

Constitutional Law Review

Question 1: Mad Cow Disease Outbreak

Humans who eat beef made from infected cattle and can develop a human form of mad cow disease, called Creutzfeldt-Jakob (CJ) disease, which is a fatal condition. State A is bordered by the only two states with confirmed cases of mad cow disease. In response to the federal government's inaction State A passes legislation to implement a local response to the crisis.

Protect Our State from Mad Cow Disease Act (the Act)

Provision 1. It is unlawful to sell cattle products in State A unless the products have been inspected at an approved privately-owned inspection plant located in State A. This inspection facility employs state-of-the-art microbiological equipment, unavailable at most other facilities, to test products for mad cow disease. Recent studies have shown that facilities with inferior microbiological equipment have produced false negatives by failing to detect mad-cow disease in infected cattle.

Provision 2. A mad cow tax is imposed on all sales of cattle products in State A. Fifty percent of all revenues derived from this tax will be distributed as a subsidy to cattle producers in State A, to promote the production of cattle products uncontaminated by mad cow disease.

A cattle producer, located outside of State A, has sued State A and argues that the Act is unconstitutional under the Dormant Commerce Clause. More specifically, the producer argues that Provision 1 violates the Dormant Commerce Clause by preventing out-of-state cattle producers from relying on their own inspection facilities, thereby raising the costs of producing and selling cattle. It further argues that Provision 2 violates the Dormant Commerce Clause because the provision benefits in-state cattle producers at the expense of out-of-state cattle producers.

Is provision 1 constitutional under DCC?

Provision 1. It is unlawful to sell cattle products in State A unless the products have been inspected at an approved privately-owned inspection plant located in State A. This inspection facility employs state-of-the-art microbiological equipment, unavailable at most other facilities, to test products for mad cow disease. Recent studies have shown that facilities with inferior microbiological equipment have produced false negatives by failing to detect mad-cow disease in infected cattle.

Yes. Even though Provision 1 discriminates against interstate commerce, it serves a legitimate local purpose that available nondiscriminatory means cannot serve as well. DCC generally prohibits states from discriminating against interstate commerce, or imposing undue burdens on it. Where a state statute discriminates against interstate commerce, that statute is unconstitutional, unless the state demonstrates that the statute serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means.

Laws that facially distinguish between in-state and out-of-state citizens, goods, or services are considered discriminatory. A law that is facially neutral, but has a discriminatory purpose or effect, is also considered discriminatory. Provision 1 is facially neutral. It applies to all cattle producers, whether located in-state or out-of-state, and it requires all incoming cattle products to be inspected at a particular facility in State A. It does not differentiate between cattle products based on their geographic origin, nor does it prohibit the sale of out-of-state cattle products.

Although Provision 1 is facially neutral, it is discriminatory in effect, because it allows only a favored inspection plant within State A to inspect cattle products for mad cow disease. Even though Provision 1 is discriminatory in effect, it may be upheld if State A can demonstrate that it serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. Provision 1 serves the legitimate local purpose of protecting State A's citizens from mad cow disease. In addition, this purpose cannot be served as well by other means, because the inspection facility in State A has state-of-the-art equipment that most other inspection facilities lack. Moreover, other facilities with inferior equipment have failed to identify the disease in infected cattle. As a result, State A has not engaged in arbitrary discrimination. Without inspection at these high standards, the health and safety of State A's citizens may be compromised. **Maine v. Taylor is analogous to this case.** There, the Supreme Court held that Maine's law prohibiting the importation of out-of-state bait fish was constitutional, because the law was necessary to protect Maine's fisheries from both parasites and predatory non-native species of fish. The Act's purpose here is similar: to prevent the serious health consequences of mad cow disease, by subjecting all cattle products entering State A to inspection at high standards. What is more, Provision 1 is less discriminatory than the law upheld in *Maine v. Taylor*. Provision 1 does allow the sale of out-of-state cattle products, provided they pass inspection, whereas the law in *Maine v. Taylor* completely prohibited the importation of out-of-state bait fish. In sum, although Provision 1 discriminates against interstate commerce, it is constitutional because the state has carried its burden of showing that the provision serves the legitimate local purpose of protecting and promoting the health of its citizens, and that this purpose cannot be served as well by available nondiscriminatory means.

Is provision 2 constitutional under DCC?

Provision 2. A mad cow tax is imposed on all sales of cattle products in State A. Fifty percent of all revenues derived from this tax will be distributed as a subsidy to cattle producers in State A, to promote the production of cattle products uncontaminated by mad cow disease.

Provision 2 has two components: (1) the provision charges an assessment on all sales of cattle products within State A, but (2) the provision distributes half of the resulting assessments to in-state cattle producers.

The first component of Provision 2 is constitutional. The assessment is a **non-discriminatory tax that applies equally to all cattle products sold within State A**, whether the products originate from out-of-state or in-state.

But second component of Provision 2 renders that provision unconstitutional. By taxing all sales of cattle products, but returning half of that tax as a subsidy to local cattle producers, the law has the effect of benefiting the local producers at the expense of out-of-state ones. Provision 2 is analogous to the statute struck down as unconstitutional in the Supreme Court's decision in **West Lynn Creamery v. Healy** where the Court invalidated a Mass statute that charged an assessment on all milk sold by dealers to Massachusetts retailers, and then distributed that assessment as a subsidy to local dairy farmers. Similarly, State A has funded its subsidy in part with sales of cattle products imported from out-of-state, **which has the effect of burdening and discriminating against interstate commerce**. If State A's goal is to promote in-state production of safe cattle, that goal can be achieved through nondiscriminatory means, in contrast to Provision 1. For example, State A can constitutionally provide a subsidy to in-state producers, as long as the subsidy is funded from a general state account, as opposed to assessments targeted in part to benefit in-state cattle producers at the expense of out-of-state producers. Accordingly, Provision 2 is unconstitutional under DCC.

Question 3

Michigan recently enacted The Sugary Drinks Portion Cap. The state law prohibits the sale of sugary soft drinks in containers larger than 16 ounces in volume by restaurants or retail stores in the state. The law is intended to reduce the increased risk of tooth decay and chronic diseases, such as diabetes and high blood pressure, associated with consuming sugar. The Coca Cola Company (Atlanta, Georgia) and PepsiCo (Purchase, New York) challenge the Michigan law in federal court, arguing that it violates the Dormant Commerce Clause. Their Complaint states that virtually all soda sold in Michigan is produced and bottled outside of Michigan and more than half of it is sold in containers larger than 16 ounces. Are Coca Cola and Pepsi likely to succeed in their suit? Why or why not? (15 points)

No. The issue is whether the Michigan law violates the Dormant Commerce Clause.

First, the law is not discriminatory on its face, in its purpose, or in its effects. The text of the law does not distinguish between in-state and out-of-state parties. The law addresses a public health problem, is generally applicable, and burdens both in-state interests (retail stores) and out of state interests (manufacturers).

Because it is non-discriminatory, a court will ask if the incidental burdens are justified by a legitimate government purpose. Pepsi and Coke will argue that more than 50% of their sales will be impacted because they are sold in containers larger than 16 ounces. But Pepsi and Coke may continue to sell soda in Michigan. They just must use smaller containers. The soda is analogous to the flow of oil in *Exxon v. MD*, which continued to flow, albeit through different business structures, and the flow of milk in *MN Cloverleaf*, only in different containers. In addition, the law does not eliminate one state's marketing advantage as in the *WA Apple* case. Nor is the law regulating or blocking channels of commerce, as in the trucking cases, or requiring production in one state, as in *Bruce Church*.]

Question 4: Standing

US Fish and Wildlife (USFW) temporarily suspended the enforcement of most fishing and poaching regulations because they are understaffed due to covid.

Dory's Friends is a local group that has been working to prevent overfishing.

Dory's Friends are opposed to the US FW's decision and would like to challenge its legality in court.

What would they need to show they have standing to sue?

Question 4: Standing

Dory's Friends would:

- 1) First have to show that as a result of the USFW's alleged violation they suffered or are likely to suffer a **concrete injury in fact**, either to their health, their economic interests, or their quality of life.
- 2) Second, they would have to show **causation**, meaning that their alleged injury is fairly traceable to the USFW's temporary suspension.
- 3) Lastly, they would have to show **redressability** meaning that their alleged harm will be redressed by a favorable court decision.

Question 5: is it Constitutional?

In response to an increasing motor-vehicle accidents, Congress enacts the Don't Text and Drive Act (the Act).

Senate report for the Act attributes increase in accidents to a rise in the number of drivers, particularly teenagers, who text and drive. Report also finds that these accidents cost billions of dollars annually in economic losses, personal injury, and overall societal harm, and that they interfere with the well-being and educational prospects of their teenager victims. The senate report further asserts that this problem requires a national solution, because states have failed to uniformly prohibit texting while driving.

The Act conditions certain federal funding on the states' prohibiting texting while driving, an offense defined in the Act as "operating a motor vehicle while manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device." Under the Act, states have the discretion to impose civil or criminal penalties on violators. Any state that does not prohibit texting while driving will lose 15 percent of the federal funds it receives to improve the quality of its public K-12 education. The total amount that each state would lose constitutes approximately 2 percent of an average state's overall budget.

Not Constitutional. Why? Spending Power, look at *Dole* factors.

- (1) the exercise of the spending power must further the general welfare of the United States
- (2) the conditions that states must meet to receive federal funding must be stated unambiguously,
- (3) the conditions must be related to Congress's purpose in granting the federal funding, and
- (4) the financial inducement offered to the states by Congress cannot be so coercive as to pass the point at which pressure turns into compulsion.

(1) the exercise of the spending power must further the general welfare of the United States

ASK: Is this sufficiently related to the general welfare? How much \$ is at stake?

Argue for and against relation.

- “The Act conditions certain federal funding on the states’ prohibiting texting while driving”
- “In response to an increasing motor-vehicle accidents”
- Senate report for the Act attributes increase in accidents to a rise in the number of drivers, particularly teenagers, who text and drive.

(1) the exercise of the spending power must further the general welfare of the United States ✓

(2) the conditions that states must meet to receive federal funding must be stated unambiguously

Ask: are the conditions expressly stated so that states are aware of what choice they are making

- “Any state that does not prohibit texting while driving will lose 15 percent of the federal funds it receives to improve the quality of its public K-12 education.”

(3) the conditions must be related to Congress's purpose in granting the federal funding, and

- In this case, the question is whether the condition of prohibiting texting while driving relates to Congress's purpose in providing the states with federal funds for public K-12 education.
- Relationship between the spending and the condition in the Act is less direct than the relationship in *Dole* (5 percent of federal highway funding on the requirement that states raise their minimum drinking age to 21)
- **Could argue:** Senate report cited teenagers are the primary victims in texting-while-driving accidents, which can interfere with the well-being and educational prospects of their teenager victims. Relates to the purpose of federal funding for K-12 education, but this relationship is probably too removed to satisfy requirement.
- To make the relationship between condition and purpose stronger, Congress should amend the statute to condition the receipt of highway funds, rather than education funds, on prohibiting texting while driving.

(4) the financial inducement offered to the states by Congress cannot be so coercive as to pass the point at which pressure turns into compulsion.

For the Act to pass this test, the states must have a genuine choice whether to accept Congress's condition.

Cases: In **Dole**, funds at stake constituted less than 0.5 percent of South Dakota's budget, which the Court found to be only "relatively minor encouragement."

In contrast, in NFIB v. **Sebelius**, Congress's threat to withhold 100 percent of Medicaid funds from states who refused to accept Congress's new Medicaid program was unconstitutionally coercive. The funds at stake in Sebelius amounted to over 10 percent of a state's overall budget.

Funds at stake here: 15 percent of the federal funds for its public K-12 education. The total amount is 2 percent of an average state's overall budget.

