Extraterritorial Toxics: Regulating California Hazardous Waste After *National Pork Producers Council v. Ross*

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In the United States, the production of hundreds of millions of tons of hazardous waste every year poses substantial harm to the environment and public health. While the Resource Conservation and Recovery Act (RCRA) defines what counts as hazardous waste and determines how it needs to be handled, states are free to set more stringent guidelines. California, known for surpassing federal environmental standards, has used a more expansive definition of hazardous waste. The result is a distinction between waste considered hazardous under RCRA (RCRA hazardous waste) and waste that is not considered hazardous under RCRA but is under California's definition (non-RCRA hazardous waste or "California hazardous waste"). Non-RCRA hazardous waste—mostly soil contaminated with heavy metals and DDT—accounts for 86.1 percent of hazardous waste produced in California since 2010. However, once California hazardous waste crosses state borders, it can be treated under federal law as regular municipal solid waste (MSW). According to a 2023 CalMatters investigation, California has exported almost half of its non-RCRA hazardous waste to Arizona and Utah MSW landfills in that period. This cross-border dumping echoes the problems that gave rise to the "garbage wars" of previous decades, in which states passed laws regulating out-of-state waste dumping. In almost every instance, the U.S. Supreme Court has struck down these laws as per se discrimination against interstate commerce in violation of the Dormant Commerce Clause (DCC). However, in the Court's most recent DCC case, National Pork Producers Council v. Ross *(*NPPC*)*, *a fractured Court upheld Proposition 12, a California law banning in-state sales of pork meat from pigs not raised in humane conditions under state law. In doing so, the Court rejected an "almost per se" rule against nondiscriminatory state laws whose*

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practical effects regulate out-of-state behavior. On the flip side, for laws not deemed per se illegal under the DCC, the Court reserved its power to balance a state law's putative benefits against its burdens on interstate commerce. By analyzing and applying the Court's reasoning in NPPC*, this Note makes two arguments. First, the majority's analysis of extraterritoriality in* NPPC *reinforces the case for overruling the previous "garbage cases" and refocusing the DCC on protectionism. Second, while California cannot directly regulate other states' waste management practices, it ought to exert control over its own toxic waste, even after the waste crosses state lines. While such a regulation would still face challenges under the DCC,* NPPC *makes the outcome of those challenges less clear-cut. Given that California must produce a comprehensive waste management plan by 2025, this Note uses California hazardous waste as a case study to inform discussions of how the state should consider evolution in DCC jurisprudence when crafting new regulations with out-of-state effects.*

INTRODUCTION

California often surpasses the federal government and other states in regard to enacting stringent environmental and health regulations. Examples abound of the Golden State not waiting for the federal government to pursue a more

ambitious regulatory agenda. And as California is the largest sub-national economy in the world, these regulations have caused ripple effects on industries doing business countrywide and even globally.[2] Of course, the U.S. Constitution gives a large degree of deference to the states to implement their police powers and to serve as laboratories of democracy, regardless of the states' sizes or political perspectives.[3] But such vertical federalism, the division of federal and state power, only paints half of the picture. A horizontal federalism question also arises: How far should a state's regulations be able to reach beyond that state's own borders?

This basic question of the limits on state power underlies what has come to be known as the Dormant Commerce Clause (DCC). The (wakeful) Commerce Clause, which is laid out explicitly in Article I of the U.S. Constitution, gives Congress the power to regulate interstate commerce.[4] However, its dormant counterpart, a product of Supreme Court precedent, functions as an implied limit on state regulations "designed to benefit in-state economic interests by burdening out-of-state competitors."[5] It is not difficult to observe how the effects of regulations from a state as large as California may impact industry in other states and run afoul of this constitutional mandate. But not all burdens on interstate commerce are equal, and the Court has employed different tests to determine which state regulations are acceptable and which are not.[6]

The reach of the DCC took center stage on May 11, 2023, when the Supreme Court decided *National Pork Producers Council v. Ross* (*NPPC*).[7] In *NPPC*, the Court ruled that California can, consistent with the DCC, enforce California Proposition 12 (Prop 12), which bans the sale of pork in the state that is not sourced from a pig raised humanely by California standards.[8] In a highly fractured opinion upholding the California law, the Court raised two key issues:

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2. For example, California has passed laws setting car emissions standards, low-carbon fuel requirements, greenhouse gas limits for power grids, cleaner fuel criteria for ships, and the elimination of PFAS from certain consumer products, all of which have some effect on corporations operating outside of California. *See* Peter Valdes-Dapena, *How California ended up in the zero-emissions driver's seat*, CNN, https://www.cnn.com/2022/09/06/business/california-emissions-regulations/index.html (last updated Sept. 6, 2022); *Advanced Clean Cars Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program (last visited Sept. 29, 2024); *Low Carbon Fuel Standard*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/low-carbon-fuel-standard/about (last visited Sept. 29, 2024); *Greenhouse Gas Cap-and-Trade Program*, CAL. PUB. UTIL. COMM'N, https://www.cpuc.ca.gov/industries-and-topics/natural-gas/greenhouse-gas-cap-and-trade-program (last visited Sept. 29, 2024); *Ocean-Going Vessel Fuel Regulation*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/ocean-going-vessel-fuel-regulation/about (last visited Sept. 29, 2024); *Food Packaging Containing Perfluoroalkyl or Polyfluoroalkyl Substances*, DEP'T OF TOXIC SUBSTS. CONTROL, https://dtsc.ca.gov/scp/food-packaging-containing-pfass .

3. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments").

4. U.S. CONST. art. I, § 8, cl. 3.

5. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–274 (1988)).

6. *See infra* Part I-B.

7. 598 U.S. 356.

8. *Id.* at 363-64; *see* CAL. HEALTH & SAFETY CODE § 25990(b)(2) (West 2018).

(1) the validity of the so-called "extraterritoriality" doctrine; and (2) the validity of the Court's previous balancing test.[9] However, the Court's reasoning may also shine light on its application of the DCC generally, including its holding that discriminatory state laws are invalid per se and the weight given to extraterritoriality as a factor in evaluating a relevant law's "burden" on interstate commerce.

This Note argues that after *NPPC*, the Court should reconsider its approach to state regulation of waste. First, despite *NPPC* not involving allegations of discrimination against interstate commerce, the Court's analysis helps demonstrate why its approach to supposedly discriminatory waste regulations has been flawed. Despite substantive federal law on the subject, waste management is largely the domain of states and localities. Waste management has also played an outsized role in DCC jurisprudence, having been subject to heightened DCC scrutiny in a series of Supreme Court cases from 1978 to 2007.[10] Much of the Court's analysis in dismissing the challenge to Prop 12, in fact, bolsters the challenges that scholars and Justices have voiced to the waste decisions. Second, even if the Court maintains its waste precedents, California can and should apply the logic of the Court's ruling to its current handling of toxic waste. Presently, certain waste that is considered non-hazardous under federal law is deemed hazardous under California law.[11] While at first blush this may seem consistent with the state's environmental values, the reality is more complicated as much of the state-defined hazardous waste ends up disposed in out-of-state regular solid waste landfills.[12] By passing stricter regulations on this type of disposal, the state can regulate evenhandedly in a way that acceptably restricts interstate waste trade but still passes constitutional muster.

This Note proceeds as follows. Part I provides background on the DCC including its history, modern application, underlying principles, and relationship to state waste regulations. Part II covers the arguments and outcome of *NPPC*, the Supreme Court's most recent DCC case. Part III discusses and applies the Court's rationale to earlier DCC waste regulation cases and proposes a solution to California's hazardous waste export problem that is more feasible post-*NPPC*.

I. THE DORMANT COMMERCE CLAUSE

A. History of the Dormant Commerce Clause

To fully understand the contours of the DCC and the murkiness around its application, it is helpful to start from the doctrine's inception.

The Commerce Clause as written in Article I of the Constitution empowers Congress to "regulate Commerce . . . among the several States . . . ."[13] The

9. *Id.* at 348 and 392.
10. *See infra* Part 1-D.
11. *See* CAL. CODE REGS. tit. 22, § (a)(2)(B) (2024).
12. *See infra* Part III-B.
13. U.S. CONST. art. I, § 8, cl. 3.

Supreme Court, by "reading between the Constitution's lines,"[14] has held that the Commerce Clause not only vests Congress with the ability to regulate interstate commerce but also contains an implicit negative command forbidding state laws that discriminate against interstate commerce.[15] This negative command is known as the dormant Commerce Clause.

In *Gibbons v. Ogden*, Chief Justice Marshall broadly defined the scope of Congress's power to regulate interstate commerce.[16] But in dicta, Marshall also considered the Commerce Clause as an independent limit on state power, even where Congress had not acted.[17] He wrote that states may pass laws regulating commerce in their own states, such as inspection, quarantine, and health laws, that still have "a remote and considerable influence on commerce" in other states.[18] But "when a State proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress and is doing the very thing which Congress is authorized to do."[19]

A few decades later, in *Cooley v. Board of Wardens*, the Court upheld a Pennsylvania law requiring all ships entering or leaving the Port of Philadelphia to use a local pilot or pay a fine that went to support retired pilots.[20] In doing so, the Court reasoned that Congress manifested an intention not to overrule state legislation about local ports, stating that "it is 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 parts within their limits."[21] The implied test articulated here by the Court was that when Congress had not definitely reserved its authority on a subject, states could legislate on such matters characterized by "local peculiarities," whereas areas requiring uniform treatment among the states required federal regulation. Many cases applied this "local vs. national character" test throughout the nineteenth and part of the twentieth century, drawing a stark divide between valid state regulations and those encroaching upon areas that required national uniformity of regulation.[22]

B. The Modern Dormant Commerce Clause

The Court eventually moved from this bright line rule to a balancing approach that weighs the benefits of a law against the burdens it imposes on interstate commerce.[23] The specific balancing test used depends first on whether

14. *NPPC*, 598 U.S. at 368.
15. *See* Nw. Airlines, Inc. v. Cnty. of Kent, 510 U.S. 355, 372-73, 373 n.18 (1994).
16. 22 U.S. 1 (1824).
17. *Id.* at 209.
18. *Id.* at 203.
19. *Id.* at 199-200.
20. 53 U.S. 299, 312 (1851).
21. *Id.* at 319.
22. *See, e.g.*, Welton v. Missouri, 91 U.S. 275 (1875); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886); Smith v. Alabama, 124 U.S. 465 (1888); Erb v. Morasch, 177 U.S. 584 (1900); Atchison Topeka & Santa Fe Ry. Co. v. R.R. Comm'n, 283 U.S. 380 (1931).
23. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 456–57 (6th ed. 2020).

the law at issue is (1) deemed discriminatory against out-of-staters or (2) treats in-staters and out-of-staters alike. If a state law is deemed discriminatory on its face or in its effect, it is deemed "virtually per se invalid,"[24] and only survives if it passes a rigorous strict scrutiny test.[25] The DCC strict scrutiny test upholds a discriminatory state law only if the law serves a legitimate local purpose that cannot be achieved by a less discriminatory alternative.[26] Once a law is determined to be discriminatory, it is almost certain to be struck down. If a law does not discriminate against out-of-staters but has only incidental effects on interstate commerce, the Court evaluates it under a more permissive balancing test, commonly referred to as *Pike* balancing, in which it weighs the local benefits of the law against its burdens on interstate commerce.[27]

1. Determining Whether a State Law Is Discriminatory

The first question the Court addresses in its analysis under the DCC is whether a state law is discriminatory. A law may be found to be facially discriminatory if its plain language draws distinctions between in-state and out-of-state economic interests. Or a law may be non-facially discriminatory if its language appears neutral, but the law nonetheless has a discriminatory effect.

In *City of Philadelphia v. New Jersey*, the Court first developed its two-step formulation for DCC analysis and used it to strike down a local law it deemed facially discriminatory.[28] To deal with a shortage of landfill space, the New Jersey legislature prohibited the importation of out-of-state waste for disposal in New Jersey. After identifying municipal waste as an article of commerce, the Court determined that the legislative purpose of the ban was not relevant to the constitutional issue because the New Jersey law discriminated against out-of-state articles of commerce "both on its face and in its plain effect."[29] In the Court's view, even a legitimate goal could not be pursued through illegitimate means. The Court concluded its analysis by cautioning against economic isolation:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.[30]

24. Oregon Waste Sys. Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 99 (1994).
25. *See* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COM. 395, 395–96 (1986).
26. *See id.* at 396.
27. *See id.* at 398; *see* Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).
28. 437 U.S. 617, 624, 627–28 (1978).
29. *Id.* at 627.
30. *Id.* at 629.

Similarly, a law that does not discriminate on its face may be invalid if it unintentionally has a discriminatory effect. Consider *Hunt v. Washington State Apple Advertising Commission*,[31] in which an apple industry group brought a Commerce Clause challenge to a North Carolina statute requiring "all closed containers of apples sold, offered for sale, or shipped into the State to bear 'no grade other than the applicable U.S. grade or standard.'"[32] Washington was the largest producer of apples in the United States, and the law expressly prohibited the display of state grades on North Carolina-bound apples, creating a costly marketing problem for the state of Washington. The Court found the statute discriminatory in effect because it raised the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving their North Carolina counterparts unaffected, since they were not forced to alter their marketing practices to comply with the statute (effectively shielding the local apple industry from competition).[33]

Once the Court finds that a law is either facially or in effect discriminatory, it applies a strict scrutiny test, upholding the law only if it serves a legitimate local purpose that cannot be achieved by a less discriminatory alternative.[34] This test is hard to pass. The only time a discriminatory state law withstood a DCC challenge was in *Maine v. Taylor*.[35] There, the Court upheld a Maine statute that blocked all inward shipments of live baitfish at the state's border because "substantial scientific uncertainty surround[ed] the effect that baitfish parasites and nonnative species could have on Maine's fisheries."[36] There was no less discriminatory alternative because "there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species."[37]

Thus, when it comes to discriminatory state laws, the strictures of the DCC are well settled. Whether such laws are discriminatory in text or in effect, and no matter how laudable a state's policy goals may be, courts are almost certain to find less discriminatory alternatives that achieve those goals, rendering a finding of discrimination "practically outcome determinative."[38]

2. Pike *Balancing for Nondiscriminatory Laws That Have Only Incidental Effects on Interstate Commerce*

If a court finds a state law to be nondiscriminatory and having only incidental effects on interstate commerce, the court evaluates the law under the

31. 432 U.S. 333 (1977).
32. *Id.* at 335.
33. *Id.* at 350–52.
34. *See id.* at 396.
35. 477 U.S. 131 (1986).
36. *Id.* at 148.
37. *Id.* at 141.
38. Stephanie Postal, Note, *Looking Beneath the Surface of* Rocky Mountain Farmers Union *and Dormant Commerce Clause Challenges to State Environmental Efforts*, 41 ECOLOGY L.Q. 459, 463 (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 442 (4th ed. 2011) ("[S]tate laws that discriminate rarely are upheld, while nondiscriminatory laws are infrequently invalidated.")).

more permissive *Pike* balancing test. Under *Pike* balancing, the court will uphold the law if it finds that its benefits to the government outweigh its burdens on interstate commerce.[39]

The *Pike* balancing test originated from the case *Pike v. Bruce Church, Inc.*, which involved an Arizona statute requiring cantaloupes grown in Arizona to follow certain packing requirements.[40] A state official enforced the requirements by prohibiting Bruce Church, Inc. from transporting uncrated cantaloupes from its Arizona ranch to California for packing and processing, requiring the company to build an expensive new packing shed in Arizona.[41] The Court explained the balancing test as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[42]

The Court struck down the law, reasoning that the burden on commerce (requiring business to be performed in Arizona when it could be more efficiently performed elsewhere) clearly outweighed the state's "tenuous interest in having the company's cantaloupes identified as originating in Arizona."[43]

While *Pike* created a new test, scholars have questioned the extent to which it actually involved balancing rather than per se anti-protectionist considerations.[44] Judges and scholars have also criticized *Pike* balancing for its *Lochnerian* placement of the judiciary in position of evaluating economic policy.[45] The core concern of the DCC is striking down discriminatory state laws, so critics have stated that if a state law regulates evenhandedly, it should not be subject to an unpredictable, ad hoc balancing test.[46]

One thing is for certain. The fate of a state law facing a DCC challenge depends substantially on whether it is deemed discriminatory. Once determined

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39. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

40. *Id.* at 138.

41. *Id.* at 139–40.

42. *Id.* at 142.

43. *Id.* at 145.

44. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1220 (1986).

45. *See* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy." (internal citation omitted)); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008) ("What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.").

46. *See* Farber, *supra* note 25, at 398–99 (internal citations omitted).

to discriminate between in-staters and out-of-staters, a law is unlikely to survive heightened scrutiny. Meanwhile, the test for evenhanded regulations, while uncertain, is much more flexible. The Court has not invalidated a law under *Pike* in more than three decades.[47] This is especially important given that the line between a law being discriminatory in effect and a law having incidental effects on interstate commerce is not entirely clear[48] but can wind up being outcome determinative.[49]

*3. Extraterritoriality Pre-*NPPC

Finally, before *National Pork Producers Council v. Ross*, it was thought that three Supreme Court decisions—*Baldwin v. G.A.F. Seelig, Inc.*,[50] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[51] and *Healy v. Beer Institute, Inc.*[52]—elucidated a DCC test separate from the anti-discrimination principle and *Pike* balancing. The "extraterritoriality" doctrine inferred from these cases stemmed from language prohibiting state laws with the inherent practical effect of regulating out-of-state commerce.[53] Under the extraterritoriality test, a state law that regulates or applies to commerce "wholly outside of the State's borders"[54] is "virtually per se invalid"[55] even if it "neither discriminate[s] against out-of-state interests nor disproportionately burden[s] interstate commerce."[56] As demonstrated in Part II, the Supreme Court's most recent DCC decision

47. Brief for the State Respondents at 37, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2022) (No. 21-468); *see also* Bradley W. Joondeph, *State Taxes and "*Pike *Balancing",* 99 IND. L.J. 893, 905 n.81 (2024) ("There appear to be only seven decisions in which a majority or plurality of the Supreme Court has invalidated a nondiscriminatory, intra-territorial state law specifically due to its incidental burden on interstate commerce: *Quill*, 504 U.S. 298 (1992); *Edgar v. MITE Corp*., 457 U.S. 624 (1982); *Kassel v. Consolidated Freightways Corp*., 450 U.S. 662 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967); *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 526 (1959); and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 779 (1945).").

48. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997).

49. For a more recent example, consider the DCC challenge brought against California's Low Carbon Fuel Standard (LCFS). In *Rocky Mountain Farmers Union v. Corey*, out-of-state liquid fuel producers argued that the California Air Resources Board discriminated against renewable fuels produced outside of California by basing its credit calculation on the distance of shipment of fuels to California. The Ninth Circuit majority applied *Pike* balancing and upheld the LCFS, finding that it was within California's discretion to factor in real differences in carbon intensity. In contrast, the dissent applied strict scrutiny due to the law's facial geographic discrimination and the existence of less burdensome regulatory incentives. 730 F.3d 1070, 1093, 1109 (9th Cir. 2013).

50. 294 U.S. 511 (1935).

51. 476 U.S. 573 (1986).

52. 491 U.S. 324 (1989).

53. *See id.* at 336. ("[T]he '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.'") (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)).

54. *Id.*

55. Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013).

56. *Id.* at 378 (Sutton, J., concurring).

refused to extend the logic of the *Healy* line of cases beyond the discriminatory price-affirmation statutes at issue in those cases.[57]

C. Principles Underlying the Dormant Commerce Clause

Why adhere to an "implied" constitutional doctrine that was not explicitly laid out by the drafters of the Constitution? After all, it would not have been difficult for the framers to include, and Congress has the power to preempt state legislation that it perceives to overstep its bounds. Farber and Hudec pose the question: "Free trade may be a desirable state of affairs, but so are many other things that are left to the discretion of governmental units. Why not leave local units of government . . . with unlimited control over this area? Why have a . . . DCC at all?"[58]

Farber and Hudec go on to note two traditional justifications for the DCC: "free trade as a substantive value, and protection of outsiders as a process value."[59] The free trade rationale emphasizes the importance of guarding a national free market from protectionism. Protectionism refers to laws that intend to improve "the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors."[60] In *Baldwin v. G.A.F. Seelig, Inc.*, for example, the Court invalidated the application of a New York law setting a minimum price for milk to a dealer buying its milk from a producer in Vermont.[61] Writing for the Court, Justice Cardozo described the Commerce Clause as a response to the protectionist retaliations that typified state relations under the Articles of Confederation. The Court noted that if New York "may guard [its farmers] against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."[62] *Baldwin* demonstrates the most traditional concern animating the DCC—protection of political union between states against protectionist laws which favor insularity and locality. [63]

While the free-market rationale focuses on antiprotectionism, the outsider protection rationale focuses on protecting outsiders from burdensome laws passed by state governments where they lack representation.[64] If a law burdens in-staters and out-of-staters equally, it is less likely to fail DCC scrutiny since the in-staters can hold government actors who passed the law politically

57. *See supra* Part II-C-1.

58. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATTs-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1404 (1994).

59. *Id.* at 1406.

60. Regan, *supra* note 44, at 1138.

61. 294 U.S. 511, 519–21 (1935).

62. *Id.* at 522.

63. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 417 (1994) (Souter, J., dissenting).

64. Later use in this Article of the term "process protection" derives from Robert Verchick's use of the phrase to refer to the same idea of the outsider protection rationale. *See* Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1251 (1997).

accountable. For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court applied *Pike* balancing and upheld a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard cartons.[65] The Court reasoned that the burden on the out-of-state plastics industry, compared to the Minnesota pulpwood industry, was not substantial enough to outweigh the state's interest in conservation.[66] Importantly, "two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation [were] Minnesota firms."[67] As the Court explained in a footnote, "the existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse."[68]

These principles are especially important to consider regarding their role (or lack thereof) in the Court's application of the DCC to state environmental laws–particularly waste regulation, as will be examined next. In his examination of the "waste cases," legal scholar Robert Verchick observed, "the Court mov[ed], with only moderate dissent, from the harbor of representational concerns into the more expansive waters of substantive economic rights."[69] At the same time, the Court moved from an antiprotectionism analysis to one focused on protecting an "unfettered market."[70] However, the Court's logic in *NPPC* could support reorienting the DCC toward its traditional rationales. And while questions about the DCC's reach remain, putting extraterritoriality to rest may modestly expand state regulatory power over waste disposal that has previously been limited.

D. Relationship Between the Dormant Commerce Clause and Waste Regulation

The DCC has often been a roadblock to state environmental regulations that, while lacking protectionist intent, were nonetheless invalidated when subjected to strict scrutiny and found to discriminate against interstate commerce.[71] This has been especially true for interstate waste regulation, starting with *City of Philadelphia* and expanding in subsequent cases.[72] Environmental law scholar

65. 449 U.S. 456, 472–74 (1981).
66. *Id.* at 473.
67. *Id.*
68. *Id.* at 473 n.17.
69. Verchick, *supra* note 64, at 1255.
70. *Id.* at 1244, 1270–74.
71. *See, e.g.*, Sporhase v. Nebraska, 458 U.S. 941, 960 (1982) (holding unconstitutional, under the DCC, a Nebraska statute that required any person intending to withdraw groundwater from any well in the state and transporting it for use in an adjoining state to first obtain a permit from the Nebraska Department of Water Resources). The Court acknowledged that Nebraska had a legitimate interest in preserving its diminishing groundwater resource. *Id.* at 954. However, it took issue with the statute's reciprocity requirement, which required any state using Nebraska groundwater to grant reciprocal rights to withdraw and transport groundwater from that state into Nebraska. *Id.* at 957-58. The Court found the statute discriminatory on its face and not narrowly tailored enough to survive DCC scrutiny. *Id.*
72. This notable line of dormant Commerce Clause cases, referred to as the "garbage cases" or "waste cases," involved challenges brought by waste disposal companies against regulations from garbage-importing states seeking to curb the flow of out-of-state garbage. *See* City of Philadelphia v. New

Christine Klein noted that in DCC cases, "with only one exception, the Court has invalidated every state law protecting water or land resources that it has considered between 1978 and the end of the twentieth century."[73] This Part focuses on how the Court has applied heightened DCC scrutiny to state waste regulations without paying adequate attention to the doctrine's underlying principles outlined by Verchick. The devotion to protecting an unrestricted interstate market not only forced certain states to become dumping grounds for their neighbors, but also blurred the lines between discriminatory (per se invalid) and burdensome (deferential to the state) laws.

This blurred line takes us back to *City of Philadelphia*, discussed above, where the Court struck down a New Jersey law prohibiting the importation of out-of-state waste for disposal in New Jersey. The "virtually per se rule of invalidity" applied against the New Jersey import restriction was novel in the sense that the Court simply looked at the law's language and effect, when previous DCC cases encouraged courts to review legislative motive and the legislation's goals, with the aim of rooting out simple economic protectionism.[74] In this case, there was no evidence that New Jersey was attempting to favor local waste producers at the expense of New York waste producers, yet the Court declared any such motive irrelevant.[75] The Court ending its analysis at the law's facial discrimination based on geography demonstrates the Court's desire for an unfettered market as an end in and of itself.

Fourteen years later, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, the Court considered a Michigan law that prohibited private landfill operators from accepting solid waste that originated outside the county in which their facilities were located unless authorized by the receiving county's waste management plan.[76] Michigan, a "net exporter" of waste, "adopted the legislation as part of a comprehensive scheme to encourage local responsibility for waste management."[77] When St. Clair County prohibited a local landfill operator from accepting nonlocal waste, the operator sued. Michigan argued that the law operated "evenhandedly" because it equally burdened all out-of-state and most in-state waste.[78] Additionally, Michigan argued that the law did not unfairly burden outsiders since in-state interests could lobby against local trade barriers that threatened out-of-state interests as well. Moreover, the only plaintiff in *Fort Gratiot* resided in St. Clair County.

Jersey, 437 U.S. 617 (1978); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992); Oregon Waste Sys., Inc. v. Dep't of Env't. Quality of Or., 511 U.S. 93 (1994); C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Authority, 550 U.S. 330 (2007).

73. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1, 44 (2003).

74. Verchick, *supra* note 64, at 1272.

75. *City of Philadelphia*, 437 U.S. at 626.

76. 504 U.S. 353, 357 (1992).

77. Verchick, *supra* note 64, at 1258.

78. *Fort Gratiot*, 504 U.S. at 361.

Nevertheless, the Court struck the law down for discriminating on its face against out-of-county waste generators.[79]

In *Chemical Waste Management, Inc. v. Hunt*, the Court struck down an Alabama law that imposed an additional disposal fee on all hazardous waste disposed of in Alabama facilities.[80] The Court found the discriminatory tax no different from the prohibition in *Fort Gratiot*.[81] Again, the plaintiff was the owner and operator of an in-state facility.[82] There was no reference in the opinion to outsized hardship on any specific out-of-state parties.

Similarly, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, Oregon, a net importer of waste, sought to impose a $2.25 per ton surcharge on in-state disposal of out-of-state solid waste to recoup costs.[83] Once again, the Court struck down the surcharge as discriminatory without seriously considering economic protectionism or process protection despite Oregon "impos[ing] restrictions on the [waste disposal] *of its own citizens*."[84]

In *C&A Carbone, Inc. v. Town of Clarkstown*, the Court considered a flow control ordinance requiring all solid waste to be processed at a selected transfer station before leaving Clarkstown, New York.[85] The town had planned to use the processing fees at the station to subsidize the facility's cost.[86] The Court invalidated the ordinance after finding it to be discriminatory against interstate commerce by favoring an in-state facility over out-of-state facilities.[87] As in the previous cases, the plaintiffs had a substantial in-state presence.[88] Moreover, the law in *Carbone* precluded competition from both in-state and out-of-state waste processors in favor of a centrally regulated approach to waste management.[89]

Finally, in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, the Court restricted the scope of the DCC regarding waste management.[90] The Court applied *Pike* balancing and upheld a county waste disposal ordinance virtually identical to that in *Carbone*, with the key differentiating factor being the favored facility was a state-created public benefit corporation owned and operated by the county government.[91] The Court

79. *See id.;* Verchick, *supra* note 64, at 1259-60.
80. 504 U.S. 334, 336–38.
81. *Id.* at 340–42.
82. *Id.* at 334.
83. 511 U.S. 93, 93 (1994); Verchick, *supra* note 64, at 1263–64.
84. *Oregon Waste Sys.*, 511 U.S. at 111 (Rehnquist, C.J., dissenting). Justice Rehnquist believed, for example, that the Court "ignore[d] the fact that in-state producers of solid waste support[ed] the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste." *Id.* at 110.
85. 511 U.S. 383, 386 (1994).
86. *Id.* at 387.
87. *Id.* at 391.
88. *Id.* at 387.
89. *Id.* at 390.
90. 550 U.S. 330, 342–47 (2007).
91. *Id.* at 334.

reasoned that "it simply 'does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.'"[92]

The above rulings demonstrate Verchick's argument that the waste cases exemplify the Court's increasing unwillingness to consider the traditional DCC principles of process protection and antiprotectionism.[93] Rather than weighing the benefits and burdens imposed by a state law to weed out disproportionate in-state representation or protectionist motives, the Court evidenced a broad distrust of laws that differentiate between in-state and out-of-state interests, with the outlier being laws favoring local government over both in-state and out-of-state private companies, such as the law upheld in *United Haulers*. And since waste regulation is far from entirely state run, *United Haulers*'s application of *Pike* balancing as opposed to the often-fatal strict scrutiny test represents an exception rather than the rule for states restricting the flow of waste.

II. *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

With the waste cases and their focus on the per se antidiscrimination rule in mind, the relevance of *NPPC*'s focus on a nondiscriminatory animal welfare law is not obvious at first glance. However, a deep look shows that *NPCC* can provide further justification for reexamining the Court's broad view of discrimination under the DCC and the role of extraterritoriality in waste regulation. Before delving into its relevance to the waste cases and California's hazardous waste problem, this Part summarizes the key arguments made by both sides and the Court's ruling.

In November 2018, California's Proposition 12 (Prop 12) passed with 62.7 percent voter approval.[94] The law amended the state's Health and Safety Code to prohibit the sale of eggs, veal, and pork within the state when produced without following specific standards for freedom of movement, cage-free design, and specified minimum floor space.[95] Violations are punishable by a $1,000 fine or 180 days in prison, and they subject sellers to civil actions for damages or

92. *Id.* at 343 (Alito, J., dissenting).

93. *See* Verchick, *supra* note 64, at 1258 ("Of the four Supreme Court opinions addressing the waste trade since [*Philadelphia*], none of them can be explained easily in terms of the process protection rationale. Instead, each decision . . . strikes down, under the strictest of standards, popular laws that pose little threat to representational values. A brief examination of each case shows the Court moving, with only moderate dissent, from the harbor of representational concerns into the more expansive waters of substantive economic rights."); *see also id.* at 1270 ("While the language of these cases might suggest no more than an affirmation of the anti-protectionist view described earlier in this section, a closer investigation shows that Philadelphia and its progeny have moved beyond this justification and have reworked the familiar Commerce Clause doctrines to combat not only protectionism but almost any obstacle to an unfettered market.").

94. *See* Proposition 12, LEG. ANALYST'S OFF. (Nov. 6, 2018), https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

95. CAL. HEALTH & SAFETY CODE § 25991(e) (West 2018) (prohibiting the sale of such products when the animal is confined in a way "that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," or "with less than 24 square feet of usable floorspace per pig.").

injunctive relief.[96] California law imposes the same confinement standards on farmers who raise sows in California, even if the meat of the pigs born from those sows (or of the sows themselves) is sold elsewhere.[97]

In December 2019, the National Pork Producers Council and the American Farm Bureau Federation (NPPC) filed suit in federal district court, alleging that Prop 12 violated the dormant Commerce Clause.[98] The United States District Court for the Southern District of California dismissed the complaint for failure to state a claim.[99] The organizations appealed, and the Ninth Circuit affirmed.[100] When the Supreme Court granted NPPC's petition for a writ of certiorari, "many anticipated NPPC could be one of the more significant 'horizonal federalism' decisions in a generation."[101]

A. NPPC's Argument

The National Pork Producers Council conceded that Prop 12 was not discriminatory but instead attacked the law via two other pillars of the DCC—extraterritoriality and *Pike* balancing.[102] The crux of NPPC's extraterritoriality argument was that the DCC disallows laws like Prop 12 that have the "practical effect" of regulating wholly out-of-state commerce, regardless of whether they also regulate in-state commerce.[103] What matters is not just discrimination or protectionism, but that the State is "impeding substantially the free flow of [interstate commerce]."[104] According to NPPC, the Court had embraced the doctrine in various prior cases.[105]

Moreover, NPPC argued that California exaggerated the potential negative effects of the extraterritoriality doctrine when the state claimed that the doctrine would constrain too many state regulations which often have out-of-state effects. NPPC differentiated between laws that regulate in-state conduct and merely have "effect[s]" on conduct in other states (which are permissible) and those that

96. CAL. HEALTH & SAFETY CODE §25993(b).

97. *See* CAL. HEALTH & SAFETY CODE §25990(b).

98. Complaint for Declaratory and Injunctive Relief at 1–5, Nat'l Pork Producers Council v. Ross, 456 F.Supp.3d 1201 (S.D.C.A. 2019) (No. 1), 2019 WL 6683174.

99. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 364 (2023).

100. *Id.*

101. Bradley W. Joondeph, *The 'Horizontal Separation of Powers' after* National Pork Producers Council v. Ross, 61 SAN DIEGO L. REV. 45, 60 (2024).

102. *See* Reply Brief for Petitioners, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2022) (No. 21-468).

103. *Id.* at 3.

104. *Id.* at 5 (quoting S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945)).

105. *See generally* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); *see also* Reply Brief for Petitioners, *supra* note 102, at 7 ("This Court's invalidation of discriminatory or protectionist laws does not mean that those are the only concerns of the dormant Commerce Clause. Respondents cite no case in which the Court considered and rejected the extraterritoriality doctrine on the grounds that it is not an aspect of the dormant Commerce Clause. Far from it, this Court has explicitly embraced the doctrine, in *Baldwin*, *Healy*, *Brown-Forman*, *Edgar*, and *Southern Pacific*, and recently reiterated its place in Commerce Clause jurisprudence in *Wayfair*.").

effectively control conduct entirely out of the state's jurisdiction or "usurp[] other States' policy-making prerogatives."[106]

Based on what NPPC framed as a "straightforward application" of DCC principles, that states cannot legislate commerce in other states, Prop 12 was an unconstitutional extraterritorial regulation.[107] 99.9 percent of sow farmers operate outside of California.[108] And given the "complex, vertically-segmented nature of pork production," most of them would have to "alter their facilities, practices, and contractual relationships" and incur significant costs to comply with the law.[109] Retail prices would increase both in- and out-of-state, and other states' views on sow housing would be overridden.[110] Striking down Prop 12 would "preserve[] the rights of other States to make their own policy choices regarding farming practices in their jurisdictions, and protect[] nationwide commerce in pork from Balkanized regulatory regimes."[111]

NPPC also argued that Prop 12 failed *Pike* balancing.[112] First, the regulation imposed substantial burdens on interstate commerce. The industry would have to completely change its current methods of sow housing which would "increase sow mortality, decrease herd size, interfere with entirely out-of-state contracts, and result in consumers nationwide paying for California's preferred out-of-state farming practices."[113] Second, NPPC argued that such burdensome effects on interstate commerce easily outweighed the law's alleged benefits. California, they argued, has no "legitimate local interest" in regulating out-of-state animal husbandry policies, and burdening interstate commerce based on "philosophical objection" would open the floodgates of economic Balkanization.[114] Furthermore, Prop 12 would "remove important tools for maintaining herd health," does not promote human health, and could actually increase the risk of foodborne pathogens.[115] Thus, because the regulation subjected the nationwide pork industry to burdensome regulations without clear local benefit, NPPC argued Prop 12 was invalid under *Pike*.

B. California's Argument

California addressed both of NPPC's arguments against Prop 12.[116] The state first addressed the extraterritoriality argument, stating that Prop 12 did not control out-of-state prices or directly regulate wholly out-of-state commerce.[117] California distinguished *Baldwin*, *Brown-Forman*, and *Healy* as specifically

106. Reply Brief for Petitioners, *supra* note 102, at 11.
107. *Id.* at 10.
108. *Id.* at 3.
109. *Id.* at 3–4.
110. *Id.* at 4–5.
111. *Id.* at 4.
112. *Id.*at 21.
113. *Id.* at 23.
114. *Id.* at 14–15.
115. *Id.* at 14, 16.
116. *See* Brief for the State Respondents, *supra* note 47.
117. *Id.* at 13.

dealing with price-control and price-affirmation statutes that sought to protect local industry with the effect of raising costs for out-of-state consumers or rival businesses.[118] All the state laws at issue in those cases were struck down as discriminatory against interstate commerce and per se invalid. Prop 12, the state argued, is nondiscriminatory. Because in-state and out-of-state pork producers are regulated evenhandedly, it is distinct from protectionist regulation of prices.[119] Respondents also distinguished Prop 12 from the law in *Edgar v. MITE Corp.* In *Edgar,* an Illinois securities statute directly regulating tender offers made by out-of-state buyers to "those living in other States and having no connection with Illinois."[120] The transactions in *Edgar* had no connection with the regulating state, whereas Prop 12 "serves the localized objective of 'eliminat[ing] inhumane and unsafe products from the *California marketplace*.'"[121]

California's second response to NPPC's extraterritoriality argument took aim at the doctrine itself. The state argued that the "practical effects" inquiry advanced by NPPC was not supported by case law and the Court had already rejected efforts to "convert *Healy*'s dicta into a sweeping new branch of dormant Commerce Clause doctrine."[122] Moreover, expanding the concept of extraterritoriality into a per se rule of invalidity would risk serious overinclusion and impinge on state sovereignty since "the States frequently regulate activities that occur entirely within one State but have effects in many."[123] Such a far-reaching standard would "invite abusive litigation and produce inconsistent results."[124] Finally, California noted existing constitutional safeguards, such as the affirmative Commerce Clause, Due Process Clause, and right to interstate travel, to address the federalism concerns raised by NPPC, as well as the state-level political checks evident in the passing of Prop 12.[125]

California also argued that Prop 12 meets NPPC's "practical effects" standard and does not regulate wholly out-of-state conduct. First, the law allows out-of-state producers to "freely choose whether to make the adjustments necessary to produce Prop[] 12-compliant pork" that may be sold in California (for a higher price) or sell non-compliant pork in other states.[126] Second, Prop 12 would not affect all pork production, as "[p]ork producers have used segregated supply chains for years" to produce specialized goods, including in response to Prop 12.[127]

Additionally, California argued that NPPC did not sufficiently state a *Pike* claim. First, the state argued that there is no cognizable burden on interstate

118. *Id.* at 13–16.
119. *Id.*
120. *Id.* at 16.
121. *Id.* at 18.
122. *Id.* at 19–20.
123. *Id.* at 22.
124. *Id.* at 24.
125. *Id.* at 25–27.
126. *Id.* at 28.
127. *Id.* at 29.

commerce, especially given the deferential nature of the balancing test to policies directed toward legitimate local concerns. Courts typically apply *Pike* balancing when there is a hidden discriminatory purpose, when the law directly interferes with instrumentalities or channels of interstate commerce, or when the regulated activity has no connection to the regulating state.[128] Second, even if there is a cognizable burden, it is not "clearly excessive in relation to the putative local benefits."[129] The state posited that California consumers clearly exhibited a moral interest in not contributing to animal cruelty. And while the risk of foodborne illness is not perfectly understood, Prop 12 is valid as a precautionary measure and the Court should not second-guess the utility of a democratically adopted state law.[130]

C. Breaking Down the Decision

The Court issued a plurality opinion not split between typical ideological lines, affirmed the judgment of the Ninth Circuit, and upheld Prop 12. [131] In its opinion, the Court evidenced a significant disagreement regarding the reach of the DCC, but a majority agreed to (1) clarify the lack of an independent extraterritoriality test and (2) preserve the *Pike* balancing test.[132]

1. Extraterritoriality

The Court unanimously refused to accept NPPC's invitation to enforce a per se extraterritoriality rule against state laws with the "practical effect" of regulating out-of-state commerce.[133] Writing for the Court, Justice Gorsuch emphasized the "antidiscrimination principle" at the core of DCC jurisprudence: the DCC is meant to strike down "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[134] He explained that NPPC wrongly interpreted an "almost per se" rule against extraterritorial regulations from *Healy*, *Brown-Forman*, and *Baldwin*, when those cases actually "typif[y] the familiar concern with preventing purposeful discrimination against out-of-state economic interests."[135] The Court in those cases took issue with

128. *Id.* at 36–40.
129. *Id.* at 44.
130. *Id.* at 44–48.
131. The plurality that invalidated Prop 12 included Justices Gorsuch, Thomas, Sotomayor, Kagan, and Barrett. Within the plurality, Justices Gorsuch and Thomas were squarely against applying the *Pike* balancing test. Justices Sotomayor, Kagan, and Barrett were in the pro-*Pike* camp, with the liberal Justices finding Prop 12 to flunk the balancing test, and Barrett stating she would have applied *Pike* balancing had the benefits and burdens been commensurable. Chief Justice Roberts, along with Justices Alito, Kavanaugh, and Jackson, would have vacated the judgment and remanded the case for the court below to decide whether the petitioners stated a claim under *Pike*. *See generally* Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).
132. *Id.* at 371, 380.
133. *Id.* at 376.
134. *Id.* at 369 (quoting New Energy Co. of Ind. v. Limbach, 486 U. S. 269, 273-274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)).
135. *Id.* at 371.

specific impermissible extraterritorial effects; the statutes challenged in those cases regulated prices to limit out-of-state competitive advantages, protected local industry and operated like "a tariff or customs duty."[136] Gorsuch also echoed California's arguments regarding the danger of expanding the dicta in *Healy* given the interconnection of the modern marketplace. For example, "[e]nvironmental laws often prove decisive when businesses choose where to manufacture their goods."[137]

2. Pike *Balancing*

While NPPC did not fare any better with their *Pike* claim, the Court splintered on the validity of the test itself and how exactly it applied to Prop 12. Justices Gorsuch, Thomas, Sotomayor, and Kagan found that NPPC failed to plausibly allege that Prop 12 imposed a "substantial burden" on interstate commerce.[138] The possibility that "certain out-of-state farmers and processing firms will find it difficult to comply with Proposition 12 and may choose not to do so" is not enough.[139] Compliance is only required if a firm decides to avail itself of the California market, so costs would be borne either by those firms or California consumers.[140] And while Justice Barrett found that NPPC alleged a substantial burden on interstate commerce, she nonetheless found their *Pike* claim to be insufficient due to Prop 12's benefits and burdens being "incommensurable"—meaning that weighing California's moral interest in animal welfare against the law's monetary costs would require moral and policy judgment inconsistent with the judicial role.[141]

Meanwhile, Chief Justice Roberts, with Justices Alito, Kavanaugh, and Jackson, found that NPPC *had* plausibly alleged a substantial burden on the interstate pork market and found the benefits and burdens to be comparable.[142] These four Justices placed great weight on the compliance costs to farmers serving the California market and the spillover effects on firms that do not even sell in California. Such "sweeping extraterritorial effects," while not rendering Prop 12 per se invalid, were an important enough factor in the *Pike* analysis to overcome a motion to dismiss.[143]

Although all the Justices applied *Pike* balancing in their analysis, some expressed skepticism of the test. In the opinion of the Court, Justice Gorsuch explained, "[p]etitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule." And since the petitioners disavowed any discrimination claim, Justice Gorsuch reasoned, *Pike* was of little use. However,

136. *Id.* at 372 (quoting West Lynn Creamery, Inc. v. Healy, 512 U. S. 186, 194, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994)).
137. *Id.* at 374 (citing American Beverage Assn., 735 F. 3d, 379 (2013)).
138. *Id.* at 383–87.
139. *Id.* at 385.
140. *Id.*
141. *Id.* at 393–94 (Sotomayor, J., concurring in part).
142. *Id.* at 394, 397 (Roberts, C.J., concurring in part and dissenting in part).
143. *Id.* at 399–400 (Roberts, C.J., concurring in part and dissenting in part).

Justice Gorsuch was only joined by Justices Thomas and (to some extent) Barrett in his desire to discard *Pike* balancing entirely. To these three Justices, weighing a state law's burdens on interstate commerce against its local benefits is "a task no court is equipped to undertake" and should be left to the legislature.[144] The other six Justices, while disagreeing on *Pike*'s application in this case, refused to "pull the plug" on the controversial test.[145] In the lead dissent, Chief Justice Roberts stated that "sometimes there is no avoiding the need to weigh seemingly incommensurable values." This sentiment was echoed in Justice Sotomayor's concurrence and Justice Kavanaugh's dissent.[146] However, Justice Barrett refused to discard *Pike* balancing entirely and found that NPPC had plausibly alleged a substantial burden on interstate commerce, yet still found NPPC's claim insufficient because the benefits and burdens of Prop 12 were "incommensurable." Thus, if Justice Barrett believed the benefits and burdens to have been commensurable, the outcome of the case could have been drastically different since a majority of the court would have agreed to remand the case for the Ninth Circuit to apply *Pike*.

As Bradley Joondeph points out, "[t]he Court's holding with respect to this claim [] stands as a naked outcome, lacking any precedential rationale."[147] Going forward, *NPPC* may simply mean that California can enforce Prop 12. But the dicta regarding *Pike* balancing sheds somewhat greater light on how the Court may rule in future DCC cases. Given the uncertainty of *Pike* balancing, and the Court's clear refusal to read an extraterritoriality rule into the DCC, major unanswered questions in the wake of *NPPC* are: To what extent can a state regulate out-of-state behavior, and how should such regulation be evaluated?

III. WASTE WARS AND THE CALIFORNIA PROBLEM

Part I of this Note detailed the Court's historical treatment of the DCC and its application to state and local waste regulations. Part II examined how the Court addressed extraterritoriality and *Pike* balancing in its most recent DCC decision. With these issues in mind, this Part explains what *NPPC* can tell us about the Court's reasoning in the DCC waste cases and California's current hazardous waste problem.

*A. Reexamining the Waste Cases Post-*NPPC

The Court in *NPPC* was right to reject the petitioners' invitation to interpret the DCC as invalidating laws with the "practical effect" of controlling out-of-state transactions. In doing so, it reaffirmed what lower courts had already ruled: the *Healy, Brown,* and *Baldwin* line of cases dealt with specific impermissible

144. *Id.* at 382.
145. *Id.* at 395 (Roberts, C.J., concurring in part and dissenting in part).
146. *Id.* at 396–97 (Roberts, C.J., concurring in part and dissenting in part).
147. Joondeph, *supra* note 101, at 73.

extraterritorial effects.[148] It is true that the Court in those cases took issue with one state "project[ing] its legislation" onto another state and thus directly regulating interstate commerce. But as Justice Gorsuch pointed out in *NPPC*, those cases involved purposeful discrimination against out-of-state economic interests and amounted to "simple economic protectionism."[149] To yield to an "almost per se" rule because of a law's out-of-state "practical" effects "would invite endless litigation and inconsistent results."[150]

At the same time, Justice Gorsuch's criticism of NPPC's proposed rule invalidating a law based only on its out-of-state impact could just as easily apply to the per se rule of invalidity articulated in *City of Philadelphia* and applied to resource-protection laws that draw geographical boundaries. There was no clearly articulated reason any of the laws in the *City of Philadelphia* line of cases involved protectionist measures and could not "fairly be viewed as [] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[151] Just as it is not clear where the line would be for permissible versus per se invalid extraterritorial regulation, it is also unclear what differentiates a law effectively discriminating against interstate commerce from one with merely an incidental burden on interstate commerce. *Fort Gratiot* saw the Court deem county-line restrictions that applied equally to interstate and intrastate waste discriminatory.[152] In *Oregon Waste*, an additional $0.14 per week cost for out-of-state waste producers was more than incidental.[153] In *C&A Carbone*, a flow control law that designated a transfer station for in- and out-of-state waste was also deemed discriminatory.[154] The burdens imposed on in-state interests in those cases arguably exceeded those in *NPPC*, where practically all affected producers operate outside of California. But the Court's use of "discrimination" as a placeholder for "protectionism" in the waste cases circumvented any inquiry into those effects, creating the same overinclusion problem the Court recognized in *NPPC*.

On the surface, there is a clear difference between Prop 12 and the laws at issue in the waste cases. The former regulates completely evenhandedly while the latter treated in-state and out-of-state waste differently. However, this surface-level approach to differentiate between discriminatory and nondiscriminatory laws is a shortcut that, in favoring unrestricted free trade as an end in and of itself, does not consider the more consistent principles of process protection and antiprotectionism. A fair analysis in the waste cases and *NPPC* would have focused on the burden on in-state interests versus out-of-state interests. Regarding Prop 12, most of the pork industry operates outside of the

148. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173-74 (10th Cir. 2015); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013).
149. 598 U.S. at 372.
150. *Id.* at 375.
151. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
152. *See infra* Part I-D.
153. *See infra* Part I-D.
154. *See infra* Part I-D.

regulating state, which may seem like a process protection concern. But this is tempered by the fact that compliance with Prop 12 is a precondition to accessing the California market, and voters agreed to the cost. Prop 12 had nothing to do with favoring local industry at the expense of out-of-state industry. These justifications would have made more sense than the fact that the law treated in-state and out-of-state producers the same, especially considering that almost no producers operate in California.

Likewise, in the *City of Philadelphia* line of cases, the Court focused on discrimination based on geography rather than whether the laws at issue created unfair economic advantages for in-state interests. This meant the Court did not even consider the significant presence of in-state plaintiffs, domestic burdens, and non-protectionist motives in those cases. As a result, the Court invalidated state laws that "bestow[ed] no benefit on a class of local private actors," and whose main effect and purpose was to "directly aid[] . . . government[s] in satisfying a traditional governmental responsibility."[155]

To sum up, just as a state has valid reasons to effectively regulate out-of-state behavior when the behavior has a connection to the regulating state, a state may also have reasons—such as environmental, health-based—that should be considered when evaluating "discriminatory" laws like those at issue in the waste cases. The *NPPC* Court emphasized the "antidiscrimination principle" at the core of DCC doctrine, rightfully associating it with concerns of protectionism, but the waste cases demonstrate how the Court has confused the two concepts in its pursuit of unrestricted commerce as its ultimate goal. After *NPPC*, states can more confidently pass laws that have extraterritorial effects, and such laws can affect the interstate market based on moral views of the regulating state. However, the exact extent of states' ability to do so is uncertain, and because of the Court's lack of clarity on the discrimination issue, states are still hamstrung in their attempts to pass non-protectionist laws to regulate waste disposal. Because waste moves in interstate commerce, the Court can always craft a less burdensome alternative and swiftly invalidate such laws that consider geography, thus preserving the free flow of waste despite states' valid reasons to control it.

B. Case Study: California Hazardous Waste

California is currently reckoning with its own waste crisis, and it is worth considering the potential implications of *NPPC* for the state's ability to regulate in ways that affect the interstate flow of waste. The waste cases demonstrated the Court's reluctance to allow states to regulate waste in a way it deems "discriminatory." However, given the Court's disavowal of the extraterritoriality rule and cautioning against overuse of *Pike* balancing in *NPPC*, there may be an opportunity for evenhanded regulation of California hazardous waste to promote public health and survive DCC scrutiny. This Part begins with an overview of the current waste regulation landscape in California. It proceeds by examining

155. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 411 (1994) (Souter, J., dissenting).

California's hazardous waste crisis which is, in a way, the inverse of the waste problems faced by the defendants in the waste cases. This Part concludes with a proposal to expand the reach of the state's hazardous waste law in a manner arguably consistent with both the holding of *NPPC* as well as the DCC principles that this Note argues the Court has muddled.

1. Background: Hazardous Waste Regulation in California

Passed in 1976, the Resource Conservation and Recovery Act (RCRA)[156] is the nation's primary law governing the transportation, storage, treatment, and disposal of solid and hazardous waste.[157] RCRA grants the U.S. Environmental Protection Agency (EPA) authority to monitor hazardous waste from "cradle to grave" by imposing obligations on generators,[158] transporters,[159] and owners and operators of facilities that manage hazardous waste.[160] These obligations include completion of permitting procedures, compliance with a system of tracking hazardous waste, and maintenance of extensive records.[161]

However, federal law only acts as a baseline. California adopted its own comprehensive hazardous waste management program in 1972 under the Hazardous Waste Control Act (HWCA), which eventually served as the model for RCRA.[162] California's program is more comprehensive and regulates waste and activities not covered by RCRA. The law includes stronger testing requirements, along with stricter regulation of used oil, mercury-containing waste, hazardous waste containers deemed "empty" under RCRA, and mixtures of RCRA-defined waste.[163] Since 2010, 86.1 percent of the manifested[164] hazardous waste managed within California has been non-RCRA hazardous waste (or "California hazardous waste") and 12.9 percent has been RCRA hazardous waste.[165] The largest waste stream since 2010 has been contaminated soil from site cleanups, averaging more than 567,000 tons each year.[166]

156. 42 U.S.C. §§ 6901-6987.
157. *See id.* § 6902.
158. 40 C.F.R § 262.
159. *Id.* § 263.
160. *Id.* § 264.
161. Resource Conservation and Recovery Act (RCRA) Overview, https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview (last visited Sept. 29, 2024).
162. *Our History*, CAL. DEP'T OF TOXIC SUBSTS. CONTROL, https://dtsc.ca.gov/about-dtsc/our-history (last visited Sept. 29, 2024).
163. *5 Differences Between California and Federal RCRA Waste Laws*, TRIUMVIRATE ENV'T, (Oct. 21, 2021), https://www.triumvirate.com/blog/5-differences-between-california-and-federal-rcra-waste-laws.
164. "Manifested" in this context refers to the manifest system used to track hazardous waste during shipment and arrival at its destination. *See* DEP'T TOXIC SUBSTS. CONTROL, DRAFT HAZARDOUS WASTE MANAGEMENT REPORT 2, https://dtsc.ca.gov/wp-content/uploads/sites/31/2023/07/Hazardous-Waste-Management-Report_Section-3_accessible.pdf; *Hazardous Waste Management System*, EPA, https://www.epa.gov/hwgenerators/hazardous-waste-manifest-system (last visited Sept. 29, 2024) [hereinafter DTSC Report].
165. DTSC Report, *supra* note 164, at 7.
166. *Id.* at 8.

Approximately 93 percent of contaminated soil has been non-RCRA hazardous waste, and 56.1 percent of which has been managed out of state.[167] Because hazardous waste landfill capacity is finite and hazardous waste landfills are costlier to operate and more difficult to permit than regular municipal landfills, proper treatment and disposal is often at odds with cost considerations.[168] For example, the Department of Toxic Substances Control (DTSC) requires hazardous waste landfills to have "double composite liners and leachate collection systems," but there are no such requirements for municipal solid-waste landfills.[169]

2. California Toxics and Interstate Disposal

California government agencies and businesses have transported much of the state's hazardous waste to nearby states with weaker environmental regulations and dumped it at regular municipal landfills. Since 2010, just over half of California's land-disposed hazardous waste (approximately 6,509,000 tons) has been disposed of outside of the state.[170] In most cases, this waste is "not required to be managed as hazardous waste in other states," so those states are "not required to dispose of California's non-RCRA waste in permitted hazardous waste land disposal facilities."[171] Since 2010, approximately 43.1 percent of California's manifested land-disposed hazardous waste was managed at Class 2 or Class 3 landfills (non-hazardous waste landfills).[172]

The biggest source of waste leaving California is soil from site cleanups contaminated with heavy metals like lead and chemicals like DDT.[173] While some of the waste ends up in Oregon and Nevada, which have laws that effectively treat it as hazardous if neighboring states do,[174] much of the waste ends up in Arizona and Utah, which do not have such laws.[175] Once this waste enters Arizona or Utah, it is all considered regular solid waste.[176]

In January 2023, nonprofit news outlet CalMatters published a series of articles chronicling its four-month-long investigation of California's out-of-state toxic waste dumping.[177] While CalMatters "found no reports directly linking California waste to public health issues in surrounding communities," the out-of-state landfills largely rely on self-reporting, and at least one does not conduct

167. *Id.* at 8–9.
168. *Id.* at 28.
169. NATIONAL RESEARCH COUNCIL, RISK-BASED WASTE CLASSIFICATION IN CALIFORNIA 19 (Nat'l Academy Press, 1999).
170. DTSC Report, *supra* note 164, at 22.
171. *Id.* at 24.
172. *Id*.
173. Robert Lewis, *California Toxics: Out of State, Out of Mind*, CALMATTERS (Jan. 25, 2023), https://calmatters.org/environment/2023/01/california-toxic-waste-dumped-arizona-utah/?series=hazardous-waste-california.
174. *Id.*; Or. Admin. R. 340-093-0040; Nev. Admin. Code 444.8565.
175. Lewis, *supra* note 173.
176. *Id*.
177. *Id.*

groundwater testing.[178] Specifically, the La Paz County, Arizona, landfill sits five miles from the Colorado River Indian Tribes Reservation, is subject to limited oversight, and does not monitor groundwater at the site.[179] Another significant destination of contaminated soil is the South Yuma County landfill:

> [The landfill] sits just a few miles from the Cocopah Indian Tribe's reservation and abuts the lush, green orchards of a company that grows organic dates. It's a landfill that the Arizona Department of Environmental Quality labeled as posing an "imminent and substantial threat" in 2021 after an inspection noted windblown litter, large amounts of "disease vectors" (flies and birds), and groundwater with elevated levels of chromium—a metal that can harm people and the environment.[180]

The ECDC Environmental, LLC landfill in East Carbon, Utah is also a major destination for California's contaminated soil. While the Utah landfill conducts groundwater testing and has shown no problems thus far, the risk to groundwater is still a concern due to its proximity to an aquifer.[181] A company called Promontory Point Resources (PPR), at the time of publishing of the CalMatters report, was attempting to get a permit from Utah regulators to operate a similar landfill on the shores of the Great Salt Lake, raising contamination concerns. In February 2023, Utah regulators denied PPR's permit because there was already sufficient landfill capacity to meet current needs, quelling concerns for the near future.[182] However, landfill capacity is inherently limited, and permitting authorities may find that projected needs necessitate approval in the future.

The lucrative business of sending contaminated soil to landfills like those in La Paz County, South Yuma County, and East Carbon demonstrates the "seriously unequal patterns in the interstate and intrastate distribution of garbage. . . . Interstate waste flows from richer states to poorer states, from less polluted states to more polluted states, and from more densely populated states to less densely populated states."[183] In short, California's environmentally stringent standards come at the expense of exposed communities in other states. *NPPC*'s outcome, and its shortcomings, illuminate how California may take responsibility for its own waste and stay true to its environmental goals.

3. An Extraterritorial Approach?

A 2021 law requires California to craft a new hazardous waste management plan by spring 2025.[184] While the issue of hazardous waste dumping is decades

178. *Id.*
179. *Id.*
180. *Id.*
181. Leia Larsen, *Utah regulators to deny permit for landfill on the shores of Great Salt Lake*, SALT LAKE TRIBUNE (Feb. 23, 2023), https://www.sltrib.com/news/environment/2023/02/23/utah-regulators-deny-permit/.
182. *Id.*
183. Verchick, *supra* note 64, at 1294.
184. S.B. 158, 2021 Leg. (Cal. 2023).

in the making and "state regulators sa[y] there's not much they can do to stop private entities from taking waste across the border," California's Department of Toxic Substances Control should consider *NPPC* and its impact on DCC jurisprudence when designing the plan. [185] This may potentially allow the state to create a plan that impacts out-of-state behavior while still regulating evenhandedly. Specifically, the DTSC should consider applying the HWCA definition of hazardous waste to all waste generated within its borders regardless of its destination. Such a regulation would certainly raise DCC questions given its conflict with other states' more lenient hazardous waste standards. But after the Court's rejection of a per se extraterritoriality rule in *NPPC*, courts would be less likely to strike down this type of regulation under the DCC.

An important pre-*NPPC* case to consider is *Daniels Sharpsmart, Inc. v. Smith*, in which the Ninth Circuit affirmed a grant of a preliminary injunction against the California Department of Public Health (DPH) due to what it characterized as impermissible extraterritorial regulation of medical waste disposal.[186] Daniels, a corporation handling the transport and treatment of medical waste, operated a medical waste treatment and transfer station in Fresno and was subject to California's Medical Waste Management Act (MWMA).[187] "In general, under the MWMA, California-generated waste must be incinerated."[188] At issue in this case was the provision stating that "[m]edical waste transported out of state shall be consigned to a permitted medical waste treatment facility in the receiving state."[189] In 2014, Daniels transported its medical waste to locations in Kentucky and Indiana, where the waste would be treated by non-incineration methods that were legal under those states' regulations (and more cost-effective for Daniels).[190] The DPH imposed a $618,000 penalty, and Daniels filed a complaint alleging the Department violated the DCC by applying the MWMA extraterritorially.[191] The Court found that Daniels was likely to succeed on the merits, citing *Healy* and *Brown-Forman* in a fashion very similar to the *NPPC* plaintiffs: "The mere fact that some nexus to the state exists will not justify regulation of wholly out-of-state transactions."[192] The Court justified finding a per se violation of the DCC by reasoning that otherwise, "California could purport to regulate the use or disposal of any item . . . everywhere in the country if it had its origin in California."[193]

But five years later in *NPPC*, the Supreme Court refused to extend the *Healy* dicta in the way the Ninth Circuit did in *Sharpsmart*. And without a per se extraterritoriality rule, it would be insufficient for a plaintiff to argue that

185. Lewis, *supra* note 173.
186. Daniels Sharpsmart, Inc. v. Smith 889 F.3d 608, 608 (9th Cir. 2018).
187. *Id.* at 612.
188. *Id.* at 612 (citing CAL. HEALTH & SAFETY CODE §§ 118215(a)(1)(A), (a)(3)(A)).
189. *Id.*
190. *Id.* at 612–13.
191. *Id.* at 613.
192. *Id.* at 616.
193. *Id.* at 618.

California is regulating wholly out-of-state commerce by penalizing actors dealing in California hazardous waste. Enforcing HWCA on in-state entities shipping waste out-of-state would not require other states to adopt California's hazardous waste requirements but would merely require that in-state generators and transporters of hazardous waste comply with HWCA regardless of the state in which they dispose the waste. Moreover, landfill operators in other states would only have to comply with HWCA if dealing in California waste.

A key distinction from Prop 12, however, is that HWCA's out-of-state oversight would apply to commerce leaving the state while Prop 12 was a precondition to dealing *within* the California market. Importantly, this distinction makes the proposed law's validity less certain if subject to *Pike* balancing. Because the law does not discriminate, a court would have to determine if its burdens on interstate commerce outweigh its putative local benefits. Those that save money from transporting California hazardous waste to Arizona or Utah, and the out-of-state landfills that profit from accepting said waste, would certainly face a burden from extending HWCA's regulations. On the other hand, the DTSC has a valid interest in ensuring that the state safely and responsibly treats and stores what it considers to be hazardous waste instead of dumping contaminated soil in regular landfills near critical agricultural hubs and water sources. Based on *NPPC,* six Justices on the Court—Roberts, Alito, Jackson, Kavanaugh, Sotomayor, and Kagan—could very likely find these burdens and benefits commensurable.[194] The law's extraterritorial effects, including its application of HCWA to out-of-state dumping and resulting cost increases, would become significant factors in such a balancing test.

However, as suggested by Verchick and this Note's analysis, *Pike* balancing should be understood as a proxy for evaluating a law's protectionist effects and process concerns. Under this framework, the preponderance of local burdens imposed by the law, like in the waste cases, should be considered. Local actors, including the DTSC itself, have benefited from dumping California hazardous waste in Arizona and Utah. Extending HWCA's requirements to those actors' activities outside California would not benefit local commerce at the expense of out-of-state commerce. Challengers could argue that extending HWCA's requirements would remove the incentive to export waste to other states, thus benefiting California waste disposal companies and hurting out-of-state landfills that profit from accepting California's contaminated soil. However, extending HWCA, much like Prop 12, would simply set conditions for companies doing business in California; significant costs would be borne in-state, and environmental benefits would flow out-of-state. Such a law arguably "falls

194. *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 391–93 (2023) (Sotomayor, J., concurring in part) ("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."); *see also id.* at 394–95 (Roberts, C.J., concurring in part and dissenting in part) ("Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be 'free private trade in the national marketplace.'").

outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting."[195] It would likely not benefit California's economy at the expense of out-of-state competitors since California generators would be more stringently regulated and incentivized to properly manage, under state law, all non-RCRA hazardous waste. The law also would not violate representational values because California businesses that face increased costs would arguably serve as adequate proxies for out-of-state waste recipients that lose potential business.

It is true that this proposed regulation could be vulnerable under *Pike* balancing. Because extending HWCA to California-generated waste that is taken out-of-state would hinder interstate waste trade, *Pike* balancing in its current form may endanger the law if a majority of the Court found this hindrance to outweigh the law's benefits. This possibility further supports Verchick's argument that the DCC should strictly be applied to protectionist laws and laws that violate principles of fair representation. Such an approach would not only allow states like California to take responsibility for domestically produced waste, but it would also prevent courts from taking the shortcut of equating protectionism with discrimination and applying strict scrutiny, as in *City of Philadelphia*, or evaluating state laws against amorphous "burdens" on interstate commerce. Furthermore, it would prevent courts from applying the DCC inconsistently and arbitrarily, a danger the *NPPC* court correctly foresaw would flow from the petitioners' proposed extraterritoriality test.

CONCLUSION

Forty-five years after the Court deemed waste to be an article of commerce in *City of Philadelphia*, its movement across state lines continues to create significant problems for "dumping ground" states that serve as destinations for other states' waste. Because *NPPC* has somewhat reoriented the DCC to its original purpose and ended the per se rule against extraterritoriality, California should extend enforcement of HWCA to actors dealing in California waste even outside of its borders. However, while expanding HWCA's reach would be more in line with California's values than the status quo, it might still face significant legal hurdles due its burden on interstate commerce. The *NPPC* opinion, in warning against the overinclusion problems with the extraterritoriality rule, could have also applied that argument to the Court's application of heightened scrutiny against past waste regulations deemed discriminatory. Instead of prioritizing an unfettered market over valid state regulations, the Court should tame the DCC further by restricting its application to laws designed to benefit in-state industry over out-of-state industry. While expanding HWCA's reach is more feasible post-*NPPC*, a more consistent approach to the DCC would further enable such non-protectionist, evenhanded laws with out-of-state effects.

195. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 411 (1994) (Souter, J., dissenting).

Of course, many loose ends remain. Should extending HWCA in the manner proposed be treated differently under the DCC since it is an administrative measure rather than a measure adopted democratically via a ballot like Prop 12 was? Should more credence be given to the argument that laws like the one proposed create inconsistent regulations between states? What types of cost-saving measures would need to be implemented to make the proposed law more feasible given the high cost of hazardous waste landfill permitting and operation? Additionally, only two hazardous waste landfills operate in California, which warrants deeper examination of the environmental justice implications of and alternatives to disposal. These are valid questions that future research should explore.

What *NPPC* means going forward is not entirely clear, but it certainly has opened opportunities for both doctrinal reconsiderations and extending California waste regulation beyond state lines. If courts have less freedom to use the DCC to strike down non-protectionist state laws in favor of unfettered free trade across borders, states like California will have more freedom to regulate legitimate environmental and health concerns surrounding toxic waste that have been decades in the making.

We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.