordination rules, see discussion *infra* Section IV.B.2.

303 Halberstam, *supra* note 263, at 810 (criticizing undue-burden cases generally, without distinguishing between single-state and mismatch cases, because undue burden cases represent "a naked effort to contain democratic politics by harmoniz[ation]").

itly, if not explicitly, rejects the tradeoffs that the offending state chose in its political process. But only in mismatch cases does judicial preclusion reject the challenged state's tradeoffs *in favor of different tradeoffs made by other states*. For example, in *Kassel*, Iowa's legislature at the margin would have traded less efficient trucking for safer roads. But other states at the margin chose commerce over safety. When the Supreme Court determined that Iowa's shorter maximum truck length impermissibly burdened interstate commerce as compared to an external benchmark consisting of other states' longer maximums, the Court implicitly chose other states' democratic tradeoffs over Iowa's. Some justices object to this type of harmonization by preclusion. For example, in his dissent in *Kassel*, Justice Rehnquist criticized the Court for "essentially . . . compelling Iowa to yield to the policy choices of neighboring States."[304]

Beyond forcing harmonization, this Article shows that preclusion in mismatch cases will tend to be deregulatory in ways that preclusion in single-state cases is not. On the surface, judicial preclusion in both single-state and interaction cases is deregulatory because after either, the state must eliminate or revise its regulation. However, because mismatch cases implicitly involve *selecting one regulation over another*, and because commercial actors will tend to challenge stricter and novel regulations, but not laxer and common regulations, when mismatch cases end in preclusion, they tend to preclude stricter and novel regulations. Again, *Kassel* serves as a good example. Private litigants challenged Iowa's stricter law, and the Court used other states' laxer laws as the benchmark for evaluating the benefit and burden of Iowa's law. In this way, stricter and newer laws face challenges that older and laxer laws do not; the role of private litigants in dormant Commerce Clause cases will thus tend to make preclusion on those cases deregulatory.

The most obvious deregulatory impact of preclusion in mismatch cases occurs when the challenged state simply repeals its own stricter rule and adopts the laxer benchmark rule. But deregulation following preclusion in a mismatch case can work through other mechanisms as well. Return to *Kassel*. After the Supreme Court precluded its short-truck rule, Iowa had to allow other states' sixty-five-foot trucks on its roads. Iowa could do this by repealing its own truck-length limit and conforming to the sixty-five-foot benchmark rule. But Iowa could try to advance its residents' preferred tradeoff between safety and com-

304 Kassel v. Consol. Freightways Corp., 450 U.S. 662, 699 (1981) (Rehnquist, J., dissenting) (arguing that only Congress could prescribe a uniform national rule for truck lengths).

mercial efficiency while simultaneously satisfying its obligations under the dormant Commerce Clause by retaining its shorter limit for *Iowa-licensed trucks* while permitting longer trucks from other states to drive on its roads. If Iowa maintains its shorter limit for Iowa-licensed trucks, out-of-state truckers will have a competitive advantage over Iowa truckers whenever longer trucks are more efficient. This will tend to advantage out-of-state truckers and will likely lead to more non-Iowa-licensed trucks on Iowa highways. Thus, out-of-state truckers, who are subject to laxer regulations, can be expected to constitute a larger share of the Iowa market. In-state truckers, now disadvantaged in competition with out-of-state truckers, in turn, can be expected to lobby for the laxer rule to apply to themselves as well. In this way, even if it does not lead directly to adoption of the laxer rule by the precluded state, preclusion pursuant to *Bibb* balancing will tend over time to lead to deregulation and to encourage legal harmonization. Economists call this phenomenon—under which laxer regulations spill over to other jurisdictions—the "Delaware Effect" or a "race to the bottom."[305]

In contrast with mismatch cases, state responses to preclusion in single-state cases are relatively straightforward. Preclusion of single-state burdens leads to "equalization" of the in-state and out-of-state case, or it leads to disapplication of the offending state's rule in whole or part. What a state need not do to cure a single-state violation, however, is to examine—much less accept or adopt—the laws of other states. Thus, harmonization is not a necessary outcome of single-state cases.

D. Complexity of Balancing

A persistent criticism of dormant Commerce Clause review concerns the difficulty of conducting balancing analysis.[306] Acknowledg-

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305 *See generally* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5 (1995) (using the terms "Delaware Effect" and "race to the bottom"). Note that adopting a coordination rule will also tend towards deregulation, as multistate commercial actors respond to the coordination rule. *See infra* Section IV.B.2. Indeed, the term "Delaware Effect" refers to the *private* response to the internal-affairs doctrine, under which states defer to certain corporate regulation of a company's charter state. The internal-affairs doctrine has led multistate companies to disproportionately incorporate in Delaware. *See* VOGEL, *supra*, at 5–6. Under the early view of this phenomenon, corporations favored Delaware because managers sought to take advantage of the state's management-favorable corporate law. Under the more recent view, corporations choose Delaware because Delaware's rules maximize the value of the firm, which benefits both shareholders and managers.

306 Justice Scalia famously compared balancing state interests and impacts on interstate commerce to comparing the length of a line to the heaviness of a rock. Bendix Autolite Corp. v.

ing these concerns, this Section considers whether there is any reason to expect that balancing would be easier or harder in mismatch cases than in single-state cases.

First, determining the burden in *Bibb* cases may be harder than in *Pike* cases because determining the magnitude of any disruptive effect on the national market of a mismatch—as opposed to a single-state rule that functions equivalently to a toll—requires knowledge of the law in multiple states and of the goods and services produced by different firms in different states. It also requires knowledge—possibly deep knowledge—of the marketplace, including competing products, production techniques, marketing practices, and consumer perceptions. These are not assessments that courts are well-equipped to make. Second, mismatch cases are dynamic—that is, the benchmark will change as states change their regulations, and as economic actors adjust their commercial practices. This, in turn, may necessitate *more frequent* judicial consideration in mismatch than single-state cases. Put differently, whereas a decision in a single-state case generally may be regarded as final, a decision in a mismatch case is only final as long as the benchmark remains unchanged.[307] Third, mismatch cases are more

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Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). We have no special response to this impossibility or "incommensurability" argument, which applies not only to dormant Commerce Clause review, but to all areas in which courts use balancing to trade off constitutional rights, entitlements, and values. Instead, we merely observe, as have others before us, that if constitutional courts are the correct institution to make tradeoffs among such interests, then those courts inevitably will have to balance among them. *See generally* Mathews & Stone Sweet, *supra* note 280, at 803 (defending balancing, which they call by its European name, proportionality). We also observe that the types of comparisons called for in dormant Commerce Clause review are less problematic than Justice Scalia's quip would suggest. As more cases are heard and more decisions are rendered, earlier decisions provide context for later decisions, so later decisions can more readily and reasonably be evaluated for their consistency with earlier decisions. *Id.* at 820 ("One of the virtues of proportionality balancing is that it allows a court to claim doctrinal consistency while retaining flexibility across time and cases.").

307 The fifty-year battle over collection of state sales taxes by remote sellers, which required the Supreme Court to revisit substantively the same legal issue *three times* under changing market, legal, and technological conditions, provides a nice demonstration of the perils of dynamic baselines. *See* Ruth Mason, *Implications of* Wayfair, 46 INT'L TAX REV. 810, 810–14 (2018) (describing three Supreme Court cases dealing with tax-compliance mismatches, decided over fifty years, in which the outcome on the dormant Commerce Clause issue changed principally due to shifting technological and market conditions that altered both burdens and interests). Although these cases involved dormant Commerce Clause nexus, rather than dormant Commerce Clause undue burdens, the legal issues considered were so similar that in dicta in *South Dakota v. Wayfair*, the last of the three cases, the Supreme Court concluded by noting that the Court might have to take up analysis of the burdens and benefits of mismatched tax-compliance rules in the future under *Pike*. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018). Specifically pointing to *Pike*, the Court stated that "other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into con-

difficult for courts to resolve than single-state cases for the simple reason that mismatch cases involve balancing among a larger number of competing interests than do single-state cases. Single-state cases involve weighing only two interests against each other—the burden on interstate commerce against one particular state's regulatory interest. In this way, single-state cases represent a simple tug-of-war between the *national-market interests* and the *regulatory interest* of the challenged state. In contrast, mismatch cases involve *multifactor* analysis. In addition to implicating national-market interests and the regulatory interests of the challenged state, mismatch cases also effectively involve a *contest among two (or more) states* for regulatory control of a single commercial act that affects both states. In mismatch cases, unless the reviewing court sees a clear case of intentional protectionism (as with California's fat-content rule for avocados), *Bibb*-balancing requires adjudicating disputes about whether, in the name of national market efficiency, one state's regulations should prevail over another state's regulations. When different states adopt different policies, resolving impediments to interstate commerce that result from those policy differences implicitly means choosing among the different regulations.[308] Thus, balancing in mismatch cases is more complicated than in single-state cases. The next Part discusses these issues at greater length.

IV. The Future of Mismatch Cases under the Dormant Commerce Clause

So far, this Article has sought to reframe dormant Commerce Clause doctrine by emphasizing the differences between single-state and mismatch burdens that, in turn, motivate differences in *Pike* and *Bibb* balancing. This Article also explained how traditional criticisms of dormant Commerce Clause doctrine apply differently to single-state and mismatch cases. This Part uses an example from a recent case involving a challenge to California's cage-free egg regulation to consider the most important disputes surrounding regulatory mismatches, namely, whether the Supreme Court should intervene in them, and if so, how it should decide which state's law prevails. This

sideration the small businesses, startups, or others who engage in commerce across state lines." *Id.*

308 Reticence about refereeing between competing state regulations can be seen elsewhere in constitutional law. For example, the Supreme Court largely has withdrawn from active intervention in interstate conflicts-of-laws disputes. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–13 (1981) (holding that state's decision to apply its own law will conform to Constitution provided it is "neither arbitrary nor fundamentally unfair").

Part also suggests ways that the Supreme Court could modify its analysis in mismatch cases to produce more predictable outcomes, or, in the alternative, it suggests different decision-making paradigms that the Court could use to resolve mismatch cases. These alternatives derive from EU law, trade law, and scholarship.

A. A Current Example: Cage-Free Eggs

There are several pending dormant Commerce Clause challenges to regulatory mismatches—on topics ranging from product standards[309] to corporate-board composition[310]—that will give courts, including the Supreme Court, the opportunity to formally recognize the distinction between single-state and mismatch cases. To make our arguments about the differences between *Pike* and *Bibb* balancing concrete, this Section considers one such dispute. In response to California recently banning the production or sale in California of non-cage-free eggs, six other states, led by Missouri, challenged the regulation, arguing that, as applied to eggs produced outside California, the regulation was discriminatory, or, in the alternative, that it imposed an undue burden on interstate commerce.[311] The Ninth Circuit dismissed the challenge, holding that the six states lacked standing to challenge California's rule. But injured farmers will have standing, and they presumably will bring their own challenges. If so, any court that hears the case would consider whether the California cage-free egg rule violates the dormant Commerce Clause. The law is not facially discriminatory; California treats in-state and out-of-state eggs the same; to be sold in California, they must be produced by cage-free chickens.[312] Notwithstanding its facial neutrality, our analysis suggests that if the regulation had been enacted with protectionist intent, then

309 *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022) (challenging as a mismatch a California law requiring sows to be kept in cages larger than those required by other states); *see also* Jessica Berch, *If You Don't Have a Cow (or Chicken or Pig), You Can't Call It Meat: Weaponizing the Dormant Commerce Clause to Strike Down Anti-Animal-Welfare Legislation*, 2021 UTAH L. REV. 73, 73 (2021) (tracking pending dormant Commerce Clause cases related to "the animal-protection movement," such as labeling laws and laws related to the humane treatment of farm animals).

310 *See* Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, at 3 (Stanford L. Sch. & Rock Ctr. for Corp. Governance, Working Paper Series 232, 2018) (arguing that recent legislation requiring companies headquartered in California, regardless of where incorporated, to appoint women and minorities to their boards violates the dormant Commerce Clause because it conflicts with regulations in the companies' incorporation state).

311 Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 650–52 (9th Cir. 2017), *cert. denied sub. nom.* Missouri v. Becerra, 137 S. Ct. 2188 (2017) (dismissing the case for lack of standing).

312 *See id.* at 651–52.

courts typically would preclude it for that reason alone. Some judges would go no farther, concluding that, after exhausting the inquiry into intentional protectionism, further judicial intervention into mismatches cases is improper. Notice that the consequence of such a view is that the principal remaining limits on a state's ability to use mismatched rules to burden interstate commerce would be extraterritoriality principles developed under the dormant Commerce Clause, the possibility of federal preemption, and due process limits on the reach of a state regulatory authority.

Other judges, however, would go on to evaluate the California regulation as a mismatch burden—namely, a mismatch between California's regulation requiring eggs to be cage-free and other states', including Missouri's, laxer regulations. These judges would apply what we call *Bibb* balancing (but which courts typically describe as *Pike* balancing).[313] Such *Bibb* balancing involves choosing an external benchmark against which to measure the burden of the California rule. Although this Article noted earlier that there is no obvious, well-grounded method for selecting external benchmarks for evaluating mismatched regulations, past experience tells us that the reviewing court likely would pick an external benchmark consisting of the dominant egg regulation applicable in other states, if one exists, or perhaps the regulation of the complainant's state, such as Missouri. In either case, the reviewing court would judge the California rule against a baseline consisting of the regulation of another state or states.

Suppose the reviewing court identifies Missouri law as the relevant benchmark. It would then measure the burden that the California rule imposes on interstate commerce relative to that benchmark. The resulting burden, which would include the need for out-of-state egg producers to, for example, buy larger crates, would be attributed solely to California. Only then, to justify this burden on interstate commerce, would California be able to bring in its regulatory interests, such as preventing cruelty to animals and any human health benefits from cage-free over non-cage-free eggs. Assuming these are legitimate local interests,[314] they too would be judged by an external benchmark consisting of the laws of other states. California would

313 Interventionist judges also might apply narrow tailoring in mismatch cases, either before or after balancing. Narrow tailoring is not our main focus.

314 Determining California's interest could be contentious because California is protecting not only California chickens, but chickens outside of California as well. *Id.* at 650–51. Whether the welfare of egg-laying hens residing in other states is a legitimate state concern in our federal system is an unanswered question. One reason that an interest in the welfare of animals *outside* California might not be a legitimate interest of California is that, in a federation, such an interest

thus have to show that its regulation actually advanced California's legitimate local public interests—such as improving animal welfare or human health—compared to the benchmark rule, and that the regulation did so in a manner that did not unnecessarily burden interstate commerce. As we have explained, precluding the regulation would implicitly endorse the Delaware Effect, under which economic actors would arrange their affairs to take advantage of the laxest state regulation and in which states competing for economic activity would relax their regulatory standards. On the other hand, upholding the regulation would implicitly endorse the California Effect, under which strict state regulations would spill over to other states.[315] Mismatch cases thus involve not merely a narrow question of national market efficiency, but also the division of regulatory power among the states. That is, mismatch cases implicitly involve a contest among two or more states for regulatory control of a single commercial act that affects multiple states.

B. Reforming Bibb *Balancing*

As an initial matter, we advocate four minor steps to clarify the dormant Commerce Clause. First, and at a minimum, the Supreme Court and lower courts should acknowledge the differences between single-state and mismatch cases, especially the fact that balancing in single-state cases involves internal benchmarking, whereas balancing in mismatch cases involves external benchmarking. The second clarification involves deference to trial courts. In several mismatch cases, the Supreme Court essentially conducted a de novo review of the evidence presented at trial, overturning trial court findings regarding the presence of intentional protectionism.[316] Because the largest area of

might invade the policy prerogatives of other states (in this case, the states where the hens reside).

315 S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938) ("Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce."); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277–78 (1978) (rejecting the argument that judicial invalidation of a nondiscriminatory state statute is required under the Commerce Clause to alleviate asymmetrical burdens on interstate commerce); S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting) ("I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce."); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 705 (1981) (Rehnquist, J., dissenting) (acknowledging that "[w]henever a State enacts more stringent safety measures than its neighbors, in an area which affects commerce, the safety law will have the incidental effect of deflecting interstate commerce to the neighboring States," but refusing to strike down the state law).

316 *See*, *e.g.*, Minnesota. v. Clover Leaf Creamery Co., 449 U.S. 456, 476 (1981) (Powell, J., concurring) (noting that "this Court has no basis for *inferring* a rejection of the quite specific

agreement under the dormant Commerce Clause is that it prevents intentional protectionism, it would seem particularly important for the Court to defer to trial court determinations regarding such findings, as long as such determinations are truly independent.[317] Third, to avoid dormant Commerce Clause challenges to mismatched regulations, the Supreme Court, where possible, could broadly construe federal laws that create uniform products standards so as to preempt inconsistent state standards.[318] Finally, the Court should confirm that because *Bibb* balancing is dynamic and depends on facts on the ground, stare decisis should not attach firmly to decisions in mismatch cases. Changing conditions on the ground—whether economic, regulatory, or commercial—*properly* affect *Bibb* balancing.

C. Alternatives to Bibb *Balancing*

1. Mutual Recognition and Harmonization

One potential alternative solution to mismatch cases would be for the Supreme Court to adopt (or endorse) coordination rules, which are rules for picking the prevailing rule. *CTS Corp. v. Dynamics Corp. of America*[319] is an example of the Supreme Court deferring to a preexisting coordination rule in use by the states.[320] Under the internal affairs doctrine, states defer to the state of incorporation regarding regulations that govern a corporation's "internal affairs." In *CTS*, the Supreme Court determined that, as a practical matter, a state that applied its antitakeover rules only to companies chartered in its own territory created no unconstitutional mismatch risk. The Court's reasoning depended on widespread adherence to the internal affairs

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factfindings by the trial court"); *Barnwell*, 303 U.S. at 192–95 (ignoring the factual findings of the trial court).

317 The concern with relying on lower courts' factual findings includes that state judges might be less willing than federal judges to make factual findings against the interests of state legislatures and in-state voters because in many states, state judges lack the independence of federal judges. *See*, *e.g.*, Paul M. Friedman, *Threats to Judicial Independence and the Rule of Law*, ABA (Nov. 18, 2019), https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/ [https://perma.cc/J69M-2TH5] ("In contrast to the institutional independence guaranteed to federal judges by the Constitution, most state court judges are not so insulated from outside pressures.").

318 For example, four justices in *Florida Lime* would have held that California's fat-content rule was preempted by federal agricultural standards that determined the ripeness of avocados based on picking-date and size. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 169 (1963) (White, J., dissenting).

319 481 U.S. 69 (1987).

320 *Id.* at 78.

doctrine, and the decision in *CTS* also had the effect of endorsing the internal-affairs doctrine as an appropriate coordination rule.[321]

The Court of Justice of the European Union ("CJEU") goes further by expressly adopting coordination rules of its own devising. The CJEU interprets a treaty regime that—like our Constitution—assures both state regulatory autonomy and free movement of goods, business establishments, and capital throughout the common market.[322] In 1979, in the famous *Cassis de Dijon* case, France required fruit liqueurs to contain at most twenty percent alcohol, whereas Germany required such liqueurs to contain at least twenty-five percent alcohol.[323] As a result, products manufactured to French specifications could not be sold in Germany, and vice versa. Because the treaties of the European Union unsurprisingly provided no guidance as to the appropriate alcohol content of liqueur, it was not clear which state's rule should prevail.

To resolve the case, the CJEU fashioned the celebrated "mutual recognition" requirement, under which products that comply with the regulation of their *state of manufacture* are putatively free to circulate in all other EU states.[324] Mutual-recognition rules specify the jurisdictional basis—call it the jurisdictional hook[325]—that will govern a particular type of regulation for the whole European Union. The state that possesses that jurisdictional hook is called the *origin state*, while all other EU states are *destination states* for that type of regulation. Thus, rather than simply precluding mismatched regulations and leaving it to the challenged state to choose among forbearance, conformity, and coordination as a response, the CJEU itself specifies an EU-wide coordination rule—that is, it specifies the jurisdictional hook—for a given type of regulation. Again, the best-known example is *Cas-*

321 It is uncertain whether the internal-affairs doctrine represents a constitutional requirement. *See generally* Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29 (1987).

322 For similarities between the dormant Commerce Clause and the EU fundamental freedoms, see generally Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014, 1106–15 (2012).

323 Case 120/78, Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649, ¶ 1–3. Although the literature on mutual recognition is very substantial, especially in Europe, as far as we know, no one has argued that preclusion or affirmation under the dormant Commerce Clause doctrine may be understood to implicitly endorse mutual-recognition rules. *Cf.* Mathews & Stone Sweet, *supra* note 280, at 823–24.

324 *Cassis de Dijon*, 1979 E.C.R. at ¶ 14. *See generally* Jacques Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14 J. EUR. PUB. POL'Y 699, 703 (2007).

325 The term "jurisdictional hook" is ours; the CJEU does not use it. We use the term to avoid ambiguity between "origin state" in a mutual-recognition sense and "origin state" in the ordinary sense.

sis, in which the CJEU determined that the jurisdictional hook for consumer-protection regulation would be the state of manufacture, and all other states (as "destination states") would have to accept products that complied with the rules of their state of manufacture.[326] Mutual recognition combines a uniform jurisdictional hook with limited preclusion of destination states' rules.

Mutual recognition relies on a crucial assumption, namely that there exists a fundamental consonance between different states' policies that regulate the same subject matter.[327] The notion of regulatory consonance works as follows: if the rules of both the origin and destination states are designed to protect consumers, then either state should be able to rely on the other's rule. If this is so, then to promote market integration, rules that aim at the same outcome should be mutually recognized, even if they differ in specification. However, if the destination state can point to an important state interest that is not addressed by the origin state's rule, then mutual recognition does not apply, and the destination state may apply its own rule.[328] To avoid unravelling the benefits of mutual recognition, the CJEU construes this exception narrowly.[329]

Mutual recognition represents a bold intervention. Not only does the CJEU resolve the particular regulatory conflict before it, but it promulgates the functional equivalent of a conflict-of-law rule for the whole EU on the regulatory area subject to conflict. Such an approach is bold because of its broad applicability. But it also avoids what is, under the current doctrine of the Supreme Court, a stark choice: a reviewing court faced with a regulatory mismatch must either choose one state's rule over another state's or allow the conflict to remain.

The U.S. product-packaging cases discussed above, *Hunt* and *Clover Leaf*, can be placed into a mutual-recognition paradigm. In *Hunt*, the goal of both the North Carolina and Washington apple-labeling regimes were ostensibly to inform the consumer of the quality of the apples, thereby protecting consumers from fraud or confusion. Although North Carolina preferred the federal grading regime to the Washington grading regime, the Supreme Court essentially held that because the Washington regime was sufficient to meet North Carolina's policy goal, North Carolina had to recognize that regime, rather

326 *Cassis de Dijon*, 1979 E.C.R. at ¶ 15.

327 Pelkmans, *supra* note 324, at 703.

328 *See*, *e.g.*, *Cassis de Dijon*, 1979 E.C.R. at ¶ 8 (recognizing exceptions related to tax, fairness, public health, and consumer protection).

329 Pelkmans, *supra* note 324, at 711.

than displace it. This is tantamount to requiring mutual recognition. By contrast, Minnesota's environmental goals in *Clover Leaf* could not be fulfilled by the plastic milk containers that origin states permitted. Other states' more permissive container regulations were likely motivated by goals other than environmentalism. Under a European conception of mutual recognition, the failure of the origin state's regulation to meet the destination state's policy goals may entitle the destination state to displace the origin state's regulation. Notions of mutual recognition also may emerge in narrow tailoring analysis in dormant Commerce Clause cases. For instance, the Court's conclusion in *Dean Milk* that Madison could have relied on out-of-state inspectors to achieve its milk-safety goals takes a mutual-recognition approach.[330]

Although the parallels between the EU's fundamental freedoms and the dormant Commerce Clause are obvious, the Supreme Court never has adopted the concept of origin and destination states, nor expressly adopted mutual-recognition rules, even when seized with severe regulatory conflicts.[331] Arguably the closest the Supreme Court has come to mutual recognition was to approve a coordination rule—the internal-affairs doctrine—that the states had already adopted themselves.[332] Moreover, mutual recognition would require courts to develop an approach to decide which state would serve as the origin state for any particular situation. In some circumstances, such as the production of goods, the origin state may seem easy to select. However, in other circumstances, such as online activities, the issue is more complicated. Courts could choose the origin state by reference to national welfare,[333] conflict-of-laws rules,[334] general constitutional principles,[335] or imagined interstate bargaining.[336]

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330 Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951).

331 Some might regard authorizing legislation as needed to propound mutual-recognition rules. One reason to doubt that the Supreme Court would seek to impose mutual-recognition rules in regulatory mismatch cases is the Court's virtual withdrawal from a constitutional jurisprudence of conflict of laws. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 257–58 (1992) (citing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), as part of a discussion concluding that "the modern Supreme Court has all but abandoned the field" of constitutional review of state conflict-of-laws rules).

332 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 78 (1987).

333 Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 814 (1971) (advocating that under the dormant Commerce Clause, the Supreme Court should select national regulations that "would best facilitate multistate commercial transactions").

334 *See generally* Laycock, *supra* note 331, at 252–56 (discussing various approaches to conflicts-of-laws questions).

335 *See generally id.* at 250–51 (observing in the conflict-of-laws context that although the

2. *Requiring "National Treatment" for "Like Products"*

The European Union is not alone in constraining states' abilities to enact and enforce mismatched regulations. The international rules that have underpinned the global economic system since the end of World War II do likewise. In 1948, the victorious allies, believing that a multilateral trade framework would both restrain the protectionist pressures that exacerbated the Great Depression and promote peace and security, established the General Agreement on Tariffs and Trade ("GATT").[337] The drafters' goals were to create a framework that would reduce tariffs and establish a basic code of conduct for international trade. In a series of negotiations, the GATT members sharply reduced their tariff rates.[338] In order to meaningfully hold the member countries to the tariff-reduction commitments they made, the GATT also included a requirement of "national treatment."[339] Under the national treatment provision, members cannot use internal laws, taxes, or nontax regulations to discriminate against imports from member states that are "like" domestic goods.[340] An imported product is "like" a domestic product if it is "a directly competitive or substitutable product."[341]

Although it is widely recognized that it has been difficult to apply the concept of "like product" consistently and uniformly because its

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Constitution does not "dictate[] a unique set of choice-of-law rules," federal courts could use background constitutional principles to develop such rules, including the principles of (1) equal citizens, (2) equal states, and (3) territorial states, which Laycock defines, respectively, to mean that states "must treat the citizens of sister states equally with their own . . . must treat sister states as equal in authority to themselves . . . [and the idea that the] fundamental allocation of authority among states is territorial"); *see also* Erbsen, *supra* note 263, at 568–69 ("[C]ompeting state regulatory interests could lead a court to require one state to yield to another by inferring a [mandatory] comity principle from the structure of horizontal federalism. . . . A constitutional common law of comity, if applied with a light touch, could arguably help avoid interstate friction.").

336 We are grateful to Dan Ortiz for suggesting Coasian bargaining to us.

337 *See* GATT, *supra* note 301; *see also* DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, THE GENESIS OF THE GATT 5–8 (2008).

338 *See* IRWIN ET AL., *supra* note 337, at 18–20.

339 GATT, *supra* note 301, art. III.

340 There are a few narrow exceptions permitted, such as for protecting health and exhaustible resources and for security. GATT, *supra* note 301, art. XX, XXI.

341 *See The General Agreement on Tariffs and Trade (GATT 1947)*, WTO, https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#annexi [https://perma.cc/YD3P-B7QQ] (providing interpretative notes about provisions of the GATT); *see also* WTO, GUIDE TO GATT LAW AND PRACTICE: VOLUME 1 121, 124 (6th ed. 1995). In 1995, when the World Trade Organization ("WTO"), which updated the GATT, was created, the national treatment principle and the concept of "like products" were maintained.

boundaries are not well defined,[342] there is at least widespread agreement on what are the relevant factors: the products' physical characteristics, the end uses of the products, how the products are classified for tariff purposes, and how consumers view the products.[343] Barring discrimination against foreign products that are "like" domestic products substantially curtails the ability of member states to enact protectionist policies that rely on small differences across products to justify differential treatment. It also prevents member states from treating products differently because of differences in the process or method of production.[344] Thus, for example, the United States was challenged under the international trade framework when it banned imports of tuna that were caught using methods that killed more dolphins than U.S. standards allowed.[345] The United States was found to have violated the national treatment standard because the tuna it banned was "like" the tuna that the United States allowed, namely both were canned yellowfin tuna (none of which contained dolphin meat).[346]

Notice, however, that under the logic of "like product" and "national treatment," the United States could have completely banned the sale of canned yellowfin tuna. Such a complete ban would not impact world trade less than did the U.S. ban on non-dolphin-safe tuna. But the multilateral trade rules do not aim at eliminating every impact on world trade that might arise from genuine policy differences. Instead, the rules aim to prevent invidious discrimination against foreign products. With a total ban, U.S. and non-U.S. producers would be equally affected. But when a country uses a process or method of production as a basis for differential treatment, the expectation is that domestic products will comply (and hence be allowed) whereas foreign products will not comply (and hence be excluded).

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342 *See*, *e.g.*, Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R (adopted July 11, 1996) ("The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.").

343 Panel Report, *Japan–Customs*, *Duties*, *Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 (Nov. 10, 1987), GATT B.I.S.D. (34th Supp.), at 93 (1988).

344 *See* Robert E. Hudec, "*Like Product": The Differences in Meaning in GATT Articles I and III*, *in* Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law 104 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

345 *See* Panel Report, *United States–Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.), at 156–57 (1993).

346 *Id.* at 204–05.

If the U.S. Supreme Court were to interpret the dormant Commerce Clause to include a principle analogous to the multilateral trade system's national treatment principle for like products, states would be prohibited from using narrow distinctions to differentiate among products. Thus, for example, because caged eggs and cage-free eggs are like products different only with respect to production process—that is, they are the same in their physical characteristics, end uses, and are seen as close substitutes based on consumer tastes and habits—California would not be able to allow the sale of cage-free eggs while banning the sale of imported caged eggs. At the same time, however, California could ban the sale of eggs entirely. Although such a ban might have a larger impact on interstate commerce than would a ban of non-cage-free eggs, the logic underlying the multilateral trade rule is that states will not give in to protectionist pressures if the only way to do so is by enacting comprehensive bans because such bans would harm domestic producers (and consumers) as much as out-of-state producers. Thus, any comprehensive bans would likely reflect policy preferences other than protectionism. Notice also that if California did enact a complete ban on the sale of eggs, such a complete ban would not interfere with any other state's ability to prescribe regulations for egg production in their own territory. Thus, California's outright ban would not interfere with Minnesota's ability to regulate its own territory; mediating such interstate disputes is one of the horizontal federalism concerns addressed by dormant Commerce Clause review of mismatches.

3. Focusing Exclusively on Legislative Intent

Donald Regan's 1986 article, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, remains one of the most influential contributions on the dormant Commerce Clause. He argued that all the Supreme Court does, and all it should do, in dormant Commerce Clause cases is smoke out intentional protectionism.[347] Although Regan limited this argument to what he called the free-movement-of-goods cases, and so did not include many of the mismatch cases this Article discussed, the same argument also could be made with respect to mismatch cases. That is, when faced with a regulatory mismatch, the Supreme Court could consider only whether the trial court record supports the conclusion that the mismatch was undertaken for protectionist reasons. Under this approach, if the in-

347 *See generally* Regan, *supra* note 16.

tent was protectionist, the regulation would be precluded; otherwise, the regulation would be upheld. Thus, trial courts would resolve the main issue in any mismatch case.

There is an obvious appeal to focusing on intent in mismatch cases; it would avoid balancing. But even setting aside concerns about whether a legislature can have a single intention,[348] or concerns about whether trial courts would fail to uncover intentional protectionism,[349] resolving mismatch cases solely by reference to intentional protectionism would seem to be insufficient. First, mismatched regulations segment the national marketplace even when such regulations are not motivated by protectionism. Second, limiting dormant Commerce Clause review to cases of intentional protectionism would seem to supply the states with a roadmap. To segment the market and to protect insiders from competition, all a state legislature would need to do

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348 In *Kassel*, Justice Brennan pointed to the gubernatorial veto of a bill passed by the Iowa legislature that would have increased Iowa's limits to sixty-five feet. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 684 (Brennan, J., concurring). In vetoing the bill, the governor noted that the regulatory change would have increased traffic and accidents in Iowa. *Id.* Thus, concluded Justice Brennan, "Iowa's actual rationale" for the regulation had nothing to do with the difference in safety between trucks of different lengths; instead, "Iowa sought to discourage interstate truck traffic on Iowa's highways." *Id.* at 681–82 (Brennan, J., concurring). Brennan regarded the goal to deflect traffic to be an impermissible state interest because it was "*protectionist* in nature." *Id.* at 685 (emphasis in original). In response, Justice Rehnquist first questioned whether a legislature could even have "one discernible 'actual' purpose" capable of being discovered by a court. *Id.* at 702 (Rehnquist, J., dissenting). Next, he noted that "[s]triking down legislation . . . because of asserted impermissible motives for not enacting other legislation, motives which could not possibly have been present when the legislation under challenge here was considered and passed," was "unprecedented in this Court's history." *Id.* at 705 (emphasis omitted).

349 *Bibb* may be an example of failure to uncover intentional protectionism. The late Abner Mikva, congressman, circuit court judge, and White House counsel, noted that when he was in the Illinois legislature, he frequently voted "present," rather than "yea" or "nay," because a bill just smelled bad. Interview by Mark DePue with Judge Abner Mikva, former Congressman, D.C. Cir. Judge, and Clinton White House Couns., in Chicago, Ill. (Oct. 22, 2014), https://presidentlincoln.illinois.gov/Resources/c013a7b0-0931-4c38-83c4-2ff88a7abf12/Mikva_Abner_EXCPT_TRSCRPT.pdf [https://perma.cc/VTC5-BXFP]. The example Mikva gave was a 1955 bill requiring curved mudflaps on Illinois roads. *Id.* Paul Powell, a powerful Illinois legislator, who twice served as speaker, had introduced the bill. *Id.* Mikva was not sure what was going on, but to him the bill smelled bad. *Id.*

Although the courts that handled *Bibb* raised no concerns about improper motives, when Paul Powell died in 1970, it was clear that Mikva's nose was onto something. Among the many assets Powell had in his $4.6 million estate when he died, were 17,000 shares in one Illinois company that produced curved mudflaps and a $55,000 promissory note from another mudflap company. Dorothy Clune, *Powell Estate Inventory Filed*, MOUNT CARMEL DAILY REPUBLICAN REG., Jan. 29, 1971, at 1. A federal investigation determined that Powell acquired much of his wealth from bribes, and he had been bribed to introduce the bill that advanced the mudflap companies' interests. *Fender Guard Admits Writing Law*, CHI. DAILY TRIB., Feb. 9, 1957, at 7.

is adopt a mismatch that asymmetrically burdens interstate commerce without giving as the reason for doing so the desire to reduce or eliminate competition from outsiders. Savvy legislatures could thus impose intentionally protectionist mismatches with impunity. Third, limiting review to intentional protectionism would ignore the structural federalism concerns that mismatch cases raise, including questions regarding proper allocation of power among states. Thus, limiting judicial review of mismatched regulations only to those motivated by protectionist intent would do nothing to limit even severe *intentional* regulatory spillovers (provided such spillovers were not intentionally protectionist).[350]

Conclusion

Most commentators and, by our estimates, a majority of the newly constituted Supreme Court, support the nondiscrimination strand of dormant Commerce Clause doctrine, but much more controversy surrounds undue burdens. Views diverge about whether regulations that are facially neutral should be immune from scrutiny under the dormant Commerce Clause. That divergence is not surprising given the important values on both sides—the interest in preventing state enmities and protecting the national marketplace on the one hand, and the interests in preserving state autonomy and regulatory diversity on the other hand. Dormant Commerce Clause cases involve trading off these values against each other.

It is worth understanding, however, which cases pose the hardest problems under the dormant Commerce Clause, and which draw the most justified criticism. This Article sought to supplement the tradi-

350 An example is a California law that prohibits sales in California of pork from the offspring of breeding sows confined in a manner California considers cruel. Cal. Health & Safety Code § 25990(b) (West 2022). Such law probably cannot be reasonably said to have been intended to protect California hog farmers from outside competition because there are so few hog farmers in California. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 17, Nat'l Pork Producers Council v. Ross, No. 21-468 (filed Sept. 27, 2021) (noting that 99.9 percent of pork sold in California is derived from sows outside of the state). However, the law can be understood as intended to impose California standards on hog farmers outside of California. Brief for the United States as Amicus Curiae Supporting Petitioners at 19, Nat'l Pork Producers Council v. Ross, No. 21-468 (filed Jun. 1, 2022) ("Proposition 12's primary 'purpose'—and according to the California Department of Food and Agriculture, its only substantial purpose—is 'to prevent animal cruelty by phasing out' what California voters deem to be 'extreme methods of farm animal confinement.'" (citations omitted)). One of the issues in *Nat'l Pork Producers Council v. Ross*, set for argument in the Court's 2022-23 term, is whether California has a constitutionally legitimate interest in housing conditions of *out-of-state* animals. The U.S. Solicitor General argues that California has no such interest. Brief for the United States, *supra*, at 19–24.

tional discrimination/undue-burden distinction in dormant Commerce Clause cases with a distinction that takes account of the type of burden imposed by the regulation: whether it is single-state or mismatch. Reframing the doctrine allowed us to show that (1) mismatch cases are meaningfully different than single-state cases, which is why they receive different treatment by the Supreme Court; (2) there are more sources of doctrinal uncertainty in mismatch cases than single-state cases, due to fundamental disagreements about whether and how to resolve such cases; (3) more so than single-state cases, decisions to preclude or uphold in mismatch cases tend to endorse particular rules and policy shifts; and (4) unlike single-state cases that principally raise concerns about the smooth functioning of the national market, mismatch cases raise fundamental horizontal federalism questions about the allocation of power between states. Thus, this Article sought to make clear what is really at stake in mismatch cases, how they differ from single-state cases, and why they generate so much controversy.

The goal of this Article was not to argue that the Supreme Court either should abandon undue-burden balancing in mismatch cases or engage in more balancing in such cases. Instead, the goal was to clarify what is actually happening in dormant Commerce Clause cases, including mismatch cases, to explain why it matters in terms of regulatory outcomes, the national economy, and federalism more generally, and to offer some rational ways of improving or curtailing balancing in mismatch cases.

TABLE. APPROACH OF JUSTICES IN MISMATCH CASES DISCUSSED IN PART II (AUTHOR CREATED)[351]

Justice	Party of Appointing President	*Barnwell* 1938	*S. Pac.* 1945	*Bibb* 1959	*Hunt* 1977	*Moorman* 1978	*Kassel* 1981	*Clover Leaf* 1981
Black	D	N	N	I				
Blackmun	R				I	I	I	N
Brandeis	D	N						
Brennan	R			I	I	I	I	N
Burger	R				I	N	N	N
Butler	R	N						
Clark	D			I				
Douglas	D		N	I				
Frankfurter	D		I	I				
Harlan	R			I				
Hughes	R	N						
Jackson	D		I					
Marshall	D				I	N	I	N
McReynolds	D	N						
Murphy	D		I					
Powell	R				I	I	I	N/A
Reed	D		I					
Rehnquist	R					N	N	
Roberts	R	N	I					
Rutledge	D		I					
Stevens	R				I	N	I	I
Stewart	R			I	I	N	N	N
Stone	R	N	I					
Warren	R			I				
White	D				I	N	I	N
Whittaker	R			I				

351 We are grateful to Lawrence Barker, UVA J.D. expected 2023, for this table. In this table, "N" indicates a noninterventionist approach, "I" indicates an interventionist approach, and "N/A" indicates that the justice did not reach the mismatch issue.