

*Dormant Commerce Clause — Interstate Commerce —
State Law — Extraterritoriality —
National Pork Producers Council v. Ross*

In an increasingly interconnected national economy, the myriad political leanings and morals of political actors result in equally varied — and sometimes diametrically opposed — state laws.¹ Thus, tensions abound, leading to high-profile disagreements among politicians,² between politicians and corporations,³ and between states themselves.⁴ While states and politicians may appear to feud with abandon,⁵ they are constrained, in part, by the Constitution, which provides a framework for such jousting.⁶

Constitutional frameworks and their applications, while purportedly neutral and enforced by supposedly neutral arbiters, are in practice likely to create structural biases that favor certain parties over others.⁷ Last Term, in *National Pork Producers Council v. Ross*,⁸ the Supreme Court considered the intricacies of one of these frameworks: the dormant commerce clause. In *Ross*, the Court upheld California’s Proposition 12, a regulation on the confinement of farm animals with wide-reaching interstate effects.⁹ Beneath the facially neutral discussion and application of the constitutional framework, the Court clarified the application of the dormant commerce clause to state regulations, endorsing a heightened deference to state regulation. In doing so, the Court exposed the dormant commerce clause’s structural biases.

While California’s animal rights activists may be the immediate winners in *Ross*, the Court’s fractured opinion on the dormant commerce

¹ Many bordering states have conflicting laws. For example, Oregon has expanded access to abortion while Idaho has outlawed abortion. See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/QK77-LCHW>].

² See, e.g., Jeremy B. White, “Pathetic Man”: *The California-Florida Rivalry Just Exploded*, POLITICO (June 6, 2023, 4:30 AM), <https://www.politico.com/news/2023/06/06/gavin-newsom-ron-desantis-feud-00100320> [<https://perma.cc/94AR-7G62>].

³ See, e.g., Jesus Jiménez & Brooks Barnes, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/article/disney-florida-desantis.html> [<https://perma.cc/8L7D-GFTR>].

⁴ See, e.g., Uriel J. García, *Sheriff Files Criminal Charges over Florida’s Transport of Migrants from San Antonio to Massachusetts*, TEX. TRIB. (June 6, 2023), <https://www.texastribune.org/2023/06/05/texas-san-antonio-migrant-flight-marthas-vineyard-criminal-charges> [<https://perma.cc/6HRK-EY9F>].

⁵ See, e.g., White, *supra* note 2 (“The feud between Gavin Newsom and Ron DeSantis is getting nastier — and that’s how both of them want it.”).

⁶ See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 60 (2022) (“Perhaps the most basic task of a constitution is to supply the rules of ‘the political game.’” (quoting Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 659 (2011))).

⁷ *Id.* at 62 (“[S]tructural biases are bound to exist in any constitutional system . . .”).

⁸ 143 S. Ct. 1142 (2023).

⁹ *Id.* at 1150.

clause will — in the long run — likely benefit states with large economies and political ambitions for government-imposed economic regulation. While the dormant commerce clause is a facially neutral constitutional framework, *Ross* likely empowers blue “liberal” states — which tend to have both large economies and a predisposition toward government intervention — to leverage the dormant commerce clause to advance their political values.

The dormant commerce clause is found “between the Constitution’s lines.”¹⁰ Under the Commerce Clause, Congress is vested with the power to enact laws that regulate interstate trade and commerce, and also to “*preempt* conflicting state laws.”¹¹ The dormant commerce clause, on the other hand, exists as the inverse of the Commerce Clause.¹² In its modern incarnation, the dormant commerce clause is meant to prohibit states from facially discriminating against interstate commerce as well as placing undue burdens on interstate commerce through extraterritorial regulation.¹³ This doctrine was the foundation of the legal challenge in *Ross*.

In November 2018, California voters passed Proposition 12 with nearly sixty-three percent of the vote.¹⁴ In part, the Proposition sought to increase the welfare of pigs by amending the California Health and Safety Code.¹⁵ The amendment prohibited the sale of pork from pigs that were “confined in a cruel manner” or born to cruelly confined sows.¹⁶ These prohibitions — which garnered significant support from animal rights activists¹⁷ — applied to all pork sold in the state of California, regardless of where the pigs were bred, raised, or slaughtered.¹⁸

Petitioners, the National Pork Producers Council, challenged the new regulations, pointing out that California imports nearly all of its

¹⁰ *Id.* at 1152.

¹¹ *Id.* (emphasis added) (citing U.S. CONST. art. I, § 8, cl. 3; *id.* art. VI, cl. 2); *see, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012) (opinion of Roberts, C.J.) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

¹² *See Ross*, 143 S. Ct. at 1152; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

¹³ *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 444–49 (5th ed. 2015).

¹⁴ *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)) [<https://perma.cc/53PT-F65L>].

¹⁵ CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West, Westlaw through Ch. 1 of 2023–2024 Extraordinary Sess. and urgency legislation through Ch. 163 of 2023 Reg. Sess.) (originally passed as “Proposition 12”); *see U.S. Supreme Court Upholds Prop 12, Preserving Landmark Protections for Pigs, Chickens and Calves!*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS (May 15, 2023), <https://www.aspc.org/news/us-supreme-court-upholds-prop-12-preserving-landmark-protections-pigs-chickens-and-calves> [<https://perma.cc/S8B9-3A68>] [hereinafter *ASPCA*].

¹⁶ HEALTH & SAFETY § 25990(b)(2).

¹⁷ *See, e.g., ASPCA, supra* note 15 (“Though millions of pigs still suffer in gestation crates across the country, this ruling offers hope that the era of extreme confinement of farm animals is heading to a close.”).

¹⁸ *See* HEALTH & SAFETY §§ 25990–25994.

pork.¹⁹ Petitioners asserted that California's importation levels and overall share of the marketplace forced *non*-California pig farmers to comply with the costly regulation, thus impermissibly interfering with "the functioning of a \$26 billion a year interstate [pork] industry."²⁰ The challenge alleged an undue burden on interstate commerce in violation of the dormant commerce clause.²¹ Petitioners also asserted that the Proposition created an impermissible extraterritorial effect because the regulations effectively forced non-California pig farmers to comply with the California law.²² The U.S. District Court for the Southern District of California, finding no substantial burden on interstate commerce, dismissed the complaint for failure to state a claim.²³

On appeal, the Ninth Circuit affirmed the dismissal.²⁴ The court held that while Proposition 12 had an "indirect 'practical effect'" on the national market, the effect did not violate the dormant commerce clause.²⁵ Furthermore, the panel held that while Proposition 12 plausibly imposed compliance requirements and burdens on interstate commerce that could raise costs in the market, the law was not of sufficient national concern to warrant it impermissibly extraterritorial.²⁶

The Supreme Court affirmed the decision of the Ninth Circuit.²⁷ Writing for the Court, Justice Gorsuch, joined by Justices Thomas, Sotomayor, Kagan, and Barrett, concluded that Proposition 12 did not violate the dormant commerce clause.²⁸ First, the Court explained that the antidiscrimination principle is "at the 'very core'" of the doctrine.²⁹ In "modern" dormant commerce clause cases, the Court's analysis centered on the prohibition of "economic protectionism," thwarting a state from benefiting itself by "burdening [its] out-of-state competitors."³⁰ The opinion quickly disposed of a claim of facial discrimination because the petitioners themselves conceded that Proposition 12 imposed equal burdens on in-state and out-of-state pork producers.³¹

¹⁹ See *Nat'l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1205 (S.D. Cal. 2020). This number is estimated to be as high as ninety-nine percent. Greg Stohr, *Supreme Court Voices Worries over California Humane-Pork Law (I)*, BLOOMBERG L. (Oct. 11, 2022, 2:13 PM), <https://news.bloomberglaw.com/us-law-week/supreme-court-voices-worries-about-california-humane-pork-law> [<https://perma.cc/9YDJ-EJTT>].

²⁰ *Ross*, 456 F. Supp. 3d at 1205.

²¹ *Id.* at 1206, 1208.

²² *Id.* at 1206-07.

²³ *Id.* at 1210.

²⁴ *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1034 (9th Cir. 2021).

²⁵ *Id.* at 1028-29.

²⁶ See *id.* at 1031-32.

²⁷ *Ross*, 143 S. Ct. at 1150.

²⁸ *Id.*

²⁹ *Id.* at 1153 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

³⁰ *Id.* (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008)).

³¹ *Id.*

In Part III, the Court addressed the “ambitious” allegation that Proposition 12 created an undue burden on interstate commerce in violation of the dormant commerce clause.³² Under the clause’s prohibition on extraterritorial regulation, petitioners contended that past cases implied an “almost per se” rule prohibiting state laws that have the *practical* effect of controlling interstate commerce, even if such an impact is not purposeful.³³ But the Court found that the petitioners “read too much into too little,” explaining that the cited cases were “discrete” and “in a particular context,” precluding broad applicability.³⁴ In each case, the challenged extraterritoriality was “specific[ally] impermissible,” but the Court declined to find implied or general invalidity for all extraterritorial effects,³⁵ noting the “strange” and wide-reaching consequences of accepting “almost per se” extraterritoriality.³⁶

In Part IV-A, the Court addressed petitioners’ second “ambitious theory” under the *Pike*³⁷ balancing test. Petitioners asserted that under *Pike*, the Court must “assess ‘the burden imposed on interstate commerce’ by a state law” and strike the law down if the burdens are “clearly excessive in relation to the putative local benefits.”³⁸ Petitioners claimed that the costs of Proposition 12 significantly outweighed the benefits, thereby amounting to discrimination in practice.³⁹ But the Court found that even a close examination of Proposition 12’s practical effects failed to reveal purposeful discrimination under *Pike*.⁴⁰

In Part IV-B, Justice Gorsuch, joined by Justices Thomas and Barrett, asserted the futility of *Pike* balancing.⁴¹ Justice Gorsuch wrote that “no court is equipped to undertake” the balancing of morals and economics required by *Pike*.⁴² Instead, the opinion asserted that the voters and their elected officials — rather than courts — are the only entities able to engage in such balancing.⁴³

In Part IV-C, Justice Gorsuch was joined by Justices Thomas, Sotomayor, and Kagan.⁴⁴ The Court found that the petitioners “merely allege[d] harm to some producers’ favored ‘methods of operation,’”⁴⁵ which did not create a sufficient burden on interstate commerce to

³² *Id.* at 1153–54.

³³ *Id.* at 1154. Petitioners cited *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); and *Healy v. Beer Inst.*, 491 U.S. 324 (1989). *Ross*, 143 S. Ct. at 1154.

³⁴ *Ross*, 143 S. Ct. at 1155.

³⁵ *Id.* (emphasis omitted).

³⁶ *Id.* at 1156.

³⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

³⁸ *Ross*, 143 S. Ct. at 1157.

³⁹ *Id.*

⁴⁰ *Id.* at 1158.

⁴¹ *See id.* at 1159–60 (opinion of Gorsuch, J.).

⁴² *Id.* at 1160.

⁴³ *Id.*

⁴⁴ *Id.* at 1161.

⁴⁵ *Id.* at 1163 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)).

warrant further scrutiny. Indeed, the Justices recognized that the clause is not intended to prevent market shifts in their entirety.⁴⁶

Once again joined by Justices Thomas and Barrett in Part IV-D, Justice Gorsuch addressed Chief Justice Roberts's partial dissent (the "lead dissent") and Justice Kavanaugh's opinion concurring in part and dissenting in part.⁴⁷ In both instances, Justice Gorsuch explored the hypothetical results of the proposed frameworks. He suggested that these opinions would have undermined the promises of federalism and state independence by providing "a roving license" for courts to strike down state statutes.⁴⁸

Finally in Part V, and joined by a majority, Justice Gorsuch looked to the Framers, finding that they believed that court interference with interstate commerce should be undertaken with "extreme caution."⁴⁹ And while the petitioners hoped to "cast aside [the] caution" of the Founders, they ultimately remained unsuccessful in *Ross*.⁵⁰

In addition to joining all but Parts IV-B and IV-D of Justice Gorsuch's opinion, Justice Sotomayor concurred in part, joined by Justice Kagan.⁵¹ Justice Sotomayor wrote that petitioners failed to satisfy the *Pike* precedent by not alleging a substantial burden on interstate commerce.⁵² Declining to rework *Pike*, she wrote that the inquiry into morality and economics can be "difficult and delicate" and that "federal courts are well advised to approach the matter with caution."⁵³

Justice Barrett wrote an opinion concurring in part.⁵⁴ She found that while Proposition 12 imposed a substantial burden on interstate commerce, petitioners could not proceed to *Pike* because the "benefits and burdens" of the law's impacts were "incommensurable" and thus not suited to judicial balancing.⁵⁵

Chief Justice Roberts filed the lead dissent, concurring in part and dissenting in part, joined by Justices Alito, Kavanaugh, and Jackson.⁵⁶ While the Chief Justice agreed that the dormant commerce clause prevents economic protectionism and that there is no "per se" rule against extraterritorial effects, he disagreed with the plurality's assessment of

⁴⁶ *Id.* at 1161 (writing that the Court has "squarely rejected" the notion that a change in market structure is an impermissible burden in violation of the dormant commerce clause).

⁴⁷ *Id.* at 1163–64.

⁴⁸ *Id.* at 1164 (citing *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007)).

⁴⁹ *Id.* at 1165 (majority opinion) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring))).

⁵⁰ *Id.*

⁵¹ *Id.* (Sotomayor, J., concurring in part).

⁵² *Id.* at 1166.

⁵³ *Id.*

⁵⁴ *Id.* (Barrett, J., concurring in part).

⁵⁵ *Id.* at 1167.

⁵⁶ *Id.* (Roberts, C.J., concurring in part and dissenting in part).

the *Pike* balancing test.⁵⁷ He wrote that *Pike* found nondiscriminatory state laws to be valid “unless the burden imposed on [interstate] commerce is clearly excessive in relation to . . . local benefits.”⁵⁸ He asserted that while balancing competing interests might be difficult, “sometimes there is no avoiding the need.”⁵⁹

Finally, Justice Kavanaugh filed an opinion concurring in part and dissenting in part.⁶⁰ He agreed with the lead dissent in that Proposition 12 created a substantial burden on interstate commerce, adding that the Proposition may raise further questions under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.⁶¹ Pointing to the unusual nature of Proposition 12, the opinion suggested that California attempted “to unilaterally impose its moral and policy preferences . . . on the rest of the Nation.”⁶² He also suggested that Proposition 12 could be a “blueprint” for other regulations in contravention of “the Constitution [of] the Framers.”⁶³

Given our interconnected economy, state laws are increasingly likely to create some extraterritorial effect.⁶⁴ Under a system of higher deference to state laws, states with large economies and a favorable attitude toward government regulation will be most able to enact laws that out-of-state firms cannot afford to avoid.⁶⁵ As a formal matter, the holding in *Ross* is permissive toward *all* states. But as a functional matter, *Ross* is most likely to benefit progressive states because those states possess the economic power and political will to create laws that can reverberate outside their borders.

While the fractured opinions may initially appear vague, in the context of other dormant commerce clause cases,⁶⁶ *Ross* has offered some clarity about the Court’s likely future interpretation of the clause. The Court itself suggested that early dormant commerce clause jurisprudence lacked much legal force, describing the clause as leaving “considerable uncertainties . . . yet to be overcome.”⁶⁷ Into the twenty-first century, legal scholars continued to question and disagree about the

⁵⁷ *Id.*

⁵⁸ *Id.* (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

⁵⁹ *Id.* at 1168.

⁶⁰ *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

⁶¹ *Id.*

⁶² *Id.* at 1174.

⁶³ *Id.*

⁶⁴ *See id.* at 1155–56 (majority opinion).

⁶⁵ California’s economy is by far the largest in the United States, and an economic giant even on a global scale. *See* Matthew A. Winkler, Opinion, *California Poised to Overtake Germany as World’s No. 4 Economy*, BLOOMBERG (Oct. 25, 2022, 8:22 AM), <https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy> [https://perma.cc/3LJQ-5HLH].

⁶⁶ Scholars have described the history of the clause as one of confusion and skepticism. *See* James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the “Considerable Uncertainties”* — 1824 to 1945, 52 CREIGHTON L. REV. 243, 252 (2019).

⁶⁷ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018).

legitimacy of the dormant commerce clause, which some called “dubious” with uncertain constitutional underpinnings and unpredictable policy concerns.⁶⁸ While *Ross* is a fractured opinion, eight Justices agreed that the dormant commerce clause has a place in modern jurisprudence, and so, the doctrine lives to see another day despite its critics. Each Justice, save Justice Kavanaugh,⁶⁹ examined and explored the claim of the pork producers firmly within the context of the dormant commerce clause, signaling that the question raised in *Ross can* — and likely *should* — be answered by using the doctrine.

Like the dormant commerce clause, *Pike* balancing also survives, though with more skepticism from the Court. While *Pike* has fallen out of favor with Justices Thomas, Gorsuch, Barrett, and due to the “incommensurable” nature of competing interests,⁷⁰ Justices Sotomayor and Kagan asserted that federal courts should continue to use *Pike* balancing and are “well advised to approach” the test “with caution.”⁷¹ The Court’s inability to produce a majority in favor of abandoning the doctrine ensures *Pike* balancing lives on.

Taken together, the Court’s discussion of the dormant commerce clause and examination of *Pike* suggest an attitude of permissiveness toward state laws despite their extraterritorial effects. A majority found the initial “antidiscrimination” prong to be at the core of the doctrine,⁷² which somewhat truncates the judicial analysis so long as state laws with extraterritorial effects also create intrastate effects.⁷³ Moreover, the Court did not constrict the holding so tightly to the facts as to render *Ross* inapplicable to future cases. While the Court refused to extend the holdings of previous dormant commerce clause cases, requiring “a careful eye to context”⁷⁴ in *Ross*, the Justices did not excessively focus on the intricate economic statistics and technical farming requirements imposed by Proposition 12. Instead, *Ross* took a wider lens on the practical effects of a given state law in a modern economy.⁷⁵

Thus, the question remains: Who stands to benefit from the new attitude of permissiveness toward state law? In the immediate future,

⁶⁸ Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011), <https://virginialawreview.org/articles/course-unbroken-constitutional-legitimacy-dormant-commerce-clause> [<https://perma.cc/A5B8-KB9J>] (describing in the article’s online abstract how some scholars argue that the dormant commerce clause is “of dubious legitimacy”); see also McGoldrick, *supra* note 66, at 252; Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991).

⁶⁹ See *Ross*, 143 S. Ct. at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

⁷⁰ *Id.* at 1160 (opinion of Gorsuch, J.); *id.* at 1167 (Barrett, J., concurring in part) (citing Justice Gorsuch’s assertion that “the benefits and burdens of Proposition 12 are incommensurable”).

⁷¹ *Id.* at 1166 (Sotomayor, J., concurring in part).

⁷² *Id.* at 1153 (majority opinion).

⁷³ See *id.* (implying that moving beyond the core antidiscrimination prong, theories become more “ambitious”).

⁷⁴ *Id.* at 1155.

⁷⁵ See, e.g., *id.* at 1150 (discussing the intricacies of the modern American consumer’s choices and speculating about the American economy beyond the pork market).

animal rights activists can celebrate their victory.⁷⁶ California's large pork market will likely force most American hog farmers to comply with Proposition 12's more humane regulations because sellers cannot opt out of selling to California consumers.⁷⁷ In other words, California's economic power is largely to thank for the out-of-state adoption of Proposition 12 regulations. This trend is likely to continue because of *Ross*: heightened permissibility of extraterritorial effects will favor states and regions with larger, more powerful economies and a preference for active governing through regulation.

These states, cities, and regions tend to be more liberal in their social and political convictions.⁷⁸ While not universally true, the epicenters of economic power in America are primarily in blue states and districts.⁷⁹ One recent study shows that Democratic-voting regions make up seventy percent of the American economy.⁸⁰ Moreover, Democratic-voting districts have seen a steady increase in household income since 2008, whereas Republican districts have seen a decline during the same period.⁸¹ And not only is there a stark difference today in the economies of red and blue districts, they are quickly diverging further, giving way to what is likely to be larger contrasts of economic power in the coming decades.⁸² Thus, blue states may increasingly use their economies to strong-arm corporations into complying with the values of their residents.

While Proposition 12 was the focus of the Court in *Ross*, there are many other laws and proposed regulations from progressive-leaning states that are likely to significantly impact interstate commerce in the coming years. Consider California's recently enacted Advanced Clean Cars II regulations, which mandate that all new passenger vehicles sold

⁷⁶ See *ASPCA*, *supra* note 15.

⁷⁷ *Ross*, 143 S. Ct. at 1173 (Kavanaugh, J., concurring in part and dissenting in part).

⁷⁸ See CLARA HENDRICKSON ET AL., BROOKINGS INST., COUNTERING THE GEOGRAPHY OF DISCONTENT: STRATEGIES FOR LEFT-BEHIND PLACES 5 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Report_Countering-geography-of-discontent_Hendrickson-Muro-Galston.pdf [<https://perma.cc/7FLK-C465>]; Joachim Klement, *Red States, Blue States: Two Economies, One Nation*, CFA INST.: ENTERPRISING INV. (Mar. 13, 2018), <https://blogs.cfainstitute.org/investor/2018/03/13/red-states-blue-states-two-economies-one-nation> [<https://perma.cc/XD9S-3K6S>].

⁷⁹ See Klement, *supra* note 78; cf. Ronald Brownstein, *Republicans' Big Rich-City Problem*, THE ATLANTIC (May 4, 2023), <https://www.theatlantic.com/ideas/archive/2023/05/red-states-blue-cities-metro-areas-brookings-institution-analysis/673942> [<https://perma.cc/FT85-Z2R6>] (charting how blue cities in red states oftentimes contribute significant shares to the state economy).

⁸⁰ Mark Muro et al., *Biden-Voting Counties Equal 70% of America's Economy. What Does This Mean for the Nation's Political-Economic Divide?*, BROOKINGS INST. (Feb. 26, 2021), <https://www.brookings.edu/articles/biden-voting-counties-equal-70-of-americas-economy-what-does-this-mean-for-the-nations-political-economic-divide> [<https://perma.cc/HB6G-YGE7>].

⁸¹ Mark Muro & Jacob Whiton, *America Has Two Economies — And They're Diverging Fast*, BROOKINGS INST. (Sept. 19, 2019), <https://www.brookings.edu/articles/america-has-two-economies-and-theyre-diverging-fast> [<https://perma.cc/32LZ-UVKX>].

⁸² *Id.*

in California must be zero-emissions by 2035.⁸³ Californians account for over ten percent of the national new-car market,⁸⁴ nearly the same percentage the California pork market accounted for in *Ross*.⁸⁵ Similarly, California's recently passed Senate Bill 54 requires all packaging in the state to be compostable or recyclable by 2032, effectively forcing companies of all sorts and from all over the country to rethink the packaging of their goods.⁸⁶ And following closely behind is New York State, which has pending legislation to increase regulations and restrictions on plastics.⁸⁷ The holding in *Ross* has provided a pathway for this legislation and similar wide-reaching regulations to significantly alter the national marketplace through state law.

Beyond the size and market power of left-leaning state economies, liberal legislators and voters tend to support economic regulation more than their conservative counterparts.⁸⁸ Thus, the Court's permissive attitude toward economic regulation with spillover effects likely advantages — in the aggregate — blue states that favor these sorts of regulations. In the highly polarized and distrustful conservative electorate,⁸⁹ liberal states are not only positioned to benefit under *Ross* because of the size of their economies, but also because they are more likely to support wide-reaching government intervention.

While the bulk of economic power sits with blue regions, there is also potential for Republican states with large economies, such as Florida and Texas, to act under *Ross*. Despite conservatives' general distaste for government regulation, Texas regulations surrounding public school

⁸³ *Advanced Clean Cars II Regulations: All New Passenger Vehicles Sold in California to Be Zero Emissions by 2035*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii> [<https://perma.cc/H3CQ-49XZ>]; Camille von Kaenel, *California Air Agency to Ban Sales of Gasoline-Powered Cars by 2035*, POLITICO (Aug. 24, 2022, 3:28 PM), <https://www.politico.com/news/2022/08/24/california-air-agency-to-ban-sales-of-gasoline-powered-cars-by-2035-00053547> [<https://perma.cc/5TH2-P5KP>].

⁸⁴ Felix Richter, *California Is Among the World's Largest Car Markets*, STATISTA (Sept. 24, 2020), <https://www.statista.com/chart/23023/top-10-markets-for-new-passenger-car-registrations> [<https://perma.cc/TM8S-R763>].

⁸⁵ See *Ross*, 143 S. Ct. at 1173 (Kavanaugh, J., concurring in part and dissenting in part).

⁸⁶ S.B. 54, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted) (codified at CAL. PUB. RES. CODE §§ 42040–42081 (West, Westlaw through Ch. 1 of 2023–2024 Extraordinary Sess. and urgency legislation through Ch. 163 of 2023 Reg. Sess.)) (banning single-use plastic by 2032); see also *SB 54: Plastic Pollution Prevention and Packaging Producer Responsibility Act*, CALRECYCLE, <https://calrecycle.ca.gov/packaging/packaging-epr> [<https://perma.cc/8KPU-GXEY>].

⁸⁷ See Louis Finley, *Environmentalists Push for More Single-Use Plastic Reform*, SPECTRUM NEWS N.Y. 1 (June 6, 2022, 8:19 AM), <https://www.ny1.com/nyc/all-boroughs/news/2022/06/06/environmentalists-push-for-more-single-use-plastic-reform> [<https://perma.cc/NL87-BT68>].

⁸⁸ PEW RSCH. CTR., *LOW APPROVAL OF TRUMP'S TRANSITION BUT OUTLOOK FOR HIS PRESIDENCY IMPROVES* 32 (2016), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/12/12-08-16-December-political-release.pdf> [<https://perma.cc/JR8E-L59Q>].

⁸⁹ PEW RSCH. CTR., *AMERICANS' VIEWS OF GOVERNMENT: DECADES OF DISTRUST, ENDURING SUPPORT FOR ITS ROLE* 8 (2022), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/06/PP_2022.06.06_views-of-government_REPORT.pdf [<https://perma.cc/J22Y-U4UE>].

textbooks have had interstate spillover effects for decades.⁹⁰ The size of the Texas textbook market, accompanied by conservative campaigns to limit certain information — most often related to the history of race and gender equality in the United States — forced publishers to appease the Texas market.⁹¹ Because it was economically infeasible for publishers to write separate books for different markets and political leanings, students all over the country were taught from, essentially, Texas textbooks.⁹² Under *Ross*, such impacts could continue and be further amplified by conservative states with large economies.

Relatedly, there is the potential for politically opposed economies to clash under *Ross*. Should these scenarios arise, corporate America is likely to be caught in the crosshairs of *Ross*'s attitude of heightened permissiveness toward state laws. Take, for example, Texas Governor Greg Abbott's campaign against environmental, social, and corporate governance (ESG), which is often associated with liberal ideology.⁹³ On the other hand, in California, the state legislature has considered a law requiring corporations to adhere to an ESG framework.⁹⁴ Under *Ross*, corporate America could ultimately be forced to choose between the two markets.

Today, *Ross* is a victory for animal rights activists and a loss for hog farmers across the country who will be forced into reconfiguring their business structures. But, looking beyond Proposition 12, *Ross* offers a glance into a possible future for interstate commerce and state regulations with significant spillover effects. While the future is anything but clear, the Justices laid the foundation for powerful state economies to shape interstate commerce through their own state legislatures. Because blue states tend to have larger economies and a higher tolerance for widespread economic regulation as compared to their red-state counterparts, on net, *Ross* likely benefits blue states and regulation, over red states and deregulation. In an interconnected national economy, these sorts of wide-reaching regulations are likely to continue, and the Court's deference toward wide-reaching state regulations in *Ross* will remain a touchstone in ongoing dormant commerce clause litigation.

⁹⁰ Rob Alex Fitt, *Conservative Activists in Texas Have Shaped the History All American Children Learn*, WASH. POST (Oct. 19, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/10/19/conservative-activists-texas-have-shaped-history-all-american-children-learn> [https://perma.cc/DVB4-9SKH].

⁹¹ *See id.*

⁹² *Id.*

⁹³ *See* Amal Ahmed, *Lawmakers Passed a Bill to Stop Insurers from Considering ESG Criteria in Setting Rates*, TEX. TRIB. (June 12, 2023, 12:00 PM), <https://www.texastribune.org/2023/06/12/texas-legislature-insurance-esg-rates> [https://perma.cc/57JN-3GKG].

⁹⁴ Mark Segal, *California Senate Passes Bill for First Law in US Requiring Companies to Disclose All GHG Emissions*, ESG TODAY (Jan. 31, 2022), <https://www.esgtoday.com/california-senate-passes-bill-for-first-law-in-us-requiring-companies-to-disclose-all-ghg-emissions> [https://perma.cc/YQ4X-8R65].