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Horizontal Federalism & the Big State "Problem"

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HORIZONTAL FEDERALISM & THE BIG STATE "PROBLEM"

by

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INTRODUCTION

Since the founding, we have understood the potential for big states to exercise outsized influence. California was always coming because at the start, there was Virginia.[2] Fractious relationships between states of various sizes and starkly divergent economies brought participants in the initial "firm league of friendship"[3] to the squabbling brink and led even those framers disinclined to a strong nationalist approach to the Philadelphia Convention in 1787.[4] Voluntary compliance with agreed-upon restrictions in the Articles of Confederation simply was not working.[5]

The potential for big states to wield big power was front-of-mind for the framers, whose starting volley at the Convention was the Virginia Plan for a bicameral legislature with representation allocated by population in both houses.[6] This plan, which promised to ensconce Virginia for all practical purposes at the helm of the national government, elicited an immediate

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[2] In the first decennial census in 1790, Virginia had a total population of 747,610. *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 48-50 (1793). By comparison, Delaware and Rhode Island, the two least populous states, had 59,094 and 68,825 people, respectively. *See id.* at 34, 46.

[3] ARTICLES OF CONFEDERATION of 1781, art. III.

[4] *See* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 49-50 (2005) (describing that "commercial predation among the states" led even the "fence-sitters" and more "moderate nationalists" to contemplate dramatic reform). *See also* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982) (characterizing America under the Articles as "marked by commercial warfare between the states" that "threatened both the viability and peace of the union"); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 511 (2008) (noting that the framers "had lived through a tumultuous period under the Articles of Confederation in which states pursued conflicting self-interests at their collective expense"); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1889-90 (2011) (describing Articles-era trade battle between New York, New Jersey, and Connecticut).

[5] The Federalist Papers amply document perceived deficiencies in the Articles of Confederation government, which, by relying on voluntary state compliance, had "conducted us to the brink of a precipice." THE FEDERALIST No. 15, at 76 (Alexander Hamilton) (J.R. Pole ed., 2005). Cataloguing the defects under the Articles, James Madison lamented states restricting interstate commerce as "destructive of the general harmony" and called the absence of any federal sanction a "fatal" omission. James Madison, *Vices of the Political System of the United States*, *in* 9 THE PAPERS OF JAMES MADISON 345, 351 (Robert A. Rutland & William M.E. Rachal eds., 1975); *see also* Eule, *supra* note __, at 430 (noting that commercial fights among the states, which existentially threatened the union, are "almost uniformly conceded to be the primary, if not sole, catalyst for the convention of 1787"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1478-79 (2007) (suggesting that states' inability to self-police under the Articles demonstrated the need for a "national umpire").

[6] *See* Farrand, *supra* note 1, at 68.

clapback from the smaller states in the New Jersey Plan, which increased the enforcement powers of the federal government but kept each state's equal representation in a unicameral legislature intact.[7] After weeks of contentious debate,[8] the framers agreed to a "Great Compromise" that combined features of each, giving large states their proportionally drawn House and smaller states their equal say in the Senate.[9] Crisis averted, the framers set to work addressing perceived failings of the Articles of Confederation, most notably conferring on their new national legislature powers strong enough to enforce the already-extant (but to that point toothless) limitations on the states.

The key feature of the Constitution that emerged was enhanced *federal* power over recalcitrant states; the framers imported restrictions on states, housed primarily in Article IV, with little modification from the Articles of Confederation.[10] An amped-up Congress given Commerce, Taxing, and Spending powers was the framers' primary check on a system of self-executing rules that had not worked in its absence.[11] Throughout the Convention, the framers' primary occupation was with the scaffolding of vertical federalism,[12] buttressing extant restrictions on states with a new, and very different, federal mechanism for ensuring compliance.[13]

When Congress acts pursuant to this scheme, federal courts have a ready set of metrics for evaluating compliance with the constitutional framework.[14] Provided Congress has acted within the boundaries of these enumerated powers and has not violated a constitutional side

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[7] *See id.* at 85.
[8] *See id.* at 94.
[9] *See id.*at 105.
[10] *See id.* at 128 (noting that Committee of Detail took several provisions of the Constitution directly from the Articles of Confederation but "attempt[ed] to infuse into the new system sufficient energy and power to carry out the functions that had been granted to the old"); *id.* at 154 (observing that restrictions on what states could do were "more sharply defined" but largely drawn from the Articles of Confederation).
[11] With the Reconstruction, our "Second Founding," Congress gained additional power against the states through the enforcement clauses of the Fourteenth and Fifteenth Amendments, and this in turn enlisted the federal courts more directly in safeguarding constitutional rights against state incursion. *See* Eric Foner, THE SECOND FOUNDING (2019). Foner describes the Reconstruction Amendments as a "rewriting of the Constitution" that, for the first time, gave the federal government a role "in defining or protecting Americans' rights," a matter that to that point had been committed exclusively to the states. *Id.* at 8.
[12] "Vertical" federalism describes the hierarchical relationship the Supremacy Clause sets up between the federal government and the states. *See* Erbsen, *supra* note __, at 501.
[13] *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316 (1992) ("Much of the federal Constitution is devoted to the allocation of authority between the state and the federal government.").
[14] Put simply, courts ensure that Congress is operating within the confines of an enumerated power. *See* United States v. Comstock, 560 U.S. 126, 133 (2010); United States v. Morrison, 529 U.S. 598, 607 (2000). With respect to its vast power under the Commerce Clause, Congress must steer clear of regulating states as states, *see* Murphy v. NCAA, 138 S. Ct. 1461, 1475-76 (2018), and avoid regulation of non-economic activity that lacks a substantial effect on interstate commerce, *see Morrison*, 529 U.S. at 613; United States v. Lopez, 514 U.S. 549, 559-61 (1995). Actions under the Spending power must pursue the general welfare and cannot dragoon. *See id.* at 581-82; South Dakota v. Dole, 483 U.S. 203, 207 (1987). Taxes must functionally operate like taxes and cannot amount to penalties. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius ("*NFIB*"), 567 U.S. 519, 565-66 (2012). Fourteenth Amendment enforcement authority may be prophylactic but must be congruent and proportional to a legitimate remedial end. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

constraint,[15] the Supremacy Clause operates to displace conflicting state law.[16] The order of operations, when Congress has taken action, is comparatively clear.

The same situation does not obtain in the face of congressional *in*action. At this point, the role of federal courts in policing default rules governing interstate behavior—rules lifted intact from a dysfunctional Articles of Confederation regime—becomes both murky and mysterious. We are left with scattershot doctrines described as "peculiar,"[17] "hopelessly confused,"[18] "underdeveloped and subject to debate,"[19] and "logically incoherent."[20] Certain principles lurk in the background. In particular, we often assume an extraterritoriality principle, the notion that a state's legislative jurisdiction "extends to its borders, but no further."[21] We can all agree on the easy cases: North Carolina plainly lacks power to set rules directly governing primary conduct in Georgia; such is the very nature of state sovereignty.[22] But the scope, provenance, and constitutional moorings of an extraterritoriality principle remain elusive.[23] To what extent can a state create rules governing *in*-state activity that have out-of-state spillover effects? Populous states have big, attractive markets, and when they set requirements governing their in-state markets, out-of-state producers have powerful incentives to conform their conduct. Should this trouble us? More importantly, does it offend the Constitution?

Put concretely, in September 2022, California regulations went into effect implementing Proposition 12, the Farm Animal Confinement Initiative,[24] which set specific standards regarding floor space and freedom of movement for pigs raised and sold as pork in the state.[25] Out-of-state producers filed suit under the dormant Commerce Clause, arguing that the California rules necessitated out-of-state compliance and conflicted with a *per se* rule barring state laws with extraterritorial effects.[26] In *National Pork Producers Council v. Ross*,[27] an

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[15] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
[16] *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-44 (1963).
[17] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477-78 (Gorsuch, J., dissenting).
[18] Kassel v. Consol. Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).
[19] David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 7 (2023).
[20] Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 899 (2008).
[21] Dawinder Sidhu, *Interstate Commerce X Due Process*, 106 IOWA L. REV. 1801, 1811 (2021); *see also* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1887 (1987) (arguing that the extraterritoriality principle is "an inference from the structure of our system as a whole").
[22] *See* Bonaparte v. Tax Ct., 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").
[23] *See* Regan, *supra* note __, at 1885 (stating that "we do not understand the extraterritorial principle" and "we have no acceptable account of [its] constitutional underpinnings"); *id.* at 1913 (arguing that "what we know about extraterritoriality is much less than what we have still to work out"); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (describing the principle as "poorly understood" and "notoriously unclear").
[24] California Proposition 12, Farm Animal Confinement Initiative (2018), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (last visited June 15, 2023).
[25] *See* CAL. HEALTH & SAFETY CODE § 25990(b)(2) (2022).
[26] *See* Brief for Petitioners at 22-35, Nat'l Pork Producers v. Ross, No. 21-468.
[27] 143 S. Ct. 1142 (2023) ("*Pork Producers*").

otherwise fractured Court unanimously rejected this *per se* ban.[28] However, the four dissenters proceeded to usher bits and pieces in through a back door, noting that high costs of voluntary compliance with the California rule could amount to a substantial burden on interstate commerce[29] that impermissibly "forc[es] massive changes to pig-farming and pork-production practices throughout the United States."[30] The prospect that the alluring market of the nation's most populous state[31] could entice out-of-state compliance with its animal husbandry paradigm plainly troubled four members of the Court. Justice Barrett, a member of the fractured majority that rejected the dormant Commerce Clause challenge, wrote separately to communicate that she, too, found California's impact on the national market "pervasive, burdensome" and, implicitly, concerning.[32] Writing for himself, a dissenting Justice Kavanaugh cast about for a place to house his discomfort, suggesting that, if the dormant Commerce Clause did not do the trick, "potentially several other constitutional provisions, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause," might come into play.[33] He repeatedly "express[ed] no view on whether such an argument ultimately would prevail" but flagged that housing the inquiry under different clauses of the Constitution "warrants further analysis in a future case."[34]

This Article demonstrates that the Constitution's various self-executing[35] restrictions on states are not concerned with what I will call "the Big State Problem"[36]—Big State A controlling entry into its in-state market that *effectively* spills its standards over its borders. Congress plainly can set national standards regarding interstate sales of pork that displace California's pork requirements.[37] This Article sets aside that uncontroversial prospect and examines whether there is any constitutional recourse when Congress has not acted. After studying the text, history, and operation of the dormant Commerce Clause, Article IV, Section 2 Privileges and Immunities Clause, Article I, Section 10's Import-Export Clause, and the Full Faith and Credit Clause, this

[28] *See id.* at 1154-56; 1167 (Roberts, C.J., concurring in part and dissenting in part).
[29] *See id.* at 1170-71 (Roberts C.J., concurring in part and dissenting in part).
[30] *Id.* at 1174 (Kavanaugh, J., concurring in part and dissenting in part).
[31] *See* United States Census Bureau: State Population Totals and Components of Change: 2020-2022, https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#v2022.
[32] *National Pork Producers*, 143 S. Ct. at 1167 (Barrett, J., concurring in part).
[33] *Id.* at 1175 (Kavanaugh, J., concurring in part and dissenting in part).
[34] *Id.* at 1175-76 (Kavanaugh, J., concurring in part and dissenting in part). Others have struggled to find a home for this principle. *See* Erbsen, *supra* note __, at 520 ("There is no clear constitutional restraint on exclusions that indirectly frustrate regulatory objectives in other states, leaving the problem to political resolution or federal preemption."); Regan, *supra* note __, at 1885 ("The truth . . . is that the extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.").
[35] *See* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1030 (1967) (characterizing the Constitution's prohibitions on state action as "self-executing" rather than "enabling").
[36] By "problem," I mean "a question raised for inquiry, consideration, or solution." https://www.merriam-webster.com/dictionary/problem.
[37] *See Nat'l Pork Producers*, 143 S. Ct. at 1152 ("Everyone agrees that Congress may seek to exercise [its Commerce] 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.").

Article shows that nothing in the 1789 Constitution was intended to be or is up to the task.[38] The overarching thrust of these default rules was preventing state protectionism and curbing direct action; no clause or provision restrains big states with big markets from setting nondiscriminatory internal rules with *de facto* extraterritorial effect. This Article concludes that the self-executing checks on state interaction, legacies of the toothless Articles of Confederation, are not the clauses Justice Kavanaugh is looking for. Under our constitutional scheme, protection against having to comply with unwanted rules governing an irresistible market lies either in a company's choice to refrain from market participation or with Congress stepping into the breach to set uniform national rules.

This Article breaks ground. Constitutional provisions bearing on horizontal federalism are "scattered silos" [39] that are scarcely taught in law school classes, and scholarly efforts to connect them have been few.[40] In a seminal 1987 article, Professor Donald Regan flagged the persistence of the extraterritoriality principle and laid out some unanswered questions it poses in hard cases.[41] He rejected housing it any particular clause and grounded the principle that states may not legislate extraterritorially, "whatever that means,"[42] in the Constitution's structure.[43] Regan started with the assertion that "the mere fact that a statute has extraterritorial effects does not raise an extraterritoriality problem,"[44] so his analysis did not touch upon the Big State Problem except to set it aside. Writing in 2023, Professors Cohen, Donley, and Rebouché canvassed the various interstate battles over abortion that promise to emerge after the demise of *Roe* and concluded that we lack "well-established doctrine or case law as guideposts" and that "constitutional doctrines related to extraterritoriality are notoriously underdeveloped."[45] Various scholars have looked at discrete topics in horizontal federalism, like the dormant Commerce

[38] This Article focuses on states acting unilaterally to control products for sale in their own markets and does not take up the rarely-invoked Compact Clause, which bars states from getting into agreements or compacts with other states in the absence of congressional consent. *See* U.S. CONST. Art. I, § 10, cl. 3. As Katherine Mims Crocker relates, for better or worse, "the Supreme Court . . . has limited the Compact Clause to interstate arrangements that threaten federal supremacy—and then, it seems, to even a subset of that subset." Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185, 1200 (2023). The "upshot" of the Court's three cases construing the Clause, Crocker submits, "is that the Court has rendered the Compact Clause a 'virtual nullity.'" *Id.* at 1203 (quoting Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L.
REV. 285, 301 (2003)).

[39] This term is Allan Erbsen's. *See* Erbsen, *supra* note __, at 561.

[40] *See generally* Timothy Zick, *Rights Dynamism*, 19 U. PENN. J. OF CONST. LAW 791, 850 (2017) ("In the legal academy, as well as in broader public discourse, there is a tendency to separate and balkanize constitutional rights.").

[41] *See* Regan, *supra* note __, at 1887 (stating he was laying out problems "not with an eye to presenting a general theory, but in hopes of encouraging someone else to try to develop one").

[42] *Id.* at 1896.

[43] *See id.* at 1885. Professor Laycock agrees that territoriality "is a fundamental constitutional principle, even though that principle is not attributable to any particular constitutional clause." Laycock, *supra* note __, at 318.

[44] *Id.* at 1874.

[45] Cohen, Donley & Rebouché, *supra* note __, at 34, 37.

Clause,[46] the Import-Export Clause,[47] and the Full Faith and Credit Clause,[48] though for the most part, they have focused on the silo at hand. This Article examines various levers of horizontal federalism in order to assess their utility in addressing a problem that is currently troubling at least five members of the Court, and it concludes that they are unavailing.

Part I defines the variables of the Big State Problem and then examines the *Pork Producers* case as a point of departure. This part demonstrates that several justices harbor profound misgivings about in-state regulation that has out-of-state spillover effects—at least where the state is big enough to have an irresistible market—and, though losing the dormant Commerce Clause battle in *Pork Producers*, may be suiting up for a future counteroffensive. At least one member of the *Pork Producers* majority might, in the appropriate case, jump at a chance to contain the Big State and its regulatory spillover effects. The confusion and discomfort loom large in the case.

Part II considers the dormant Commerce Clause, long justified as an inference from Congress's Commerce power, and concludes that, while the doctrine has well-founded applications in certain contexts, there is little precedential foundation for using it to contain nondiscriminatory regulatory spillover effects. Various members of the *Pork Producers* Court struggled with how to classify certain dormant Commerce Clause precedents, but properly understood, none of these precedents provide support for a rule that circumscribes a Big State's

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[46] There is considerable scholarship, too numerous to recount fully in a single footnote, focused specifically on the dormant Commerce Clause. For a representative sampling, *see, e.g.*, Eule, *supra* note __, at 446-455 (arguing that Article IV privileges and immunities is superior to the dormant Commerce Clause in addressing state parochialism); Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 316-18 (2017) (contending that the dormant Commerce Clause is in retreat); Friedman & Deacon, *supra* note __, at 1899-1901 (arguing that the framers' rejection of Congress's right to negate state laws in favor of judicial review manifested support for a dormant Commerce Clause); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787-88 (2001) (arguing that invalidation of state internet regulations on dormant Commerce Clause grounds reflects misunderstanding of the doctrine); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 569-574 (1987) (arguing that the dormant Commerce Clause lacks any constitutional basis and sacrifices benefits of federalism, like state experimentation); Regan, *supra* note __, at 1092-93 (contending that the modern Court's dormant Commerce Clause cases are—and should be—solely aimed at preventing "purposeful protectionism," even when the Court purports to be balancing).

[47] *See, e.g.*, Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 MISS. L.J. 521, 563-64 (1998) (arguing that the framers intended the Import-Export Clause, not the Commerce Clause, to redress interstate commercial squabbling); Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 159-60 (1999) (analyzing a Thomas dissent advocating replacing the dormant Commerce Clause with the Import-Export Clause and concluding that Thomas had "painted himself" into a corner)

[48] *See, e.g.*, David Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1592-95 (2009) (examining English and Articles of Confederation practice and concluding that "faith and credit" generally did not require sister states to give records or proceedings full "effect"); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206-09 (2008) (arguing that the self-executing first clause was originally understood as a rule of evidence); Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 488-92 (2013) (defending the current jurisprudence on full faith and credit as consistent with early historical practice); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 599-605 (1981) (arguing that the self-executing portion of the Clause was primarily intended to serve an evidentiary purpose).

regulation of its in-state market. Though the *Pork Producers* "majority" could not agree on a rationale, this part concludes that five Justices reached the right result.

Part III demonstrates that the 1789 Constitution's other clauses addressing interstate relationships do not bear on the problem.[49] Part III (A) examines the history, original understanding, and judicial interpretation of the Article IV Section 2 Privileges and Immunities Clause and concludes that it was always intended to serve the different purpose of guaranteeing out-of-staters equal treatment, at least with respect to the enjoyment of certain key privileges, when they visited their fellow states. The Privileges and Immunities Clause has no role to play in the absence of discriminatory treatment. Part III(B) looks at the Import-Export Clause and finds that, even as originally conceived (rather than as presently narrowed by the Court), it had a very narrow, tax-focused reach and a primary purpose of keeping states with favorable ports from affirmatively gouging states that lacked them. Finally, Part III(C) demonstrates that the Full Faith and Credit Clause has little application to state laws, as opposed to state judgments, that have no mandatory out-of-state impact.

Absent congressional action, then, the Constitution does not empower federal courts to step into the breach to resolve the Big State "Problem." *Pork Producers* and its evident confusion notwithstanding, this should not be a shocking proposition. For much of our history, the Court has permitted states free rein in regulating their in-state markets, has recognized that costs of doing business in State A can become high enough that out-of-state companies might wish to withdraw from their markets, and (conversely) has understood that out-of-state companies might affirmatively wish to incur costs to design products to take advantage of particular markets.[50] These commonplace assumptions underlie many principles of personal jurisdiction.[51] Stopgaps exist. However, we find them not in the horizontal federalism clauses but in the fact that [1] no producer has to aim at Big State A's market or comply with its rules and [2] Congress, should it perceive a Big State Problem, has means readily in hand to solve it.

I. *PORK PRODUCERS* AND THE BIG STATE PROBLEM

A. Regulatory Spillover Effects; The Big State Problem Defined

California is our most populous state, with an estimated 39,029,342 residents as of July 1, 2022.[52] While it ranks only 28th in the United States in pork production, California accounts for

[49] This Article leaves for another day the question whether the Fourteenth Amendment's Due Process Clause or Privileges or Immunities Clause may have roles to play, focusing instead on interrogating whether and to what extent the Constitution that emerged out of the 1787 Convention provided guard rails to curb nondiscriminatory state regulations of their own in-state markets. Preliminarily, though, one could speculate that the Fourteenth Amendment Due Process Clause would likely provide only a weak check against demonstrably irrational state regulations in this space. *See* Armour v. City of Indianapolis, 566 U.S. 673, 680-81 (2015) (where "ordinary commercial transaction" involves neither fundamental right nor a suspect classification, "rational basis review requires deference to reasonable underlying legislative judgments").

[50] *See infra* notes __ and accompanying text.

[51] *See id.*

[52] *See* https://www.census.gov/quickfacts/fact/table/CA .

13% of pork consumption nationally[53] and represents the largest market for pork consumption nationwide.[54] The top five pork producing states are Iowa, Minnesota, North Carolina, Illinois, and Indiana.[55] California imports 99.87% of its pork.[56]

In November 2018, California voters approved ballot Proposition 12, the Farm Animal Confinement Initiative, by a 62.66% to 37.34% margin.[57] Proposition 12 bans the knowing sale of uncooked pork products derived from animals whose gestational confinement did not comport with minimum space requirements.[58] It applies equally to pork supplied by in-state and out-of-state producers.[59] Any pork producer who wishes to take advantage of the sizeable California market must comply with the California confinement standards, even if that producer happens to raise its pigs in Iowa, Minnesota, North Carolina, Illinois, Indiana, or another state. Because the pork production chain frequently involves shipping pigs to a series of weaning, finishing, slaughter, and packing facilities,[60] moreover, compliance with Proposition 12 will require bigger, more vertically-integrated firms to develop a mechanism for identifying and tracking California-bound pork during the production process.[61] The National Pork Producers Council estimates that Proposition 12 will increase farmers' costs by 9.2%, or approximately $13 per pig.[62] California consumers will bear a lot of these costs, and they knew this would be the case when they voted. California's non-partisan Legislative Analyst's Office released its assessment of the Proposition before the election and made clear that adoption of the measure would lead to increased prices that "are likely to be passed through to consumers who purchase the products."[63] The Official Voter Information Guide for the November 2018 election, disseminated to voters in August

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[53] *See* Commodity Fact Sheet, Pork (Cal. Pork Prods. Ass'n) (2021), https://cdn.agclassroom.org/ca/resources/fact/pork.pdf.

[54] *See US Pork Supply Chain Locked in Limbo as Producers Await Legal Ruling* 6 (Rabobank, Feb. 2021), www.agri-pulse.com/ext/resources/pdfs/Rabobank_US-Pork-Supply-Chain-Locked-in-Limbo_McCracken_Feb2021.pdf.

[55] *See* https://worldpopulationreview.com/state-rankings/hog-production-by-state (March 2023).

[56] *See* Petition for Writ of Certiorari, Nat'l Pork Producers Council v. Ross (No. 21-468), at 7.

[57] *See* https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018). In California, citizens may propose measures that appear on the general ballot and bypass the legislative process by by following certain prescribed procedures. *See* Statewide Initiative Guide 2024, https://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf.

[58] *See* CAL. HEALTH & SAFETY CODE §§ 25990(b)(2), 25991(e) (2021). Any sale violating the standards subjects the seller to criminal and civil sanctions. *See* CAL. BUS. & PROF. CODE §§ 17203-17207.

[59] *See* CAL. HEALTH & SAFETY CODE § 25990(a), (b).

[60] *See* Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1205 (S.D. Cal. 2020).

[61] The pork industry has become increasingly consolidated in recent decades. *See* James M. MacDonald *et al*., *Consolidation in U.S. Meatpacking* 5 ERS (USDA 2000), https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=0 (noting "dramatic and ongoing consolidation" in the hog production industry). An *amicus curiae* brief filed on behalf of Small and Independent Farming Businesses argued in support of Proposition 12 that it "enhance[] opportunities for independent farmers to successfully compete in the growing market for crate-free pork." Brief of Small & Independent Farming Businesses *et al.* as Amici Curiae Supporting Respondents, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (No. 21-468).

[62] *See* Brief for Petitioners at 15, Nat'l Pork Producers v. Ross, No. 21-468.

[63] Legislative Analyst's Office, Proposition 12, https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

2018, incorporated this analysis in its entirety, along with arguments in favor of and against the initiative.[64]

California is far from unique in regulating its in-state market like this. Californians could have banned the sale of pork products altogether. They have already banned *foie gras*[65] and, along with other states, flavored tobacco products.[66] States of various sizes routinely ban products like horse meat,[67] dog meat,[68] shark fins,[69] and bottle rockets.[70] It is commonplace for states to ban the sale of goods produced using particular methods, like unpasteurized milk[71] and cosmetics tested on animals.[72] With increasing frequency, states are banning the use and sale of certain kinds of product packaging, like perfluoroalkyl and polyfluoroalkyl substances (PFAS),[73] polystyrene foam containers,[74] and single-use plastic carryout bags.[75] State control of products allowed for sale in their markets is not a recent phenomenon. The invention of margarine in the 1860s caused existential angst in the dairy industry, and by 1886, nine states had banned retail sale of margarine altogether.[76] Numerous states barred the sale of "filled milk," milk products with added non-milk fats and oils, through the 1920s and 1930s.[77]

Despite the ubiquity of this kind of state regulation, there are big states and little states in our system, and Proposition 12 represents a paradigmatic example of what this Article calls the Big State Problem. A clear majority of California voters decided what kind of pork they do and

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[64] *See* A. Padilla, Cal. Secretary of State, CALIFORNIA GENERAL ELECTION—OFFICIAL VOTER INFORMATION GUIDE 68-70, https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf.

[65] *Foie Gras* is the liver of a goose or duck fattened through a process of forced feeding. *See* CAL. HEALTH & SAFETY CODE § 25982. The Ninth Circuit upheld this ban in 2022. *See* Ass'n des Eleveurs de Canards et d'Oies du Québec v. Bonta, 33 F.4th 1107 (9th Cir. 2022).

[66] *See* CAL. HEALTH & SAFETY CODE § 104559.5; MASS. GEN. LAWS ch. 270 § 28 (2019); N.J. STAT. ANN. § 2A:170-51.12 (2020); N.Y. PUB. HEALTH § 1399-mm-1 (McKinney 2020).

[67] *See, e.g.*, 225 ILL. COMP. STAT. 635 § 2.1 (2007); N.J. STAT. ANN. § 4:22-25.5 (2012); TEX. AGRIC. CODE § 149.002 (2021).

[68] GA. CODE ANN. § 26-2-160; N.J. STAT. ANN. § 4:22-25.4.

[69] *See, e.g.*, CAL. FISH & GAME CODE § 2021 (2012); 7 DEL. CODE § 928A (2014); OR. REV. STAT. § 498.257 (2012); WASH. REV. CODE § 77.15.770 (2014).

[70] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-1601, 1602, 1606; KAN. STAT. ANN. § 31-507 (West 2023); OKLA. STAT. ANN. tit. 68, § 1624. Massachusetts bars sales of all fireworks including explosives or flammable compounds. *See* MASS. GEN. LAWS ANN. ch. 148 § 39.

[71] *See, e.g.*, ALA. ADMIN. CODE r. 420-3-16-.12 (2013); 16 DEL. ADMIN. CODE 4461 (2023); GA. COMP. R. & REGS. 40-2-1-.01 (2021); HAW. CODE R. § 11-15-46 (1989); IND. CODE § 15-18-1-21; IOWA CODE § 192.103; KY. ADMIN. REGS. 50:120; MD. CODE ANN. HEALTH-GEN. § 21-434.

[72] *See, e.g.*, IL. COMP. STAT. 620/17.2 (2019); LA. STAT. ANN. § 51:772 (2022); ME. REV. STAT. ANN. tit. 10, §1500 -M (2021); MD. CODE ANN. HEALTH-GEN. § 21-259.3; N.J. STAT. ANN. § 4:22-61 (2022);

[73] *See, e.g.*, N.Y. ENV'T CONSERV. LAW § 37-0209 (2022); MINN. STAT. § 325F.075 (effective Jan. 1, 2024); VT. STAT. ANN. tit. 18, § 1672 (2023).

[74] *See* MD. CODE ANN. ENV'T § 9-2203 (West 2020).

[75] N.J. STAT. ANN. § 13:1E-99.128 (2022); R.I. GEN. LAWS § 23-19/18-3 (effective Jan. 1, 2024); VT. STAT. ANN. tit. 10, § 6692 (2020).

[76] *See* Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 112-13 (1989). The Supreme Court struck down New Hampshire's requirement that margarine be dyed pink in *Collins v. New Hampshire*, 171 U.S. 30 (1898), though the case focused only on wholesale of margarine in its original packaging bound for interstate shipment. *See id.* at 32-34.

[77] The Supreme Court upheld a Kansas ban on filled milk in *Sage Stores Co. v. Kansas ex rel. Michell*, 323 U.S. 32, 36 (1944). The Court found the Kansas statute had a rational basis. *See id.*

don't want to buy in California, and any producer wishing to capitalize on the California market will have to comply. However, because it has 39 million people, California's regulation of products for sale in its in-state market is more likely to have an impact beyond the California border than, say, a Vermont regulation barring certain kinds of plastics in packaging might.[78] California and Delaware can both ban the sale of shark fins; the simple reality, though, is that profit-minded producers will miss a market of 39 million people more than they will a market of 1,018,396.[79] The first defining feature of the Big State Problem is that the state's sheer size means its regulations will have a predictable effect beyond its borders. Access to its markets is a tantalizing prospect.

The Big State Problem's second defining feature is that regulation of products for sale in the in-state market neither discriminates against out-of-state products nor serves the protectionist purpose of boosting in-state interests. The National Pork Producers conceded this was the case with Proposition 12.[80] In-state and out-of-state producers face the same new compliance hurdles. At this point, the astute reader might point to the serendipitous presence of *some* pork producers in California and wonder what would happen if they did not exist. In other words, this reasoning works so long as there are in-state and out-of-state producers and all are treated the same, but does it hold up if all production is out-of-state? In most cases, yes.[81] There is no discrimination against out-of-state interests; there is simply an in-state ban on the sale of certain products that would apply equally should any entity wish to set up a factory manufacturing that product in-state.

It is fair to assume that a producer opting to sell pork in California is likely to bear increased costs, even though some of these costs will flow through to California consumers, (as non-partisan analysts told them would likely be the case).[82] Critically, though—and this is the third key to the Big State Problem—the out-of-state pork producer faces no compulsion to sell its products in California in the first place. The Court has predicated a lot of Civil Procedure case law on the notion that a company has agency and can withdraw from a state market if costs of

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[78] The U.S. Census estimated Vermont's population at 647,064 on July 1, 2022. https://www.census.gov/quickfacts/fact/table/VT.

[79] The U.S. Census estimated Delaware's population at 1,018,396 on July 1, 2022. https://www.census.gov/quickfacts/fact/table/DE/PST045222

[80] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023).

[81] One can certainly conjure a situation where a state's regulation of products for sale in its in-state market masks a purpose to discriminate against out-of-state interests. *See* Donald H. Regan, *The Dormant Commerce Clause and the* Hormones *Problem*, *in* THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO 91 (Cottier & Mavroidis eds., 2003) ("If only explicit discrimination is forbidden, lawmakers who want to discriminate can hide their discriminatory intentions behind facially neutral classifications that are nonetheless chosen because they differentially burden the protected class."). The Court has ample means to "smoke out" purposeful discrimination, and I am defining the Big State Problem to exclude this scenario. *See infra* notes __ and accompanying text.

[82] Increased costs are especially likely in the short term, because the supply of compliant pork may fall short of California's needs as producers transition. *See US Pork Supply Chain Locked in Limbo as Producers Await Legal Ruling* 2-3 (Rabobank, Feb. 2021), www.agri-pulse.com/ext/resources/pdfs/Rabobank_US-Pork-Supply-Chain-Locked-in-Limbo_McCracken_Feb2021.pdf. However, industry analysts believe the market will reach equilibrium over time, as was the case with implementation of California's cage free egg mandate. *See id.* at 3.

participation become too high.[83] Those opting out of the California market and compliance with Proposition 12 will miss out on some sales. They may also incur costs ensuring that their pork does not land in the California market. Provided they take reasonable precautions, though, they are unlikely to inadvertently incur criminal penalties or civil liability, as Proposition 12 only penalizes business owners who "knowingly" selling non-compliant products.[84]

B. The Litigation

National Pork Producers Council and other industry groups filed a federal suit against state officials in December 2019 seeking declaratory and injunctive relief on the basis that Proposition 12 violates the dormant Commerce Clause.[85] Plaintiffs argued that Proposition 12 violated "the extraterritorial principle because it regulates wholly out-of-state conduct."[86] As a fallback, Plaintiffs claimed that Proposition 12 imposed excessive burdens on interstate commerce in relation to its purported local benefit—in other words, it failed the *Pike* balancing test the Court uses to assess laws that do not facially discriminate against interstate commerce.[87] The district court rejected both arguments, granting defendants' motion to dismiss,[88] and a unanimous Ninth Circuit panel affirmed.[89] The court concluded that, without facial discrimination or direct regulation of entirely out-of-state transactions, a regulation would violate the dormant Commerce Clause only if it substantially impeded the flow of interstate commerce or "interfere[d] with a national regime."[90] The court found neither to be the case.[91]

The Supreme Court granted certiorari and issued an opinion affirming the Ninth Circuit on May 11, 2023.[92] The "badly fractured" opinion "featured competing rationales"[93] and was quickly labeled "a mess" and "a good deal more troubling than the ordinary mess."[94] Justice Gorsuch wrote an opinion for five with respect to parts I, II, III, IV-A, and V, an opinion for himself and Justices Thomas and Barrett for parts IV-B and IV-D, and an opinion for himself and Justices Thomas, Sotomayor, and Kagan with respect to IV-C.

1. The Two Factions Comprising the "Majority"

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[83] This principle originated in the personal jurisdiction context. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (noting that, if costs of doing business in a state become "too great," a company may "sever[] its connection with the State"); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1027 (2021) (quoting the *World-Wide Volkswagen* language and noting it "has appeared and reappeared in many cases since").
[84] CAL. HEALTH & SAFETY CODE §§ 25990(b).
[85] *See* Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d.1201, 1204 (S.D. Cal. 2020).
[86] *Id.* at 1206-07.
[87] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). For more in-depth analysis of *Pike*, *see infra* notes __ and accompanying text.
[88] *See Nat'l Pork Producers Council*, 456 F. Supp. 3d at 1208-09.
[89] *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1031-33 (9th Cir. 2021).
[90] *Id.* at 1033-34.
[91] *See id.*
[92] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).
[93] Adam Liptak, *Supreme Court Upholds California Law on Humane Treatment of Pigs*, N.Y. TIMES, May 12, 2023 ,at A19.
[94] David Post, *Another Voting Paradox Case (Pork Division)*, VOLOKH CONSPIRACY (May 16, 2023, 11:53 a.m.), https://reason.com/volokh/2023/05/16/another-voting-paradox-case-pork-division/.

The parts of the opinion for which Justice Gorsuch commanded five votes included the factual background and procedural history (part I),[95] the premise that preventing discrimination against out-of-state interests lies at the "very core" of dormant Commerce Clause jurisprudence and that petitioners had specifically disavowed a discrimination claim (part II),[96] rejection of petitioners' primary argument, the proffered *per se* rule that any legislation with an extraterritorial effect fails under the dormant Commerce Clause (part III),[97] the observation that most prior cases are consistent with the Court's effort to smoke out discrimination against sister states and that very few cases have involved genuinely nondiscriminatory rules (part IV-A),[98] and the conclusion that the dormant Commerce Clause power should only invalidate state regulation "where the infraction is clear," which he concluded was not the case (part V).[99]

Although they all got to the same end result, the plot thickened in the middle of part IV, with the majority fracturing as to petitioners' fallback argument that Proposition 12 failed "*Pike* balancing"—the balancing of in-state benefit against out-of-state cost that petitioners argued the Court should use to evaluate concededly nondiscriminatory statutes.[100]

Three Justices would have circumscribed *Pike* to only the most obvious infractions. Writing for Justices Thomas and Barrett in part IV-B, Justice Gorsuch admitted room for *Pike* balancing "to test for purposeful discrimination"—in other words, as a mechanism buttressing the antidiscrimination principle—and in certain limited situations where states have imposed costs on "instrumentalities of interstate transportation."[101] Beyond that, he rejected petitioners' invitation to "retool" *Pike* for the "more ambitious project" of striking down laws regulating in-

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[95] *See Nat'l Pork Producers*, 143 S. Ct. at 1150-52.

[96] *Id.* at 1153.

[97] *See id.* at 1153-57. Over a decade ago, Brannon Denning had already noted the Court's abrupt retreat from any embrace of a *per se* extraterritoriality ban. *See* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 980 (2013). Denning attributed death of the concept in part to the lack of any limiting principle, particularly vexing given the rise of the internet. *See id.* at 998-1001. In 2023, Denning heralded the Court's full-throated rejection of a *per se* extraterritoriality ban in *Pork Producers* as "an overdue bit of doctrinal pruning" and "a unanimous *coup de grace*." Brannon P. Denning, National Pork Producers Council v. Ross: *Extraterritoriality Is Dead, Long Live the Dormant Commerce Clause*, 2022-2023 CATO SUP. CT. REV. 23, 23, 29 (2023).

[98] *See id.* at 1157-59.

[99] *Id.* at 1164-65.

[100] In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a cantaloupe company operating in Arizona and California challenged an Arizona order requiring that its cantaloupes grown in Arizona be packed in Arizona, rather than 31 miles away at the company's centralized packing plant, located in California. *See id.* at 139. In its analysis, the Court articulated what has become "the *Pike* balancing test": "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1210-11 (1986) (arguing the scheme is an "explicit embargo on the export of unprocessed goods" with an "inevitable tendency . . . to advantage Arizona packing workers").

[101] *Nat'l Pork Producers*, 143 S. Ct. at 1159. In several cases related to instrumentalities of interstate transportation, the Court has taken a more aggressive stance in striking down state statutes requiring mudguards, governing the lengths of trucks and trains, and the like. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (striking an Illinois mud flaps requirement); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (invalidating Arizona rule limiting passenger train length). *See infra* notes __ and accompanying text.

state sales of ordinary consumer products.[102] Such an inquiry by its terms required balancing of "incommensurable" values, "[a] task like being asked to decide 'whether a particular line is longer than a particular rock is heavy.'"[103] Legislatures, not unelected judges, are the proper entities to resolve these competing policy choices.[104] Save for the narrow categories of already-recognized cases, Justice Gorsuch disclaimed such a "freewheeling power," likening open-ended balancing to use of "Mr. Herbert Spencer's Social Statics" during the *Lochner* era.[105] Justice Gorsuch found utility for *Pike* only in the extreme, smoke-out cases: Where putative local benefits are small, nonexistent, or obviously pretextual, then any substantial out-of-state impact likely signifies protectionism. But this isn't a robust balancing of incommensurables; it's a quick sniff test.

Justice Gorsuch and Justice Thomas lost Justice Barrett, but picked up Justices Kagan and Sotomayor, in part IV-C. Even if *Pike* balancing *were* appropriate, he reasoned, petitioners would not be able to establish the "substantial burden" on interstate commerce that necessarily must precede, and therefore trigger, the balancing inquiry.[106] Citing *Exxon Corp. v. Governor of Maryland*,[107] he concluded that banning one set of firms (here, both in-state and out-of-state) from a market while at the same time welcoming another configuration of in-state and out-of-state firms into that same market merely shifts market share among differently configured entities and does not substantially harm interstate commerce.[108] Given the likelihood that costs would be pushed onto consumers and the prospect that niche producers would readily step into the void, he found substantial harm to interstate commerce to be "nothing more than a speculative possibility"—not enough to trigger *Pike* balancing, even if one were inclined to do it.[109]

2. Separate Opinions of Members of (Some Portions of) the Majority

Justices Sotomayor, joined by Justice Kagan, filed an opinion concurring in part that clarified her views about why the *Pike* claim failed.[110] She observed that, while the main run of dormant Commerce Clause cases had grappled with discriminatory legislation, the Court had nonetheless left open the possibility of challenge to nondiscriminatory legislation and had

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[102] *Id.*
[103] *Id.* at 1160 (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)).
[104] *See id.* at 1160-61.
[105] *See id.* at 1159, 1160. The *Lochner* Era takes its name from *Lochner v. New York*, 198 U.S. 45 (1905), which struck down state laws limiting a baker's work week in the name of "liberty of contract." *Id.* at 56. *Lochner*'s repudiation during the Great Depression was decisive, and it now has claimed its place in "the anticanon." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 1, 12 (2014). The pejorative reference to Herbert Spencer's Social Statics as a source for legal reasoning is from the solo dissenting opinion of Justice Oliver Wendell Holmes. *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
[106] *Nat'l Pork Producers*, 143 S. Ct. at 1161.
[107] 437 U.S. 117 (1978).
[108] *Nat'l Pork Producers*, 143 S. Ct. at 1161-62.
[109] *Id.* at 1163. Justice Gorsuch noted that one *amicus* brief from small producers stated that Proposition 12 afforded them new opportunities to compete against large, vertically integrated pork producers. *See id.* at 1162 n. 3 (citing Brief for Small and Independent Farming Businesses as *Amici Curiae* 1, 12, 19-20).
[110] *Id.* at 1165 (Sotomayor, J., concurring in part).

invalidated it in the interstate transportation context and in *Edgar v. MITE Corp.*,[111] which struck an Illinois law regulating tender offers.[112] Justice Sotomayor rejected Justice Gorsuch's suggestion that judges were institutionally incapable of balancing, noting that courts were called upon to weigh burdens against benefits in a host of other contexts.[113] She rooted her agreement with Justice Gorsuch in part IV-C on the similarity of the facts to those in *Exxon*.[114] She thus agreed that petitioners had not shown the requisite substantial burden on interstate commerce to trigger *Pike* balancing, but she left more room for *Pike* balancing in cases presenting unspecified but different facts.

Justice Barrett wrote a solo concurrence in part. She agreed with Justice Gorsuch that the benefits/burdens calculus for Proposition 12—weighing a moral judgment of California voters against predominantly out-of-state costs—was not something judges have institutional competence to balance.[115] But she disagreed with Justices Gorsuch, Thomas, Sotomayor, and Kagan on the substantial burden question.[116] In other words, she believed that Proposition 12 did impose burdensome costs on primarily non-Californian entities, but she did not believe the *Pike* test afforded her the mechanism for addressing it.[117] Though Justice Barrett did not expressly invite consideration of other clauses of the Constitution, she did not foreclose it, either. Something about the Big State Problem troubled her, and she wrote separately to flag it.

3. The *Pork Producers* Dissents[118]

a. The Principal Dissent

Chief Justice Roberts wrote the principal dissent, joined by Justices Alito, Kavanaugh, and Jackson. He began with points of agreement: He, too, believed the dormant Commerce Clause primarily targeted protectionism and discrimination, and he, too, found no basis for a *per se* rule against state laws with extraterritorial effect.[119]

From there, he proceeded to his disagreement with the majority's *Pike* analysis. Conceding that *Pike* might be susceptible of misapplication due to "freewheeling judicial weighing of benefits and burdens," he nonetheless rejected the proposition that it applied only to a narrow class of cases involving discriminatory state laws and instrumentalities of interstate

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[111] 457 U.S. 624 (1982).
[112] *Nat'l Pork Producers*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part) (citing *Edgar*, 457 U.S. at 643-46). Five years after *Edgar*, the Court upheld an Indiana anti-takeover statute in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987). *CTS Corp.*, scarcely mentioned *Pike* and did not engage in balancing, and Justice Sotomayor did not reference it.
[113] *See Nat'l Pork Producers*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part).
[114] *See id.*
[115] *See id.* at 1167 (Barrett, J., concurring in part).
[116] *See id.*
[117] *See id.*
[118] Thought the dissents agree with the Court's disposition of the extraterritoriality argument and are thus "concurring in part," I will use "dissents" here for simplicity to communicate disagreement with the core *Pike* arguments laid out in various parts of the majority opinion, part IV.
[119] *See id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

transportation.[120] Chief Justice Roberts argued that "sometimes there is no avoiding the need to weigh seemingly incommensurable values."[121] He referenced Justices Sotomayor's concurrence, counted noses, and flagged that "a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*."[122]

Turning to the burdens imposed by Proposition 12, Chief Justice Roberts argued that the Ninth Circuit had erred in seeing the Proposition as a law that "increase[d] compliance costs, without more."[123] He contended that prior cases had distinguished direct costs of compliance from other burdens on the interstate market and had evaluated these burdens independently. At this point, Chief Justice Roberts' use of cases becomes a little perplexing. His primary citation is *Bibb v. Navajo Freight Lines*,[124] a case that invalidated an Illinois law requiring that trucks use a particular mudguard.[125] *Bibb*, a classic "instrumentalities of interstate commerce" case, was a curious citation to support his argument for expansive application of *Pike* because the entire Court, Justice Gorsuch included,[126] had agreed that *Pike* ought to apply at least in that context.[127] Chief Justice Roberts followed with two more interstate transportation cases, arguing that in each, the Court had considered harms to the interstate market separately from compliance costs.[128] In addition to arising in the "instrumentalities of interstate commerce" context, each of these cases involved state schemes serving arguably protectionist impulses[129]—again, a category on which the Court was unanimous regarding *Pike*'s application.[130] Chief Justice Roberts noted that in *Pike* itself, the Court had considered compliance costs along with consequential market harms from a regulation "requiring business operations to be performed in the home State."[131] Finally, he cited *Edgar v. MITE Corp.*,[132] a plurality decision likewise flagged by Justice Sotomayor, noting that the state anti-takeover statute failed *Pike* balancing despite arising in a context other than interstate transportation or overt discrimination.[133] However, like Justice Sotomayor before him, he failed to follow up with *CTS Corp. v. Dynamics Corp.*,[134] a case that came down five years after *Edgar*, upheld a similar anti-takeover statute, stated it was "not

[120] *Id.* at 1167-68 (Roberts, C.J., concurring in part and dissenting in part).
[121] *Id.* (Roberts, C.J., concurring in part and dissenting in part).
[122] *Id.* at 1169 (Roberts, C.J., concurring in part and dissenting in part).
[123] *Id.* (Roberts, C.J., concurring in part and dissenting in part).
[124] 359 U.S. 520 (1959).
[125] *See Nat'l Pork Producers*, 143 S. Ct. at 1169 (Roberts, C.J., concurring in part and dissenting in part).
[126] *See id.* at 1158 n. 2.
[127] *See id.* at 1159 (plurality op.); *id.* at 1166 (Sotomayor, J., concurring in part).
[128] *See id.* at 1169 (Roberts, C.J., concurring in part and dissenting in part) (citing Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (plurality), and Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978)).
[129] In both *Kassel* and *Raymond Motor*, the Court suggested that protectionist impulses were lurking behind ostensibly neutral rules. *See Kassel*, 450 U.S. at 675-78 (invalidating Iowa rule governing truck length that granted exemptions to Iowans and "promote[d] its own parochial interests"); *Raymond Motor*, 434 U.S. at 446-47 (holding Wisconsin law limiting the size of trucks violates the dormant Commerce Clause and "were enacted at the instance of, and primarily benefit, important Wisconsin industries").
[130] *See Nat'l Pork Producers*, 143 S. Ct. at 1158 n. 2.
[131] *Id.* at 1170 (Roberts, C.J., concurring in part and dissenting in part).
[132] 457 U.S. 624 (1982).
[133] *Nat'l Pork Producers*, 143 S. Ct. at 1170 (Roberts, C.J., concurring in part and dissenting in part).
[134] 481 U.S. 69 (1987).

bound" by *Edgar*'s reasoning as that opinion was simply a plurality,[135] and notably did not itself engage in *Pike* balancing.[136]

Examining the facts at hand, Chief Justice Roberts noted significant compliance costs and, separate from those costs, "assert[ed] harms to the interstate market itself."[137] Here, he credited petitioners' argument that the interconnectedness of the market for pork would effectively compel their compliance with Proposition 12, even for meat sold in other states. California's rules, he argued, "carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California."[138] Despite agreeing with the majority that a *per se* rule against extraterritoriality was ill advised, he argued that such sweeping extraterritorial effects ought to be "pertinent" in applying *Pike.*[139] Finally, he noted that the regulation might come with costs more difficult to quantify, such as stress to pigs and exposure to pathogens that petitioners alleged might arise due to compliance with Proposition 12.[140] Because Proposition 12 would lead to pervasive change to the national pork industry, Chief Justice Roberts found the requisite "substantial burden against interstate commerce" and would have remanded for the Ninth Circuit to balance whether California had a good-enough reason to adopt it.[141]

b. Justice Kavanaugh's Dissent

Writing for himself, Justice Kavanaugh underscored the counting-of-noses, noting that six Justices had voted to retain *Pike* and that the Court's rejection of the *per se* rule against extraterritorial effects was unanimous.[142] The key point of disagreement, in his view, was between the dissenters and Justice Sotomayor and Kagan, and they simply came down differently on the question whether there was a substantial burden on commerce.[143]

Justice Kavanaugh then suggested that Proposition 12 not only required *Pike* balancing under the dormant Commerce Clause but might also offend the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.[144] He flagged the difficulty producers might face in segregating non-compliant pigs and observed that "California's 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market."[145] He scolded California for "aggressively propound[ing] a 'California knows best' economic philosophy," effectively seeking to impose its values nationwide.[146] Left unchecked, he suggested, California's Proposition would "provide a blueprint for other States," foreshadowing an era where states

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[135] *Id.* at 81.
[136] *See* Regan, *supra* note __, at 1866-67 ("I take some pleasure in observing that in none of the three opinions in
CTS is there any favorable mention of *Pike*.").
[137] *Nat'l Pork Producers*, 143 S. Ct. at 1170 (Roberts, C.J., concurring in part and dissenting in part).
[138] *Id.* (Roberts C.J., concurring in part and dissenting in part).
[139] *Id.* (Roberts C.J., concurring in part and dissenting in part).
[140] *Id.* at 1171 (Roberts C.J., concurring in part and dissenting in part).
[141] *Id.* at 1172 (Roberts C.J., concurring in part and dissenting in part).
[142] *See id.* & n. 1 (Kavanaugh, J., concurring in part and dissenting in part).
[143] *See id.* (Kavanaugh, J., concurring in part and dissenting in part).
[144] *See id.* at 1172-73 (Kavanaugh, J., concurring in part and dissenting in part).
[145] *Id.* at 1173 (Kavanaugh, J., concurring in part and dissenting in part).
[146] *Id.* at 1174 (Kavanaugh, J., concurring in part and dissenting in part).

"shutter their markets to goods produced in a way that offends their moral or policy preferences."[147] Justice Kavanaugh invited consideration of different constitutional clauses in a future case, though he took no view as to whether such arguments would ultimately prevail.[148]

4. Taking Stock: The Big State Problem After *Pork Producers*

The *Pork Producers* case reflects a troubled Court that is uncertain what to do about the Big State Problem. That one Big State—simply by controlling the products it allows in its own markets—can cause so many out-of-state producers to change their production policies plainly vexes four Justices (Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson). They lost the dormant Commerce Clause battle to two arguments, neither of which commanded a majority—the notion that *Pike* balancing should be limited to cases of discrimination and instrumentalities of interstate transportation (Justices Gorsuch, Thomas, and Barrett) and the position that *Pike* has no application where a nondiscriminatory regulation simply has the effect of preferring one business structure over another in the same market (Justices Gorsuch, Thomas, Sotomayor, and Kagan). Justice Barrett staked out a position that might be characterized as medium-concerned. She agreed with the dissenters that Proposition 12 imposed substantial costs on interstate commerce but did not see *Pike* balancing as the mechanism for tackling the problem. Justice Kavanaugh specifically invited future arguments housing his concern under other clauses, and if and when these cases come, Justice Barrett has not foreclosed taking a look. One thing, at least, is clear enough: The Big State Problem and its various reckonings will be a feature of our legal landscape in years ahead.

II. RECKONING WITH THE DORMANT COMMERCE CLAUSE

Before turning to the textual hooks in the 1789 Constitution directly regulating relationships between the states, this section examines what is admittedly a tenuously-textual hook—the implied dormant Commerce Clause authority that allows courts to step in where Congress has not acted directly under its Commerce Clause authority—in order to assess whether *Pork Producers* reached the right result on the question before it. While the Court itself was all over the place, this part determines that its underlying conclusion was correct. Unless the issue is so federally-charged that there is no room for state regulation in an area, the dormant Commerce Clause does not prevent big states from generating interstate spillover effects through nondiscriminatory regulation of their own markets.

A. Textual Analysis and Early Understanding

The Commerce Clause, "darling" of the 1787 Convention,[149] represents an affirmative grant of power to Congress and, on its face, contains neither a prohibition against state laws regulating commerce nor an indication of what is to happen if Congress fails to act.[150]

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[147] *Id.* at 1174 (Kavanaugh, J., concurring in part and dissenting in part).
[148] *See id.* at 1175-76 (Kavanaugh, J., concurring in part and dissenting in part).
[149] Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 446 (1941).
[150] *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-35 (1949).

Records of the Convention reflect "nearly universal agreement" that Congress ought to have a commerce power, frequently mentioning its absence as the chief defect of the Articles of Confederation.[151] The framers agreed to the Committee of Detail's reported Commerce Clause language "without dissent," and the clause confronted no opposition in ratification conventions.[152] There are several indications that at least some of the Convention's delegates believed the Commerce Clause power to be exclusive, an understanding that necessarily implied the corollary that states were divested of authority in the area.[153] Charles Pinckney of South Carolina originally proposed that Congress "shall have exclusive Power of regulating trade."[154] James Madison closed out the Convention stating he "was more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority."[155] Tea leaves that many of the framers understood the commerce power to be exclusive, of course, have to be read alongside their understanding that the Commerce power they contemplated was limited.[156]

Chief Justice Marshall seized the opportunity to expand the commerce power in the Court's first brush with it, and he contended with dormant Commerce Clause arguments from the beginning. In *Gibbons v. Ogden*,[157] Marshall defined Congress's power broadly to include not merely the exchange of goods but "intercourse," a subject that encompassed regulation of navigation and could reach into the interior of each state.[158] *Gibbons* involved a hotly-contested battle over a New York steamboat monopoly with a federal statute, the 1793 Federal Navigation Act,[159] lurking on the periphery. Grounding his argument on the dormant Commerce Clause, Gibbons lawyer Daniel Webster contended that Congress's commerce power was exclusive and displaced state regulation even when Congress had not acted.[160] Marshall admitted the "great force" of the argument and said "the Court is not satisfied that it has been refuted."[161] Still, he sidestepped the question. Adopting a reading of the Federal Navigation Act that "was quite a

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[151] Abel, *supra* note __, at 444; Friedman & Deacon, *supra* note __, at 1884-86.
[152] Abel, *supra* note __, at 444; *see also* Denning, *supra* note __, at 83.
[153] *See id.* at 491-94 (collecting statements).
[154] 2 Farrand 135.
[155] 2 Farrand (Madison) 625. As Friedman and Deacon relate, even dormant Commerce Clause skeptics concede that "if the commerce power is exclusive, the dormant Commerce Clause doctrine is legitimate." Friedman & Deacon, *supra* note __, at 1882, 1903. Friedman and Deacon contend that the framers' persistent concerns about states relinquishing their powers "evince a consistent expectation among the Framers that the grant of authority to the federal government included a simultaneous denial to the states." *Id.* at 1906-07.
[156] For example, the framers' early conception of commerce did not clearly include the arteries of commerce—highways, streams, bridges, and the like. *See* Abel, *supra* note __, at 478. Thus, after approval of the clause's language, the framers debated a proposal to give the federal executive charge of "roads and navigations and the facilitating of communications throughout the United States," but authority would have resided with the secretary of domestic affairs, not commerce, and the framers never adopted it. *Id.* (citing 2 Farrand (McHenry) 504).
[157] 22 U.S. (9 Wheat.) 1 (1824).
[158] *Id.* at 189-90, 195.
[159] 1 Stat. 305 (1793).
[160] *See* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1412 (2004).
[161] 22 U.S. at 209. As Professor Tushnet explains, "[i]f national power excludes all state regulation, every local statute regulating commerce is automatically invalid." Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125, 151 (1979).

stretch," [162] Marshall opted instead to find the state statute preempted by *affirmative* congressional action. Whether the state possessed some concurrent power over "commerce" or not (something Marshall found it unnecessary to decide), it had to yield where it collided with an express act of Congress.[163]

An early analytical framework for the dormant Commerce Clause emerged in *Cooley v. Board of Wardens*,[164] which involved challenge to a Pennsylvania law requiring all ships entering Philadelphia to hire a local pilot or contribute to a charitable organization devoted to local pilots.[165] The Court rejected the proposition that the Commerce Clause committed *all* regulation of commerce exclusively to Congress,[166] instead finding that only areas of law that "are in their nature national, or admit only of one uniform system or plan of regulation" required exclusive congressional authority. [167] Other areas, likewise touching commerce, are "likely to be the best provided for not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."[168] Finding that the regulation of local pilots required no national plan, the Court declined to displace the Pennsylvania regulation.[169]

B. The Wholesale/Retail Line and Proto-*Pike* Concepts of the *Lochner* Era

The late nineteenth and early twentieth century Court continued to draw sharp lines between the commerce power and state police power, which among other things was understood to confer exclusive state dominion over farming, mining, and manufacture.[170] State regulation crossed the line and was impermissible where interference with commerce was "direct"[171] and

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[162] Williams, *supra* note __ at 1399. Williams speculates that Marshall saw the case as an opportunity to set out an expansive view of the Commerce Clause power and that going the dormant Commerce Clause route would have afforded him more limited opportunity to do so. *See id.* at 1401-02. Tushnet wondered whether "[t]he uniform system of nonregulation that exclusive but unexercised national power would erect was a little too robustly laissez faire for an aristocratic federalist like Marshall." Tushnet, *supra* note __, at 126.

[163] 22 U.S. at 210. Marshall's colleague, Justice Johnson, agreed with Webster that Congress's power over interstate commerce was exclusive. *See id.*at 236 (Johnson, J., concurring in the judgment). Marshall retained the dichotomy between commerce power and police power in *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), which again permitted him to remain agnostic on the exclusivity question. *Willson* involved challenge to a Delaware statute authorizing the damming of a navigable creek. *See id.* at 251-52. Marshall concluded that Delaware was exercising its police power in seeking to enhance property values and the health of inhabitants. *See id.*at 251. Observing that Congress had passed no statutes bearing on the case, Marshall concluded, without analysis, "[w]e do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant State." *Id.* at 252.

[164] 53 U.S. 299 (1851).

[165] *See id.* at 311.

[166] *See* Friedman & Deacon, *supra* note __, at 1924.

[167] *Cooley*, 53 U.S. at 319.

[168] *Id.*

[169] *See id.* at 321.

[170] United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895).

[171] *Id.* at 16. *See also* Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925) (articulating the direct/indirect test and stating that "the course of adjudication has been consistent and uniform").

intentional.[172] Much turned on the distinction between products traveling in wholesale packaging *through* states and products taken out of boxes and placed on store shelves *within* states. Thus, states were not permitted to bar the movement of certain products or the sale of products in their original wholesale packages; these were passing-through "articles of commerce" over which states altogether lacked authority.[173] At the same time—and significantly for purposes of the Big State Problem—the Court upheld states' authority to prevent in-state retail sale once items were removed from their shipping containers because such decisions rested upon "the undoubted right of the states of the Union to control their purely internal affairs."[174]

The laissez-faire-inclined *Lochner* Court[175] deployed the dormant Commerce Clause in service of free trade to knock down state and local regulations that affirmatively discriminated against out-of-state goods.[176] At the same time, notions that courts could prevent states from imposing "excessive" burdens on interstate commerce even absent protectionist intentions, a proto-*Pike* concept, started to sneak into dormant Commerce Clause jurisprudence. In *Sioux Remedy Co. v. Cope*,[177] for example, the Court observed that, while a state had authority "to adopt reasonable measures to promote and protect the health, safety, morals, and welfare of its people, even though interstate commerce be incidentally or indirectly affected," it lacked power

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[172] *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1095-96 (2000) (observing that the *Knight* Court's decision turned "on the absence of evidence that the company *intended* to restrain interstate commerce").

[173] *See* Leisy v. Hardin, 136 U.S. 100, 125 (1890) (striking state prohibition on sale of liquor as applied to out-of-state imports in original packaging); Schollenberger v. Pennsylvania, 171 U.S. 1, 16-17 (1898) (striking state statute barring importation of margarine but acknowledging state authority to control its retail market); Austin v. Tennessee, 179 U.S. 343, 344 (1900) (rejecting state effort to ban importation and wholesale of cigarettes).

[174] *Leisy*, 136 U.S. at 122; *see also id.* at 123 (finding it "[u]ndoubtedly" for the state legislatures to determine whether "the sale of such articles will injuriously affect the public"). *See generally* Barry Friedman & Genevieve Lakier, *"To Regulate," Not "To Prohibit": Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 276 (2012) (describing general consensus in the late nineteenth century "that it belonged to states to determine what goods circulated in their markets").

[175] The *Lochner*-era Court embraced laissez faire economic principles and "liberty of contract" to invalidate progressive labor reforms at the state and federal levels. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of* Lochner, 76 N.Y.U. L. REV. 1383, 1392 (2001) (noting that the *Lochner* Court "constantly ran afoul of the two great political movements of the time: Populism and Progressivism").

[176] *See* Cushman, *supra* note __ at 1102-02. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (invalidating a statute that guarded New York milk producers against competition from cheaper out-of-state entities); Voight v. Wright, 141 U.S. 62, 66-67 (1891) (noting that a state "may not, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against the products and industries of some of the state in favor of the products and industries of its own or of other states); Brimmer v. Rebman, 138 U.S. 78, 81-82 (1891) (striking a state animal inspection statute that was, "in effect, a prohibition upon the sale in Virginia of beef, veal, or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale"); Minnesota v. Barber, 136 U.S. 313, 321 (1890) (invalidating Minnesota statute requiring in-state inspection of animals twenty-four hours before slaughter because it had effect of requiring slaughter in Minnesota and discriminating against business of other states); Walling v. Michigan, 116 U.S. 446, 458 (1886) (invalidating discriminatory state tax on out-of-state businesses selling liquor in-state).

[177] 235 U.S. 197 (1914).

to subject out-of-state corporations or others engaged in interstate commerce "to requirements which are unreasonable or pass beyond the bounds of suitable local protection."[178]

In reviewing the *Lochner* Court's tentative expansion of balancing, it is hard not to credit then-Professor Felix Frankfurter's observation that "[i]nstances have not been wanting where the concept of interstate commerce has been broadened to exclude state action, and narrowed to exclude congressional action."[179] While engaging the scholarly debate on the sins of *Lochner* is beyond the scope of this analysis,[180] it seems fair to note that standard critiques of *Lochner*-era cases—that the Court acted without a clear legal rudder in pursuit of its own policy preferences—seem on point here.

C. The Modern Era—Key Points of Concern

Beginning in 1937, the Court embraced a more deferential approach to economic regulation at the state and federal levels.[181] Since then, it has primarily deployed the dormant Commerce Clause in two different areas.

1. Where There's a Need for National Uniformity

Every Justice in the *Pork Producers* case agreed that invocation of the dormant Commerce Clause in this interstate transportation context was justifiable, [182] though none attempted to articulate a rationale for why this is so.

The Interstate Transporation Cases themselves reflect doctrinal evolution. In *South Carolina State Highway Department v. Barnwell Brothers* in 1938,[183] the Court upheld a South Carolina regulation prohibiting trucks on state highways whose weight and width exceeded a prescribed maximum.[184] The Court noted that safety on state highways was primarily of local

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[178] *Id.* at 201.
[179] Felix Frankfurter, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 76 (1937).
[180] As Strauss relates, "[t]he striking thing about the disapproval of Lochner . . . is that there is no consensus on why it is wrong." David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003). For a representative sampling of the points of disagreement in this field, *compare, e.g.*, Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that *Lochner*'s primary sin was adopting the baseline assumption that any deviation from the existing distribution of wealth violated "neutrality"); Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 302 (1988) (citing justices' imposition of their own values) *with* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (arguing that Sunstein's thesis lacks historical foundation); Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 531 (2015) (describing modern conservative legal movement's eagerness to return to "robust judicial protection for economic rights"); David E. Bernstein, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 125 (2011) (describing *Lochner* as "unfairly maligned").
[181] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938) (adopting the rational basis test for "regulatory legislation affecting ordinary commercial transactions"); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (holding that restrictions of wheat production for home consumption are within the commerce power because, when aggregated, the effect on commerce is "far from trivial").
[182] Several opinions in *Pork Producers* reference this line of cases. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 n. 2 (majority); 1166 (Sotomayor, J., concurring in part); 1169 (Roberts, C.J., concurring in part and dissenting in part). *See supra* notes __ and accompanying text.
[183] 303 U.S. 177 (1938).
[184] *See id.* at 189-90.

concern and found it dispositive that the act did not discriminate.[185] If the burden on interstate commerce was too much to bear, Congress could set uniform standards, then-Associate Justice Stone reasoned, "[b]ut that is a legislative, not a judicial, function."[186] Seven years later, in *Southern Pacific Co. v. Arizona*,[187] the Court, per now-Chief Justice Stone, changed course when confronted with an Arizona rule restricting the length of trains operating within the state.[188] Noting that the bulk of Arizona train traffic was interstate, the Court found the law "materially impedes the movement of appellant's interstate trains . . . and interposes a substantial obstruction to the national policy proclaimed by Congress" during the war.[189] In *Bibb v. Navajo Freight Lines*,[190] issued three years after Congress passed the Federal-Aid Highway Act of 1956 authorizing the construction of 41,000 miles of Interstate Highways,[191] the Court invalidated an Illinois statute requiring that trucks use specific mudguards on in-state highways. Conceding *Barnwell*'s proposition that states enjoyed considerable authority to regulate their highways,[192] the Court nonetheless observed that conflicting requirements in other states would require vehicles to stop and change mudguards at state lines.[193] The Court concluded, "[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[194]

Since *Cooley*, the Court has recognized that, while states enjoy broad general police powers, courts can sideline states from acting in certain areas that require uniformity and a nationwide standard,[195] and the transportation cases represent a paradigmatic example. *Bibb* balked at the bespoke Illinois mudguard rules because the prospect of different rules in every state, and the resulting need to stop and switch at every state line, imposed high transaction costs on interstate commerce.[196] The Court seemed to view the uninterrupted flow of commerce between the states as a national asset—a uniquely federal interest—that required uniform rules.[197] The whole conceit of the Interstate Highway Program, well underway in 1959, was the

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[185] *See id.*
[186] *Id.* at 190.
[187] 325 U.S. 761 (1945).
[188] *See id.* at 783-84. Redish and Nugent point to *Southern Pacific* as the case in which the Court stopped trying to find a constitutional basis for the dormant Commerce Clause, relying instead on its century-old pedigree. *See* Redish & Nugent, *supra* note __, at 581.
[189] *Id.* at 773. During the War, the Interstate Commerce Commission had suspended the operation of state law "to save manpower, motive power, engine-miles, and train-miles" in a time of national emergency. *Id.* at 772. The Court used this statute to justify the conclusion that the burdens imposed by Arizona had a nationwide impact. *See id.* at 782. Notably, Chief Justice Stone observed that, "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Id.* at 767 n. 2.
[190] 359 U.S. 520 (1959).
[191] Pub. L. No. 84-627, 70 Stat. 374 (1956).
[192] *See Bibb*, 359 U.S. at 525-26.
[193] *See id.* at 526-27.
[194] *Id.* at 529.
[195] *See supra* notes __ and accompanying text.
[196] *See supra* notes __ and accompanying text.
[197] *See* Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1168 (2016) ("The most straightforward presentation of the question of unarticulated federal interests arises in the context of the federal interest in the free flow of interstate commerce.").

establishment of consistent, system-wide standards.[198] In invalidating the Illinois rule, the Court's concern was less with horizontal federalism and how states relate to each other than with vertical federalism. Put simply, it was not that Illinois was bugging Indiana; it was that no state should be operating in this space in the first place. Though the Court did not say so directly, one can rationalize these cases in terms of implicit preemption, an inference that is particularly strong given the lattice of federal statutes enacted in 1956 and 1958 that committed over $26 billion to the construction of a uniform federal highway system.[199]

2. Smoking Out Protectionism and Discrimination: The Movement-of-Goods Cases[200]

The second area in which the dormant Commerce Clause can claim a pedigree is where the Court identifies that the state is acting with a protectionist purpose,[201] though this may stray more into the "we can all agree this is a good idea" category. Clearly, concern about state protectionism under the Articles of Confederation was a key impetus for the framers in going back to the drawing board and drafting the Constitution.[202] Moreover, the framers' rejection of a congressional veto in favor of judicial review, together with the textual hook in the Supremacy Clause, certainly provide some support for a judicial role in this space.[203] As Justice Alito observed for the Court in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*,[204] "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply

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[198] *See generally* David R. Levin, *Federal Aspects of the Interstate Highway Program*, 38 NEB. L. REV. 377, 393-96 (1959) (describing uniform design standards of the system relating to speed, intersections, curvature, sign distance, grade, width, and medians).

[199] *See* The Federal-Aid Highway Act, Pub. L. No. 84-627, 70 Stat. 374 (1956); The Federal-Aid Highway Act, Pub.
L. No. 85-381, 72 Stat. 89 (1958). *See also* Levin, *supra* note __, at 380, 392. Put in these terms, the Interstate Transportation Cases look neither remarkable nor unique. The Court has not hesitated to fashion federal common law where national interests require uniformity in other contexts, and scholars have both seen this in implied preemption terms and agreed that it is a legitimate practice. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 4 (2015) (arguing that federal common law is legitimate on topics that some written federal law—either the Constitution or a federal statute—"implicitly or explicitly puts beyond the reach of the states' lawmaking powers"); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. L. REV. 585, 607-09 (2006) (approving of federal common law where there are "significant conflicts" between "uniquely federal interests" and the operation of state law) Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1041-42 (1967) (describing *D'Oench, Duhme* and *Clearfield* as cases in which the Court's preemptive authority derives from the Constitution itself). In *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), for example, the Court opted to devise federal rules governing financial obligations of the United States because subjecting the federal government to fifty different state rules would impair a national interest: "The desirability of a uniform rule is plain." *Clearfield Trust*, 318 U.S. at 367.

[200] Regan coined this term and defined it "by exclusion." Regan, *supra* note __, at 1098. He removed from the category cases involving regulation of instrumentalities of interstate transportation, cases involving taxation, and cases where the state acted as a market participant. *See id.* at 1098-99.

[201] *See* Regan, *supra* note __, at 1095 ("The anti-protectionism principle has obvious historical roots, and that is part of what recommends it.").

[202] *See supra* notes __ and accompanying text.

[203] *See* JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170-74 (Elliot ed. 1891). *See also* Rakove, *supra* note __, at 1046-47 (arguing that rejection of the congressional veto gives judicial review a solid constitutional foundation); Friedman & Deacon, *supra* note __, at 1901-03 (using rejection of the congressional veto to counter skeptics' view that only Congress has power to act when states transgress).

[204] 139 S. Ct. 2449 (2019).

rooted," and there is intuitive appeal to his claim that the framers would "surely find surprising" the prospect of its absence.[205]

Modern movement-of-goods cases are consistent with a "virtually *per se*"[206] rule barring state legislation that discriminates against out-of-state interests. Often, the Court has confronted flagrant discrimination. In *H.P. Hood & Sons v. Du Mond*,[207] New York denied a Massachusetts milk distributor's application for a permit to build additional New York facilities because diverting the local milk supply to Massachusetts would raise in-state prices.[208] Invalidating New York's action, the Court held that it "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce either into or out of the state."[209] In *Dean Milk Co. v. City of Madison*,[210] the Court struck a Wisconsin municipal ordinance requiring milk to be pasteurized within twenty-five miles of the city center, reasoning that the regulation had the purpose and practical effect of keeping Illinois milk out of the market.[211] *Philadelphia v. New Jersey*[212] invalidated a New Jersey statute prohibiting importation of garbage originating outside the state's territorial limits, reasoning that the Court had consistently found "parochial legislation of this kind" unconstitutional.[213]

The Court laid out the eponymous *Pike* balancing test for assessing nondiscriminatory state regulations in *Pike v. Bruce Church*,[214] though its application even in that case is subject to debate. Bruce Church, a company that grew apparently terrific cantaloupes in Arizona, challenged an Arizona order barring it from sorting, inspecting, and packing its cantaloupes over the border at its California facility.[215] Although the Court set out a test suggesting it would balance in-state benefits against out-of-state burdens, the regulation requiring Arizona cantaloupe packing served a protectionist purpose, effectively requiring higher-than-average-Arizona fruit to bear a conspicuous Arizona designation and thereby enhancing the reputation of other, more pedestrian Arizona fruit by association.[216] To advance this purpose, Arizona employed the classically forbidden technique of explicitly preventing one key part of the process from happening across state lines.[217] After laying out the famous *Pike* balancing test, though, the Court "proceed[ed] virtually to ignore it."[218] The *Pike* Court reminded that it has "viewed with

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[205] *Id.* at 2460. *See* Friedman & Deacon, *supra* note __, at 1927 (arguing that use of the dormant Commerce Clause to counter state discrimination against interstate commerce "is easy to justify; it is perfectly consistent with framing-era concerns about economic balkanization, and no one at the Convention approved of these laws").
[206] Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).
[207] 336 U.S. 525 (1949).
[208] *See id.* at 529.
[209] *Id.* at 535.
[210] 340 U.S. 349 (1951).
[211] *See id.* at 354.
[212] 437 U.S. 618 (1978).
[213] *Id.* at 627. *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270-71 (1984) (striking down a Hawaii regulation giving favorable tax treatment to alcoholic beverages manufactured in-state).
[214] 397 U.S. 137 (1970).
[215] *See Pike*, 397 U.S. at 139-40.
[216] *See* Regan, *supra* note __, at 1210-11. *See also* Tushnet, *supra* note __, at 130 ("The state apparently hoped that the label would lead to judgments that all cantaloupes so labelled were of equally high quality.").
[217] *See* Regan, *supra* note __, at 1210-11. The Court struck an analogous scheme in *Dean Milk*, *see supra* note __.
[218] Regan, *supra* note __, at 1213.

particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."[219] Even had Arizona advanced a solid local interest, the Court reasoned, "this particular burden on commerce has been declared to be virtually *per se* illegal."[220]

The Court's other facially-neutral-rule cases are consistent with a driving force of ferreting out protectionism, with minimal balancing only occasionally surfacing at the margins.[221] In *Hunt v. Washington State Apple Advertising Commission*,[222] the Court invalidated a seemingly neutral North Carolina regulation barring closed containers of apples sold to retailers in the state from bearing state grading designations.[223] Washington State, at great expense, had created a state apple grading commission, and apples bearing Washington grades were a market indicator of high quality.[224] North Carolina justified its regulation as an effort to spare end consumers the baffling array of apple grades.[225] This purported interest was not served by rules regulating stickers on wholesale crates that customers would never see.[226] With an obviously pretextual interest on one side of the balance and the regulation's clear protectionist effect of leveling the playing field for North Carolina growers on the other, the Court found indications that "the discriminatory impact on interstate commerce was not an unintended byproduct" and struck the regulation.[227] Contrast *Hunt* with *Exxon Corp. v. Governor of Maryland*,[228] decided one year later, where the Court considered an oil-crisis-era Maryland statute prohibiting oil producers and refiners from operating retail gas stations in the state.[229] Maryland had no in-state producers or refiners; it had [1] locally-owned gas stations; [2] gas stations run by out-of-state interests that were *not* refiners/producers; and [3] gas stations run by out-of-state refiners/producers. Neither group [1] nor group [2] was affected by the statute, a factor the Court cited in finding the statute did not discriminate against interstate commerce.[230] Instead, the Court found that the statute permissibly barred a particular vertically-integrated structure whose players were apparently causing shortages at independently owned gas stations

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[219] 397 U.S. at 145.
[220] *Id.*
[221] Crediting Regan's analysis, Justice Scalia said, "[o]ne commentator has suggested that, at least much of the time, we do not in fact mean what we say when we declare that statutes which neither discriminate against commerce nor present a threat of multiple and inconsistent burdens might nonetheless be unconstitutional under a 'balancing test.' If he is not correct, he ought to be." CTS Corp. v. Dynamics Corp., 481 U.S. 69, 96 (1987) (Scalia, J., concurring) (citation omitted). As Greve summed it up, "[t]he 'discrimination' label serves to describe instances when the state loses." Michael S. Greve, *The Dormant Coordination Clause*, 67 VAND. L. REV. EN BANC 269, 273 (2014). Michael Kent and Brannon Denning classify the Court's effort to "smoke out" subtle protectionism as an "anti-evasion doctrine." Michael B. Kent, Jr. & Brannon P. Denning, *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776-77 (2012).
[222] 432 U.S. 333 (1977).
[223] *See id.* at 337.
[224] *See id.* at 336-37.
[225] *See id.* at 349.
[226] *See id.* at 352.
[227] *Id.*
[228] 437 U.S. 117 (1978).
[229] *See id.* at 119-20.
[230] *See id.* at 126.

(both Maryland- and out-of-state owned).[231] This, the Court concluded, did not present dormant Commerce Clause issues,[232] and tellingly, the Court did not even cite *Pike*.[233]

3. Anything Left?

Beyond situations of needful-national-uniformity and obvious (or lurking) state protectionism, it is more difficult to sustain the use of the dormant Commerce Clause in a principled fashion. Descriptively, Justice Gorsuch seems correct that the modern Court's primary invocation of *Pike* has been to ferret out a protectionist purpose.[234] Since the *Lochner* era, the Court has not rigidly scrutinized state regulations in movement-of-goods cases. Notably, even in the *Lochner* era, when the Court felt fewer constraints in striking down state regulations, cases readily admitted states' police power to ban and otherwise control products for retail sale in their own markets.[235] In other modern contexts, the Court has recognized without concern that a state's control over goods for sale in its markets can impose special manufacturing requirements on producers who wish to join those markets. First-year law students addressing a stream-of-commerce problem in Civil Procedure, for example, know that one "plus factor" signifying a defendant's purposeful availment of a state's market is "designing the product for market in the forum state." [236]

Conceding that "[t]here was a time when this Court presumed to make such judgments for society, under the guise of interpreting the Due Process Clause," even Chief Justice Roberts chided litigants in 2007 for asking the Court "to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause."[237] Justice Gorsuch's conclusion that application of *Pike* in the *Pork Producers* case would take the Court "well outside of *Pike*'s heartland"[238] seems descriptively correct; his contention (with Justices Thomas and Barrett) that balancing the moral and health interests of Californians against costs borne by out-of-state pork

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[231] The Court cited a law review comment detailing Maryland hearings at which evidence reflected the out-size power group [3] stations exerted and the harm they were causing Marylanders as a result. *See id.*at 124 n. 13 (citing Comment, *Gasoline Marketing Prices and Meeting Competition Under the Robinson-Patman Act*, 37 MD. L. REV. 323 (1977)). As Regan sees it, "the absence of protectionist purpose" settled the case. Regan, *supra* note __, at 1236.

[232] *Exxon Corp.*, 437 U.S. at 127.

[233] Regan notes that *Exxon* "came as a shock to believers in balancing." Regan, *supra* note __, at 1234. To similar effect was *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), which rejected a challenge to a Minnesota ban on plastic nonreturnable milk containers. The Court said that, if indications suggested the rule was "simple economic protectionism, it was presumptively invalid. *Id.* at 471. Concluding that was not the case, the Court brought *Pike* balancing in, but it found the inconvenience of switching packaging to be slight. *See id.* at 173. Regan characterizes the balancing in *Clover Leaf* as "completely perfunctory." Regan, *supra* note __, at 1240. Francis marks *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), as "a sea change," noting that, in the nearly thirty years since, "the Court has not struck down a single statute under the dormant Commerce Clause on grounds
of burden." Francis, *supra* note __, at 301.

[234] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158-59 (2023).

[235] *See supra* notes __ and accompanying text.

[236] Daimler AG v. Bauman, 571 U.S. 117, 128 n. 7 (2014) (quoting Asahi Metal Indus. Co. v. Sup. Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality op.).

[237] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt., 550 U.S. 330, 347 (2007).

[238] 143 S. Ct. at 1158-59.

producers would involve the Court in a "freewheeling" endeavor where "[y]our guess is as good as ours," too, has intuitive appeal.[239]

D. Applying the Settled Dormant Commerce Clause Case Law to the Big State Problem

Despite its "long and complicated" history,[240] the dormant Commerce Clause has been a consistent feature of our landscape, and it is possible to defend its existence on originalist grounds. The concept that Congress's Commerce Clause power includes an exclusive component that divests states of authority to act even when Congress is silent emerged in the Convention itself and surfaced in early days of judicial interpretation.[241] Subsequent case law has firmly entrenched two applications of the dormant Commerce Clause, neither of which has obvious bearing on the Big State Problem. Actual garden-variety balancing of state interests versus out-of-state cost, though adverted to in *Pike*, does not appear to have been a meaningful feature of the inquiry since the repudiation of *Lochner*.

Turning to the Big State Problem, it is possible to imagine other contexts, beyond the transportation cases, where only a uniform national rule makes sense. However, it is instructive that the Court has invoked the dormant Commerce Clause to do so only sparingly to date. At this point, nothing about a sow's gestational confinement appears to require national uniformity. Congress could certainly conclude otherwise, but there is neither basis nor principled justification for a federal court to jump in preemptively at this juncture.

Nor does the Big State Problem pose looming threats of discrimination or protectionism. In the *Pork Producers* case, the petitioners "disavow[ed] any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state pork producers."[242] As we have defined the Big State Problem, protectionism and discrimination thus are not in play, so this second valid application of the dormant Commerce Clause, too, is not implicated.

Although the *Pork Producers* majority squabbled over the optimal rationale, the underlying result that Proposition 12 does not offend the dormant Commerce Clause seems doctrinally defensible and correct.

III. No Other Horizontal Federalism Lever in the 1789 Constitution Bears on the Inquiry

[239] Tushnet, assessing dormant Commerce Clause cases in 1979, remarked, "[w]he the Court's decisions are viewed as a group, they show enhanced due process scrutiny parading in the guise of a balancing process." Tushnet, *supra* note __, at 147. The Fourth Circuit, per Judge Wilkinson, observed that "[t]he *Pike* test is often too soggy to properly cabin the judicial inquiry or effectively prevent the district court from assuming a super-legislative role." Colon Health Ctrs. of America, LLC v. Hazel, 733 F.3d 535, 546 (4th Cir. 2013).
[240] Tenn. Wine & Spirits Retails Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).
[241] *See supra* notes __ and accompanying text.
[242] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023).

What about the alternative clauses one could conceivably use to circumscribe a Big State's ability to control products sold in its market, Article IV, Section 2's Privileges and Immunities Clause, the Import-Export Clause, and the Full Faith and Credit Clause? This part demonstrates that the framers contemplated that each of these clauses would navigate a particular facet of interstate relations that has little to do with a state's nondiscriminatory regulation of its own in-state market.[243] To deploy them in this context wrenches them out their intended and long-understood contexts.

A. Article IV, Section 2 Privileges and Immunities

Article IV, Section 2's Privileges and Immunities Clause, also called the "Comity Clause," was "taken from the article of confederation, and with some modifications in wording . . . accepted by the convention without question."[244] Without further embellishment, Alexander Hamilton cryptically touted the Privileges and Immunities Clause as "the basis of the Union,"[245] and courts and commentators have understood it to "facilitate[] national unification by promising federal protection for citizens who venture beyond the borders of their state."[246]

1. History, Text, and Purpose

From their earliest chartering documents, American colonists sought to ensure that they would not be treated differently from countrymen across the pond in their enjoyment of the full-fledged "rights of every Englishman."[247] Thus, the Charter of 1606 given to the Virginia Company by King James I provided that settlers in the colonies "shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England."[248] Guarantees of the "liberties, franchises, and immunities' of Englishmen" likewise appeared in the charters of

[243] This Article sidesteps vigorous debates over the optimal methodology of constitutional interpretation. Taking its cue from both the majority and dissenting opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), this part will examine the text of each clause, its structural relationship to the whole, founding era understandings as reflected in notes of the Convention and any documents generated in connection with ratification, and judicial interpretation. *See generally* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1119-20 (observing that even confirmed textualist Justice Scalia frequently relied on the "secret" drafting history of the Constitution).

[244] Farrand, *supra* note __, at 158.

[245] THE FEDERALIST No. 80, at 424 (A. Hamilton) (J.R. Pole ed., 2005). As one commentator lamented, "[u]nfortunately, he did not elaborate, and almost no one else mentioned it at the Constitutional Convention or during ratification." Stewart Jay, *Origins of the Privileges and Immunities of States Citizenship Under Article IV*, 45 LOY. U. CHI. L.J. 1, 2 (2013).

[246] Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW 1250-51 (3d ed. 2000).

[247] 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 66 (Banks & Bros. Ed. 1877). *See also* Steven K. Green, *The Mixed Legacy of Magna Carta for American Religious Freedom*, 32 J. L. & RELIGION 207, 211 (2017) (noting that colonists generally "perceived Magna Carta as an integrated part of a larger body of laws and acts, such as the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, all of which guaranteed the fundamental rights and liberties of Englishmen").

[248] THE FIRST CHARTER OF VIRGINIA; April 10, 1606, https://avalon.law.yale.edu/17th_century/va01.asp.

Massachusetts, Maryland, Maine, Connecticut, Carolina, Rhode Island, and Georgia from 1632 to 1732.[249]

Post-independence, founding documents shifted this theme of equal treatment from Englishman-colonist to citizens of different states. Thus, in order "to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union," the Articles of Confederation secured to "the free inhabitants" of each state

> all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .[250]

With little fanfare or discussion, the Constitution truncated this, and Article IV, Section 2 guaranteed "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several states."[251] However, Madison explained in Federalist 42 that the abbreviated language was designed to eliminate confusing terms and redundancies—not to change the clause's substantive meaning.[252]

A "privilege" is a benefit or entitlement to act conferred by law,[253] and an "immunity" frees someone with a privilege from any interference with that entitlement,[254] but the terms have long been used interchangeably with "rights."[255] The clause applies to "citizens" of "each State" and guarantees them the "Privileges and Immunities of Citizens." Per Joseph Story, at least, the

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[249] A.E. Dick Howard, ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 15-16, 19 (1968). *See also* Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 91-95 (2011) (noting preservation of English citizenship and pleas for the rights of Englishmen "became a part of the lexicon of the American colonist"). Gordon Wood has observed that, by 1775, "it became awkward to talk continually of English rights," and colonists "began more and more to refer to their rights as natural rights, rights that existed in nature and that did not have to be embodied in old parchments or musty records." Gordon S. Wood, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 29 (2021).

[250] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

[251] U.S. CONST. Art. IV § 2.

[252] *See* The Federalist No. 42, at 231-32 (James Madison) (J.R. Pole ed., 2005); *see also* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 75-76 (2011) (observing that the language in the Articles of Confederation was "cumbersome" and that the framers changed it because they "desir[ed] simplicity"); Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 787 (2008) (noting that, while the constitutional clause is "more laconic" than its counterpart in the Articles, it simply eliminated repetition and inconsistencies).

[253] *See* Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1130 (2009) (quoting founding-era dictionaries).

[254] *See id.*at 1133-34; *see also* Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 165 (1919).

[255] *See* 1 W. Blackstone, COMMENTARIES 458 (Blackstone Inst. ed. 1915) (using "rights" and "private immunities" and "privileges" interchangeably); *see also* Natelson, *supra* note __, at 1141 (concluding that eighteenth century legal documents in the colonies used "rights," "liberties," "franchises," "privileges," and "immunities" to connote "overlapping, or even identical, meaning"); *but see id.* at 1144-47 (suggesting that in the Revolutionary Era, "right" often connoted an inalienable, natural right, whereas "privilege" was something conferred by law).

provision was "plain and simple in its language; and its object is not easily to be mistaken."[256] Story saw the clause as conferring "a general citizenship" and protecting "all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances."[257]

Notwithstanding its apparent clarity to Story, scholars have long debated whether privileges and immunities encompass all positive rights conferred by a state, some subset of positive rights, or Lockean natural rights.[258] Recently, Jud Campbell—echoing Story's terminology—has argued that the clause protects a concept less-familiar to modern thinking, the right of "general citizenship," distinct from local or national citizenship, that a state "could not rightfully abridge or abandon."[259] Setting aside *what* rights are secured by the clause—whether it protects all state-conferred rights or some subset of rights, either expressly conferred by states or generally understood to inhere in citizenship—most scholars agree that it sets forth an antidiscrimination principle barring a state from treating out-of-staters differently from their own citizens in the enjoyment of these rights.[260] Colonial practice and the Court's consistent interpretation bear out that equal treatment is its overarching focus.[261]

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[256] 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1806. For an analysis of various ambiguities in the clause that belies Story's assessment of its simplicity, *see* David R. Upham, Note, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1494-98 (2005).

[257] Story, *supra* note __, at § 1806.

[258] *Compare*, *e.g.*, Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Doctrine*, 99 B.U. L. REV. 1535, 1545 (2019) (arguing that "the phrase was understood to refer to grants of positive law") *and* Natelson, *supra* note __, at 1187 (contending that any benefit a state bestowed on its own citizens as an incident of citizenship it was required to bestow on visiting out-of-staters) *with* Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 5 (1967) (mooring protection of privileges and immunities in natural law, rights "recognized by the international community as belonging to free men"). *See generally* Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1125 & n. 144 (1988) (observing that "[m]odern commentators usually ridicule" the "much maligned interpretation of the privileges and immunities clause as a guarantee of certain fundamental or natural rights"); Hamburger, *supra* note __, at 77-83 (canvassing different approaches to defining rights subject to the clause's protection).

[259] Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 634-36 (2023). Campbell argues that seeing the clause "merely as a nondiscrimination rule" is only partly accurate, as the clause "presupposed the existence of general fundamental rights that states were already obliged to recognize and secure." *Id.* at 635-36. Campbell does not take issue with the antidiscrimination aspect of the clause; he argues, though, that the clause forbids interstate discrimination with respect to rights that states had to afford their own citizens under principles of general law, a concept fixed and understood by the framers. *See id.*

[260] *See* Redish & Johnson, *supra* note __, at 1544-49; *see also* Laycock, *supra* note __, at 261 (noting that, under the clause, "a Californian in Texas . . . is entitled to all the privileges and immunities accorded to Texans" and "[i]n short, we must treat her like a Texan"). As Campbell recounts, though the clause was largely understood as an antidiscrimination principle, some antebellum thinkers saw the Article IV Privileges and Immunities Clause as reflecting a baseline understanding that states had to secure rights of general citizenship to their own citizens, as well. *See* Campbell, *supra* note __, at 635-36. Still, the clause by its terms forbade discrimination against out-of-state citizens in the enjoyment of these rights and did not *itself* secure these baseline obligations a state bore toward its own citizens. *See id.*

[261] "A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it. The claim to that treatment is not absolute, but relative to whether others receive it." Kenneth W.
Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985).

2. Judicial Interpretation

Cases interpreting the Privileges and Immunities clause in the Nineteenth and early Twentieth Centuries are consistent with an antidiscrimination principle. Early judicial interpretation of what privileges and immunities are protected came in 1825 with Justice Bushrod Washington's circuit decision in *Corfield v. Coryell.*[262] New Jersey constables seized and sold *The Hiram* for raking oysters in violation of a New Jersey statute barring all collection of oysters between May and September and allowing collection in other months only by New Jersey residents.[263] Plaintiff, owner of *The Hiram* and not a New Jersey citizen, challenged the act as an infringement of the Privileges and Immunities Clause.[264]

In treating non-New Jersey citizens differently in their rights to oysters, the statute might have run afoul of a simple antidiscrimination principle; however, Justice Washington concluded that the clause prevented discrimination only as to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union."[265] He resisted an exhaustive list, which "would perhaps be more tedious than difficult to enumerate," but then dashed off a couple that owed much to Lockean natural rights[266]—the right to acquire and possess property; the right of a citizen of one state to travel through or to reside in any other state "for purposes of trade, agriculture, professional pursuits, or otherwise"; the right to claim the benefit of the writ of habeas corpus; the right "to institute and maintain actions of any kind in the courts of the state"; the right "to take, hold and dispose of property, either real or personal"; and the right to "exemption from higher taxes or impositions than are paid by the other citizens of the state."[267] In limiting the clause's protection to "fundamental" rights—which notably did not include oyster harvesting—Justice Washington rejected the contention that non-citizens were, by dint of the clause, "permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."[268] *Corfield* imposes the first significant narrowing of the compass of the Privileges and Immunities Clause by limiting its protection against discrimination to only certain kinds of rights, and this limitation endures.[269]

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[262] 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230). The case was from the April 1823 term but did not issue until 1825. *See* Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n. 2 (2019).
[263] *See Corfield,* 6 F. Cas. At 550.
[264] *See id.* at 551.
[265] *Id.*
[266] *See* Redish & Johnson, *supra* note __, at 1556; *see also* Hague v. C.I.O., 307 U.S. 496, 511 (1939) (stating that Justice Washington thought Privileges and Immunities Clause embraced "natural rights"); Magliocca, *supra* note __ ,at 710 (noting it is ambiguous whether Justice Washington believed "the opinion's list of fundamental rights must be given by all states to all of their citizens"); *but see* Campbell, *supra* note __, at 645 (seeing *Corfield* as a reflection
of the framers' concept of "general rights").
[267] *Id.* at 551-52. Justice Washington's instinct that the clause protected discrimination against a particular set of rights, rather than the full panoply of rights extended to a state's own citizens, dovetails with Jud Campbell's concept of general citizenship. *See* Campbell, *supra* note __, at 645-46.
[268] *Id.* at 552.
[269] *See* McBurney v. Young, 569 U.S. 221, 232-33 (2013) (concluding Virginia Freedom of Information Act does not violate the Privileges and Immunities Clause by restricting access to Virginians because the right of access to

The second judicially-imposed restriction on the application of the Privileges and Immunities Clause came in 1869 with *Paul v. Virginia*.[270] Paul, a Virginia resident employed by New York insurance companies, sought a license to act on behalf of those companies in Virginia. Virginia authorities denied the license because Paul had not complied with elevated application requirements imposed on out-of-state companies.[271] Rejecting Paul's argument, the Court made short work of the case, deeming the Privileges and Immunities Clause inapplicable because out-of-state corporations were not "citizens" within the meaning of the clause.[272] This restriction on the Privileges and Immunities Clause persists even though it is often maligned,[273] and even though the Court has not hesitated to protect corporate "personhood" under other provisions of the Constitution.[274]

3. Application to the Big State Problem

Whatever rights the Privileges and Immunities Clause protects, and whether or not *Paul*'s restriction on the rights of corporations is flat wrong or justifiable, there is little basis to bring the Privileges and Immunities Clause to the aid of those troubled by the Big State Problem. The Privileges and Immunities Clause requires discrimination by State A against visitors from State B as a threshold trigger.[275] It has always been understood to keep out-of-staters on equal or at least equal-as-to-fundamental-things footing vis-à-vis in-state interests. By definition, the Big State Problem involves State A's *nondiscriminatory* regulation of products for sale in State A, the in-state market. Where a state regulating products for sale in its own market treats in-state

public information is not fundamental); Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 378 (1978) (holding that access to recreational elk hunting is not fundamental and that a state may prefer its own residents "upon such terms as it sees fit").

[270] 75 U.S. 168 (1869).

[271] *See id.* at 169.

[272] *See id.* at 177. The Court described the function of the clause "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Id.* at 180. It also stated that the clause secures to out-of-state citizens "in other states the equal protection of their laws." *Id.*

[273] *See, e.g.,* Eule, *supra* note __, at 451 (arguing that "the legal underpinnings of Justice Field's conclusion are no longer sound"); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 380-81 (1988) ("Excluding [corporations] from the privileges and immunities clause is inconsistent with the true purpose of that clause."); Gergen, *supra* note __, at 117 (noting that "most scholars agree that this rule is a relic of an earlier era").

[274] Redish and Johnson note, for example, that the clause authorizing federal jurisdiction in controversies between "citizens" of different states counts corporations as "citizens." Redish & Johnson, *supra* note__, at 1565. *See also* Citizens United v. FEC, 558 U.S. 310, 315 (2010) (recognizing First Amendment rights of corporations).

[275] *See* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 392 n. 22 (2003). Writing in 2003, Denning assumed explicit discrimination was a trigger and said, "I have found no case in which the Supreme Court struck down a facially neutral state law under the Privileges and Immunities Clause on the ground that it nevertheless had the effect of discriminating against out-of-state citizens." *Id.* There do not appear to have been any cases at odds with this conclusion in the twenty years since.

and out-of-state producers equally, the interests served by the Privileges and Immunities Clause are not implicated.[276]

B. The Import-Export Clause

The Import-Export Clause, although directly restricting state power, likewise has no bearing on the Big State Problem.

1. Textual and Purposive Analysis

The Import-Export Clause, contained in Article I, Section 10, provides that "No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws."[277] By its terms, the clause restricts state taxation instead of limiting state regulatory authority.[278] It applies to a subset of state taxes, prohibiting only "imposts" and "duties" on "Imports or Exports." Its terminology contrasts with the Federal Export Tax Clause in Article I, Section 9, which bars Congress from laying a "tax or duty . . . on Articles exported from any State"[279] and Congress's taxing power in Article I, Section 8, which broadly confers on Congress power to collect taxes forbidden the states by allowing it to "lay and collect Taxes, Duties, Imposts and Excises."[280] Unlike the Commerce Clause, which is silent regarding limits on state action in the absence of congressional regulation, the Import-Export Clause's restrictions on state imposts and duties are direct and self-executing.

The clause includes a single exception to what is otherwise an absolute prohibition, permitting taxation to the extent strictly necessary to fund state inspections, and the Court has invoked that express exception to reject the creation of others.[281] To the extent taxes are assessed pursuant to the state inspection exception, the clause provides that "the net Produce of

[276] It is altogether possible to conjure a situation where a state's seemingly "neutral" regulation of products for sale in its in-state market is in fact pretextual and discriminatory. For example, a state could bar a product that is tied to a particular point-of-origin, like "Maine Blueberries," and that would present a different case. No Californian can produce Maine Blueberries in-state, so such a regulation would have the effect of permitting in-state production of blueberries but barring producers from Maine from entering the retail market. At that point, it is possible to characterize the California regulation as discriminating against out-of-state interests, perhaps to the advantage of its in-state market. There is ample room in existing doctrine to deal with discrimination and protectionism. The Big State Problem, though, assumes nondiscrimination, as was the case with California's Proposition 12, and to this, the Privileges and Immunities Clause has no ready application.

[277] U.S. CONST., art. I, § 10, cl. 2. Records of the 1787 Convention reflect that "duties" and "imposts" did slightly different work. Framer James Wilson, responding to Luther Martin's inquiry whether both terms were needed, indicated "duties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects as stamp duties &c." James Madison, 2 THE PAPERS OF JAMES MADISON 1339 (Henry D. Gilpin ed., 1841). As Denning explained, "[i]n other words, all imposts are duties, but all duties are not imposts." Denning, *supra* note __ [Colo.], at 192.

[278] *See* Bittker & Denning, *supra* note __, at 524. Bittker and Denning note that the interstate strife to which the framers responded was "overwhelmingly, if not exclusively, attributed to state taxes, not to other types of state regulation." *Id.*

[279] U.S. CONST. art I, § 9, cl. 5.

[280] U.S. CONST. art I, § 8, cl. 1.

[281] *See* Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 76-77 (1946).

all Duties and Imposts . . . shall be for the Use of the Treasury of the United States."[282] On its face, then, the Import-Export Clause underscores that duties and imposts, the imposition of which is permitted the federal government under Article I, Section 8, will be an important source of federal revenue, so much so that any extra collected pursuant to the one acknowledged exception will go into federal coffers.[283]

In addition to preserving an important source of revenue for the federal government's exclusive use, the framers intended the Import-Export Clause to work in tandem with Congress's Commerce Clause power to address one of the principal defects of the Articles of Confederation—"the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased."[284] Some states had convenient ports and deep harbors to receive ships laden with commerce; others did not.[285] Imposts and duties on incoming products bound for other states enriched the treasuries of port states while raising prices for consumers in states where the products landed for retail sale.[286] These end consumers, of course, had no meaningful political recourse. In his Preface to *Debates in the Convention of 1787*, James Madison labelled the Articles of Confederation's inability to resolve this externality as a primary "source of dissatisfaction."[287] The result left New Jersey a "[c]ask tapped at both ends" by Philadelphia and New York, and North Carolina, haplessly situated between Virginia and South Carolina, "a patient bleeding at both arms."[288]

2. Judicial Interpretation

In reviewing judicial treatment of the clause, we again start with Chief Justice Marshall, who had occasion to consider the Import-Export Clause in *Brown v. Maryland* in 1827.[289] A Maryland statute required all importers of foreign goods to pay $50 for a license to sell their products in wholesale markets, and a non-complying importer of dry goods challenged his conviction under the Import-Export Clause and the Commerce Clause.[290] Examining the former,

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[282] U.S. CONST. art I, § 9, cl. 5.

[283] In cataloguing the defects of the Articles of Confederation, Farrand observed that, "[i]n the matter of trade a uniform policy was necessary, and that uniformity could only be obtained by grating to the central government full power over trade and commerce, both foreign and domestic." Farrand, *supra* note __ [Framing], at 45. Farrand followed, "[t]his meant of course that duties would be laid and something in the way of revenue would result," even if it would not be sufficient to cover all the federal government's needs. *Id.*

[284] Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976).

[285] *See* Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 598-99 (1994); David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 952 (2019).

[286] *See id.* Observing that New York and South Carolina "found themselves the fortunate overseers of the only convenient natural harbors on long stretches of coastline," LeBoeuf notes they "could impose high levels of taxes, secure in the knowledge that the bulk of them would be paid by out-of-staters." *Id.* at 598.

[287] James Madison, *Preface to Debates in the Convention of 1787, reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 542 (Max Farrand ed., 1911).

[288] *Id.* Madison also recounts that Rhode Island was the sole state to resist the call for a Constitutional convention, as the state was "well known to have been swayed by an obdurate adherence to an advantage which her position gave her of taxing her neighbors thro' their consumption of imported supplies, an advantage which it was foreseen would be taken from her by a revisal of the Articles of Confederation." *Id.* at 546-57.

[289] 25 U.S. (12 Wheat.) 419 (1827).

[290] *See id.* at 436-37.

Marshall assumed three possible purposes for it—preserving state harmony, allowing the federal government a single voice in commerce with foreign nations, and conferring this kind of revenue on the federal government, as opposed to states.[291] Marshall then concluded that the state license fee, though indirect, was a prohibited tax on imports because the state assessed it on goods still in their original package that had not lost their "distinctive character as an import."[292] Though Marshall dealt only with foreign imports in *Brown*, he stated in dictum that "[i]t may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state."[293] Several decades later, Chief Justice Taney struck down a California tax on gold dust set for export to New York in *Almy v. California* in the apparent but not-explicitly-stated agreement that the Import-Export Clause applied in the context of movement of goods between states.[294]

The Court rejected that assumption eight years later in *Woodruff v. Parham*,[295] which restricted the Import-Export Clause to foreign imports and exports. Assuming "impost" to have the same meaning throughout the Constitution, the Court examined Congress's taxing power, which included power to collect "imposts," and reasoned that, if "imposts" there included duties on goods carried from one state to another, then Article I Section 9's bar on Congress imposing imposts on goods exported from any state "is curiously rendered nugatory."[296] Noting that the clause permits imposts with congressional consent, the Court found it "altogether improbable" that Congress might be able to assent to a state imposing duties on other states.[297] The Court refused to ascribe any import to Chief Justice Marshall's "casual remark . . . made in the close of the opinion" that the clause might have a broader compass.[298] The Court's limitation on the Import-Export Clause was doubtless informed by its increasing willingness to strike state legislation on dormant Commerce Clause grounds, as evidenced by its ready alternative explanation for *Almy*: "It seems to have escaped the attention of counsel on both sides, and of the Chief Justice who delivered the opinion, that the case was one of interstate commerce."[299]

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[291] *See id.* at 439. Marshall did not cite to any records of the Convention for the proposition that the clause might serve the purposes of facilitating one voice in foreign commerce and conferring an exclusive revenue source on the federal government. However, Farrand underscores that this was an important objective. *See* Farrand, *supra* note __, at 45.

[292] *Id.*at 441. As in the dormant Commerce Clause context, early analysis placed great significance on whether a product was in wholesale crates or readied for retail sale. *See supra* notes __ and accompanying text.

[293] *Id.* at 449.

[294] *See* Almy v. California, 65 U.S. (24 How.) 169, 175 (1860).

[295] 75 U.S. 123 (1868).

[296] *Id.* at 132. Denning argues that "the tension between the two provisions that Miller regards as significant support for his reading of the Import-Export Clause is largely of his own making." Denning, *supra* note __ [Colo.], at 183.

He contends that a different definition of "import" makes sense for the Import-Export Clause given its focus on states, not Congress. *See id.*

[297] *Id.* at 133.

[298] *Id.* at 139. *See* Denning, *supra* note __ [Colo.], at 163.

[299] *Woodruff*, 75 U.S. at 137.

The *Woodruff* limitation on the Import-Export Clause, which is not without its detractors,[300] persists today.[301]

The Court's modern approach to the Import-Export Clause hails from *Michelin Tire Corp. v. Wages*, which abandoned Chief Justice Marshall's "original package"/open crate dichotomy in favor of a more functional analysis.[302] A New York importer of foreign tires challenged Georgia's assessment of an *ad valorem* property tax on its Georgia inventory.[303] The case presented a tricky and somewhat metaphysical question under Marshall's old "packaging" formula given that tires are simply stacked, not crated, while in transit.[304] In a unanimous opinion by Justice Brennan, the Court set aside rigid scrutiny of original packaging and instead focused on the "three main concerns" previously identified by Marshall that had motivated the framers to craft the Import-Export Clause—allowing the federal government to conduct foreign commerce "with one voice"; providing an exclusive source of revenue to the federal government; and preventing a major source of friction between seaboard states and states with less favorable portage situations.[305] Going through each purpose in turn, the Court concluded that a nondiscriminatory *ad valorem* tax would not affect the federal government's singular voice or impair its exclusive right to revenue from duties and imposts and would not give rise to the interstate conflicts against which the Import-Export Clause was addressed.[306] Because the nondiscriminatory tax was not based on the tires' foreign origin or status as imports and did not trigger interstate evils, the Court upheld it.[307]

3. Application to the Big State Problem

So long as *Woodruff* remains intact, the Import-Export Clause has no application to the Big State Problem. As defined, we are looking at a state's nondiscriminatory regulation of products for sale in its internal markets, which can generate spillover effects in other states for

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[300] The most thorough modern critique of *Woodruff* is in Justice Thomas's solo dissent in *Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 621-40 (1997). Justice Thomas relied extensively on the mid-twentieth century analysis of Professor William Crosskey, who had concluded that "it would be fantastic to suggest "that the framers "could have read the [Import-Export] Clause as applying to 'foreign imports' and 'foreign exports' only." William W. Crosskey, *The True Meaning of the Imports and Exports Clause: Herein of 'Interstate Trade Barriers,'* in 1787, *in* 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 297-300 (1953). Crosskey references numerous instances of prominent advertisements in contemporaneous newspapers for goods "[j]ust imported from Philadelphia" and the like. *Id.* at 298.

[301] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 & n. 4 (2019) (recognizing extant *Woodruff* limitation but acknowledging its critics); Mallory v. Norfolk S. Ry. Co., No. 21-1168, 2023 WL 4187749, at * 17 n. 4 (June 27, 2023) (Alito, J., concurring in part) (noting that, whether or not *Woodruff* was correct "as an original matter," it is "entrenched").

[302] 423 U.S. 276 (1976).

[303] *See id.* at 278-80. "The typical ad valorem property tax is an annual levy on property in the form of a percentage of its value." Note, *Development in the Law – Federal Limitations on Developments – State Taxation*, 75 HARV. L. REV. 955, 978 (1962).

[304] *See Michelin Tire*, 423 U.S. at 281-82.

[305] *Id.* at 285. To reach this result, the Court had to overrule *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871). *Low* had barred the state of California from assessing an *ad valorem* tax on champagne imported from France because the bottles were still in their original shipping packages, effectively creating total immunity from state taxation until the bottles were out of their crates. *See id.* at 35.

[306] *See Michelin Tire*, 423 U.S. at 286-90.

[307] *See id.* at 290-94.

producers who wish to sell in that state's market. *Woodruff* restricts the Import-Export Clause to state efforts to impose duties on foreign goods only.

Let's imagine, though, a world in which the *Woodruff* detractors prevail and the Import-Export Clause bans imposts and duties on imports and exports from foreign entities *and* other states. The first hurdle is that the clause by its terms is limited to certain kinds of taxes and does nothing to circumscribe other forms of state regulation, even regulation that is plainly protectionist/discriminatory.[308] Obviously, the Court is unlikely to get hung up on specific labels if a state is plainly attempting to assess imports *qua* imports. *Brown v. Maryland*, which invalidated a license fee rather than a tax, believed the fee to be within the ambit of the prohibition, reasoning, "[i]t is impossible to conceal from ourselves that this is varying the form without varying the substance."[309] Taxing the importer, Chief Justice Marshall reasoned, is "in like manner a tax on importation."[310] Still, the Court was at pains to match up the state's conduct with its understanding of the clause's underlying substantive target.[311] It is more of a stretch to take the clause out of an import-tax-adjacent space altogether.

But suppose we do that. Taking a cue (really, a leap) from the *Michelin* decision, the Court could step away from taxes as such and use the Import-Export Clause to invalidate anything that might generally give rise to the evils against which the clause was directed. That would be a dramatically atextual move, and the Justices who have inveighed against the loosey-goosey mooring of the dormant Commerce Clause cases[312] might find it challenging to get there in a principled fashion. Even were there five votes to do that, however, there is no obvious connection between a state barring certain products from its markets and the power of Congress to speak with one voice in foreign commerce.[313] Conceivably, a state's decision to ban sale of shark fins might occasion upset in certain countries, but the negotiating "voice" would still belong to Congress, which could, in any event, displace state regulation if it wished. Nor does a state's regulation of its in-state market impair the exclusive right of Congress to derive revenue from imposts and duties on foreign imports and exports.[314] Whether a state barring certain

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[308] *See* Denning, *supra* note __ [Colo.], at 219-20.
[309] Brown v. Maryland, 25 U.S.(12 Wheat.) 419, 444 (1827).
[310] *Id.*
[311] *See also* Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 8 (2009) (stating that the Tonnage Clause, which prevents states from levying duties or taxes on incoming ships and is closely related to the Import-Export Clause, bars attempts to indirectly achieve what states cannot achieve directly). The *Polar Tankers* Court referenced the purpose of the Tonnage Clause and concluded that it barred any tax specific to vessels that taxed them differently from other property. *See id.* at 12-13. The Court used a specific formulation of the clause's purpose, avoidance of exploitation. For an excellent discussion of the case, *see* Michael S. Greve, THE UPSIDE-DOWN CONSTITUTION 357-58 (2012). As Greve relates, the principle that states cannot circumvent constitutional prohibitions by clever labelling "must have a limit—defined, like the principle itself, by the purpose of the underlying provision." *Id.* at 358.
[312] *See* Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 609-21 (1997) (Thomas, J. dissenting); Tyler Pipe Indus. v. Wash. State Dept. of Revenue, 483 U.S. 232, 259-64 (1987) (Scalia, J., concurring in part and dissenting in part).
[313] *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).
[314] *See id.* The *Michelin Tire* Court specifically rejected the argument that heightened costs might affect Congress's revenue stream indirectly by decreasing the number of products imported, reasoning that "prevention or avoidance of this incidental effect was not . . . even remotely an objective of the Framers in enacting the prohibition." *See id.*at 287.

products in its markets undermines interstate "harmony" in a way that offends the Import-Export Clause presents a classic level-of-generality problem. The precise interstate evil against which the clause was directed was port states enriching themselves by gouging other states, who would bear costs but not benefits and whose citizens had no meaningful political remedy.[315] When State A regulates the products for sale in its own markets, it does not fill its own coffers; to the contrary, increased costs are likely to be borne by State A consumers. Even were we to focus on a functional analysis of the purposes of the Import-Export Clause, then, its application to the Big State Problem would necessitate a stretch to untenable extremes.

C. The Full Faith and Credit Clause

Justice Kavanaugh's final candidate for possible resolution of the Big State Problem is the Full Faith and Credit Clause of Article IV, Section 1, which consists of a self-executing clause providing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,"[316] followed by the Effects Clause, which grants permissive power to Congress to enact general laws that "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[317] It is an understatement to suggest that, "[a]fter more than 200 years, the Full Faith and Credit Clause remains poorly understood."[318] Per Justice Jackson, the chief function of the clause is "to coordinate the administration of justice among the several independent legal systems which exist in our federation."[319] A flurry of scholarship following Congress's passage of the Defense of Marriage Act (DOMA),[320] which allowed states to refuse recognition of same-sex marriages permitted in other states, suggests there may be a serious disconnect between the understanding of the clause at the framing and its modern compass; however, these revisionist views are not without their critics.[321]

1. Textual Analysis and Early Understanding

Like the other textual levers of horizontal federalism, the Constitution's Full Faith and Credit Clause had an immediate antecedent in the Articles of Confederation, which mandated

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[315] *See supra* notes __ and accompanying text.
[316] U.S. CONST. art IV, § 1.
[317] *Id.*
[318] Sachs, *supra* note__, at 1202. *See also* Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 126 (2011) (suggesting that, "to modern eyes," the clause "contain[s]a contradiction").
[319] Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945).
[320] Pub. L. 104-199, § 2(a), 110 Stat. 2419 (1996)
[321] *See, e.g.*, Sachs, *supra* note __, at 1208-09 (arguing that the self-executing clause had evidentiary implications only and that Congress's power under the Effects Clause was understood to be a potential power it had not yet exercised); Engdahl, *supra* note __, at 1588 (arguing that the Constitution sets forth only an evidentiary principle and it is the 1790 Act that prescribes a *res judicata* effect). *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2003 (1997) (arguing that unqualified "full" and mandatory "shall" in the Full Faith and Credit Clause mean Congress lacks power under the Effects Clause to allow states to accord less than full effect to sister state judgments); Schmitt, *supra* note __, at 530-32 (articulating a "historical view" that the conclusiveness of state judgments derives from the Full Faith and Credit Clause itself).

that states give "full faith and credit . . . to the records, acts, and judicial proceedings of the courts and magistrates" of sister states.[322] By the 1780s, the words "full," "faith," and "credit" were in regular use and generally understood by lawyers to refer to the probative value of evidence.[323]

The Articles avoided overt treatment of what effects courts would accord sister state records,[324] but judicial decisions under the Articles frequently (though not exclusively) treated the phrase as a rule of evidence, ensuring that properly authenticated documents were admissible.[325] Upon their admission, their substantive basis was subject to challenge. For example, in *Phelps v. Holker*,[326] a Pennsylvania action to enforce a judgment rendered in Massachusetts, the Pennsylvania Supreme Court rejected plaintiff's argument that the Massachusetts judgment conclusively resolved the issue of debt, holding that "the Defendant ought still to be at liberty to convert and deny it."[327] Any other reading of the Articles of Confederation, the court reasoned, would work "evident mischief and injustice."[328]

At the Constitutional Convention, the Committee of Detail added the Full Faith and Credit Clause with little fanfare towards the end of the summer of 1787, incorporating the Articles of Confederation's list and adding "the acts of the Legislatures" of each state.[329] After a back-and-forth between federalists and anti-federalists on a possible role for Congress, the framers granted Congress a discretionary authority to prescribe the "effect" of these acts, records, and judicial proceedings.[330] If the self-executing component of the clause simply required states to admit sister state records into evidence, it would fall on Congress to flesh out

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[322] ARTICLES OF CONFEDERATION of 1781 art. IV, para. 3. The Articles did not operate on a blank slate, either. Four of the colonies had statutes governing their sister states' records, three of which addressed their means of authentication and admission into evidence. *See* Sachs, *supra* note __, at 1221-22 (describing Connecticut, Maryland, and South Carolina laws). The fourth, Massachusetts, passed a statute in 1774 that specified not merely the means of authentication, but allowed that a judgment creditor could file an action in Massachusetts on an out-of-state judgment as if such judgment had been obtained in Massachusetts. *See id.* at 1222 (describing Massachusetts act); *see also* Engdahl, *supra* note __, at 1584, 1611 (same).

[323] *See* Engdahl, *supra* note __, at 1607-08.

[324] Engdahl relates that the 1781 Continental Congress committee that considered possible improvements to the newly-approved Articles flagged consideration of sister-state effect as an unresolved issue. *See* Engdahl, *supra* note __, at 1611. Yablon says the Articles clause "was born in confusion." Yablon, *supra* note __, at 140.

[325] *See* Daniel A. Crane, *The Original Understanding of the "Effects Clause of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 316-18 (1998); Engdahl, *supra* note __, at 1614-19.

[326] 1 Dall. 261 (Pa. 1788).

[327] *Id.*

[328] *Id.* A contrary decision is *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8 (1784), in which a South Carolina court found itself "obliged to give due faith and credit" to a North Carolina admiralty court's proceedings, considering it "conclusive as to this point." *Id.* Engdahl recounts that this is the only case under the Articles where a full *res judicata* approach "received even a passing judicial nod." Engdahl, *supra* note __, at 1614.

[329] 2 Max Farrand, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 188 (1966). Initially, inclusion of legislative acts was an effort sweep in state insolvency laws. *See* Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIS. 215, 219-20 (1957). Nadelmann reports that, at the time of the Convention, some states, like Connecticut and Pennsylvania, relied on special acts of the legislature to provide relief to individual insolvent debtors, and whether sister states would recognize one state's discharge of debts was a contentious issue. *See id.* at 221-25.

[330] *See* Crane, *supra* note __, at 322-24 (recounting the debate).

precisely what effect they would have upon admission.[331] Madison characterized the conferral of authority on Congress as "an evident and valuable improvement" on the Articles of Confederation version, which he found "extremely indeterminate."[332] This power, he contended, made the clause "a very convenient instrument of justice."[333]

In 1790, Congress passed a statute prescribing the manner of authentication for acts of state legislatures, records, and judicial proceedings to be admitted in courts of sister states.[334] The Act went on to provide that records and judicial proceedings—not acts of state legislatures—"shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[335] The meaning of this sentence is not obvious[336]; Stephen Sachs has argued that it, too, specified the evidentiary effect of properly authenticated documents rather than mandating any particular *res judicata* consequences,[337] and he recounts two decades thereafter in which Congress attempted—unsuccessfully—to pass bills regulating the effects of sister state judgments as evidence of prevailing understanding that the Constitution and 1790 Act had left the issue unresolved.[338] At the least, as David Engdahl recounts, "controversy would rage" for nearly two decades until the Supreme Court resolved the question.[339]

2. Judicial Interpretation

The Supreme Court settled any debate the 1790 Act engendered regarding judicial proceedings in *Mills v. Duryee* in 1813.[340] Plaintiff filed an action seeking to collect on a New York judgment in Washington D.C., and defendant responded denying that he owed anything. Rejecting the argument that the 1790 Act required only that the New York judgment serve as *prima facie* evidence of a debt, the Court, per Justice Story, held that the Constitution had empowered Congress to give sister state judgments conclusive effect and that Congress had, by the 1790 Act, in fact done so.[341] Because the New York judgment was conclusive in New York, the Court reasoned, "[i]t must, therefore, be conclusive here also."[342]

Thereafter, as Engdahl recounts, "by a gradual process of intellectual slippage that was neither recognized nor remarked upon at the time," what was seen as a clear *statutory* command in *Mills* was, by the late nineteenth century, attributed to the Constitution's self-executing Full

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[331] *See* Sachs, *supra* note __, at 1206.
[332] THE FEDERALIST No. 42 (Madison) 232 (J.R. Pole ed., 2005).
[333] *Id.*
[334] 1 Stat. 122 (1790) (codified as amended at 28 U.S.C. § 1738 (2006)).
[335] *Id*. Professor Laycock interprets the statute differently and believes that it does prescribe the effect of state statutes. *See* Laycock, *supra* note __, at 295.
[336] *See* Engdahl, *supra* note __, at 1587 (observing that the 1790 Act "caused confusion among lawyers, judges, and even legislators").
[337] *See* Sachs, *supra* note __, at 1233-40.
[338] *See id.* at 1246-58. Professor Laycock disagrees with this view. *See* Laycock, *supra* note __, at 304 (arguing that seeing the clause as prescribing evidentiary weight only "is a clever way of giving little or not credit").
[339] Engdahl, *supra* note __, at 1636; *see also* Whitten, *supra* note __, at 567 (noting that correct meaning of 1790 Act "is not entirely free from doubt").
[340] 11 U.S. (7 Cranch) 481 (1813).
[341] *See id.* at 485.
[342] *Id.* at 484.

Faith and Credit Clause itself.[343] Thus, by 1887, the Court said "[w]ithout doubt" that the constitutional requirement "implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."[344]

The modern approach treats the Full Faith and Credit Clause itself as the source for required *res judicata* effects, but it differentiates sharply between the results of sister-state judicial proceedings and the application of sister-state statutes and common law rules. The Court takes as a given that the Full Faith and Credit Clause itself requires a state to give conclusive effect to sister-state judgments if rendered by a court with competent jurisdiction.[345] This obligation is "exacting" and gives the judgment of the rendering court "nationwide force."[346] "A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits."[347] For judgments, this means unquestioned adherence to conclusions "in the context of concrete disputes over particular facts."[348]

At the same time, the clause does not oblige a state to apply a sister state's statute or common law rules in lieu of its own in matters where it is competent to legislate.[349] The Full Faith and Credit Clause only weakly constrains a state's power to select its own law in adjudicating cases—even cases whose facts arose predominantly out of state.[350] The Court has merged the Full Faith and Credit Clause analysis with the Due Process Clause in the choice-of-law context[351] and acknowledged that state' legislative jurisdiction can overlap.[352] Provided a forum state has sufficient contacts with a dispute such "that choice of its law is neither arbitrary nor fundamentally unfair," the Court has permitted it to select its own law over that of an interested sister state.[353] The bar for sufficient contacts is low. In *Allstate Insurance Co. v. Hague*,[354] a plurality of the Court permitted a Minnesota court to use Minnesota's uninsured

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[343] Engdahl, *supra* note __, at 1589; *see also* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 344 (1998) (describing late nineteenth century confusion over whether *Mills* interpreted the statute or the Constitution itself).
[344] Chi. & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887).
[345] *See* Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 232-33 (1998). *But see id.* at 241-42 (Scalia, J., concurring in the judgment) (arguing that the clause only controls the evidentiary effect of out-of-state judgments).
[346] *Id.* at 233.
[347] V.L. v. E.L., 577 U.S. 404, 407 (2016) (per curiam).
[348] Schmitt, *supra* note __, at 531.
[349] *See Baker*, 522 U.S. at 232 (quoting Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)). During the nineteenth century, "neither litigants nor the courts seemed to suppose that the Constitution obligated states to enforce sister-state laws." Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 EMORY L.J. 1023, 1031 (2014).
[350] *See* Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 494, 499 (2003) (declining "to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause").
[351] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985). This approach is not without critics. *See generally* Laycock, *supra* note __, at 261-70 (arguing that allowing states to select their laws because in-state parties are affected violates the antidiscrimination principle inherent in the Privileges and Immunities Clause).
[352] *See* Sun Oil v. Wortman, 486 U.S. 717, 727 (1988). The concept of "legislative jurisdiction" typically arises when a state seeks to apply its own law to foreign facts, and its contours are 'relatively unexplored." Willis Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978).
[353] *Phillips Petroleum*, 472 U.S. at 818.
[354] 449 U.S. 302 (1981).

motorist insurance "stacking" provision in a suit over the death of a Wisconsin resident who had purchased insurance and suffered his fatal accident in Wisconsin.[355] The decedent had commuted daily into Minnesota for work, and his widow had moved to Minnesota before filing suit for reasons unrelated to the Minnesota law.[356] These weak connections, the plurality found, were enough to satisfy Due Process and the Full Faith and Credit Clause[357]; Minnesota, in other words, could constitutionally apply Minnesota rules to adjudicate the consequences of a Wisconsin accident that killed a Wisconsin resident. A majority of the Court cited the *Allstate* standard with approval in *Phillips Petroleum Co. v. Shutts*.[358] Though the *Phillips Petroleum* Court reached a different result, concluding that Kansas could not constitutionally apply its own law where it lacked *any* interest, the Court specifically distinguished the facts of *Allstate*, which it agreed satisfied the standard.[359]

3. Application to the Big State Problem

The Full Faith and Credit Clause, combined with the Effects Clause, may be purely evidentiary in its self-executing aspect while conferring power on Congress to specify the effects of sister-state laws and judgments. Alternatively, and as presently understood, it may on its own terms create an inexorable command that states give conclusive effect to out-of-state judgments of courts with competent jurisdiction and some markedly weaker obligation in certain circumstances to apply a sister state's law in the context of adjudication.

Regardless, it is difficult to see how the Full Faith and Credit Clause can affect a Big State's right to control what products it allows in its in-state market when spillover effects, though predictable, are unintentional. First of all, Proposition 12 simply exerts authority over what products may be sold in California's retail market. It does not purport to dictate choices made by out-of-state actors. Iowa is free to have different rules regarding animal husbandry in Iowa, over which it clearly has an interest; it is not bound by California's rule and cannot foist its own rules on California actors. Because California represents such a big segment of the national pork market, its requirements will obviously have predictable out-of-state effects as producers opt to comply. Whether out-of-state producers change their practices to conform to the California rule, though, is a purely voluntary endeavor. The extraterritorial impact of Proposition 12 is simply a function of the allure of California's market.

D. Putting It All Together

Although the Constitution contains several self-executing levers of horizontal federalism, none of them are offended by a state's nondiscriminatory regulation of products for sale in its own market. The Privileges and Immunities Clause mandates equal treatment with respect to certain core rights. As presently understood, it applies only to human beings, rather than to out-of-state corporations. But even if the Court were to dispense with that disputed limitation, the

[355] *See id.* at 313-20 (plurality opinion).
[356] *See id.*
[357] *See id.* at 320. Laycock criticized *Allstate* as "the apparent end of all meaningful limits." Laycock, *supra* note __, at 257.
[358] *See Phillips Petroleum*, 472 U.S. at 821-822.
[359] *See id.* at 821-23.

clause's antidiscrimination principle by definition has no application where a state is regulating products for sale in its in-state market in an evenhanded, nondiscriminatory way.

The Import-Export Clause is a narrow provision, narrowed further by the Supreme Court, designed to guarantee certain income streams to the federal government, to allow the federal government to speak with a single voice in foreign affairs, and to prevent port states from enriching their own coffers at the expense of their geographically-unblessed neighbor states. Even were the Court to undo the clause's current limitation to imposts and excise taxes on foreign imports and to step away from its rigid focus on the tax context, none of the long-asserted objectives of the clause is offended by a state's evenhanded regulation of products for sale in its own market. Far from lining its own pockets at the expense of neighbors, the state imposing extra restrictions on products for sale in its own markets typically anticipates increased costs for its own consumers, an inversion of the situation against which the Import-Export Clause was directed. As is the case with Proposition 12, moreover, these affected consumers have recourse at the ballot box.

Finally, the Full Faith and Credit Clause, perhaps least understood of the three, has two distinct tracks. The Court currently understands it to require State B to give conclusive, unquestioned effect to judgments validly obtained in State A. Scholars have hotly debated whether this requirement stems from the Full Faith and Credit Clause itself or from an act of Congress implementing it under the Effects Clause. Regardless, the requirement's focus on judicial proceedings, not statutes, makes it an awkward tool to import into the Big State context, where we are assessing the impact of a regulatory scheme. The Court has acknowledged that states have overlapping legislative jurisdiction and allowed states considerable leeway in rejecting application of statutes where they have interests of their own. The issue typically arises, though, where states apply their laws to out-of-state facts. Proposition 12 involves no out-of-state compulsion. A farmer's decision to modify products for sale in a Big State market may be a sensible business decision; however, no one is forcing the farmer to do so. The Big State Problem would not appear to tee up any of the issues with which either track of the Full Faith and Credit Clause is concerned.

E. Implications

Should any of this surprise us? Really, no. In a way, it is more surprising that five members of the current Court have concerns about the Big State Problem than it is that the text-based levers in the Constitution are not offended by it. The Court has long approved state regulation of products for sale in in-state markets, even at a time when it played a more active role patrolling boundaries between interstate and in-state interests.[360] The Court has for nearly half a century recognized that costs of doing business in particular states can be formidable and has predicated the law of personal jurisdiction on a corporation's agency—its ability to avoid certain state markets altogether if anticipated costs run too high.[361] So too, the Court has consistently recognized that one way a company can reflect that it has opted *in* to a state's

[360] *See supra* notes __ and accompanying text.
[361] *See supra* notes __ and accompanying text.

market is by designing a product for sale in that market.[362] Different state markets entail compliance with different state requirements. All of this is commonplace stuff; none of these oft-repeated principles has ever occasioned any concern.

Citizens of a state may have various reasons for banning products from their markets—like environmental, economic, or health and safety reasons, for example. Some regulations—like Proposition 12—may have a distinct and admitted moral component.[363] In an era of Red State/Blue State polarization, it is not difficult to imagine states devising rules vindictively; surely, that prospect lurks behind a lot of the Justices' disquiet. If California is manipulating products for sale in its markets in an effort to punish Texas or deprive Texas citizens or businesses of a competitive advantage (or vice versa), though, the dormant Commerce Clause and Privileges and Immunities Clause will enter the room. Setting aside any purpose to discriminate against another state's citizens or harm another state's market—for which we have tools already in the arsenal—state regulations predicated on different moral views or varying tolerances for environmental or personal risk ought not to offend. States have long had Blue Laws mandating Sunday closure of retail establishments.[364] Kansas, Mississippi, and Tennessee are dry states unless counties specifically act to *permit* sale of alcoholic beverages.[365] As of August 2023, eleven states have banned the sales of cosmetics tested on animals.[366] New York recently banned gas stoves and furnaces in new buildings in an effort to cut greenhouse gas emissions, a measure that will effectively require electric stoves in all new construction.[367] If these nondiscriminatory regulations of an in-state market cause great offense, Congress can step in.[368] But a state's nondiscriminatory control of products it allows for sale in-state does not offend the horizontal federalism clauses of the 1789 Constitution. Even if it's a Big State.

CONCLUSION

Though frustratingly divided, the *Pork Producers* Court came up with the right result. There is a dormant Commerce Clause, but it has solid applications only where there is manifest need for a single, uniform rule due to the involvement of a national asset or where states are acting with a protectionist purpose, seeking to discriminate against out-of-state business in order

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[362] *See supra* notes __ and accompanying text.

[363] *See* Oral Argument at 1:49, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468), http://www.yez.org/cases/2022/21-468.

[364] The Court upheld Maryland's Blue Laws over a First Amendment challenge in *McGowan v. Maryland*, reasoning that Maryland had the secular purpose of setting aside a day of rest and permitting people to visit friends and relatives unavailable during the workweek. *See* 366 U.S. 420, 450-51 (1961).

[365] *See* Dry States 2024, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/dry-states (last visited Jan. 16, 2024).

[366] *See* https://www.humanesociety.org/resources/cosmetics-animal-testing-faq#:~:text=As%20of%20August%202023%2C%2011,sale%20of%20animal%2Dtested%20cosmetics (last visited Jan. 17, 2024).

[367] *See* N.Y. Energy Law § 11-104 (LexisNexis 2023). Industry stakeholders have challenged this provision, claiming it is preempted by the Energy Policy and Conservation Act (ECPA), Pub. L. 94-163, 89 Stat. 871 (1975).

[368] Challengers to the New York statute claim that Congress already *has* stepped in, creating a comprehensive federal approach to energy regulation that bars individual states from regulating in this space. *See* Complaint at 3-5, Mulhern Gas Co. v. Rodriguez, No. 1:23-cv-01267 (N.D.N.Y. Oct. 12, 2023). *See also* Cal. Rest. Ass'n v. City of Berkeley, No. 21-16278, 2024 WL 23986, at ** 4-8 (Jan. 2, 2024) (invalidating similar Berkeley ordinance on basis that it is preempted by the ECPA).

to prop up their own local interests. These applications have history and precedent on their side; any foray into balancing state interests against out-of-state effect in the context of nondiscriminatory legislation both lacks solid grounding in precedent and launches federal judges on an unmoored inquiry that jeopardizes the Court's eighty-six-year commitment to rational basis scrutiny of economic legislation.

Nor do the other self-executive levers of horizontal federalism—the Article IV Privileges and Immunities Clause, the Import-Export Clause, and the Full Faith and Credit Clause—have any bearing on the inquiry when we start from a premise of non-discrimination. These clauses proved toothless under the Articles of Confederation, and the framers imported them into the Constitution with only cosmetic, non-substantive modifications. Under the Constitution, as opposed to the Articles, they are enforceable by the federal courts, but none of them is addressed at a Big State's nondiscriminatory regulation of products for sale in its own market. Our system has long assumed that companies can opt out of markets, and in the absence of congressional action, there seems little basis to set aside that long-entrenched assumption. But if we're wrong about that, if a Big State market's irresistibility proves too problematic, Congress, not the federal judiciary, is the entity constitutionally charged with stepping into the breach.