

Although the Constitution does not say so directly, the Supreme Court has said there are implied limits on state regulations that interfere with interstate commerce.. This is known as the dormant commerce clause doctrine. State clean energy laws have been bedeviled by challenges based on this doctrine. The Supreme Court has just made it easier for states to fend off those claims.

As an example, consider laws that encourage a state's utilities to buy power from renewables. Those laws encourage the construction of new solar and wind in nearby states, while causing coal plants to lose market share and potentially close. Fossil fuel interests challenged laws like this, claiming that states were meddling in affairs outside their territory by taking account of carbon emissions outside their borders. The Court's new ruling puts those arguments to rest.

Some background on the new case is in order: California voters decided that they did not want to eat pork produced from animals that were inhumanely treated. They adopted an initiative banning the sale of such pork in the state. Nearly all pork is produced outside California, and California is a big chunk of the national pork market. Because it's allegedly impossible for pork suppliers to figure out which farms produced their meat, the pork industry complained this would in effect require all farmers to comply with California's standards of humane treatment.

The pork industry made two arguments. First, it said the California initiative was unconstitutional because of its "extraterritorial" effect on industry practices. Second, the industry argued California's interest in humane treatment of animals was outweighed by the industry disruption. That argument was framed in terms of what's called the *Pike* balancing test, named after a case where the Court called for such balancing.

In an opinion by Justice Gorsuch, the majority of the Supreme Court voted to uphold the California law. As the majority said, "While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list."

Part of Gorsuch's opinion had five votes and therefore is clearly binding law. In other parts of the opinion he spoke for only three or four Justices. There were two concurrences, a dissent joined by four Justices, and another dissent by Justice Kavanaugh alone. All this makes it harder to determine precisely what the Court held. However, two points are clear:

First, with the possible exception of Justice Kavanaugh in his lone dissent, none of the Justices favored the idea that a special rule applies to laws that have an "extraterritorial" effect, and the majority squarely rejected such a rule. The majority explained away earlier

precedents that seemed to support such a rule. Rather than being based on a special rule against extraterritorial effects, the Court said, those precedents were really based on findings of intentional discrimination against out-of-state companies intended to protect local firms. In the *Pork Producers* case, however, no one claimed that the California law was intended to protect its own pig farmers from competition.

Second, a majority of the Court agreed that the balancing test should mostly apply to two categories of cases: those in which a disparate impact on interstate commerce was evidence of an intent to discriminate against out-of-state firms, and those involving the interstate transportation industry. The second category of cases mostly involves burdensome state regulations of railroads and long-haul trucks.

The confusion comes in when the Court turns to the question of whether to apply the balancing test. The Justices were completely fractured on this issue, with no agreement on a common rationale. Lower courts are going to be struggling to make sense of this.

Nevertheless, what we do know is that a majority of the Court found that the pork producers' situation was outside what it called the "heartland" of the balancing test, cases involving discriminatory impacts on interstate transportation. The majority particularly emphasized that nothing about the California initiative's "practical effects" would suggest purposeful discrimination against out-of-state businesses.

While some of the specifics are unclear, the general message of the case is very supportive of state regulation. The majority simply didn't see a big problem with the California law. As the majority opinion put it, it could see no reason to "prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms." In fact, it said that the Court had never done so in any previous case.

Rather, the majority stressed the need for caution in applying the dormant commerce clause: "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'."

The import of the case is that courts should think twice about applying the balancing test except where a state law burdens interstate transport or where a disparate impact on out-of-state firms suggests possible discriminatory intent. After all, virtually no pork is produced in California.

Overall, the outcome of the case is very good news for state regulators. *Pork Producers*

makes it clear that a law is not necessarily suspect merely because it has significant effects on how out-of-state firms do business. Thus, out-of-state companies can't win a challenge merely by showing a law puts pressure on them to reduce their carbon emissions. Moreover, unless a state energy or climate law regulates power transmission or pipelines, or has a markedly greater impact on out-of-state firms than local competitors, courts should think twice about applying the balancing test.

As for the allegedly oppressed pig producers, I predict one of two things will happen.

Despite all the gnashing of teeth, the impact of the California law probably won't be as dramatic as the industry claims for litigation purposes. Either complying with California's requirements for animal welfare won't turn out to be all that hard, or else the pork industry will learn to track where products are sourced just like other industries do.

It seems that regulations always impose crushing burdens on industry — until the litigation is over, when the previously impossible generally turns out to be quite doable.