

A Dormant Threat to State Clean Energy, Public Health Programs

THIS term, the Supreme Court is considering a case about the Dormant Commerce Clause—with the potential to curtail state powers to issue rules that favor a certain energy mix along with safety and health standards. How did we get here?

In 2018, California passed a proposition requiring pork sold in the state to be bred by sows that are housed in conditions allowing them to turn around, lie down, and stretch. The National Pork Producers Council challenged the law, arguing that the proposition violates the Dormant Commerce Clause because “its practical effects are almost entirely extraterritorial”—producers outside of California will need to change their breeding practices to sell pork inside the state.

The Constitution authorizes Congress “to regulate commerce with foreign nations, and among the several states.” Courts have interpreted that provision as also saying the negative: interfering with commerce across state lines is illegal—the Dormant Commerce Clause. States have the authority to regulate sales within their boundaries, under their traditional police powers. But when a state restricts what can be sold in its territory based on its geographic origin, that restriction can be judged protectionist and discriminatory, and thereby unconstitutional. Three Supreme Court cases have held that the doctrine also prevents states from regulating outside their borders. The Pork Producers Council relies on this “extraterritoriality” for its challenge.

California has defended the proposition, arguing that the pork producers’ position would vastly expand the extraterritorial doctrine and that this is unwarranted. The Supreme Court has not recognized an “effects” test before this case in using the clause. Instead it applied the doctrine, for example, to a

Connecticut rule that required beer sellers to affirm that they were not charging more for beer in Connecticut than in neighboring jurisdictions. Because that rule regulated the prices of beer in other states, it had an impermissible extraterritorial effect.

If state laws that instead just have an incidental effect on a product sold elsewhere are made illegal, as in the pork producers’ argument, that could have wide ramifications. Many state rules necessarily have effects on production and manufacturing outside of their borders. West Virginia has a rule seeking to limit the risk of tuberculosis in cows used for milk sold in the state; Texas has a law prohibiting the sale of horse meat for human consumption; and Arizona

and Kentucky, among many other states, regulate lead in children’s toys. In addition, there are many state energy programs that either encourage or mandate a certain percentage

of renewable energy for consumption within the state. These laws are all summarized in an amicus brief filed by a coalition of states led by Michigan and Illinois. As those states argue, the pork producers’ case has the potential to “distort” a state’s ability to exercise its traditional police powers in areas that include their energy mix.

Recent lower court decisions addressing Dormant Commerce Clause challenges to state energy rules do not go anywhere near as far as what petitioners are seeking in the pork producers’ case. For example, recently in *NextEra Energy Capital Holdings v. Peter Lake*, the Fifth Circuit invalidated a Texas law that allows only existing owners of Texas transmission lines to build new lines there. But that case was about a law that “discriminates on its face,” not about the effects of the law.

The U.S. Department of Justice filed a brief on the side of the pork produc-



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ers, arguing that the California proposition impermissibly seeks to change practices outside of that state and has “no genuine health-and-safety justification.” DOJ spends a page attempting to explain that state clean energy programs are distinguishable because they “legitimately aim to address harm to persons or property in the state.” And there is a reason to believe that they are distinguishable. As the aforementioned amicus brief explains, state clean energy programs have the goals of diversifying the state’s energy mix, reducing pollution, and spurring economic development. Regardless, the new application of the extraterritoriality doctrine sought by petitioners is a vast expansion of the Dormant Commerce Clause’s reach and presents a threat.

In the end, it is not obvious which way the Supreme Court will go in this case. It pits California and animal rights advocates against a trade association—and a conservative Supreme Court would ordinarily seem to favor the last. But there has not been an extraterritorial case in the Supreme Court since the 1980s, and at least two justices disfavor it. Clarence Thomas wrote that the Dormant Commerce Clause is “over-broad and unnecessary” and makes “little sense.” Neil Gorsuch wrote in a concurrence that it isn’t clear whether the Court should have the power to “invalidate state laws that offend no congressional statute.” Whether that is enough to aid California in this case and neutralize the risk to state programs is yet to be seen.

Can the Court nix state laws that “offend no congressional statute”?