STATE PUBLIC MORALITY REGULATION AND THE DORMANT COMMERCE CLAUSE

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INTRODUCTION

Unlike other high-profile cases decided by the Supreme Court in its 2022 term, the grant of certiorari in National Pork Producers Council v. Ross did not portend what the outcome of the case would be. At issue was the constitutionality of California’s Proposition 12 (“Prop 12”), which bans the sale in California of whole pork meat from animals confined in a manner contrary to certain standards said by the state to promote animal welfare and human health and safety. Prop 12, which was passed by a sizable majority of California voters in 2018, bans the sale of such products in the state of California irrespective of whether the products were sourced from animals raised outside of California. Violators of Prop 12 are subject to criminal penalties, including jail time, and the measure may also be enforced through private civil lawsuits.

The National Pork Producers Council and the American Farm Bureau Federation (together, “the Council”) filed suit in federal court to challenge Prop 12 under the Dormant Commerce Clause (“DCC”), arguing that the sales ban (i) impermissibly regulates extraterritorial conduct by requiring out-of-state producers to change their operations to meet California standards, and (ii) imposes excessive burdens on interstate commerce by significantly increasing operation costs and changing national market structure without advancing legitimate local interests. Both the district court and a panel of the Ninth Circuit Court of Appeals dismissed the Council’s complaint, concluding that Prop 12 does not impermissibly control extraterritorial conduct and does not

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impose an excessive burden on interstate commerce. On March 28, 2022, the Supreme Court granted review.

Court watchers found the case especially intriguing because conservative justices do not always align on DCC issues. Strict textualists like Justices Gorsuch and Thomas regard the DCC as an unlawful judicial invention, while more business-minded justices might be inclined to invoke the Court’s amorphous DCC jurisprudence to insulate powerful corporate enterprises from state regulation. Even nominally liberal justices might prefer the administrative rationality of a uniform federal standard and therefore invoke the DCC to clear the field for congressional or federal executive action rather than permit a proliferation of competing state standards. In short, although the grant of certiorari clearly indicated that at least four justices wished to address the issues raised by National Pork Producers, how in particular a majority of the Court would address them was anyone’s guess.

The Court’s decision came down on May 11, 2023, and its significance remains up in the air. While Prop 12 survived the constitutional challenge at issue, central questions about the decision’s scope and impact remain murky. Somewhat lost in the popular reporting on the case was the badly—indeed, weirdly—fractured nature of the Court’s opinions. This essay therefore first offers a breakdown of what exactly the Court did and did not hold in National Pork Producers. It then offers thoughts on two of the key arguments raised in the case. Most notably, the Council’s effort to characterize sparse and vague Supreme Court precedent as a freestanding extraterritoriality rule that automatically invalidated Prop 12 was soundly rejected by the Court—with good reason. The jurisprudence on extraterritoriality does support invalidating state regulations that have the effect of coercively dictating market conditions in sister states that have no connection to the regulating state. Most state regulations, however, should not be subject to such a rule even if they indirectly affect operations or costs of out-of-state producers. To the extent that extraterritoriality can play a salutary role in DCC analysis for such

1. See Nat’l Pork Producers Council v. Ross, 6 F.4th 1021, 1031–32 (9th Cir. 2021) (“The complaint here fails to make a plausible allegation that the pork production industry is of such national concern that it is analogous to taxation or interstate travel. . . Although. . . Proposition 12 will have an impact on a national industry, we have already held that such impacts do not render the state law impermissibly extraterritorial.” (internal citations omitted)).
noncoercive laws, it is only as a factor in a broader inquiry into whether a regulating state has engaged in disguised protectionism or regulation that is otherwise unacceptable under the DCC.\(^4\) In that regard, the inquiry collapses into the more familiar and well-established DCC tests for clear discrimination under *City of Philadelphia v. New Jersey*\(^5\) or for undue burdening under *Pike v. Bruce Church, Inc.*\(^6\)

Second, the industry argued that Prop 12’s negative effects on interstate commerce under *Pike* balancing should be evaluated with recognition of the vast economic power of the state of California within the national economy. This “California Effect” argument was neither embraced nor rejected by a clear majority of justices in *National Pork Producers*. For purposes of DCC analysis, however, California should be treated no differently than Vermont when assessing the burden placed upon interstate commerce by a challenged regulation. Put differently, it is the nature of the regulation, rather than the size of the regulator, that should matter for *Pike* balancing. As Justice Gorsuch noted for a plurality, any other approach would work a kind of judicial discrimination against California as a state, affording its lawmakers less authority to regulate in furtherance of state interests than those of smaller market states for no constitutionally relevant reason. If the goal of the DCC is primarily to preserve a national market, that goal is not threatened when California’s economic power sets a de facto national standard by producers voluntarily choosing to apply California standards to their entire product line. Thus, the DCC should not be deemed violated so long as California regulates in a way that does not impede other states’ ability to set their own regulatory standards and that leaves the ultimate choice of how to comply with the various standards in producers’ hands.

Despite the fact that Prop 12 withstood challenge in *National Pork Producers*, readers should not be left feeling sanguine with respect to

\(^{4}\) See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 827 (2001) (“[T]he real concern underlying the extraterritoriality and inconsistent-regulations prongs of dormant Commerce Clause analysis is not out-of-state effects and nonuniformity per se, but rather whether the out-of-state burdens of a regulation outweigh its local benefits.”).

\(^{5}\) See 437 U.S. 617, 626–27 (1978) (“[N]ew Jersey’s purpose may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”).

\(^{6}\) See 397 U.S. 137, 142 (1970) (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960) (“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.”)).
the increasing trend of state-level regulatory warfare being utilized to fill the gaps left by dysfunctional national lawmaking. As this essay will explain, it is both a feature and a bug of the federalist system that states can attempt to influence national outcomes by regulating at nodal points within the system. As Prop 12 demonstrates, state visions of the socially appropriate conditions of production can be pursued both internally, by direct regulation of in-state producers, and externally, by the indirect influence exerted on out-of-state producers through import conditions. Importantly, it is not only progressive states like California that can utilize nodal regulations to attempt to shape the economy and culture of the nation. On issues ranging from abortion travel to alternative protein labeling to socially responsible investment, lawmakers in conservative states have begun to show remarkable creativity and eagerness to use various forms of nodal regulation to project their policy positions and moral worldviews both within and across territorial borders.

The Supreme Court, with its limited constitutional role and its bewildering DCC jurisprudence, is incapable of resolving the full normative stakes lurking behind these border spats. The Court would be wise to stay on the sidelines. But neither is Congress capable at present of asserting the kind of leadership necessary to forge consensus out of deeply clashing worldviews. Such tensions instead seem likely to continue to be worked out through subnational lawmaking, often in the form of nodal regulations that speak to larger public policy issues by targeting discrete market transactions connected to them. When politics is forced to be conducted within the currency of the market in such a manner, a question is raised about the health of democratic practice—a question that exceeds the scope and competency of the DCC, even as it troubles our future.

I. NATIONAL PORK PRODUCERS COUNCIL V. ROSS: WHAT JUST HAPPENED HERE?

Justice Gorsuch delivered the Court’s holding in National Pork Producers but commanded a majority of five justices only for a portion of his reasoning. Most notably, the majority (and, indeed, all of the justices in one way or another) rejected the effort by the petitioners to impose a per se rule of invalidity based solely on extraterritorial regulatory impacts. Beyond that holding, however, Gorsuch’s opinion got messy. In Part IV.B, joined only by Justices Thomas and Barrett, Gorsuch went after Pike balancing in a fundamental way, arguing that
the test “authoriz[es] 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.’”\(^7\) Like Justice Scalia before him, Gorsuch holds a dim view of balancing as a jurisprudential style, especially in the DCC context. Indeed, Gorsuch in *National Pork Producers* quoted a memorable passage in which Scalia likened judicial balancing tests to being asked “whether a particular line is longer than a particular rock is heavy.”\(^8\) Witticisms aside, Gorsuch will have to wait for another day to strike down the *Pike* balancing test, having failed to lure two more justices to join Part IV.B.

In Part IV.C of his opinion, Gorsuch lost Barrett but gained Sotomayor and Kagan—still a mere plurality of four justices. In this Part, Gorsuch concluded that the petitioners have not shown that Prop 12 substantially burdens interstate commerce, even before getting to the question of whether the local benefits of the law outweigh the interstate burdens. For Gorsuch, it is critical that out-of-state producers enjoy choice in how to respond to Prop 12: “They may provide all their pigs the space the law requires; they may segregate their operations to ensure pork products entering California meet its standards; or they may withdraw from that State’s market.”\(^9\) Thus, while it is likely that Prop 12 will result in some restructuring of the national pork market, with some producers choosing to retain access to California’s market and others declining to do so, interstate commerce itself is not unduly burdened in Gorsuch’s view. Out-of-state producers are not treated any differently than in-state producers, and their conduct is not coercively controlled in a way that would clearly exceed California’s sovereign authority. Again, though, these views did not command a majority of justices.

In Part IV.D, Gorsuch regained Barrett but lost Sotomayor and Kagan—hence, back down to three justices. This Part critiqued the lead dissent by Chief Justice Roberts for endorsing a form of what Gorsuch sees as judicial lawmaking: “[T]he lead dissent seems to advance a reading of *Pike* that would permit judges to enjoin the enforcement of any state law restricting the sale of an ordinary consumer good if the law threatens an ‘excessive’ ‘har[m] to the interstate market’ for that

\(^7\) *Nat’l Pork Producers*, 143 S. Ct. at 1159.

\(^8\) *Id.* at 1160 (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring)).

\(^9\) *Id.* at 1161–62.
Gorsuch here also flatly rejected giving any weight to the so-called “California Effect,” i.e., the fact that, because California is such a massive economic market, the in-state standards that it imposes can work in practice to establish standards for the national market. As Gorsuch argued (rightly in this author’s view, as discussed below), giving constitutional weight to the California Effect would violate a principle of formal equality between states. If the size of the market “makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets.”

Finally, Gorsuch rejected Roberts’ characterization of cognizable costs for purposes of *Pike* balancing as including broad “social costs that are ‘difficult to quantify’ such as (in this case) costs to the ‘national pig population,’ ‘animal husbandry’ traditions, and (again) ‘industry practice.’” Again, only two other justices joined Gorsuch in these thoughts.

Four justices wrote separate opinions. First, writing only for herself and Justice Kagan, Justice Sotomayor emphasized that she “vote[s] to affirm the judgment because petitioners fail to allege a substantial burden on interstate commerce as required by *Pike*, not because of any fundamental reworking of that doctrine.” She stressed that, in her view, *Pike* balancing has survived this case and will continue to leave “‘the courtroom door’ open to claims premised on ‘even nondiscriminatory burdens.’” One example of such nondiscriminatory burdens that might trigger a *Pike* challenge are “state laws that impose burdens on the arteries of commerce, on trucks, trains, and the like.” But other kinds of nondiscriminatory burdens might also qualify. Thus, for Sotomayor, “petitioners’ failure to allege discrimination or an impact on the instrumentalities of commerce does not doom their *Pike* claim.” And because, as Sotomayor noted, the lead dissent by Roberts agreed with this point and because Roberts is joined by three other dissenters, it remains the law in the United States that even an absence of discrimination or a burden on the “arteries of commerce” does not end analysis under the DCC.

The next justice to write separately was Justice Barrett—but her
opinion will be saved for last because of its unusual and provocative nature. The main dissent was authored by Roberts and joined by Justices Alito, Kavanaugh, and Jackson. Roberts agreed that much of DCC analysis is about trying to stop state discrimination, and he also agreed that a per se extraterritoriality rule is unacceptable. But he defended Pike balancing and, as Sotomayor noted, he did not close the door to nondiscriminatory burdens being ruled unconstitutional under that test. Indeed, Roberts concluded that “[p]etitioners identify broader, market-wide consequences of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce.” He detailed factual allegations by the Council regarding the costliness and difficulty of compliance for the industry. He even appeared to endorse the California Effect as a practical phenomenon that might constitute a substantial burden on interstate commerce, notwithstanding the formal state equality objection raised by Gorsuch. For Roberts and his three fellow dissenters, significant extraterritorial regulatory effects can be considered part of the burden to be weighed under Pike. In an attempt to limit the expansiveness of this approach, Roberts drew a distinction between mere costs of compliance and what he called “industry-wide harms,” arguing that petitioners had adequately alleged the latter in this case.

Justice Kavanaugh wrote a separate dissent in which he offered something of a road map for other constitutional challenges that he believes could be brought against laws like Prop 12. These include challenges under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause. Kavanaugh also noted that, if one ignores the health risks associated with noncompliant pork products alleged by California, Prop 12 appears to constitute morally motivated legislation concerning practices that occur wholly outside the state, a form of state action that Kavanaugh called “something quite different and unusual.” In Kavanaugh’s view, California “has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation.” He worried that the Court’s apparent endorsement of Prop 12 might embolden state-level economic warfare driven not by protectionism but by competing moral worldviews: “[W]hat if a state

17. Id. at 1169 (Roberts, C.J., dissenting).
18. Id. at 1172.
19. Id. at 1174 (Kavanaugh, J., dissenting).
20. Id.
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 . . . 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)?

Enter Justice Barrett, whose solely authored opinion gives rise to the indeterminate and vexing nature of *National Pork Producers* as a precedent. Despite joining the portions of Gorsuch’s opinion that appeared designed to kill off *Pike* balancing entirely, Barrett instead articulated a view in which the *Pike* test continues as part of DCC jurisprudence, but only in cases that do not involve benefits and burdens that are “incommensurable.” Certain forms of state legislation give rise to benefits that, in Barrett’s view, are not amenable to judicial weighing: “California’s interest in eliminating 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.” This aspect of Barrett’s opinion can be read as a counterargument to Kavanaugh’s fear of interstate moral warfare being meted out through economic regulations with extraterritorial impact: “Bring it on!” Barrett seems to say, perhaps imagining a post-*Dobbs* landscape in which state legislatures can creatively and aggressively attempt to constrain reproductive rights outside their borders through Prop 12-style laws. At least in Barrett’s account, such laws would be insulated against constitutional challenge since they would be seen to promote the “incommensurable” value of a moral view, rather than protectionism or mere economic costs and benefits.

But then, Barrett threw in a wild card: She closed her brief concurrence by saying that she agrees with the Roberts dissent that Prop 12 imposes a substantial burden on interstate commerce, notwithstanding her view that Prop 12 is a form of moral legislation that cannot be appropriately evaluated under *Pike* balancing. For those keeping score at home, we now see that—despite Gorsuch having

21. *Id.* (quoting Brief for Indiana and Nineteen Other States as Amici Curiae Supporting Petitioners at 33, *Nat’l Pork Producers*, 143 S. Ct. 1142 (No. 21-468)).

22. *Id.* at 1167 (Barrett, J., concurring) (citing Dep’t of Revenue of Ky. v. Davis, 553 U. S. 328, 354-55 (2008) (“But to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable.”)).

23. *Id.*
written the opinion of the Court and despite the Court holding that the Ninth Circuit opinion dismissing the constitutional challenge to Prop 12 stands—we have not actually gained much clarity on the issues raised by the case apart from the decisive rejection of extraterritoriality as a standalone per se rule of invalidity. Indeed, we cannot be sure that Prop 12 and laws like it really are constitutional. That is because, when you add Barrett to the four dissenters, you have a majority of justices finding that Prop 12 arguably does impose a substantial burden on interstate commerce. And when you add Sotomayor and Kagan to the four dissenters, you have a different majority of justices believing that Pike balancing remains an appropriate test for DCC violations, potentially even in the absence of state discrimination or a direct impact on the “arteries of commerce.” Only the odd splintering of Sotomayor and Kagan, on the one hand, and Barrett, on the other, prevented Chief Justice Roberts’s opinion from being the Court’s majority ruling.

What this means, in practice, is that the pork industry can with justification claim that the constitutionality of state laws like Prop 12 remains uncertain, notwithstanding the formal outcome of the case. Thus, the meat industry can still challenge similar laws from different states, such as Question 3 in Massachusetts, in order to try to generate a circuit split with the Ninth Circuit decision that was upheld in National Pork Producers.24 Even Prop 12 itself might be challenged, perhaps by different plaintiffs, in an effort to overcome the pleading deficiency that only a plurality of justices agreed existed. Likewise, the roadmap of further constitutional challenges provided by Kavanaugh will not go unnoticed by the industry, and nothing in the National Pork Producers opinions forecloses a sympathetic court from accepting one or more of those arguments.

Whether the industry will feel it is worthwhile to pursue these various potential avenues of relief depends not only on the state of legal doctrine, but also on the economic, reputational, and other practical costs of litigating. Already, at least one separate challenge to Prop 12 was voluntarily dismissed following the National Pork

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24. Indeed, the Massachusetts law was the subject of a bench trial held in December 2023. Dan Flynn, Pork producers ask for partial summary judgment ahead of Boston bench trial, FOOD SAFETY NEWS (Nov. 2, 2023), https://www.foodsafetynews.com/2023/11/pork-producers-ask-for-partial-summary-judgment-ahead-of-boston-bench-trial/. On February 5, 2024, federal district judge William Young ruled that a portion of Question 3 creating an exception for direct meat sales by in-state slaughterhouses was unconstitutional due its discriminatory effects, but that the law was otherwise valid notwithstanding the plaintiffs’ Pike balancing challenge.
Producers decision, suggesting that the challengers in that case no longer felt the battle was worth pursuing against a lowered likelihood of success.25 Further, a challenge arising under Pike would expose the industry to intrusive and potentially damaging factfinding in a way that the attempted per se rule of extraterritoriality would not have. Still, as was seen during the height of the Covid pandemic, the meat industry has proven itself willing to take extreme, even reckless measures in order to preserve its revenue stream.26 In that sense, pursuing a costly scorched earth legal campaign against Prop 12 seems mild in comparison to the knowing exposure of slaughterhouse workers to an elevated risk of death.

II. “EXTRATERRITORIALITY” AND THE NATIONAL MARKET

A critical component of the Council’s argument in National Pork Producers was that DCC precedent supported a free-standing test of unconstitutionality based on a law’s “extraterritorial” effect. As noted above, the Court’s rejection of this proposed per se rule is the clearest and most durable aspect of the National Pork Producers opinions. This section digs deeper than the opinions did themselves to illustrate the wisdom of that rejection.

The Council was correct that the Court has shown special concern for state regulation that appears to control market conditions outside the state’s borders, threatening a disruptive impact on the national economy and the sovereignty of sister states. But the relevant case law is more limited and less clear than the Council portrayed. Understandably so, for the very notion of striking down “extraterritorial” regulation in order to preserve a national market is in tension with itself. An integrated national market is one in which subnational boundaries are inevitably porous. State-level regulation in such a networked system will frequently have effects that are impossible to contain within state borders and will therefore be difficult to classify as exclusively “territorial” or “extraterritorial” in nature. For instance, because Prop 12 was upheld, California might appear to objectors to have used its regulatory authority and extensive market

power to influence production practices out of state. On the other hand, if Prop 12 had been struck down, Californians might have felt that objecting states used their regulatory authority to force consumers in California to ingest animal products they viewed as morally suspect. In either case, extraterritoriality alone cannot do the work of resolving the conflict. What is needed is a set of criteria to specify which kinds of transboundary effects are constitutionally illicit. “Extraterritoriality” is merely a label that marks the conclusion of a substantive analysis; it is not the analysis itself.27

Although the “extraterritoriality” notion is generally traced to the case of Baldwin v. G.A.F. Seelig,28 the Court’s most prominent attempt to unpack the notion’s underlying substantive analysis appears in Healy v. Beer Institute, Inc.:

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 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

27. See Goldsmith & Sykes, supra note 4, at 795 (“Innumerable state laws affect outsiders, and no one thinks that all (or even most) of these laws violate the dormant Commerce Clause. What is needed is a way to distinguish legitimate from illegitimate out-of-state effects.”).
in one State before undertaking a transaction in another.  

This language is both broad and unclear. The most one can say on its behalf is that the language contains something for everyone. To defend Prop 12, California emphasized that the law 1) covers only in-state purchases, 2) applies equally to in-state and out-of-state producers, and 3) is designed to promote anticruelty and health and safety interests for the benefit of California residents. Thus, the law does not apply to “commerce that takes place wholly outside of the State’s borders” nor does it “directly control[]” such commerce. On the other hand, the Council emphasized the enormous financial incentive that out-of-state meat producers have to maintain access to the California market. Therefore, the Council contended that the “practical effect of [Prop 12] is to control conduct beyond the boundaries of the State,” and, as a result, California was seeking to achieve “the projection of one state regulatory regime into the jurisdiction of another State.”

Based on existing case law, California had the better argument. For the most part, courts have not taken the “practical effect” language of Healy as an invitation to strike down laws just because they have large indirect effects on out-of-state production. In an illuminating opinion written before he was elevated to the Supreme Court, Justice Gorsuch aptly summarized the reasoning for this circumspection as follows:

[S]tate laws setting non-price standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety) may be amenable to scrutiny under the generally applicable Pike balancing test, or scrutinized for traces of discrimination under Philadelphia, but the Court has never suggested they trigger near-automatic condemnation under [the “extraterritoriality” rule of] Baldwin.

In saying this much, we hardly mean to suggest non-price regulations don’t impact price in or out of state. In today’s interconnected national marketplace such a suggestion would be beyond naïve. We readily recognize that state regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere. So, for example,

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when one or more states impose quality mandates manufacturers may find the cheapest way to comply isn’t to produce a special product for them but to redesign their product as it’s sold nationwide, with an increased cost felt by consumers everywhere. Still, without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers, Baldwin’s near *per se* rule doesn’t apply.31

The kinds of laws that are vulnerable to an “extraterritoriality” challenge are those that use state power to coercively regulate transactions entirely outside the state. “Extraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way.”32 Statutes that compel producers to offer in-state prices that match the lowest price offered out-of-state are a prime example. Such statutes have the unavoidable effect of regulating the price that producers may charge for goods that are sold in a different state. Notably, under such regimes, there is no way for the out-of-state producer to control its pricing decisions in other states without facing sanction by the regulating state. In contrast, under Prop 12, meat producers retain autonomy to comply with the California law in multiple ways, as Gorsuch’s opinion noted.33

Some courts and commentators have gone so far as to argue that the *Healy* line of cases should be understood as being limited exclusively to price-matching or price-affirmation statutes.34 That argument perhaps goes too far as states can utilize nonprice regulations in ways that inescapably control commercial transactions entirely

31. Energy & Env’t Legal Inst. v. Epel, 793 F.3d 1169, 1173–74 (10th Cir. 2015).
33. *See also* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978) (holding that while some business “may choose to withdraw entirely from” a state’s market, “interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.”).
34. *See, e.g.*, Energy & Env’t Legal Inst., 793 F.3d at 1173 (observing that the Supreme Court has only used the “extraterritoriality” principle to strike down three state laws and that each involved “(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses.”); Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) (noting that the extraterritoriality principle is “not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices”) (internal quotations and citation omitted).
outside the state. For example, in *Edgar v. MITE Corp.*, the Court considered a Commerce Clause challenge to the Illinois Business Take-Over Act, which applied to takeover offers for shares not only of companies incorporated by Illinois, but also of companies partially held by Illinois shareholders or with certain connections to the state. The Court found the statute unconstitutional because it could apply to transactions between buyers and sellers conducting business entirely outside of Illinois. Likewise, the Ninth Circuit sitting en banc struck down a California statute that awarded a five percent royalty to artists for sales of their work by a California resident. The court reasoned that the statute could apply to sales that take place entirely outside the state if, say, a California resident owned a gallery in New York that regularly made sales to non-Californians. Finally, in *American Beverage Association v. Snyder*, the court struck down a Michigan recycling regulation that required certain beverage makers to apply a “unique mark” on their product containers for Michigan sales and dictated that containers bearing the mark could not be sold in states that lacked a comparable recycling system to Michigan’s, irrespective of whether Michigan had any connection to those out-of-state transactions.

The common thread in each of these cases is that the regulating state sought to mandate particular outcomes in commerce taking place entirely outside the state’s borders. As such, the regulating state interfered with the equal sovereignty of sister states. As a further example, consider *National Solid Wastes Management Association v. Meyer*. In that case, the court struck down a Wisconsin law that denied access to Wisconsin landfills for out-of-state waste unless the state of origin had adopted Wisconsin’s recycling standards. Critical to the court’s judgment was the fact that the Wisconsin law required out-of-state communities to adopt its standards with respect to all of the communities’ waste irrespective of whether it was destined for disposal in Wisconsin. By contrast, in *National Electrical Manufacturers Association v. Sorrell*, the court rejected a DCC challenge to a Vermont statute that required manufacturers to label mercury-containing light bulbs sold within the state because the statute did not “require manufacturers to label all lamps wherever distributed.”

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36. Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1323 (9th Cir. 2015).
37. 735 F.3d 362, 376 (6th Cir. 2013).
38. 63 F.3d 652, 653–54 (7th Cir. 1995).
39. 272 F.3d 104, 107, 110 (2d Cir. 2001).
40. *Id.* at 110.
In some very rare circumstances, courts have concluded that a state statute violated the DCC, not because the state expressly sought to control wholly out-of-state transactions, but because the peculiar nature of the relevant market made such out-of-state control inescapable. For instance, in *American Booksellers Foundation v. Dean*, the Second Circuit struck down a Vermont statute that barred dissemination of harmful material on the internet to minors, given that out-of-state internet users have no technological means available to deny Vermont users access to posted material. Similarly, in *North Dakota v. Heydinger*, a Minnesota renewable energy law was ruled unconstitutional under the DCC because, given the impossibility of differentiating power within the electricity grid, the Minnesota requirements would apply to all energy transactions within the region, not just those with a Minnesota connection. These cases could be criticized as resting on false empirical assumptions. Even accepting them at face value, such cases are the exception rather than the rule. So long as the market involved is not one where differential compliance by producers is physically or technologically impossible, a state’s regulation should not be deemed impermissibly “extraterritorial” when, by its terms, it applies only to in-state transactions and producers are afforded flexibility in determining whether to adopt those in-state standards for their out-of-state markets.

As noted above, Prop 12 fares well under these principles. Nothing about the market for meat products makes it physically or technologically impossible for producers to segment the market into Prop 12-compliant and noncompliant supply lines if they so choose.\(^{46}\)

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41. *Id.*
42. 342 F.3d 96, 104 (2d Cir. 2003).
43. 15 F. Supp. 3d 891, 916–17 (D. Minn. 2014).
44. See Goldsmith & Sykes, *supra* note 4, at 816 (questioning the assumption the geographical restrictions on the internet are infeasible).
45. See VIZIO, Inc. v. Klee, 886 F.3d 249, 256 (2d Cir. 2018) (rejecting television manufacturer’s extraterritoriality challenge to Connecticut’s electronic waste recycling fee law because, with respect to business conducted outside Connecticut, “VIZIO is free to arrange its business in one manner or another without consideration of out-of-state compliance with Connecticut’s E-Waste Law.”).
46. The Pacific Legal Foundation attempted to argue otherwise. See Brief of Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 17 n. 11, Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (“Like the pork bits in this case, the electrons sought to
To the extent that the industry faces cost or difficulty in doing so, it is because private actors within the industry have voluntarily chosen to develop nationally integrated distribution channels, not because of any inherent feature of the product or market. Nor does Prop 12 by its terms apply to sales of meat that will take place outside of California. In other words, this is not a case in which California has conditioned access to its market on out-of-state producers adopting Prop 12 standards for all of their production, irrespective of the destination market. A different case would be posed if, say, California had prohibited sales of pork from states that fail to adopt a law similar to Prop 12 for all of the state’s production, whether or not destined for sale in California. Or if California had required out-of-state sellers to affirm that pork products sold in-state derived from sows that were given at least as much space as sows that were processed and sold to other state markets. Such laws would have the impermissible effect of controlling production conditions for goods with no California connection. Prop 12, as actually adopted, has no such necessary impact.

A final point on “extraterritoriality” must be addressed: States might conceivably craft facially neutral standards for in-state products that are carefully—and covertly—designed to afford economic protection to their in-state producers. Such disguised economic favoritism has a long history in the field of international trade law. A celebrated example concerned a tariff schedule adopted by Germany that was drafted to cover only “large dappled mountain cattle or brown cattle reared at a spot at least 300 meters above sea level and which have at least one month’s grazing each year at a spot at least 800 meters above sea level.” Upon scrutiny, it was discovered that the measure granted a tariff reduction to products from Switzerland without extending similar treatment to Germany’s other trading partners.47 A more contemporary example involved regulations adopted by the United States under the Marine Mammal Protection Act to protect dolphins from being incidentally killed by the harvesting methods of the tuna industry. Prompted by valid conservation goals, the regulations nevertheless were crafted by the United States in a manner that worked

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to subtly advantage U.S. fishing interests to the detriment of those from Mexico. Although the trade dispute panel that heard Mexico’s complaint against the U.S. regulation could have sided with Mexico on these narrow discrimination grounds, the panel instead chose to broadly criticize the U.S. regulation as an impermissible attempt to regulate “extrajurisdictional” production practices. 48

A similar example in the DCC context comes from the case of *Legato Vapors, LLC v. Cook*, 49 in which out-of-state producers challenged an Indiana law regulating the manufacture and distribution of vapor pens and liquids used in electronic cigarettes. As the Seventh Circuit noted, the Indiana law was “written so as to have extraterritorial reach that is unprecedented, imposing detailed requirements of Indiana law on out-of-state manufacturing operations.” 50 The court struck down the law as a violation of the DCC “prohibition against extraterritorial legislation.”51 But a better way to understand the case is as an instance of disguised protectionism on the part of Indiana. The extensive and parochial requirements imposed on e-cigarette producers included such matters as obtaining a multiyear contract with an independent security firm, the description of which was written in such a way that “only one company in the entire United States, located not so coincidentally in Indiana, satisfied the criteria of the Indiana Act.”52 Indeed, after reviewing the absurdly meticulous and inflexible requirements of the Indiana law, it is hard to understand the state’s motivation as anything other than an effort to surreptitiously grant economic favor to in-state businesses. Nevertheless, in striking down the law, the court rested its holding not on grounds of discrimination against out-of-state competition, but instead on the “more basic reason” that the law constituted “extraterritorial legislation.” 53

The Court in *National Pork Producers* was right to resist this equation of disguised protectionism with “extraterritorial” regulation. To be sure, a state law that imposes extensive import conditions on out-of-state producers raises the possibility that a state has engaged in disguised protectionism in order to benefit its in-state producers. However, it is not extraterritoriality *per se* that is a problem, but instead

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49. 847 F.3d 825, 827 (7th Cir. 2017).
50. Id.
51. Id.
52. Id. at 833.
53. Id.
the likelihood that a state’s hyper-scrutiny of extraterritorial behavior is being used to engage in protectionism. Although facially neutral, some state regulations may impose discriminatory impacts sufficiently great to raise the specter of disguised protectionism and to cast doubt on the purported public interest justification for the regulation. 54 Prop 12 did not fit into this category. California has a vanishingly small number of domestic pork producers, and there was no evidence that those producers constituted a lobbying force in favor of Prop 12. The state has a long and well-documented history of regulating food products for anticycruelty and health and safety reasons, and for establishing border measures to shore up the integrity of those regulations. In short, there was no evidence to suggest that Prop 12 is “designed to benefit in-state economic interests by burdening out-of-state competitors,” 55 a point conceded by the Council.

III. SHOULD SIZE OF THE REGULATING STATE’S MARKET MATTER?

Political scientist David Vogel coined the term “California Effect” to capture the notion that regulatory standards within the Golden State can exert a de facto national influence due to the sheer economic significance of the state’s market. 56 California’s economy—$3.598 trillion in 2022—was so large that, if the state were an independent nation, it would boast the fifth largest economy in the world, behind only the United States, China, Japan, and Germany. 57 No doubt the campaigners who launched Prop 12 were aware of this fact and the likelihood that restricting importation of pork products into California which failed the Proposition’s requirements could ultimately lead to transformation of industry practices nationwide. In turn, the Council and its amici supporters seized on this same dynamic, decrying it as an inequitable and excessive burden on interstate commerce.

For instance, the Council’s petition for certiorari emphasized the following alleged facts:

“Pork is a $26-billion-a-year interstate business in the U.S., with

56. See DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 6 (1995) (“The California effect refers to the critical role of powerful and wealthy ‘green’ political jurisdictions in promoting a regulatory ‘race to the top’ among their trading partners.”).
57. See Ryan A. Hughes, If California Were a Country, BULLOAK CAPITAL (June 8, 2023), https://bulloakcapital.com/blog/if-california-were-a-country/ [https://perma.cc/J97D-RJ4C].
significant international imports and exports."

"California residents consume 13% of the Nation’s pork, and 99.9% of pork sold in the State derives from sows raised out-of-state."

The national pork industry at present is structured in a manner that “makes it impossible to trace every cut of pork back to a particular sow housed in a particular way.”

Producers that decide to become Prop 12-compliant will need to spend “an estimated $293,894,455 to $347,733,205 of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Prop 12 imposes.”

"[C]ompliance will increase production costs by over $13 dollars per pig, a 9.2% cost increase at the farm level."

"Increased production costs will flow through to every market hog born to every sow raised in compliance with Prop 12, and to every cut of meat from each of those market hogs—regardless of where that meat is sold."

Based on such facts, the Council argued that “the practical effect [of Prop 12] is to specify the means of production of goods to be used in other states, and to alter commercial transactions among out-of-state parties that are unrelated to California.” Such an effect, in the Council’s view, cannot be justified by the animal welfare and human health and safety interests Prop 12 purports to advance.

The Council’s arguments were well addressed by California and its supporters. In short, they argued that major pork companies have already begun moving toward the production model required by Prop 12 due to consumer demand and that the severe market disruptions predicted by the Council are conjectural. In contrast, they contended that the animal and human welfare interests promoted by Prop 12 are well documented. What is important to point out for present purposes is that the vast majority of argumentation by the Council and its supporters with respect to the Pike balancing test took the form of policy analysis—that is, of projecting how Prop 12 will affect out-of-

59. Id.
60. Id. at 7.
61. Id. at 11–12.
62. Id. at 12.
63. Id.
64. Id. at 18–19.
state businesses, who will ultimately bear the costs of compliance, and whether those costs and their distribution are justified in light of the benefits promoted by the challenged law. In an opinion written while he still sat on the Tenth Circuit, Justice Gorsuch critiqued DCC analysis of this sort as judicially illegitimate. Gorsuch was especially concerned that the Pike test requires judges to engage in an openended comparison of incommensurable values, a refrain that was repeated vigorously by the majority in the Dobbs opinion. In short, it appeared possible that Pike balancing—and with it the most far-ranging and textually unhinged features of DCC case law—might be killed off entirely by National Pork Producers.

Nevertheless, in a fractured and tenuous way, Pike balancing survives. One point a majority of justices should be able to agree upon going forward, though, is that the size of a state’s market should not be relevant for purposes of assessing the impact of the state’s regulation on interstate commerce. In other words, the “California Effect” should be of no weight in DCC analysis, whatever its interest to political scientists. As Gorsuch’s opinion noted, a formal equality argument supports this notion: except where power is expressly apportioned differently by the constitution, each state is an equal sovereign in our federal system. Put differently, no legitimate reason exists for federal judges to afford the California legislature less scope for regulation than smaller states. If businesses choose to comply with Prop 12 across their

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65. See Energy & Env’t Legal Inst. v. Epel, 793 F.3d 1169, 1171 (10th Cir. 2015) (referring to the Pike balancing test as “ineffable” and “unwieldy”).

66. See id. (“By any reckoning, that’s a pretty grand, even ineffable, all-things considered sort of test, one requiring judges (to attempt) to compare wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters).”). See also Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“[The Pike balancing] scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610, 618 (1997) (Thomas, J., dissenting) (criticizing dormant Commerce Clause jurisprudence as being “unmoored from any constitutional text” and resulting in “policy-laden judgments that courts are ill equipped and arguably unauthorized to make”); Goldsmith & Sykes, supra note 4, at 820 (observing that “there is a growing consensus that courts, though perhaps competent to enforce an antidiscrimination regime, are ill-suited to make the many difficult value judgments that the balancing test requires”); Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring) (criticizing Pike balancing as being “a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines”).


68. See Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1164 (2023) (suggesting that, according to the equality principle, it would be constitutionally wrong for small market states to have more regulation power than voters in large market states).
entire product line, that choice is independent of California’s authority to regulate in-state transactions. Conversely, if businesses chose to comply with a similar law passed by Vermont through a segmentation of their product line or a withdrawal entirely from the Vermont market, that choice again is made independent of Vermont’s regulatory authority. For purposes of DCC analysis, California and Vermont are afforded equal respect by analyzing the impact of their regulations on a transactional, rather than an aggregate, basis.

A pragmatic argument supports this approach as well. If the goal of the DCC is to preserve a national market, then a national market still prevails even when the California Effect leads a state’s local standards to set de facto national standards. Congress could always override the California Effect through preemptive federal lawmaking. But unless and until Congress so acts, the goal of preserving a national economic market is not disrupted when a powerful economic state regulates in a way that establishes a de facto national standard, so long as the standard is imposed through “the independent choices of private market participants.” This conclusion holds even in the case of “complex national distribution channels” that have the practical effect of making producers apply a particular state’s standards nationwide rather than incur the expense of segmenting its product lines. So long as the state does not regulate in a way that mandates a particular outcome in commerce that takes place entirely outside the state’s borders, and so long as the market involved is not one where segmentation by producers is physically or technologically impossible, neutral state regulations that produce the California Effect should comfortably pass muster under the DCC.

69. Nonetheless, it is noteworthy that in many areas of environmental, health, and safety regulation Congress has instead affirmatively embraced the power of states like California to set higher standards of protection, even ones that influence conditions outside the states’ borders. See Ann E. Carlson, Iterative Federalism and Climate Change, 103 Nw. U. L. Rev. 1097, 1099-1100 (2008) (explaining that Congress exempted California from the preemption of state regulation in the Clean Air Act of 1963.).

70. Online Merchants Guild v. Cameron, 995 F.3d 540, 556 (6th Cir. 2021).

71. Id. Thus, the fact that Amazon requires its merchants to apply uniform nationwide pricing did not render the state of Kentucky’s price-gouging statute impermissible under the DCC even though the practical effect of Amazon’s policy was to force merchants to offer Kentucky-compliant prices everywhere. In rejecting a DCC challenge to this Kentucky law, the Sixth Circuit explained that there was nothing “direct or inevitable” about the extraterritorial effect because it “depends entirely upon Amazon’s independent decisions in how it structures its online marketplace.” Online Merchs. Guild v. Cameron, 995 F.3d 540, 555 (6th Cir. 2021).

72. See supra text accompanying notes 31–41.

73. See supra text accompanying notes 45–46.
IV. “A WILD BOYCOTT OF AGITATION”

The animal protection community faced a difficult strategic choice in *National Pork Producers*. To defend the law, it had to balance relying on animal welfare interests alone with also emphasizing human health and safety arguments. Because the movement is committed to the advancement of nonhuman animals’ moral and legal status, it would seem disloyal to highlight human health and safety over and above Prop 12’s benefits for animals. Yet the benefits to animals occur almost entirely outside the state of California and are recognized as “local benefits” for DCC analysis only in the form of moral satisfaction that Californian consumers might experience. Centering the animal welfare interests advanced by Prop 12 therefore made the law appear more vulnerable to constitutional challenge as an attempt by one state to impose its production preferences on another. Hence, the Trump Administration sided with the Council during the Ninth Circuit proceedings by arguing that Prop 12 advances an “improper purpose” and bans pork imports “based solely on a desire to prevent what California considers animal cruelty that is occurring entirely outside the State’s borders.” The Biden Administration followed suit by supporting the Council in its appeal, stating flatly that:

California has no legitimate interest in protecting the welfare of animals located outside the State. Proposition 12’s sales ban is aimed at “cruelty” to animals that occurs entirely outside California and has no impact within California. The State may not extend its police power over animal welfare beyond its jurisdictional bounds by regulating out-of-state activity with no in-state impact based on a philosophical objection.

This characterization of Prop 12 as merely fulfilling a “philosophical objection” was taken up by the Council’s amici supporters, who more strongly condemned the measure as a “moral crusade[...],” the only effect of which is to allow “the rich techies in San

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74. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (evaluating whether a state regulation’s burdens on interstate commerce are “clearly excessive in relation to the putative local benefits”).


76. *Brief for the United States as Amicus Curiae Supporting Petitioners at 16–17, Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (No. 21-468) (internal quotations and citations omitted). *See also id.* at 18 (“States may not otherwise regulate out-of-state entities by banning products that pose no threat to public health or safety based on philosophical objections to out-of-state production methods or public policies that have no impact in the regulating State.”).

77. *Brief of Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 23, Nat’l*
Francisco and the Hollywood elite [to] feel more virtuous eating pork.” Importantly, five justices acknowledged in Part I of Gorsuch’s opinion the long history of state laws aimed at preventing animal cruelty, appearing to accept the notion that state promotion of animal welfare is squarely within a state’s police powers to pursue. Notably, however, the majority did not address whether state promotion of animal welfare that occurs purely outside its territory represents a legitimate state interest.

Mindful of the challenging issues raised by a pure cross-border “moral crusade,” California was careful throughout the history of Prop 12 to connect its standards to human health and safety concerns. Nonetheless, what if those concerns were not present and California instead was required to defend Prop 12’s control of imported meat products based solely on animal treatment that occurs outside the state’s borders? Writing for the Court in Baldwin v. G.A.F. Seelig, Justice Cardozo hypothesized such a case. He mused about a state which “condition[ed] importation upon proof of a satisfactory wage scale in factory or shop” on the theory that substandard wages might lead workers to make unsafe compromises during production that would ultimately harm in-state consumers. Dismissing that causal argument as speculative, Cardozo instead viewed the law as a pure effort to reform the labor policies of a sister state and concluded that “[o]ne state may not put pressure of that sort upon others to reform their economic standards.”

The Council in National Pork Producers cited this passage with gusto, as did the United States in its brief supporting the Council. If it is obvious to Cardozo that a state cannot restrict imports from jurisdictions with a lower minimum wage for human workers, then surely it is also obvious that the treatment of nonhuman animals in out-of-state production is beyond the proper

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80. Baldwin v. G.A.F. Seelig, 294 U.S. 511, 524 (1935). See also Hammer v. Dagenhart, 247 U.S. 271–72 (1918) (striking down a federal prohibition on the interstate shipment of goods produced by child labor as beyond congressional authority under the Commerce Clause because the “goods shipped are of themselves harmless”). The latter case was overruled explicitly by United States v. Darby, 312 U.S. 100, 116 (1941), which recognized that the reasoning adopted in Hammer, “that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned.” Id.
scope of a state’s regulatory concern. Perhaps, though, Cardozo was wrong in presuming as he did. Perhaps a state can constitutionally restrict imports from states that fail to meet specified wage standards, so long as the state is not engaged in disguised protectionism. California seemed to contend as much during oral argument at the Ninth Circuit in a separate case related to Prop 12.

A state enters particularly difficult terrain when it restricts imports to effectuate the moral preferences of its citizens regarding out-of-state production practices. Many have argued—including within the Prop 12 dispute—that a conceptual distinction between “processes” and “products” should be used to police that terrain. Under this distinction, regulating states would only be allowed to condition importation of products with respect to characteristics inhering in the physical product itself, rather than extraterritorial processes giving rise to the product. Such a “process-product distinction” is too thin and formalistic a device to resolve the normative stakes at issue in these disputes. It is not merely a matter of California’s “philosophical objection to the public

81. See Petition for Writ of Certiorari at 18–19, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468); Brief for the United States as Amicus Curiae Supporting Petitioners at 12, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“States may not ‘condition importation’ of products on such non-price factors as ‘proof of a satisfactory wage scale in factory or shop.’” (quoting Baldwin, 294 U.S. at 524)).


83. See Brief for Indiana and 25 Other States as Amici Curiae in Support of Petitioners at 20, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (complaining that Prop 12 evinces “hardly the faintest pretense of concern for the quality of the commodities themselves”); Brief for the United States as Amicus Curiae Supporting Petitioners at 21–22, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (characterizing Prop 12 as resting on “a philosophical objection to animal-welfare policy in other States” in contrast to regulations addressing “hazardous products” or products that pose “environmental harm within the regulating State”); Brief for Petitioners at 60, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“Although safeguarding the welfare of domestic animals is a valid exercise of police power, a law that attempts to address perceived harms to animals in other States is not.”); Brief of North American Meat Institute as Amicus Curiae Supporting Petitioners at 19, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“When a State regulates the properties of goods sold in-state or their packaging to prevent in-state harms resulting from the goods’ in-state use, the State acts within its jurisdictional authority.”); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners at 2–3, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“States may not bar the importation of goods from other States because of how they were manufactured elsewhere—in the absence of material effects within the State.”).

policy of other States,” since Californians themselves experience personal welfare effects from knowledge regarding the upstream production practices that are tied to their consumption activities. Those welfare effects also complicate the effort to adapt the “internal consistency” test from state taxation analysis to the context of regulations aimed at health, safety, and welfare. The internal consistency test asks whether taxed entities would be subjected to inconsistent or multiplicative tax burdens if all states followed the practice of the taxing scheme being challenged. As applied to Prop 12, promoters of this approach argue that California must choose between regulating the confinement conditions of animals within California-based production or regulating confinement conditions for animal products sold within California. In other words, the state should regulate domestic product sales (irrespective of the location of production) or domestic production (irrespective of the location of eventual sale), but not both.

While an “internal consistency” test might prove workable when addressing the fungible state interest of tax revenue, nontax regulations may be supported by a diverse range of state interests that do not lend themselves to the same analysis. Prop 12, for instance, can be seen to simultaneously promote animal welfare for sows within the state and consumer welfare for Californians who voted collectively to stop supporting agricultural animal abuse both in and out of state. Similarly, if California conditioned importation of goods on producer compliance with the state’s higher-than-average minimum wage law, then the restriction again could be seen as effectuating dual purposes. The minimum wage standard promotes the economic interest of California workers, while the import regulation promotes the moral interest of California consumers in not supporting what they view as objectionable labor conditions anywhere. When it comes to taxation, interstate

85. Brief for the United States as Amicus Curiae Supporting Petitioners at 34, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (deeming such an interest tantamount to local economic protectionism as an illegitimate state ground for regulation under the DCC). See also Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners at 26, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“California cannot, in the name of protecting the health, safety, and welfare of its citizens, leverage the market power of those citizens to impose its idiosyncratic brand of animal husbandry beyond its borders.”).

86. See Brief of Professors Michael Knoll and Ruth Mason as Amici Curiae Supporting Petitioners at 7, Nat’l Pork Producers, 143 S. Ct. 1142 (2023) (No. 21-468) (“Under this Court’s doctrine, a state’s rule for determining its share of taxable income must display internal consistency between the burdens on intrastate activity and interstate activity. A tax apportionment rule is internally consistent if its adoption by every state would lead to the same income being taxed by no more than one state.” (citation omitted)).
comity might compel California to choose between taxing at the level of sales or production, but why should such comity interests require California to choose among interests like worker, animal, and consumer welfare when engaging in nontax regulation?

At bottom, the process-product context raises the question of which aspects of comparative advantage are legitimate bases for economic competition and which instead are morally contentious enough to be appropriately guarded against through border measures. In the context of Prop 12, this question became whether the greater disregard of animal suffering shown by pork-producing states is a feature of those states’ economic strength that California should be forced to accept as part of residing within an integrated national economy. And if that feature was something Californians would have to swallow, what other forms of cost-reduction must they abide under the DCC? More germane to National Pork Producers Council, is the Supreme Court the right body to be making such determinations in the absence of action by Congress? A plurality of three justices felt not, but the remaining members of the Court all seemed in one way or another reluctant to give up on the considerable judicial authority conferred by a more expansive DCC jurisprudence.

The basic normative legitimacy of morally rooted border restrictions, at least in some circumstances, must be conceded. In the extreme, one may look at the 1939 U.S. consumer boycott of German goods, which Adolf Hitler decried by saying “[i]t is . . . an unbearable burden for the world economic relations that it should be possible in some countries for some ideological reason or other to let loose a wild boycott of agitation against other countries and their goods and so practically to eliminate them from the market.” Few would find this argument persuasive in light of the horrors being protested through the boycott. Likewise, in the decades leading up to the Civil War, Quakers in the North led a consumer movement to avoid cotton and other goods produced through slave labor in the South. If a northern state had formalized such a boycott through import regulations, few again would

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consider such a law illegitimate. 90 Indeed, the U.S. government itself is waging today an extremely costly, high-political-stakes campaign against goods produced using forced labor from the Chinese province of Xinjiang, where Uyghur Muslims and other ethnic minorities have been subjected to human rights abuses. 91

Slavery and the Holocaust are extreme examples designed to demonstrate that not all import restrictions based on practices and conditions abroad can or should be dismissed as “moral militancy.” 92 Examples exist at the opposite extreme as well. For instance, during the twentieth century U.S. civil rights struggle, white supremacists greeted Black consumer campaigns with commercial activism of their own. “By the mid-1960s white supremacists were countering black consumer boycotts with ‘buy-ins’ designed to support spurned merchants and their own boycotts of white retail businesses owned by those considered race traitors.” 93 Even nominally neutral attempts to utilize “union-made” labels to support labor have been effectuated in ways that exclude and harm nonwhite workers. 94 If a state passed a law utilizing import restrictions to promote these kinds of racially discriminatory preferences of its citizens, few would argue that a legitimate “local benefit” was being promoted by the state. Indeed, some would go further to claim that denying consumers information about upstream aspects of production is actually an important component of the liberal market approach to combating prejudice and factionalism. As Gail Heriot has written, “liberalism postulates a preference structure in citizens that may or may not exist: that citizens

90. Again, a different situation would be posed if a state’s regulation implicated foreign commerce and the federal executive’s authority to speak on behalf of the nation in foreign affairs with “one voice.” See Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381 (2000) (striking down a Massachusetts law restricting state purchases from firms doing business in the country of Myanmar).


94. See Marion Crain, Colorblind Unionism, 49 UCLA L. REV. 1313, 1322 (2002) (“Look-for-the-union-label campaigns were used not only to harness the dollars of union families on behalf of the union, but to pressure manufacturers to hire only white workers.”).
generally derive utility from the physical properties of the goods they purchase, not from the religious preference or any other private data about the producer or vendor.95

These counterexamples serve to illustrate that nodal regulations can promote a whole range of policy goals, from the morally compelled to the morally reprehensible. Progressives may cheer when California behaves “like a nation-state”96 and asserts its enormous market power to influence conditions and practices outside its borders. But what is good for the goose when California bans importation of foie gras97 is also good for the gander when conservative states utilize the same strategies. Already, conservative lawmakers have passed laws that ban state agencies from doing business with companies that “discriminate” against gun manufacturers and the fossil fuel industry in an effort to counter divestment from these industries.98 Conservative politicians also have proposed laws that seek to prevent residents from obtaining an abortion out-of-state by allowing private citizens to sue actors who provide assistance, from the out-of-state physician who performs the procedure to the Uber driver who transports the patient across state lines.99

It is not hard to imagine such nodal regulations taking the same form as Prop 12’s product import restriction. For instance, Texas might require out-of-state product manufacturers to certify that their

96. See Douglas A. Kysar & Bernadette A. Meyler, Like A Nation State, 55 UCLA L. REV. 1621, 1622 (2008) (detailing California’s attempt to reduce GHG emissions without the support of major emitters in direct opposition to federal policy at the time regarding climate change).
97. See Ernesto Hernández-López, Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs, 7 UC IRVINE L. REV. 319, 321 (2017) (“Since 2008, California has attempted to limit animal cruelty in food industries with policies directed at slaughtering immobile swine called ‘downers’; foie gras, liver from force fed ducks; shark fins; and eggs from hens in large-scale housing called ‘battery cages.’”).
facilities do not permit transgender individuals to use bathrooms based on gender identity. Or Utah might require out-of-state companies to verify that they do not reimburse their employees’ travel expenses to obtain an abortion in states where the procedure remains legal. Or Indiana might restrict importation of pork products sourced from farmers who did not use gestation crates, citing a state preference for efficiency and cost-reduction at the express price of animal suffering. Which of these measures would constitute the legitimate exercise of state police powers and which would represent a “wild boycott of agitation?”

One thing is clear in response to such a question: The Supreme Court, working through its self-invented DCC jurisprudence, is not institutionally equipped to settle the normative disagreements behind such laws.

CONCLUSION

So long as they are carefully designed to pass constitutional muster—as Prop 12 was—nodal regulations with significant extraterritorial impacts should be permissible for states to adopt unless and until Congress utilizes its Commerce Clause authority to establish preemptive national standards. To be sure, the result may be a revival of the kind of balkanized economic battles that characterized the colonies prior to adoption of the Constitution100—only now the battles will include the full range of public policy disputes inflicted through the medium of market transactions.101 Congress, rather than the Court, should decide whether and when to end such interstate squabbling. Presently, Democratic states and local governments would seem to hold an advantage in interstate commerce regulatory warfare, given the larger share of the national economy those governments represent.102 Indeed, one might argue that this “malapportionment” of economic

100. See Baldwin v. G.A.F. Seelig, 294 U.S. 511, 522 (1935) (“We are reminded . . . that a chief occasion of the commerce clauses was the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.”) (internal quotation omitted).

101. See Brief for Indiana and 25 Other States as Amici Curiae in Support of Petitioners at 6, Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (“States will be able to impose any restriction on out-of-state businesses so long as it ties that restriction to the sale of goods within its borders. Minimum wage, employee benefits and working conditions, and use of undocumented workers, all would become fair game for extraterritorial reach.”).

power within Democratic-leaning jurisdictions is a welcome counterbalance to the malapportionment of political power that exists within Republican-leaning jurisdictions.

Other concerns loom, however. The very success of Prop 12 risks reinforcing the belief that more traditional avenues of lawmaking at the national level are broken and that we, as a nation, are consigned to being united only through an economy in which we now indirectly try to settle our moral disputes. If a legislative window ever did open for reform of industrial animal agriculture at the national level, will Prop 12 have served to mobilize and empower a coalition of supporting citizens or will it have only segmented and mollified an audience of consumers that no longer has the feel for democratic self-governance? Contrary to the progressive vision behind laws like Prop 12, the national economy in an era of nodal regulatory warfare will not look like one giant Whole Foods. Instead, it will contain all the diversity and discord of conventional politics, refracted through a market lens in which consumption and investment choices are seen as “votes” to resolve policy disputes we may no longer know how to confront directly.

This translation of politics into economics is highly imperfect. Although originating with a ballot initiative, in which the metric of influence was one vote per California citizen, Prop 12’s ultimate policy impact is meted out through consumer purchases in which the metric is one vote per dollar spent. It is unclear whether an obvious path exists back from such fractious, state-level marketized politics to politics proper. This much, though, should be clear: the path cannot be dictated by the Supreme Court.