NATIONAL PORK PRODUCERS COUNCIL V. ROSS

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INTRODUCTION

In November 2018, California adopted Proposition 12, a ballot initiative that created new standards for the sale of pork within the state.[1] The new law prohibits "the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are 'confined in a cruel manner.'"[2] It defines "confined in a cruel manner" as "confining [the pigs] in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely."[3]

The law applies to pork produced both in-state and out-of-state.[4] Nonetheless, the cost of complying with the law will primarily burden out-of-state producers because California imports most of the pork it consumes.[5] To comply with Proposition 12, producers must spend "between $290 and $348 million" reconstructing sow housing.[6] These increased costs will amount to an increase in costs of 9.2% per pig at

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1. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023).

2. *Id.* at 1150 (citing CAL. HEALTH & SAFETY CODE § 25990(b) (West Cum. Supp. 2023).

3. CAL. HEALTH & SAFETY CODE § 25991(e)(1).

4. *Nat'l Pork Producers Council*, 143 S. Ct. at 1151.

5. *Id.* at 1151–52.

6. *Id.* at 1170 (Roberts, J., dissenting).

the farm level.[7] The nature of the national pork market practically requires that "all or most hog farmers will be forced to comply with the California requirements" regardless of whether the producers sell in California.[8]

I. ISSUE: STATE POWER UNDER THE DORMANT COMMERCE CLAUSE

The fundamental issue in this case is about the extent to which states can regulate intrastate commerce when there are extraterritorial effects. More specifically, whether states can enact nondiscriminatory regulations that bar the sale of goods produced under certain conditions if said regulations amount to a de facto regulation of out-of-state producers.

II. DEVELOPMENT OF THE DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause is the implicit negative command housed in the Commerce Clause that prohibits "certain state regulation even when Congress has failed to legislate on the subject."[9] The suggestion of the Commerce Clause's implicit bar of certain state regulations can be traced to the beginning of Commerce Clause jurisprudence.[10] Notwithstanding this suggestion, the Court still noted that states had the power to regulate commerce, even if the laws had a "remote and considerable influence on commerce."[11] The Court reiterated that there may be an implicit bar against certain state regulations absent congressional legislation decades later.[12] The Dormant Commerce Clause was first used to strike a state regulation in *Guy v. Balt*.[13] In that case, the Court held that legislation designed to exclude goods manufactured or produced in other States violated the Constitution because such a law would amount to an attempt by a State to regulate commerce between the States.[14] The driving factor

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7. *Id.*

8. *Id.*

9. James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. 1, §8, cl. 3 – Supreme Court Cases*, 41 A.L.R. Fed. 2d 1 § 2 (2009).

10. *Nat'l Pork Producers Council*, 143 S. Ct. at 1152 (noting that in Gibbons v. Ogden, 22 U.S. 1, 203 (1824), Justice Marshall found the argument that the Commerce Clause implicitly barred "certain types of state economic regulation").

11. *Gibbons*, 22 U.S. at 203.

12. *Nat'l Pork Producers Council*, 143 S. Ct. at 1152 (citing Cooley v. Bd. of Wardens, 53 U.S. 299, 320 (1852)).

13. *Id.* (noting that the Court "cashed out these warnings" when it struck down a state commercial regulation in Guy v. Balt, 100 U.S. 434, 443 (1879)).

14. *Guy*, 100 U.S. at 443.

in that case was that Maryland sought to build up its domestic industry at the expense of other states, i.e., Maryland was enacting a protectionist trade policy.[15] The Court continued to interpret the negative command of the Commerce Clause as prohibiting economic isolationism that burdens the flow of commerce across state lines.[16] The dormant Commerce Clause jurisprudence is centered around the principle that states are not allowed to discriminate against commerce with other states.[17]

Given that the primary focus of the dormant Commerce Clause jurisprudence concerns discrimination against interstate commerce, statutes that regulate "evenhandedly to effectuate a legitimate local public interest" and have only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit."[18] The extent to which burdens on interstate commerce will be tolerated depends on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[19] A burden on interstate commerce that "clearly outweigh[es] the benefits of a state or local practice" still may be struck down.[20] This undue burden test associated with *Pike*, however, is not clearly distinct from the analysis regarding discriminatory legislation because many of the cases applying the undue burden test "turned in whole or in part on the discriminatory character of the challenged state regulations."[21] One of the purposes of the *Pike* test was to "smoke out purposeful discrimination in state laws" that are facially neutral.[22] Nonetheless, the fact that the burden primarily or even solely falls on interstate companies, requiring them to either withdraw from a state market or incur new costs, does not necessarily violate the Commerce Clause.[23] State laws that affect the functioning of the interstate markets may be permissible because the Commerce

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15. *Id.*

16. Buchwalter, *supra* note 9 (citing Okla. Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 (1995)).

17. *Nat'l Pork Producers Council*, 143 S. Ct. at 1153 (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581).

18. Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).

19. *Id.*

20. Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008).

21. GMC v. Tracy, 519 U.S. 278, 298 n.12 (1997).

22. *Nat'l Pork Producers Council*, 143 S. Ct. at 1164 n.4.

23. *Id.* at 1161 (citing Exxon Corp. v. Governor of Md., 437 U.S. 117, 125–27 (1978)).

Clause does not protect "the particular structure or methods of operation in a retail market."[24]

The state laws that were neutral and still failed the *Pike* test were those that "undermined a compelling need for national uniformity in regulation."[25] Laws that failed this test typically placed burdens on the "arteries of commerce, on 'trucks, trains, and the like.'" [26] The sole case applying the *Pike* test that struck down a state law that neither had a hidden discriminatory intent nor burdened the arteries of commerce involved "an Illinois securities law that '*directly* regulate[d] transactions which [took] place . . . wholly outside the State' and involved individuals 'having no connection with Illinois.'"[27] That law placed "a direct restraint on interstate commerce" and had "a sweeping extraterritorial effect."[28]

III. ANALYSIS

Proposition 12 does not fall squarely into the prior types of cases. It does not facially discriminate against interstate commerce.[29] It does not discriminate against out-of-state businesses in its practical effects.[30] It does not directly regulate transactions wholly outside the state without any connection to California.[31] Proposition 12 regulates the conditions under which whole pork meat sold in the state may be produced.[32] The law directly regulates the sale of whole pork meat within the state. It indirectly regulates pork producers throughout the country because many of them find it "economically infeasible" to withdraw from the California market because of its prevalence in the consumer pork market.[33] Given that the petitioners conceded that there was no discrimination against out-of-state producers, the analysis centers on the extraterritorial impact the law will have on the pork market. The theories under which the petitioners sought to strike the law were 1) under a proposed "almost *per se"* rule that forbids "enforcement of state laws that have the 'practical effect of controlling commerce outside the State'" regardless of purposeful

24. *Exxon*, 437 U.S. at 127.

25. *GMC*, 519 U.S. at 298 n.12.

26. *Nat'l Pork Producers Council*, 143 S. Ct. at 1166 (Sotomayor, J., concurring).

27. *Id.* at 1157 n.1 (alteration in original) (emphasis in original).

28. Edgar v. Mite Corp., 457 U.S. 624, 642 (1982).

29. *Nat'l Pork Producers Council*, 143 S. Ct. at 1158 (noting the petitioners "disavow[ed] any claim that Proposition 12 discriminates on its face").

30. *Id.* (observing that petitioners did not even suggest that the law's practical effects would discriminate against out-of-state businesses).

31. *See* CAL. HEALTH & SAFETY CODE § 25990(b).

32. *See id.*

33. *Nat'l Pork Producers Council*, 143 S. Ct. at 1173 (Kavanaugh, J., dissenting).

discrimination against out-of-sate economic interests,[34] or 2) under a finding that the law imposes a substantial burden on interstate commerce that does not outweigh the putative local benefits.[35]

A. *"Almost Per Se" Rule*

Petitioners cited three cases to support the proposition of this rule: *Healy v. Beer Institute*, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, and *Baldwin v. G.A.F. Seelig, Inc.*[36] They argued that these cases turned on the "practical effect" of the laws having an extraterritorial effect.[37] The Court notes, however, that there is an antidiscrimination element to all three of these cases.[38] *Baldwin* was a case about a price-fixing statute that denied out-of-state producers the ability to capitalize on their comparative advantage in New York markets.[39] *Brown-Forman* and *Healy* were about price-affirmation statutes that required out-of-state producers to affirm that their in-state prices were not higher than their out-of-state prices.[40] In both of these cases, the laws amounted to economic protectionism.[41] The New York law in *Brown-Forman* "sought to force out-of-state distillers to 'surrender' whatever cost advantages they enjoyed against their in-state rivals."[42] The Connecticut law in *Healy* sought to protect in-state merchants by discouraging consumers "from crossing state lines to make their purchases from out-of-state vendors."[43]

In each of these cases, the issue was not simply that the laws had an extraterritorial effect; the issue was that the statutes had the "*specific* impermissible 'extraterritorial effect'" of deliberately denying "businesses and consumers in other States of 'whatever competitive advantages they may possess.'"[44] These cases, like most of the dormant Commerce Clause precedent, turned on the discrimination

34. *Id.* at 1154.
35. *Id.* at 1157.
36. *Id.* at 1154.
37. *Id.* at 1155.
38. *Id.* at 1153.
39. *Id.* at 1154.
40. *Id.*
41. *Id.*
42. *Id.* (citing Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 580 (1986)).
43. *Id.* at 1155 (citing C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 391–92 to argue that laws like Connecticut's were designed to "'hoard' commerce 'for the benefit of' in-state merchants").
44. *Id.* at 1155 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989)).

against interstate commerce.[45] Discriminating against interstate commerce does produce extraterritorial effects—effects designed to protect the enacting state's home industries and consumers. The Court's rejection of laws with these specific effects does not amount to the rejection of any law with extraterritorial effects.

Additionally, the "almost *per se*" rule would create massive instability and undermine "laws long understood to represent valid exercises of the States' constitutionally reserved powers."[46] The Court noted that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."[47] State laws ranging from income tax to environmental regulation to tort laws all have a "practical effect" on controlling extraterritorial behavior because these are factors businesses consider when deciding where to locate.[48] The "almost *per se"* rule is impractical with the nation's current economy and divorced from the history and tradition of the nation where States have long been able to enact laws "that have a 'considerable' influence on commerce outside their borders."[49]

B. *Pike Balancing Test*

Under this theory, Petitioners ask the Court to weigh the burden imposed on interstate commerce and strike the law if the burden clearly outweighs the presumed local benefit.[50] The initial flaw with this theory is that it assumes that the *Pike* line of cases is truly distinct from the "core antidiscrimination precedents."[51] Although *Pike* does not rely on facial discrimination like much of the Court's precedent, *Pike* and its progeny have often "turned in whole or in part on the discriminatory character of the challenged state regulations."[52] *Pike* serves not as a distinct line of case but as an "important reminder that a law's practical effects may also disclose the presence of discriminatory purpose."[53] The Court then notes that although the dormant Commerce Clause is used primarily to invalidate protectionist or discriminatory laws, there have been some successful

45. *Id.* at 1154.
46. *Id.* at 1156.
47. *Id.*
48. *Id.*
49. *Id.* at 1156 (citing Gibbons v. Ogden, 22 U.S. 1, 203 (1824)).
50. *Id.* at 1157.
51. *Id.* (reiterating that there is not a clear line separating the *Pike* line of cases from the Court's core antidiscrimination precedents).
52. *Id.* (quoting GMC v. Tracy, 519 U.S. 278, 298 n.12 (1997)).
53. *Id.* at 1157.

challenges against laws that were nondiscriminatory, but those kinds of challenges infrequently prevail. [54]

When applying the standard used in *Pike*, the Court finds that the petitioners' challenge failed the balancing test, but there are two rationales as to why it failed—neither of which obtained a majority of the Court. The first rationale is that courts are not "institutionally suited" to balance the variety of economic and noneconomic interests of the statute as would be required in cases such as this one.[55] The second rationale is that the Court does not need to balance the interests in this case because the Petitioners did not "plead facts plausibly showing that [the] challenged law imposes 'substantial burdens' on interstate commerce."[56]

1. Judicial Competence

Writing for three Justices on this point, Justice Gorsuch argues that courts are unable to weigh economic costs against noneconomic benefits.[57] For some groups, the moral and health interests of the new law would outweigh the costs while others would come out the other way; this law seeks to balance incommensurable competing goods.[58] Accordingly, policy choices that weigh these types of costs and benefits "belong to the people and their elected representatives."[59] He further writes that the appropriate solution to the disruption the law causes is to pursue a remedy through Congress because it is "better equipped than [the] Court to identify and assess all the pertinent economic and political interests at play across the country."[60]

2. Substantial Burden on Interstate Commerce

Writing for a four Justice plurality, Justice Gorsuch noted that the plaintiff must show that the "challenged law imposes 'substantial burdens' on interstate commerce" prior to addressing the costs and benefits.[61] He then argues that the petitioners have not done so.[62] Petitioners have alleged that they will incur hundreds of millions of

54. *See id.* at 1158–59.
55. *Id.* at 1159.
56. *Id.* at 1161.
57. *Id.* at 1150.
58. *Id.* at 1160.
59. *Id.*
60. *Id.* at 1160–61.
61. *Id.* at 1161.
62. *Id.*

dollars in costs to build compliant housing, face an increase in production cost by 9.2% at the farm level, and producers will be required to comply even if most of their hog are sold outside California.[63] These, however, are compliance costs associated with changing the market structure and methods of operation. In a prior case, *Exxon Corp. v. Governor of Maryland*, the Court "rejected the view that this predicted 'change [in] the market structure' would 'impermissibly burde[n] interstate commerce.'"[64] In this case, like in *Exxon*, the effect of the law was "to shift market share from one set of out-of-state firms . . . to another."[65] The petitioners' allegations allow for the possibility that the market share will shift from one out-of-state producer to another rather than benefiting in-state producers at the expense of out-of-state producers.[66] The complaint also allows for the possibility that producers will be able to pass some of the costs to Californians—the same people who voted for the challenged law.[67] The complaint also fails to allege sufficiently that "out-of-state consumers indifferent to pork production methods will have to pick up the tab."[68] Furthermore, the reason that most producers will be affected by the regulation is that "California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate."[69] To limit California's ability to regulate its own commerce because of the size of the market would be to say 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."[70]

IV. IMPLICATIONS

As a result of this decision, States will have greater leeway in regulating commerce. States do not need to be as cautious of having extraterritorial effects; they must avoid effects that are impermissible, i.e., discriminatory or protectionist in nature. By rejecting the "almost *per se*" rule, the Court allows states significantly more freedom to regulate their economies and exclude goods they

63. *Id.* at 1170 (Roberts, J., dissenting).

64. *Id.* at 1161 (alteration in original) (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978)).

65. *Id.*

66. *Id.* at 1162.

67. *Id.* at 1162–63 (noting that an increase in prices for citizens of a state resulting from that state implementing a law is not cognizable offense under the dormant Commerce Clause precedents).

68. *Id.* at 1163.

69. *Id.* at 1164.

70. *Id.*

deem to be made in immoral or substandard conditions. The plurality's finding of no "substantial burden on interstate commerce" because the law regulates market structures and methods of operations further expands States' ability to regulate markets broadly. Since the decision, the Sixth Circuit, as well as district courts in the Fourth, Eighth, and Ninth Circuits, have all used this more expansive vision of reserved powers to dismiss challenges to state laws.[71]

Another potential outcome of this case is that States may try to leverage their markets and economic power to coerce states and businesses in other states to enact the former's preferred policies. As Justice Kavanaugh mentions in his dissent, this case has implications that reach far beyond the pork industry. States may decide to prohibit the sale of goods made "by noncitizens who are unlawfully in the country . . . workers paid less than $20 per hour . . . producers that do not pay for employees' birth control or abortions (or alternatively, that do pay for employees' birth control or abortions)."[72] If similar laws can be upheld because they only seek to change the "market structure or method of operations," then the nation could expect to see a new kind of trade war, one that seeks not to protect in-state economic interests but instead seeks to undermine the businesses and economies of ideological opponents.

Nonetheless, the risks of these new kinds of trade wars or abuse of economic leverage are mitigated by the ability of Congress to intervene. The dormant Commerce Clause only acts in the absence of congressional action; thus, Congress could address any issues that implicate national interests. If states were engaging in these kinds of conflicts, Congress is free to implement a uniform rule that preempts these kinds of laws.[73] Additionally, the Commerce Clause is not the only source of restrictions on States' economic regulations. Other constraints such as "the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause" may void laws that would survive scrutiny under the dormant Commerce Clause.[74]

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71. *See* Truesdell v. Friedlander, 80 F.4th 762 (6th Cir. 2023); N. Va. Hemp & Agric. LLC v. Virginia, No. 1:23-cv-1177, 2023 U.S. Dist. LEXIS 195168, at *41–42 (E.D. Va. Oct. 30, 2023); Pitman Farms v. Kuehl Poultry LLC, No. 19-cv-3040, 2023 U.S. Dist. LEXIS 97917, at *24–25 (D. Minn. June 6, 2023); Interlink Prods. Int'l v. Crowfoot, No. 2:20-cv-02277-DAD-CKD, 2023 U.S. Dist. LEXIS 109746, at *10 (E.D. Cal. June 26, 2023).

72. *Nat'l Pork Producers Council*, 143 S. Ct. at 1174 (Kavanaugh, J., dissenting).

73. *See id.* at 1160.

74. *Id.* at 1172 (Kavanaugh, J., dissenting).

CONCLUSION

National Pork Producers v. Ross strengthened the ability of states to regulate their economies even when the regulations have extraterritorial effects. This is especially true for larger states that have a significant extraterritorial impact due simply to the size of their markets. They are free to attempt to craft regulations that choose between their preferred market operations and methods of operation so long as that preference is not "in-state businesses." This also creates some risk that smaller states may be left behind if they try to enact regulations that are incompatible with regulations adopted by larger states. This decision empowers the states, and thus the people, to regulate what kind of goods can be sold in their markets.