THE DORMANT COMMERCE CLAUSE AND MORAL COMPLICITY IN A NATIONAL MARKETPLACE

> *To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*
>
> — Justice Brandeis[1]

A theory of states as laboratories of democracy has long persisted as one of the fundamental tenets of American federalism. Yet, as Justice Brandeis intimated in his *New State Ice Co. v. Liebmann*[2] dissent, judicial review enables courts to cut off state experimentation when it is at odds with federal constitutional principles or federal statutory pronouncements.[3] One such federal principle — which has proven difficult to pin down[4] — is the so-called "dormant," or "negative," commerce clause. Recent litigation and scholarship have invoked the dormant commerce clause as a limit on state ethical innovation, arguing that state regulations that impose unique compliance costs may need to yield to a uniform national market if they are based on a local moral interest that is at odds with the moral position of a majority of other states.[5]

Focusing on a recent case that raised this argument, *National Pork Producers Council v. Ross*,[6] this Note argues that such a position is misguided. Even if the dormant commerce clause serves in some sense to establish a uniform national marketplace, there are important reasons to exempt states from participating in that marketplace where moral values are at issue. Rather than empowering courts to choose between competing moral positions by reviving a near-dead balancing test, the Court should limit the dormant commerce inquiry to the question of whether a sufficient moral interest exists. If so, the judicial role is fulfilled, though Congress remains free to reunite the marketplace through federal legislation if it chooses.

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[1] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[2] 285 U.S. 262.

[3] *Id.* at 311 (Brandeis, J., dissenting).

[4] *See, e.g.*, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 417 (2008) (discussing the allegations of "incoherence and unpredictability" that have historically been lodged at the Supreme Court's dormant commerce doctrine).

[5] *See, e.g.*, Brief for Petitioners at 27, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 n.2 (1945)); Michael S. Knoll & Ruth Mason, Bibb *Balancing: Regulatory Mismatches Under the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. 1, 76 & n.350 (2023).

[6] 143 S. Ct. 1142.

Part I of this Note provides the doctrinal background for the current dormant commerce clause debate. Part II describes *National Pork*. Though the suit largely focused on matters of extraterritoriality and state health interests, it also obliquely presented the question of how the dormant commerce clause should apply to "morals legislation" — here, legislation about the ethical treatment of animals — that runs the risk of dividing up a national economic market. The Court ultimately left the question of precisely how to balance moral interests against economic interests open, so Part III attempts to offer a possible resolution: that morality is entitled to solicitude under the dormant commerce inquiry based on states' interests in avoiding complicity with unethical practices. Part IV briefly addresses a few counterarguments.

I. DOCTRINAL BACKGROUND

The "dormant commerce clause" is a "negative implication"[7] of the federal Constitution's Commerce Clause, which says that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[8] Throughout its doctrinal history, the dormant commerce clause has engendered confusion and skepticism as the Court and scholars have struggled to derive sufficient principles to guide its application. Yet while the constitutional limits on morals legislation have been explored in detail in relation to other constitutional doctrines, the question of morality-based state legislation under the dormant commerce clause seems to be a relatively novel one.

A. Origins of the Dormant Commerce Doctrine

For two hundred years, the Supreme Court has interpreted the Commerce Clause not only as an affirmative grant of power to Congress but also as a restraint on the legislative authority of states. This conception of the clause first appeared, at least by implication, in *Gibbons v. Ogden*,[9] a case in which the Court engaged in an extended discussion of the commerce power.[10] Though the Court flirted with the conclusion that the commerce power was exclusive to Congress,[11] it ultimately decided the matter based on the preemptive effect of a congressional enactment.[12]

Only a few years later, however, the Court more expressly acknowledged the operation of the clause as a restriction on state power. In

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[7] Dep't of Revenue v. Davis, 553 U.S. 328, 337 (2008).

[8] U.S. CONST. art. I, § 8, cl. 3.

[9] 22 U.S. (9 Wheat.) 1 (1824).

[10] *See id.* at 186–239.

[11] *See id.* at 199–200 (rejecting the proffered analogy to the power of taxation, because "[w]hen . . . each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress," *id.* at 199).

[12] *Id.* at 221.

Willson v. Black Bird Creek Marsh Co.,[13] the Justices were confronted with a Commerce Clause challenge to the erection of a dam.[14] While the Court concluded that the action did not offend the Constitution, it did so by stating: "We do not think that the act . . . can . . . be considered as repugnant to the power to regulate commerce in its dormant state."[15] The Court thus more clearly indicated that a state law could run afoul of Congress's commerce power even if Congress had not exercised the power through a federal statute.

Many scholars have documented the Court's ensuing misadventures in attempting to select an appropriate dormant commerce clause rule.[16] In the mid-1800s, the Court adopted the *Cooley v. Board of Wardens*[17] formulation.[18] By the end of the nineteenth century, *Leisy v. Hardin*[19] synthesized this "national/local"[20] rule into the idea that:

> [W]here the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, . . . Congress can alone act upon it . . . . The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.[21]

Leisy's "congressional silence" theory survived for decades, although it has since incurred the wrath of textualist jurists.[22] Its federal uniformity component remains as a variation of the modern rule.[23]

Meanwhile, expansion of national trade throughout the 1800s motivated the emergence of two additional dimensions of the doctrine: the antidiscrimination principle and the direct/indirect distinction. As to the former, the Court began noting that "attempt[s] to discriminate

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[13] 27 U.S. (2 Pet.) 245 (1829).

[14] *Id.* at 245–46.

[15] *Id.* at 252.

[16] *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 229–30 (1985) (describing the Taney Court's efforts to clarify the dormant commerce clause doctrine as "submerg[ing] the unhappy reader in a torrent of verbiage . . . without providing any meaningful guidance," *id.* at 230, which resulted in "almost total [doctrinal] incoherence," *id.* at 229–30); Denning, *supra* note 4, at 433–34 (noting that the *License Cases* "not only settled nothing, but they actually sowed more confusion," *id.* at 433, and that the *Passenger Cases* "continued the unedifying airing of multiple points of view," *id.* at 434).

[17] 53 U.S. (12 How.) 299 (1852).

[18] *Cooley* indicated that some subjects of commerce regulation "imperatively demand[] a single uniform rule . . . and some . . . imperatively demand[] that diversity, which alone can meet the local necessities of navigation." *Id.* at 319.

[19] 135 U.S. 100 (1890).

[20] Denning, *supra* note 4, at 438; *see also id.* at 435–36.

[21] *Leisy*, 135 U.S. at 119.

[22] *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting) ("To the extent that the 'pre-emption-by-silence' rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of the law.").

[23] *See, e.g.*, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1031 (9th Cir. 2021) (indicating that the principle that "'state regulation of activities that are inherently national or require a uniform system of regulation' violates the dormant Commerce Clause" can be "deemed a 'variation' of the two primary principles of the dormant Commerce Clause" (quoting Rosenblatt v. City of Santa Monica, 940 F.3d 439, 452 (9th Cir. 2019)) (citing South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018))), *aff'd*, 143 S. Ct. 1142 (2023).

injuriously against the products of other States . . . [would operate as] an attempt to fetter commerce among the States."[24] The worry was that "all the evils of discriminating State legislation . . . which existed previous to the adoption of the Constitution, might follow"[25] from expressly protectionist legislation — returning the United States to the very interstate turmoil that the new Constitution had sought to avoid.[26]

As to the latter, the dormant commerce doctrine paralleled the affirmative Commerce Clause doctrine[27] in attempting to distinguish "direct" from "indirect" burdens on interstate commerce, where only the former violated the Constitution.[28] The direct/indirect distinction was employed somewhat imprecisely[29] and eventually fell by the wayside.[30]

B. The Modern Framework

Over time, the doctrine has convalesced around two general principles: the discrimination rule and the *Pike v. Bruce Church, Inc.*[31] balancing test. As the Supreme Court recently reiterated:

> State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." State laws that "regulat[e] 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."[32]

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[24] Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 140 (1869).

[25] Welton v. Missouri, 91 U.S. 275, 281 (1876).

[26] Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1886–93 (2011) (discussing the issue of interstate and retaliatory tariffs in the wake of the Revolutionary War); *see also* Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979) ("[T]he Commerce Clause . . . reflected 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." (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–34 (1949))).

[27] *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1126 (2000) ("Affirmative Commerce Clause doctrine during this period, then, was the flip side of the Court's dormant Commerce Clause jurisprudence.").

[28] Smith v. Alabama, 124 U.S. 465, 482–83 (1888) (finding a statute valid "so far as it affects transactions of commerce among the States . . . only indirectly, incidentally, and remotely, and not so as to burden or impede them," *id.* at 482).

[29] Cushman, *supra* note 27, at 1114–16 (explaining that the distinction sometimes indicated that the subject of regulation did not fall within Congress's commerce power and other times suggested that it *could* be regulated by Congress, but that the state's regulation affected interstate commerce without attempting to directly regulate it).

[30] Denning, *supra* note 4, at 440. A preview to its demise appeared in *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), *overruled by* California v. Thompson, 313 U.S. 109 (1941), where Justice Stone in dissent noted that "the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value." *Id.* at 44 (Stone, J., dissenting).

[31] 397 U.S. 137 (1970).

[32] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018) (citation omitted) (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005); *Pike*, 397 U.S. at 142) (citing S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 779 (1945)).

The first proposition in this formulation is a gloss on the discrimination rule. More precisely, the rule requires that:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.[33]

The second principle emerged after scholars[34] and judges[35] determined that ad hoc balancing might better capture the competing considerations at issue where a law did not have a discriminatory purpose or effect yet still significantly impacted interstate commerce.

The discrimination rule has enjoyed continued vitality. Perhaps given its relatively strong historical grounding,[36] the Court has regularly repeated the holding that states must offer a legitimate interest other than protectionism to justify discriminating against interstate commerce;[37] if a state cannot do so, its law will be struck down.[38] Likewise, it has commonly found that a nondiscriminatory alternative is available to serve the state interest proffered.[39] This pattern seemingly adheres to the proposal that Professor Donald Regan developed in a prominent 1986 article, that "in movement-of-goods cases what the Court should do and is doing is to prevent state protectionism. That and no more."[40]

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[33] Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)) (citing Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957 (1982); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)).

[34] *E.g.*, John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 592 (1936); Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 19–28 (1940).

[35] *See supra* note 30 (discussing Justice Stone's characterization of the earlier formulations as "too mechanical"); *see also S. Pac. Co.*, 325 U.S. at 770–71 ("Hence the matters for ultimate determination here are . . . whether the relative weights of the state and national interests involved are such as to make inapplicable the rule . . . that the free flow of interstate commerce . . . [is] safeguarded by the commerce clause from state interference . . . .").

[36] *See supra* notes 24–26 and accompanying text.

[37] *E.g.*, New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988) ("Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." (citations omitted) (citing *Sporhase*, 458 U.S. 941; Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980); *Dean Milk Co.*, 340 U.S. 349; Maine v. Taylor, 477 U.S. 131 (1986))); *see also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring in the judgment) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); *Taylor*, 477 U.S. at 138).

[38] *See* Wyoming v. Oklahoma, 502 U.S. at 454–55 ("Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978))).

[39] *C & A Carbone*, 511 U.S. at 393 ("Here Clarkstown has any number of nondiscriminatory alternatives . . . ."); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344–45 (1992) ("Less discriminatory alternatives, however, are available to alleviate this concern . . . ."); *Dean Milk Co.*, 340 U.S. at 354 ("It appears that reasonable and adequate alternatives are available.").

[40] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1099 (1986).

By contrast, the balancing test, while formally still alive and well,[41] has largely fallen into disuse. From the outset, some members of the Court looked upon its adoption as an inappropriate expansion of the judicial role.[42] Later, in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[43] Justice Scalia famously complained that though the test was "ordinarily called 'balancing,' . . . the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[44] Since Justice Scalia's *Bendix* concurrence, published two years after Regan's article, "the Court has not struck down a single statute under the dormant Commerce Clause on grounds of burden."[45]

Recently, however, a pair of scholars have sought to revitalize the balancing test. In Bibb *Balancing*,[46] Professors Michael Knoll and Ruth Mason put forth a theoretical refinement on the *Pike* test. They argue that some burden analyses pertain to "single-state burdens, which arise from the application of a single state's law alone," and others pertain to "mismatch burdens, which arise from legal diversity" across state lines.[47] The authors derive the theory from *Bibb v. Navajo Freight Lines, Inc.*,[48] where the Court struck down an Illinois law regulating truck mudflaps in a manner that departed from the prevailing rule in other states.[49]

Acknowledging the Court's inconsistent approach to balancing cases,[50] as well as concerns about institutional competence,[51] Knoll and Mason nonetheless believe balancing tests have an important place in dormant commerce doctrine.[52] They criticize Regan's theory as "insufficient," because even nonprotectionist mismatch regulations "segment the national marketplace."[53] A focus on protectionist intent alone therefore could permit states to engage in "*intentional* regulatory spillovers," so long as those spillovers are not effected specifically to protect in-state industry.[54] This result, they contend, would be at odds with the principles underlying the Commerce Clause and dormant commerce

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[41] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

[42] S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 788 (1945) (Black, J., dissenting) (accusing the Court of acting as a "super-legislature").

[43] 486 U.S. 888 (1988).

[44] *Id.* at 897 (Scalia, J., concurring in the judgment) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[45] *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 301 (2017); *see also id.* at 292. Indeed, Professor Daniel Francis argues that Regan hastened the *Pike* test's decline. *Id.* at 283 (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987)).

[46] Knoll & Mason, *supra* note 5.

[47] *Id.* at 1.

[48] 359 U.S. 520 (1959).

[49] *Id.* at 530.

[50] Knoll & Mason, *supra* note 5, at 9.

[51] *E.g.*, *id.* (citing S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 195–96 (1938)).

[52] *See id.* at 8–9.

[53] *Id.* at 75.

[54] *Id.* at 76.

doctrine.[55] This Note addresses various animating aspects of their arguments as references for key theoretical points.

C. Judicial Review of Morals Legislation

A recent example of regulatory spillover highlights the novel intersection of "morals legislation" and dormant commerce. Knoll and Mason identify a particular California law as an "*intentional* regulatory spillover," citing their view that it "intended to impose California standards on hog farmers outside of California."[56] As the next Part will explain, moral or ethical views *did* play an important role in passage of the law, thus raising the question of how the dormant commerce rule should apply to morality-based legislation.

Before delving into a short survey of the Court's approach to "morals legislation," a brief word on what is meant by "morals legislation" or morality is necessary. In this Note, "morality" is used colloquially: morals legislation is that which reflects the acceptableness of acting in a certain way, not because there are health or safety implications to the behavior, but simply because the majority has deemed it to be "wrong."

Some areas of Supreme Court jurisprudence have clearly addressed "morals legislation." Perhaps most famously, Justice Kennedy's majority opinion in *Lawrence v. Texas*[57] announced — quoting from Justice Stevens's dissent in *Bowers v. Hardwick*[58] — that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[59] But in the wake of Justice Scalia's infamous *Lawrence* dissent — in which he bemoaned "the end of all morals legislation"[60] — many commentators observed that this exaggeration could not be descriptively accurate.[61] Sure enough, the *Lawrence* majority author would write an opinion upholding a statute motivated by moral sentiment only a few years later.[62]

Other cases likewise indicate that public morality may be a legitimate basis for a law under appropriate circumstances. For example, the Court's controlling obscenity rule reflects deference to the moral values

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[55] *Id.*

[56] *Id.* n.350.

[57] 539 U.S. 558 (2003).

[58] 478 U.S. 186 (1986).

[59] *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

[60] *Id.* at 599 (Scalia, J., dissenting).

[61] *E.g.*, Peter de Marneffe, *Sexual Freedom and Impersonal Value*, 7 CRIM. L. & PHIL. 495, 511 (2013) ("Furthermore, even if the *Lawrence* decision did rest on the general principle that majority disapproval cannot justify any sexual restrictions, this principle would still not decree the end of all morals legislation . . . .").

[62] *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (Kennedy, J.) ("Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.").

of the relevant community.[63] And *Washington v. Glucksberg*[64] endorsed moral justifications in permitting Washington's ban on assisted suicide, noting that "condemnation of suicide . . . [is a] consistent and enduring theme[] of our philosophical, legal and cultural heritage[]."[65]

As a matter of common sense, states can legitimately enact policies that primarily serve the moral well-being of their citizens. Multiple states restrict the sale or import of horse meat[66] or the slaughter of horses for human consumption,[67] and every state has at least one animal cruelty law.[68] Taking horse meat as an example, that it is safe for human consumption suggests that state prohibitions reflect moral beliefs about which animals are appropriately used as food.[69] Indeed, criminal laws might often be thought to express moral judgments about behaviors that are or are not acceptable in the relevant society.[70]

The important point is that certain limits exist on the scope of morals legislation — the Constitution itself being one such limit.[71] Cases like *Loving v. Virginia*[72] and *Lawrence* illustrate the fact that a state's morality interests cannot be used to evade the values enshrined in the Equal Protection Clause and the Due Process Clause. Likewise, the First Amendment imposes restrictions on how governments can express moral views that burden speech, expression, and religious exercise.[73]

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[63] *See* Miller v. California, 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)) (describing a three-part test that considers whether a community member would find the depiction "patently offensive" or appealing to "the prurient interest").

[64] 521 U.S. 702 (1997).

[65] *Id.* at 711 (citing Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 17–56 (1985); N.Y. STATE TASK FORCE ON LIFE & THE L., WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 77–82 (1994)).

[66] *E.g.*, CONN. GEN. STAT. § 21a-22 (2023); MINN. STAT. ANN. § 31.621 (2022).

[67] *E.g.*, 225 ILL. COMP. STAT. § 635/1.5(a) (2022); N.J. STAT. ANN. § 4:22-25.5 (West 1998); CAL. PENAL CODE § 598c (2011).

[68] *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/laws-that-protect-animals [https://perma.cc/Q9WJ-L7AJ] ("Each of the 50 states now has a felony animal cruelty law on the books. Each state determines what constitutes cruelty . . . .").

[69] *See* Susanna Forrest, *The Troubled History of Horse Meat in America*, THE ATLANTIC (June 8, 2017), https://www.theatlantic.com/technology/archive/2017/06/horse-meat/529665 [https://perma.cc/WE37-5TDB].

[70] *See, e.g.*, Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 228 (2002) ("However, law and morality work together to control a vast range of behavior; notably, most crimes and torts are not only legally sanctionable but are also thought immoral . . . ."); Richard C. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624, 624 (1942) ("Sociologically speaking, . . . a criminal statute is simply the formal embodiment of someone's moral values (usually the group dominant in political authority) in an official edict . . . .").

[71] To paraphrase Professor Jamal Greene, the real question regarding morals legislation is: When is it too burdensome or unjustifiable? *See* Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 62 (2018).

[72] 388 U.S. 1 (1967).

[73] *E.g.*, United States v. Stevens, 559 U.S. 460, 469 (2010) ("As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding depictions of animal cruelty from 'the freedom of speech' codified in the First Amendment, and the Government points us to none." (citations omitted)); *see also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973).

The issue addressed by this Note is whether and when the dormant commerce clause should operate as such a limit. The petitioners in the *National Pork* case took a stark position: that California's moral interest was merely "illusory" in the context of the *Pike* test.[74] Although ultimately the Justices did not closely analyze this question, the various opinions on the *Pike* issue hint at an approach the Court could take with regard to future morality-based "intentional regulatory spillovers."

II. *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

National Pork concerned a California ballot initiative aimed at alleviating the suffering of farm animals raised for food. Assuming producers in other states abide by California's requirements, the law will have the practical effect of altering production practices in other states, even if those states disagree with the standards. Because the view that California's standards are morally preferable played a role in its passage, the law presented the question of whether and how courts should incorporate moral interests in dormant commerce clause analyses.

A. Proposition 12 and Its Detractors

California passed Proposition 12 on November 6, 2018, with 62.7% of the vote.[75] The ballot measure, known as the Farm Animal Confinement Initiative, established certain minimum space requirements for veal-calf, breeding-pig, and egg-laying-hen enclosures.[76] Proposition 12 was designed to address perceived shortcomings in its predecessor, 2008 California Proposition 2.[77] First, Proposition 12 established minimum space measurements as opposed to only general guidelines based on animal behavior.[78] Second, Proposition 12 aimed to prohibit the sale throughout the state of animal products from animals whose enclosures did not meet the designated standards.[79] As a practical matter, this second alteration would exclude in-state sale of out-of-state animal products that did not meet California's animal welfare standards.

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[74] Brief for Petitioners, *supra* note 5, at 44.

[75] SEC'Y OF STATE ALEX PADILLA, STATEMENT OF VOTE: NOVEMBER 6, 2018 GENERAL ELECTION 16 (2018), https://elections.cdn.sos.ca.gov/sov/2018-general/sov/2018-complete-sov.pdf [https://perma.cc/R9AZ-M7C7].

[76] CAL. PROPOSITION 12: ESTABLISHES NEW STANDARDS FOR CONFINEMENT OF SPECIFIED FARM ANIMALS; BANS SALE OF NONCOMPLYING PRODUCTS. INITIATIVE STATUTE. (2018), https://repository.uclawsf.edu/ca_ballot_props/1377 [https://perma.cc/TW9H-XDAQ].

[77] CAL. PROPOSITION 2: STANDARDS FOR CONFINING FARM ANIMALS. INITIATIVE STATUTE. (2008), https://repository.uclawsf.edu/ca_ballot_props/1282 [https://perma.cc/7RBF-PLHM]; *see also* Sara Amundson, *Voters Must Be Heard on California's Proposition 12*, HUMANE SOC'Y LEGIS. FUND (Dec. 1, 2021), https://hslf.org/blog/2021/12/voters-must-be-heard-californias-proposition-12 [https://perma.cc/VWJ5-4465] ("Proposition 12 built on another ballot measure approved by California voters in 2008, Proposition 2 . . . .").

[78] CAL. HEALTH & SAFETY CODE § 25991(e) (West 2010 & Supp. 2023).

[79] *Id.* § 25990(b).

Proposition 12 was based on multiple local interests.[80] Most interestingly for the purposes of this Note, the law was animated by animal welfare concerns — which seem to be purely moral concerns. As the State asserted in its litigation briefs, "Californians plainly have an interest in whether local grocery stores and other retailers are contributing to a market that they view as *immoral*."[81] Likewise, the ballot initiative committee[82] and various media commentators[83] noted the ethical considerations at play in setting farm animal welfare standards.

The favorable public response did not dissuade meat-industry interest groups from mounting multiple challenges to the law.[84] On October 4, 2019, the North American Meat Institute (NAMI), filed suit against then–California Attorney General Xavier Becerra and others in the Central District of California, alleging that Proposition 12 violated the Commerce Clause.[85] The district court denied NAMI's request for a preliminary injunction[86] but permitted the suit to move past the motion to dismiss stage.[87] A month later, the National Pork Producers Council and the American Farm Bureau Federation filed a similar suit in the Southern District of California,[88] which was subsequently dismissed.[89] The Ninth Circuit affirmed dismissal of the suit.[90]

Although the Supreme Court had previously denied NAMI's petition for a writ of certiorari,[91] the Court granted certiorari in *National Pork Producers Council v. Ross* in March 2022.[92] The grant prompted commentators to wonder about the possible implications of a ruling in favor of the pork producers. Some commentators speculated that the *National Pork* case might impact laws attempting to restrict access to out-of-state

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[80] In addition to the moral interest, health and safety concerns also animated Proposition 12. *See* Brief of American Public Health Ass'n et al. as Amici Curiae in Support of Respondents at 6–7, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468).

[81] Brief for the State Respondents at 45, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) (emphasis added).

[82] *See Campaign Overview*, YES ON 12, https://web.archive.org/web/20230404083438/https://preventcrueltyca.com/campaign-overview.html [https://perma.cc/J9T7-AE8X].

[83] *See, e.g.*, Jan Dutkiewicz & Jeff Sebo, *The Legal Fight over California's Ban on Cruel Animal Cages Will Have National Repercussions*, NEW REPUBLIC (June 29, 2022), https://www.newrepublic.com/article/166932/legal-fight-californias-prop-12-animal-rights [https://perma.cc/J8H8-Z2H4].

[84] The Iowa Pork Producers Association even attempted to sue the California officials in Iowa state court; upon removal to federal court, the suit was promptly dismissed. Iowa Pork Producers Ass'n v. Bonta, No. 21-CV-3018, 2021 WL 4465968, at *3, *12 (N.D. Iowa Aug. 23, 2021).

[85] Complaint for Declaratory and Preliminary and Permanent Injunctive Relief at 1–2, N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (No. 19-cv-08569).

[86] *N. Am. Meat Inst.*, 420 F. Supp. 3d at 1035.

[87] N. Am. Meat Inst. v. Becerra, No. 19-CV-08569, 2020 WL 919153, at *9 (C.D. Cal. Feb. 24, 2020).

[88] Complaint for Declaratory and Injunctive Relief at 5, Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-cv-02324).

[89] *Nat'l Pork*, 456 F. Supp. 3d at 1210.

[90] *Nat'l Pork*, 6 F.4th at 1025

[91] N. Am. Meat Inst. v. Bonta, 141 S. Ct. 2854, 2854 (2021) (mem.).

[92] Nat'l Pork Producers Council v. Ross, 142 S. Ct. 1413, 1413 (2022) (mem.).

abortions.[93] Others raised the possibility that such a ruling might "cast doubt on state laws regulating fuel sources based on their life-cycle carbon emissions or prohibiting the use of certain chemicals in food packaging containers and materials."[94] Given the commonality of state law spillover effects, court watchers anticipated that the Court's resolution of *National Pork* could have significant and far-reaching impacts.

B. The National Pork *Opinion*

At oral argument on October 11, 2022, the Justices gave little away about how the Court might decide the case.[95] However, some moments in the argument fueled speculation about the possible gravity of the outcome.[96] Justice Barrett, for example, asked whether California could prohibit products from companies that don't require vaccination or fund gender-affirming surgery.[97] Justice Kavanaugh raised hypotheticals related to immigrant laborers,[98] minimum wages,[99] and union membership.[100] Justice Alito also pressed the union point.[101] The Justices were concerned about economic Balkanization[102] and retaliation[103] that might result if states were more aggressive in using sale restrictions to influence out-of-state practices.

In the ultimate *National Pork* opinion, the Court flatly rejected the petitioners' extraterritoriality arguments.[104] But the Justices split over how to apply the *Pike* test.[105] In line with the Court's recent practice, the majority reiterated that "'no clear line' separates the *Pike* line of

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[93] *See, e.g.*, Holly Honderich & Anthony Zurcher, *Key Cases to Watch as US Supreme Court Returns*, BBC (Oct. 3, 2022, 7:57 AM), https://www.bbc.com/news/world-us-canada-63122074 [https://perma.cc/3JKS-CXZG] ("The Supreme Court's decision [in *National Pork*] will likely have implications for other laws, like those involving climate change and out-of-state travel for abortions, where states impose burdens on others.").

[94] Wayne D'Angelo, *Supreme Court's Review of California's Proposition 12 Could Have Implications for State Climate, Energy, and Public Health Legislation*, JD SUPRA (Apr. 6, 2022), https://www.jdsupra.com/legalnews/supreme-court-s-review-of-california-s-7058970 [https://perma.cc/K97H-L25E].

[95] *See generally* Transcript of Oral Argument, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468).

[96] *See, e.g.*, *id.* at 96–103.

[97] *Id.* at 96–97.

[98] *Id.* at 99 ("So what about a law that says you can't sell fruit in our state if it's produced — handled by people who are not in the country legally? Is that state law permissible?").

[99] *Id.* at 100.

[100] *Id.* at 101.

[101] *Id.* at 102–03.

[102] *Id.* at 95.

[103] *Id.* at 86, 116.

[104] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157 (2023) ("[N]one of this means . . . that *any* question about the ability of a State to project its power extraterritorially must yield to an 'almost *per se*' rule under the dormant Commerce Clause. This Court has never before claimed so much 'ground for judicial supremacy under the banner of the dormant Commerce Clause.'" (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007))).

[105] For a thorough description of the *National Pork* opinion, see generally *The Supreme Court, 2022 Term — Leading Cases*, 137 HARV. L. REV. 290, 330–39 (2023).

cases from [the Court's] core antidiscrimination precedents."[106] Most of the time, discrimination is the deciding factor, and the *Pike* test simply helps "smoke out"[107] a state's protectionist purpose.

Where the Justices differed was in their view of judicial capacity to balance "economic costs . . . against noneconomic benefits"[108] when an intent to discriminate is not in play. Writing for Justice Thomas, Justice Barrett, and himself, Justice Gorsuch expressed his concern that *Pike* should not be a "roving license for federal courts to decide what activities are appropriate for state and local government to undertake,"[109] since "judges often are 'not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy [the] *Pike*' test."[110] He urged that the questions raised were better directed to Congress[111] — a suggestion promptly taken up by Senator Roger Marshall of Kansas, who introduced the Ending Agricultural Trade Suppression (EATS) Act[112] in the Senate on June 15, 2023. Justice Gorsuch went on — writing for Justices Thomas, Sotomayor, and Kagan — to say that, in any case, the petitioners had failed to establish that Proposition 12 imposed "a sufficient burden . . . to warrant further scrutiny."[113]

But six of the nine Justices felt more confident in the judicial capacity for balancing seemingly incommensurate interests. In her partial concurrence, which was joined by Justice Kagan, Justice Sotomayor "acknowlfedge[d] that the inquiry is difficult and delicate, and [that] federal courts are well advised to approach the matter with caution."[114] But she agreed with Chief Justice Roberts "that courts generally are able to weigh disparate burdens and benefits."[115] For his part, Chief Justice Roberts — writing for Justices Alito, Kavanaugh, and Jackson — explained that "sometimes there is no avoiding the need to weigh seemingly incommensurable values."[116] Indeed, the Court does so frequently under First and Fourth Amendment doctrine.[117]

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106 *Nat'l Pork*, 143 S. Ct. at 1157 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997)).

107 Richard FALLON JR., THE DYNAMIC CONSTITUTION 311 (2d ed. 2013).

108 *Nat'l Pork*, 143 S. Ct. at 1159 (opinion of Gorsuch, J.).

109 *Id.* (quoting *United Haulers*, 550 U.S. at 343).

110 *Id.* (alteration and omission in original) (quoting Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008)).

111 *Id.* at 1160–61.

112 S. 2019, 118th Cong. (2023). The EATS Act would permit individuals to sue to invalidate state laws that "interfer[e] with the production and distribution of agricultural products in interstate commerce." *Id.*

113 *Nat'l Pork*, 143 S. Ct. at 1161 (opinion of Gorsuch, J.).

114 *Id.* at 1166 (Sotomayor, J., concurring in part) (citing *id.* at 1164–65 (majority opinion)).

115 *Id.*

116 *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part) (citing Schneider v. New Jersey, 308 U.S. 147, 162 (1939); Winston v. Lee, 470 U.S. 753, 760 (1985); Addington v. Texas, 441 U.S. 418, 425 (1979)).

117 *See id.* at 1168–69 (referencing *Schneider*, 308 U.S. 147, as an example in the First Amendment context, as well as *Winston*, 470 U.S. 753, and *Addington*, 441 U.S. 418, as examples with regard to

The *National Pork* opinion left the controversy over state moral interests at that higher level of abstraction. Despite the assertion that courts are equipped to compare economic costs against noneconomic benefits, the six Justices holding that position did not further explicate how lower court judges should resolve the particular problem presented: whether a moral benefit was weighty enough to take precedence over an out-of-state seller's access to the state market. In the next Part, this Note sketches a possible compromise approach for dormant commerce clause inquiries into morally motivated legislation, inspired by analogy to prior judicial and legislative treatment of conscience concerns.

III. A DORMANT COMMERCE FRAMEWORK FOR STATE MORAL MOTIVES

Anxieties about the appropriateness of the judiciary weighing seemingly incommensurate interests are perhaps particularly acute when it comes to morality. Though "[t]he dormant commerce clause . . . seems to embody some notion of judicial protection for out-of-state interests,"[118] Regan aptly points out that a broad understanding of the *Pike* balancing test would likely result in a "homogenization of values."[119] Yet freedom of conscience — the right to decide on one's own ethical and moral values — has a long and storied history in American law.

Judicial opinions are littered with language celebrating the liberty interest in being able to act on conscience. In *Wallace v. Jaffree*,[120] a school prayer case, Justice Stevens wrote that "the individual's freedom of conscience [is] the central liberty that unifies the various Clauses in the First Amendment."[121] Chief Justice Hughes's dissent in *United States v. Macintosh*,[122] a conscientious objection case, noted the Court's "regard from the beginning for freedom of conscience."[123] And Justice Roberts in *Cantwell v. Connecticut*[124] said that "[f]reedom of conscience . . . cannot be restricted by law."[125]

Nor is this history unique to the judiciary. Until *Employment Division v. Smith*,[126] the Court applied strict scrutiny to laws that "force[d individuals] to choose between"[127] following their religious beliefs or

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the Fourth Amendment context). Interestingly, Chief Justice Roberts also alluded to a particular free trade view of the dormant commerce clause, saying that the doctrine "reflects the basic concern . . . that there be 'free private trade in the national marketplace.'" *Id.* at 1168 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997)).

118 Regan, *supra* note 40, at 1161.

119 *Id.* at 1166.

120 472 U.S. 38 (1985).

121 *Id.* at 50.

122 283 U.S. 605 (1931), *overruled by* Girouard v. United States, 328 U.S. 61 (1946).

123 *Id.* at 631–32 (Hughes, C.J., dissenting).

124 310 U.S. 296 (1940).

125 *Id.* at 303.

126 494 U.S. 872 (1990).

127 Sherbert v. Verner, 374 U.S. 398, 404 (1963).

receiving government benefits.[128] When *Smith* departed from the *Sherbert-Yoder* test, Congress reacted by passing the Religious Freedom Restoration Act of 1993[129] (RFRA). RFRA criticized *Smith*'s "virtual[] eliminat[ion of] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,"[130] and reimposed strict scrutiny.[131] Worries about burdening religious belief and matters of conscience became widespread in the context of the abortion debate and conscientious objection.[132]

In line with ideals of liberal neutrality,[133] then, the federal government has historically been solicitous to individuals' or corporations' worries about complicity in conduct they view as immoral. Such solicitude makes sense where there are concerns about judges directly assessing the validity of moral beliefs — and perhaps substituting their own views.[134] For example, Professor Stephen Gottlieb previously concluded that the conservatives on the Rehnquist Court had "substituted more personal views of a just world"[135] to impose a particular vision of traditional morality on the country through constitutional law. Other scholars have concluded that liberal Justices have similarly engaged in moral "overreach[]" and failed to engage in "a proper neutrality as between divergent perspectives."[136] Yet, to borrow the words of Professor Samuel Stumpf, "the Court is conscious of its restricted sphere in [the American] system of government."[137] As neutral arbiters (at least in theory), judges generally should not refer to their own moral beliefs to resolve disputes. Accordingly, the Court has tended to avoid directly

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[128] *Id.* at 403–04 ("[T]o withstand . . . challenge, it must be [that] . . . any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'" *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).).

[129] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA was held unconstitutional as applied to the states, *see id.* at 536, but the law still applies to federal action, *see, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014).

[130] 42 U.S.C. § 2000bb(a)(4).

[131] *Id.* § 2000bb-1.

[132] *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2536 n.79 (2015) ("Throughout the 1960s and early 1970s, conscience arguments circulated in debates over war and abortion.").

[133] By which this Note means "the view that the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued." Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 883 (1989).

[134] *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 152–56 (2012).

[135] STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA 62 (2000).

[136] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 408 (2007); *see also id.* at 406–07.

[137] Samuel Enoch Stumpf, *The Moral Element in Supreme Court Decisions*, 6 VAND. L. REV. 41, 42 (1952).

assessing the validity of beliefs or values, instead reviewing only the sincerity with which the belief appears to be held.[138]

A kind of conscience or complicity worry is how California has characterized its citizens' interest in Proposition 12: the law embodies California voters' desire not to "contribut[e] to a market that they view as immoral."[139] If the dormant commerce clause provides grounds for too easily striking down this kind of morality law, it will force the state to participate in conduct it finds ethically repugnant. This suggests that freedom of conscience and religion doctrines might offer a fruitful jumping-off point for evaluating morality justifications under the dormant commerce clause. Of course, analogous treatment raises two important questions: Can a state express a complicity interest? And if it can, how might judges discern whether the stated complicity concern is legitimate?

A. Can a State Be "Complicit"?

There are two ways in which a state's law may invoke a complicity interest. First, and most straightforwardly, states may enact laws based on an interest in preventing individual residents from being complicit in wrongdoing. Prohibitions on "indirect wrongdoing"[140] have long been embodied in law. A classic example is conspiracy, which enables an individual to "be held responsible . . . regardless of whether or not he directly participated in the act."[141] Hearkening back to an earlier example used in this Note, laws banning production or sale of horse meat for human consumption similarly aim to prevent individual producers or sellers from being complicit in a wrong — regardless of whether that individual shares the moral sentiment invoked.

Second, there is an argument to be made that a state, as a collective entity, can itself be complicit in wrongdoing.[142] Recently, much organizing effort has been expended on pressuring collective entities, whether

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138 *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–25 (2014).

139 Brief for the State Respondents, *supra* note 81, at 45; *see also* Brief of Professors Michael Knoll and Ruth Mason as Amici Curiae Supporting Petitioners at 29, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) ("Respondent-intervenors characterize California's interest as ensuring that Californians buying meat do not become morally complicit in the cruel treatment of animals.").

140 Andrew Cornford, *Indirect Crimes*, 32 LAW & PHIL. 485, 485 (2013).

141 Richard B. LeVine, Inc. v. Higashi, 32 Cal. Rptr. 3d 244, 249 (Ct. App. 2005) (quoting 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 44, at 107 (9th ed. 1987)).

142 Although a state is not directly analogous to a corporation, the Supreme Court has already acknowledged the capacity of a collective entity to have a complicity interest by applying RFRA to closely held corporations. As the Court explained in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, "[a] corporation is simply a form of organization used by human beings to achieve desired ends." *Id.* at 706.

corporate,[143] governmental,[144] or social[145] in form, to take actions that are likely to alleviate wrongs. What makes this kind of organizing appropriate is that these groups have coordinated structures for policymaking and enforcement.[146] As a result, the whole of the collective is able to carry out wrongs that would not be possible for an individual member to execute alone. This feature, which Professor Peter French refers to as "conglomerate collectivity,"[147] means that the collective entity can be a moral agent. Where that collective has a moral obligation to prevent some harm and fails to do so, it is morally blameworthy for the failure.[148]

Though not significantly theorized in the realm of domestic constitutional law, problems of state complicity have been analyzed in the context of international law and human rights. For example, an *Annual Review of Political Science* article recently argued that "[s]tates employing privilege violence are more accurately viewed not as weak but as *complicit* in the violence that binds their governing system."[149] And Professor Miles Jackson explored state complicity under international law in a recently published book.[150]

In short, it seems reasonable to think that a state can invoke a complicity interest — on behalf of either itself or its individual citizens — in passing a morally motivated law. The question then becomes: How can courts discern whether a proffered complicity law should be permitted?

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[143] *See* Nadine El-Bawab, *Everytown Launches Campaign Demanding Colleges, Universities Divest from Gun Industry*, ABC NEWS (Jan. 27, 2023, 12:41 PM), https://abcnews.go.com/US/everytown-launches-campaign-demanding-colleges-universities-divest-gun/story?id=96713930 [https://perma.cc/78RP-268Z].

[144] *See* Steve Ahlquist, *Campaign Seeks to Encourage Fossil Fuel Divestment Among RI Municipalities and Non-profits*, UPRISE RI (Mar. 22, 2023, 4:21 PM), https://upriseri.com/esg-campaign-fossil-fuel-divestment-ri-municipalities-non-profits [https://perma.cc/8ZPY-FZCT].

[145] *See* Emily Stewart, *The Problem with America's Semi-Rich*, VOX (Oct. 12, 2021, 8:00 AM), https://www.vox.com/the-goods/22673605/upper-middle-class-meritocracy-matthew-stewart [https://perma.cc/8P35-UKJP] ("I do think the issue is basically a class that has allowed itself to delude itself about the sources of its own privilege, and its main contribution would be in opening its eyes and then living and working more in accordance with what I think was the original inspiration of the class.").

[146] "[L]oosely organized" groups may also achieve collective wrongs, so formalized processes and systems are not a necessary feature. *See* Howard McGary, *Morality and Collective Liability*, 20 J. VALUE INQUIRY 157, 160 (1986) (discussing collective moral liability of social groups).

[147] *See generally* PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984).

[148] Violetta Igneski, *Collective Duties of Beneficence*, *in* THE ROUTLEDGE HANDBOOK OF COLLECTIVE RESPONSIBILITY 447, 448 (Saba Bazargan-Forward & Deborah Tollefsen eds., 2020) ("[W]hen there is evidence that the group of individuals has the necessary capacity to prevent a harm or wrong and the individuals are aware (or should be aware) of this, they have a duty, as a group, to prevent that harm or wrong.").

[149] Rachel Kleinfeld & Elena Barham, *Complicit States and the Governing Strategy of Privilege Violence: When Weakness Is Not the Problem*, 21 ANN. REV. POL. SCI. 215, 216 (2018) (emphasis added).

[150] MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW 3–4 (2015) (offering analytical and normative observations about international rules relating to state complicity).

This is where the analogy to freedom of conscience and freedom of religion doctrine comes into play.

B. When Is a State "Complicit"?

The Justices expressed concern about state abuse of morality claims at oral argument for *National Pork*,[151] and courts do inquire into legislative motive in other areas of constitutional jurisprudence.[152] Accordingly, courts may want to examine state conscience laws for whether the complicity motive is valid.

Fortunately, there is a significant body of philosophical and religious literature that may help draw out what, specifically, "complicity" entails.[153] Essentially, "secondary agents" — those "whose actions do not constitute the principal wrongdoing but are part of a causal chain leading to it"[154] — can engage in "secondary wrongdoing."[155] Chiara Lepora and Professor Robert Goodin explain that:

> How morally blameworthy an act of complicity is is a function of four things: the moral badness of the principal wrongdoing; whether . . . the secondary agent crosses the threshold of moral responsibility for having contributed to it; how much of a contribution his act made (or might make) to the principal wrongdoing; and the extent to which the secondary agent shares the purposes of the principal wrongdoer.[156]

A simplified assessment using this formulation could help answer the question of whether a law like California's is reasonably based on a concern about moral complicity.[157]

The first factor gets at the truth of whether a certain act is in fact morally bad, as well as how bad it is in comparison to other moral wrongs. By analogy to other conscience and religion cases, courts should be deferential to states on this factor, for "'[m]en may believe what they cannot prove.' . . . [C]ourts . . . are not free to reject beliefs because they consider them 'incomprehensible.'"[158] Instead, the question should be

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151 *E.g.*, Transcript of Oral Argument, *supra* note 95, at 96–103.

152 *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.).

153 *See, e.g.*, NeJaime & Siegel, *supra* note 132, at 2522–23 ("The concept of complicity has a richly elaborated theological basis in Catholicism."); CHIARA LEPORA & ROBERT E. GOODIN, ON COMPLICITY AND COMPROMISE 33 (2013); GREGORY MELLEMA, COMPLICITY AND MORAL ACCOUNTABILITY 18–19 (2016).

154 LEPORA & GOODIN, *supra* note 153, at 33.

155 *Id.*

156 *Id.* at 97.

157 Lepora and Goodin's formulation is certainly not the only possibility for assessing whether a valid complicity interest exists.

158 United States v. Seeger, 380 U.S. 163, 184–85 (1965) (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).

whether the moral or religious belief is sincere or genuine,[159] looking at indicators such as legislative history and internal consistency.

The remaining factors, though, are compatible with further probing. For purposes of this Note, it is not necessary to delve deeply into the intricacies of the different factors or how specifically they should be evaluated. It is enough to say that if a state seems to sincerely hold the belief that a particular action is morally wrong, and if there is a voluntary and knowing causal relationship between certain conduct and the wrongful act, the baseline for moral complicity has likely been met. A state would then have reasonable — not illusory — grounds for adopting a conscience law that cuts off the complicity.

C. Complicity and the Pike *Balance*

Concluding that the state's interest is genuine does not terminate the inquiry. There is still the question of how that noneconomic interest weighs against the economic interests apparently embodied in the dormant commerce clause. Here the Court has left open another point: whether the Commerce Clause specifically constitutionalizes a free market *beyond* simply ensuring that states do not intentionally discriminate against out-of-state economic interests.

Chief Justice Roberts's *National Pork* opinion alluded that it might, citing *H.P. Hood & Sons, Inc. v. Du Mond*[160] for the proposition that the U.S. system encourages production by assuring "every farmer and every craftsman . . . that he will have free access to every market in the Nation."[161] Briefing by Knoll and Mason and by the *National Pork* petitioners took the same tack, arguing that "split[ting] the national marketplace along state boundaries"[162] amounts to precisely the economic Balkanization that the dormant commerce clause aims to avoid[163] and that California's law "invite[s] 'tit-for-tat state regulatory conflict' and threaten[s] to transform our 'integrated national market into a patchwork of regulatory regions.'"[164] The *National Pork* briefing drew upon broad language from extraterritoriality cases[165] to suggest this substantive requirement of a uniform market.[166]

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[159] *See id.* at 185 ("But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . .").

[160] 336 U.S. 525 (1949).

[161] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1168 (2023) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Hood & Sons*, 336 U.S. at 539).

[162] Brief of Professors Michael Knoll and Ruth Mason as Amici Curiae Supporting Petitioners, *supra* note 139, at 18.

[163] *Id.*

[164] Brief for Petitioners, *supra* note 5, at 5–6 (quoting Brief of Indiana and Nineteen Other States as Amici Curiae in Support of Petitioners at 13–14, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

[165] *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 326 (1989).

[166] *See, e.g.*, Brief for Petitioners, *supra* note 5, at 18 (quoting Petition for a Writ of Certiorari app. at 7a, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

But there are reasons to doubt that the Commerce Clause stands for such a far-reaching economic position. For one thing, it is in tension with the commitment to federalism embodied in the Tenth Amendment.[167] Because that amendment has been interpreted to preserve states' expansive "police powers" over their internal regulations,[168] the practical reality is that the national marketplace frequently *does* look like a patchwork. A technology company based in California today, for example, must comply with differing privacy regulations in Virginia[169] and Colorado[170] if it wishes to do business in those states. As a result, various Justices have expressed skepticism that the brief text of the Commerce Clause should be read to stringently limit states.[171]

But even supposing the dormant commerce clause *did* stand for an underlying "uniform national regulation" principle, the *Pike* test contemplates departure from the market baseline when the local state interest is sufficiently weighty.[172] Knoll and Mason highlighted this point when they said: "The dormant Commerce Clause does not require national uniformity in all regulation. Instead, it requires that states imposing regulations that generate significant burdens on interstate commerce because those regulations differ from other states' regulations must have sufficient reasons to justify those burdens."[173] Health and safety interests are frequently sufficient to justify burdens on the right of access to a state market.[174] Federal solicitude for freedom of conscience suggests that morality interests should be, too — particularly given that moral belief is not susceptible to validity evaluations like those that resolved the *Bibb* case.[175] Still, this is not to say that states are unequivocally entitled to their so-called morality laws.

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167 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

168 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'" (citing United States v. Morrison, 529 U.S. 598, 618–19 (2000))).

169 VA. CODE ANN. § 59.1-576 (2019).

170 COLO. REV. STAT. § 6-1-1304 (2023).

171 Justice Thomas, for example, has called the dormant commerce clause a "failed jurisprudence." Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), Justice Scalia called it a "quagmire," *id.* at 259 (Scalia, J., concurring in part and dissenting in part) (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)), that "ma[kes] no sense," *id.* at 260.

172 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

173 Brief of Professors Michael Knoll and Ruth Mason as Amici Curiae Supporting Petitioners, *supra* note 139, at 32.

174 *See, e.g.*, Nat'l Ass'n of Optometrists & Opticians v. Brown, 709 F. Supp. 2d 968, 973–74 (E.D. Cal. 2010) (applying *Pike* balancing test and upholding health regulations).

175 *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529–30 (1959).

IV. When Morals Legislation Is Not Morals Legislation

The implications of this argument may raise a number of concerns. First, perhaps states might attempt to use morality as a get-out-of-commerce-free card, labeling issues that really amount to policy preferences as "moral" to limit judicial review. Second, perhaps states could use a claimed moral motivation as cover for retaliatory activity. Third, perhaps broad power to enact legislation based on complicity concerns will further enable states to pass laws facilitating discrimination or restricting access to abortion. Finally, perhaps large states like California might now be able to "force other States to regulate in accordance with . . . idiosyncratic state demands,"[176] effectively imposing on smaller states what those states perceive to be ethically repugnant requirements.

The proposed approach leaves courts with options for addressing these worries. Following in the footsteps of Regan's earlier theory, the approach permits courts to consider whether the legislation is primarily retaliatory, protectionist, or coercive.[177] A simplified version of this kind of case can be illustrated using Justice Alito's "right to work" example during the *National Pork* oral argument.[178] If a state banned sales of products created by people who lacked a "right to work," the framing of the ban in terms of another state's statutory rights looks more like policy coercion — raising worries of infringement on state autonomy — than like an ethical concern. Likewise, the complicity inquiry could investigate whether the enacting state's rule is germane enough to the barred product or practice to create a risk of complicity; if not, the dormant commerce clause might pose a barrier. This analysis might resemble the Spending Clause rule: if the banned conduct is not clearly related to the product targeted by the legislation, the law would be an illegitimate attempt to exercise the conscience exception.[179] For example, with Proposition 12, the poorly treated animal literally *is* the banned product.[180] On the other hand, states likely cannot leverage regulations of consumer products against companies that also provide access to abortion or gender-affirming care, because those services are not component parts of the companies' products.

In short, the concern in these policy coercion and retaliation cases is not the fact of the regulatory mismatch; rather, it is about *intent*. Knoll and Mason implicitly accept this point: their dissatisfaction with California's law is that it "suppl[ies] the states with a roadmap"[181] for segmenting the market and engaging in "severe *intentional* regulatory

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176 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1174 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

177 *See* Regan, *supra* note 40, at 1099.

178 Transcript of Oral Argument, *supra* note 95, at 102–03.

179 *Cf.* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

180 *See* CAL. HEALTH & SAFETY CODE § 25990(b) (West 2010 & Supp. 2023).

181 Knoll & Mason, *supra* note 5, at 75.

spillovers."[182] Intentional regulatory spillovers are state laws that "can be understood as intended to impose [the enacting state's] standards on [actors] outside of [that state]."[183] This framing presumes an illegitimate motive. But if states adopt laws based on reasonable concerns about complicity, the intent is not one of infringing on autonomy, even if the practical result is changed practices in other states whose producers wish to preserve access to the enacting state's market.

The more difficult concern to address is that judicial deference to laws based on complicity might enable states to enact legislation further restricting abortion or enabling discrimination. After all, these dormant commerce limits on "morals legislation" would apply equally to all states and policies, regardless of political valence. This Note does not advocate gerrymandering constitutional doctrine to achieve certain policy goals and defeat others. Therefore, to the extent that a judge concluded that a policy was motivated by sincere moral belief, the policy would be entitled to this more deferential standard under the dormant commerce clause. One kind of response to this concern — albeit one that is not entirely satisfying — is that perhaps the dormant commerce doctrine is not the appropriate vehicle for challenging these types of laws. That is to say: even if a state is concerned about complicity of some kind, any law it passes must comport with the First Amendment,[184] the Due Process Clause,[185] and the Equal Protection Clause.[186] Thus, majoritarian judgments still cannot impose a particular religious belief system statewide, they will be hard-pressed to justify categorization based on protected identities, and they cannot invade too far into the realm of privacy protected by the Fourteenth Amendment.

Finally, state-level complicity laws feel different from what Professors Douglas NeJaime and Reva Siegel have previously described as use of religious exemptions to "preserve traditional morality."[187] They explain that these exemptions arose as an alternative to "entrench[ing] traditional morality through laws of general application" once the movement no longer commanded a political majority.[188] But here there is no federal law of general application from which states seek exception; instead, there is only a soft presumption of regulatory uniformity for interstate commerce that health and safety concerns frequently rebut.

In the case of Proposition 12, the pork producers sought to "*resist* legal settlement of conflict"[189] by constructing a tool for ongoing contestation of social norms that have won out in the political process of the

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182 *Id.* at 76.
183 *Id.* n.350.
184 U.S. CONST. amend. I.
185 *Id.* amend. V.
186 *Id.* amend. XIV.
187 NeJaime & Siegel, *supra* note 132, at 2543.
188 *Id.*
189 *Id.* at 2559.

relevant state.[190] Proclaiming that they simply hold a different moral view from California's,[191] the pork producers believed that the opposing moral viewpoints should cancel out.[192] But the crucial point is that other states and producers outside California need not make any changes if they are morally opposed to California's position. They can simply decline to distribute products to California.[193] The changes must be made only if the producers conclude that access to the market is worth transitioning to the production format required.[194]

The backstop for state ethical experimentation is Congress,[195] not the courts. Courts are reasonably well equipped to consider legislative motivation, helping to explain the general agreement about the dormant commerce clause's discrimination principle.[196] When it comes to the types of mismatch regulations that the pork producers targeted,[197] courts can apply the same skillset to ascertain whether a given regulation is based on a genuine concern about complicity and moral responsibility. But courts should not be in a position to choose between different substantive moral positions based on an inchoate balancing test. Instead, the question should be whether the state has a genuine and well-founded conscience concern underlying its law.

CONCLUSION

One beauty — and challenge — of federalism is that states may deviate ethically from one another. In resolving the petitioners' dormant commerce clause challenge, the *National Pork* Court stopped short of providing guidance to lower courts on how, precisely, to incorporate moral interests into a dormant commerce analysis. Still, six of the Justices agreed that judges need not decline to balance incommensurate interests. This Note suggests that concerns about judges freely balancing moral interests against economic ones are valid and that courts could take inspiration from freedom of conscience and freedom of religion rules to limit the scope of a dormant commerce clause inquiry.

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190 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 88, at 5.

191 *Id.* at 4–5.

192 *Id.* at 5.

193 This decision would admittedly come with significant costs to the producers, but the fact of the matter is that producers are not entitled to the specific type of market that is ideal to their interests. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1162 (2023) (opinion of Gorsuch, J.) (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978)).

194 Besides, as the Court previously held in another context, the government cannot artificially create a market for goods that consumers do not want. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.). This disfavors use of the dormant commerce clause to force creation of a market for goods that California voters have deemed undesirable.

195 *See, e.g.*, Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023).

196 *See, e.g.*, *Nat'l Pork*, 143 S. Ct. at 1152–53 (quoting, inter alia, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)) (discussing the antidiscrimination principle in the Court's Commerce Clause jurisprudence).

197 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 88, at 71.