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State Regulatory Powers and the Dormant Commerce Clause

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Note: *This is the second of two* Lessons on the Law *articles that explore the Commerce Clause in U.S. history. See "The Mighty Commerce Clause: Ebbs and Flows," in* Social Education *87, no. 6 (Nov/Dec 2023), which explained that the Commerce Clause is one of Congress's most significant powers.*

IN 2023, the U.S. Supreme Court decided a case about pork production from California. *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). This decision involved a deep dive into how pigs are raised, how much pork Californians consume, and how pork is processed as a commodity nationwide. All of this centered on a California law dictating that pork sold in California must come from pigs raised in certain "more humane," larger living spaces. Since nearly all pork sold in California is produced outside the state, and California imports most pork from the national market, the national association of pork producers determined that *all* pork producers in the country would need to comply with the California law to ensure that pork imported for sale in California was produced in accordance with the "more humane" standard. This, the producers argued, would create a hardship for pork producers nationwide, and California was going beyond its power as a state to make this demand. The Supreme Court voted to uphold the California law, prompting Justice Gorsuch to quip, in the 5-4 opinion, "While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list."

This case focused on the dormant commerce clause in a very accessible, real, and contemporary way. The dormant commerce clause is the legal corollary to the Commerce Clause (Article 1, Section 8, Clause 3 in the Constitution) that says because Congress has exclusive power over interstate commerce, states cannot discriminate against interstate commerce or unduly burden interstate commerce, even in the absence of federal legislation regulating the activity. This means that even though the Constitution does not say so directly, the Supreme Court has defined implied limits on state regulations that interfere with interstate commerce.

Having students consider this limitation on state power as a corollary to Congress's explicit power to regulate interstate commerce can lead to a deeper exploration of the balance of state and federal powers. This article offers a quick primer on the dormant commerce clause: the legal rules, context and application, intellectual debates, and implications for the future.

Legal Rule of the Dormant Commerce Clause

Very generally, any state law that affects interstate commerce:

1. *Must not discriminate against out-of-state actors or out-of-state competition or have the effect of favoring in-state economic actors.* If the law is discriminatory, then the state must show it has no other reasonable means of advancing a legitimate local purpose. Legitimate local purposes must be important, non-economic state interests, such as health

AP Photo/Jeff Roberson

Sows now have room to roam in a gestation area, where they spend most of their life, on a farm run by Jared Schilling in Walsh, Illinois. Schilling has made his farm compliant with a California law that was upheld by the U.S. Supreme Court, and took effect on July 1, 2023.

and safety. It is worth noting that promoting economic interests of its own citizens at the expense of out-of-state citizens is not a legitimate state objective.

2. *Must not be unduly burdensome.* If the law only incidentally burdens interstate commerce, or if the law is nondiscriminatory, a court will balance whether the benefits of the state's interest outweigh the burden on state commerce, or not. Courts use these two questions as a test: Are there less restrictive alternatives on interstate commerce? Are there any conflicts with other states' regulations?

Considering the Pork Industry

The Court in *National Pork Producers Council v. Ross* was forced to grapple with the question of whether California's law is "unduly burdensome" to not only pork producers, but consumers and the national market at large. This wasn't easy, as California cited health and safety reasons for the law. In the opinion that favored California, Justice Gorsuch wrote:

> [We] remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.

There are not comparable national standards on this matter, despite extensive lobbying of Congress from relevant stakeholders. In that regard, this California law was effectively a workaround for any delays at the federal level. The pork producers threatened that compliance would "massively disrupt" the market. The Court recognized that Congress, not the courts, handles regulating commerce:

> In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, and "try novel social and economic experiments" if they wish, *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). …If, as petitioners insist, California's law really does threaten a "massive" disruption of the pork industry, if pig husbandry really does "'imperatively demand'" a single uniform nationwide rule, they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make. But so far, Congress has declined the producers' sustained entreaties for new legislation.

Ultimately, the Court decided to uphold the California law, citing the need for "extreme caution" before striking down such state legislation. It was a remarkable win for states:

> Whether moved by this experience or merely worried that more States might join the bandwagon, the Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. In the years since, this Court has inferred an additional judicially enforceable rule against certain, especially discriminatory, state laws adopted even against the backdrop of congressional silence. But "extreme caution" is warranted before a court deploys this implied authority…. Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of "extreme delicacy," something courts should do only "where the infraction is clear."… Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production. And they disavow any reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation. … Like the courts that faced this case before us, we decline both of petitioners' incautious invitations. The judgment of the Ninth Circuit is Affirmed.

With this ruling, the Court effectively narrowed the opportunities, or simply muddled the doctrinal waters, for parties to challenge state laws that affect commerce. It's useful to put this decision in context and examine where the dormant commerce clause doctrine came from, how it's been applied, and consider how its status today might influence the future.

Defining the Commerce Clause and its Corollary

The first Supreme Court decision to discuss the "dormant" commerce power came in 1829 (just five years after the first Commerce Clause case of *Gibbons v. Ogden*, 22 U.S. 1 (1824)), and was called *Willson v. Black Bird Creek Marsh Company*, 27 U.S. 245. In *Willson*, Mr. Willson owned a federally licensed boat that broke through a creek dam in Delaware. The Black Bird Creek Marsh Company had built the dam in response to a Delaware law to address health concerns presented by the creek water. Willson argued that damming the navigable creek was unconstitutional because it disrupted commerce. Chief Justice John Marshall noted that if Congress had regulated in this area there would be no question, but Congress had not acted. The Court found that the state had power to control the water in the creek for the reasons the state cited: to protect property values on the banks of the creek and improve the health of inhabitants.

As Chief Justice Marshall explained, the Court was required to assess whether "under all the circumstances of the case" the law was "repugnant to the power to regulate commerce in its dormant state." Chief Justice Marshall emphasized that state powers "were not phantom." States were limited only by the explicit powers granted to the federal government under the Constitution, and this exclusivity did not cancel a state's capacity to act. States could regulate their own internal commerce, in some circumstances, even interstate commerce, under police powers.

Thus, these early cases laid the groundwork for our structure of dual federalism in American government. Under a dual federalism system, the federal and state governments each have enumerated and understood powers and exercise powers without interference from the other. The federal government has exclusive authority to regulate interstate commerce, while states retain "policing power" over "safety, education, and welfare." The result was transformative in U.S. history—simply think about your own state government's bureaucracy! The balance—deliberate tension—between law making powers of federal and state governments is the enduring theme in dormant commerce-related case law.

Taxes and Safety Regulations

If we consider the Commerce Clause throughout U.S. history, used by Congress to enact an array of progressive reforms—antitrust laws, labor reforms, civil rights, environmental protections—then states have enacted systems of taxes and safety regulations, quite often to achieve similar goals on a state level. It is typically these kinds of laws that are at issue in dormant commerce court cases.

There are nine important cases that help illustrate how this definition has evolved over time. There were several cases in the nineteenth century that set parameters, primarily around discrimination in the market. Almost a century later, the "undue burden" standard appeared, and applied to cases in the late twentieth century.

Cooley v. Board of Wardens, 53 U.S. 299 (1852) – A Pennsylvania law requiring ships entering or leaving the Port of Philadelphia to hire a local pilot was found not to violate the Commerce Clause. The Court explained that while shipping is commerce, the local waterway conditions justified state regulation of ship pilots.

Almy v. State of California, 65 U.S.169 (1860) – A California law that taxed exports of gold and silver was held unconstitutional because transportation of freight is commerce and taxes on freight transported between states is an improper regulation of commerce.

Minnesota v. Barber, 136 U.S. 313 (1890) – The Court deemed unconstitutional a Minnesota law requiring that any meat sold in the state, whether originating within or without the state, be examined by an inspector within the state.

Pike v. Bruce Church, 397 U.S. 137 (1970) – An Arizona law required that cantaloupes grown in Arizona be labeled as such. An Arizona cantaloupe grower sent his produce to California to be packaged without the label; he was fined and sued. The Court held that the Arizona law was overly burdensome given the state's interest.

Hughes v. Alexandria Scrap, 426 U.S. 794 (1976) – Maryland created a junked car program that paid more for cars with Maryland license plates. The Court ruled this was not a Commerce Clause violation as Maryland was acting like a market participant as opposed to a regulator.

Exxon v. Maryland, 437 U.S. 117 (1978) – The Court ruled that a state can prohibit oil producers and refiners from operating gas stations within the state.

Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) – The Court upheld a state law that banned plastic non-returnable milk containers but allowed other non-plastic nonreturnable containers,

determining that this was not enough of a burden on out-of-state plastic manufacturers.

Western and Southern Life Insurance v. California Board of Equalization, 451 U.S. 648 (1981) – A California law imposed a tax on out-of-state insurers. The Court determined this did not create a Commerce Clause violation as Congress gave California this authority by statute.

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) – The Court struck down a Massachusetts state tax on milk products because the tax impeded interstate commercial activity by discriminating against non-Massachusetts citizens and businesses.

Focusing on the Constitution's Text

There are scholars, and jurists, who argue the dormant commerce clause doctrine should be scrapped because it is not in the Constitution and was simply a judicial creation. Justice Antonin Scalia was one of its fiercest critics, as evidenced by his 2015 dissent in *Comptroller of Treasurer of Maryland v. Wynne*, 575 U.S. 542:

> The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause. Unlike the negative Commerce Clause adopted by the judges, the real Commerce Clause adopted by the People merely empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. The Clause says nothing about prohibiting state laws that burden commerce. Much less does it say anything about authorizing judges to set aside state laws *they believe* burden commerce. The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce.

Other critics point to how commerce and communication have changed over time–the marketplace is transformed compared to 1829, even to 1970. It's worth understanding that the dormant commerce clause is a contested concept among legal scholars, especially as we grapple with it as savvy students, lifelong learners, and media consumers.

Opportunities for State-Initiated Reforms

If we think about the California pork law as the tip of an iceberg, the possibility of more cases

invoking questions around commerce and the dormant commerce clause is great. There could be more laws about food safety, climate change, labor, family leave time, health and wellness, disability, homelessness, basic income programs–the list is long. There are plenty of conversations around enforcement of immigration policies that might concern interstate commerce. Challenges to state legislative restrictions on travel to access abortion services or transgender therapies are also on the legal horizon. Another area that gets a lot of attention is cannabis legalization, which, at this point, has become so deeply invested in by private and state actors that a change in national policy might be extremely disruptive. There are also questions about social media restrictions that provoke conversations about free speech but might also implicate interstate commerce as specific states seek to implement various measures.1

In fact, states have been using their power to start reforms for decades. California, for many years, has led the way in the nation with specific automobile emissions standards. Many states have implemented environmental protection laws–including emissions testing protocols, health care and wellness programs, and professional licensing regulations that have survived court challenges.

One major example of state-initiated reform happened in 2018 with *South Dakota v. Wayfair,* where the Supreme Court ruled 5-4 that states could start collecting tax on sales its residents made with out-of-state sellers, even if the sellers had no physical presence in the state. The case overturned *Quill Corp. v. North Dakota* 504 U.S. 298 (1992), which thwarted North Dakota's attempts to collect tax on out-of-state vendor Quill's mail order sales to its residents in the name of "interstate commerce." During those years 1992-2018, of course, such sales exploded with the growth of internet retail. As states missed out on billions of dollars in tax revenue, over 20 states passed "Kill *Quill*" legislation, which openly defied the 1992 ruling in an effort to compel the Court to revisit the decision. By the end of 2018, following the *Wayfair* decision, all states were collecting, and Amazon was charging tax on internet sales.

If we consider commerce as central to our lives as other commonalities in our national experience, it is easy to see how foundational and still transformative this entire legal framework truly is. As engaged educators, professionals, consumers, and citizens, we can all stay informed and hopefully feel, even a little, more confident about these questions as they appear, most likely, given the speed of our world, in the not-so-distant future.

Note

1. For more information about the dormant commerce clause, social media, and free speech, see these two excellent articles: Ayesha Rasheed, "Dormant Commerce Clause Constraints on Social Media Regulation," 25 *Yale J.L. & Tech.* Special Issue 101 (2023) and Jack Goldsmith and Eugene Volokh, "State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation," *Texas Law Review* 101 issue 5 (2023).

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