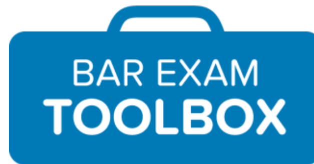
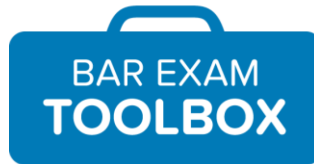


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're going to be discussing an issue in our "Listen and Learn" series – this one is about the Dormant Commerce Clause. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to be talking about the Dormant Commerce Clause, also known as the Negative Commerce Clause. Despite its name, the Dormant Commerce Clause is not actually a clause in the Constitution, but rather a doctrine that has been inferred from the Commerce Clause. We have already covered the Commerce Clause in another episode, but as a reminder, the Commerce Clause grants Congress the authority to regulate interstate commerce, or commerce between the states. Congress may also regulate activities within a state, or intrastate commerce, if the cumulative impact of the activities has a substantial effect on interstate commerce.

Lee Burgess: Despite Congress's broad power to regulate commerce, its power is not exclusive. States are allowed to regulate commerce if such regulation is not preempted by federal law. But even when Congress has not acted, there are still certain laws that state and local governments cannot pass. And that's where the Dormant Commerce Clause comes into play. Under the Dormant Commerce Clause, state and local governments generally cannot pass laws that, (a) discriminate against out-of-state commerce; or (b) place an undue burden on interstate commerce.

Lee Burgess: That's the general rule, but let's break it down a bit, starting with what constitutes a discriminatory regulation. A law is deemed discriminatory when it is either, (a) facially discriminatory; or (b) the law has a discriminatory impact because it favors in-state commerce over out-of-state commerce. State and local laws that discriminate against out-of-state commerce are unconstitutional, unless the burden on interstate commerce is narrowly tailored to achieve a



legitimate, non-protectionist state objective. For a law to be narrowly tailored, there must be no less-discriminatory alternatives available.

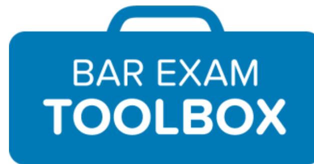
Lee Burgess: Now let's move on to what constitutes an unduly burdensome regulation. State and local laws that are not discriminatory, but still place an undue burden on interstate commerce are unconstitutional when the burden on interstate commerce is clearly excessive to the putative benefits of the state and local government. Courts apply this balancing test on a case-by-case basis.

Lee Burgess: We're almost done with our rules; we just need to address an important and often-tested exception called the market participant exception. Under this exception, a state or local government may discriminate against out-of-state commerce if it is acting as a "market participant" rather than solely a regulator of economic activity. For example, a state may favor its own citizens regarding state programs, state businesses, or when it is the entity buying or selling goods.

Lee Burgess: Now that we've covered the rule and the exceptions, it's time for our first hypo. As we go through the facts, you might notice that several other issues are triggered. That's because Dormant Commerce Clause questions often also involve the Privileges and Immunities Clause, substantive due process, and equal protection. While we will not be addressing those issues today, it's a good idea to keep them in mind as you practice. Okay, let's get to our hypo. This one is adapted from the July 2018 California bar exam:

Lee Burgess: "Five years ago, State X bought Railroad, which was in bankruptcy and about to be liquidated. Railroad has always been the largest rail carrier in State X, presently carrying 70% of its rail freight. Railroad's transport rates are generally lower than other rail carriers. In signing the Act authorizing the purchase of Railroad, the governor stated that it would ensure continued freight rail service for State X industry. The Act authorizing the purchase of Railroad provides that manufacturers with factories in State X shall have first choice of space on Railroad. Peter, a citizen of State Y, which borders State X, grows melons in State Y for sale to grocers there and in State X. Before its purchase by State X, Peter exclusively used Railroad for shipping melons to his many State X customers. Peter has lost nearly all of his State X customers over the last five years because he cannot guarantee timely delivery of ripe melons, because shipping space on Railroad is so uncertain. Peter has repeatedly been forced to give up reserved space on Railroad because it is being used by State X manufacturers.

Lee Burgess: What claims can Peter make under the United States Constitution about how the court should rule?"



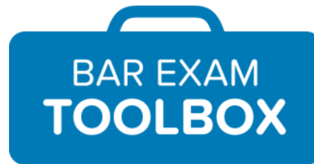
Lee Burgess: Okay, so we can quickly see that this question involves a citizen of one state claiming that another state's law is unfairly burdening his business, and there is no indication that the state law has been preempted by federal law. That means we're in Dormant Commerce Clause territory.

Lee Burgess: So let's work through our rule. The first question is whether the Act discriminates against out-of-state commerce by either being facially discriminatory or having a discriminatory impact because it favors in-state commerce over out-of-state commerce. Here, the Act facially discriminates against out-of-state commerce by explicitly giving State X manufacturers first choice of space on Railroad. Note that State X is not necessarily favoring its own citizens here; it is merely favoring manufacturers that have factories within State X. The manufacturers themselves can be incorporated or headquartered in any state. Nevertheless, the Act clearly favors commerce in State X. Therefore, the Act discriminates against out-of-state commerce.

Lee Burgess: Now that we have established that the Act is discriminatory, the next question is whether the burden on interstate commerce is narrowly tailored to achieve a legitimate, non-protectionist state objective. We're told that prior to State X's purchase of Railroad, the railroad was in bankruptcy. State X would argue that the Act allowed the State to purchase Railroad, thereby ensuring continued freight service to State X industry. Peter would successfully argue, however, that although State X has a legitimate interest in continuing to provide rail service for State X manufacturers, the provision in the Act giving priority to in-state manufacturers is not necessary to achieve that interest. Railroad's ability to continue operating and providing service to State X manufacturers is not dependent on those manufacturers having first choice of space. Therefore, although State X's interest is legitimate, the methods used to achieve that interest are not narrowly tailored. Accordingly, the Act is a discriminatory regulation, unless the market participation exception applies.

Lee Burgess: State X would successfully argue that, as the owner of Railroad, State X is acting as a participant in the market and not solely as a government regulator of Railroad. Therefore, although the Act discriminates against out-of-state commerce, the Act does not violate the Dormant Commerce Clause, because the market participation exception applies.

Lee Burgess: Now, even though we have determined that the Act is facially discriminatory, we still want to go through the unduly burdensome test as an alternative argument. So let's do that now. To apply that test, we need to balance the burden on interstate commerce against the putative benefits to State X. Here,



the burden on interstate commerce appears to be substantial. We're told that Peter has lost nearly all of his State X customers over the last five years because he cannot guarantee timely delivery of ripe melons due to uncertain shipping space on Railroad. The same is likely true for other suppliers of perishable items. State X could argue that Peter and other suppliers could secure shipping space on other carriers. After all, State X only accounts for 70% of the state's rail freight.

Lee Burgess: But even if that's the case, we're told that Railroad's rates are generally lower than other carriers, which means that Peter and other out-of-state suppliers would need to pay more for shipping. Moreover, these effects are compounded if out-of-state manufacturers rely on Railroad to get their products through State X to other states. This burden on interstate commerce is clearly excessive to the state's interest in ensuring continued freight service to State X industry, given that the state's interest can be achieved with far less burdensome regulation. Therefore, under the unduly burdensome test, the Act violates the Dormant Commerce Clause.

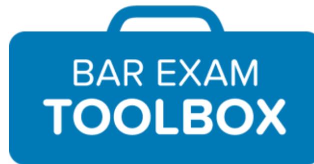
Lee Burgess: And that's it for this hypo. Let's do one more. This one is adapted from the February 2005 California bar exam:

Lee Burgess: "A State X statute prohibits the retail sale of any gasoline that does not include at least 10% ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as gasohol. The statute is based on the following legislative findings: one, the use of gasohol will conserve domestic supplies of petroleum; two, gasohol burns more cleanly than pure gasoline, therefore reducing atmospheric pollution; and three, the use of gasohol will expand the market for grains from which ethanol is produced. State X is the nation's largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Lee Burgess: Oilco is a State Y petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X's grain production or lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Lee Burgess: Can Oilco successfully assert that the statute violates the Commerce Clause?"

Lee Burgess: Alright, first things first. Does the statute facially discriminate against out-of-state commerce? Here, no. The statute merely prohibits the retail sale of any

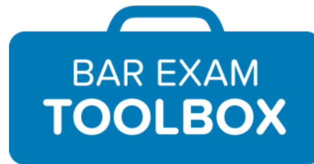


gasoline that does not include at least 10% ethanol. All manufacturers are permitted to sell gasohol in State X on the same terms, so the statute does not discriminate on its face.

Lee Burgess: Next, does the statute have a discriminatory impact because it favors in-state commerce over out-of-state commerce? We're told that State X is the nation's largest producer of grain used for making ethanol, and that State X has no oil wells or refineries. We're also told that the State X legislature found that "the use of gasohol will expand the market for grains from which ethanol is produced". Based on these facts, Oilco would argue that the statute promotes State X interests by essentially guaranteeing a market for State X grain to the detriment of out-of-state petroleum companies. State X could argue that the statute does not favor in-state commerce over out-of-state commerce, but rather happens to favor grain-producing states over petroleum-producing states. While State X benefits from the statute, so does any other state that produces grain for ethanol. This one is a close call, and you could go either way. Just make sure you have a strong conclusion one way or another.

Lee Burgess: No matter which way you come out, you will still want to continue your analysis to get all available points. If you determined that the law was not discriminatory above, you can still move forward by starting your next paragraph with something like: "Assuming the court finds that the statute discriminates against out-of-state commerce." So let's do that together now. Assuming the court finds that the statute discriminates against out-of-state commerce, the next issue we need to address is whether the burden on interstate commerce is narrowly tailored to achieve a legitimate, non-protectionist state objective. State X will likely point to the legislative findings regarding the conservation of petroleum and the reduction in pollution resulting from the use of gasohol. State X will argue that these are legitimate state interests, and that they cannot be achieved by non-discriminatory means. While Oilco might be able to demonstrate that there are alternative ways to reduce pollution and conserve petroleum to the same extent as provided for by the statute, there is no reason why the alternatives should be mutually exclusive. State X arguably has a legitimate interest in reducing pollution and preserving petroleum as much as it can, and not merely to the extent achieved by gasohol here. Therefore, State X will likely be able to show that the statute is narrowly tailored to achieve a legitimate state objective.

Lee Burgess: Next, we want to address the market participation exception. State X might also argue it is permitted to discriminate against out-of-state commerce because it is a market participant. We know that State X is the nation's largest producer of grain used for making ethanol. We don't know, however, whether State X itself

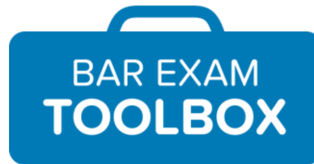


is the producer. In other words, there is no indication whether the grain is produced by farms owned by State X or merely by private farms operating within State X. Moreover, while the State X government is likely a purchaser of gasohol, the statute is not limited to the state government, but rather applies to all retail sales throughout the state. Therefore, the market participation exception does not apply.

Lee Burgess: Finally, we want to address the unduly burdensome test. Again, we can do this by arguing in the alternative. So, assuming the court finds that the statute does not discriminate against out-of-state commerce, Oilco would argue that the statute nevertheless imposes an undue burden on Oilco and other petroleum companies that have limited capacity to produce gasohol. In support of that argument, Oilco would point to the fact that its sales and profits in State X have decreased substantially. State X would respond by arguing that the burden on Oilco, while significant, is not undue. After all, Gasohol is still made from 90% gasoline. While State X might be able to produce the ethanol, it cannot produce gasohol without buying gasoline from somewhere. The same is true for any other ethanol producer. Either Oilco can produce the 10% ethanol required to make gasohol from State X or other ethanol-producing states, or it can sell its gasoline to gasohol producers, including those in State X, because the statute does not prohibit the wholesale of 100% gasoline. In any event, any losses incurred by Oilco and other petroleum companies are outweighed by the environmental and conservation benefits of the statute, which Oilco itself does not dispute. Therefore, in light of the limited impact on Oilco and the substantial benefits to State X, the statute is likely not unduly burdensome.

Lee Burgess: And with that, we're done with our hypos. So, what did you think? Do you think we got the analysis right? Do you think we should have come out the other way on some issues? If you do, that's okay! These questions are meant to illicit reasonable arguments on both sides. As always, the important thing is that you deeply engage with the facts and make a compelling argument in support of your conclusion.

Lee Burgess: That's all the time we have for today. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!



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California Bar Examination – Essay Questions and Selected Answers, July 2018
California Bar Examination – Essay Questions and Selected Answers, February 2005
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Podcast Episode 117: Listen and Learn – Due Process and Equal Protection (Con Law)
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How to Approach Constitutional Law MBE Questions