

***NATIONAL PORK PRODUCERS COUNCIL V. ROSS: AN INVITATION TO
REVISIT THE IMPORT-EXPORT CLAUSE?***

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Introduction

In one of the most closely watched cases of the Supreme Court’s 2022 Term, [*National Pork Producers Council v. Ross*](#) (2023) (*NPPC*), the Court upheld California’s Proposition 12, which forbids the sale of pork from pigs that were “[confined in a cruel manner](#).” Given that California imports most of the pork consumed within the state, the plaintiffs contended that the law violated the dormant Commerce Clause. Writing in part for the Court, Justice Neil Gorsuch rejected this challenge and clarified the dormant Commerce Clause doctrine in doing so. Justice Gorsuch’s opinion, as well as Justice Brett Kavanaugh’s partial concurrence, briefly touched on another, more obscure, clause: the Import-Export Clause.

The Import-Export Clause bars states from imposing, without congressional consent, “[any Imposts or Duties](#)” on imports and exports. Mid-nineteenth-century Supreme Court precedent cabined the Clause’s applicability to only foreign trade. This precedent is quite plausibly erroneous. Yet even in the context of foreign trade, the Import-Export Clause has largely been superseded by the dormant Commerce Clause. Even though the Import-Export Clause did not bear on the outcome in *NPPC*, taken together the Justices’ opinions signal that the time to reexamine the Import-Export Clause is fast approaching.

And even if the Court, as it shifts in an originalist direction, determines that its dormant Commerce Clause doctrine is largely correct in an interstate context (and thus largely overlaps with the Import-Export Clause), a better understanding of the Import-Export Clause may provide clarity on the limits of state regulation of interstate commerce. As states such as California increasingly experiment with novel regulations that significantly implicate interstate commerce, from confinement requirements for cattle to [board diversity requirements](#) for foreign corporations, a proper understanding of these clauses will only grow in importance.

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I. The Impact of *National Pork Producers Council*

The dormant Commerce Clause represents a negative inference from Congress’s [constitutional authority](#) “[t]o regulate commerce . . . among the several states.” The Clause has been read to particularly ban actions taken by states to discriminate against out-of-state actors. Additionally, in [Pike v. Bruce Church, Inc.](#) (1970), the Court outlined a standard that “[w]here 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*” (emphasis added). To succeed on a *Pike* balancing challenge, a plaintiff must show that the regulation imposes a substantial burden on interstate commerce before the court weighs the relevant interests.

In *NPPC*, Justice Gorsuch [observed](#) that an “antidiscrimination principle lies at the ‘very core’ of the Court’s dormant Commerce Clause jurisprudence”: states may not impose regulations that discriminate against other states. Thus, even for Justice Gorsuch and Justice Clarence Thomas, two Justices generally skeptical of the dormant Commerce Clause doctrine, facially discriminatory protectionist efforts to build up industry within a state are constitutionally impermissible. And the Court unanimously [rejected](#) the notion that the dormant Commerce Clause contains “an ‘almost per se’ rule against state laws with ‘extraterritorial effects.’”

Yet, the Court did not reach a clear holding on the application of *Pike* balancing to Proposition 12. While a majority of Justices rejected a *Pike* challenge to Proposition 12, their reasons for doing so differed. Justice Gorsuch, joined by Justice Thomas and Justice Amy Coney Barrett, rejected the plaintiff’s *Pike* challenge on commensurability grounds, arguing that courts could not weigh the interests implicated by Proposition 12. Justices Sonia Sotomayor, Elena Kagan, Gorsuch, and Thomas rejected the *Pike* challenge on the grounds that the plaintiffs had failed to plead that Proposition 12 had substantially burdened interstate commerce. In dissent, Chief Justice John Roberts, who was joined by Justices Samuel Alito, Kavanaugh, and Ketanji Brown Jackson, wrote that he would have remanded the case, finding both that a substantial burden had been alleged and that the interests at issue were commensurable.

Nevertheless, even with *Pike*’s uncertain application to regulations such as Proposition 12, it remains a component of the Court’s dormant Commerce Clause analysis. Post-*NPPC*, it seems plausible that *Pike* balancing will be more limited, however. The majority’s emphasis that the “antidiscrimination principle” constitutes

the “very core” of the dormant Commerce Clause may serve to eventually limit Commerce Clause challenges to at least plausibly, if not facially, discriminatory regulations. Relatedly, the Court [emphasized](#) in *NPPC* that even “facially neutral” actions can violate the dormant Commerce Clause if their “practical effect[s] . . . reveal[] a discriminatory purpose.” Justice Gorsuch [conceded](#) that “a small number of [the Court’s] cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory,” though he emphasized that *Pike* and cases derived from it reflect the antidiscrimination principle.

Furthermore, concerns about commensurability, even though only three Justices found such problems in the facts at issue in *NPPC*, may impede lower courts from engaging in *Pike* balancing. Thus, as is admittedly always the case in precedent-laden constitutional law doctrines, the exact remaining reach of the dormant Commerce Clause remains an open question after *NPPC*.

While the bulk of Justice Gorsuch’s *NPPC* opinion fleshed out this dormant Commerce Clause doctrine, it made passing reference to a considerably more obscure constitutional provision: the Import-Export Clause. Though the dormant Commerce Clause, with its broader language, has [largely swallowed](#) the Import-Export Clause, the opinions of *NPPC* suggest that it is appropriate to reconsider the Import-Export Clause.

Justice Gorsuch [noted](#) in *NPPC* that the Court “[had] no need to engage with [the Import-Export critique] to resolve [the] case.” Yet clever litigants, armed with a similar, yet slightly altered set of facts, and a theory that emphasizes the Import-Export Clause, may soon be able to persuade the Court to face the issue. And indeed, as the Court reexamines constitutional provisions through an originalist lens, (exemplified by cases such as [New York State Rifle & Pistol Ass’n v. Bruen](#) (2022)) it should not forget the oft-neglected Import-Export Clause. An originalist interpretation of the Import-Export Clause would likely differ from the Court’s current doctrine in material ways, such as the applicability of the Clause to duties on domestic imports and exports. While the Import-Export Clause implicates “Imposts” and “Duties,” and thus would likely not apply to regulations such as California’s Proposition 12, it may play an important role in limiting other interstate regulations.

II. Today’s Import-Export Clause

The [Import-Export Clause](#), art. I, § 10, cl. 2 of the Constitution, provides the following limitation on states:

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: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

Looking at this Clause in *NPPC*, Justice Gorsuch briefly [remarked](#) that some members of the Court have “suggested that [the antidiscrimination principle] may be more appropriately housed” in the Import-Export Clause. He cited Justice Thomas’s dissent in [Camps Newfound/Owatonna, Inc. v. Town of Harrison](#) (1997), which observed that “[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application” and argued that the Import-Export Clause provides stronger textual grounding for limitations on interstate trade.

Concurring in part, Justice Kavanaugh [observed](#) in *NPPC* that “if one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause.”

Yet, as both Justice Thomas and Justice Kavanaugh have noted, current precedent strictly bars the application of the Import-Export Clause to situations such as those at issue in *NPPC*. In [Woodruff v. Parham](#) (1868), the Supreme Court held that the Import-Export Clause applies only to *foreign* trade. This decision seemingly represented a departure from practice at the founding, when the Clause was [thought to apply to trade between states](#) in addition to that with foreign countries.

The Court’s [recent originalist turn](#) toward examining constitutional questions through the lens of text, history, and tradition should prompt reconsideration of this once-prominent Clause. As Justices Gorsuch and Kavanaugh imply in their respective opinions in *NPPC*, there is compelling reason to believe that *Woodruff* is erroneous. The text, history, and tradition of the Import-Export Clause strongly suggest that the Clause bars certain *interstate* taxes as well.

Litigants should not hesitate to raise such Import-Export challenges, as the time for the Supreme Court to reconsider the intersection of the dormant Commerce Clause with the Import-Export Clause is ripe. Justices Kavanaugh, Thomas, and Gorsuch have signaled at least some willingness to revisit the doctrine. As states

explore novel interstate regulations, an opportunity for a successful Import-Export challenge may present itself to a savvy litigant.

III. Revisiting the Import-Export Clause and the Dormant Commerce Clause

Relatively little scholarly material on the Import-Export Clause has been published, with the late Professor Boris Bittker and Professor Brannon Denning providing some of the [most comprehensive research](#). However, perhaps surprisingly to the modern reader, the Import-Export Clause [generated more discussion](#) at the Constitutional Convention than the Commerce Clause. Bittker and Denning suggest that some of this may be due to the relative specificity of the language in the two Clauses. Whereas the Commerce Clause provides Congress the broad power “to regulate commerce,” the Import-Export Clause provides a specific limitation on certain “Imposts or Duties on Imports or Exports.” This relative difference in debate between these two Clauses at the Constitutional Convention may also suggest that some of the more creative uses of the Commerce Clause are inconsistent with its original understanding. Nevertheless, the open nature of the Commerce Clause led it to take on a far more prominent role in constitutional law (even in the context of state regulation of commerce, of which it contains no explicit prohibition) than did the Import-Export Clause.

Any argument that the Import-Export Clause has a role to play in interstate matters must, as a threshold matter, show that the Court’s holding in *Woodruff* (that the Clause only applied to foreign commerce) was erroneous. And the available historical record suggests that the Justices who have questioned the holding are right to do so.

In forging his argument to revisit the scope of the Clause in *Camps Newfound/Owatonna, Inc.*, Justice Thomas [cited heavily](#) from Professor William Crosskey’s book *Politics and the Constitution in the History of the United States*.¹ Crosskey looked at contemporary uses of the terms “imports” and “exports,” finding that they were commonly used to refer to trade between the states. After further surveying contemporary usage and debates surrounding the Clause, Professor Denning [observed that](#) the evidence he surveyed, “as well as [that] provided by Professor Crosskey, create[s] a presumption (rebuttable though it may be) that the terms used in the Import-Export Clause were not used exclusively in reference to foreign commerce.”

¹ WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

The proliferation of corpus linguistics provides an opportunity to better understand the meaning of these terms as they were used at the founding. [Corpus linguistics](#) is an emerging approach to legal research that analyzes large databases of language to determine the meaning of words and text. A brief examination of the [Corpus of Founding Era American English \(COFEA\)](#) highlights this tool's potential to uncover the meaning of potentially obscure clauses. A short survey of this corpus reveals that "imports" and "exports" were used to refer to both foreign and interstate trade roughly contemporaneously with the Convention. [One 1784 report](#) of trade in South Carolina specifically quantified "Exports from Charleston" to "To The United States of America" in addition to those to foreign countries. [A letter](#) from a member of the Connecticut Council in 1791 observes that iron bar is "exported to New-York." These examples of ordinary usage suggest that the Import-Export Clause applies to interstate trade, especially when viewed in light of debate at the Constitutional Convention and early Supreme Court jurisprudence. A more thorough examination of founding-era corpora, employing both quantitative and qualitative analysis, likely represents a useful endeavor in understanding the proper scope of the Import-Export Clause and Commerce Clause.

As Denning [has noted](#), records of debate at the Constitutional Convention appear to indicate that the Import-Export Clause also applies to interstate commerce. [Gouverneur Morris supported the addition](#) of a bar on certain state taxes on exports because he "thought the regulation necessary, to prevent the Atlantic States from endeavoring to tax the Western States." At another point in the Convention, Morris also [observed that](#) "[t]he power of regulating the trade between [Pennsylvania] & [New] Jersey will never prevent the former from taxing the latter," suggesting a clear distinction between the Commerce Clause and the Import-Export Clause. James Madison similarly remarked, "The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports."

A few decades after the Constitution was ratified, Chief Justice John Marshall held in [Brown v. Maryland](#) (1827) that a tax on foreign imports by Maryland was "repugnant to that article of the [C]onstitution which declares, that 'no State shall lay any impost or duties on imports or exports'" as well as to the Commerce Clause. In dicta, he added 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." Thus it appears that Chief Justice Marshall, like the framers, viewed the Import-Export Clause as applying to interstate commerce.

The holding in *Brown* portends the challenge that later courts would face in delineating the boundaries between the Commerce Clause and the Import-Export Clause. In what Bittker and Denning [have labeled](#) a process of “constitutional homogenization,” the Court has [largely merged](#) its Import-Export Clause doctrine with the foreign (given the holding in *Woodruff*) dormant Commerce Clause Doctrine. Now, the [Supreme Court’s holding](#) that state taxes that divert revenue from the federal government violate the Import-Export Clause [appears to be](#) its “only unique contribution.” The remaining foreign limitations of the Clause are also prohibited by the dormant Commerce Clause.

The Court would face similar challenges in the domestic context. Elucidating the boundaries between the two doctrines will be challenging. As Justice Marshall’s decision in *Brown* suggests, there will undoubtedly be much overlap between the Clauses, unless the Court, as Justice Thomas [has suggested](#), entirely replaces the dormant Commerce Clause doctrine with that of the Import-Export Clause.

If Justice Thomas is correct that something resembling the dormant Commerce Clause should be housed in the Import-Export Clause instead of the Commerce Clause, an originalist would face great trouble justifying state limitations that are not “Imposts” or “Duties.” As [Denning has observed](#), many currently prohibited regulations would be permitted, unless the Court liberally defined the limitations of the Import-Export Clause. Setting aside an atextual reading of the dormant Commerce Clause for an atextual reading of the Import-Export Clause hardly represents a sound approach to constitutional interpretation. Thus, the significance of a resurrected Import-Export Clause will hinge on how broad the sweep of “Imposts” and “Duties” goes. Forcing “Imposts” and “Duties” to bear weight beyond their original meaning simply creates a novel atextual doctrine covering much of the same ground.

In the wake of *NPPC*, [Iowa and several states](#) alleged that a [Massachusetts confinement law](#) similar to the California law at issue in *NPPC* violates the Import-Export Clause. The analysis of this issue in their amicus brief was largely preliminary, urging that a potential conflict between confinement laws and the Import-Export Clause “warrants reconsideration.” Citing [an article by Professor Robert Natelson](#), the [states argue](#) that “Duties” include measures to regulate or prohibit trade, rather than merely measures to raise revenue. Although the Court has [defined taxes broadly in other contexts](#), the states face difficulty in asserting that regulations subject to fines should be thought of as an “Impost” or “Duty” subject to the Import-Export Clause. As with defining “Imports” and “Exports,” corpus linguistics represents a potentially useful term in defining these terms.

Assuming that the Court does not entirely set aside its dormant Commerce Clause doctrine, determining the boundaries of these Clauses will be difficult due to the significant overlap between the doctrines. One's comfort with this overlap partially depends on how strongly one thinks the presumption against surplusage should apply in the constitutional context.

Additionally, if much of the dormant Commerce Clause were to be set aside and replaced by the Import-Export Clause, states would likely have greater leeway to regulate out-of-state commerce. Read literally, the antidiscrimination principle would only apply to regulations and statutes that could be characterized as an "Impost" or "Duty." It is also impossible to faithfully find a home for judicial *Pike* balancing in the Import-Export Clause, given its explicit bar on such Imposts and Duties "[without the Consent of the Congress.](#)"

The interplay between these Clauses, as well as others like the [Tonnage Clause](#) (which, unlike the neighboring Import-Export Clause, currently does apply to interstate commerce), represents a challenging puzzle for legal scholars and future courts to solve. *NPPC* represents an invitation for scholars and litigators to begin putting the pieces together. Laws and regulations that effectively function as taxes on interstate commerce may well violate the Import-Export Clause.

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