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National Pork Producers Council v. Ross and the Dormant Commerce Clause

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ABSTRACT

National Pork Producers Council v. Ross is a dormant Commerce Clause case in which petitioners challenged a California law that restricts the in-state sale of pork that comes from breeding pigs "confined in a cruel manner." Because California comprises 13% of the national pork market, and because most pork consumed in California is raised in other states, the cost of compliance with the law falls largely on out-of-state producers. Pork Producers claimed that the California law placed an excessively heavy burden on interstate commerce, but they did not claim that California targeted out-of-state producers. The Court of Appeals dismissed the case for failure to state a claim, and the Supreme Court affirmed.

This Article first provides a summary of the facts of the case and basic dormant Commerce Clause doctrine, followed by a description and comparison of the various positions that the Justices took regarding two basic matters—the failure to state a claim and the continuing viability of the *Pike* balancing test. A majority of the Justices agreed that petitioners failed to provide evidence of a sufficient burden to state a claim, but they did not agree on a rationale. None of the Justices said that the Court should abandon the *Pike* balancing test, but three of the Justices did indicate that the types of cases to which the test is applied should be limited.

The focus then shifts to reconstructing a proper understanding of Chief Justice Marshall's Commerce Clause jurisprudence, starting with the framework for legal analysis that he set out in *McCulloch v. Maryland*. Next, the importance of the object test that he identified in *Gibbons v. Ogden* and applied in *Willson v. Blackbird Creek* is highlighted. Before applying Marshall's dormant Commerce Clause doctrine to the facts of National

Pork Producers, this Article briefly traces the demise of Marshall's Commerce Clause legacy beginning with *Cooley v. Board of Wardens*. Marshall would likely have reached the same conclusion as the Court did in *National Pork Producers* but for very different reasons.

Lastly, biblical guidelines can properly be used to justify and inform California's exercise of its police powers in this case. The Bible also provides a vision for prosperity and peace that informs a proper understanding of our constitutional order designed to establish a free and common market and to ensure national security.

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ARTICLE

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Jeffrey C. Tuomala[†]

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Marshall's dormant Commerce Clause doctrine to the facts of National Pork Producers*, this Article briefly traces the demise of Marshall's Commerce Clause legacy beginning with* Cooley v. Board of Wardens*. Marshall would likely have reached the same conclusion as the Court did in* National Pork Producers *but for very different reasons.*

Lastly, biblical guidelines can properly be used to justify and inform California's exercise of its police powers in this case. The Bible also provides a vision for prosperity and peace that informs a proper understanding of our constitutional order designed to establish a free and common market and to ensure national security.

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I. INTRODUCTION

National Pork Producers Council v. Ross[1] is a dormant Commerce Clause case. California voters adopted Proposition 12, a law that restricts the in-state sale of pork that comes from breeding pigs "confined in a cruel manner."[2] Confinement is "cruel" if the conditions prevent a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely."[3] Petitioners sought to permanently enjoin enforcement of Proposition 12, alleging that the law violated the dormant Commerce Clause, first because it had the extraterritorial effect of regulating conduct outside of California and, second, because it imposed an excessive burden on interstate commerce.[4] The federal district court dismissed the complaint for failure to state a claim and the court of appeals affirmed.[5] The Supreme Court, in turn, affirmed the court of appeals by a 5-4 vote.[6]

Part II of this Article summarizes the facts of the case, basic dormant Commerce Clause jurisprudence, and reasons petitioners failed to state a claim. Part III breaks down the various positions taken in the decision, which Justice Kavanaugh aptly described as "fractured."[7] The focus is first on petitioners' claim that Proposition 12 places an excessive burden on interstate commerce and, second, on the various reasons that the Justices gave for concluding that petitioners failed, or did not fail, to state a claim. Part IV revisits Chief Justice John Marshall's Commerce Clause jurisprudence as providing the proper understanding of the dormant Commerce Clause. He would have agreed that the Court has the power to strike state laws that discriminate against interstate commerce, but he would not agree that the Court has the power to strike neutral state laws that have

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[1] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023). At the time of the submission of this Article, the United States Reports citation for *Nat'l Pork Producers* was not yet available.

[2] *Id.* at 1150 (quoting CAL. HEALTH & SAFETY CODE § 25990(a) (Deering 2023)).

[3] *Id.* at 1150–51 (quoting HEALTH & SAFETY § 25991(e)(1)).

[4] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (2021), *aff'd*, 143 S. Ct. 1142 (2023).

[5] *Nat'l Pork Producers*, 143 S. Ct. at 1150.

[6] *Id.* at 1149.

[7] *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

an incidental effect on interstate commerce. Lastly, Part V shows how the Bible justifies and informs California's exercise of its police powers in this case and provides a vision for prosperity in a legal order marked by free trade and national security as promoted in the U.S. Constitution.

II. POSTURE OF THE CASE

A. Facts Alleging a Claim

The prohibition on the sale of pork in California applies equally to pork produced under inhumane conditions whether in California or elsewhere; however, most pork sold in California is produced in other states "such as Iowa, Minnesota, Illinois, Indiana, and North Carolina."[8] Several states other than California, including Massachusetts, Florida, Maine, Michigan, Arizona, Oregon, and Rhode Island, have similar laws restricting the sale of pork,[9] but they do not constitute as large a share of the pork market as California, which has 13% of the national pork market.[10]

California had two reasons for adopting Proposition 12. The first was that raising pigs "confined in a cruel manner," as prohibited by the law, increases the risk of food poisoning.[11] The second reason was to enforce moral standards against animal abuse.[12] The pork producers countered these assertions. They claimed that raising pigs in the conditions prohibited by the California law reduces the risk of food contamination.[13] They also claimed that placing pigs in California-compliant group pens where they have more freedom of movement is actually more harmful to the pigs because pigs are aggressive.[14]

The pork producers argued that compliance with California's law places a huge economic burden on them. Approximately 72% of pork is raised in

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[8] *Id.* at 1173.

[9] *Id.* at 1150 (majority opinion).

[10] *Id.* at 1173 (Kavanaugh, J., concurring in part and dissenting in part).

[11] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150–51 (2023) (majority opinion).

[12] *See id.* at 1151.

[13] *Id.*

[14] *Id.*

facilities that do not comply with California law.[15] Because the production and sale of pork is largely a vertically integrated industry, it would be very difficult to segregate and trace California-compliant pork, keeping it separate from non-compliant pork.[16] Therefore, most pork produced anywhere in the United States would have to comply with California law even if it is not ultimately sold in California.[17] Because California has such a large share of consumers, most producers could not afford to give up that market. Compliance with California law would increase production costs by 9.2% or $13.00 per pig, with total estimated compliance costs of "between $290 and $348 million."[18]

B. Contemporary Dormant Commerce Clause Jurisprudence

It is necessary to understand the basic contours of the dormant Commerce Clause in order to understand why petitioners failed to state a claim. The term "dormant Commerce Clause" does not appear in the Constitution, but derives from the understanding that a chief reason for adopting the Constitution was to establish a common market fostering the freedom of trade.[19] The power to regulate interstate commerce, as Chief Justice Marshall explained it, is a valid doctrine.[20] Although the Court's dormant Commerce Clause jurisprudence long ago deviated from Chief Justice Marshall's, contemporary doctrine still bears some resemblance to his.

The Constitution gives Congress the power "to regulate Commerce . . . among the several States."[21] When a state law regulates the *subject* of interstate commerce, and there is no federal law preempting the state law, Congress's power is said to lie dormant. There are two basic types of state laws that come into play in dormant Commerce Clause cases. The

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[15] *See* Petition for Wirt of Certiorari Appendix G at 236a, *Nat'l Pork Producers*, 143 S. Ct. 1142 (No. 21-468).

[16] *Nat'l Pork Producers Council*, 143 S. C.t at 1151.

[17] *Id.* at 1171 (Roberts, C.J., concurring in part and dissenting in part).

[18] *Id.* at 1151 (majority opinion); *id.* at 1170 (Roberts, C.J., concurring in part and dissenting in part).

[19] *Id.* at 1172–73 (Kavanaugh, J., concurring in part and dissenting in part).

[20] *Infra* Part IV (explaining the proper understanding of the dormant Commerce Clause and its application in this case).

[21] U.S. CONST. art. 1, § 8, cl. 3.

first type is state laws that facially or purposely discriminate against out-of-state commerce. The Court often rules that these laws are "virtually *per se*" unconstitutional.[22] Petitioners did not allege that California facially or purposely discriminated against out-of-state commerce.

The second type of dormant Commerce Clause case involves state laws that apply equally to in-state and out-of-state interests but place an incidental burden on interstate commerce. In other words, the effect of the state law, not the purpose, is to place a burden on interstate commerce. In *National Pork Producers*, petitioners alleged the California law violates the dormant Commerce Clause by placing an excessive burden on interstate commerce.[23] What has become known as the *Pike* balancing test generally applies in this second type of dormant Commerce Clause case.[24] In applying the *Pike* balancing test, the Court supposedly determines whether the burden the state law places on interstate commerce is clearly excessive as compared with the benefit the state derives from the exercise of its police powers.[25] Police powers are those powers of civil government reserved for the states to promote health, safety, welfare, and morals.

> In *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court distilled a general principle from its prior cases. "Where [a] 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." Further, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[26]

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[22] *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).The Court has recognized some exceptions to this rule that were not applicable in this case.

[23] *Nat'l Pork Producers*, 143 S. Ct. at 1157.

[24] *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

[25] *Id.* at 1157 (majority opinion).

[26] *Id.* at 1165 (Sotomayor, J., concurring in part) (citation omitted).

One of the main conceptual problems with the application of the *Pike* balancing test is that it is inherently political in nature as it claims to measure and weigh the respective burdens (costs) and benefits of the state law. Because application of the *Pike* balancing test is essentially political in nature, Congress has the power to overrule a court's decision if it comes to a different conclusion regarding the weighing of burdens and benefits of the state law.[27]

> Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States.[28]

C. Failure to State a Claim

The Court focused most of its attention on petitioners' claim that Proposition 12 imposed an incidental burden on interstate commerce.[29] Had petitioners' complaint not been dismissed for failure to state a claim, petitioners would have borne the burden under the *Pike* balancing test of convincing the Court that the burden the law placed on interstate commerce was clearly excessive as compared to the benefit to California.[30] But to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, petitioners had to allege at least a *substantial burden* on interstate commerce in their complaint.

> Even as petitioners conceive *Pike*, they face a problem. As they read it, *Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes "substantial burdens"

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[27] *See* S. Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769–71 (1945).

[28] *Nat'l Pork Producers*, 143 S. Ct. at 1152 (citation omitted).

[29] All of the Justices rejected petitioners' claim that the Court should find Proposition 12 *per se* unconstitutional for having the extraterritorial effect of regulating conduct outside of California. *See id.* at 1165–76.

[30] *See id.* at 1150, 1157.

> on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other. And, tellingly, the complaint before us fails to clear even that bar.[31]

This preliminary substantial burden requirement might seem easy enough to meet, given the very large cost of complying with California law, but it was not. The court of appeals ruled that the cost required to comply with the California law (mere "compliance cost") was not relevant in calculating the preliminary substantial burden placed on petitioners.[32] Being unable to allege a substantial burden, the petitioners would obviously be unable to prove at trial that the burden on them was not only substantial but was clearly excessive as compared to the benefit of the state law.

Five of the Justices agreed that petitioners failed to state a claim, but those five Justices did not agree on the reasons for drawing that conclusion.[33] None of the Justices relied on the court of appeals' compliance cost reasoning. Four of the Justices wrote that petitioners' alleged burdens simply were not substantial.[34] Two of those Justices, plus a third Justice, wrote that petitioners failed to state a claim because they were asking the Court to weigh economic burdens on the petitioners as compared with the non-economic benefits to California, something a court is incapable of doing.[35] These three different reasons for concluding that petitioners failed to state a claim are addressed more fully below.

The four dissenting Justices believed that petitioners met the burden of alleging substantial burdens and that the case should have been remanded to the lower courts for an actual weighing of burdens and benefits to determine

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[31] *Id.* at 1161 (citation omitted).

[32] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1032 (2021), *aff'd* 143 S. Ct. 1142 (2023).

[33] *I.e.*, Justices Gorsuch, Thomas, Kagan, Sotomayor, and Barrett. *See Nat'l Pork Producers*, 143 S. Ct. at 1149.

[34] *I.e.*, Justices Gorsuch, Thomas, Kagan, and Sotomayor. *Id.* at 1149; *id.* at 1161 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.).

[35] *I.e.*, Justices Gorsuch, Thomas, and Barrett. *Id.* at 1148, 1159, 1163 (Part IV-B and Part IV-D joined by Thomas & Barrett, JJ.).

whether the burdens were clearly excessive as compared with the benefits.[36] A good portion of Chief Justice Roberts' dissent was directed to responding to the court of appeals' reasoning that petitioners had failed to allege any burden other than mere compliance costs.[37]

The Court addressed petitioners' claim that Proposition 12 constituted an "almost *per se*" violation of the dormant Commerce Clause because it had an extraterritorial effect of regulating conduct outside the state of California.[38] None of the nine Justices were willing to accept this kind of dormant Commerce Clause claim based simply on extraterritorial effects. The Court distinguished the three precedents upon which petitioners relied. In each of those cases, the states had employed laws purposely to prejudice out-of-state economic or commercial interests.[39] Because the Court rejected the petitioners' assertion that extraterritorial effects "almost per se" constitute a dormant Commerce Clause violation, no amount of evidence alleged could have sustained a claim.

III. A FRACTURED COURT

A. Agreement—Nine Justices

The best way to start parsing the Court's decision is to identify those matters upon which all nine Justices appear to agree.[40] None of the Justices questioned the essential doctrinal legitimacy of the dormant Commerce Clause.[41] Even though the Court ignores an object or purpose test when

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[36] *I.e.*, Justices Roberts, Alito, Kavanaugh, and Jackson. *Id.* at 1149, 1172 (Roberts, C.J., concurring in part and dissenting in part) (opinion joined by Alito, Kavanaugh, & Jackson, JJ.).

[37] *Id.* at 1169–72.

[38] "They would have us recognize an 'almost *per se*' rule against the enforcement of state laws that have 'extraterritorial effects'—even though this Court has recognized since *Gibbons* that virtually all state laws create ripple effects beyond their borders." *Id.* at 1165 (majority opinion).

[39] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153–56 (2023).

[40] The dissents were concurring in part and dissenting in part, so this section is an attempt to identify what all agree on. *See id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) (opinion joined by Alito, Kavanaugh, & Jackson, JJ.); *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

[41] *See Nat'l Pork Producers*, 143 S. Ct. 1142.

reviewing Congressional statutes under its Commerce Clause jurisprudence, the Justices acknowledged the purpose of the Commerce Clause in *National Pork Producers*.[42]

All of the Justices recognize that the states can regulate the subject matter of interstate commerce for police power purposes.[43] In *National Pork Producers*, the police powers exercised were for health and morals purposes.[44] Interestingly, enforcement of morals, without proof of any measurable harm, is treated once again as a legitimate government interest.

The Justices agreed that the antidiscrimination principle is at the core of the dormant Commerce Clause and that state laws that purposely discriminate against out-of-state commerce violate the dormant Commerce Clause.[45] Additionally, the *Pike* balancing test applies in reviewing at least some state laws that incidentally impose a substantial burden on interstate

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[42] Justice Gorsuch noted that "the very structure of the Constitution . . . 'was framed upon the theory that the peoples of the several [S]tates must sink or swim together.'" *Id.* at 1149, 1153 (alteration in original) (quoting Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005)). Justice Roberts also affirmed the purpose of the Commerce Clause:

> Today's majority does not pull the plug. For good reason: Although *Pike* is susceptible to misapplication as a freewheeling 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." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)); *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977) (*Pike* protects "a national 'common market'"). "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

Id. at 1167–68 (Roberts, C.J., concurring in part and dissenting in part) (parallel citations omitted).

[43] *Id.* at 1149, 1152 (majority opinion); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

[44] *Id.* at 1150–51 (majority opinion).

[45] *Id.* at 1149, 1152–53; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

commerce.[46] The Justices disagreed, however, as to whether the *Pike* balancing test should apply to movement-of-goods cases (e.g., the sale of pork) or only to instrumentalities of transportation cases (e.g., train length and truck sizes).[47] Five Justices agree that the *Pike* balancing test has not been applied previously in movement-of-goods cases.[48] It appears that three Justices would limit *Pike* balancing to instrumentalities-of-transportation cases.[49] The other six Justices would apply the test in all cases involving nondiscriminatory laws that incidentally impose a substantial burden on interstate commerce.[50]

Lastly, all the Justices agree that Congress has the power to preempt the California law and eliminate its incidental burden on interstate commerce if Congress were to decide that the burden on interstate commerce exceeds the health and moral benefits of Californians.[51] This is similar to Chief Justice Marshall's view but not identical. Chief Justice Marshall would not apply the *Pike* balancing test at all.[52] It is for Congress alone to determine whether the benefits of a state law outweigh the burdens it imposes on interstate commerce in cases involving an incidental burden on interstate commerce.

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[46] *Id.* at 1149, 1161–62 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.); *id.* at 1165 (Sotomayor, J., concurring in part); *id.* at 1166–67 (Barrett, J., concurring in part); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

[47] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1149, 1165 (2023); *id.* at 1163 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan); *id.* at 1163–64, 1164 n.4 (Part IV-D joined by Thomas & Barrett, JJ.); *id.* at 1165–66 (Sotomayor, J., concurring in part); *id.* at 1166–67 (Barrett, J., concurring in part); *id.* at 1167–70 (Roberts, C.J., concurring in part and dissenting in part).

> [T]hey would have us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case before us, we decline both of petitioners' incautious invitations.

Id. at 1165 (majority opinion).

[48] *Id.* at 1149, 1159; *see id.* at 1165–66 (Sotomayor, J., concurring in part).

[49] *Id.* at 1149, 1159 (majority opinion).

[50] *Id.* at 1167–68 (Roberts, C.J., concurring in part and dissenting in part).

[51] *See id.* at 1152 (majority opinion); *id.* at 1172, 1174 (Kavanaugh, J., concurring in part and dissenting in part).

[52] *See infra* Part IV.

B. The Court's Opinion—Five Justices (Gorsuch, Thomas, Sotomayor, Kagan, Barrett)[53]

The five Justices who affirmed the holding of the court of appeals that the pork producers failed to state a claim agreed on a couple of points that did not distinguish them from the dissenters in an essential way. They thought that many, if not most, cases purportedly applying *Pike* (including *Pike* itself) were decided on antidiscrimination bases rather than on the application of a balancing test.[54] The Court noted that it is proper to consider disproportionate out-of-state effects caused by laws that do not facially discriminate as evidence of purposeful discrimination.[55]

> While many of our dormant Commerce Clause cases have asked whether a law exhibits "'facial discrimination,'" "several cases that have purported to apply [*Pike*,] including *Pike* itself," have "turned in whole or in part on the discriminatory character of the challenged state regulations." In other words, if 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.[56]

Justice Gorsuch, in a portion of the opinion joined by Justices Thomas and Barrett, observed that most cases in which the Court applied the *Pike* balancing test to strike nondiscriminatory state laws involved instrumentalities-of-transportation cases.[57] Justice Sotomayor's separate concurrence, which Justice Kagan joined, agreed with this observation but clarified that she would not limit *Pike* balancing to transportation cases and

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[53] *See Nat'l Pork Producers*, 143 S. Ct. at 1149–59, 1164–65.

[54] *Id.* at 1165 (citing U.S. CONST. art. I, § 8, cl. 3; *id.* art. IV, § 2; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 n.55 (1986); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 448–49 (1941)).

[55] *Id.* at 1158.

[56] *Id.* at 1157 (citations omitted).

[57] *Id.* at 1159.

that the Court has not so limited it thus far.[58] Justice Sotomayor cited *Edgar v. MITE Corporation*[59] as an example of a nontransportation case in which the Court applied the *Pike* balancing test to strike a statute that was neutral on its face, but which had an excessively burdensome impact on interstate commerce.[60] In fact, Justices Sotomayor and Kagan would have applied *Pike* in this case had petitioners pled facts constituting a substantial burden on interstate commerce.[61]

C. The Controlling Opinion—Four Justices (Gorsuch, Thomas, Sotomayor, Kagan)[62]

Justice Kavanaugh identified Part IV-C as the controlling opinion because the four Justices agreed on the basis for ruling that the pork producers failed to state a claim:

> But Part IV-C of Justice Gorsuch's opinion is controlling precedent for purposes of the Court's judgment as to the plaintiffs' *Pike* claim. There, a four-Justice plurality of the Court applies *Pike* and rejects the plaintiffs' dormant Commerce Clause challenge under *Pike*. The plurality reasons that the plaintiffs' complaint did not sufficiently allege that the California law at issue here imposed a substantial burden on interstate commerce under *Pike*.[63]

The plurality's reasoning, however, differed from the court of appeals' reasoning. The court of appeals ruled that the costs of complying

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[58] *Id.* at 1165–66 (Sotomayor, J., concurring in part) (opinion joined by Kagan, J.). The four dissenters likewise made it clear that they would not limit the *Pike* balancing test to transportation cases and had not in the past. *Id.* at 1167–68 (Roberts, C.J., concurring in part and dissenting in part) (opinion joined by Alito, Kavanaugh, & Jackson, JJ.).

[59] Edgar v. MITE Corp., 457 U.S. 624 (1982); *Nat'l Pork Producers*, 143 U.S. at 1165–66 (Sotomayor, J., concurring in part) (opinion joined by Kagan, J.). However, *Edgar* was not a movement-of-goods case.

[60] *Nat'l Pork Producers*, 143 S. Ct. at 1165–66 (Sotomayor, J., concurring in part) (opinion joined by Kagan, J.).

[61] *Id.*

[62] *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

[63] *Id.*

(compliance costs) with the California law do not, as a matter of law, constitute a substantial burden.[64]

Justice Gorsuch gave several reasons for finding that petitioners had not pled sufficient evidence of a substantial burden on interstate commerce, but those reasons were not particularly persuasive, or at least they were not persuasive enough to convince the other five Justices.[65] Gorsuch relied heavily on drawing a comparison between *National Pork Producers* and the *Exxon* case,[66] in which the petitioners also failed to state a claim.[67] However, the structure of the petroleum market at issue in *Exxon* is too different from the structure of the pork market in this case to draw convincing parallels.[68]

Gorsuch identified several reasons for believing Proposition 12 imposed no substantial burden. Increased costs to consumers were not in themselves sufficient.[69] Many of the petitioners' costs were merely speculative.[70] It would be relatively easy for petitioners to accommodate production to comply with the California laws. Several smaller pork-producing cartels apparently were not burdened and submitted briefs in support of California.[71] Some large producers were already modifying their production operations, suggesting that it would not impose too great a burden for others to comply as well.[72] The Court stated that the impact of the law on the pork producers was simply a limit on their "favored 'methods of operation.'"[73]

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[64] *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028–29, 1033 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1413; *Nat'l Pork Producers*, 143 S. Ct. at 1152.

[65] *See Nat'l Pork Producers*, 143 S. Ct. at 1149, 1161–63 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.).

[66] *Id.* at 1161–62 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)).

[67] *Id.* at 1145, 1149 (majority opinion); *id.* at 1161–62 (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.).

[68] *Id.* at 1161–62.

[69] *See id.* at 1161.

[70] *Id.* at 1163.

[71] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1162 n.3 (2023) (plurality opinion) (Part IV-C joined by Thomas, Sotomayor, & Kagan, JJ.).

[72] *See id.*

[73] *Id.* at 1163.

D. Weighing Incommensurables—Three Justices (Gorsuch, Thomas, Barrett)[74]

Part IV-B of the Court's opinion is decisive because Justice Barrett joined it, thus providing the fifth vote for deciding that petitioners failed to state a claim in their complaint.[75] The separate reason for holding that the petitioners failed to state a claim is that it is impossible for the Justices to weigh burdens that are economic in nature as compared with benefits that are noneconomic in nature.[76] While losses to pork producers may be calculated in dollars and cents, the benefit to consumers of eating pork with morally clear consciences cannot be calculated by the same units of measurement.[77]

> How is a court 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. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).[78]

Justice Barrett wrote a separate concurring opinion stating that incommensurables cannot be weighed against one another and that such balancing tests require policy judgments that are not for the courts to make.[79]

> I agree with Justice Gorsuch that the benefits and burdens of Proposition 12 are incommensurable. California's interest in eliminating allegedly inhumane products from its markets

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[74] *Id.* at 1149 (majority opinion); *id.* at 1159–61 (Part IV-B joined by Thomas & Barrett, JJ.).

[75] *See id.*

[76] *Id.*

[77] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023) (Part IV-B joined by Thomas & Barrett, JJ.).

[78] *Id.* at 1159–60.

[79] *Id.* at 1166–67 (Barrett, J., concurring in part).

> 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.[80]

Justice Barrett stated that the law did impose a substantial burden on interstate commerce, but if the petitioners' claim ultimately rested on weighing incommensurables, which by nature called for a political judgment rather than a judicial one, the petitioners necessarily failed to state a claim.[81]

This part of the opinion, Part IV-B, is strongest in calling for limits on the *Pike* balancing test. Justice Kavanagh even concluded that "[a]lthough Parts IV-B and IV-D of Justice Gorsuch's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent, as I understand it."[82]

Anticipating that the other Justices would point out that the Court weighs non-economic factors while applying balancing tests in other kinds of cases, Justice Gorsuch simply asserted that cases arising under the Due Process Clause are to be treated differently from dormant Commerce Clause cases.[83] But the Justices did not go far enough with this line of reasoning. The problem of weighing burdens and benefits is not limited to balancing incommensurables. The balancing test is inherently political in nature. This is why Justice Scalia and Justice Thomas strongly criticized the Court's dormant Commerce Clause jurisprudence in prior cases.[84] One can only

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[80] *Id.*

[81] *See id.*

[82] *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

[83] *See* Nat'l Pork Producers v. Ross, 143 S. Ct. 1142, 1159 (2023).

[84] Justice Scalia wrote that a state law should be struck under the dormant Commerce Clause only if it "'facially discriminates against interstate commerce' and . . . is 'indistinguishable from a type of law previously held unconstitutional by this Court.'" Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Scalia, J., concurring) (quoting W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring)). Justice Thomas went even further stating 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." Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part) (citation omitted).

speculate why Justice Thomas did not make that point in this case. If the Court were to eliminate the *Pike* balancing test, that would signal a return to the dormant Commerce Clause jurisprudence of Chief Justice Marshall.[85]

E. Dissenting (In Part)—4 Justices (Roberts, Alito, Kavanaugh, Jackson)

Chief Justice Roberts, writing for the four dissenters, affirmed an expansive view of the applicability of the *Pike* balancing test—specifically stating that it is not limited to instrumentalities-of-transportation cases.[86] He also gave several examples of cases in which the Court measured incommensurables in applying *Pike*.[87]

In addressing the court of appeals' opinion that concluded the pork producers had alleged only compliance costs, Justice Roberts cited numerous examples of costs other than compliance costs that the Court had recognized in other cases, many of which the petitioners alleged in their complaint. These examples came primarily from instrumentalities-of-transportation cases and included delays in operations, dangers to drivers, impacts on the market, and highway accidents.[88] Additionally, he noted that *Pike* had not conflated these kinds of costs with compliance costs.[89]

Justice Roberts also rejected the Court's comparison of this case with *Exxon*. In this case, the California law had sweeping extraterritorial effects with injuries far beyond those pled in *Exxon*.[90] There was also conflicting evidence regarding pig welfare and health dangers that a court could examine and weigh.[91]

Justice Kavanaugh joined the other four dissenters but wrote a separate opinion, making two additional points. The first was to identify the implications of this case for situations in which states might try to force other

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[85] *See supra* Sections III.A–B.

[86] *Nat'l Pork Producers*, 143 S. Ct. at 1168 (Roberts, C.J., concurring in part and dissenting in part) (opinion joined by Alito, Kavanaugh, & Jackson, JJ.).

[87] *Id.*

[88] *Id.* at 1169–70.

[89] *Id.*

[90] *See id.* at 1171.

[91] *See id.*

social values extraterritorially on other states.[92] For example, California might prohibit the sale of all goods manufactured by employees who are paid less than the California minimum wage.[93] Second, the Constitution contains other provisions that may be relevant for resolving the matters involved in this case—the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.[94]

IV. THE MARSHALL LEGACY AND ITS DEMISE

A. Framework for Constitutional Analysis—McCulloch v. Maryland

In *McCulloch v. Maryland*,[95] a Necessary and Proper Clause case, Chief Justice Marshall laid out a framework of analysis that applies not only to Necessary and Proper Clause cases but also to Commerce Clauses cases, and indeed all legislative reasoning:

> But we think the sound construction of the constitution must allow to the national legislature that *discretion*, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the *end* be legitimate, let it be within the scope of the constitution, and all *means* which are appropriate, which are *plainly adapted* to that end, which *are not prohibited*, but consist with the letter and spirit of the constitution, are constitutional.[96]

Marshall's term "means" refers to laws, be they federal or state. The term "end" denotes the purpose or object for which a power is given and a law is enacted. For Congress, the end/purpose/object is usually one of the enumerated powers identified in Article I, Section Eight; for the states, it is one of the police powers. The police powers are those legitimate powers of

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[92] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1174 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

[93] *See id.*

[94] *Id.* at 1175–76.

[95] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[96] *Id.* at 421 (emphasis added).

civil government reserved to the states. "Plainly adapted" refers to the nexus between the means (the law) and the end (enumerated or police power). If a law is not plainly adapted to a legitimate end, it is most likely a pretext to an illegitimate end and, therefore, unconstitutional. Lastly, a law may be plainly adapted to a legitimate end and yet be prohibited. Courts have the power to review whether an end is legitimate, whether the law is plainly adapted to that end, and whether a superior law places a prohibition on a particular means (law). To use the language of the Necessary and Proper Clause, courts have the power to determine whether a law is "proper."[97]

Courts do not have the power to review matters committed to the "discretion" of the legislature. It is for legislatures to determine whether a law is "a convenient, a useful, and essential instrument."[98] To use the language of the Necessary and Proper Clause, courts do not have the power to determine whether a law is "necessary."[99] Whether a law is useful or beneficial (necessary) is a political question for the legislature to answer. Balancing tests in which burdens and benefits are weighed and compared are political in nature.

B. The Marshall Legacy and the Commerce Clause

1. The Commerce Clause

In *Gibbons v. Ogden*,[100] Marshall stated that in dealing with enumerated powers, the Court must consider the subject matter ("language of the instrument") and the object of the power.[101] In *Gibbons*, Marshall was careful to define the subject matter of the Commerce Clause, because that was the issue on which the parties focused.[102] The object of the Commerce Clause, whether stated as fostering free trade or establishing a common market, was

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97 U.S. CONST. art. I, § 8, cl. 18.

98 *McCulloch*, 17 U.S. (4 Wheat) at 422.

99 U.S. CONST. art. I, § 8, cl. 18.

100 Gibbons v. Ogden, 22 U.S. 1 (1824).

101 "We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred." *Id.* at 189.

102 *Id.* at 189–96.

well known.[103] Consideration of the object has all but dropped out of the Court's Commerce Clause jurisprudence, but, interestingly, it is widely acknowledged in dormant Commerce Clause cases—making the Court's jurisprudence sound much more like that of Chief Justice Marshall.

Marshall made it fairly clear in *Gibbons* that the power to regulate interstate commerce is given exclusively to Congress.[104] The states do not possess a concurrent power to regulate interstate commerce. Ogden took issue with this position, pointing out that Article I, Section Ten, clause three (the Import-Export Clause) expressly recognizes the power of the states to impose inspection laws on goods moving in interstate commerce.[105] Marshall acknowledged that the states have the power to regulate the *subject matter* of interstate commerce, but it is only for police power purposes.[106] Federal laws and state laws may come to bear on the same subject matter, but to be lawful, they must be for their respective purposes. For Congress, that purpose is to ensure free trade. For the states, it is to further the health, safety, welfare, or morals of the people (objects of the police powers).

The Import-Export Clause expressly recognizes the power of Congress to preempt a state law enacted pursuant to its police powers if Congress determines that the burden on interstate commerce is greater than the benefit.[107] This weighing of burdens and benefits is by nature a prudential or political decision for Congress to make and not for the courts. In other words,

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[103] *See e.g.*, H.P. Hood & Sons v. DuMond, 336 U.S. 525, 532–38 (1949). "The Constitution . . . 'was framed upon the theory that the peoples of the several states must sink or swim together, and that, in the long run, prosperity and salvation are in union, and not division.'" *Id.* at 532 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (unanimous decision)).

> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.

Id. at 538.

[104] *Gibbons*, 22 U.S. at 211.

[105] *Id.* at 198, 200–01, 203.

[106] *Id.* at 203–04.

[107] U.S. CONST. art. I, § 10, cl. 2.

it is within the discretion of Congress. In applying the *Pike* balancing test to review state laws that place an incidental burden on interstate commerce, the Court engages in political rather than judicial decision-making.

The Supreme Court has acknowledged that its application of a balancing test in dormant Commerce Clause cases is inherently political in nature. This explains why the Court recognizes that Congress can overrule the Court's application of a balancing test if Congress makes a different calculation of burdens and benefits than the Court makes. In *Southern Pacific Co. v. Arizona*, the Court claimed that it may weigh the costs and benefits because Congress wants it to do so.[108]

2. The Dormant Commerce Clause

Marshall's interpretation of the dormant Commerce Clause is clearly presented in *Willson v. Black Bird Creek Marsh Co.*[109] Delaware authorized Black Bird Creek Marsh Co. to build a dam on a navigable stream capable of carrying interstate commerce.[110] Willson broke the dam with his boat and, in defense of a suit for damage to the dam, argued that the dam was built in violation of the Commerce Clause.[111]

The purpose of the dam was to drain a malarial swamp to promote health, not to interfere with or regulate interstate commerce.[112] The state was

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[108] "But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, [when Congress has not acted]." S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945).

> Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

Id. at 770–71.

[109] Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).

[110] *Id.* at 251.

[111] *Id.* at 246.

[112] *Id.* at 249.

exercising its police powers.[113] Congress had enacted no conflicting statute to preempt the state statute.[114] Thus, Congress's power to regulate was said to lie dormant. The Court had no power to weigh the respective burdens and benefits of the state law and, if Willson wanted relief, the proper forum to obtain it was Congress or the state legislature, not the Court.[115] Delaware had adopted a law (means) that clearly furthered (was plainly adapted to) the health of its citizens (end), which Congress had not preempted (was not prohibited). It was a political question for Congress to decide (as a matter of discretion), i.e., whether to preempt the state law.

C. Demise of the Marshall Legacy

1. *Cooley v. Board of Wardens*

The Court in *National Pork Producers* cited *Cooley v. Board of Wardens*[116] for the proposition that the Court has long recognized its power to strike state laws that violate the dormant Commerce Clause.[117] What the Court did not acknowledge, and has never acknowledged, is that *Cooley* was the first step in the dissolution of Chief Justice Marshall's Commerce Clause jurisprudence. The *Cooley* Court ruled that the power to regulate interstate commerce is a concurrently held power of Congress and the states.[118] In so ruling, the Court eliminated the object test for distinguishing between the powers of Congress and the states over the subject of interstate commerce.[119]

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113 *Id.* at 251.

114 *Id.* at 252.

115 *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 251–52 (1829).

116 Cooley v. Bd. of Wardens, 53 U.S. 299 (1852).

117 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152 (2023).

118 *Cooley*, 53 U.S. at 318, 320.

119 *Id.* at 320 ("In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.").

The object test being eliminated, the Court subsequently tried to distinguish Congress's power from the states on the basis of subject matter.[120] The Pennsylvania law at issue in *Cooley*, regulating safe navigation in the Philadelphia harbor, was thus denominated the exercise of the power to regulate interstate commerce rather than an exercise of the police power.[121] The Court was never able to clearly establish a test for distinguishing between local and national subject matter.[122]

2. *Champion v. Ames*

In *Champion v. Ames*,[123] the Court established the prohibition principle to be applied in reviewing Congress's exercise of the power to regulate interstate commerce. It ruled that Congress could regulate the subject matter of interstate commerce (movement of lottery tickets across state lines), not for the purpose of establishing free trade (an enumerated power), but for the purpose of furthering health, safety, welfare, and morals of the people (police powers).[124]

A huge disconnect arises in the Court's Commerce Clause jurisprudence. If Congress can prohibit interstate commerce as a regulation of commerce, and if states have the concurrent power to regulate interstate commerce, then logically states would have the power to prohibit the movement of goods leaving or coming into their territory. That, of course, would undermine the whole purpose or object of the Commerce Clause, which is to establish free trade and a common market.[125]

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[120] *Id.* at 319 ("Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

[121] *See id.* at 320.

[122] CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 259 (6th ed. 2019).

[123] Champion v. Ames, 188 U.S. 321 (1903). The prohibition test was ultimately more firmly established in *United States v. Darby*. United States v. Darby, 312 U.S. 100 (1941).

[124] *See Champion*, 188 U.S. at 354–56, 358, 363–64.

[125] *See* Gibbons v. Ogden, 22 U.S. 1, 189–90, 193–94 (1824).

Logic aside, the Court's reasoning in *dormant* Commerce Clause cases tracks fairly closely with Chief Justice Marshall's analysis. The Court recognizes that the whole purpose of the Commerce Clause is free trade. When states discriminate against out-of-state commerce, they are acting ultra vires and the courts can review those laws. Essentially, this is an admission that free trade is the purpose of the Commerce Clause. What the Court cannot see is that Congress's power under the Commerce Clause should therefore be limited to ensuring free trade.

The Supreme Court's Commerce Clause analysis went even further astray after *Champion v. Ames*, culminating in the substantial effects test—as most memorably formulated and applied in *Wickard v. Filburn*.[126] In *Wickard*, the Court did away not only with the object test, but also with the subject matter test, in reviewing the constitutionality of Congressional acts under the Commerce Clause.[127] After *Wickard*, Congress could regulate any activity that "in the aggregate" has a substantial effect on interstate commerce.[128] Justice Thomas has been the lone voice in the wilderness of Commerce Clause jurisprudence calling for a return to a subject matter test.[129] Unfortunately, he has not called for a return to an object test. This is rather perplexing, especially since the purpose of the Commerce Clause—free trade—is so readily recognized in the dormant Commerce Clause cases. [130]

D. Reconstructing the National Pork Producers *Opinion*

Now reconsider the Court's dormant Commerce Clause jurisprudence in *National Pork Producers* to see where the *Pike* balancing test fits in the *McCulloch* framework set out above. California restricted the sale of pork (means) to further health and morals (end).[131] The means clearly promotes (is plainly adapted to) these ends and there is no law preempting that means

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126 Wickard v. Filburn, 317 U.S. 111 (1942).

127 *Id.* at 124–25.

128 *Id.* at 125; United States v. Lopez, 514 U.S. 549, 561 (1995). In a subsequent case, the Court modified the substantial effects test somewhat so that Congress could only regulate *economic* activity that in the aggregate has a substantial effect on interstate commerce. *See Lopez*, 514 U.S. at 561.

129 *See Lopez*, 514 U.S. at 584, 587–88 (Thomas, J., concurring).

130 *Gibbons*, 22 U.S. at 189–90, 193–94.

131 *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1149–50 (2023).

(not prohibited). The Court's analysis should stop there under the proper Marshall analytical framework. Instead, the Court—in applying the *Pike* balancing test (had the complaint not been dismissed for failure to state a claim)—would weigh the burdens and benefits of the law (the "necessary" component).[132] This weighing of burdens and benefits is a political question for Congress to decide, not the courts.

Under Marshall's analysis, Congress and the states can regulate the subject matter of interstate commerce.[133] Congress can regulate to ensure free trade and establish conditions for a common market.[134] The states can regulate for police power purposes.[135] Congress, not the courts, can preempt state laws that it believes place too great a burden on interstate commerce as compared to the benefits obtained from the exercise of the police power.[136]

The legal proceedings in *National Pork Producers* should have stopped as soon as the Court concluded that California's law was not a pretext for discriminating against out-of-state commerce. The Court had no reason to rule whether that law placed a substantial burden on interstate commerce because it has no power to weigh burdens and benefits under a *Pike* balancing test. The Court should have overruled *Pike*.

In its dormant Commerce Clause jurisprudence, the Court recognizes that free trade is the object of the Commerce Clause. Unfortunately, the Court's contemporary Commerce Clause jurisprudence totally ignores the object test and implicitly substitutes a new object: whatever Congress believes is good for America. If the Court restored the object test, it would eliminate the substantial effects test (*Wickard*) and most likely eliminate the prohibition test (*Champion*).

V. BIBLICAL PRINCIPLES

A. Police Powers

The powers of civil government reserved to the states are commonly referred to as the police powers. Historically, the courts have identified the

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132 *Id.* at 1157.

133 *See, e.g.*, *Gibbons*, 22 U.S. at 210.

134 *See id.* at 189–90, 193–94.

135 *Id.* at 208.

136 *See id.* at 210.

purposes of the police powers as promoting the health, safety, welfare, and morals of the people.[137] In recent times, "morals" has been dropped from the listing of police powers, but California and the Supreme Court have put it back into play. Perhaps the most immediately recognizable moral principle that governs in *National Pork Producers* is the humane treatment of animals: "The righteous care for the needs of their animals, but the kindest acts of the wicked are cruel."[138] The Court recognized the long history of laws in America prohibiting the abuse of animals.[139]

The Court reviews constitutional challenges to state laws, at a minimum, under the minimal scrutiny or rational basis standard. That standard asks whether the state has a legitimate interest (end) in enacting the law being challenged. On occasion, the Court has ruled that the enforcement of morals is not a legitimate state interest.[140] Because very few of the states' legitimate interests are identified in the U.S. Constitution, the Court must look to some extra-textual source in order to identify them. Therefore, in virtually every case in which the Court applies the rational basis standard of review or some variant of it, the Court implicitly engages in law of nature reasoning. In this case, it is the Biblical standard of the humane treatment of animals.

Another purpose of Proposition 12 is to protect Californians from the consumption of tainted pork.[141] This easily fits within the purposes of the police powers to protect the physical health, safety, and welfare of the people. The modern state has a legitimate interest in protecting people against the

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[137] The term "police powers" is usually used interchangeably with "The powers . . . reserved to the States." *See* U.S. CONST. amend. X. In other words, the police powers include all law of nature powers of civil government that the American have not delegated exclusively to the federal government.

[138] *Proverbs* 12:10 (New Int'l).

[139] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023) (citing Body of Liberties § 92, A Bibliographical Sketch of the Laws of the Massachusetts Colony 52–53 (1890)).

[140] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003). In a dissenting opinion in *Lawrence*, Justice Scalia wrote: "This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Id.* at 599 (Scalia, J., dissenting).

[141] *Nat'l Pork Producers*, 143 S. Ct. at 1151.

consumption of tainted or poisonous food,[142] but pork in and of itself is not tainted. We know from the Old Testament that God prohibited Israelites from eating "unclean" food which included pork.[143] However, it becomes clear in the New Testament that the distinction between clean and unclean food had been imposed as a temporary, visible sign and a reminder that God called Israel to be set apart from sin unto holiness. With Christ's coming, God removed the division between Jew and Gentile, thus declaring all foods clean.[144]

B. Economic and Gospel Prosperity

The Framers drafted the Constitution, which "We the People" adopted with two chief ends, or objects, in mind. The first was to facilitate commerce by establishing a common market. The second was to secure our borders and international trade by an effective system of national security. Most of the enumerated powers in Article I, Section Eight, clauses one through nine effect the establishment of a common market.[145] These include the powers to tax, borrow money, regulate commerce, establish bankruptcy laws, coin money, fix standards of weights and measures, punish counterfeiting, establish lines of communication, issue copyright and patents, and constitute

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[142] *See 2 Kings* 4:39–40 (New Int'l).

[143] *Leviticus* 11:7 (New Int'l).

[144] The New Testament establishes this principle. Following a dispute with the Pharisees, who faulted Jesus's disciples for not washing their hands before eating, Jesus explained the true meaning of uncleanliness: "'Are you so dull?' He asked. 'Don't you see that nothing that enters a person from outside can defile them? For it doesn't go into their heart but into their stomach, and then out of the body.' (In saying this, Jesus declared all foods clean)." *Mark* 7:18–19 (New Int'l). God spoke to Peter in a vision in which he was told three times to eat unclean animals that descended to him. *See Acts* 10 (New Int'l). He came to understand by this vision that God had removed the barrier between Jew and Gentile. Peter said:

> I now realize how true it is that God does not show favoritism but accepts from every nation the one who fears him and does what is right. You know the message God sent to the people of Israel, announcing the good news of peace through Jesus Christ who, is Lord of all.

Id. 10:34–36. Affirmation of Peter's realization was confirmed when "the Holy Spirit came on all who heard the message." *Id.* 10:44.

[145] U.S. CONST. art. I, § 8, cls. 1–9.

courts.[146] Article I, Section Eight, clauses ten through seventeen focus on matters of national security.[147]

Agriculture, mining, industry, and commerce are integral parts of the first commandments that God gave to Adam and Eve to be fruitful and exercise dominion over the earth.[148] These economic activities, carried out in obedience to that mandate, are not just occupations; they are godly callings and ministries. This holds true, even after the Fall, for believers and nonbelievers alike. In fact, the children of Lamech were pioneers in several economic and cultural endeavors.[149] However, the Bible also links the economic collapse of once-prosperous nations to sin and lawlessness. The Bible is replete with accounts of unbelieving nations that experienced great prosperity for a time but were eventually destroyed because of their sins.[150]

Among Isaiah's remarkable prophecies are those found in chapters sixty through sixty-two.[151] They describe the economic prosperity that comes upon the peoples who follow God's laws.[152] Although we are not to make wealth an idol,[153] we should take joy in experiencing the blessings of prosperity.[154] Commerce by air and by sea fosters this economic order marked by productivity and prosperity.[155] Borders are gone, and the city gates are always open, [156] likely because the peoples have turned their swords into

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146 *See id.*

147 *Id.* art. I, § 8, cls. 10–17.

148 *See Genesis* 1:26–31 (New Int'l).

149 *Id.* 4:19–24 (New Int'l).

150 *See, e.g.*, *Isaiah* 13:1, 14:23 (New Int'l) (addressing Babylon); *see also id.* 23:1–18 (New Int'l) (addressing Tyre and Sidon).

151 *Id.* 60–62.

152 *See id.*

153 *See* 1 *Timothy* 6:5–10 (New Int'l).

154 *See Deuteronomy* 28:1–14 (New Int'l); *Philippians* 4:11–13 (New Int'l).

155 *See Isaiah* 60:5–6 (New Int'l) ("[T]he wealth on the seas will be brought to you, to you the riches of the nations will come. Herds of camels will cover your land, young camels of Midian and Ephah. And all from Sheba will come, bearing gold and incense and proclaiming the praise of the LORD.").

156 "Your gates will always stand open, they will never be shut, day or night, so that people may bring you the wealth of the nations—their kings led in triumphal procession." *Id.* 60:11.

plowshares as Isaiah prophesied in chapter two.[157] Isaiah provides a depiction of economic prosperity and security that is envisioned in the many provisions of our Constitution.

In the very center of these prophecies, Isaiah identifies the primary factor that accounts for this beatific vision of prosperity and security.[158] He foretells the incarnation of Jesus Christ, who would inaugurate a new world order free from the bondage of sin through the preaching of the gospel:

> The Spirit of the Sovereign LORD is on me, because the LORD has anointed me to proclaim good news to the poor. He has sent me to bind up the brokenhearted, to proclaim freedom for the captives and release from darkness for the prisoners, to proclaim the year of the LORD'S favor . . . .[159]

The New Testament makes it clear that Isaiah's prophesy points to the person and work of Jesus Christ. Jesus Himself attests to this fact when He commences His public ministry by reading Isaiah's prophesy:

> The Spirit of the Lord is on me, because he has anointed me to proclaim good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to set the oppressed free, to proclaim the year of the Lord's favor.[160]

These passages refer to the Old Testament year of Jubilee. In the year of Jubilee, on the Day of Atonement, the following proclamation was issued: "Consecrate the fiftieth year and proclaim liberty throughout the land to all its inhabitants. It shall be a jubilee for you; each of you is to return to your family property and to your own clan."[161]

The Liberty Bell is inscribed with this passage from *Leviticus* 25:10: "Proclaim Liberty Throughout All the Land Unto All the Inhabitants

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[157] "He will judge between the nations and will settle disputes for many peoples. They will beat their swords into plowshares and their spears into pruning hooks. Nation will not take up sword against nation, nor will they train for war anymore." *Id.* 2:4.

[158] *See Id.* 61:1–2.

[159] *Id.*

[160] *Luke* 4:14–19 (New Int'l) (referring to *Isaiah* 61:1–2).

[161] *Leviticus* 25:9–10 (New Int'l).

thereof."[162] The Liberty Bell was never a church bell.[163] It was previously named the old "State House Bell" until it became the iconic emblem of the abolition movement and was renamed the "Liberty Bell."[164] It is an implicit recognition that political liberty is built on freedom from enslavement to sin, freedom which comes with Christ's atonement.[165]

Bankruptcy laws as depicted in the Old Testament then, and as they should be understood now, signify a release from debt and renewal of life. They should serve as a concrete reminder of our indebtedness and release from sin's power over us that is available ultimately only in Christ Jesus.[166] It is that freedom from the condemnation and power of sin both individually and corporately that holds the promise of unleashing all the blessings of liberty, including an economic prosperity that is fostered by freedom of trade and by properly ordered and functioning institutions of civil government.

C. Biblical Lessons Reflected in the Constitution

Three factors come to the fore in Isaiah's depiction of economic prosperity—freedom of commerce, security, and religious liberty under God's law.[167] These three factors prominently mark our constitutional order.

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[162] *The Liberty Bell*, NAT'L PARK SERV. https://www.nps.gov/inde/learn/historyculture/stories-libertybell.htm (last visited Nov. 3, 2023) (emphasis added) (quoting *Leviticus* 25:10 (King James)); *Leviticus* 25:10 (King James).

[163] *See* History.com Staff, *Why is the Liberty Bell Cracked?*, HIST. (Aug. 24, 2023), https://www.history.com/news/why-is-the-liberty-bell-cracked.

[164] *See* The Liberty Bell first rang over the new nation on July 8, 1776. *See* NCC Staff, *10 Fascinating Facts About the Liberty Bell*, NAT'L CONST. CTR. (July 8, 2023), https://constitutioncenter.org/blog/10-fascinating-facts-about-the-liberty-bell. There are different stories about when it cracked, but I choose to believe the account that it cracked on July 8, 1835, when it rang in honor of Chief Justice John Marshall, who had died just two days prior on July 6, 1835, in Philadelphia, Pennsylvania. *See* History.com Staff, *supra* note 163; History.com Editors, *John Marshall*, HIST. (Nov. 16, 2021), https://www.history.com/topics/us-government-and-politics/john-marshall; Kathy Mitchell & Marcy Sugar, *Liberty Bell—Including Flaw—Beloved Symbol*, SPOKESMAN-REV. (July 4, 2005), https://www.spokesman.com/stories/2005/jul/04/liberty-bell-including-flaw-beloved-symbol/.

[165] *See Galatians* 5:1.

[166] *See Acts* 4:11–12.

[167] *Isaiah* 60–62.

Most of Congress's enumerated powers relate to commerce and security.[168] Religious freedom is secured by the First Amendment, which allows for the free proclamation of the gospel—with its consequent effects on prosperity and security.[169] Israel experienced several problems related to the functioning of a common market, which, as shown below, the prophets addressed. The following table identifies some of the problems that arose in Israel, and most other nations, and the corresponding enumerated powers that "the People" gave the U.S. Congress to address those problems.

Subject	**Bible**	**U.S. Constitution**
Bankruptcy	"At the end of every seven years you must cancel debts. This is how it is to be done: Every creditor shall cancel any loan they have made to a fellow Israelite."[170]	"The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."[171]
Money	"Every value is to be set according to the sanctuary shekel, twenty gerahs to the shekel."[172]	"The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin . . . ."[173]
Weights and Measures	"Differing weights and differing measures—the LORD detests them both."[174]	"The Congress shall have Power . . . To . . . fix the Standard of Weights and Measures . . . ."[175]
Freedom of Travel	"Look, their brave men cry aloud in the streets; the	"The Congress shall have Power . . . To regulate

168 U.S. CONST. art. I, § 8.

169 *Id.*; U.S. CONST. amend. I.

170 *Deuteronomy* 15:1–2a (New Int'l).

171 U.S. CONST. art. I, § 8, cl. 4.

172 *Leviticus* 27:25 (New Int'l).

173 U.S. CONST. art. I, § 8, cl. 5.

174 *Proverbs* 20:10 (New Int'l).

175 U.S. CONST. art. I, § 8, cl. 5.

	envoys of peace weep bitterly. The highways are deserted, no travelers are on the roads."[176]	Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[177]
Communi-cation	"In the days of Shamgar son of Anath, in the days of Jael, the highways were abandoned; travelers took to winding paths."[178]	"The Congress shall have Power . . . To establish Post Offices and post Roads . . . ."[179]
Bribery	"Your rulers are rebels, partners with thieves; they all love bribes and chase after gifts."[180]	"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[181]

VI. CONCLUSION

The Court's holding in *National Pork Producers* is correct in that California did not violate the dormant Commerce Clause.[182] However, the Court's approach to the dormant Commerce Clause—in particular, its use and affirmation of the *Pike* balancing test—is faulty.[183] Balancing tests are inherently political in nature and the Court even recognizes that fact.[184] The

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176 *Isaiah* 33:7–8a (New Int'l).

177 U.S. CONST. art. I, § 8, cl. 3.

178 *Judges* 5:6 (New Int'l).

179 U.S. CONST. art. I, § 8, cl. 7.

180 *Isaiah* 1:23a (New Int'l).

181 U.S. CONST. art. II, § 4.

182 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1165 (2023).

183 *Supra* Section IV.B.1.

184 *Id.*

Court should restore Justice Marshall's explication of the dormant Commerce Clause, not because of an "original intent" bias, but because Justice Marshall was correct.[185] If a state law is enacted pursuant to its police powers and does not purposely discriminate against out-of-state interests, the Court should uphold it. If a state law imposes an incidental burden on interstate commerce by a law that is neutral and enacted pursuant to its police powers, it is for Congress, not the courts, to decide whether to preempt that law.

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[185] *See supra* Part IV.