Loyola University Chicago Law Journal

Volume 55
Issue 5 *Online*

Article 3

2024

National Pork Producers Council v. Ross: Reining in the Dormant Commerce Clause, Pushing the Limits of State Sovereignty

Jessica Kowalski
Loyola University Chicago Law School

Note

National Pork Producers Council v. Ross: Reining in the Dormant Commerce Clause, Pushing the Limits of State Sovereignty

Jessica Kowalski[*]

The dormant Commerce Clause is one of the oldest constitutional doctrines in the United States and is essential in maintaining equal sovereignty among the states. While the doctrine has been substantially refined since it was first recognized, it had gone largely unchanged in recent years, until a controversial California law required further clarification of its scope.

In National Pork Producers Council v. Ross*, the Supreme Court considered whether a California law prohibiting the in-state sale of pork produced in cruel conditions was constitutional under the dormant Commerce Clause. The Court ultimately upheld the California law, holding that a regulation that generates an in-state moral benefit—to the detriment of out-of-state businesses—does not discriminate against interstate commerce in the manner proscribed by the dormant Commerce Clause.*

In Part I, this Note traces the historical development of the dormant Commerce Clause doctrine, beginning with its origin and leading to the modern understanding of the doctrine prior to National Pork*. Part II discusses the facts and procedural history of* National Pork*, and summarizes the reasoning of the majority, plurality, concurring, and dissenting opinions. Part III explores each analytical step taken by the Court in reaching its decision, considering the strength of the Court's policy reasoning as well as its adherence to precedent. Part IV considers the impact of the decision on the scope of the dormant Commerce Clause and anticipates how the decision may complicate the regulation of various industries beyond pork production. Ultimately, this Note concludes that the Court correctly clarified the scope and limitations of the dormant Commerce Clause in invalidating independent state regulations while preserving the doctrine's primary purpose.*

* J.D. Candidate, Loyola University Chicago School of Law, Class of 2025. I would like to thank the editors of the *Loyola University Chicago Law Journal* for their dedication and support.

INTRODUCTION

The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States . . . ."[1] This provision has been interpreted as granting Congress the authority to regulate the channels and instrumentalities of interstate commerce, as well as intrastate economic activities which substantially affect or substantially relate to interstate commerce.[2] Beyond this express provision of authority to Congress, the United States Supreme Court has also consistently interpreted the Commerce Clause as including a further, negative command—known as the "dormant" Commerce Clause—prohibiting the enactment of state regulation that discriminates against interstate commerce, even where Congress had failed to enact federal legislation preempting the particular issue.[3]

Under the dormant Commerce Clause doctrine, a state regulation will be found to discriminate against interstate commerce if it bolsters or protects in-state economic interests at the expense of out-of-state economic interests on its face.[4] For example, in *Tennessee Wine & Spirit Retailers Association v. Thomas*, the Supreme Court struck down a state law that required a certain duration of in-state residency before a retail alcohol license could be issued or renewed, finding that this law violated the dormant Commerce Clause on its face because it unfairly and

1. U.S. CONST. art. I, § 8, cl. 3.

2. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (describing the three categories congress may regulate under its commerce power); *see also* United States v. Morrison, 529 U.S. 598, 608–09 (2000) (same).

3. *See* James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 A.L.R. Fed. 2d Art. 1, § 2 (2009) ("The United States Supreme Court has consistently construed the Commerce Clause to imply a further command, known as the negative or 'dormant' Commerce Clause, prohibiting certain state regulation even when Congress has failed to legislate on the subject." (citing Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995))); *see also* Karen L. Schultz, *State Laws Discriminating Against Interstate Commerce Under Dormant Commerce Clause*, 152 AM. JUR. 2D *Commerce* § 95 (2023) ("The Commerce Clause has an implied requirement, called the 'dormant Commerce Clause,' that limits the power of the states to discriminate against interstate commerce by forbidding differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (citing Yerger v. Massachusetts Turnpike Auth., 395 Fed. App'x 878 (3d Cir. 2010))).

4. *See* Guy v. City of Baltimore, 100 U.S. 434, 443 (1879) (explaining the police powers of States); *see also* 15 C.J.S. *Commerce* § 60 (2024) (explaining that "discrimination" against out-of-state business under the dormant Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," and that facially-discriminatory state laws are "almost always invalid" (first citing Granhold v. Heald, 544 U.S. 460 (2005); and then citing Chicago Wine Co. v. Holcomb, 532 F. Supp. 3d 702 (S.D. Ind. 2021))).

unjustifiably restricted the ability of out-of-state residents to conduct business in the state.[5]

Even a facially neutral state law is not permitted to exhibit discrimination in its practical effect if its putative local benefits do not outweigh the burden it imposes upon interstate commerce.[6] For example, in *Bibb v. Navajo Freight Lines, Inc.*, the Supreme Court held that a state law requiring that trucks and trailers traveling within the state use a certain type of mudguard was unconstitutionally burdensome to interstate commerce under the dormant Commerce Clause.[7] The Court explained that while the law was not facially discriminatory against out-of-state interests, its putative local benefits did not outweigh the burdens it imposed upon interstate commerce.[8] These burdens included increased costs, labor, delays, and danger for out-of-state drivers who needed to pass through the state to transport goods.[9]

Even in light of the Supreme Court's precedents regarding what kinds of state laws may violate the dormant Commerce Clause, prior to the Court's decision in *National Pork Producers Council v. Ross*,[10] the extent to which a state could enact nondiscriminatory laws that would substantially affect out-of-state commerce was unclear and, therefore, led to a circuit split.[11] The issue in *National Pork* was whether state-enacted legislation regulating products sold within the state based upon moral

5. Tenn. Wine & Spirit Retailers Ass'n v. Thomas, 139 S. Ct. 2249, 2474, 2476 (2019).

6. *See* Necheles & Simmons, *supra* note 4 (explaining that a seemingly nondiscriminatory state law may still be invalid if its "practical effect" is discrimination against interstate commerce); *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

7. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 521–22, 530 (1959).

8. *See id.* at 529 ("This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce.").

9. *See id.* at 525, 527 (describing the high costs of purchasing and installing mudguards on the vehicles).

10. Nat'l Pork Producers Council (*Nat'l Pork*) v. Ross, 143 S. Ct. 1142 (2023).

11. *See* Emma Horne, Note, *Eating High on the Humanely Raised Hog: State Bans on Selling Food Produced Using Cruel Animal Farming Methods Do Not Violate the Dormant Commerce Clause*, 107 CORNELL L. REV. 1137, 1160–63 (2022) (discussing the circuit split on the constitutionality of regulation of out-of-state production methods for products sold in-state); *see also* Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) (noting that "the scope of permissible state regulation in areas of congressional silence" has often been a "controversial" area of law).

values violated the dormant Commerce Clause when such legislation significantly impacted out-of-state producers of such products.[12]

Specifically, the National Pork Producers Council challenged a California law known as "Proposition 12," which prohibits the in-state sale of pork products made from breeding pigs, or their offspring, raised in cruel confinement.[13] The law defined cruel confinement, subject to certain exceptions, as confinement which prevents a pig from "l[ying] down, stand[ing] up, fully extend[ing] [its] limbs, and turn[ing] around freely" or which involves an enclosure providing less than "twenty-four square feet of usable floorspace per breeding pig."[14] The *National Pork* Court held that Proposition 12 was constitutional under the dormant Commerce Clause, reasoning that it did not discriminate against, nor impose a substantial burden upon, interstate commerce and noting that no "per se" rule exists to prohibit states from enacting nondiscriminatory regulations which have *any* sort of extraterritorial impact upon out-of-state businesses.[15]

The *National Pork* decision is notable because it clarifies the limits upon states' ability to independently legislate under the dormant Commerce Clause and will have far-reaching implications for the ability of a state to enact regulations that affect nationwide industries, not limited to farmed animals and meat products—including abortion-related medication, environmental policies, technology, and more.[16]

---

12. *See Nat'l Pork*, 143 S. Ct. at 1149, 1152 (majority opinion) ("Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States.").

13. *Id.* at 1150–51; *see also* CAL. CODE REGS. tit. 3, § 1322.1(a) (2023) ("No person shall knowingly engage in a commercial sale within the state of whole pork meat for human food if the whole pork meat is the product of a breeding pig, or the product of the immediate offspring of a breeding pig, that was confined at any time during the production cycle for said product in an enclosure that fails to comply with the [ ] standards . . . .").

14. CAL. CODE REGS. tit. 3, § 1322.1(a) (2023) (listing the requirements for the confinement of breeding pigs); *see Nat'l Pork*, 143 S. Ct. at 1150–51 (majority opinion) (citing CAL. HEALTH & SAFETY CODE § 25990(b)(2) (West 2018)).

15. *Nat'l Pork*, 143 S. Ct. at 1150 (majority opinion).

16. *See* J. Michael Showalter et al., *Supreme Court 2023 Highlights—Administrative and Environmental Law*, NAT'L L. REV. (July 12, 2023), https://www.natlawreview.com/article/supreme-court-2023-highlights-administrative-and-environmental-law [https://perma.cc/55F3-KBB4] (noting that "[t]his type of state regulation could present businesses with significant obstacles and difficult choices when they wish or need to participate in multiple state markets, but those states have conflicting laws for compliance"); *see also* Kaelan Deese, *Supreme Court Upholding California Pork Producer Law Could Affect Abortion Pill Suit*, WASH. EXAM'R (May 28, 2023, 10:00 AM), https://www.washingtonexaminer.com/policy/courts/scotus-pork-producer-ruling-impact-abortion-pill-suit [https://perma.cc/34PD-FM6L] (explaining that the *National Pork* decision could be used to refute a dormant Commerce Clause challenge to a state ban on abortion); Mary Zeigler, *A California Animal Welfare Case May Be a Loss for Reproductive Rights*, BOS. GLOBE (May 12,

This Note will argue that *National Pork* was correctly decided, based upon its consistency with the Court's precedent in previous dormant Commerce Clause challenges to facially neutral state laws impacting out-of-state commerce, and upon the well-established impropriety of a court's second-guessing of a state legislature's decision-making on moral issues; however, while this decision will likely have the positive effect of decreasing the prevalence of cruel farming practices across the country, it will also have complex effects on other key industries across the nation.

Part I of this Note analyzes the background and development of the Supreme Court's dormant Commerce Clause jurisprudence, explaining key cases that contributed to the Court's modern interpretation of the doctrine. Part II discusses the facts, procedural history, and central issues of *National Pork*. This Part also explains the majority, plurality, dissenting, and concurring opinions in the splintered decision.[17]

Part III analyzes each opinion in *National Pork* and discusses the consistency of each opinion with the Court's previous dormant Commerce Clause precedents. This Part discusses the Justices' various interpretations of the extraterritoriality doctrine, the proper application of the *Pike v. Bruce Church, Inc.* balancing test, the Court's ability to apply *Pike* balancing to the facts presented in *National Pork*, and requirements for adequately pleading the imposition of a substantial burden on interstate commerce. Part IV anticipates the impacts of the *National Pork* decision on the pork industry and other industries. This Part also discusses remaining legal doctrines, which may undercut states' broadened ability under *National Pork* to enact legislation regulating out-of-state conduct.

I. BACKGROUND

The dormant Commerce Clause has been substantially altered and refined in the centuries since it was first recognized. Section I.A will

---

2023, 11:59 AM), https://www.bostonglobe.com/2023/05/12/opinion/scotus-ross-pork-abortion-ramifications [https://perma.cc/U6LG-UV7R] ("[T]his win for animal welfare may also pose a threat to reproductive rights."); Michael H. Sampson, Opinion, *From Trailers to Marijuana—Or, How the Dormant Commerce Clause Became Sexy*, PITT. JEWISH CHRON. (July 13, 2023, 3:51 PM), https://jewishchronicle.timesofisrael.com/from-trailers-to-marijuana-or-how-the-dormant-commerce-clause-became-sexy [https://perma.cc/HB7U-CER7] (discussing the potential impact of the *National Pork* decision on other industries, including cannabis and modern technology industries).

17. *See* Mark Joseph Stern, *The Supreme Court's Pork Decision Fractured the Justices in the Weirdest Way Possible*, SLATE (May 11, 2023, 4:37 PM), https://slate.com/news-and-politics/2023/05/supreme-court-pork-decision-weird-justices.html [https://perma.cc/Y8JX-99QJ] (explaining that after the *National Pork* Court concluded that Proposition 12 was not discriminatory and rejecting the extraterritoriality doctrine, "the majority scrambled like an egg" into various plurality opinions).

provide context regarding the origin and early development of the doctrine, discussing Supreme Court decisions regarding the doctrine from its inception through the 1980s. Section I.B will discuss the modern view of the doctrine as it was understood immediately prior to *National Pork*.

A. Origins and Development of the Dormant Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the power to "regulate commerce . . . among the several states,"[18] however, the Supreme Court has held that in addition to this positive grant of regulatory power, the Commerce Clause also "contain[s] a further, negative command" forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject."[19] This restriction, known as the dormant Commerce Clause, prevents states from enacting laws that discriminate against the economic interests of other states; its primary goals are to allow states to maintain equal levels of independence and to promote free trade among the states.[20]

The Supreme Court first suggested that the dormant Commerce Clause could potentially bar certain types of state regulation in *Gibbons v. Ogden*, noting that the power to regulate interstate commerce is "exclusively vested in Congress" and is in "no part" exercised by a state.[21] Several subsequent cases reinforced and built upon the notion that states may not regulate interstate commerce until, ultimately, the Court specifically held for the first time in *Guy v. City of Baltimore* that it is unconstitutional for a state to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states."[22] The *Guy* Court, however, also noted that it is nevertheless within a state's "police powers" to "exclude from its territory . . . any articles which, in its judgment, fairly exercised" are harmful to its citizens, so long as this

18. U.S. CONST. art. I, § 8, cl. 3. For a discussion of the powers granted to Congress by the Commerce Clause, see *supra* notes 1–7 and accompanying text.

19. *Nat'l Pork*, 143 S. Ct. at 1152 (majority opinion) (quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).

20. *See* Michael S. Knoll & Ruth Mason, *National Pork is a* Bibb *Case, Not a* Pike *Case*, 91 GEO. WASH. L. REV. ARGUENDO 1, 3 (2022) (noting that purposes behind the dormant Commerce Clause include preventing state regulations from "spill[ing] over to other states" and to "maintain the independence and autonomy of each state"); *see also* Horne, *supra* note 11, at 1153 ("To combat fears that states will pass laws 'designed to benefit in-state economic interests by burdening out-of-state competitors' if Congress has not regulated the market, the so-called Dormant Commerce Clause was born." (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008))).

21. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824) ("The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.").

22. Guy v. City of Baltimore, 100 U.S. 434, 443 (1879).

exclusion is not discriminatory.[23] This concept arising from *Guy*, known as the "antidiscrimination principle," has since been recognized as "the 'very core' of" the Supreme Court's "dormant Commerce Clause jurisprudence."[24]

A century's worth of precedent shows that state laws are consistently held unconstitutional for overtly discriminating against out-of-state commerce. For example, courts regularly strike down price-fixing and price-affirming laws, which impose greater costs on out-of-state businesses or products than on the same in-state businesses or products, for discriminating against out-of-state businesses.[25] Facially discriminatory laws, however, are not the only state laws subject to challenges under the dormant Commerce Clause; under this framework, even facially neutral state laws must not have unjustified discriminatory effects upon out-of-state economic interests to be deemed constitutional under the dormant Commerce Clause.[26]

Solidifying this prohibition on facially neutral state laws which have the practical effect of discriminating against out-of-state businesses, the Court in *Pike v. Bruce Church, Inc.* struck down a facially nondiscriminatory state law requiring cantaloupes sold in-state to be grown, processed, and packed in-state;[27] though, the law did not overtly impose a burden upon out-of-state business, its "practical effects" revealed discrimination against out-of-state business, the "putative local benefits" of which did not outweigh this burden.[28] However, in the subsequent case of *Exxon Corp. v. Governor of Maryland*, the Court upheld a Maryland law prohibiting petroleum producers from operating gas stations in the state, holding that the complaint failed to demonstrate a substantial

23. *Id.*

24. *See Nat'l Pork*, 143 S. Ct. at 1153 (majority opinion) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).

25. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking down a New York law prohibiting out-of-state dairy farmers from selling milk in-state for a lower price than the minimum price guaranteed to in-state producers under New York law); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) (striking down a New York law requiring liquor distillers to regularly affirm that their in-state prices were not greater than their out-of-state prices); Healy v. Beer Inst., 491 U.S. 324 (1989) (striking down a Connecticut law that required out-of-state beer sellers to affirm that their in-state prices were not greater than their out-of-state prices); Edgar v. MITE Corp., 457 U.S. 624 (1982) (striking down an Illinois law requiring shareholders making tender offers to certain businesses organized under Illinois laws to register with the Illinois Secretary, irrespective of their location).

26. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (noting the "general rule" for facially neutral state laws which have the practical effect of discriminating against interstate commerce).

27. *Id.* at 146.

28. *Id.* at 138–40, 142.

burden on interstate commerce.[29] Distinguishing its holding in *Exxon* from *Pike*, the Court explained that because Maryland had no in-state petroleum producers, there was no evidence to show that its regulation bolstered in-state business at the expense of out-of-state business by design—as there was no in-state business to bolster.[30] Instead, the Court determined that the law's practical effect was merely to shift market share in the state from one set of out-of-state businesses (i.e., "vertically integrated" gas stations) to another (i.e., non-vertically integrated gas stations); it still welcomed out-of-state competition from gas stations, so long as they did not also produce petroleum.[31] An additional caveat was, therefore, added to the dormant Commerce Clause doctrine: while the doctrine does protect "the interstate market . . . from prohibitive or burdensome regulations,"[32] it does not protect a given business or industry's "particular structure or methods of operation."[33]

Further complicating its interpretation of the dormant Commerce Clause, in *Edgar v. MITE Corp.*, the Court also seemed to recognize an "extraterritoriality doctrine" under the dormant Commerce Clause.[34] Under this extraterritoriality doctrine, state law is invalid under the dormant Commerce Clause if it regulates or has the "practical effect" of regulating "wholly out-of-state" conduct, regardless of whether such conduct actually discriminates against out-of-state economic interests.[35] The extraterritoriality doctrine, however, has been strenuously criticized by legal scholars and courts alike, as its application has become increasingly arduous and impractical in today's "borderless" national economy.[36]

29. Exxon Corp. v. Governor of Md., 437 U.S. 117, 121, 125–26 (1978).

30. *Id.* at 125.

31. *Id.* at 127.

32. *Id.* at 127–28.

33. *Id.* at 127; *see also* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 (2023) (majority opinion) (reiterating the Court's holding in *Exxon Corp.*).

34. Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982); *see* Horne, *supra* note 11, at 1157–58 ("The plurality opinion in *Edgar* is the oft-cited origin of the extraterritoriality doctrine.").

35. *Edgar*, 457 U.S. at 642–43 (quoting Southern Pacific Co. v. Ariz., 325 U.S. 761, 775 (1945)); *see also* Horne, *supra* note 11, at 1158 ("Under the extraterritoriality doctrine, a state law violates the Dormant Commerce Clause if it either regulates wholly out-of-state commerce, or has that 'practical effect.'" (quoting *Edgar*, 457 U.S. at 642–43)).

36. *See* Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 6, 9, 19, Frosh v. Ass'n for Accessible Meds., 139 S. Ct. 1168 (2019) (No. 18-546) (explaining that application of the extraterritoriality doctrine may be unreasonable in "today's sophisticated borderless economy"); *see also* Horne, *supra* note 11, at 1158–59 (discussing modern concerns with the soundness of the extraterritoriality doctrine); Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172–74 (10th Cir. 2015) (opinion written by Justice Gorsuch prior to sitting on the Supreme Court, criticizing extraterritoriality doctrine as being superfluous); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377–78 (6th Cir. 2013) (Sutton, J., concurring) (concluding that "the extraterritoriality doctrine . . . is a relic of the old world with no useful role to play in the new," and that extraterritoriality

Throughout these clarifications and developments in the Court's interpretation of the dormant Commerce Clause, confusion persisted regarding what specific test courts should use when analyzing a given dormant Commerce Clause challenge to a non-facially discriminatory state law.[37]

B. Modern View of the Dormant Commerce Clause

In 2018, the Supreme Court attempted to summarize the modern, two-part test to use in analyzing dormant Commerce Clause claims in *South Dakota v. Wayfair, Inc.*, stating that "[f]irst, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[38] The Court in *South Dakota* explained that state laws which overtly discriminate against interstate commerce face a "virtually *per se* rule of invalidity"—while seemingly neutral, non-facially discriminatory state laws which nonetheless impose a burden upon interstate commerce will be subject to the balancing test adopted by the Court in *Pike*, comparing the "burden imposed on [interstate commerce]" with the "putative local benefits" of the law.[39] Therefore, "[t]oday, this antidiscrimination principle lies at the 'very core' of [the Court's] dormant Commerce Clause jurisprudence," such that a state cannot seek to enhance its own economic interests by burdening those of other states.[40] In sum, a state law which overtly discriminates against out-of-state businesses, such as by mandating higher or lower prices for goods produced out-of-state, will be decidedly unconstitutional under the dormant Commerce Clause.[41] On the other hand, a

doctrine "has nothing to do with" the in-state favoritism targeted by the dormant Commerce Clause); *cf.* Tyler L. Shearer, Note, *Locating Extraterritoriality: Association for Accessible Medicines and the Reach of State Power*, 100 B.U. L. REV. 1501, 1507 (2020) (recognizing the "lack of jurisprudential fit between the extraterritoriality doctrine's rule and its purported objectives," but arguing that if the doctrine is understood as preserving state sovereignty, it "gains much needed coherence").

37. For a discussion of the remaining controversy and circuit split regarding the scope of states' ability to regulate the out-of-state production of products sold in-state, see *supra* note 11. *See also* Ian Millhiser, *The Supreme Court Rediscovers Humility—In a Case About Pigs*, VOX (May 11, 2023, 1:55 PM), https://www.vox.com/politics/2023/5/11/23719825/supreme-court-pigs-california-national-pork-producers-ross-neil-gorsuch [https://perma.cc/YXG6-ASXD] ("[T]he Court has often struggled to articulate where, exactly, the Dormant Commerce Clause kicks in and state laws that impact the economies of other states must fall.").

38. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

39. *Id.* (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005)).

40. Nat'l Pork Producers Council (*Nat'l Pork*) v. Ross, 143 S. Ct. 1142, 1153 (2023) (majority opinion) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).

41. For examples of state laws found to purposefully and facially discriminate against out-of-state businesses, see *supra* note 25.

seemingly neutral, yet practically discriminatory, state law that has the practical effect of imposing a "substantial burden" on interstate commerce will be subject to a *Pike* balancing test, under which the Court will weigh the local benefits advanced by the law against the burdens it imposes upon out-of-state economic interests; if a court finds that the burdens outweigh the benefits, the state law will be deemed unconstitutional.[42]

II. DISCUSSION

In a fractured series of majority, plurality, concurring, and dissenting opinions, all of the Justices agreed with the rejection of the petitioners' proposed "almost per se" rule. However, the Justices disagreed on whether the petitioners had alleged a substantial burden on interstate commerce, and if so, on whether a court may properly weigh the moral in-state benefits of a law against its economic out-of-state harms within the dormant Commerce Clause framework. The majority opinion held that the petitioners had not alleged a substantial burden on interstate commerce. However, five of the Justices would have held that the petitioners had alleged such a burden. Further, five of the Justices opined that an economic burden can be weighed against a moral benefit.

First, Section II.A of this Note will explain the facts, procedural history, and issue considered in *National Pork*. Section II.B will then discuss the majority's reasoning in rejecting the petitioners' proposed "almost per se rule" and Petitioners' argument under *Pike*. It will also explain the position of the plurality joined by Justices Thomas and Barrett in part IV-B of the opinion that only economic benefits and burdens may be weighed against one another under the dormant Commerce Clause. Next, it will discuss the view of the plurality in part IV-C of the opinion, joined by Justices Thomas, Sotomayor, and Kagan, which expanded upon the reasons for which Proposition 12 imposed no substantial burden on interstate commerce. Finally, it will discuss the plurality in part IV-D of the opinion, joined by Justices Thomas and Barrett, which addressed the lead dissent.

Sections II.C and II.D of this Note will then address the concurring opinions by Justices Sotomayor and Barrett. Section II.C will discuss Justice Sotomayor's view that the petitioners' claim should be rejected because of their failure to allege a substantial burden on interstate commerce, not because courts cannot weigh economic burdens against noneconomic benefits under *Pike*. Section II.D will explain Justice Barrett's opposite position that while the petitioners did plausibly allege

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

a substantial burden on interstate commerce, the moral benefits and economic burdens associated with Proposition 12 are not suitable for judicial balancing.

Finally, Sections II.E and II.F will discuss the concurring in part and dissenting in part opinions by Chief Justice Roberts and Justice Kavanaugh. Section II.E will explain the view of Chief Justice Roberts (the "lead dissent") that the petitioners did plausibly allege a substantial burden on interstate commerce because the costs of Proposition 12 go beyond mere compliance costs. Section II.E will also discuss the lead dissent's argument that Proposition 12 effectively forces the nationwide pig production industry to comply with California's requirements. Section II.F will then explain Justice Kavanaugh's concerns that upholding Proposition 12 will encourage states to enact future laws imposing their moral values on out-of-state industries.

A. Facts, Procedural History, and Issue

At issue in *National Pork* was the constitutionality of California's Proposition 12 law.[43] In 2018, California passed Proposition 12, with the support of about 63 percent of participating voters, to prohibit the sale in California of pork from pigs raised in cruel conditions.[44] It was undisputed by all parties that Congress could have regulated the interstate trade of pork; however, Congress had not done so, and there was no federal statute or regulation on point to displace Proposition 12.[45] Shortly after the California law was adopted, the National Pork Producers Council and the American Farm Bureau Federation (Petitioners) sued Karen Ross, in her capacity as the Secretary of the California Department of Food and Agriculture (Respondent), on behalf of their members who raise and process pigs to make pork products, arguing that the law unconstitutionally burdens interstate commerce.[46] Because California imports almost all of the pork it consumes, Petitioners argued that out-of-state businesses would bear most of the compliance costs of Proposition 12.[47] Petitioners

43. *See Nat'l Pork*, 143 S. Ct. at 1149–50 (majority opinion) (discussing the issue of Proposition 12 before the Court).

44. *Id.* at 1150; *see also* CAL. HEALTH & SAFETY CODE ANN. § 25990(b)(2) (West 2023) (discussing California's regulations around commercial pork at issue in *Nat'l Pork*).

45. *See Nat'l Pork*, 143 S. Ct. at 1152 ("Everyone agrees that Congress may seek to exercise [its Commerce Clause] power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. But everyone also agrees that we have nothing like that here." (Citation omitted)).

46. *Id.* at 1151.

47. *Id.* at 1151–52; *see also* Reply Brief for Petitioners at 1, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) ("California imports 99.9% of pork consumed there.").

cited several facts in support of their position that this law unconstitutionally burdened out-of-state pork producers under the dormant Commerce Clause, including the fact that many farmers would have to modify their practices to achieve compliance with Proposition 12—and that much of the pork production industry is "vertically-integrated," meaning that achieving such compliance would impose substantial costs on producers and require them to make substantial new capital investments.[48]

The district court dismissed the Petitioners' case for failure to state a claim, finding that the pork producers had failed to sufficiently allege that Proposition 12 discriminated against out-of-state business and had similarly failed to sufficiently allege that Proposition 12 imposed a substantial burden upon interstate commerce.[49] The Ninth Circuit unanimously affirmed the lower court's ruling.[50] In granting certiorari to consider the legal sufficiency of the complaint, the opinion of the Supreme Court is as follows.[51]

B. Majority and Plurality Opinions

In a fragmented opinion, the Supreme Court held that Proposition 12 is constitutional under the dormant Commerce Clause, affirming the lower courts' decisions.[52] The Court concluded that "[c]ompanies that choose to sell products in various States must normally comply with the laws of those various states," but noted that states are still forbidden from enacting legislation that is intended to discriminate against out-of-state business.[53] The Court considered the Petitioners' two main arguments in turn.

At the outset, the majority noted that the Petitioners' claim concededly did not implicate the antidiscrimination principle of the dormant Commerce Clause, as Proposition 12 "imposes the same burdens on in-state pork producers that it imposes on out-of-state ones."[54] Accordingly, Petitioners' first argument focused on the "extraterritoriality doctrine," contending that even absent purposeful discrimination against out-of-state economic interests, the dormant Commerce Clause creates an "almost *per se* rule forbidding enforcement of state laws" that control

48. Complaint for Declaratory and Injunctive Relief at 28, 37–38, 52, 55, *Nat'l Pork*, 456 F. Supp. 3d 1201 (S.D. Cal. 2020) (No. 19-CV-02324).

49. *Nat'l Pork*, 456 F. Supp. 3d at 1207, 1210.

50. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021).

51. *Nat'l Pork*, 143 S. Ct. at 1152 (majority opinion).

52. *Id.* at 1150; *see also* Stern, *supra* note 17 (characterizing the *National Pork* decision as fragmented).

53. *Nat'l Pork*, 143 S. Ct. at 1150 (majority opinion).

54. *Id.* at 1153.

activity outside of the state.[55] Petitioners argued that Proposition 12 violates this "almost *per se*" rule because it increases costs for out-of-state pork producers who want to sell products in California.[56]

Petitioners primarily relied upon three cases—*Healy v. Beer Institute*,[57] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[58] and *Baldwin v. G.A.F. Seelig, Inc.*[59]—in making their "extraterritoriality doctrine" argument. The Court distinguished the present case from all three of these precedential decisions, stating that each case involved purposeful discrimination against out-of-state interests, as each involved state employed price-fixing or price-affirmation statutes to harm out-of-state businesses.[60] Because these cases each involved the "familiar concern with preventing purposeful discrimination against out-of-state interests," not some bright-line prohibition against state laws that have any impact whatsoever upon out-of-state commerce, the Court rejected the argument that these cases create an "almost *per se*" rule against enforcement of statutes that have any effect on out-of-state commerce.[61] The Court also noted that though some of the language of these cases did support the Petitioners' position, a case is not meant to be read as strictly as a statute and must be interpreted and applied in context.[62] The Court further explained that adoption of the "almost *per se*" rule advocated by Petitioners would disrupt several long-standing laws across the country, as most state laws have the "practical effect of controlling" out-of-state behavior—for example, state income tax laws, environmental laws, libel

55. *Id.* at 1153–54 (citing Brief for Petitioners at 19, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

56. *Id.* at 1154.

57. *See* Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) (holding that a Connecticut statute, which required that out-of-state beer vendors sell their products to Connecticut wholesalers at prices no higher than those offered to wholesalers in other states, violated the dormant Commerce Clause on its face by controlling the prices at which out-of-state businesses could sell their products).

58. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) (holding that a New York statute which provided that distillers of alcoholic beverages could not sell their products to wholesalers in New York unless (1) the prices were in accordance with a predetermined monthly price schedule, and (2) the distillers guaranteed that such prices were no higher than they were anywhere else in the United States, violated the dormant Commerce Clause on its face by directly regulating out-of-state business).

59. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (holding that a New York statute, which prohibited the in-state purchase of milk produced out-of-state if the out-of-state price was lower than the minimum price required to be paid to an in-state milk producer, violated the dormant Commerce Clause on its face by imposing a barrier to the importation to New York of out-of-state milk); *see also Nat'l Pork*, 143 S. Ct. at 1154 ("[P]etitioners . . . invoke what they call the 'extraterritoriality doctrine.'").

60. *Nat'l Pork*, 143 S. Ct. at 1154.

61. *Id.* at 1154–55, 1157.

62. *Id.* at 1155.

laws, tort laws, and more all impact the behavior of persons and organizations beyond the state's borders.[63]

Petitioners' next argument relied upon *Pike v. Bruce Church*,[64] which they asserted would require the Court to assess the "burden imposed on interstate commerce" by Proposition 12 and "prevent its enforcement" if the law's burdens are "clearly excessive in relation to the putative local benefits."[65] While the Petitioners provided a "litany of reasons" why they believed that the costs imposed on out-of-state economic interests by Proposition 12 outweighed the law's benefits to Californians,[66] ultimately, this was another failing argument.

The Court determined that Petitioners had overstated the extent to which the *Pike* Court's reasoning differed from the Court's other dormant Commerce Clause jurisprudence.[67] The Court explained that *Pike* still requires that the challenged law be discriminatory against out-of-state economic interests in order to be struck down under the dormant Commerce Clause; *Pike* simply reinforces the notion that a state law which is discriminatory only in *effect*, rather than on its face, may still be unconstitutional.[68] Accordingly, *Pike* is not a vehicle by which Petitioners can challenge a law like Proposition 12—which they concede is not facially discriminatory against out-of-state business and which they do not suggest has practical effects which would disclose such a discriminatory purpose.[69] *Pike* does not allow judges to simply strike down nondiscriminatory state laws based on their analyses of the law's costs and benefits.[70] The Court noted that its precedents have, in fact, "expressly

63. *Id.* at 1156.

64. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (holding that a restrictive law violates interstate commerce if its burdens to interstate commerce outweigh its benefits).

65. *Nat'l Pork*, 143 S. Ct. at 1157 (citing Brief for Petitioners at 44, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

66. *Id.*

67. *See id.* ("[P]etitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of the Court's dormant Commerce Clause jurisprudence. As this Court has previously explained, 'no clear line' separates the *Pike* line of cases from core antidiscrimination precedents." (quoting General Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997))).

68. *Id.*

69. *Id.* at 1158–59.

70. *See id.* at 1159 (opinion of Gorsuch, J.) (Part IV-B joined by Thomas & Barrett, JJ.) ("While *Pike* has traditionally served as another way to test for purposeful discrimination against out-of-state economic interests . . . petitioners would have us retool *Pike* for a much more ambitious project. They urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits.' That we can hardly do." (citation omitted)).

cautioned" against allowing judges to interpret the dormant Commerce Clause as granting them "freewheeling power" to "strike down duly enacted state laws" in the absence of facial or effective discrimination against out-of-state economic interests.[71]

Next, the Court explained that judges are not authorized, under the Commerce Clause, to weigh the benefits and burdens of state laws that do not have some discriminatory, economic impact on interstate commerce; a court cannot weigh a law's economic costs against its non-economic benefits in conducting a *Pike* analysis.[72] Conversely, here, there were no economic benefits to Californians; Petitioners instead invited the Court to weigh the moral and health benefits of Proposition 12 against the economic burdens the law would impose on the out-of-state pork industry.[73] The Court rejected this invitation, holding that this was "a task no court is equipped to undertake."[74] Instead, the Court concluded that in a functioning democracy, policy choices such as these should be left to the people and their elected representatives.[75] Accordingly, the Court suggested that Petitioners seek redress from Congress if Proposition 12 truly threatens the pork industry, as the legislature is the governmental branch equipped to make such policy decisions.[76]

---

71. *Id.* ("Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power [to strike down duly enacted state laws based on a judicial assessment of the law's costs and benefits] is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as 'a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.'" (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007))).

72. *Id.* at 1159–60 (opinion of Gorsuch, J.) (Part IV-B joined by Thomas & Barrett, JJ.).

73. *Id.* at 1160.

74. *Id.*

75. *See id.* ("[S]ome out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests . . . for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? . . . [Y]our guess is better than ours." (emphasis omitted)).

76. *Id.* Shortly after the *National Pork* decision, Congress took action in response. On June 15, 2023, Kansas Senator Roger Marshall introduced the Ending Agricultural Trade Suppression (EATS) Act to the Senate. According to the Kansas Corn Growers Association, the proposed legislation would "protect agricultural producers by prohibiting state and local regulations that could create trade barriers for U.S. ag[ricultural] products." Press Release, Roger Marshall, U.S. Senator (R-Kan.), Sen. Marshall Announces Introduction of EATS Act to Ensure State's Autonomy over Agricultural Practices (June 15, 2023), https://www.marshall.senate.gov/newsroom/press-releases/sen-marshall-announces-introduction-of-eats-act-to-ensure-states-autonomy-over-agricultural-practices/# [https://perma.cc/PJP8-D344]. As of September 2023, thirty-four Republican Representatives had co-signed the Act, but 171 Representatives and thirty Senators have signed a letter in opposition. Björn Ólafsson, *211 Members of Congress Now Oppose the EATS Act*, SENTIENT MEDIA (Oct. 15, 2023), https://sentientmedia.org/eats-act-opposition/ [https://perma.cc/LJ3X-SPAV]. Additionally, the U.S. House Agriculture Committee unveiled its "2024 House Farm Bill"

The Court then concluded that even if *Pike* could be applied in the manner envisioned by Petitioners, the allegations in the complaint were still insufficient to show that Proposition 12 imposed a substantial burden on interstate commerce, a threshold requirement which must be satisfied before the issue can reach the *Pike* balancing test stage of the analysis.[77] The Justices determined that the facts alleged by Petitioners merely pleaded harm to some of the pork producers' favored "methods of operation," which they noted that the Court has previously found to be an insufficient burden to state a claim under the dormant Commerce Clause in *Exxon Corp. v. Governor of Maryland*.[78] Like the law at issue in *Exxon*, Proposition 12 does not impose a "sufficient burden on interstate commerce to warrant further scrutiny" because it does not prevent or hinder the ability of out-of-state businesses to operate in-state; instead, it merely shifts the market share from one type of out-of-state business (those which confine pigs in ways prohibited under Proposition 12) to a different type of out-of-state business (those which comply with the requirements of Proposition 12).[79] Though the Court recognized that the wisdom of enacting a law that so greatly disrupts existing industry practices may be questionable, "the dormant Commerce Clause does not protect a 'particular structure or method of operation,'" regardless of whether that structure involves gas stations, as in *Exxon*, or pigs, as in the present case.[80]

In support of its conclusion that Petitioners' complaint merely pleaded harm to some of the producers' "favored methods of operation," rather than an economic harm cognizable under the dormant Commerce Clause, the Court explained that the costs of shifting from one set of production methods to another are mere compliance costs, which the in-state consumers who chose to adopt the law will bear.[81] The Court quickly dismissed the idea that a cost, which will ultimately be paid by the in-state voters who chose to adopt the law, could constitute a cognizable harm under the dormant Commerce Clause.[82] Thus, the only remaining

---

in May 2024, which "include[s] pork producers' priorities" and provides a "legislative solution to the host of problems triggered by California's Proposition 12." *NPCC Secures Pork Priorities in House Farm Bill*, NATIONAL PORK PRODUCERS COUNCIL: NEWS (May 17, 2024), https://nppc.org/press-releases/nppc-secure-pork-priorities-in-house-farm-bill/ [https://perma.cc/EYK4-ZHTJ].

77. *Nat'l Pork*, 143 S. Ct. at 1161 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.).

78. *Id.* at 1161–62 (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 127–28 (1978)).

79. *Id.*

80. *Id.* at 1162 (quoting *Exxon*, 437 U.S. at 127).

81. *Id.* at 1162–63 (quoting *Exxon*, 437 U.S. at 127).

82. *See id.* at 1162–63 ("[N]o one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause

harm alleged was simply harm to the producers' preferred way of doing business, which is not constitutionally protected.[83]

Finally, the Court agreed with some portions of the Chief Justice's reasoning in his concurrence in part and dissent in part (the "lead dissent").[84] It agreed with Chief Justice Roberts' rejection of the "almost *per se* rule" and with his rejection of any reading of *Pike* that would "endorse a 'free-wheeling judicial weighing of benefits and burdens.'"[85] However, the Court criticized the lead dissent's reading of *Pike* as allowing judges to strike down any state laws that threaten any sort of harm to the interstate market—under the dormant Commerce Clause, it explained, the Court should not be able to reassess the wisdom of a state legislature whenever a state law has some impact on an out-of-state interest, even an out-of-state economic interest.[86] Further, the Justices reasoned that the lead dissent's argument that the burdens imposed upon interstate commerce by Proposition 12 are particularly "substantial" is only supported by the fact that California's market is so lucrative that its in-state laws will affect how any out-of-state, national business seeking to maximize its profits will choose to operate.[87] They expressed concern that recognizing such an effect as being a substantial, cognizable harm under the dormant Commerce clause would mean that "voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets," severely undermining the fundamental constitutional principle of equal sovereignty among the states.[88] Finally, they also rejected the lead dissent's argument that potential harms to the welfare and health of pigs, and upheaval of traditions and practices in the pork production industry, constitute a substantial burden on interstate commerce—reasoning that such unquantifiable "social costs" are not "freestanding harms cognizable under the dormant Commerce Clause."[89]

---

precedents." (citing United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007))).

83. *Id.* at 1162–63.

84. *Id.* at 1163.

85. *Id.* (parallel citations omitted).

86. *See id.* at 1164 (plurality opinion) (Part IV-D joined by Thomas & Barrett, JJ.) ("Our decisions . . . do not provide judges a 'roving license' to reassess the wisdom of a state legislation in light of any conceivable out-of-state interest, economic or otherwise." (quoting *United Haulers Ass'n*, 550 U.S. at 343)).

87. *Id.* at 1163–64.

88. *Id.* at 1164.

89. *Id.*

C. Justice Sotomayor's Concurrence in Part

In a concurring opinion, Justice Sotomayor, joined by Justice Kagan, concluded that the judgment of the lower court should be affirmed because the petitioners failed to allege a substantial burden on interstate commerce as required under *Pike*—not because courts are incapable of doing the *Pike* balancing test with economic versus noneconomic benefits and burdens.[90] Justice Sotomayor explained that the failure of Petitioners to allege discrimination "does not doom their *Pike* claim" because the majority opinion "does not shut the door" on all *Pike* claims that do not allege discrimination; at least one narrow exception still exists, as demonstrated by *Edgar v. MITE Corp.*, in which a nondiscriminatory state law that regulated tender offers to stakeholders was invalidated under the dormant Commerce Clause.[91] Furthermore, Justice Sotomayor explained that courts are able to, and regularly do, weigh seemingly incommensurable values against each other.[92] Accordingly, Justice Sotomayor concluded that Petitioners' claim should only fail because they did not allege a substantial burden on interstate commerce, which is a threshold requirement that must be satisfied before the *Pike* balancing test is even reached—not because the Court could not have conducted an adequate balancing of the parties' competing interests.[93]

D. Justice Barrett's Concurrence in Part

In her concurrence in part, Justice Barrett concluded that the judgment of the lower court should be affirmed because the benefits and burdens of Proposition 12 are not "judicially cognizable" or comparable.[94] Justice Barrett would have found that the burdens and benefits associated with Proposition 12 are not "capable of judicial balancing" because the benefits to Californians are moral, while the burdens on out-of-state interests are economic.[95] However, Justice Barrett would have held that the complaint did plausibly allege a substantial burden on interstate commerce, based upon the out-of-state costs imposed by Proposition 12.[96] She explained that the complaint did plausibly allege that the costs of Proposition 12 would be "pervasive, burdensome," and primarily borne

90. *Id.* at 1165 (Sotomayor, J., concurring in part).

91. *Id.* at 1166 (citing Edgar v. MITE Corp., 457 U.S. 624, 643–46 (1982)).

92. *See id.* at 1166 ("[C]ourts generally are able to weigh disparate burdens and benefits against each other, and . . . are called on to do so in other areas of the law with some frequency.").

93. *Id.*

94. *Id.* at 1167 (Barrett, J., concurring in part).

95. *Id.* 1167.

96. *Id.*

by out-of-state producers.[97] Accordingly, reaching a conclusion opposite to that drawn by Justice Sotomayor, Justice Barrett concluded that if the burdens and benefits of Proposition 12 had been capable of judicial balancing, she would have allowed Petitioners' *Pike* claim to proceed past the substantial burden threshold.[98]

E. Chief Justice Roberts's Concurrence in Part and Dissent in Part

In the lead dissent, Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson, agreed with the majority's rejection of Petitioners' proposed "[almost] *per se*" rule.[99] However, the Chief Justice disagreed with the majority's analysis of Petitioners' *Pike* claim, arguing that the Ninth Circuit had misapplied the Court's existing *Pike* jurisprudence and concluded that the complaint plausibly alleged a substantial burden on interstate commerce.[100] Accordingly, the lead dissent would have vacated the lower court's judgment and remanded the case for the Ninth Circuit to conduct a *Pike* balancing test on the matter.[101]

First, Chief Justice Roberts explained that the majority's discussion of the Court's *Pike* jurisprudence interpreted the doctrine too narrowly; under the Court's precedents, even a nondiscriminatory burden on commerce may be struck down under the dormant Commerce Clause if its burdens outweigh its benefits.[102] Therefore, in the lead dissent's view, Petitioners' *Pike* claim should not have been barred solely on the basis that Proposition 12 is not discriminatory toward out-of-state economic interests; instead, under the Court's dormant Commerce Clause jurisprudence, Chief Justice Roberts asserted that even challenges to nondiscriminatory state laws may advance to *Pike* balancing.[103]

Next, the lead dissent also disagreed with Justice Gorsuch's opinion that it is impossible for a court to balance the competing interests in this case under *Pike*.[104] Chief Justice Roberts took the position that "sometimes there is no avoiding the need to weigh seemingly incommensurable

97. *See id.* ("The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California.").

98. *Id.*

99. *Id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) (opinion joined by Alito, Kavanaugh, & Jackson, JJ.).

100. *Id.*

101. *Id.*

102. *Id.* at 1168 ("[W]e generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008))).

103. *Id.*

104. *Id.* at 1169.

values," citing several Supreme Court cases in which the Court balanced different moral and constitutional concerns.[105] The Chief Justice also noted that a majority of the Court in the present case did agree that balancing the benefits and burdens of Proposition 12 under *Pike* was possible, as four Justices had joined in the lead dissent, and the separate opinions of Justice Sotomayor also agreed with this view.[106]

The lead dissent then discussed the idea that mere "compliance costs" were found insufficient to allege a substantial burden on interstate commerce as required to reach *Pike* balancing.[107] In Chief Justice Roberts's view, the complaint alleged compliance costs and "broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce."[108] He argued that the Supreme Court's precedents have "long distinguished" the costs of compliance with a state regulation from "other economic harms to the interstate market."[109] Therefore, he would have concluded that Petitioners had alleged a substantial burden imposed upon interstate commerce.[110]

In support of this position, the lead dissent discussed the case of *Bibb v. Navajo Freight Lines, Inc.*, in which the Court held that an Illinois law requiring that trucks and trailers use a particular kind of mudguard was unconstitutional under the dormant Commerce Clause.[111] The Court reached this result not because the installation of these new mudguards would cost out-of-state trucking companies additional money, but because there were "other derivative harms flowing from the regulation," such as significant delays in shipping, increased labor hours, and potential dangers to the drivers including increased highway accidents.[112] In *Bibb*, the Court concluded that the compliance costs, in conjunction with these "*other* factors," could constitute a substantial burden on interstate

105. *See id.* at 1168 (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)).

106. *Id.* at 1169.

107. *Id.* at 1169–70.

108. *Id.* at 1169.

109. *Id.* (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)).

110. *See id.* ("Petitioners identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce.").

111. *Id.* (citing *Bibb*, 359 U.S. at 525–27).

112. *Id.*; *see generally* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (striking down state law mandating that trucks use a certain mudguard as unconstitutional for its imposition of compliance costs, delays, increased labor, and potential hazards to out-of-state businesses and their employees).

commerce.[113] The lead dissent noted that "[s]ubsequent [Supreme Court] cases following the *Bibb* logic" have found that harms such as public safety hazards and product shipping delays are distinct from increased costs to out-of-state businesses.[114] The lead dissent went on to assert that these "derivative harms" imposed economic burdens upon interstate commerce beyond mere compliance costs, even if these burdens appeared to be economic and non-quantifiable at first.[115]

The lead dissent then explained that in the present case, Petitioners had alleged compliance costs and other distinguishable harms to the interstate market.[116] The lead dissent argued that Petitioners' allegation that the interstate pork market is so interconnected that pork producers would be effectively "forced to comply" with Proposition 12—even though some or most of their products would not ultimately be sold in California—reflects a "harm to the interstate market itself," separate from the alleged increases in compliance cost.[117] The Chief Justice reasoned that "such sweeping extraterritorial effects" imposed by state law are pertinent in applying *Pike* balancing, even if they are not the "*per se*" violation of the dormant Commerce Clause which Petitioners alleged them to be.[118] He further explained that in *Edgar v. MITE Corporation*, the Court held that the "nationwide reach" of a nondiscriminatory state law could constitute a burden on interstate commerce; accordingly, he concluded that the nationwide reach of Proposition 12, forcing vertically-integrated pork producers nationwide to restructure their business to comply with its requirements, constituted a similarly "obvious burden."[119] Moreover, the lead dissent asserted that the other consequences of Proposition 12, as alleged by Petitioners, similarly went beyond mere costs of compliance.[120] For example, the Chief Justice explained that the potential for worsened

113. *Nat'l Pork*, 143 S. Ct. at 1169 (quoting *Bibb*, 359 U.S. at 526).

114. *See id.* ("Subsequent cases followed *Bibb*'s logic by analyzing economic impact to the interstate market separately from immediate costs of compliance." (citing Kassel v. Consol. Freightways Corp., 450 U.S. 662, 674 (1981))); *see also* Raymond Motor Transp., Inc., v. Rice, 434 U.S. 429, 445 (1978) (analyzing an increase in cost separately from delayed shipping of goods).

115. *Nat'l Pork*, 143 S. Ct. at 1170 (citing *Kassel*, 450 U.S. at 674); *see also Rice*, 434 U.S. at 445 (discussing further the economic burdens imposed on interstate commerce).

116. *Nat'l Pork*, 143 S. Ct. at 1170.

117. *Id.* (citing Petition for Wirt of Certiorari Appendix G at 214a, 213a, 239a, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

118. *Id.*

119. *Id.* at 1171 (citing Edgar v. MITE Corp., 457 U.S. 624, 643 (1982)); *see also Edgar*, 457 U.S. at 643 (holding that an Illinois corporate takeover statute authorizing the Illinois Secretary of State to scrutinize tender offers, even for those occurring wholly outside of Illinois, imposed an "obvious burden" on interstate commerce through its "nationwide reach").

120. *Nat'l Pork*, 143 S. Ct. at 1169.

health outcomes and increased disease and stress among the pigs, as well as the "upen[ding]" of generations of settled farming practice, were "threats to animal welfare and industry practice" that go beyond "mere costs of compliance."[121]

The lead dissent next addressed the Court's reliance on *Exxon* in concluding that Petitioners' complaint had not plausibly pleaded a substantial burden against interstate commerce.[122] Relying upon the same consequences of Proposition 12 that he had found to go beyond "mere compliance costs," Chief Justice Roberts also found that the harms alleged by Petitioners went beyond a mere shift from one out-of-state supplier to another; instead, he found that these harms would affect the entire national market, not just a few select out-of-state firms.[123]

Finally, the lead dissent concluded by asserting what it believes to separate its view from the "*per se*" extraterritoriality rule which it rejects, explaining that "mere cross-border effects" are still insufficient to constitute a substantial burden on interstate commerce, while a state law that has a "broad impact" on the national economy which proves "clearly excessive in relation to the putative local benefits" should be struck down for unconstitutionally burdening out-of-state interests.[124] The lead dissent would have found that Proposition 12 does impose a substantial burden on interstate commerce and noted that a majority of this court would agree.[125] Accordingly, in the view of Chief Justice Roberts, the case should have been remanded to the Ninth Circuit to decide whether the burdens on interstate commerce imposed by Proposition 12 exceed its local benefits.[126]

F. Justice Kavanaugh Concurrence in Part and Dissent in Part

Justice Kavanaugh, concurring and dissenting in part, disagreed with the Court's opinion that the Petitioners had not sufficiently alleged a substantial burden on interstate commerce imposed by Proposition 12, agreeing instead with the reasoning of the lead dissent on this issue.[127] Justice Kavanaugh explained that he added his opinion to "point out that state economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the

121. *Id.* (citation omitted).
122. *Id.*
123. *Id.* at 1171–72 (citing Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)).
124. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
125. *Id.* at 1172.
126. *Id.*
127. *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause."[128] Justice Kavanaugh took no position on the potential success that an argument under any of these clauses could have in the future (but noted that the question should be further examined).[129]

Justice Kavanaugh also explained the reasoning supporting his finding that Proposition 12 imposes a substantial burden on the interstate pork market.[130] He discussed the history of the Constitution generally, explaining that its key purposes included promoting and protecting free trade among the states.[131] He went on to explain that Proposition 12 regulates the farming and production of pork not only in California but also "throughout the United States."[132] He noted that few pork producers outside of California would follow the requirements of Proposition 12 if not for the law but that they now have "little choice but to comply with California's regulatory dictates," as it is impractical to produce pigs separately for California, and "economically infeasible" to exit the California market altogether, given the state's 13 percent share of the consumer pork market.[133] Furthermore, he reasoned that these required changes would cost farmers and pork producers "hundreds of millions (if not billions) of dollars," costs which will be passed on to American consumers, which may also "result in lower wages and reduced benefits (or layoffs)" to employees in the pork farming and production business.[134] He concluded that because Proposition 12 is "forcing massive changes" to national pig farming and pork production practices, California is attempting to "unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the nation," which "undermines federalism" and imposes a substantial burden on interstate commerce.[135]

Finally, Justice Kavanaugh expressed concern that this holding might encourage states to enact future morality-based laws, in areas expanding beyond the pork industry.[136] He posed multiple questions illustrating the potential outcomes of this holding, asking what would happen if a state

128. *Id.*

129. *Id.* at 1175–76.

130. *Id.* at 1173–74.

131. *Id.* at 1172–73 (citing Tenn. Wine & Spirit Retailers Ass'n v. Thomas, 139 S. Ct. 2249, 2460 (2019)).

132. *Nat'l Pork*, 143 S. Ct. at 1173.

133. *Id.* at 1173.

134. *Id.* at 1173–74.

135. *Id.* at 1174.

136. *Id.* ("California's approach . . . forc[es] individuals and businesses in one State to conduct their [business] in a manner required by the laws of a *different* State. Notably, future state laws of this kind might not be confined to the pork industry.").

law were to prohibit the in-state sale of fruit picked by non-citizens unlawfully in the country, or the sale of goods produced by workers paid less than a certain hourly rate, or the sale of goods made by producers that do or do not pay for their employees' birth control and abortions.[137] These questions exemplified his concern—if Proposition 12 is able to survive the other constitutional challenges which he proposed, this law "may foreshadow a new era" where states can prohibit any good produced in a way that "offends their moral or policy preferences . . . effectively forc[ing] other States to regulate in accordance with those idiosyncratic state demands."[138] Justice Kavanaugh concluded that this outcome would violate the purposes and goals of the Constitution as it was drafted.[139]

III. ANALYSIS

A. Rejection of Petitioners' Proposed "Almost Per Se" Rule

While the Court's ruling against the pork industry in *National Pork* is surprising considering this Court's general inclination to render decisions favoring business,[140] the reasoning utilized by the majority in the *National Pork* decision is sound and consistent with prior Supreme Court rulings in several aspects. First, the Court rejected Petitioners' argument that an "extraterritoriality doctrine" exists under the dormant Commerce Clause, creating an "almost *per se*" rule that forbids the enforcement of state laws that have the "practical effect of controlling commerce outside the State," even absent any discrimination against out-of-state business.[141] The Court's rejection of this argument is consistent with this Court's previous reasoning on similar dormant Commerce Clause issues. The Court's conclusion is consistent with the cases cited by Petitioners in support of their position; *Baldwin*, *Brown-Forman*, and *Healy* were clearly distinguishable from and contrary to Petitioners' position, as they each involved clear examples of state laws which attempted to bolster

137. *Nat'l Pork*, 143 S. Ct. at 1174 (citing Brief for Indiana et al. as Amici Curiae Supporting Petitioners at 33, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

138. *Id.*

139. *Id.*

140. *See* Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. 49, 54 fig.1 (2022) (demonstrating that 63.4 percent of decisions under Chief Justice Roberts have favored business, reflecting the highest "business win rate" seen under any Chief Justice in the last century).

141. *Nat'l Pork*, 143 S. Ct. at 1154 (majority opinion); *see also* Brief for Petitioners at 2 n.2, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) ("Another prohibition of the dormant Commerce Clause—a bar on protectionist state statutes that discriminate against interstate commerce—is not in issue here.").

in-state business interests at the expense of out-of-state business interests.[142] Further, the Court's decision also aligns with the legal scholars and court decisions that have heavily criticized the "extraterritoriality doctrine" as being increasingly improper in the modern economy where, as the Court noted, "virtually all state laws create ripple effects beyond their borders."[143]

Furthermore, the Court relied upon logically-sound policy reasoning in reaching its conclusion to reject the proposed "almost *per se*" rule, noting that acceptance of this rule would invalidate "many (maybe most) state laws," including income tax, environmental, libel, securities, tort, health, and quarantine laws, all of which have the "practical effect" of controlling out-of-state behavior.[144] Accordingly, the Court expressed concern that such a rule prohibiting states from enacting a law with any extraterritorial effects would "invite endless litigation and inconsistent results."[145] This is sound reasoning, as individual state laws greatly affect how persons and corporations conduct themselves and their affairs.[146] If a state law could be invalidated simply for having some effect on a person or group in another state, it would be virtually

142. *Nat'l Pork*, 143 S. Ct. at 1154; *see generally* 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); Healy v. Beer Inst., 491 U.S. 324 (1989); Edgar v. MITE Corp., 457 U.S. 624 (1982).

143. *Nat'l Pork*, 143 S. Ct. at 1165 (majority opinion); *see* Horne, *supra* note 11, at 1158 (explaining that "the extraterritoriality doctrine is heavily critiqued" and noting that the Supreme Court has only even "substantially considered" the doctrine in three cases prior to *National Pork*, each of which was decided in the 1980s (citing Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 967 (2017))); *see also* Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 6, 9, 19, Frosh v. Ass'n for Accessible Meds., 139 S. Ct. 1168 (2018) (No. 18-546) (outlining limitations of the extraterritoriality doctrine, including its questionable historical, textual, and structural support, and its inability to be reasonably applied in "today's sophisticated borderless economy").

144. *Nat'l Pork*, 143 S. Ct. at 1157 (majority opinion); *see, e.g.*, Matthew Boyle & Jo Constantz, *Nearly Half of Working Adults Say They're Open to Relocating to Abortion-Friendly States*, BLOOMBERG (July 10, 2022, 9:00 AM), https://www.bloomberg.com/news/articles/2022-07-19/reality-bites-for-workers-looking-to-abortion-friendly-states [https://perma.cc/8W8J-5ELT] (noting that more than two in five working adults are open to moving to a different state based on differences in state abortion laws); Janet Berry-Johnson & Rose Wheeler, *9 States With No Income Tax*, FORBES ADVISOR (Jun. 14, 2023, 3:42 AM), https://www.forbes.com/advisor/taxes/states-with-no-income-tax/ [https://perma.cc/38AX-CZSF] (recognizing that individuals may seek to move states based on states' differing income tax rates).

145. *Nat'l Pork*, 143 S. Ct. at 1156.

146. For examples of the ways in which state laws can impact out-of-state behaviors, see *supra* note 144.

impossible for states to pass any legislation, undermining the Constitution's goals of promoting state sovereignty and free trade among the states.[147]

B. Inapplicability of Pike *to Proposition 12*

The *National Pork* decision is also consistent with the Court's earlier reasoning in *Pike* and its progeny, despite Petitioners' efforts to argue that *Pike* requires the Court to weigh the local benefits of Proposition 12 against the burdens it imposes upon out-of-state commerce. Citing several prior cases under its *Pike* reasoning, the Court explained that whether a state law violates the dormant Commerce Clause depends on whether the state law has a discriminatory effect on out-of-state commerce.[148] The Court explained that *Pike* did not depart from this long-recognized antidiscrimination rule to now allow for judicial balancing of the benefits and burdens imposed by nondiscriminatory state laws; rather, *Pike* simply stands for the idea that "a law's practical effects may also disclose the presence of a discriminatory purpose."[149] Disagreeing with the majority's view, Chief Justice Roberts, in his lead dissent, and Justice Sotomayor, in her dissent in part, argued that discrimination against out-of-state business is unnecessary for a case to be analyzed under *Pike*.[150] However, the majority opinion noted that the Court in *Davis* did

147. *See Nat'l Pork*, 143 S. Ct. at 1156 ("Petitioners' 'almost *per se*' rule . . . would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers."); *see also* Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 335 (1977) ("[T]he fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States . . . . [This] is a freedom to trade with any State, to engage in commerce across all state boundaries."); Reeves, Inc. v. Stake, 447 U.S. 429, 438 (1980) ("Restraint in [the exercise of federal Commerce Clause power over the states] is also counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people[]' . . . ." (quoting Heim v. McCall, 239 U.S. 175, 191 (1915))); New York v. United States, 505 U.S. 144, 147 (1992) ("[T]he Constitution protects state sovereignty for the benefit of individuals . . . .").

148. *See Nat'l Pork*, 143 S. Ct. at 1157–58 (majority opinion); *see also* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298, n.12 (1997) (recognizing that *Pike* is consistent with other dormant Commerce Clause cases requiring some showing of discrimination against out-of-state businesses); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (holding that a law placed no impermissible burden on interstate commerce where, looking to the law's effects, "there [was] no reason to suspect that the gainers" would be in-state businesses, nor that "the losers [would be] out-of-state" businesses); Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978) (holding that a state law did not violate the dormant Commerce Clause where its practical effect was only to shift in-state business from one type of out-of-state business to another, not to inhibit out-of-state business as a whole); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (upholding a challenged state law where no discrimination in favor of in-state businesses or against out-of-state business was identified).

149. *Nat'l Pork*, 143 S. Ct. at 1147.

150. *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1166 (Sotomayor, J., concurring in part).

recognize that the dormant Commerce Clause prohibits enforcement of state laws "driven by economic protectionism"; accordingly, any exception to the antidiscrimination principle created by this case is very narrow, while voluminous precedent exists in support of the antidiscrimination principle.[151] Further, while *Edgar* did invalidate a state law based upon its "nationwide reach," the majority explained that the *Edgar* opinion spoke to a law that allowed individuals with no connection to a different state to directly regulate transactions occurring in that separate state, while Proposition 12 only regulates companies that choose to sell their goods in California.[152] The majority's conclusion is also consistent with its earlier policy reasoning supporting its rejection of Petitioners' proposed "almost *per se*" rule against state laws with extraterritorial effects.[153] If state laws were able to be invalidated based simply upon a court's determination that the law was burdensome to some out-of-state interest, this would produce increased litigation with inconsistent results as judges would have to apply very subjective analyses to identify the burdens imposed by a host of newly-challengeable state laws.[154] Thus, the majority reached the conclusion most consistent with the Court's long history of rulings affirming that dormant Commerce Clause issues do not arise where, as here, no evidence of discrimination is found under the challenged state law.[155]

C. Court's Inability to Conduct Pike *Balancing for Proposition 12*

The Court next declined to engage in any *Pike* balancing of the benefits and burdens imposed by Proposition 12, stating that the Commerce Clause does not imply "freewheeling power" for judges to "strike down duly enacted state laws" based merely on their assessment of the law's costs and benefits.[156] The Court's refusal to balance the benefits and

151. *Id.* at 1153 (majority opinion) (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008)).

152. *Id.* at 1157.

153. *See Nat'l Pork*, 143 S. Ct. at 1156. For a discussion of the Court's view that an "almost *per se*" rule could call long-accepted state laws into question and result in increased litigation with inconsistent outcomes, *see supra* Section III.A.

154. *See Nat'l Pork*, 143 S. Ct. at 1156 ("[An 'almost *per se'* rule against state laws with extraterritorial effects] would invite endless litigation and inconsistent results.").

155. For cases in which the Court held that state laws did not violate the dormant Commerce Clause where there was no evidence of discrimination against out-of-state business, see Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).

156. *Nat'l Pork*, 143 S. Ct. at 1159 (opinion of Gorsuch, J.) (Part IV-B joined by Thomas & Barrett, JJ.).

burdens imposed by Proposition 12 is consistent with its precedent stating that judges are not equipped to conduct a *Pike* balancing weighing "incommensurable" economic and non-economic interests.[157] Although the dissents noted plenty of situations in which a court must weigh such incommensurable values, the cases cited by the dissents for this proposition did not involve dormant Commerce Clause challenges.[158] Challenges to state laws under the dormant Commerce Clause are different. *Pike* balancing is designed to identify if a facially neutral law, in practical effect, discriminates against out-of-state business or economic interests.[159] A state law discriminates in this way if it burdens out-of-state economic interests to bolster in-state economic interests[160]—for example by mandating lower prices for out-of-state goods.[161] Accordingly, in detecting a state law that is discriminatory in effect through *Pike* balancing, the court must only consider the in- and out-of-state economic interests at play; no other sort of interest would be relevant to a finding of such discrimination.[162] This conclusion is also supported by the well-recognized notion that policy choices involving the weighing of moral and health concerns against economic interests should be left to "the people and their elected representatives," who are better equipped than the judiciary to

157. *Id.* at 1158–60; *see also id.* at 1164 ("Our decisions have authorized claims alleging 'burdens on commerce.' They do not provide judges 'a roving license' to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise." (first quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008); and then quoting *United Haulers Ass'n*, 550 U.S. at 343)).

158. *See generally Nat'l Pork*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part); *id.* at 1168–69 (Roberts, C.J., concurring in part and dissenting in part). *See also* Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (weighing the value in clean streets against the constitutional protection of free speech in a First Amendment freedom of speech case); Winston v. Lee, 470 U.S. 753, 760 (1985) (weighing an individual's interest in privacy against society's interest in conducting a certain surgical procedure in a Fourth Amendment case); Addington v. Texas, 441 U.S. 418, 425 (1979) (weighing individual interest in avoiding involuntary confinement with state's interest in committing emotionally disturbed people in considering what standard should govern a civil commitment proceeding).

159. *See Nat'l Pork*, 143 S. Ct. at 1157 (majority opinion) ("[I]f some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose.").

160. *See, e.g.*, Guy v. City of Baltimore, 100 U.S. 434, 443 (1879) ("[A State] cannot employ the property it thus holds for public use so as to hinder, obstruct, or burden inter-state commerce in the interest of commerce wholly internal to that State.").

161. For a discussion of state laws found to purposefully and facially discriminate against out-of-state business, see *supra* note 25 and accompanying text.

162. *Nat'l Pork*, 143 S. Ct. at 1159 (plurality opinion) (Part IV-B joined by Thomas & Barrett, JJ.) ("[J]udges are often 'not institutionally situated to draw reliable conclusions of the kind that would be necessary . . . to satisfy [the] *Pike*' test as petitioners conceive it." (quoting *Davis*, 553 U.S. at 353)).

make such decisions.[163] Therefore, the Court was correct in declining to balance the moral benefits of Proposition 12 to Californians against the economic burdens it would impose on out-of-state producers.

D. Petitioners Failed to Plausibly Plead a Substantial Burden on Interstate Commerce

Next, the Court correctly concluded that even if *Pike* did apply to the case in the ways argued by Petitioners, Petitioners' argument would nonetheless fail because they did not sufficiently plead a substantial burden on interstate commerce, a threshold requirement for the issue to reach the *Pike* balancing test.[164] The Court's decision that no substantial burden was pleaded is certainly consistent with the factually-similar case of *Exxon*.[165] While the lead dissent does make a strong argument that Proposition 12 imposes a substantial burden on interstate commerce, in that it will practically require upheaval of "generations" of pig farming practices nationwide, this argument rightfully does not win the day.[166] The Court's reasoning is more compelling, as it is correct that the lead dissent's holding is indistinguishable from the "almost *per se*" extraterritoriality rule which both opinions claim to reject.[167]

First, the Court correctly rejected the Petitioners' argument that unquantifiable social costs can substantially burden interstate commerce. As discussed in Section III-C of this Note, the social, moral, or health consequences of a state law upon other states should not be considered under a *Pike* analysis, as the purpose of a *Pike* analysis is to identify whether a state law imposes *economic* burdens on out-of-state

163. *Id.* at 1160 ("They are entitled to weigh the relevant 'political and economic' costs and benefits for themselves . . . ." (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279 (1978))).

164. *See id.* at 1161 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.) ("*Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes 'substantial burdens' on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other." (citation omitted)).

165. *See id.* at 1162 ("[*Exxon*] involved a Maryland law prohibiting petroleum producers from operating retail gas stations in the State."); *see generally* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).

166. *See Nat'l Pork*, 143 S. Ct. at 1170–71 (Roberts, C.J., concurring in part and dissenting in part) (arguing that because the effects of Proposition 12 extend to the entire national pork production market, not just to a few select out-of-state firms, its effects constitute a substantial harm on interstate commerce under *Exxon*, and further arguing that potential health consequences to pigs, as well as upheaval of "generations" of established pork production practices, go beyond mere compliance costs to constitute a substantial burden).

167. *See id.* at 1163 (plurality opinion) (Part IV-D joined by Thomas & Barrett, JJ.) (explaining that although the lead dissent would correctly reject Petitioners' proposed "almost *per se*" rule against laws with extraterritorial effects, the lead dissent's reading of *Pike* advances, in effect, this same rule that it purports to reject).

commerce.[168] Allowing *any* impact to be considered would simply replicate the rejected rule against any state law having any extraterritorial effect whatsoever. Although the lead dissent attempted to liken the harms imposed by Proposition 12 to the harms imposed by the Illinois law struck down in *Bibb*,[169] the "derivative harms" that went beyond mere compliance costs in *Bibb* (public safety hazards and product shipping delays), are distinguishable from the harms imposed on out-of-state business by Proposition 12. The lead dissent recognized that the delays imposed by the Illinois law in *Bibb* would have affected an industry where "prompt movement [was] of the essence," as it affected the nationwide trucking and trailer industry, a disruption to which would harm industries of all kinds throughout the country.[170] Conversely, the national economy faces no meaningful threat if pork production and distribution are delayed while the pork producers adjust to the requirements of Proposition 12.[171]

Additionally, unlike compliance with the law in *Bibb*, there is no risk that compliance with Proposition 12 will be "exceedingly dangerous" to anyone involved in pork production or consumption.[172] Although briefs on both sides of the argument addressed potential health consequences to both humans and pigs resulting from Proposition 12, the idea that Proposition 12 will prevent disease and other adverse health consequences for people and animals appears to be better supported by the weight of the research; thus, Proposition 12 seems to mitigate dangers in the pork industry, rather than being "exceedingly dangerous" to any group.[173]

---

168. For a discussion explaining that non-economic interests cannot be considered in the *Pike* balancing test, as the test seeks to identify harms to interstate commerce, not to any interstate interests whatsoever, see *supra* Section III.C.

169. *See Nat'l Pork*, 143 S. Ct. at 1167–70 (Roberts, C.J., concurring in part and dissenting in part) (arguing that the harms imposed by Proposition 12 exceed mere compliance costs).

170. *Id.* (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 527(1959)).

171. *See id.* at 1161–63 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.) (explaining how Proposition 12 failed to impose a "substantial burden" on interstate commerce); *but see* Brief of the Retail Litigation Center, Inc. et al. as Amici Curiae Supporting Petitioners at 9, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) (noting that the process of changing industry practices to comply with Proposition 12 could cause "supply chain disruptions" for pork products).

172. *See Nat'l Pork*, 143 S. Ct. at 1169 (Roberts, C.J., concurring in part and dissenting in part) (quoting *Bibb*, 359 U.S. at 527); *see also Bibb*, 359 U.S. at 529–30 ("A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device—out of line with the requirements of the other States—may be so compelling that the innovating State need not be the one to give way. But the present showing—balanced against the clear burden on commerce—is far too inconclusive to make this mudguard meet that test.").

173. *See* Brief for Worker Safety Advocs. as Amici Curiae Supporting Respondents at 1, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) (arguing that Proposition 12 will prevent the spread of zoonotic disease among swine); *see also* Brief for Am. Pub. Health Ass'n et al. as Amici Curiae Supporting

Next, the Court was correct that the burden on out-of-state commerce by Proposition 12 cannot be deemed "substantial" simply because the state law will influence business decisions nationwide.[174] The Court's policy-based reasoning on this issue is stronger than that of the dissents because allowing the substantiality of the burden imposed upon out-of-state economic interests by a state law to be determined based essentially only on the size of that state's market would threaten state equality and sovereignty.[175] If a larger state were prohibited from enacting certain regulations, which a smaller state would be permitted to enact, just because nationwide businesses would have more incentive to comply with the larger state's in-state laws, this would create inequality between the legislative abilities of states of different sizes. Accordingly, the majority and plurality opinions of the Court utilized sound reasoning, consistent with the Court's prior dormant Commerce Clause rulings, to reach the ultimate decision in *National Pork*.

IV. IMPACT

A. Broadened Ability of States to Enact Regulations Affecting National Industries

The Court's decision in *National Pork* clarified the boundaries of a state's ability to independently regulate within its borders under the dormant Commerce Clause. Under the *National Pork* holding, states have broadened latitude to enact regulations that affect national industries, provided that these regulations have neither a discriminatory purpose nor practical effect upon out-of-state economic interests.[176] Therefore,

---

Respondents at 7, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) (arguing that Proposition 12 will prevent foodborne illness among humans and promote food safety and public health); Brief for Ctr. for a Humane Econ. et al. as Amici Curiae Supporting Respondents at 18, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) (arguing that the types of confinement prohibited by Proposition 12 threaten the health and safety of consumers, and increase the risks of foodborne illness); *but see* Reply Brief for Petitioners, *supra* note 47, at 14 ("Proposition 12 will not improve sow welfare, and may diminish it. It has no human health benefits, but may increase pathogen transmission from pigs to humans."); Brief for North Am. Meat Inst. as Amici Curiae Supporting Petitioners at 21, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468) ("There is no basis to believe that out-of-state farmers' compliance with Proposition 12 would have any effect on the health and safety of California consumers.").

174. *Nat'l Pork*, 143 S. Ct. at 1163–64 (plurality opinion) (Part IV-D joined by Thomas & Barrett, JJ.).

175. *See id.* at 1165 (Sotomayor, J., concurring in part) ("Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production.").

176. *See id.* at 1150 (majority opinion) (explaining that despite the upholding of Proposition 12, "under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests"); *see also* Millhisner, *supra* note 37 ("If the

instead of having to rely on their spending power as consumers to gradually affect change in national industries, it is clear that citizens may now, through their elected representatives, spur industry-wide changes through in-state legislation—as long as, like California, their state represents a large enough share of the industry's market to persuade such businesses to comply with their preferences.[177] Citizens of smaller states may not realize such an increase in national policymaking power, as it is less likely that a nationwide business would bend to the will of a state that

---

Supreme Court had read the Dormant Commerce Clause aggressively . . . it could have given itself an effective veto power over nearly any state law . . . . Instead, the Court shrank the Dormant Commerce Clause considerably, freeing states to enact animal welfare laws—and, indeed, laws of any kind—with minimal oversight from federal courts, at least with respect to those laws' impacts on other states."); Lawrence Hurley, *California Law on the Humane Raising of Pigs Survives Supreme Court Challenge*, NBC NEWS (May 12, 2023, 9:58 AM), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-challenge-california-pork-industry-restriction-rcna64623 [https://perma.cc/3E3U-PQWS] ("The [*National Pork*] ruling . . . protects the authority of states to enact laws to protect the health and welfare of the public even if the measures have impacts out of state.").

177. *See* Meera Gorjala et al., *Supreme Court Pulls Back Dormant Commerce Clause in* National Pork Producers Council v. Ross, NAT'L L. REV. (May 25, 2023), https://www.natlawreview.com/article/supreme-court-pulls-back-dormant-commerce-clause-national-pork-producers-council-v [https://perma.cc/4JB7-V6FG] ("The [*National Pork*] decision could allow larger economy states like California to shift behavior across states by passing laws like [Proposition 12] that condition participation in their lucrative market on meeting a certain criteria. The[se] laws could condition participation on a wide range of moral criteria, expanding past animal welfare."); *see also* Ariane de Vogue & Tierney Sneed, *Supreme Court Upholds California's Anti-Animal Cruelty Law for Pork*, CNN POLS. (May 11, 2023, 1:25 PM), https://www.cnn.com/2023/05/11/politics/supreme-court-pork-california-regulations/index.html [https://perma.cc/NP7Y-HAB8] ("T[he] [*National Pork*] decision leaves a lot of room for states, by regulating what businesses can and must do within their borders, to impact how those businesses act in other states. How far that goes remains to be seen in future cases, but it gives a lot of power, especially to larger states, to influence what happens elsewhere." (quoting Professor Steve Vladeck, Univ. of Texas School of Law, and CNN Supreme Court analyst)); *see also Nat'l Pork*, 143 S. Ct. at 1173 (Kavanaugh, J., concurring in part and dissenting in part) (noting that because California's percent share of the pork market is so large, pork producers have "little choice but to comply" with the regulation); Stern, *supra* note 52 ("*National Pork* is a 5-4 victory for animal welfare laws like California's, which regulate in-state sales in a way that affects other states' markets. It's certainly a victory for federalism, giving states broad leeway to experiment with more humane requirements for livestock."); John Fritze, *Texas in Charge? Did the Supreme Court Give Red, Blue States More Power Over National Policy?*, USA TODAY (May 13, 2023, 5:08 AM), https://www.usatoday.com/story/news/politics/2023/05/13/supreme-court-pork-case-implications/70212782007 [https://perma.cc/E26Y-H3E9] ("[S]ome experts say [*National Pork*] . . . might make it easier for states—conservative and liberal—to impose policy choices on large swaths of the nation. 'If you're Gavin Newsom or Ron DeSantis and you're looking to project your legislation outside of your state, you probably feel more confident today than you did yesterday . . . ." (quoting Professor Ruth Mashon, Univ. of Virginia School of Law)); Editorial, *The Supreme Court's Pork Chops*, WALL ST. J. (May 12, 2023, 6:26 PM), https://www.wsj.com/articles/national-pork-producers-council-v-ross-supreme-court-decision-neil-gorsuch-john-roberts-interstate-commerce-41cd6830 [https://perma.cc/7SML-MM4J] ("[E]specially in this polarized era, the majority opinion [in *National Pork*] will embolden more states to impose their social policies on the commerce of other states.").

already provides only a small percentage of its profit.[178] It is economically feasible for a business to simply stop selling its products in a smaller state that imposes restrictions with which the business does not want to comply; it is equally unlikely that a business could simply forfeit its operations in a larger state like California, Texas, or New York.[179]

This clarification of state power will affect several industries throughout the country, not only the pork production industry.[180] Some of this impact may lead to progressive results for the country.[181] For example, the requirements of California's Proposition 12 represent a significant step in the right direction in the battle for the promotion of animal welfare and has already led to the implementation of more humane farming practices nationwide—an effect that is likely to continue as more pork and other meat producers come into compliance with the regulation's requirements.[182] The decision has been celebrated by animal rights activists such as Kitty Block, the president of the Humane Society of the United States, for "ma[king] clear that preventing animal cruelty and protecting

178. *See* Fritze, *supra* note 177 (noting that the governors of California and Florida likely feel confident, following the *National Pork* decision, in their ability to "project [their] legislation outside of [their] state[s]").

179. The states which are the biggest contributors to the United States' GDP are California, Texas, Florida, New York, Pennsylvania, Illinois, and Ohio. Katharina Buchholz, *Which States Are Contributing the Most to U.S. GDP?*, FORBES (July 28, 2023, 10:33 AM), https://www.forbes.com/sites/katharinabuchholz/2023/07/28/which-states-are-contributing-the-most-to-us-gdp-infographic [https://perma.cc/PV2V-K5T8]. Meanwhile, Vermont is the state which contributes least to the United States' GDP, with Maine, Rhode Island, Wyoming, North Dakota, and South Dakota contributing similarly low amounts. Avery Koop, *Visualized: The U.S. $20 Trillion Economy by State*, VISUAL CAPITALIST (July 19, 2023), https://www.visualcapitalist.com/us-economy-by-state/ [https://perma.cc/JLQ2-78DD].

180. For a discussion of the impact which the *National Pork* decision may have upon industries beyond pork production, see *supra* note 16.

181. *See* Fritze, *supra* note 177 (citing progressive environmental and technology regulations recently passed in California and New York and noting that such policy preferences may be able to "spill outside a state's lines" after *National Pork*).

182. *See* Noah Goldberg, *Anti-Cruelty Law that Gives Pigs More Space Could Raise Ham, Bacon Prices*, L.A. TIMES (July 3, 2023) www.latimes.com/california/story/2023-07-03/californias-pork-law-finally-takes-effect-nearly-five-years-after-it-passed [https://perma.cc/X5P7-XCBA] ("When Proposition 12 passed in 2018, pork producers claimed there was no way they could ever make the transition away from confining pigs in small cages. More than four years later [after *National Pork*], the industry has changed and it has transformed to meet the demand of California." (quoting Josh Balk, the leader of the Proposition 12 initiative)); *see also* Zeigler, *supra* note 16 (characterizing the *National Pork* decision as a "win for animal welfare"); David Favre, *Supreme Court's Ruling on Humane Treatment of Pigs Could Catalyze a Wave of New Animal Welfare Laws*, CONVERSATION (May 15, 2023, 8:33 AM), https://theconversation.com/supreme-courts-ruling-on-humane-treatment-of-pigs-could-catalyze-a-wave-of-new-animal-welfare-laws-205548 [https://perma.cc/DNZ4-66SG] ("[P]roducers of eggs and veal that sell in California are on track to implement new space requirements for their animals under [Proposition 12].").

public health are core functions of our state governments."[183] *National Pork* may also provide individual states with a new avenue to pressure national corporations to change their environmental or energy-use policies, forcing such companies to operate in an environmentally friendly manner.[184] The holding may support states in requiring basic conditions for human labor through their in-state regulations, such as by requiring specific minimum wage standards for products to be sold within their borders.[185]

The *National Pork* holding may also be applied to broaden the reach of more conservative-leaning state laws.[186] Most notably, as Justice Kavanaugh's dissenting opinion hinted at, the holding may limit the ability of advocates for women's reproductive autonomy to challenge state laws limiting access to abortion.[187] First, the decision could allow states to ban the in-state sale of goods made by producers that pay for

183. Jessica Gresko, *Supreme Court Backs California Law for More Space For Pigs. Producers Predict Pricier Pork, Bacon*, ASSOC. PRESS (May 11, 2023, 9:23 PM), https://apnews.com/article/supreme-court-california-pork-law-00f5e02dca1577e606f9d4acd8d008aa [https://perma.cc/SKQ2-274C] ("We're delighted that the Supreme Court has upheld California Proposition 12the nation's strongest farm animal welfare law—and made clear that preventing animal cruelty and protecting public health are core functions of our state governments." (quoting Kitty Block, president, U.S. Humane Society)).

184. Showalter et al., *supra* note 16 ("*National Pork* stands for the proposition that states may have more leeway to pass state-specific environmental or energy laws even if those laws impact out-of-state businesses."); *see also* Brief of Illinois, et al. Supporting Respondents at 4, 19–20, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (noting that a ruling for Respondents would protect "States' sovereign authority to enact laws protecting the welfare of their residents, including . . . energy programs," and that "state-level regulations can indirectly influence energy companies and markets beyond state borders"); Fritze, *supra* note 177 (explaining that after *National Pork*, state environmental policies are "one of the most notable" examples of state policies having an effect on interstate commerce, and that "California and other states have imposed vehicle emission standards, for instance, that have forced much of the auto industry to bend to their will").

185. Favre, *supra* note 182 ("[Under *National Pork*] California might also be able to require basic conditions for human labor, such as minimum wage standards, associated with products sold in California.").

186. *See* Fritze, *supra* note 177 ("[The *National Pork* decision] might make it easier for states—conservative and liberal—to impose policy choices on large swaths of the nation.").

187. *See Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., concurring in part and dissenting in part) (explaining that states may now be able to prohibit the sale of goods from producers that do not pay for employees' abortions); *see also* Josh Gerstein, *In New Supreme Court Decision, Abortion Lurks Just Below the Surface*, POLITICO (May 12, 2023, 6:46 PM), https://www.politico.com/news/2023/05/12/supreme-court-california-pork-ruling-abortion [https://perma.cc/Q8DQ-59KZ] (stating that the *National Pork* decision "could become a tool in states' burgeoning efforts to restrict or expand abortion access even beyond their own borders"); *see also* Stern, *supra* note 52 (explaining that Justice Ketanji Brown Jackson's agreement with the lead dissent that the Proposition 12 should have been subject to *Pike* balancing "makes perfect sense" because "the dormant Commerce Clause could help combat red state efforts to restrict abortion beyond their borders—by, say, banning residents from traveling for the procedure, or criminalizing the import of abortion pills").

their employees' reproductive healthcare, including covering their birth control or abortions, which would pressure national employers to stop providing such coverage.[188] Additionally, the holding may "make it easier for antiabortion states to apply criminal or civil penalties on abortion to people beyond state lines," as it can no longer be strongly argued that such penalties violate the dormant Commerce Clause for the restrictions they impose on out-of-state behavior.[189] Similarly, prior to *National Pork*, it could have been plausibly argued that a state abortion ban violated the dormant Commerce Clause by disrupting the interstate sale and distribution of abortion-inducing drugs which can be ordered from out-of-state through the mail; following the holding, such an argument is unlikely to hold up.[190] However, other legal doctrines and constitutional provisions beyond the dormant Commerce Clause may still protect against these potential effects.[191]

Another potential area in which conservative state laws may be extended to other states is social media. For example, Texas enacted a law in 2021 that required social media platforms to stop removing content that they deem to be offensive—including racist, hateful content or other forms of online harassment.[192] In theory, this law only applies to social media in Texas; however, because "social media companies would likely find it very difficult to identify which users are subject to the Texas law," the companies essentially have "no choice but to impose Texas's rules on everyone who uses their site."[193] Though the Texas law could be

188. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., concurring in part and dissenting in part).

189. *See* Zeigler, *supra* note 16 (noting that "abortion-rights supporters may have one less legal weapon in their arsenal" after the *National Pork* decision and that "the logic of the ruling could make it easier for antiabortion states to apply criminal or civil penalties on abortion to people beyond state lines").

190. *See* Gerstein, *supra* note 187 (quoting James Bopp Jr., counsel for National Right to Life, in saying that after *National Pork*, "there is a greater opportunity for pro-life states to regulate, for instance, the sale of chemicals that induce abortions out of state"); *see also* Deese, *supra* note 16 (explaining that the *National Pork* decision may weaken the argument that West Virginia's abortion ban violates the dormant Commerce Clause by disrupting interstate sales of an abortion pill).

191. For a discussion of additional restrictions, other than the dormant Commerce Clause, on the ability of a state to independently regulate out-of-state conduct, see *infra* Section IV.D.

192. *See* Ian Millhiser, *The Surprisingly High Stakes in a Supreme Court Case About Bacon*, VOX (Oct. 9, 2022, 7:30 AM), https://www.vox.com/policy-and-politics/2022/10/9/23392575/supreme-court-national-pork-producers-ross-bacon-dormant-commerce-clause [https://perma.cc/6K62-26CU] ("In 2021 . . . Texas enacted a law that effectively forces major social media platforms like Twitter and Facebook to stop removing content they deem offensive—including content from Nazis and white supremacists, as well as many forms of targeted harassment.").

193. *Id.* ("While this law theoretically only applies to Texas residents and people and businesses who take certain actions in Texas, social media companies would likely find it very difficult to identify which of their users are subject to the Texas law—and therefore would have no choice but to impose Texas's rules on everyone who uses their site.").

challenged under other constitutional protections, following *National Pork*, it could not be challenged for its effects on out-of-state behavior under the dormant Commerce Clause, even though it allows Texas to "decide for the entire country what sort of content appears" on nationwide social media platforms.[194]

B. Practical Effects on the Pork Production Industry

The *National Pork* decision will significantly affect the pork production industry. As argued by the Biden administration in urging the Supreme Court to decide in favor of Petitioners, this decision will mandate a "wholesale change in how pork is raised and marketed in this country" and has effectively "thrown a giant wrench" into the United States pork production business.[195] For pork producers to achieve compliance with the requirements of Proposition 12, substantial investments are anticipated to be required; producers are expected to spend "between $290 and $348 million" to reconstruct their operations and overcome the productivity loss imposed by the regulation, representing a "9.2% cost increase at the farm level."[196] If these large cost increases materialize as the pork producers anticipate, this will be reflected in increased consumer prices.[197] Though California voters voluntarily chose these increased pork prices, consumers in other states did not agree to these higher costs; this may result in a declining demand for pork products, hurting the pork

194. *Id.* (recognizing that the Texas social media law could be subject to challenge under the First Amendment, and that this law "allows a single state to decide" for "the entire country what sort of content appears on Twitter").

195. *See* Gresko, *supra* note 183 ("The Biden administration had urged the justices to side with pork producers, telling the court in written filings that Proposition 12 would be a 'wholesale change in how pork is raised and marketed in this country' and that it has 'thrown a giant wrench' into the nation's pork market.").

196. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1170 (2023) (Roberts, C.J., concurring in part and dissenting in part); *contra* Millhiser, *supra* note 192 (questioning whether the pork producers' "dire predictions" of such substantial cost increases "will actually become a reality," as "key figures within the pork industry have, at times, seemed to contradict the more alarmist positions taken by the industry's lawyers"). Major corporations in the pork production industry including Hormel Foods and Tysons Foods have made statements confirming that their organizations face no risk of material losses from moving toward compliance with Proposition 12, and that customers will still have access to their products. *Id.*

197. *See* Nate Raymond & Andrew Chung, *U.S. Supreme Court Preserves California Humane Pig Confinement Law*, REUTERS (May 11, 2023, 10:48 PM), https://www.reuters.com/world/us/us-supreme-court-rejects-challenge-california-humane-pig-confinement-law-2023-05-11 [https://perma.cc/9RFH-NJZ4] ("Scott Hays, president of the National Pork Producers Council and a Missouri pork producer, voiced disappointment with the Supreme Court's decision. 'Allowing state overreach will increase prices for consumers and drive small farms out of business, leading to more consolidation,' Hays said.").

industry overall and harming smaller farms.[198] Notably, these increased costs will "hit the poor the hardest," especially given that this population has already been facing increasing struggles with rising food prices as the nation sees inflation rates growing at a record-setting pace.[199]

C. Practical Considerations for Industries Beyond Pork Production

The *National Pork* ruling also raises complex practical concerns that businesses in industries beyond pork production must consider as they arise. The ruling may present "significant obstacles and difficult choices" for businesses in any industry wishing to participate in trade in multiple states with different compliance laws.[200] Justice Kavanaugh's dissenting opinion provided some examples of what these complicated situations may look like—for instance, his opinion asked: "What if" one state were to prohibit the sale of fruit picked by noncitizens who are unlawfully in the country, or were to prohibit the sale of goods produced by workers paid under twenty dollars an hour?[201] Because states may now enact legislation affecting national, out-of-state businesses, businesses will have to determine which states have sufficiently large markets for their products to justify taking on the increased costs of compliance with any unique state regulation.[202]

---

198. *See* Matt Regusci, *Will California and the Supreme Court Cripple the Pork Industry?*, FOOD SAFETY TECH. (Jan. 8, 2023), https://foodsafetytech.com/column/will-california-and-the-supreme-court-cripple-the-pork-industry/ [https://perma.cc/S6GU-MR6F] (noting that "for the sake of smaller pig operations nationwide," the author hoped that the Supreme Court would deem Proposition 12 unconstitutional, and explaining that Proposition 12 will mean that "only the largest pig producers in the industry" can serve California because they "have the resources" to "survive in a highly competitive marketplace nationwide" and "create separate facilities for California pork"); *see also* Raymond & Chung, *supra* note 197 (acknowledging that increased consumer prices may "drive small farms out of business"); *contra* Vogue & Sneed, *supra* note 177 (quoting California Solicitor General Michael J. Mongan as defending Proposition 12 by stating that "California voters chose to pay higher prices to serve their local interest in refusing to provide a market to products they viewed as morally objectionable and potentially unsafe").

199. *See* Regusci, *supra* note 198 (noting that an "increase in pork prices in California" will "hit the poor the hardest," particularly because this population is "already suffering" from "inflation rising at rates not seen in more than 40 years").

200. *See* Gorjala et al., *supra* note 177 ("With states given more leeway to pass laws with state specific requirements, businesses could face problems when states have conflicting rules but want or need to participate in multiple markets.").

201. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., concurring in part and dissenting in part) ("[W]hat if a state law prohibits the sale of fruit picked by noncitizens who are unlawfully in the country? What if a state law prohibits the sale of goods produced by workers paid less than $20 per hour? Or as those States suggest, what if a state law prohibits 'the retail sale of goods from producers that do not pay for employees' birth control or abortions' (or alternatively, that do pay for employees' birth control or abortions)?" (citations omitted)).

202. For example, it would be "economically infeasible for many pig farmers and pork producers to exit the California market," due to California's large share of the consumer pork market. *Id.*

Small businesses may feel this effect of the *National Pork* decision the most.[203] Small businesses may struggle to keep up with the "additional expenses and complexities associated with adhering to another state's regulations," providing small businesses with another obstacle to success, particularly when attempting to compete with larger organizations that have greater resources to adapt to the changing regulatory environment.[204] Additionally, the fallout from the holding may prove particularly challenging for vertically-integrated industries, as changing even one small aspect of production in a vertically-integrated business entails substantial change to the entire business model, with significant associated costs.[205] However, the complexities and difficulties that may arise from such "patchwork" state laws requiring different standards within the same industry may also "push Congress to set federal standards" to avoid the problems arising as businesses attempt to comply with all the necessary regulations.[206]

D. Remaining Limitations on Independent State Regulation of Out-of-State Activity

Some products or services that states could seek to regulate beyond their borders under the *National Pork* holding may still be protected under legal doctrines other than the dormant Commerce Clause; future controversy regarding state regulation of interstate activity will likely

---

at 1173. Similarly, a business seeking to sell its products in a state that has enacted regulations with which the business does not already comply will have to determine whether it is economically feasible to simply stop selling its products in that state, or whether the state's market share is large enough to justify the increased costs of compliance.

203. *See* Editorial, *Recent Supreme Court Decision Could Impact Small Businesses*, SMALL BUS. TRENDS (May 22, 2023), https://smallbiztrends.com/2023/05/recent-supreme-court-decision-could-impact-small-businesses.html [https://perma.cc/5TP2-2KZ8] ("For small businesses, particularly those involved in the pork farming and processing industry, this ruling represents a significant shift.").

204. *See id.* ("[Small businesses] now face the potential of additional expenses and complexities associated with adhering to another state's regulations, adding to the already considerable challenges small businesses encounter.").

205. *See, e.g.*, Petition for a Writ of Certiorari app. at 334a–335a, 205a–206a, 214a, *Nat'l Pork*, 143 S. Ct. 1142, No. 21-468 (filed Sept. 27, 2021) (explaining that because the pork production industry is vertically-integrated, to achieve compliance with Proposition 12, producers will have to make substantial changes to their business models, increasing production costs and requiring substantial new capital investments).

206. Favre, *supra* note 182 ("As a specialist in animal law," Professor David Favre "expects that [the *National Pork* decision] will result in a patchwork of laws that are likely to make national meat producers very uncomfortable. Ultimately, it could push Congress to set federal standards"). According to Favre, it can be expected that "Congress will enact national legislation on farm animal welfare issues that will preempt differing state laws" within the next five years. *Id.* For a discussion of the EATS Act introduction in response to the *National Pork* decision, see *supra* note 76.

center around these other legal doctrines.[207] For example, the Constitutional right to travel may protect an individual's ability to travel out-of-state to obtain an abortion, even if the individual's home state has banned such procedures because this right limits states from criminalizing behavior that happens beyond their borders.[208] The Court has held in *Strassheim v. Daily* that one state may not prosecute the citizen of another for acts committed out-of-state that do not cause in-state harm; however, it is unclear whether an abortion occurring out-of-state—but affecting an in-state resident—could be considered in-state harm.[209] Due process concerns and "violation[s] of the Full Faith and Credit Clause, which requires states to honor one another's public acts and judicial proceedings," may also be implicated by state efforts to prosecute out-of-state activity.[210]

Even under this holding, federal law still supersedes any conflicting state law; therefore, instead of seeking redress for a supposedly burdensome state law through the courts, challengers would be advised to

207. Brian R. Frazelle, *Big Business Loses Dormant Commerce Clause as Tool Against States*, CONST. ACCOUNTABILITY CTR. (May 19, 2023), https://www.theusconstitution.org/news/big-business-loses-dormant-commerce-clause-as-tool-against-states [https://perma.cc/2LZF-TRMY] ("As the Court was quick to point out . . . there are other constitutional limits on states' ability to control activity beyond their borders. Controversies involving efforts to regulate beyond state lines, whether involving abortion or other issues, will continue to center around those limits."); *Nat'l Pork*, 143 S. Ct. at 1172–76 (Kavanaugh, J., concurring in part and dissenting in part) (pointing out that "state economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause," and explaining that these questions "deserve further examination in a future case").

208. Some states have passed laws making it a crime to travel out-of-state to receive an abortion. *See* Zeigler, *supra* note 16 (discussing an Idaho law that makes it a crime to help a minor travel out-of-state for an abortion without parental consent, and that allows lawsuits against out-of-state physicians who provide abortions to these minors). However, "the right to travel has an impressive constitutional pedigree" and may be able to "constrain states seeking to criminalize" out-of-state behavior or activity. *Id.*

209. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (holding that an individual cannot be punished by a jurisdiction for "[a]cts done outside a jurisdiction" unless such act intends to, and does, produce "detrimental effects" within that jurisdiction).

210. Zeigler, *supra* note 16 ("[I]f a conservative state like Missouri tries to make it a crime for someone in Illinois to perform an abortion for a Missouri resident, a court would most likely apply Illinois law, not Missouri rules. Doing otherwise might even be unconstitutional, denying the Illinois resident due process of law, and potentially violating the Full Faith and Credit Clause, which requires states to honor one another's public acts and judicial proceedings."); *see* U.S. CONST., art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *see also Nat'l Pork*, 143 S. Ct. at 1156–57 (explaining that in addition to looking to the dormant Commerce Clause "[t]o resolve disputes about the reach of one State's power," the Court has also invoked "a number of the Constitution's express provisions—including the 'Due Process Clause and the Full Faith and Credit Clause'" (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985))).

instead urge federal regulation or Congressional legislation on issues with the potential to affect interstate commerce.[211] As the majority in the *National Pork* decision noted, if the pork producers fear disruption to their industry, "they are free to petition Congress to intervene," as Congress has the power to enact such legislation under "the (wakeful) Commerce Clause," and is "better equipped" than the court system to "identify and assess all the pertinent economic and political interests at play across the country."[212] Similarly, businesses or industries fearing disruption to their interstate activities resulting from the new state regulations likely to arise in the wake of *National Pork* should focus on achieving federal legislation or regulation to supersede the challenged state law.[213] In sum, though independent state regulations that have some nondiscriminatory effect upon interstate commerce are likely no longer challengeable under the dormant Commerce Clause, states seeking to enact regulations with national reach may still face various legal obstacles and challenges when implementing those laws.

CONCLUSION

In a landscape of judicial doctrines being sent to slaughter,[214] the *National Pork* decision spares the dormant Commerce Clause, providing much-needed clarity on its limitations while preserving its basic purpose and function. Business may be said to be the "loser" of this decision, as interstate businesses will be challenged to navigate the patchwork, state-by-state systems of compliance requirements that will likely arise from this decision. However, this case does not reflect a total defeat for business; substantial protections for interstate business remain in place after *National Pork*. Importantly, the *National Pork* Court was careful to

211. *See Nat'l Pork*, 143 S. Ct. at 1160–61 (Part IV-B joined by Thomas & Barrett, JJ.) ("Everyone agrees . . . that congressional enactments may preempt conflicting state laws." (citing U.S. CONST. art. VI, cl. 2)); *see also* Millhisner, *supra* note 37 ("*National Pork* does not prevent the pork industry (or any other industry, for that matter) from seeking a federal solution if it believes that a state law is too burdensome . . . If the pork industry does not like Prop. 12, in other words, it may lobby Congress to enact a federal law preempting California's animal welfare laws."); *see, e.g.*, Zeigler, *supra* note 16 (explaining that because abortion pills are regulated by the federal Food and Drug Administration, "federal rules on those drugs may trump conflicting state laws"); *see also supra* note 76 (discussing the EATS Act introduced in response to the *National Pork* decision).

212. *Nat'l Pork*, 143 S. Ct. at 1161.

213. *See* Note, *The Dormant Commerce Clause and Moral Complicity in A National Marketplace*, 137 HARV. L. REV. 980, 1001 (2024) ("The backstop for state ethical experimentation is Congress, not the courts.").

214. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (limiting the scope of the right to privacy); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (prohibiting the consideration of race in college admissions, overruling precedent on Affirmative Action and Equal Opportunity); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (blurring the separation between church and state).

ensure that the decision would not erode the economic equality of the states, such that state regulations would still be deemed unconstitutional if they were found to discriminate against out-of-state business interests. Moreover, the holding in no way restricts Congress's ability to enact federal regulations for interstate commerce; if problems do arise for interstate businesses due to an increase in differing state laws, Congress can intervene to restore uniformity. With these remaining safeguards, the threat interstate businesses face due to this holding is not grave. On the other hand, the "winners" of this decision are not only animal rights activists; this victory extends broadly to American citizens by allowing them to shape policy more directly throughout the country. In the wake of *National Pork*, citizens, through their state representatives, will wield a new power to apply increased pressure upon national industries to adopt policies better reflecting their wants and needs. Which industries will be most affected by this newfound power, and to what degree, remains to be seen.

SCHOOL *of* LAW