THE PIGGYBACK EFFECT: ABORTION, INTERSTATE COMMERCE, AND *NATIONAL PORK*

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ABSTRACT

The increasing emergence of abortion-related interstate travel bans — spatial regulations that prohibit the physical travel of a pregnant woman from one state to another to obtain an abortion procedure or treatment — pits the exclusive police powers of state governments against the novel Dormant Commerce Clause of the United States Constitution. The Dormant Commerce Clause prohibits states from passing legislation that discriminates against or imposes undue burdens on interstate commerce, regardless of existing federal regulation. Against the backdrop of National Pork Producers Council v. Ross (2023) ("National Pork"), in which the Court conceived of interstate transportation as an insoluble national enterprise, inconsistency in the application of the Dormant Commerce Clause is inevitable as more states work to outright ban or severely restrict abortion access. "The Piggyback Effect" analyzes how National Pork informs the constitutional standards litigators must apply should an abortion travel case reach the Supreme Court under the Dormant Commerce Clause, first from the perspective of states attempting to restrict interstate travel to obtain an abortion and then from that of fictive challengers to such state statutes. By analyzing dissenting and concurring

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opinions, lower court judgments, interviews, and legal scholarship, this article argues that National Pork affirms the unconstitutional burden imposed on interstate commerce by excluding pregnant women from abortion-related marketplaces.

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I. Introduction

"But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."

— Associate Justice Robert Jackson, *Edwards v. California* (1941)[2]

"In a functioning democracy, policy choices like these usually belong to the people and their elected representatives."

— Associate Justice Neil Gorsuch, *National Pork Producers Council v. Ross* (2023)[3]

[2] Edwards v. California, 314 U.S. 160, 186 (1941) (Black & Murphy concurring).
[3] National Pork Producers Council v. Ross, 598 U.S. ___, 20 (2023).

December 1939. His car hugged the black tarmac, the lackluster headlights barely illuminating the onward road when an unexpected gust blew Fred Edwards back to reality. After years of kitchen gardens, patched garments, and blown-out tires, a round-trip from California to Texas was a rare expense. Nonetheless, family was everything to Fred, and his brother-in-law Frank needed a break. Thus, Frank "arrived in California penniless, stayed at [Fred's] home for a short period, and received assistance from the Farm Security Administration" while Fred concealed his crime.[4] Within weeks, law enforcement arrested Fred Edwards for violating a Great Depression-era law that outlawed transporting indigent citizens into California, issuing a sentence that reflected both the cruelty of commerce and the fragility of the right to travel. The Supreme Court ultimately "struck down the California law on the ground that the Commerce Clause proscribes any state attempt to isolate itself from national problems by restraining" interstate movement in *Edwards v. California* (1941) ("*Edwards*"). 82 years later, however, *National Pork Producers Council v. Ross* (2023) ("*National Pork*") hogs the proverbial

[4] Daniel Gordon, *California Retreats to the Past: The Paradox of Unenforceable Immigration Law and Edwards v. California, the Depression, and Earl Warren*, 24 SW. U. L. REV. 319, 340 (1995).

spotlight, providing newfound clarity on the right to travel in the interstate abortion market.[5]

The increasing emergence of abortion-related interstate travel bans — spatial regulations that prohibit the physical travel of a pregnant woman from one state to another to obtain an abortion procedure or treatment — pits the Dormant Commerce Clause against the exclusive police powers of state governments in a manner not seen since *Edwards*. An implicit feature of the otherwise enumerated Commerce Clause, the Dormant Commerce Clause prohibits states from passing legislation that discriminates against or imposes undue burdens on interstate commerce, regardless of existing federal regulation.[6] Against the backdrop of *Dobbs v. Jackson Women's Health Organization* (2022) ("*Dobbs*"), in which the Court declared that the Constitution does not include the right to an abortion in or out of state,

[5] Steve Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare,* 11 YALE L. & POL'Y REV. 147, 148 (1993).

[6] The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, expressly asserts that the national legislature maintains the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In the aftermath of the Constitutional Convention, Federalists and anti-Federalists soon "became convinced that jealousies between states with strong ports and states with weak ports, or between northern and southern states, would negate hopes for self-sufficiency both within and among the states." Thus, in *Gibbons v. Ogden* (1824), Chief Justice Marshall introduced the Dormant Commerce Clause, explaining that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." Marshall maintained that while transportation regulations are the consummate example of an unconstitutional violation of the Dormant Commerce Clause, the definition of commerce is not limited to traffic, expanding the sphere of protection for abortion travel. *See* U.S. CONST. art. I, § 8, cl. 3.; Friedman and Deacon, "A Course Unbroken," 1890; Gibbons v. Ogden, 22 U.S. 1, 189 (1824).

National Pork both "shrank the Dormant Commerce Clause considerably" and indicated "an attitude of permissiveness toward state [abortion] laws despite their extraterritorial effects."[7] [8] Insofar as the Supreme Court upheld California Ballot Proposition 12 ("Proposition 12"), FDP-03-2022, which prohibited the sale and importation of pork from animals confined in a manner inconsistent with state welfare standards, the court demonstrated an effort to apply "a wider lens on the practical effects of a given state law in a modern economy," of which the economic transactions required to obtain an out-of-state abortion must necessarily include.[9] As such, how might *National Pork* shape ongoing efforts in anti-abortion states to "use various forms of nodal regulation to project their policy positions and moral worldviews both within and across territorial borders?"[10] What piggyback effect will *National Pork* exert on the constitutional standards litigators apply should an abortion travel case reach the Supreme Court under the Dormant Commerce Clause?

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[7] Ian Millhiser, *The Supreme Court Rediscovers Humility*, VOX, May 11, 2023, https://www.vox.com/politics/2023/5/11/23719825/supreme-court-pigs-california-national-pork-producers-ross-neil-gorsuch

[8] *Dormant Commerce Clause — Interstate Commerce —State Law — Extraterritoriality — National Pork Producers Council v. Ross,* 137 HARV. L. REV. 330, 336 (2023).

[9] *Id*.

[10] Douglas A. Kysar, *State Public Morality Regulation and the Dormant Commerce Clause,* YALE LAW SCHOOL, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES 1, 4 (2023).

In *the Piggyback Effect*, I argue the *National Pork* Court conceived of interstate transportation as an insoluble national enterprise and tacitly signaled that the out-of-state impact of abortion travel bans on the national economy is too burdensome to uphold. In Section II, I begin by reviewing the post-*Dobbs* relationship between the Constitution and abortion policy and the general architecture of abortion-related interstate travel prohibitions. Section III delineates the role of *National Pork* within the "mainly continuous, sometimes winding" framework of Dormant Commerce Clause jurisprudence.[11] Finally, Section IV analyzes the constitutional standards litigators must apply should an abortion travel case reach the Supreme Court under the Dormant Commerce Clause, both from the perspective of states attempting to restrict interstate travel to obtain an abortion and from that of fictive challengers to such state statutes.

II. The State of Abortion Travel Bans

In *Dobbs*, the Supreme Court reversed over 50 years of precedent and declared that the Constitution does not include the right to an abortion

[11] Richard Friedman, *The Sometimes-Bumpy Stream of Commerce Clause Doctrine*, 55 Ark. L. Rev. 981, 982 (2003).

in or out of state.[12] As University of Pennsylvania Law School Professor Seth Kreimer foresaw in 1992, the "withdrawal of federal constraint [has left] a state-by-state patchwork quilt of reproductive autonomy, if not, as in the regulation of alcohol before and after Prohibition, a pattern in which regulations differ from county to county" and court to court.[13] The proliferation of abortion-related interstate travel prohibitions across the United States compounds the logistical challenges in obtaining an out-of-state abortion for millions of women, elevating the prospect of a quasi-federal abortion ban emerging from the ashes of *Roe v. Wade* (1973) ("*Roe*"). Abortion-related interstate travel bans generally refer to a form of spatial regulation that utilizes the state's police power to prohibit the physical travel of a pregnant woman from her home state to another to undergo an abortion procedure or treatment. As University of California Davis School of Law Professor Katherine Florey explains, "The most aggressive means would be to pass a statute creating a cause of action

[12] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 32 (2022). *Dobbs* addressed a 2018 Mississippi statute prohibiting most abortions beyond the first fifteen weeks of pregnancy, violating the fetal viability standards in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). After finding that abortion was not a fundamental liberty under the history and tradition test set in *Washington v. Glucksberg* (1997), Alito insists, "None of the other decisions [adjacent to] *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way."

[13] Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 453 (1992).

explicitly imposing liability on either citizens who obtain an abortion out of state or people who perform or assist in such an abortion." Alternatively, a "subtler way of achieving the same ends would be to pass a similar law but with no geographically specific language."[14]

Before *Dobbs*, David Cohen, Greer Donley, and Rachel Rebouché found only one case where a cross-border abortion provision resulted in a conviction: in 1996, the Commonwealth of Pennsylvania convicted a woman for transporting a minor to New York for an abortion, violating a Pennsylvania parental-custody law that appeared unrelated to the abortion. [15] After *Dobbs*, Idaho became the first state in the country to prohibit some form of out-of-state abortion travel in April 2023, one month before the Supreme Court decided *National Pork*.[16] Over the next few months, "abortion opponents in Texas ... succeeded in passing a growing number of

[14] Katherine Florey, *Dobbs and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. Rev. 485, 497 (2023).
[15] David S. Cohen et al, *The New Abortion Battleground*, 123 Colum. L. Rev. 1 (2023) at 22.
[16] On April 5, 2023, Republican Governor Brad Little signed House Bill 242 (HB 242) and criminalized assisting a pregnant minor to receive an abortion in another state, whether by medication or surgery. Legislators shrewdly removed an affirmative defense in Section 1, Clause 3 for an "abortion provider" or "abortion-inducing drug provider" situated "in another state". Aria Bendix, *Idaho becomes one of the most extreme anti-abortion states with law restricting travel for abortions,* NBC News, Apr. 6, 2023, https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225; David W. Chen, *Idaho Bans Out-of-State Abortions for Minors Without Parent's Consent*, NYT, Apr. 5, 2023, https://www.nytimes.com/2023/04/05/us/idaho-out-of-state-abortions-minors-ban.html; H.B. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023).

local ordinances to prevent people from helping women travel to have abortions in nearby states that still allow the procedure."[17] [18] Meanwhile, in federal court, Alabama Attorney General Steve Marshall recently defended conspiracy charges against groups that assist women in traveling out of state for abortions, arguing that while women may independently travel for abortions, organizations that facilitate travel should face prosecution. Marshall writes in his court brief, "An elective abortion performed in Alabama would be a criminal offense; thus, a conspiracy formed in the State to have that same act performed outside the State is illegal."[19] Other states, including Texas, plan to press for similar bills when the next legislative session begins, pushing the inter-jurisdictional abortion wars to the forefront of national politics.

According to an October 2023 study by the Society of Family Planning, physicians across the United States performed at least 2,200 more abortions in the year after *Dobbs*, a substantial increase from years

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[17] Bendix, *supra note 16*.
[18] David Goodman, *In Texas, Local Laws to Prevent Travel for Abortions Gain Momentum*, New York Times, Oct. 24, 2023, https://www.nytimes.com/2023/10/24/us/texas-abortion-travel-bans.html.
[19] *Alabama's attorney general says the state can prosecute those who help women travel for abortions*, AP News, Aug. 31, 2023, https://apnews.com/article/alabama-abortion-steve-marshall-2157a7d0bfad02aad1ca41e61fe4de33#:~:text=U.S.%20News-,Alabama's%20attorney%20general%20says%20the%20state%20can%20prosecute,help%20women%20travel%20for%20abortions&text=MONTGOMERY%2C%20Ala.,another%20state%20for%20an%20abortion.

past. In states that had prohibited abortion t, clinicians provided an average of 7,911 fewer abortions per month. The Society of Family Planning report suggests, "People in states with abortion bans were forced to delay their abortion, to travel to another state, to self-manage their abortion, or to continue a pregnancy they did not want."[20] Likewise, a November 2022 study published in the Journal of the American Medical Association reported that the average travel time for an abortion nearly tripled, ranging from less than a half hour to more than an hour and a half.[21] Therefore, inconsistency in the application of abortion travel law throughout the country is inevitable as more states work to outright ban or severely restrict abortion access. As Lea Brilmayer begs, "The question then arises whether one state can apply its law to abortions that have connections with other states … Should a state be able to apply its law simply because it has a nexus with the controversy in question, regardless of the connection between the controversy and other states?"[22] *National Pork* and the Dormant Commerce Clause may provide an answer.

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[20] *WeCount,* SOCIETY OF FAMILY PLANNING (2023), https://societyfp.org/research/wecount/.
[21] Rader et al., *Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the Dobbs v Jackson Women's Health Decision,* 328 JAMA 2041 (2022).
[22] Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 880 (1993).

III. *National Pork*, In Sum

National Pork was one of only two cases during the 2022-2023 term to expressly implicate and was among the most recent to profile the Dormant Commerce Clause. The Court considered the constitutionality of Proposition 12, which "prohibited the sale of pork from pigs that were confined in a cruel manner or born to cruelly confined sows ... [and] applied to all pork sold in the state of California, regardless of where the pigs were bred, raised, or slaughtered."[23] The National Pork Producers Council, a trade association representing the pork industry, challenged the law as substantially and unduly burdening interstate commerce. The petitioners alleged a prospective "California Effect," given that "California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate."[24] As such, the petitioners relied on a string of extraterritoriality cases, *Baldwin v. G. A. F. Seelig* (1935) ("*Baldwin*"), *Edgar v. MITE Corp* (1982) ("*Edgar*"), and *Healy v. Beer Institute, Inc.* (1989) ("*Healy*"), to articulate a *per se* rule of invalidity for statutes with extraterritorial effects and to argue that Proposition 12 thus failed the *Pike* balancing test set forth by *Pike v. Bruce*

[23] *Dormant Commerce Clause—Interstate Commerce*, *supra* note 8, at 331.
[24] *Nat'l Pork Producers Council,* 598 U.S. at 26.

Church, Inc. (1970), which determines to what extent state legislatures can impose undue burdens on interstate commercial activity and is central to the contemporary understanding of permissible interstate burdens under the Dormant Commerce Clause.[25]

The United States District Court for the Southern District of California dismissed the lawsuit, and the United States Court of Appeals for the Ninth Circuit upheld the decision, declaring animal cruelty a sufficient *local* concern and Proposition 12 of insufficient *national* concern to invoke the extraterritoriality doctrine under *Pike*. Thus, in *National Pork*, "if the Supreme Court had read the Dormant Commerce Clause [more] aggressively ... it could have given itself an effective veto power over nearly any state law — because it will virtually always be possible to argue that a state law will have economic impacts on other states."[26] Instead, writing for a fractured majority, Associate Justice Neil Gorsuch found that Proposition 12 did not violate the Dormant Commerce Clause of the United States Constitution, affirming the judgment of lower courts. The

[25] Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989). *Edgar* and *Healy* involved state statutes that effectively controlled an area of trade outside the jurisdictional bounds of a State. The extraterritorial burdens imposed by the challenged legislation called into question the federalist contours of the American economy, given that if individual states had the explicit ability to determine the permissibility of a tender offer and the price of beer nationwide, for example, "what effect would arise if not one, but many or every, State adopted similar legislation?"
[26] Millhiser, *supra* note 7.

Court first rejected the petitioners' *per se* rule argument and clarified that a nondiscriminatory state statute with extraterritorial implications does not automatically violate the Dormant Commerce Clause. Rather, states "may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the interests of its citizens," such as pork inconsistent with state health and safety standards.

Thus, at face value, *National Pork* would enable states to perform individualized assessments of commercial subjects under the police power, deem abortion travel as 'prejudicial,' and therefore justify bans on the practice.[27] Yet, the majority opinion penned by Gorsuch distinguished *National Pork* from another extraterritoriality case, *Baldwin*, where the State of New York controlled intrastate milk prices by prohibiting the importation of less expensive merchandise. From Gorscuh's view, *Baldwin* merely forbids "specific" extraterritorial effects— such as the intentional prohibition of less expensive merchandise—rather than a categorical ban on extraterritorial legislation entirely. [28] As Douglas Kysar explains, "[T]he relevant case law is more limited and less clear than the Council portrayed—understandably so, for the very notion of striking down

[27] *Nat'l Pork Producers Council,* 598 U.S. at 7.
[28] *Nat'l Pork Producers Council,* 598 U.S. at 11.

extraterritorial regulation in order to preserve a national market is in tension with itself."[29]

In assuming that not all extraterritorial legislation is unconstitutional, the next step is distinguishing permissible regulation from impermissible overreach. Accordingly, the Court next applied the *Pike* balancing test ("*Pike*"). As former Associate Justice Potter Stewart explains, "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. If a legitimate local purpose is found, then the question becomes one of degree."[30] In other words, the *Pike* balancing test evaluates whether a state law that burdens interstate commerce is constitutional by balancing the local benefits to the state against the subsequent burden imposed on interstate commerce, permitting such laws only when the benefits demonstrably outweigh the burdens. The *Pike* test also holds that legislation that intentionally discriminates against rival states to obtain a competitive advantage is inherently, or *per se*, unconstitutional. In each of

[29] Kysar, supra note 10, at 12.
[30] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Baldwin, *Edgar*, and *Healy*, the Court essentially held that the Dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." Such extraterritorial laws may stand only where a legitimate state interest outweighs the burden upon interstate commerce.[31]

In *National Pork*, a third of the bench attempted to radically reconfigure *Pike* in the context of "a post-*Dobbs* landscape in which state legislatures can creatively and aggressively attempt to constrain reproductive rights outside their borders through [extraterritorial] laws."[32] The majority, however, agreed not to "pull the plug" on *Pike*— but disagreed as to how the facts of *National Pork* informed the burden-based balancing, given the minimal evidence of intentional discrimination against out-of-state economic interests.[33]

Justices Gorsuch, Thomas, and Barrett questioned if an application of *Pike* to the circumstances of *National Pork* was even possible. While Justices Gorsuch and Thomas agreed with the majority that "heartland *Pike* cases seek to smoke out purposeful discrimination in state laws (as

[31] Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989).
[32] Kysar, *supra* note 10, at 12.
[33] *Nat'l Pork Producers Council,* 598 U.S. at 2.

illuminated by those laws' practical effects) or seek to protect the instrumentalities of interstate transportation," the pair insisted that the applicability of *Pike* ends after such determinations.[34] According to Gorsuch and Thomas, the judiciary lacked the authority, knowledge, and impartiality to undertake the balancing proposed by the petitioners, beckoning an end to *Pike*. Justice Barrett concurred in part with her conservative peers, advocating for "a view in which the *Pike* test continues as part of [Dormant Commerce Clause] jurisprudence, but only in cases that do not involve benefits and burdens that are 'incommensurable,'" suggesting "[c]ertain forms of state legislation give rise to benefits that … are not amenable to judicial waiting." [35] She agreed with the National Pork Producers Council that Proposition 12 substantially burdened interstate commerce but discounted the judicial role in adjudicating between the dual registers of morality and economics.

On the other hand, Chief Justice Roberts, joined by Alito, Kavanaugh, and Jackson, authored the primary dissent and endorsed an application of *Pike*, noting that particular extraterritorial regulatory effects warrant review under the precedent. Indeed, Roberts writes, "Although

[34] *Nat'l Pork Producers Council,* 598 U.S. at 27.
[35] Kysar, *supra* note 10, at 9.

Pike is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be 'free private trade in the national marketplace.'"[36] The four justices identified a substantial burden on interstate commerce and suggested vacating and remanding to lower courts, where the task of balancing could take place.

In subtle contrast, Justices Sotomayor and Kagan expressed in their concurring opinion that "*Pike* should be read narrowly but not abandoned altogether," noting that "the means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice Gorsuch."[37] [38] Sotomayor and Kagan nevertheless ruled against the petitioners, unimpressed with the allegation of a substantial burden on interstate commerce. Justice Kavanaugh in his lone opinion "agreed with the lead dissent in that Proposition 12 created a substantial burden on interstate commerce, adding that the Proposition may raise further questions under" numerous other constitutional provisions, such as the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.[39]

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[36] *Nat'l Pork Producers Council,* 598 U.S. at 2 (Roberts concurring).
[37] Millhiser, *supra* note 7.
[38] *Nat'l Pork Producers Council,* 598 U.S. at 3 (Sotomayor concurring).
[39] *Dormant Commerce Clause—Interstate Commerce*, *supra* note 8, at 336.

Ultimately, despite conflicting reasons for concluding that the National Pork Council's arguments failed the *Pike* test, the Sotomayor and Kagan concurrence joined Gorsuch, Thomas, and Barrett to constitute a majority judgment. As such, the Court applied *Pike*, upheld Proposition 12, and left the door open for extraterritorial challenges to state morality-based laws.

IV. Implications For Abortion Travel Bans

In effect, *National Pork* devolved into little more than a Rorschach test, within which judicial commentators may see whatever they desire. The inkblots of competing economic and state-sponsored moral interests invite a multiplication of interpretations. Even the most sympathetic *Pike* supporters, including Chief Justice Roberts, empathized with the textualist enmity that frames the test as a remnant of judicial pseudoscience, imposing the subjective will of nine on the lives of 330 million. The question of out-of-state abortion travel further complicates the Rorschach test. The Roberts Court went so far as to stamp into *Dobbs* their preference for a "simpler, more workable alternative" of enabling "each state to decide its own abortion laws" over a complex imposition of subjective balancing

standards.[40] Yet, *Pike* "requires courts to weigh local benefits against national interests in the free flow of commerce," pushing the justices to depart from *Dobbs*, perhaps embrace *National Pork*, and venture to "make an explicit assessment of the strength of the state's interest in preserving fetal life."[41] How might *National Pork* inform such an assessment?

A. Abortion Travel as Interstate Commerce

The first category of Dormant Commerce Clause analysis implicated by *National Pork* entails determining whether abortion-related interstate travel bans constitute interstate commerce. Though one may readily conclude that "[t]he offer of [abortion] services by out-of-state providers and women's purchase of them, insofar as women travel across state lines to make the purchases, are both forms of interstate commerce," state governments may still prohibit abortion travel without a statutory admission that they are regulating beyond their borders.[42] Accordingly, the mere proclamation of abortion services as commerce, as opposed to a health and safety measure, may not suffice.[43] For example, Justice Barrett

[40] Cohen, *supra* note 15, at 8.
[41] Richard Fallon, *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 638 (2007).
[42] Kreimer, *supra* note 13, at 489.
[43] Thomas Molony, *Inconvenient Federalism: The Pandemic, Abortion Rights, and the Commerce Clause*, 20 GEO. J.L. & PUB. POL'Y 487, 513-514 (2022). A state may acknowledge the interstate

is unlikely to find herself swayed by the above conjecture, given that she joined the majority opinion in *Dobbs*, which backed the proposition from *Gibbons v. Ogden* (1824) that "a state is regulating health—not commerce—when it adopts health laws."[44] Similarly, Justice Thomas is likely to consider abortion-related interstate travel prohibitions as an extension of the state police power to adopt healthcare laws, which only requires passing a rational basis review. *National Pork*, however, may describe the prohibition of abortion-based transportation itself as equivalent to a regulation of interstate commerce.

In *Edwards*, the Court reaffirmed a century of precedent that described the movement of people from one state to another as interstate commerce and discrimination against such mobility as undermining the free flow of fiscal and foot traffic. Writing for the majority, former Associate Justice James Byrnes conceptualized interstate foot traffic, whether of indigents, abortion seekers, or others, as a national entity that superseded state laws. *Edwards* still holds legal weight, expanding the reach of the

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nature of travel bans but claim her constitutional authority to police the health and safety of her citizens outweighs and partially dissolves the commerce label from the activity under regulation. Despite *Gibbons* establishing transportation as a form of interstate commerce, the *Gibbons* Court also "stressed that when a state enacts health laws, it is not regulating commerce at all." Instead, health laws spring from the "State's power to protect the health of those residing within its borders." The direct general power to establish healthcare laws is exclusively vested in states, not the federal government.

[44] *Id.* at 516.

Dormant Commerce Clause beyond "geographical restrictions phrased in miles as well as in terms of political boundaries."[45] Indeed, the Court's opinion in *National Pork* was careful not "to trivialize the role territory and sovereign boundaries play in our federal system" and acknowledged that "courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context."[46] The Court rejected a *per se* rule of invalidity for any state laws that effectively control commerce outside of a state but insisted that significant extraterritorial regulatory effects might constitute part of the burden weighed under later analysis.[47] Thus, *National Pork* indicates that even abortion travel legislation "with no geographically specific language — that is, one that simply prohibited some abortion-related conduct or empowered citizens to sue abortion providers with no direct indication that it was meant to apply outside the state" still constitutes a regulation of interstate commerce.[48]

Moreover, and perhaps more apparent, abortion travel laws govern the instrumentalities of interstate transportation. Even Justices Gorsuch,

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[45] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 418 (1994).
[46] *Nat'l Pork Producers Council,* 598 U.S. at 3.
[47] I will later discuss whether abortion-related interstate travel bans are vulnerable to extraterritoriality challenges. *National Pork v. Ross* nevertheless demonstrates that the lack of geographic-specific language in an abortion statute does not outright preclude analysis.
[48] Florey, *supra* note 14, at 497.

Thomas, and Barrett "expressed special concern with certain state regulation of the instrumentalities of interstate transportation," singling out the *form* of interstate commerce as perhaps necessitating further analysis. Many such conservative jurists believe that state laws that interrupt interstate transportation warrant analysis under the Commerce Clause because of the sheer consequence of transportation to interstate commerce.[49] Justice Gorsuch conceded that "this Court has left the courtroom door open to challenges premised on even nondiscriminatory burdens" where "a lack of national uniformity would impede the flow of interstate goods," for which concerns include "trucks, trains, and the like." [50] How else might we imagine pregnant women traveling between states? Recall that, after *Dobbs*, the average travel time for an abortion tripled, ranging from less than a half hour to more than an hour and a half.[51] Given that most women cannot walk to the nearest out-of-state abortion clinic, instrumentalities of interstate commerce will most likely form modes of transportation. Trains, automobiles, trucks, buses, aircraft, boats, and practically any other imagined contrivance constitute instrumentalities of interstate commerce. Thus, any state legislation prohibiting abortion travel

[49] *Nat'l Pork Producers Council,* 598 U.S. at 18.
[50] *Id.* at 17.
[51] Rader et al., *supra* note 21.

regulates an instrumentality of interstate commerce. In turn, the fractured *National Pork* opinion suggests that, at minimum, Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Jackson would likely, on an *ad hoc* basis, regard abortion travel bans as regulating the instrumentalities and economic actors of interstate commerce.

B. The Question of Post-Discrimination Analysis

The second category of analysis that *National Pork* informs more acutely is whether the absence of intentional discrimination in abortion travel bans precludes further analysis under *Pike*. Recall that discrimination is also at the forefront of Dormant Commerce Clause analysis, focusing on state or local regulations that expressly require differential treatment of competing in-state and out-of-state commerce, intentionally or unintentionally. Indeed, even in *National Pork*, which saw "vigorous and thoughtful critiques" of the Dormant Commerce Clause writ large by nearly all nine members of the Court, the justices chose "not [to] necessarily quarrel with the antidiscrimination principle."[52] Yet, abortion-related interstate travel prohibitions do not constitute discrimination because "a state's law prohibiting its citizens from obtaining

[52] *Nat'l Pork Producers Council,* 598 U.S. at 8-9.

abortions would" regulate travel for "abortions performed in-state as well as out-of-state."[53] Joseph Dellapenna agrees, stating plainly, "A prohibition of a state's citizens [traveling to obtain] an abortion regardless of where it occurs is not likely to be held to discriminate against interstate commerce."[54] As such, in the absence of discrimination, the Court ordinarily employs *Pike* to determine whether the nondiscriminatory abortion travel statute imposes a constitutional burden on interstate commerce. Accordingly, "the question would therefore be whether the burden on interstate commerce was excessive when measured against the local interest in preventing abortion."[55]

Yet, in *National Pork*, some justices expressed that the judiciary lacks the qualifications to balance competing economic and moral interests in such cases. Justice Barrett agreed that "one State may not discriminate against another's producers or consumers" but added that "to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable."[56] As Frazelle suggests, Barrett framed the "weighing of

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[53] Fallon, *supra* note 41, at 637.
[54] For example, HB 242 deftly removed an affirmative defense in Section 1, Clause 3 for an "abortion provider" or "abortion-inducing drug provider" situated "in another state." The law consequently regulates abortion travel in and out of state identically, criminalizing movement between states with the same severity as movement inside Idaho. Joseph W. Dellapenna, *Abortion Across State Lines*, Joseph W. Dellapenna, Abortion Across State Lines, 2008 BYU L. REV. 1651, 1691 (2008); H.B. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023).
[55] Fallon, *supra* note 41, at 637.
[56] *Nat'l Pork Producers Council,* 598 U.S. (Barrett concurring) at 1.

costs and benefits [as] a task that courts have neither the constitutional authority nor the institutional competence to undertake."[57] Similarly, Justices Gorsuch and Thomas articulated that the cornerstone of *Pike* was state-sanctioned discrimination and that if discrimination did not occur, only Congress should possess the authority to tip the scales between conflicting interests. Gorsuch writes, "Our decisions have authorized claims alleging burdens on commerce. They do not provide judges a roving license to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise."[58] The evident hostility toward *Pike* in *National Pork*, particularly where purportedly "incommensurable" interests are at stake, suggests at least three members of the Supreme Court would not proceed with the post-discrimination analysis. Abortion-related state interests are among the most incommensurable policy concerns a court could balance. Thus, in their view, "[in] the face of congressional silence, the States are free to set the balance between protectionism and the free market."[59]

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[57] Frazelle, *Big Business Loses Dormant Commerce Clause as Tool Against States,* BLOOMBERG LAW, MAY 19, 2023, https://news.bloomberglaw.com/us-law-week/big-business-loses-dormant-commerce-clause-as-tool-against-states.

[58] *Nat'l Pork Producers Council,* 598 U.S. at 28

[59] United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 352 (2007).

In *National Pork*, however, six other justices disagreed with such a framing. A cross-ideological majority maintained in *National Pork* that a failure to allege discrimination cannot preclude *Pike* because "courts generally are able to weigh disparate burdens and benefits against each other and that they are called on to do so in other areas of the law with some frequency."[60] According to Douglas Kyasar, Sotomayor in particular "stressed that … *Pike* balancing has survived this case and will continue to leave the courtroom door open to claims premised on even nondiscriminatory burdens," including those generated by abortion-related travel prohibitions.[61] Kagan similarly advocated during the *National Pork* oral argument that "our doctrine indicates" courts must "do *Pike* balancing" so as not to "exclude a world of economic harms" or legitimate moral interests.[62] Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson corroborated "that it is possible [for courts] to balance benefits and burdens under the approach set forth in *Pike*."[63] Thus, "it remains the law in the United States that even an absence of discrimination ... does not

[60] *Nat'l Pork Producers Council,* 598 U.S. (Sotamayor concurring) at 3.
[61] Kysar, *supra* note 10, at 7.
[62] Oral Argument, *National Pork Producers Council v. Ross*, 598 U.S. __, https://www.oyez.org/cases/2022/21-468.
[63] *Nat'l Pork Producers Council,* 598 U.S. (Roberts concurring) at 4.

end analysis," meaning abortion-related interstate travel bans would next undergo *Pike*.[64]

C. Pike Balancing, Legitimate Local Interests

The first *Pike* question of whether abortion travel bans effectuate upon a legitimately local interest hinges on how the Court interprets the uniformity standard set in *Cooley v. Board of Port Wardens* (1852) ("*Cooley*") and reaffirmed in *National Pork*. The *Cooley* Court identified interstate transportation as falling under an inherently uniform system of federal control and discerned that "whenever the subjects over which a power to regulate commerce is asserted are in their nature national or admitting of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."[65] Therefore, according to *Cooley*, the transportation of pregnant women "through a state, or from one state to another" is a national, as opposed to local, interest, for which burdens on interstate commerce cannot suffice.[66] In *National Pork*, the Court acknowledged the *Cooley* principle that "the Constitution may come with some restrictions on what may be regulated

[64] Kysar, *supra* note 10, at 7-8.
[65] Bowman v. Chicago & Northwestern R. Company, 125 U.S. 465, 480-481 (1888).
[66] *Northwestern R. Company*, 125 U.S. at 481.

by the States even in the absence of all congressional legislation."[67] Chief Justice Roberts spoke for the majority when he recognized that interstate transportation "is an area presenting a strong interest in national uniformity."[68] Although the *Cooley* Court "provided no criteria by which one could determine whether the subject of legislation was national or local, the Court devised another set of decision rules. State laws regulating interstate commerce directly were invalidated, while those regulating commerce only indirectly were permitted. The terms direct and indirect roughly corresponded to the national and local subjects enshrined in *Cooley*, respectively."[69] Accordingly, the interstate transportation of pregnant women pertains to interstate commerce, the direct regulation of which is an onus of the federal government.

Such a conclusion, however, presupposes that the Court does not deem the abortion procedure or treatment itself as an economic activity

[67] *Nat'l Pork Producers Council,* 598 U.S. at 6-7.
[68] *Nat'l Pork Producers Council,* 598 U.S. (Roberts concurring) at 6.
[69] Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem,* 73 La. L. Rev. 979, 982 (2013).

subject to regulation under abortion travel prohibitions.[70] [71] If the Court eschewed discussion of interstate movement in favor of state police powers over abortion, *Dobbs* permits "respect for and preservation of prenatal life at all stages of development; protection of maternal health and safety; elimination of particularly gruesome or barbaric medical procedures; preservation of the integrity of the medical profession; mitigation of fetal pain; and prevention of discrimination on the basis of race, sex, or disability" to qualify as legitimate interests sufficient to regulate abortion travel.[72] Indeed, even *Pike* established that states may burden interstate commerce with "state legislation in the field of safety where the propriety of local regulation has long been recognized," suggesting challengers may need to invoke the extraterritoriality doctrine as implicated in *National Pork*.[73] Yet, despite the discussion of extraterritoriality in *National Pork*, scholars "have not actually gained

[70] *Dobbs*, 597 U.S. at 77. The *Dobbs* Court announced that "a law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity" and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." Under rational basis review, the lowest level of judicial scrutiny, "the state must only show that any abortion restriction or even a total ban is reasonably related or not arbitrary and capricious to serve its interest to protect prenatal life." The conflicting burden on interstate commerce would likely yield to the legitimate interests of state governments.

[71] Terri Day & Danielle Weatherby, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis that Lies Ahead,* 64 Wm. & Mary L. Rev. 1, 22-23 (2022).

[72] *Dobbs* 597 U.S. at 78.

[73] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). As such, states could even regulate traveling for abortion-adjacent purposes, such as tele-health check-ups.

much clarity on the [extraterritorial] issues raised by the case apart from the decisive rejection of extraterritoriality as a standalone *per se* rule of invalidity."[74] Thus, we must assume the "line of cases applying the Traditional Framework [to] prohibit states from directly regulating 'commerce occurring wholly outside the boundaries of [the] State,'" remains intact, notably elucidated in *Healy*.[75] Under the framework of *Healy*, the practical effects of abortion travel bans might include controlling "conduct beyond the boundaries of the State" and creating "a danger of inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[76]

D. Pike Balancing, Burden

Though *Healy* initially proposed that the Dormant Commerce Clause outright prohibits laws with practical effects, *National Pork* shifted the focus to the second prong of *Pike*, which enables leveraging alternative regulatory regimes to demonstrate laws' burden on interstate commerce. When he rejected a *per se* rule of invalidity for extraterritoriality in *National Pork*, Gorsuch noted that "many (maybe most) state laws have the

[74] Kysar, *supra* note 10, at 10.
[75] Daniel Francis, *The Decline of the Dormant Commerce Clause,* 94 DENV. L. REV 255, 267 (2017).
[76] Florey, *supra* note 14, at 27-28.

practical effect of controlling extraterritorial behavior."[77] As such, legitimizing the extraterritorial burden imposed by travel regulations "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers," including the capacity to monitor health and safety, a view shared by Justices Thomas and Barrett.[78] If, however, as the majority in *National Pork* indicated, the "kinds of laws that are vulnerable to an extraterritoriality challenge are those that utilize state power in a manner that inescapably regulates transactions that take place entirely outside the state," abortion-related travel prohibitions remain on the chopping block.[79] Such statutes incidentally burden interstate commerce by inescapably precluding a wide range of wholly out-of-state transactions inherent in abortion travel, a stark contrast with the law challenged in *National Pork*. Indeed, although Justices Sotomayor and Kagan found that Proposition 12 did not impose a substantial extraterritorial burden, leading some scholars to assume a "deference toward wide-reaching state regulations," the sheer scope of transportation statutes moves analysis away from mere distributive effects.[80]

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[77] *Nat'l Pork Producers Council,* 598 U.S. at 12.
[78] *Id*.
[79] Kysar, *supra* note 10, at 15.
[80] *Dormant Commerce Clause—Interstate Commerce*, *supra* note 8, at 339.

To illustrate, imagine that the State of Alabama, where abortion is categorically illegal, prohibited pregnant women from traveling out-of-state for abortions and instituted criminal or civil penalties for doing so. In January 2024, from Alabama, "the closest option for an abortion is Georgia, which has a ban at six weeks—before many people would even know that they are pregnant. For Alabamians needing an abortion up to 14 weeks, the closest provider could be hundreds of miles away in Florida."[81] A travel ban would concomitantly prohibit a pregnant woman from paying for gas, turnpike tolls, and dining fees along the 547-mile journey from Alabama to Florida, all of which are deemed secondary out-of-state transactions. Florida abortion laws would also require the Alabamians to "come up with lodging costs or make two trips: first for the state's mandatory in-person counseling (including information designed to discourage the patient from having an abortion) and second for the actual abortion, following a medically unnecessary required 24-hour waiting period."[82] Yet, an abortion-related interstate travel ban would also paradoxically bar a pregnant Alabamian from Floridian lodging. As such, a pregnant Alabama

[81] Elizabeth Harned & Liza Fuentes, *Abortion Out of Reach: The Exacerbation of Wealth Disparities after Dobbs v. Jackson Women's Health Organization,* GUTTMACHER INSTITUTE (2023), https://www.guttmacher.org/article/2023/01/abortion-out-reach-exacerbation-wealth-disparities-after-dobbs-v-jackson-womens.
[82] *Id.*

woman would find herself legally inclined to not pay the cost of a first-trimester abortion at any Planned Parenthood clinic in Florida. I should note, however, that the Florida Supreme Court recently upheld a new 15-week abortion ban, enabling an additional 6-week ban to take effect on May 1, 2024, and situating Virginia as the next closest abortion provider for Alabamians.[83]

The implication writes itself. Excluding any pregnant woman from comparable abortion-related marketplaces across the United States, regardless of residence, constitutes an inescapable regulatory burden on commerce between states. As Justice Kavanaugh lamented in *National Pork*, "California's law thus may foreshadow a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands."[84] Chief Justice Roberts and Associate Justices Jackson, Kagan, and Sotomayor similarly agreed in *National Pork* that "significant extraterritorial regulatory effects can be considered part of the burden to be weighed under *Pike*," suggesting the Court could find the out-of-state impact of

[83] *Id.*
[84] *Nat'l Pork Producers Council,* 598 U.S. (Kavanaugh concurring) at 5-6.

abortion travel bans too burdensome to justify.[85] *National Pork*, however, is one case among dozens informing such a constitutional question. Thus, how the Roberts Court might ultimately decide the question of abortion travel bans remains entirely speculative, for "conservative justices do not necessarily line up in lockstep on Dormant Commerce Clause issues" unrelated to the challenges posed in *National Pork*.[86]

V. Conclusion

Interstate abortion travel regulations raise numerous constitutional questions.[87] While many constitutional scholars agree that "the notions embodied in the right to travel, the freedom of movement and freedom to settle in a place of one's own choosing without governmental interference, have long been recognized and protected in the United States," the Dormant Commerce Clause is but one, albeit contentious, option.[88] In *National Pork*, critics alleged the Dormant Commerce Clause is nothing more than a quixotic gateway drug, a precedent-setting legal instrument

[85] *Nat'l Pork Producers Council,* 598 U.S. (Roberts concurring) at 6.
[86] Kysar, *supra* note 10, at 2.
[87] Cohen, *supra* note 15, at 34-35. The Privileges and Immunities Clause in Article IV and the Citizenship Clause of the Fourteenth Amendment, in particular, indicate a commitment to a legal system in which state sovereignty was limited to application within its own borders and to a conception of national citizenship that protected a strong right to travel to other states.
[88] Duane W. Schroeder, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117, 117 (1975).

that will eventually dismantle our constitutional republic. Conversely, in 1941, the *Edwards* Court understood that regulation "of commerce may be the clause's central mechanism, but its force and purpose lay in its structuring of governmental authority to assure certain ends; its underlying values and ultimate aims are no less weighty than national union, community, and democratic governance, all of which have the capacity to secure and advance human liberty."[89]

From one perspective, state police powers are the cornerstones of human liberty, firmly establishing that states can issue divergent regulations for the same activity without violating the Dormant Commerce Clause. From another, as Chief Justice Roberts writes, "It is the difference between mere cross-border effects and broad impact requiring ... compliance even by producers who do not wish to sell in the regulated market," abortion-related or otherwise.[90] Though *National Pork* insists that in "a functioning democracy, policy choices like these usually belong to the people and their elected representatives," the Court nevertheless clung to the *Edwards*-era conception of interstate transportation as an insoluble national enterprise.[91] Even in *Dobbs,* Justice Alito himself acknowledged,

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[89] Loffredo, *supra* note 5, at 153.
[90] *Nat'l Pork Producers Council,* 598 U.S. (Roberts concurring) at 9.
[91] *Nat'l Pork Producers Council*, 598 U.S. at 20.

"In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an unborn human being."[92] Thus— from Fred Edwards to Jane Roe to the National Pork Producers Council—the moral and legal intangibility of abortion as a constitutional right may determine whether state governments can constitutionally limit the ability to move between states. The scope of human liberty and abortion access varies from American to American and state to state, but do interstate travel bans cross the line? *National Pork* seemingly answers in the affirmative.

[92] *Dobbs,* 597 U.S. at 31.