The "Dormant" Commerce Clause and Agriculture

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Overview

Much environmental legislation and regulation restricting private land use activities is created pursuant to the commerce clause of the United States Constitution. 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." But, there's also something known as the "Dormant" Commerce Clause. What is it and how is it relevant to agricultural law and policy?

The Dormant Commerce Clause – it's the topic of today's post.

Background

The Dormant Commerce Clause cannot be found in the Constitution. It is a judicially-created doctrine that several U.S. Supreme Court Justices don't believe in and that special interests groups have utilized to achieve an outcome in the courts that they could not obtain in state legislatures. In essence, the doctrine has been used to create law where there is none with the result of a further expansion of the federal government into what should be purely a state matter. The outcome is that elected state legislators are stripped from establishing policy for their own citizens. For example, with respect to agriculture, this has been evident in the past couple of decades with respect to agricultural "checkoff" programs and anti-corporate farming laws

So what is the "Dormant Commerce Clause"? It 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. *Willson 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. A recent example on this point is the California legislature enacting Proposition 12 specifying how laying hens are to be raised in other states if those producers want access to the California market.

The U.S. Supreme Court has developed two tests to determine when state regulation has gone too far. Under the first test, states are generally prohibited from enacting laws that discriminate against interstate commerce. *City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)*. Under the second test, the

Court balances the burden on interstate commerce against the state's interest in its regulation. *Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).*

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).* That was the basis for the court's decision in the California Proposition 12 case mentioned above. In that case, *National Animal Meat Institute v. Becerra, 825 Fed. Appx. 518 (9th Cir. 2020), aff'g. sub. nom., National Animal Meat Institute v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019),* 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.

Under Proposition 12, effective January 1, 2022, all pork producers selling in the California market must raise sows in conditions where the sow has 24 square feet per sow. The law also applies to meat processors – whole cuts of veal and pork must be from animals that were housed in accordance with the space requirements of Proposition 12. The plaintiff challenged Proposition 12 as an unconstitutional violation of the Dormant Commerce Clause by imposing substantial burdens on interstate commerce "that clearly outweigh any valid state interest." The trial court rejected the challenge, finding that the plaintiff failed to establish that the law discriminated against out-of-state commerce for the purpose of economic protectionism. On appeal, the appellate court affirmed. The appellate court determined that the trial court did not abuse its discretion in finding that the plaintiff was not likely to succeed on the merits of its Dormant Commerce Clause claim. The appellate court also stated that the plaintiff acknowledged that Proposition 12 was not facially discriminatory, and had failed to produce sufficient evidence that California had a protectionist intent in enacting the law. The appellate court noted the trial court's finding that the law was not a price control or price affirmation statute. Similarly, the appellate court held that the trial court did not abuse its discretion in holding that Proposition 12 did not substantially burden interstate commerce because it did not impact an industry that is inherently national or requires a uniform system of regulation. The appellate court noted that the law merely precluded the sale of meat products produced by a specific method rather than burdening producers based on their geographic location.

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. Specifically, the Court assumes that discrimination between in-state and out-of-state competitors necessarily harms the welfare of the national economy, making the second

requirement superfluous. The Court simply assumes that free competition among rational economic actors will necessarily improve the national economy. In other words, the Court assumes that individuals can have no impact on the results of the market, and that the rational pursuit of individual self-interest will result in society being better off. But, this is an incorrect assumption – and it's the primary reason for the existence of anti-trust laws, including the Packers and Stockyards Act, and the real reason behind why, historically, some states have taken action to enact corporate farming laws.

For example, assume that Mary goes to the grocery store to buy steak for Sunday dinner. Mary will evaluate the information that is available in the marketplace by comparing the prices of the different brands along with her perception of their various qualities. Based on her analysis, she will decide which steak product to buy. Price and quality are set by the market, and Mary does not act strategically – she does not take into account any future behavior of the meat department manager or the supplier. However, the purchasing agent for the grocery store who buys meat from suppliers not only considers price and quality, but also the supplier's future behavior. The purchasing agent will want to know whether the supplier is likely to breach a contract with the grocery store which would result in empty shelves and lost sales. If a breach is anticipated, the purchasing agent may refuse to deal with the supplier regardless of price and quality. So, the purchasing agent will act strategically by considering how the supplier is anticipated to behave. The outcome is that Mary may not actually be getting the best deal that she otherwise could.

Economic theory has a blind spot for strategic behavior – it does not address situations in which people anticipate another's future conduct. It simply assumes that free competition among rational actors will be efficient. But, the presence of strategic behavior undermines that assumption. That's where the legal system comes in - to establish appropriate legal rules to provide incentives or disincentives for appropriate economic conduct.

Application

So what does all of this mean? Why is this relevant? The application is that, in some cases, states act strategically. That is, they act in response to the anticipated behavior of other states. In these situations, it is incorrect for any court to build economic assumptions about free competition into its Dormant Commerce Clause anti-discrimination test. In these cases, state discrimination between in-state and out-of-state competitors may actually improve national welfare.

With that much said, in recent years, the most conservative Justices on the Supreme Court have argued for the complete elimination of the dormant Commerce Clause. Former Chief Justice Rehnquist, and former Justice Scalia as well as the most senior member of the current Supreme Court, Justice Thomas, believe that not only is there no textual basis for the Dormant Commerce Clause, but that it actually contradicts, and therefore directly undermines, the Constitution's carefully established textual structure for allocating power between federal and state governments. In a dissent joined by Rehnquist and Scalia, Justice Thomas concluded: "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1615 (1997)*.

How would the Court rule on a Dormant Commerce Clause case if it were to have one? Who knows? But, using the Dormant Commerce Clause to strike down state legislation impacting agriculture, would lead to an expansion of the federal government, a reduction of the role of state legislatures to set policy for their citizens and a further push down the path of globalization. *See McEowen, Roger A., South Dakota Amendment E Ruled Unconstitutional – Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?, 37 Creighton Law Review, 285 (2004).* The recent inclusion by the current Administration of including a provision in federal legislation purporting to provide economic relief from the virus barring states from using the funds to enact tax breaks at the state level is an example of the expansion of the power of the federal government over states.

In a 1932 dissenting opinion, Justice Brandeis sounded a warning that remains true today.

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable…. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles…". *New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)*

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 those states, those opposed to such laws could challenge them on Dormant Commerce Clause grounds. This is one of those legal theory issues that is "floating" around out there that can have a real impact in the lives of farmers and ranchers and how economic activity is conducted.

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