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Legal Sidebar

Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law

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On May 11, 2023, the Supreme Court upheld a California rule (Proposition 12) banning the in-state sale of whole pork meat from pigs that had been "confined in a cruel manner," even if those pigs were confined in another state. In *National Pork Producers Council v. Ross*, the Court held that Proposition 12 did not violate the dormant Commerce Clause, which bars state laws that unduly restrict interstate commerce. In general, the Court's decision narrows the dormant Commerce Clause doctrine by rejecting a *per se* rule against nondiscriminatory state regulations that affect out-of-state interests. However, the Justices fractured over which legal standard to apply in evaluating Proposition 12. The five opinions authored in the case reveal extensive disagreements among the Justices that do not follow typical ideological fault lines, but they offer little clarity about the continued relevance of the dormant Commerce Clause or the way in which the Court will apply various lines of precedent in future cases.

Overview of the Dormant Commerce Clause

Article I, Section 8, Clause 3 of the Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although the Commerce Clause is framed as a positive grant of power to Congress and not an explicit limit on states' authority, the Supreme Court has interpreted this clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is "dormant." This negative or dormant interpretation of the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."

The Supreme Court has identified two principles that animate its modern dormant Commerce Clause analysis. First, subject to certain exceptions, states may not discriminate against interstate commerce by enacting laws that are "driven by economic protectionism" or "designed to benefit in-state economic interests by burdening out-of-state competitors." A law that clearly discriminates against out-of-state goods or nonresident economic actors will generally be struck down unless the regulatory entity meets the burden of showing that it is "narrowly tailored to advance a legitimate local purpose" and that there is no reasonable, nondiscriminatory regulatory alternative.

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Second, states may not take actions that are facially neutral but unduly burden interstate commerce. To evaluate facially neutral laws, the Court applies a balancing test most famously articulated in *Pike v. Bruce Church, Inc.*:

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

The Supreme Court has also at times applied an "extraterritoriality principle" in its dormant Commerce Clause analysis, striking down facially neutral state laws that have the effect of regulating conduct entirely beyond a state's borders. While the Court did not articulate a general rule for when it would consider a state's law to have the practical effect of regulating extraterritorial commerce, it recognized that the extraterritoriality principle "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State" and "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the [regulating] State."

Proposition 12 and the Lower Court Litigation

In November 2018, California adopted a ballot initiative known as Proposition 12, which amends California law to forbid the in-state sale of whole pork meat that comes from breeding pigs or their immediate offspring that were "confined in a cruel manner." The law defines *confined in a cruel manner* to include preventing a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely."

The National Pork Producers Council and the American Farm Bureau Federation sued, alleging that Proposition 12 impermissibly burdened interstate commerce because California imports most of the pork consumed in the state. As a result, the petitioners claimed, out-of-state producers would bear most of the law's compliance costs. The district court dismissed the case, holding that the plaintiffs failed to state a claim that Proposition 12 imposed a substantial burden on interstate commerce and that it was therefore unnecessary for the court to evaluate the purported benefits of the regulation. The Ninth Circuit affirmed, and the Supreme Court agreed to review whether Proposition 12 violated the dormant Commerce Clause.

In their briefs, the petitioners conceded that Proposition 12 imposes the same burdens on in-state and out-of-state pork producers. Under the extraterritoriality principle, however, the petitioners argued that Proposition 12 violated an "almost *per se*" bar on laws that have the "practical effect of controlling commerce outside the State" irrespective of whether those laws purposely discriminate against out-of-state economic interests. The petitioners also argued in the alternative that Proposition 12 failed the *Pike* balancing test because the law's benefits to Californians did not outweigh the costs imposed on out-of-state economic interests.

The Supreme Court's Decision

The opinions in the *National Pork Producers* case primarily addressed three questions. First, should the Court adopt the petitioner's proposed "almost *per se*" rule, in which a law that is not facially discriminatory nor motivated by a discriminatory purpose can be unconstitutional based on its practical effects? Second, did Proposition 12 substantially burden interstate commerce? And third, if Proposition 12 did substantially burden interstate commerce, should the lower courts have applied a *Pike* balancing test to determine whether that burden was excessive?

A fractured Supreme Court affirmed the Ninth Circuit's ruling and upheld Proposition 12 through a plurality opinion. Although five Justices agreed that Proposition 12 did not violate the dormant Commerce Clause, those Justices did not agree on *how* the Court should evaluate dormant Commerce Clause challenges to state regulation. Justice Gorsuch delivered the opinion for the Court but garnered a majority of votes for only part of his opinion. Four other opinions concurred, dissented, or both with respect to various aspects of the plurality opinion's reasoning.

Justice Gorsuch's Opinion for the Majority Rejects the "Almost *Per Se*" Rule

The Court unanimously rejected the petitioners' proposed "almost *per se*" rule against laws with extraterritorial effects. In an opinion by Justice Gorsuch, the majority held that the cases cited by the petitioners did not support an "almost *per se* rule" against state laws that effectively control out-of-state commerce but instead typified "the familiar concern with preventing purposeful discrimination against out-of-state interests." The majority stressed the specific context of various cases on which the petitioners relied, explaining that "the challenged statutes had a *specific* impermissible 'extraterritorial effect'—they deliberately 'prevent[ed out-of-state firms] from undertaking competitive pricing' or 'deprive[d] business and consumers in other States of 'whatever competitive advantages they may possess.'" The majority acknowledged that many if not most state laws have the practical effect of controlling extraterritorial behavior, and it cautioned that the petitioners' proposed rule "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers."

The majority also rejected the petitioners' argument that Proposition 12 was unconstitutional under *Pike*. The majority described that case as concerned with the *purpose* of a law: If a state law's "practical effects" disclosed a discriminatory purpose, then it might run afoul of *Pike*. Because the petitioners alleged neither that Proposition 12 was facially discriminatory nor that its practical effects would disclose purposeful discrimination against out-of-state businesses, the majority concluded that their claim "falls well outside *Pike*'s heartland."

Five Justices Would Have Held That Proposition 12 Created a "Substantial Burden"

Even without purposeful discrimination, a state law might violate the dormant Commerce Clause under *Pike* if it imposed a "substantial burden" on interstate commerce. Five Justices (in two separate opinions) would have held that Proposition 12 had adequately alleged such a burden.

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson, wrote an opinion concurring in part and dissenting in part. While he agreed with the majority's rejection of the petitioners' *per se* rule against state laws with extraterritorial effects, Chief Justice Roberts argued that the petitioners plausibly alleged a substantial burden on interstate commerce and would have vacated and remanded the case for the lower court to reapply *Pike*.

Justice Kavanaugh joined the opinion written by Chief Justice Roberts and wrote separately to argue that Proposition 12 imposes substantial burdens on the interstate pork market. In his view, Proposition 12 was a significant departure from agricultural practices that are common and lawful in other states and could actually worsen animal health and welfare, but pork producers had little choice but to comply because of California's large market share. Justice Kavanaugh wrote that state regulations such as Proposition 12 may also implicate the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

In contrast, Justice Gorsuch wrote that balancing burdens and benefits under *Pike* was unnecessary because the petitioners failed to establish that Proposition 12 imposed substantial burdens on interstate commerce. Joined by Justices Thomas, Sotomayor, and Kagan, Justice Gorsuch wrote that out-of-state pork producers could choose to modify their existing operations in order to comply with Proposition 12, segregate their operations to ensure that pork products entering California are compliant, or withdraw

from the California market. Justice Gorsuch concluded that the fact that California's new law might shift market share from one set of producers to another did not constitute a sufficient burden on interstate commerce to warrant further judicial scrutiny.

Finally, Justice Barrett agreed with Chief Justice Roberts on this question. In a concurring opinion in which no other Justice joined, Justice Barrett argued that the petitioners' complaint plausibly alleged that Proposition 12 substantially burdened interstate commerce. She accordingly would have permitted the petitioners to proceed with their *Pike* claim "[i]f the burdens and benefits were capable of judicial balancing." That important qualifier, however, split the Court, preventing the five Justices who would have found a "substantial burden" from determining the outcome of *National Pork Producers*.

The Debate on the Court Over the *Pike* Balancing Test

Under *Pike*, if a state law has a substantial burden on interstate commerce, a reviewing court would next apply a balancing test to determine whether that burden was excessive in relation to the local benefits of the law. The question of whether the burdens and benefits of a state law are "capable of judicial balancing," in Justice Barrett's words, became a significant point of discussion in the *Pork Producers* opinions. None of the opinions on that question, however, gained the support of a Court majority, leaving the long-term consequence of this debate uncertain.

In a portion of his opinion joined by two other Justices (Justices Thomas and Barrett), Justice Gorsuch would have ruled that the *Pike* balancing test was judicially unworkable because a court cannot meaningfully compare or weigh economic costs against noneconomic benefits. In this particular case, the three Justices described the competing concerns of new costs for out-of-state producers who choose to comply with Proposition 12 and the moral and health interests of in-state residents as "incommensurable" and argued that policy choices that require the weighing of relevant political and economic costs and benefits are more appropriately made by the political branches. In her separate opinion, Justice Barrett agreed with Justice Gorsuch that it was not possible for a court to weigh California's interest in "eliminating allegedly inhumane products from its markets" against the economic effects on out-of-state producers.

Justice Sotomayor, joined by Justice Kagan, rejected the view that the *Pike* balancing test was judicially unworkable, arguing that *Pike* and its progeny allow at least some challenges to nondiscriminatory state laws.

Chief Justice Roberts's opinion on behalf of four Justices acknowledged that *Pike* is "susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens." He argued, however, that it "also reflects the basic concern of our Commerce Clause jurisprudence that there be free private trade in the national marketplace" and rejected the notion that *Pike* was judicially unworkable or applied only to cases involving discriminatory state laws or implicating the instrumentalities of interstate transportation.

Implications of the Court's Decision

The unusual lineup of opinions in *National Pork Producers* may appear to present a dilemma: Five Justices agreed that Proposition 12 was a substantial burden on interstate commerce, while a different set of six Justices agreed that *Pike* balancing is an appropriate method to evaluate such a law under the dormant Commerce Clause. Despite this, the Court did not order *Pike* balancing for Proposition 12. The reason for that outcome is that five Justices voted to affirm the lower court decision, but on divergent grounds: Justices Sotomayor and Kagan because they did not believe that the particular state law at issue here imposed a substantial burden on interstate commerce; and Justices Gorsuch, Thomas, and Barrett because they believed more generally that *Pike* balancing is unworkable. What, then, does this complex set of opinions mean?

Most directly, the Court's decision in *National Pork Producers* allows California to continue regulating animal welfare conditions for pork sold in the state and could empower other states to impose their own similar requirements. The ruling could also bolster efforts by states to enact other types of regulations that have impacts on out-of-state businesses, including when the benefits of those regulations are non-economic in nature. In particular, some commentators have suggested that the case could most directly affect challenges to state energy policies that require a specific percentage of electricity sold in the state to come from renewable resources. The Justices left unanswered, however, how courts should approach state laws that impose conflicting requirements on out-of-state actors. Some scholars have observed that burdens arising from "mismatches" among two or more states' laws have historically been evaluated under a framework that focuses on different benchmarks than how courts consider the burden imposed by a single state's law. Courts could confront this question in the future if states adopt animal welfare laws that conflict with California's Proposition 12.

More broadly, it is difficult to parse are the decision's effects on the dormant Commerce Clause. The fractured ruling, which did not align with traditional ideological divisions on the Court, indicates disagreement among the Justices about how to evaluate dormant Commerce Clause challenges to state regulations. For now, the *Pike* balancing test remains viable even though some Justices disfavor its continued use. In light of the majority's yoking of *Pike* to the Court's "core antidiscrimination precedents," however, future litigants will need to allege that a challenged law is discriminatory in order for a review court to weigh its benefits and burdens under *Pike*.

Even under that test, lower courts may disfavor striking down state and local regulations on dormant Commerce Clause grounds in light of the *National Pork Producers* majority's insistence that "[e]xtreme caution is warranted" before invalidating a democratically adopted state law. Some Justices have also periodically argued that the Court should turn its focus away from the dormant Commerce Clause and instead evaluate the constitutionality of state regulations under other frameworks, such as the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause. Justice Kavanaugh's opinion highlighting those constitutional provisions indicates that there remains some interest in this approach among the Justices, though it has not gained the support of a majority of the Court. Litigants seeking to challenge state and local regulations thus may increasingly focus on other constitutional arguments instead of or in addition to the dormant Commerce Clause.

The relevance of extraterritorial effects in evaluating future dormant Commerce Clause challenges is also unclear. The majority rejected a *per se* rule against extraterritoriality and distinguished earlier cases that the petitioners cited in support of their proposed approach. While the Court unanimously ruled that such effects may not form the sole basis for invalidating a state regulation, Chief Justice Roberts's concurring opinion suggests that there could be room for courts to consider "sweeping extraterritorial effects" among other aspects of a challenged law in applying *Pike*. None of the *National Pork Producers* opinions addressed how future courts should weigh extraterritorial effects as one factor in applying *Pike*, however.

The Supreme Court's modern dormant Commerce Clause jurisprudence has been highly fact-specific and may continue to be so. The *National Pork Producers* majority warned against "read[ing] too much" into the language of individual dormant Commerce Clause cases, emphasizing that the Court's opinions "dispose of discrete cases and controversies and ... must be read with a careful eye to context." As the Court's jurisprudence in this area continues to develop, the applicability of both *National Pork Producers* and prior lines of precedent to future cases is difficult to predict.

Considerations for Congress

Courts analyze state regulations under the dormant Commerce Clause framework where Congress is "dormant"—i.e., where there is not relevant federal legislation. Currently, there are not nationally applicable laws governing the confinement of pigs. As noted by Justices Gorsuch and Kavanaugh,

Congress could exercise its Commerce Clause authority to impose nationwide requirements for pig confinement or for other aspects of pork production. Congress could also limit states' ability to regulate livestock and other agricultural production, but federal laws that issue direct commands to states, rather than regulating private actors, may raise anticommandeering concerns.

Some Members have expressed support for Proposition 12. Following the Court's ruling in *National Pork Producers*, other Members who opposed Proposition 12 reintroduced legislation to prohibit states from imposing requirements on out-of-state agricultural producers that would be more stringent than federal requirements or the laws of the state in which the production takes place. The Ending Agricultural Trade Suppression Act (H.R. 4417 and S. 2019), which was also introduced in the 117th Congress (H.R. 4999 and S. 2619), would create a right of action for producers and other entities that are affected by state agricultural regulations to sue to invalidate a regulation and seek damages for economic loss resulting from the regulation.

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