



## Pork, The Dormant Commerce Clause, and Legislating Morality

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**[00:00:00] Jeffrey Rosen:** Hello friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people.

**[00:00:22] Jeffrey Rosen:** Last week, the Supreme Court heard oral arguments in *National Pork Producers v. Ross*. The case is about a 2018 California ballot initiative in which voters decided that the state should ban the sale of pork from animals confined in what they considered to be an inhumane manner.

**[00:00:39] Jeffrey Rosen:** Today on We the People, we will discuss whether the Dormant Commerce Clause of the Constitution restricts states from using moral objections as the basis for economic regulations. Joining me to discuss this fascinating and important case are two of America's leading experts on Constitutional law.

**[00:00:56] Jeffrey Rosen:** It is always such an honor to convene them, and I'm so excited to share the conversation with you, We the People listeners. Erwin Chemerinsky is Dean of Berkeley Law. He's the author of 14 books, including most recently *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights*, and he filed an amicus brief on the side of California. Erwin, it is an honor to welcome you to We the People.

**[00:01:18] Erwin Chemerinsky:** It's always such a pleasure to be with you and Michael.

**[00:01:20] Jeffrey Rosen:** And Michael McConnell is Richard and Francis Mallory Professor of Law at Stanford and Director of the Constitutional Law Center. He is co-author of *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, which came out earlier this year.

**[00:01:36] Jeffrey Rosen:** He filed an amicus brief with the Chamber of Commerce of the United States in support of the National Pork Producers Council. Michael, it's an honor as well to welcome you back to We the People.

**[00:01:46] Michael McConnell:** Thanks for inviting me.

**[00:01:47] Jeffrey Rosen:** Erwin, what are the stakes in this important case?

**[00:01:51] Erwin Chemerinsky:** This is a case, as you said, that's about the Dormant Commerce Clause. The Dormant Commerce Clause is the principle that state and local laws are unconstitutional as they place an undue burden on interstate commerce. Usually, the Dormant Commerce Clause applies if a state is acting in a protectionist manner – if it's trying to exclude goods and services from other states.

**[00:02:13] Erwin Chemerinsky:** That's not what this case is about. This case is about: has the state put too much of a burden on interstate commerce by effectively limiting pork products from other states? Is that too much of a burden on interstate commerce?

**[00:02:26] Jeffrey Rosen:** Michael, how would you describe those stakes in the case?

**[00:02:29] Michael McConnell:** The Dormant Commerce Clause is a bit of a misnomer. The Commerce Clause gives power to Congress, but has always been understood, or at least early on in our history, it was understood to be an exclusive power that is it not only gave power to Congress, but it took power away from the states to regulate interstate commerce.

**[00:02:50] Michael McConnell:** And there are basically two branches to this doctrine. One which Erwin referred to has to do with protectionist legislation. And the other, which is what this case is about is, is somewhat less common. It has to do with extra territorial regulation where a state attempts to use its power over its own commerce in order to effectively regulate the activities going on in other states.

**[00:03:17] Jeffrey Rosen:** It would be helpful, I think, to review the history and text of the Commerce Clause and the Dormant Commerce Clause just so listeners and I understand the evolution of this complicated doctrine because the stakes of this case are really important.

**[00:03:31] Jeffrey Rosen:** Erwin, take us back to the founding. When did the Dormant Commerce Clause first get introduced? When was this concern about extra territorial effects introduced in the case law? And tell us about this case that the Supreme Court focused on a law called *Pike*, which balanced the benefits and burdens of the regulation.

**[00:03:50] Erwin Chemerinsky:** I'd start as Michael did with the text of the Constitution, which gives Congress the power to regulate commerce with foreign nations, with Indian tribes and among the several states. The Supreme Court, really going back to the 19th century, has said that there's implicit within this a limit on state power, and that's what we mean by the Dormant Commerce Clause.

**[00:04:15] Erwin Chemerinsky:** Sometimes it's even been called the Negative Commerce Clause. Some believe that the very existence of the Constitution was about keeping states from adopting laws that put a significant burden on interstate commerce. Under the Articles of Confederation, there was no Congress with a national commerce power, the Confederation Congress didn't have that authority.

**[00:04:37] Erwin Chemerinsky:** And states were engaging in retaliation against goods and services from other states. Port states were charging large tariffs for landlocked states to be able to get to the water. Landlocked states were retaliating. And I don't think anyone disputes that one of the inspirations for calling the Constitution Convention in 1787 was trying to limit the ability of states to do this.

**[00:04:59] Erwin Chemerinsky:** Interesting though, the Constitution isn't explicit, it's something that the Court has inferred. That's why some justices who are originalists, like Justice Thomas, question the very existence of the Dormant Commerce Clause.

**[00:05:14] Erwin Chemerinsky:** As Michael and I have both said, the Dormant Commerce Clause has primarily been about situations where a state is discriminating against other states. There was a Supreme Court case where Michigan said it would allow in-state wineries to ship wine directly to consumers through mail, but not allow out-of-state wineries to do that.

**[00:05:33] Erwin Chemerinsky:** That's the discriminatory law that the Dormant Commerce Clause is primarily about. But the Supreme Court has also said even if a law is not discriminatory, it can still violate the Dormant Commerce Clause if the burdens on interstate commerce outweigh the benefits from the law, the case that you alluded to *Pike versus Bruce Church* is where the Supreme Court articulated this balancing test.

**[00:05:59] Erwin Chemerinsky:** I just want to dispute one thing Michael said. I think that it's very much in disagreement in this case whether the California law should be regarded as regulating extra-territorially. If you look at the briefs, if you listen to the oral argument, this is one of the key things the lawyers were arguing over.

**[00:06:15] Jeffrey Rosen:** Michael, how would you describe the text and original meaning of the Dormant Commerce Clause doctrine, and do you share the concern of some of the originalist justices like Justices Thomas and Gorsuch, that because it's not textually rooted, it shouldn't be broadly interpreted?

**[00:06:30] Michael McConnell:** Erwin has explained the history of the clause. One of the main purposes was to prevent hostile and retaliatory measures from one state to another. James Madison, for example, explained, and I quote that the Commerce Clause was not just an empowerment of Congress but was quote, "intended as a negative and preventive provision against injustice among the states themselves."

**[00:07:00] Michael McConnell:** So, to say that the Commerce Clause is just an empowerment of Congress would reverse over 200 years of Supreme Court history. Now, I do think that there's a way in which the doctrine has gone astray and, Erwin expressed it, and not just Erwin, but the Court has expressed it in terms of states presenting an undue burden on interstate commerce.

**[00:07:27] Michael McConnell:** But I don't think that's the way it was originally understood. I believe the way it was originally understood is that states have power only to pass regulations which protect the health, safety, welfare and morals of their own citizens, that is of actions within the state.

**[00:07:47] Michael McConnell:** They did not have power to regulate extra territorially. So, I think rather than thinking of this in terms of an undue burden on interstate commerce the Court should think about this as whether California is regulating activities that take place elsewhere.

**[00:08:05] Michael McConnell:** And the most important thing here, it isn't that it's morals regulation, that's okay, that's not a problem. The problem with this is that the pork which is being forbidden for sale in California is just like every other pork. The evil here, which has to do with the mistreatment of pigs took place elsewhere, it was completed elsewhere.

**[00:08:29] Michael McConnell:** It was over before the pork ever entered the state of California. In other words, California is regulating an action which took place elsewhere and has no effect on health, safety, welfare, or morals within the state of California. And that's why the law is unconstitutional.

**[00:08:53] Jeffrey Rosen:** Well, we've now put on the table this fascinating question of how the states can regulate health, safety, and morals, which is part of their police power and to what degree that regulation can take place extra territorially.

**[00:09:05] Jeffrey Rosen:** Erwin, in the oral arguments, several of the justices talked about how Balkanized we are and how states might retaliate against each other for taking moral positions that they disagreed with. Describe the stakes of this case in that regard and why you think that California can regulate the way that it has.

**[00:09:25] Erwin Chemerinsky:** This is California deciding what pork products it wants sold in California. Of course that might have an effect on other states, but if that's extra territorial, the limit on state power is enormous. California has prohibited the sale of gas stoves after a certain period of time.

**[00:09:47] Erwin Chemerinsky:** Most gas stoves are made outside of California and everything, and to use Michael's words, are completed there. Does that then mean that California can't prohibit gas stoves because it believes that electric stoves are better for the environment or, a hypothetical that came up, imagine that California is stricter with regard to pesticides than other states.

**[00:10:07] Erwin Chemerinsky:** Does that mean that California can't ban the importing into the state of which pesticides are used? States have the authority to decide what products they want sold, so long as it's not protectionist. And in answering your question of the stakes, I think this is a case about state's rights.

**[00:10:27] Erwin Chemerinsky:** And it's so interesting that I'm the liberal arguing in favor of state's rights and Michael is the conservative arguing to disempower the states to protect their citizens as they choose.

**[00:10:40] Jeffrey Rosen:** Michael, what's your response to that irony and why is it that the liberals in this case are arguing for broad power to regulate morals and conservatives seem to be on the other side?

**[00:10:51] Michael McConnell:** Well, Erwin's examples are easy. Gas stoves are forbidden in California because they believe that they don't want the release of the gas products, the waste products, within California. So, the purpose of that regulation is to affect what goes on in California.

**[00:11:13] Michael McConnell:** The reason California regulates pesticides is because the pesticides poison the environment within California. So, California can regulate that because it has to do with effects in California. But in this case, the pigs are raised in Ohio or North Carolina or wherever they happen to be raised.

**[00:11:36] Michael McConnell:** Whatever happens to the pigs happens in Ohio or Wisconsin or wherever it is, it's over. There is no effect of the conduct being regulated here within the state of California. California is simply trying to use its market power in order to regulate activities that take place entirely in other states.

**[00:12:02] Jeffrey Rosen:** Erwin, is it your position and that of the defenders of the California law that there's no limit to California's ability to regulate morals as long as there's some interstate effect? Or do you agree with Michael that California cannot regulate on the basis of morals, conduct that takes place entirely out of state?

**[00:12:22] Erwin Chemerinsky:** I strongly disagree with Michael, and I think what's the flaw in his argument is, this is California regulating what goes on in California. It's people in California consuming the pork, and California saying we have the ability to decide what pork products we want sold in the state, just like we have the ability to decide what stoves will be made or what timber will be produced with what pesticides.

**[00:12:48] Erwin Chemerinsky:** It's the ability of California to choose what products it wants to be sold and consumed in this state. I think Michael and I both agree that California can have morals legislation. The question is, is this an extra territorial regulation. About that we strongly disagree. And no, I'm not saying there's no limit.

**[00:13:08] Erwin Chemerinsky:** I'll go back to *Pike v. Bruce Church* and I would say what you have to do is balance the burdens on interstate commerce against the benefits. And often you're weighing incommensurate things. How do you weigh the effect on other states economically versus the moral justification?

**[00:13:24] Erwin Chemerinsky:** But I think that's an issue for remand, that's never even faced by the trial court.

**[00:13:28] Jeffrey Rosen:** Michael, in the oral argument, Justice Gorsuch expressed skepticism about the *Pike* case. He said it was over reading old cases as he called it, and suggested that balancing economic harms and benefits was something the Court rejected in the *Lochner* case and the justices should try not to do that. Do you share his concerns and what might their implications be?

**[00:13:49] Michael McConnell:** Well, I think there's much to be said for that criticism of *Pike*, which is just a sort of freewheeling balancing test. And I think the Court, in recent decades, has moved away from that kind of jurisprudence. But to decide this case, you don't have to balance anything.

**[00:14:09] Michael McConnell:** California is simply not affected within California by the way pigs are treated in Pennsylvania. It is none of their business how pigs are treated in Pennsylvania. And let me just throw out a couple of other examples that are, I think, quite realistic.

**[00:14:28] Michael McConnell:** There's a lot of talk about ESG regulation of corporations. Well, California is a huge market. If California decided to prohibit the sale of products from companies that don't have their corporate boards organized in a particular way or that, or that, uh, do something else completely elsewhere, if California wins in this case, they'll be able to do that.

**[00:14:52] Michael McConnell:** And it's not just California. There are only a few states with enough market power to throw their weight around here, but California, Texas, maybe New York. And those all happen to be one party states that have particular ideologies that they might very well want to inflict on the rest of the country.

**[00:15:12] Michael McConnell:** So Texas might very well say that you can't import products from companies if they require their workers to belong to a labor union. This goes both ways. And if we allow California to use its market power to regulate the activities in other states, there'll be no end of it.

**[00:15:37] Jeffrey Rosen:** Erwin, what is your response to this concern about Balkanization going both ways? Justice Kagan said in the oral argument, you could have states doing a wide variety of things to the mechanism of saying, unless you comply, you can't sell goods in our market. We live in a divided country. The Balkanization the framers were concerned about is surely present today.

**[00:15:57] Jeffrey Rosen:** She seemed concerned about a world where Texas is at war with California and California is at war with Texas. Do you share that concern and what's the implication?

**[00:16:07] Erwin Chemerinsky:** I think that's a legitimate concern, but I don't think that's what this case is about. And I think what's being left out of the equation here is the importance of states being able to make certain decisions. What California is doing here is saying that it believes that the certain kinds of products shouldn't be consumed.

**[00:16:25] Erwin Chemerinsky:** Products where pigs have been abused shouldn't be consumed in California, and that's California's choice to make. Imagine that California believed that the making of certain products was terrible for the environment because it released an enormous amount of greenhouse gas emissions.

**[00:16:41] Erwin Chemerinsky:** And if California were to say, we as a state don't want to be complicit in the degradation of the environment and climate change. So, we're not going to sell those products in this state. I think that's California's choice to make.

**[00:16:53] Erwin Chemerinsky:** In terms of Balkanization, it's hard to say allowing California to regulate pork products that are sold in the state is somehow the end of commerce or war between the states. States have been doing this before and there's no reason they won't continue to do this.

**[00:17:10] Jeffrey Rosen:** Michael, play out the fears of those who are concerned about Balkanization. Justice Kagan said, New York has a law that says if you want to import firewood, you have to use a certain pesticide. But there were lots of horrors paraded in the oral argument about the kind of retaliation that might take place. What are you concerned about?

**[00:17:29] Michael McConnell:** Well, if New York passed such a law, I'd want to know, is the concern that the pesticide is now in the wood and therefore is going to come into New York and do harm in New York? If so, then New York can ban it. But if the concern is just that they don't think that other states should be able to use pesticides, well, frankly, that's just none of their business.

**[00:17:51] Michael McConnell:** If you want a nationwide ban on pesticides or a nationwide ban on certain treatment of pigs, go to Congress. Don't go to state legislatures in large states and ask them to use their market power to affect what's going on elsewhere.

**[00:18:08] Michael McConnell:** Remember what's going on here. This is a very vivid example because California is not banning a particular kind of product. It's banning a product if it is made in a particular way elsewhere. California is literally sending its meat inspectors around the country to inspect meat packing operations or meat preparation.

**[00:18:35] Michael McConnell:** It isn't the packing, it's the growing of the pigs, but they're literally sending their inspectors around the rest of the country, to see whether farmers elsewhere are complying with California regulations. If that's not extra-territorial regulation, I don't know what is.

**[00:18:55] Jeffrey Rosen:** Erwin, in the oral argument, Justices Jackson and Sotomayor and others suggested that you might be able to regulate for health and safety, but not purely on the basis of moral objections, because those concerns were purely extra-territorial. Is there any basis in the law for distinguishing between morals legislation on the one hand and health and safety on the other?

**[00:19:20] Erwin Chemerinsky:** Certainly there is no precedent in Supreme Court decisions for drawing that distinction. I heard Michael earlier reject that distinction. Indeed, the police power of the state has always extended to health, safety, and morals.

**[00:19:34] Erwin Chemerinsky:** And I think what Michael is missing is California doesn't want to be complicit through its economic behavior in causing harm elsewhere. And that should be the choice of California. If California wanted to prohibit the sale of pork products entirely because it believes that they cause great harm to the environment, or they're produced in a way that's inhumane, that's California's ability to do that.

**[00:20:00] Erwin Chemerinsky:** And if it wants to do something less by saying, we'll allow pork products, but we don't want as a state through our consumer behavior to be complicit in the harm to these animals, that too is its ability as a state to do. It's not regulating what's going on in other states except indirectly. It's saying this is what we want sold and consumed in this state.

**[00:20:20] Jeffrey Rosen:** Michael, what's the strongest case that you have for arguing that extra territorial morals legislation violates the Dormant Commerce Clause? And what's the logic in Constitutional text and history?

**[00:20:32] Michael McConnell:** The early cases in the Supreme Court all come down this way. And some justices may dismiss those as old cases, but some of us might think that the early cases in the Marshall Court showed a clearer understanding of what the Constitution was about than we do sometimes hundreds of years later.

**[00:20:52] Michael McConnell:** And in those early cases, the Court treated the regulation of interstate commerce as being exclusively the province of Congress. And the question was, what kind of power did the states have to affect that commerce and the Court held in cases like *Black Bird Marsh* that the answer is the police power.

**[00:21:17] Michael McConnell:** That the states have the power to regulate issues to protect the health, welfare, safety, and morals of their own citizens and their own states, and that's it. They do not have the right to affect commerce elsewhere. For that, you go to Congress.



**[00:21:35] Jeffrey Rosen:** Erwin, what is your response to cases like *Black Bird Marsh*, which Michael cited saying that the police power only allows you to regulate health, safety, and morals within your own state?

**[00:21:45] Erwin Chemerinsky:** What California is doing here is only regulating California. It's saying this is what can be sold in California. I think what Michael just said would have enormous consequences. He says states can't regulate things in his exact words that affect commerce. The Supreme Court has never said that.

**[00:22:06] Erwin Chemerinsky:** That would then mean that California can't ban the consumption of any product that's made anywhere else in the country. California can't even regulate any product that's made anywhere else in the country because, in effect, that is interstate commerce. It would mean then that California can't ban natural gas stoves because they're a product that's made elsewhere in the country.

**[00:22:24] Erwin Chemerinsky:** That's not what the Supreme Court has ever said. Now what the Court has said is if a law is protectionist and discriminatory against other states, then it likely violates the Dormant Commerce Clause. If a law is not discriminatory, then the presumption is in its favor and then you get to the *Pike versus Bruce Church* where you balance the state's interest on the one hand against the burden on interstate commerce on the other.

**[00:22:48] Erwin Chemerinsky:** But that's not a test that says that any effect on interstate commerce becomes unconstitutional.

**[00:22:53] Jeffrey Rosen:** Michael, what's your response to that? And might this case just come down to a disagreement among the justices about how to apply the *Pike* casing when it's triggered?

**[00:23:03] Michael McConnell:** State laws that are protectionist also violate the Commerce Clause, but that's never been the sole province. There's always been the second branch, which is a prohibition on extra territorial regulation. Now that does not mean, as Erwin says, that states are unable to bar importation of or sale of products that are made elsewhere.

**[00:23:26] Michael McConnell:** The question is where does the evil, what is the evil that California is trying to prevent? Where does that evil take place? If that evil takes place in California, they can regulate it. If it takes place in Wisconsin, they cannot.

**[00:23:41] Jeffrey Rosen:** Erwin, let's pull back and discuss this question of morals legislation. In the *Lawrence* case, which struck down sodomy laws, Justice Scalia objected in dissent, this means the end of morals legislation and indeed Justice Kennedy's sweeping vision of autonomy seemed to say that the states couldn't ban sexual conduct because of moral objections.

**[00:24:01] Jeffrey Rosen:** In this case, as liberals are embracing morals legislation, what might the effect of this position be for cases involving sexual autonomy, including *Lawrence* on *Roe v. Wade*?

**[00:24:12] Erwin Chemerinsky:** I don't think there's any implication of this case for sexual autonomy or *Roe v. Wade*. I think this is about a very discreet doctrine with regard to Constitutional law. The reality is some world's legislation is unconstitutional. You mentioned *Lawrence v. Texas*.

**[00:24:29] Erwin Chemerinsky:** Texas was defending a law prohibiting private consensual adult, same sex sexual activity as immoral and the Supreme Court rejected that. But there's also plenty of laws that are based on moral justification. I think states that have laws that prohibit consumption of marijuana, I think it's based on a moral judgment that is wrong for people to get high.

**[00:24:49] Erwin Chemerinsky:** I think prostitution laws are based on morals justifications. I think gambling laws are based on morals justifications. I don't think the Supreme Court ever said or ever will say that there can never be morals legislation.

**[00:25:04] Erwin Chemerinsky:** I think in this instance it's the difficult question of how do you weigh the state's interest in its moral judgment that it's wrong to consume products where the animals have been produced in this way versus the burden on interstate commerce. And I think that's where most of the justice were going in oral argument, how to face that question.

**[00:25:22] Jeffrey Rosen:** Michael, do you think Justice Scalia was too sweeping when he said that *Lawrence* meant the end of morals legislation? And what do you think the implications are for this case about the regulation of sexual autonomy?

**[00:25:36] Michael McConnell:** I agree with Erwin that this case has nothing to do with that. That, whether or not, Substantive Due Process or other protections, privacy protections, extend to morals, regulation is an entirely different question of Constitutional law. I don't think that there has ever been any doubt that for purposes of the Commerce Clause, states can use their police power to regulate morals within their own state in the commercial sphere.

**[00:26:04] Jeffrey Rosen:** Well, let's pull back and describe the different positions of the justices. Erwin, at oral argument, there did seem to be a division between the textualist justices like Justice Gorsuch, who said it's not the business of Congress to make economic judgments and to balance costs and benefits, against those like Justice Kagan who were concerned about states retaliating against each other if the Court didn't establish the ability of California to regulate. Describe that debate between the textualist and non-textualist justices.

**[00:26:36] Erwin Chemerinsky:** Justice Thomas has previously taken the position that there be no such thing as the Dormant Commerce Clause. It's not in the text of the Constitution. Courts

shouldn't be enforcing it. I think some of what Justice Gorsuch was expressing at oral argument, there's an accord with that.

**[00:26:51] Erwin Chemerinsky:** Now some justices have said that the Dormant Commerce Clause should apply only when it's protectionist legislation, only when it's a state discriminating against goods and services from other states. Justice Scalia took that position on the Court.

**[00:27:04] Erwin Chemerinsky:** On the other hand, there certainly was expressed at oral argument by some of the justices such as Justice Kagan, a concern about Balkanization, a concern of if we empower the states, they'll then retaliate against each other. And at this moment in history where our country is so divided, that concern seems particularly salient.

**[00:27:24] Erwin Chemerinsky:** At the end of the oral argument, Justice Kagan was embracing the *Pike v. Bruce Church* case. She was rejecting Michael's characterization of extra territoriality. And she says, really what we should do is send this back to the trial court to do what *Pike v. Bruce Church* instructs, weigh the burdens on interstate commerce against the benefits of the law.

**[00:27:45] Jeffrey Rosen:** Michael, how would you describe the position among the justices? And as a textualist and originalist, do you agree with Justice Thomas that there's no Dormant Commerce Clause or that it only should apply when there is protectionist legislation or that some kind of balancing is appropriate?

**[00:28:00] Michael McConnell:** I don't disagree with Erwin's description of the split among, uh, the justices. Uh, but I think that the problem here is that Justice Thomas and perhaps Justice Gorsuch were focused too much on *Pike* versus uh, *Bruce Church*, which is a, uh, one of these 1970s balancing tests that's really does put the, uh, justices into the driver's seat for, uh, deciding economic policy.

**[00:28:28] Michael McConnell:** I think they need to go back to the beginning. And at the beginning there's, there is a textual basis, uh, for the Dormant Commerce Clause. Uh, and the textual basis is that the power to regulate the movement of goods and services across state lines is invested in Congress.

**[00:28:49] Michael McConnell:** And the only exception to that, and this is what was worked out in the early decades of the 19th century, is that states do have the power to regulate commercial activity in order to protect the health, welfare, safety, and morals of their citizens within their state.

**[00:29:09] Michael McConnell:** But that doesn't give them carte blanche to regulate the whole country. They can't say, well, we don't like this product because we think the circumstances under which it was produced were immoral. That's none of their business how it was produced elsewhere, what matters is the product within the state itself.

**[00:29:31] Michael McConnell:** And I think and hope that the textualist and originalist justices when they reflect upon this and read the early cases and read the records of the adoption of the Commerce Clause, will realize that the Commerce Clause was pretty much universally understood as having a negative implication because of the idea that the exclusive power over the regulation of interstate commerce was vested in Congress.

**[00:30:01] Michael McConnell:** States don't have that power. They have the police power to regulate evils within their own state, but not to project their power elsewhere.

**[00:30:10] Jeffrey Rosen:** Erwin, how does this case fit into the broader debate on the Court about the future of the regulatory state and the effort by some of the conservative justices to resurrect limitations on regulation that have been dormant since the new deal?

**[00:30:25] Erwin Chemerinsky:** I don't think it directly relates to that debate at all. It's a strange doctrine in terms of ideology, because here what you have is the most conservative justice on the Court, Justice Thomas and perhaps Justice Gorsuch, one of the most conservative justices, rejecting the Dormant Commerce Clause and wanting to empower states to regulate.

**[00:30:47] Erwin Chemerinsky:** On the other hand, you have some of the more liberal justices concern with regard to what's going to be the effect on interstate commerce is states can Balkanize in this way. I think also what you have is the irony as I pointed out earlier, that liberals say like me, are embracing states' rights.

**[00:31:04] Erwin Chemerinsky:** And I very much disagree with Michael that this is about California regulating what goes on in other states. This is California deciding for itself what products it wants consumed in California. And then you have conservatives trying to limit states' rights, which is in conflict with the usual liberal and conservative positions.

**[00:31:21] Erwin Chemerinsky:** The one thing I disagree with Michael about is in saying that the balancing test comes from the 1970s. I think you can find cases going back to the 1920s and the 1930s in terms of the ability of states to regulate truck length and width or train length or width or mud flaps on trucks that go back to the 1950s.

**[00:31:42] Erwin Chemerinsky:** The idea that the Court's going to balance burdens on interstate commerce against benefits to the state is not something that's recent or new.

**[00:31:51] Jeffrey Rosen:** Michael, why is it that the sides seem to be reversed in this case and you have conservatives arguing against states' rights and liberals arguing for it. Does it have something to do with textualism or is there a different balance or explanation for this reversal?

**[00:32:07] Michael McConnell:** I think it's just an overgeneralization that liberals are against states' rights and conservatives for it. I think in a number of different areas the sides split. I don't actually consider myself a states' rights guy. I consider myself a Madisonian. I believe that our constitution is partly national and partly federal.

**[00:32:30] Michael McConnell:** I think it's just as important for the powers over interstate matters, national commerce, to be vested in the national government as it is, that powers over what goes on in the states are vested within the states.

**[00:32:46] Michael McConnell:** And I think trying to just say you should be for states always, or for the federal government always is simplistic. I don't think anybody really thinks that way.

**[00:32:57] Jeffrey Rosen:** Erwin, why is this case arising now? Have there been other similar morals legislation in the past couple years or is California a trailblazer?

**[00:33:08] Erwin Chemerinsky:** There are occasionally laws where states are trying to say, we don't want products to be consumed in this state because the way in which they're produced. California had a law that prohibited the sale of foie gras because the way in which geese were tortured in order to produce it.

**[00:33:26] Erwin Chemerinsky:** There were laws that say, in order for eggs to be sold, the chickens have to be treated in a certain way. And in all of these, what the state is saying is we don't want to be complicit in the inhumane treatment of animals, and in order for us in this state to avoid being complicit, we're going to restrict what can be sold in this state. And there's not a lot of these laws, but that's what this is about.

**[00:33:53] Jeffrey Rosen:** Michael, why do you think this case is arising now? Is California sort of a harbinger of liberal morals legislation and why are conservatives especially concerned about this kind of law?

**[00:34:05] Michael McConnell:** So, I fear that California is the harbinger. There have not been very many acts of this sort in the past. Uh, the parties haven't referred to any, from any other state than California. It is true that California in the last few years has started to experiment with using its enormous market power.

**[00:34:24] Michael McConnell:** It's the largest market in the country. In order to try to impose California ideas of proper production on other states, it's done it with foie gras, it's done it with eggs, it's also done it with ethanol and now pork.

**[00:34:40] Michael McConnell:** I'm not aware of any other examples. I think we ought to nip it in the bud because if the Supreme Court gives a green light to this new practice of states using their market power in order to penalize conduct that they don't like going on in other states, there will be no end of it.

**[00:34:59] Michael McConnell:** And I guarantee you Texas will be in the act and then the liberals will be on the other side of this.

**[00:35:05] Jeffrey Rosen:** Erwin what are the implications of striking down California's law for other debates including contraception and abortion?

**[00:35:15] Erwin Chemerinsky:** I don't think it has a direct effect in those other areas. With regard to contraception, there is still under the constitution a right to purchase and use contraceptives. In fact, justice Alito's opinion in *Dobbs v. Jackson Women's Health* was explicit that the Court was not putting in danger the decisions with regard to the right to purchase and use contraceptives.

**[00:35:37] Erwin Chemerinsky:** With regard to abortion, there are indirect implications of this. There are bills pending in some states like Missouri that would make it a crime for a woman to cross state lines for an abortion. But I think that's about the right to travel, not about the Dormant Commerce Clause.

**[00:35:54] Erwin Chemerinsky:** Some states have prohibited importing into the state medication that can induce an abortion. I think that's much more likely to be litigated in terms of preemption by federal law and whether the medication is characterized as a contraceptive or is abortion inducing then it's likely to be litigated under the Dormant Commerce Clause.

**[00:36:14] Jeffrey Rosen:** Michael, do you think there are any implications of this case for the abortion and contraception debate?

**[00:36:19] Michael McConnell:** Um, I think the principle of extraterritoriality cuts across several other constitutional doctrines in addition to the Commerce Clause. Due Process, for example. If someone commits an act which is lawful in the state where they committed the other state can't prosecute them for it. That's due process.

**[00:36:45] Michael McConnell:** Similarly, Procedural Due Process has some implications here too. Erwin refers to the right to travel, by which I assume he must mean the Privileges and Immunities Clause, which is where the right to travel resides. And I agree with him that the extraterritorial principle applies there as well.

**[00:37:07] Michael McConnell:** What I don't understand is why Erwin and others are willing to recognize this principle for other Constitutional doctrines and not for the Commerce Clause. It's very coherent, the Constitution is a coherent whole. Their intention was to create a constitutionalized common market.

**[00:37:27] Michael McConnell:** So, while nations can pass economic sanctions against others because we don't like what they're doing in order to pressure them to do one thing or another, states can't do that with respect to other states. They have to treat other states as part of the same country.

**[00:37:46] Jeffrey Rosen:** Erwin, Justice Gorsuch asked, "Why isn't this just a form of enshrining non-textual economic liberties into the Constitution, something this Court disavowed

a long time ago?" To what degree is this case an important part of the debate on the Court about whether or not to recognize non-textual liberties?

**[00:38:06] Erwin Chemerinsky:** I think everyone has to agree that the Constitution does not include in its text the Dormant Commerce Clause. It's an inference from the Supreme Court over 200 years, that there's a limit on states in what they can do by the grant of power to Congress to regulate commerce among the states.

**[00:38:24] Erwin Chemerinsky:** Now, I believe it's completely appropriate for the Court to protect non-textual rights, and I believe that there should be a Dormant Commerce Clause. But I think that in this instance, it's not about California discriminating as against other states. It's California regulating what's going on here.

**[00:38:41] Erwin Chemerinsky:** But I certainly understand why justices like Thomas and Gorsuch, who don't want non-textual rights would say there's no such thing as the Dormant Commerce Clause.

**[00:38:50] Jeffrey Rosen:** Michael, how important is this case in the debate among conservatives about non-textually enumerated rights?

**[00:38:57] Michael McConnell:** I think this is a sleeper case. This case has not gotten as much attention as it deserves. If the Court strikes down this California law, we're going to have pretty much the status quo because states haven't been using their market power to punish activities that are completely outside of their sphere of interest.

**[00:39:21] Michael McConnell:** But if the Court goes the other way and approves this California law, I think we're going to have one case after another, and they're going to come from both directions ideologically, and we will, everybody will regret it. This could be a very damaging decision.

**[00:39:40] Jeffrey Rosen:** Erwin, your response to Michael's claim that if the Court upholds the law, we'll have one case after another. Do you agree or disagree?

**[00:39:49] Erwin Chemerinsky:** I very much disagree. I don't think there's any basis for that prediction. The Supreme Court has never limited states in having these kind of laws before, and yet as we both acknowledge these kinds of laws are rare. I think what has to be remembered here is that California's not discriminating against the other states.

**[00:40:06] Erwin Chemerinsky:** This law says that for pork produced in California or pork that's produced anywhere that's sold in California, it has to meet certain requirements in terms of humane treatment of animals. If California was only saying pork from other states had to meet this requirement, but California pork didn't, we both agree that would violate the Dormant Commerce Clause.

**[00:40:29] Erwin Chemerinsky:** This is about the ability of a state to regulate what's sold in that state. And I don't think that this case is going to be that big of a deal no matter which way it comes out.

**[00:40:38] Jeffrey Rosen:** Before closing arguments, Michael, give examples of the kind of laws that you think might be coming down the pike if the Court does uphold this one.

**[00:40:47] Michael McConnell:** Well, I strongly suspect that the next California law will be to restrict the sale of products from companies that don't comply with California's environmental, social, and governance regulations.

**[00:41:01] Jeffrey Rosen:** Well, it's time for closing arguments in this important discussion. And Erwin, tell us, based on the Constitution, why you believe that California's regulation is consistent with the Dormant Commerce Clause and why the Court should uphold it.

**[00:41:17] Erwin Chemerinsky:** The issue in this case is can California decide what products are sold in California. As I was just saying here, the law applies equally to pork produced in California and pork produced out of California. To me, this is a question of state's rights.

**[00:41:36] Erwin Chemerinsky:** It's about whether California wants to be complicit in the inhumane treatment of animals, and that's for California to decide. If California was discriminating against goods and service from other states, all of us agreed that they would violate the Dormant Commerce Clause.

**[00:41:51] Erwin Chemerinsky:** This isn't what it's about in this case, and it does come down, as the justices said, to the test from *Pike versus Bruce Church*, how do you balance the burdens on interstate commerce against the benefits with regard to the morals legislation of the state?

**[00:42:07] Erwin Chemerinsky:** I think Justice Kagan was right at the end of oral argument. That's a question that in the first instance should be confronted by the lower courts.

**[00:42:13] Jeffrey Rosen:** Michael, the last word is to you. Why do you think the Court should strike down the California law and why do you think it's inconsistent with the Dormant Commerce Clause?

**[00:42:22] Michael McConnell:** The California law is aimed at imposing California's notion of proper regulation on the production of pork elsewhere. The pork sold in California is you have two packages of pork chops, absolutely identical. You can't tell the difference. The only difference is how they were produced elsewhere, and that is none of California's business.

**[00:42:48] Jeffrey Rosen:** Thank you so much, Erwin Chemerinsky and Michael McConnell for giving We the People listeners the benefits of your insight and constitutional wisdom in this important case. Erwin, Michael, thank you so much, as always, for joining.



**[00:43:02] Erwin Chemerinsky:** Thank you.

**[00:43:02] Michael McConnell:** Thanks for inviting me.

**[00:43:06] Jeffrey Rosen:** Today's show is produced by Melody Rowell, and engineered by David Stotz. Research was provided by Sophia Cardell, Kelsang Dolma, Liam Kerr, Emily Campbell, and Lana Ulrich. Please rate, review and subscribe to We the People on Apple. Recommend this show to friends, colleagues, or anyone who's eager for a weekly dose of Constitutional education and debate.

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