National Pork Producers Council v. Ross: Extraterritoriality Is Dead, Long Live the Dormant Commerce Clause

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Introduction

In a 2021 decision, Ninth Circuit Judge Sandra Ikuta wrote that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction."[1] Until quite recently, there appeared to be considerable truth in that remark.[2] The case Judge Ikuta was writing about, *National Pork Producers Council v. Ross*, ended up at the Supreme Court. And a cursory glance at the Supreme Court's subsequent opinion might not inspire confidence that the dormant Commerce Clause doctrine (DCCD) is in good health. The tangle of majority and plurality opinions on the issues before the Court, expressed through partial concurrences and dissents, might seem to suggest that the DCCD is on its last legs.

Happily, reports of the doctrine's having one foot in the grave turn out to be exaggerated. Despite a superficial messiness caused by that skein of separate opinions, *National Pork Producers* is the latest in a series of cases decided within the last decade that cement the DCCD firmly in our constitutional canon. Moreover, it performs an overdue bit of doctrinal pruning by unanimously abjuring what was once a branch of the DCCD: extraterritoriality. Finally, it provides some clarification of so-called *Pike* balancing, in which facially neutral statutes are subjected to a test that compares the local benefits of the

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[1] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1142, 1165 (2023).

[2] *See infra* Part III.

law with the burdens the law places on interstate commerce.[3] That test had long been subject to criticism from members of the Court, most notably the late Justice Antonin Scalia, as being beyond the judicial ken.[4] Parsing the various opinions in *National Pork Producers*, it appears that *Pike* balancing (as traditionally understood) retains the support of a solid majority of the Justices.

I summarize the facts that led up to the opinion itself in Part I. In Part II, I discuss both the Court's rejection of the claim that the challenged law operated with impermissible extraterritorial effect and the Court's rejection of extraterritoriality itself as a DCCD doctrine. Part III then looks at the Court's treatment of the *Pike* balancing claim and the clarifying statements from the Justices themselves about *Pike*'s correct application. A brief conclusion follows.

I. *National Pork Producers Council*: A Summary[5]

In 2018, 61 percent of California voters approved Proposition 12, which "revised the State's existing standards for the in-state sale of eggs and announced new standards for the in-state sale of pork and veal products."[6] Specifically, the revised law defined as "cruel" the confinement of pigs in cages that prevented them from lying down, standing up fully, or turning around.[7] Proponents argued that more humane confinement conditions could result in more sanitary conditions that, in turn, might reduce incidents of food poisoning. Opponents argued to the contrary that more restrictive confinement could better protect animals ("by preventing pig-on-pig aggression") and better protect public health ("by avoiding contamination").[8] Opponents "also warned voters that Proposition 12 would require

[3] *See infra* notes 67–98 and accompanying text.

[4] *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (complaining that because the benefits and burdens are incommensurable, *Pike* balancing asks a court to "judg[e] whether a particular line is longer than a particular rock is heavy").

[5] This description of the case draws heavily from Brannon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce § 6.07[I](1) (2nd ed. 2013) (2024-1 Supp.).

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

[7] *Id.* at 1150–51.

[8] *Id.* at 1151.

some farmers and processors to incur new costs . . . . that 'might be "passed through" to California consumers.'"[9]

Two groups, including the National Pork Producers Council, filed a lawsuit challenging the law under the DCCD. In broad terms, the DCCD holds that states violate the Constitution's Commerce Clause "when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States.'"[10] In their challenge, the groups conceded that California's law was facially neutral because it did not distinguish between pork produced outside California and pork produced within California. But they alleged that Proposition 12 violated the DCCD in two ways: (1) by its impermissible extraterritorial effects; and (2) by its inability to clear the bar set by *Pike v. Bruce Church, Inc.*[11] The petitioners noted that although a substantial percentage of farmers nationwide had "already converted to some form of group housing for pregnant pigs," "even some farmers who already raise group-housed pigs will have to modify their practices if they wish to comply with Proposition 12."[12] In addition, because of the vertically integrated nature of the pork industry, "[r]evising this system to segregate and trace Proposition 12-compliant pork . . . will require certain processing firms to make substantial new capital investments" of more than nine percent.[13] "These compliance costs," the petitioners argued, "will fall on California and out-of-state producers alike. . . . But because California imports almost all the pork it consumes . . . 'the majority' of Proposition 12's compliance costs will be initially borne by out-of-state firms."[14]

In the end, the Supreme Court rejected both claims. In the pages that follow, I will highlight what are, to me, the two remarkable aspects of *National Pork Producers*. First—as I speculated in an article published a decade ago[15] and as *National Pork Producers* has now made explicit—extraterritoriality is no longer a branch of the DCCD.

[9] *Id.*

[10] *Id.* at 1152.

[11] 397 U.S. 137 (1970).

[12] *National Pork Producers*, 143 S. Ct. at 1151.

[13] *Id.*

[14] *Id.* at 1151–52.

[15] Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979 (2013).

Second, *National Pork Producers* is one of a recent string of opinions that firmly cement the position of the DCCD as a legitimate—indeed, necessary—body of constitutional doctrine. A decade ago, the DCCD's future status—especially its *Pike* balancing prong—was decidedly less certain.

II. Extraterritoriality is Dead . . . [16]

In *Baldwin v. G.A.F. Seelig*, a 1935 opinion written by Justice Benjamin Cardozo, the Court invalidated a New York law that prohibited the in-state sale of milk purchased out-of-state if the milk had been purchased below the minimum price prescribed by New York.[17] Justice Cardozo wrote that the DCCD prohibited New York from "project[ing] its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[18] In the 1980s, the Court built on Cardozo's conclusion that such projection constituted the sort of direct regulation of interstate commerce that the DCCD denies to the states. Extending Cardozo's logic, the Court decided a series of cases that grafted extraterritoriality onto the DCCD.[19]

In 1989, Justice Harry Blackmun summarized DCCD extraterritoriality in the following sweeping terms:

> The principles guiding this assessment, principles made clear in *Brown–Forman* and in the cases upon which it relied, reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres. Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the "Commerce Clause . . . 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 State," . . . and, specifically, a State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in other states[.]" Second, a statute that directly controls commerce occurring wholly outside the boundaries of a

[16] Portions of this Part draw from Denning, *supra* note 5, at § 6.08[E] (2024-1 Supp.).

[17] 294 U.S. 511 (1935).

[18] *Id.* at 521.

[19] Healy v. Beer Inst., Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Edgar v. MITE Corp., 457 U.S. 624 (1982).

> State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. . . . And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.[20]

This broad and sweeping[21] articulation of DCCD extraterritoriality had the potential to disrupt state regulatory efforts in a variety of areas.[22] Seven years later in *BMW v. Gore*,[23] the Court seemed to reinforce *Healy*'s sweeping conception of extraterritoriality. *Gore* struck down a jury verdict in a fraud case involving a damaged car falsely sold as new. The jury's method of calculating damages was to multiply the damage to the plaintiff's car by the total number of sales of similarly damaged BMW cars in other jurisdictions. The Court held that this verdict violated the Constitution's Due Process Clause because in some cases the out-of-state conduct was not considered fraud under those states' laws. In the opinion, the Court cited several of its DCCD extraterritoriality cases to underscore the principle that states may not export their policies into other states.

With the advent of the internet, scholars and judges alike began to appreciate the implications of a broad extraterritoriality branch

[20] *Healy*, 491 U.S. at 335–37 (citations and footnotes omitted).

[21] 1 Laurence H. Tribe, American Constitutional Law § 6-8, at 1077, 1078 n.21 (3d ed. 2000).

[22] *See, e.g.*, Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits*, 2003 Mich. St. DCL L. Rev. 115, 151–56.

[23] 517 U.S. 559 (1996).

of the DCCD.[24] One New York district court struck down a state law prohibiting the dissemination of obscene material to minors over the internet, largely on extraterritoriality grounds.[25] I myself questioned the constitutionality of municipal suits against firearm manufacturers on the same extraterritoriality grounds, arguing that the changes that cities were demanding of manufacturers were essentially attempts to regulate activities that occurred within the boundaries of other states.[26]

Other scholars argued during this period that either DCCD extraterritoriality was not as broad as was claimed or, if it was, that it should be revisited by the Court.[27] In 2003, the Court itself seemed to walk back a great deal of *Healy*'s more expansive language in *Pharmaceutical Research and Manufacturers of America v. Walsh*.[28] In that case, the Court upheld Maine's prescription drug subsidy program. Under the program, prescription drug manufacturers would rebate money from drug sales to the state's Medicaid program in order to avoid a prolonged preauthorization process. That money in turn

[24] Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177 (S.D.N.Y. 1997); Dan L. Burk, *Federalism in Cyberspace*, 28 Conn. L. Rev. 1095, 1127–32 (1996); Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 Va. L. Rev. 535, 537–40 (1996); Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 Ga. L. Rev. 889 (1998).

[25] *Am. Libraries Ass'n*, 969 F. Supp. at 173–77.

[26] Brannon P. Denning, *Gun Litigation and the Constitution*, *in* Suing the Gun Industry: A Battle at the Crossroads of Gun Control & Mass Torts (Timothy D. Lytton, ed., paperback ed. 2006).

[27] *See e.g.*, Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 786–87 (2001) ("[T]he reasoning of *American Libraries Ass'n* extends far beyond the regulation at issue in that case. In fact, the dormant Commerce Clause argument, if accepted, threatens to invalidate nearly every state regulation of Internet communications. For under the logic of *American Libraries Ass'n*, nearly every state regulation of Internet communications will have the extraterritorial consequences the court bemoaned."); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. Rev. Mich. St.-Detroit Coll. L. 115, 176 ("At its first opportunity, the Supreme Court should go further and disavow altogether its suggestions of a renewal of strict territorial limits on the reach of state law. While the Constitution imposes limits on a state's prescriptive and adjudicatory jurisdiction, it does not demand that state law stop dead in its tracks at the state's borders.").

[28] 538 U.S. 644 (2003).

would subsidize drug sales to Maine residents under a new program.[29] The petitioners argued that the program had impermissible extraterritorial effects, but the Court rejected that argument:

> [U]nlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices." The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.[30]

In a 2013 article, I concluded that extraterritoriality was moribund,[31] based in part on *Walsh* and in part on the Court's subsequent rooting of its punitive damage decisions in the Due Process Clause rather than the DCCD.[32] The doctrine continued to be cited in the lower courts,[33] however, leading some to argue that "[t]he demise of the dormant Commerce Clause's extraterritoriality doctrine has been greatly exaggerated."[34] But if there *was* still some life left in extraterritoriality, *National Pork Producers* delivered a unanimous *coup de grace*.

Justice Neil Gorsuch began the majority's analysis by stressing that the DCCD's antidiscrimination principle was not in play here, which meant that "petitioners begin in a tough spot."[35] Nevertheless, he explained, "[t]hey contend that our dormant Commerce Clause cases suggest an . . . 'almost *per se*' rule forbidding enforcement of state laws that have 'the practical effect of controlling commerce outside the state,' even when those laws do not purposely discriminate against out-of-state economic interests."[36] The law here, they argued, "offends this 'almost *per se*' rule because the law will impose

[29] *Id.* at 649–50.

[30] *Id.* at 669.

[31] Denning, *supra* note 15.

[32] Philip Morris, USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[33] Denning, *supra* note 15, at 992–94 & nn.80–86.

[34] Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 Marquette L. Rev. 497, 526 (2016).

[35] *National Pork Producers,* 143 S. Ct. at 1153.

[36] *Id.* at 1154.

substantial new costs on out-of-state pork producers who wish to sell their products in California."[37]

But Justice Gorsuch concluded that no such per se rule existed in the DCCD. Any such limits on states' abilities to legislate beyond their borders lay elsewhere—in the "original and historical understandings of the Constitution's structure and the principles of 'sovereignty and comity' it embraces," or in the Due Process and Full Faith and Credit Clauses, for example.[38] Gorsuch described the petitioners' argument as "falter[ing] out of the gate" because each of the canonical extraterritoriality cases they cited—*Baldwin*, *Healy*, and *Brown-Forman*—"typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests."[39] The New York price-fixing statute in *Baldwin* "'plainly discriminate[d]' against out-of-staters by 'erecting an economic barrier protecting a major local industry against competition from without the State.'"[40] Likewise, "*Brown-Forman* and *Healy* differed from *Baldwin* only in that they involved price-affirmation, rather than price-fixing, statutes."[41] The latter "amounted to 'simple economic protectionism'" by "requiring out-of-state distillers to 'surrender' whatever cost advantages they enjoyed against their in-state rivals."[42]

The petitioners had argued that the defendants' narrow reading of those cases "misses the forest for the trees."[43] But Justice Gorsuch responded that it was actually the petitioners who "read too much into too little."[44] Cautioning that judicial opinions should not be read as if they were statutes, the majority opinion noted that *Walsh* had cabined those three earlier opinions such that they stood only for the limited proposition that states cannot tie the "price of . . . in-state products to out-of-state prices."[45] To adopt the more expansive

[37] *Id*.

[38] *Id*. at 1156.

[39] *Id*. at 1154.

[40] *Id*. (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951)).

[41] *Id*.

[42] *Id*. (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 576 (1986)).

[43] *Id*. at 1155.

[44] *Id*.

[45] *Id*. (quoting *Walsh*, 538 U.S. at 669).

reading of those cases would ignore the fact that "[i]n our interconnected national market place, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."[46] If any state law that had the "practical effect" of controlling out-of-state commerce were suspect, that application of the DCCD "would cast a shadow over laws long understood to represent vital exercises of States' constitutionally reserved powers."[47]

Justice Gorsuch did not doubt that there were limits to a state's ability to project its legislative jurisdiction into other states. But he argued that those limits lay elsewhere.[48] He concluded: "The antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means . . . that *any* question about the ability of a State to project its power extraterritorially must yield to an 'almost *per se*' rule under the dormant Commerce Clause."[49]

In a partial dissent, Chief Justice John Roberts, joined by Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson, likewise rejected extraterritoriality as a branch of the dormant Commerce Clause. That made this portion of the decision effectively unanimous. "I . . . agree," Roberts wrote, "with the Court's conclusion that our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."[50]

Professor Donald Regan once wrote that "extraterritoriality is not a dormant commerce clause problem."[51] Thirty-six years later, the Court appears to have come around to his view, recharacterizing the canonical "extraterritoriality" cases discussed above as anti-discrimination cases and leaving to other parts of the Constitution the role of limiting states' legislative jurisdiction vis-à-vis one another.

[46] *Id*.

[47] *Id*. at 1156.

[48] *Id*.

[49] *Id*. at 1156–57.

[50] *Id*. at 1167 (Roberts, C.J., concurring in part and dissenting in part).

[51] Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1873 (1987).

III. . . . Long Live the Dormant Commerce Clause

In a previous article, I speculated that one of the drivers of the Court's abandonment of a strong DCCD extraterritoriality principle was its overall ambivalence towards the DCCD as a constitutional doctrine.[52] "In 2003, when *Walsh* was decided," I noted, "Justice [Clarence] Thomas announced his intention never again to vote to invalidate a state law challenged under the DCCD."[53] Norman Williams and I regarded the Court's grant of certiorari in *Comptroller v. Wynne*[54] as "ominous"[55]—possibly heralding dramatic restrictions on (or even abandonment of) the DCCD.[56] From 2000 until 2015, the Court had invalidated only one non-tax state law under the DCCD: Michigan's in-state winery exception to its ban on direct shipment of wine to consumers.[57] During that time, the Court also created a heretofore unknown exception to the DCCD's anti-discrimination principle: a law may grant a monopoly to a local public entity performing a traditional governmental service, as long as the law prohibits competition from *both* in-state and out-of-state private providers of that service.[58] Only Justices John Paul Stevens, Anthony Kennedy,

[52] Denning, *supra* note 15, at 1004–06.

[53] *Id.* at 1004. Justice Scalia's disdain for the doctrine was long a matter of record. *See, e.g.*, Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?* 12 Cardozo L. Rev. 1717 (1991) (surveying and analyzing the various grounds on which Justice Scalia objected to the DCCD).

[54] Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453 (Md. 2013), *cert. granted* 572 U.S. 1134 (2014), *aff'd* 575 U.S. 542 (2015).

[55] Brannon P. Denning & Norman R. Williams, Wynne*: Lose or Draw*? 67 Vand. L. Rev. En Banc 245, 268 (2014).

[56] *Id.* at 264–67.

[57] Granholm v. Heald, 544 U.S. 460 (2005). In *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16 (2008), the Court did hold that Illinois had unconstitutionally attempted to tax a portion of income from a transaction that was not part of MeadWestvaco's unitary business.

[58] United Haulers Ass'n, Inc. v. Oenida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007); *see also* Dep't of Rev. of Ky. v. Davis, 553 U.S. 328 (2008) (applying the public-entities exception to uphold a state tax exemption for income from bonds issued by the state or its subdivisions, where the state taxed income derived from similar out-of-state bonds). For an analysis and critique of this exception, see Norman R. Williams & Brannon Denning, *The New Protectionism and the American Common Market*, 85 Notre Dame L. Rev. 247 (2009).

and Alito expressed support for a robust DCCD.[59] It appeared that the DCCD might have been on its last legs.

But starting with the *Wynne* decision in 2015, it began to look like the DCCD was getting its second wind. The Court began to embrace the DCCD with escalating levels of enthusiasm. In *Wynne*, the Court held that Maryland could not deny its residents a tax credit for county taxes paid on out-of-state income. The Court held that this denial violated the DCCD's "internal consistency" requirement, which ensures that state residents are not taxed twice on interstate income.[60] Three years later, in *South Dakota v. Wayfair*, the Court formally abandoned its previous holding that states may not tax the income of businesses that lack a physical presence in the state—a requirement that had become increasingly untenable in light of the growth of internet commerce.[61] While *Wayfair* broadened the ability of states to tax interstate commerce, Justice Kennedy's opinion was interesting in its treatment of the DCCD as a body of doctrine. Kennedy's opinion was unlike Justice Alito's *Wynne* opinion, which was rather minimalist insofar as it stressed that *Wynne*'s outcome was largely determined by the Court's prior cases.[62] Justice Kennedy, by contrast, undertook a broad survey of the doctrine and its application in tax cases, highlighting the doctrine's lengthy pedigree. He concluded that "[m]odern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[63]

The next term in *Tennessee Wine & Spirits Retailers Association v. Thomas*, the Court struck down, on DCCD grounds, a state residency

[59] *See Davis*, 553 U.S. at 362 (Kennedy, J., dissenting); *United Haulers Ass'n*, 550 U.S. at 355 (Alito, J. dissenting).

[60] *Wynne*, 575 U.S. at 564–65. *See generally* Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 Minn. L. Rev. Headnotes 103 (2016).

[61] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097, 2099 (2018), *overruling* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[62] *See* Denning, *supra* note 60, at 109 (speculating about the "peculiar structure of the opinion").

[63] *Wayfair*, 138 S. Ct. at 2090–91.

requirement for persons applying for a retail liquor store license.[64] Writing for the Court's majority, Justice Alito authored his own survey of the DCCD that was no less extensive than Justice Kennedy's in *Wayfair* and even more emphatic about the importance of the DCCD to our constitutional system. While acknowledging the DCCD's critics, Justice Alito forthrightly wrote, "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law."[65] Moreover, he added, "without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising."[66]

Alito noted that the Constitution was, in part, a response to the states' interference with interstate commerce during the Articles of Confederation Era.[67] "In light of this background," he continued, "it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job."[68] Alito noted that the Import-Export and the Privileges and Immunities Clauses have both been interpreted in ways limiting their reach.[69] "In light of this history and our established case law," he concluded, "we reiterate that the Commerce Clause by its own force restricts state protectionism."[70]

[64] 139 S. Ct. 2449, 2476 (2019).

[65] *Id.* at 2460.

[66] *Id.*

[67] *Id.* For an account of this Confederation-Era period, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause*, 94 Ky. L.J. 37 (2005).

[68] *Tenn. Wine & Spirits*, 139 S. Ct. at 2460.

[69] *Id. See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equaliz. of Cal., 451 U.S. 648, 656 (1981) (Privileges and Immunities Clause does not apply to corporations); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 136–37 (1869) (Import-Export Clause applies only to foreign commerce). For a critique of the latter case, see Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 Colo. L. Rev. 155 (1999) [hereinafter Denning, Camps Newfound/Owatonna]. Justice Alito also observed that the Privileges and Immunities Clause's substantive protections may be limited in relation to the DCCD. *Tenn. Wine & Spirits*, 139 S. Ct. at 2461 (citing Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 Minn. L. Rev. 384, 393–97 (2003)).

[70] *Tenn. Wine & Spirits*, 139 S. Ct. at 2461.

What is striking about *Tennessee Wine & Spirts* is that none of the seven Justices who joined the majority seemed to disagree with Justice Alito's forthright endorsement of the DCCD and his emphatic declaration of its legitimacy. If his colleagues had had any qualms, one might have expected a brief concurring opinion or two. But none wrote separately. And Justices Gorsuch and Thomas dissented not because they disagreed with the majority's description of the DCCD, but rather because they thought the Twenty-first Amendment—which delegated control over alcohol to the states—effectively overrode the DCCD when it came to those products.[71]

Which brings us to the *National Pork Producers* case.[72] In Part II of Justice Gorsuch's opinion, which commanded a majority,[73] Gorsuch described the "antidiscrimination principle" as "the 'very core' of our dormant Commerce Clause jurisprudence."[74] Chief Justice Roberts agreed, along with Justices Alito, Kavanaugh, and Jackson.[75] What's remarkable about this unanimity is that it included Justice Thomas, who had regularly and vehemently denounced the DCCD in toto.[76] He offered no explanation for joining this part of the opinion; perhaps he felt no need to write separately because the Court upheld California's statute, because his views are well-known and oft-stated, or because of some combination of the two. His apparent acquiescence in the Court's support for the anti-discrimination prong of the DCCD, though, did lend a dog-that-didn't-bark air to the decision.

[71] *Id.* at 2484 (Gorsuch, J., dissenting). As it happens, I think the dissenters were right. *See* Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 Const. Comment. 297 (2002).

[72] The following paragraphs draw on Denning, *supra* note 5, at § 6.05 (2024-1 Supp.).

[73] 143 S. Ct. at 1149. Justice Gorsuch was joined by Justices Thomas, Sonia Sotomayor, Elena Kagan, and Amy Coney Barrett.

[74] *Id.* at 1153.

[75] *Id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) ("I agree with the Court's view in its thoughtful opinion that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism.").

[76] *See, e.g.*, McBurney v. Young, 133 S. Ct. 1709, 1721 (2013) (Thomas, J., concurring) ("I continue to adhere to my view that the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.") (cleaned up); *see also* Camps Newfound/Owantonna, Inc. v. Town of Harrison, 520 U.S. 564, 610–12 (1997) (Thomas, J., dissenting).

The other notable feature about *National Pork Producers* is that while the Court splintered on the application of *Pike* balancing, a close tally of the votes suggests that *Pike*, too, is secure for the near future.

Echoing skeptics of balancing like Justices Scalia and David Souter, Justice Gorsuch (along with Justices Thomas and Barrett, in part) argued that the true purpose of *Pike* was to serve as an "anti-evasion"[77] mechanism. On this view, *Pike* allowed the Court to smoke out protectionist purposes or effects hiding in facially neutral statutes.[78] It did *not* empower the Court to conduct a freewheeling balancing of costs and benefits anytime a state law has implications for interstate commerce.[79]

"How is a court," Gorsuch asked, "supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle."[80] Although the petitioners had argued that the putative benefits ought to be "heavily discount[ed]," they had conceded that states could ban "the in-state sale of products they deem unethical or immoral without regard to where those products are made . . . ."[81] Thus,

> we remain left with a task no court is equipped to undertake. On the one hand, some 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 of some

[77] *Cf.* Michael B. Kent, Jr. & Brannon P. Denning, *Anti-Evasion Doctrines in Constitutional Law,* 2012 Utah L. Rev. 1773 (2012).

[78] *National Pork Producers*, 143 S. Ct. at 1156 (plurality op.) ("[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."). Gorsuch did concede that "this Court left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens' . . . and while 'a small number of our cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory . . . petitioners' claims fall well outside *Pike*'s heartland. . . ." *Id.* at 1158–59. Gorsuch's characterization of *Pike* seemed to command a majority of the Court (himself along with Justices Thomas, Sotomayor, Kagan, and Barrett).

[79] *Id.* at 1159.

[80] *Id.* at 1159–60 (quoting Justice Scalia's "whether a particular line is longer than a particular rock is heavy" line from *Bendix Autolite Corp.*, 486 U.S. at 897 (Scalia, J., concurring in judgment)).

[81] *National Pork Producers,* 143 S. Ct. at 1160 (plurality op.).

> (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours. More accurately, your guess is *better* than ours.[82]

Given this incommensurability, democratic decisionmaking should prevail. And Justice Gorsuch concluded that if the economic disruption turns out to be as massive as petitioners alleged, then Congress should step in to preempt the disruptive state laws. That is Congress's prerogative "[u]nder the *wakeful* Commerce Clause."[83]

Gorsuch concluded that even *were* the Court to apply balancing in this case, the pleadings showed that "[a] substantial harm to interstate commerce remains nothing more than a speculative possibility."[84] In this conclusion, he and Justice Thomas were joined by Justices Sotomayor and Kagan. Gorsuch noted that "[p]etitioners must plead facts 'plausibly' suggesting a substantial harm to interstate commerce; facts that render that outcome a 'speculative' possibility are not enough."[85] The alleged harms to interstate commerce were speculative, because it was possible that Proposition 12 could *benefit* some out-of-state pork producers. The fact that *some* out-of-state producers "may face difficulty complying (or may choose not to comply) with Proposition 12" meant that "*other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void."[86] Equally speculative was the allegation that these costs would be passed along to California consumers who, after all, voted for the law. In any event, raising costs for in-state consumers is not a cognizable harm under the DCCD.

Justice Barrett declined to join this part of Justice Gorsuch's opinion, however. She acknowledged that "Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California."[87] But, she argued, "California's interest in eliminating

[82] *Id.* (emphasis in original).

[83] *Id.* at 1160.

[84] *Id.* at 1163.

[85] *Id.* at 1162 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555, 557 (2007)).

[86] *Id.* (footnote omitted).

[87] *Id.* at 1167 (Barrett, J., concurring in part).

allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians."[88] Thus, "the benefits and burdens of Proposition 12 are incommensurable." In contrast to Justice Gorsuch, she thought the benefits and burdens on interstate commerce *could* be weighed against each other in cases where the burdens and benefits could be measured according to some common metric.

Justice Sotomayor (joined by Justice Kagan) concurred with Justice Gorsuch's conclusion that the petitioners had failed to plead sufficient facts to succeed on their *Pike* claim, but she wrote separately to disclaim any "fundamental reworking" of *Pike* balancing.[89] She made clear that although "*Pike* claims that do not allege discrimination or a burden on an artery of commerce are further from *Pike*'s core" of smoking out discriminatory purposes or effects, nevertheless "courts generally are able to weigh disparate burdens and benefits against each other, and . . . they are called on to do so in other areas of the law."[90] She denied that the incommensurability issue that Justice Gorsuch stressed meant *Pike* balancing was a fool's errand, but she did argue that proof of a substantial burden was "a threshold requirement" that must be established before "courts need even engage in *Pike*'s balancing and tailoring analyses."[91]

Chief Justice Roberts wrote what Justice Gorsuch characterized as the "lead dissent," but it's only a partial dissent. Writing for himself and Justices Alito, Kavanaugh, and Jackson, Chief Justice Roberts agreed that the point of the DCCD was to guard against economic protectionism. The four likewise agreed that "our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."[92] The four disagreed, however, with the plurality's *Pike* analysis. Roberts and company "would find that petitioners[] have plausibly alleged a substantial burden against interstate commerce, and would therefore vacate the judgment and remand the case for

[88] *Id.*

[89] *Id.* at 1165 (Sotomayor, J., concurring in part).

[90] *Id.* at 1166.

[91] *Id.*

[92] *Id*. at 1167 (Roberts, C.J., concurring in part and dissenting in part).

the court below to decide whether petitioners have stated a claim under *Pike*."[93]

Chief Justice Roberts defended *Pike* as more than simply a tool for detecting latent protectionism and stressed that *Pike* balancing retained the endorsement of a solid majority:

> Although *Pike* is susceptible to misapplication as a free-wheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be "free private trade in the national marketplace."[94] Nor is *Pike* confined to cases "involving discriminatory state laws and those implicating the 'instrumentalities of interstate transportation.' . . . [W]e have since applied *Pike* to invalidate nondiscriminatory state laws that do not concern transportation."[95]

Contrary to what Justice Gorsuch claimed, the petitioners' complaint "alleges more than simply an increase in 'compliance costs,' unless such costs are defined to include all the fallout from a challenged regulatory regime."[96] "Petitioners," he continued, "identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce."[97] The immediate costs to producers to become California-compliant were estimated to be between $290 and $348 million, or $13 per pig.[98] "Separate and apart from those costs," he continued,

> petitioners assert harms to the interstate market itself. The complaint alleges that the interstate pork market is so interconnected that producers will be "forced to comply" with Proposition 12, "even though some or even most of the cuts from a hog are sold in other States." Proposition 12 may not expressly regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana

[93] *Id*.

[94] *Id.* at 1167–68.

[95] *Id.* at 1168 (citations omitted).

[96] *Id.* at 1169.

[97] *Id*.

[98] *Id*. at 1170.

> and North Carolina, whether or not they sell in California. The panel below acknowledged petitioners' allegation that, "[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements."[99]

Such extraterritorial effects, he noted, "even if not considered as a *per se* invalidation, [are] pertinent in applying *Pike*."[100] Moreover, "petitioners here allege that Proposition 12 will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices."[101]

Responding to Justice Gorsuch's claim that this approach can't be distinguished from a *per se* ban on extraterritorial regulations, Roberts replied that the difference is "between mere cross-border effects and broad impact requiring . . . compliance even by producers who do not wish to sell in the regulated market."[102] Even then, he noted, the burdens must be "clearly excessive" in light of the benefits.[103] For the Chief Justice, the "broader, market-wide *consequences* of compliance" with Proposition 12 were enormous—large enough that he would have remanded the case to the Ninth Circuit for the application of *Pike* balancing.[104]

For those keeping score, it appears that there is still a solid majority of the Court that regards *Pike* balancing as an independent branch of the DCCD—a doctrine for reviewing facially neutral yet burdensome laws that impact interstate commerce, as opposed to simply a tool for detecting hidden discrimination. The Chief Justice, along with Justices Alito, Sotomayor, Kagan, Kavanaugh, and Jackson, endorsed that view. And Justice Barrett did as well, so long as the benefits and burdens are commensurable. Only Justices Gorsuch and Thomas—along with Justice Barrett if the benefits and burdens are incommensurable—would seem prepared to abjure balancing entirely and restrict *Pike* to an anti-evasion role in detecting protectionism. *Pike* thus lives to fight another day.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 1171.

[102] *Id*.

[103] *Id*.

[104] *Id.* at 1169.

Conclusion

National Pork Producers performs a useful mopping up function for a doctrine long derided as a "conceptual disaster area"[105]—to crib Charles Black's characterization of the state action doctrine—by its critics.[106] The opinion locates the core of the DCCD in the elimination of protectionism, whether "sophisticated [or] simple-minded,"[107] and generally acknowledges the doctrine's longstanding pedigree. It clears up the status of DCCD extraterritoriality, confirming Donald Regan's conclusion from nearly four decades ago that wherever the constitutional limits to a state's ability to project its authority beyond its borders were to be found, they weren't in the DCCD. It also gives *Pike* balancing a new lease on life, with the Justices recognizing *Pike* not only as a useful anti-evasion doctrine to backstop the anti-discrimination principle, but also as valuable in its own right in certain cases.[108]

Extraterritoriality is dead! Long live the DCCD!

[105] Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967).

[106] For a summary of contemporary critiques, see Denning, Camps Newfound/Owatonna, *supra* note 69, at 156 nn.2–4.

[107] Lane v. Wilson, 307 U.S. 268, 275 (1939).

[108] I once argued that the Court should drop balancing in favor of developing its facially-neutral-but-discriminatory-effects-or-purpose criteria. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 493–94 (2008). At the time, I didn't appreciate *Pike* balancing's utility as an anti-evasion doctrine. In any event, given *Wayfair*'s suggestion that *Pike* balancing may have a heretofore unknown role in tax cases, *Pike* appears poised to take on an expanded role in DCCD cases. *Wayfair,* 138 S. Ct. at 2098–99 (responding to arguments that the compliance costs would be unduly burdensome for small businesses to pay state taxes in states where they lack a physical presence by suggesting that "other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce" and mentioning *Pike* balancing as an example). *But see* Bradley W. Joondeph, *State Taxes and "*Pike *Balancing,"* 99 Ind. L. J. __ (forthcoming), available at https://tinyurl.com/y3xnff5f (arguing that *Pike* balancing has at best a small role to play in assessing tax compliance burdens, but none in the assessment of the amount of tax liabilities).