California's Regulation of U.S. Agriculture

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Overview

In a huge blow to pork producers (and consumers of pork products) nationwide, the U.S. Court of Appeals for the Ninth Circuit has upheld California's Proposition 12. Proposition 12 requires any pork sold in California to be raised in accordance with California's housing requirements for hogs. This means that any U.S. hog producer, by January 1, 2022, will need to upgrade existing facilities to satisfy California's requirements if desiring to market pork products in California.

Each state sets its own rules concerning the regulation of agricultural production activities. So, how can one state override other states' rules? Involved is a judicially-created doctrine known as the dormant Commerce Clause.

California Proposition 12, the dormant Commerce Clause and the ability of a state to dictate ag practices in other states – it's the topic of today's post.

Background

The Commerce Clause. Article I Section 8 of the U.S. Constitution provides in part, "the Congress shall have Power...To regulate Commerce with foreign Nations and among the several states, and with the Indian Tribes." The Commerce Clause, on its face, does not impose any restrictions on states in the absence of congressional action. However, the U.S. Supreme Court has interpreted the Commerce Clause as implicitly preempting state laws that regulate commerce in a manner that disrupts the national economy. This is the judicially-created doctrine known as the "dormant" Commerce Clause.

The "dormant" Commerce Clause. The dormant Commerce Clause is a constitutional law doctrine that says Congress's power to "regulate Commerce ... among the several States" implicitly restricts state power over the same area. In general, the Commerce Clause places two main restrictions on state power – (1) Congress can preempt state law merely by exercising its Commerce Clause power by means of the Supremacy Clause of Article VI, Clause 2 of the Constitution; and (2) the Commerce Clause itself--absent action by Congress--restricts state power. In other words, the grant of federal power implies a corresponding restriction of state power. This second limitation has come to be known as the "dormant" Commerce Clause because it restricts state power even though Congress's commerce power lies dormant. *Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).* The label of "dormant Commerce Clause" is really not accurate – the doctrine applies when the Congress is dormant, not the Commerce Clause itself.

Rationale. The rationale behind the Commerce Clause is to protect the national economic market from opportunistic behavior by the states - to identify protectionist actions by state governments that are hostile to other states. Generally, the dormant Commerce Clause doctrine prohibits states from unduly interfering with interstate commerce. State regulations cannot discriminate against interstate commerce. If they do, the regulations are per se invalid. See, e.g., *City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).* Also, state regulations cannot impose undue burdens on interstate commerce. See, e.g., *Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).* Under the "undue burden" test, state laws that regulate

evenhandedly to effectuate a local public interest are upheld unless the burden imposed on commerce is clearly excessive in relation to the local benefits.

The Court has never held that discrimination between in-state and out-of-state commerce, without more, violates the dormant Commerce Clause. Instead, the Court has explained that the dormant Commerce Clause is concerned with state laws that both discriminate between in-state and out-of-state actors that compete with one another, *and* harm the welfare of the national economy. Thus, a discriminatory state law that harms the national economy is permissible if in-state and out-of-state commerce do not compete. *See, e.g., General Motors Corp. v. Tracy, 117 S. Ct. 811, 824-26 (1997).* Conversely, a state law that discriminates between in-state and out-of-state competitors is permissible if it does not harm the national economy. *H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).*

California Proposition 12 Litigation

In 2018, California voters passed Proposition 12. Proposition 12 bans the sale of whole pork meat (no matter where produced) from animals confined in a manner inconsistent with California's regulatory standards. Proposition 12 established minimum requirements on farmers to provide more space for egg-laying hens, breeding pigs, and calves raised for veal. Specifically, the law requires that covered animals be housed in confinement systems that comply with specific standards for freedom of movement, cage-free design and minimum floor space. The law identifies covered animals to include veal calves, breeding pigs and egg-laying hens. The implementing regulations prohibit a farm owner or operator from knowingly causing any covered animal to be confined in a cruel manner, as specified, and prohibits a business owner or operator from knowingly engaging in the sale within the state of shell eggs, liquid eggs, whole pork meat or whole veal meat, as defined, from animals housed in a "cruel manner." In addition to general requirements that prohibit animals from being confined in a manner that prevents lying down, standing up, fully extending limbs or turning around freely, the measure added detailed confinement space standards for farms subject to the law. The alleged reason for the law was to protect the health and safety of California consumers and decrease the risk of foodborne illness and the negative fiscal impact on California.

In late 2019, several national farm organizations challenged Proposition 12 and sought a declaratory judgment that the law was unconstitutional under the dormant Commerce Clause. The plaintiffs also sought a permanent injunction preventing Proposition 12 from taking effect. The plaintiffs claimed that Proposition 12 impermissibly regulated out-of-state conduct by compelling non-California producers to change their operations to meet California's standards. The plaintiffs also alleged that Proposition 12 imposed excessive burdens on interstate commerce without advancing any legitimate local interest by significantly increasing operation costs without any connection to human health or foodborne illness. The trial court dismissed the plaintiffs' complaint. *National Pork Producers Council, et al. v. Ross, No. 3:19-cv-02324-W-AHG (S.D. Cal. Apr. 27, 2020).*

On appeal, the plaintiffs focused their argument on the allegation that Proposition 12 has an impermissible extraterritorial effect of regulating prices in other states and, as such, is per se unconstitutional. This was a tactical mistake for the plaintiffs. The appellate court noted that existing Supreme Court precedent on the extraterritorial principle applied only to state laws that are "price control or price affirmation statutes." *National Pork Producers Council, et al. v. Ross, No. 20-55631, 2021 U.S. App. LEXIS 22337 (9th Cir. Jul. 28, 2021).* Thus, the extraterritorial principle does not apply to a state law that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices. Because Proposition 12 was neither a price control nor a price-affirmation statute (it didn't dictate the price of pork products or tie the price of pork products sold in California to out-of-state prices) the law didn't have the extraterritorial effect of regulating prices in other states.

The appellate court likewise rejected the plaintiffs' claim that Proposition 12 has an impermissible indirect "practical effect" on how pork is produced and sold outside California. *Id.* Upstream effects (e.g., higher

production costs in other states) the appellate court concluded, do not violate the dormant Commerce Clause. The appellate court pointed out that a state law is not impermissibly extraterritorial unless it regulates conduct that is wholly out of state. *Id.* Because Proposition 12 applied to California and non-California pork production the higher cost of production was not an impermissible effect on interstate commerce.

The appellate court also concluded that inconsistent regulation from state-to-state was permissible because the plaintiffs had failed to show a compelling need for national uniformity in regulation at the state level. *Id.* In addition, the appellate court noted that the plaintiffs had not alleged that Proposition 12 had a discriminatory effect on interstate commerce.

Simply put, the appellate court rejected the plaintiffs' challenge to Proposition 12 because a law that increases compliance costs (projected at a 9.2 percent increase in production costs that would e passed on to consumers) is not a substantial burden on interstate commerce in violation of the dormant Commerce Clause.

On to the Supreme Court?

Earlier this summer, the U.S. Supreme Court declined to review Proposition 12. *North American Meat Institute v. Bonta, No. 20-1215, 2021 U.S. LEXIS 3405 (S. Ct. Jun. 28, 2021).* Will the Court now take up the decision of the Ninth Circuit if requested? That remains to be seen. Unfortunately, the Supreme Court has been careless in applying the anti-discrimination test, and in many cases, neither of the two requirements--interstate competition or harm to the national economy--is ever mentioned. *See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979).* The reason interstate competition goes unstated is obvious – in most cases the in-state and out-of-state actors compete in the same market. But, the reason that the second requirement, harm to the national economy, goes unstated is because the Court simply assumes the issue away.

Conclusion

The dormant Commerce Clause is something to watch for in court opinions involving agriculture. As states enact legislation designed to protect the economic interests of agricultural producers in their states, those opposed to such laws could challenge them on dormant Commerce Clause grounds. But, such cases must be plead carefully to show an impermissible regulation of extraterritorial conduct.

In the present case, practically doubling the cost of creating hog barns to comply with the California standards was not enough, nor was the interconnected nature of the pork industry. California gets to call the shots concerning the manner of U.S. pork production for pork marketed in the state. This, in spite of overarching federal food, health and safety regulations that address California's purported rationale for Proposition 12.

The dormant commerce clause is one of those legal theories "floating" around out there that can have a real impact in the lives of farmers, ranchers and consumers, and how economic activity is conducted.