AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Federalism

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)

The city of Madison, Wisconsin, located in Dane County, at mid-century was the home of 5,600 dairy farms that produced dairy products for Madison and a national market. Madison adopted an ordinance banning the sale of milk products that had not been pasteurized within five miles of the center of the city or produced from a farm that was not inspected by city officials. City officials were limited to inspecting farms within a twenty-five-mile radius of the city center. Milk produced in Dane County was not Grade A, according to standards established by the United States Public Health Service.

Dean Milk Co. was based in Illinois and distributed milk products throughout Illinois and Wisconsin, drawing on dairy farms from northern Illinois and southern Wisconsin. The farms used by Dean Milk were outside Dane County and the pasteurization facilities were located in Illinois. The company's products were Grade A, according to federal standards. Dean Milk was denied a license to sell its products in Madison. The company sued in a Wisconsin court seeking a declaration that the city ordinance was unconstitutional. The trial court ruled in favor of the city, and the Wisconsin Supreme Court affirmed that judgment (while refusing to reach the constitutionality of the twenty-five-mile-limit on farm permits). The company appealed to the U.S. Supreme Court, which reversed the Wisconsin courts in a 6–3 decision.

The question for the Court was whether the milk ordinance violated the interstate commerce clause. There was no conflicting federal statute, so the issue was whether the milk ordinance inappropriately discriminated against interstate commerce. The majority concluded that the city ordinance was not a necessary means for protecting public health but did burden the free flow of interstate commerce. The dissenters objected to the rigorous standard that the majority applied to evaluating health laws that impinged on interstate commerce and to their assessment of the costs and benefits of the policy.

Is the standard that the Court used to evaluate laws affecting interstate commerce consistent with the more general post-New Deal approach to evaluating economic regulations? Why might burdens on interstate commerce receive stricter scrutiny than other economic burdens? Is the Court necessarily engaged in policymaking? In Southern Pacific Co. v. Arizona *(1945), Justice Douglas argued that Court should intervene only when state laws discriminate against interstate commerce. Does this case suggest that evaluating whether state laws discriminate against out-of-state goods is no easier than evaluating whether state laws unduly burden the free flow of goods? How can a local exercise of the police powers be distinguished from economic discrimination? Should it matter that the Madison ordinance affected milk produced in Wisconsin as well as milk produced in Illinois?*

JUSTICE CLARK delivered the opinion of the Court.

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This is not an instance in which an enactment falls because of federal legislation which, as a proper exercise of paramount national power over commerce, excludes measures which might otherwise be within the police power of the states. . . . There is no pertinent national regulation by the Congress. . . .

Nor can there be objection to the avowed purpose of this enactment. We assume that difficulties in sanitary regulation of milk and milk products originating in remote areas may present a situation in

which "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities." *Parker v. Brown* (1943) . . . . We also assume that since Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate commerce may be affected. . . .

But this regulation . . . in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. . . . A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. . . . Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them. . . .

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It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. . . . [And Wisconsin health] officials agreed that a local health officer would be justified in relying upon the evaluation by the Public Health Service of enforcement conditions in remote producing areas.

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To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation." . . .

For these reasons we conclude that the judgment below sustaining the five-mile provision as to pasteurization must be *reversed* [and remand on the issue of the twenty-five mile limitation].

JUSTICE BLACK, joined by JUSTICE DOUGLAS and JUSTICE MINTON, dissenting.

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(1) This ordinance does not exclude wholesome milk coming from Illinois or anywhere else. It does require that all milk sold in Madison must be pasteurized within five miles of the center of the city. But there was no finding in the state courts, nor evidence to justify a finding there or here, that appellant, Dean Milk Company, is unable to have its milk pasteurized within the defined geographical area. As a practical matter, so far as the record shows, Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison.

(2) . . . . [T]he fact that [this ordinance], like all health regulations, imposes some burden on trade, does not mean that it 'discriminates' against interstate commerce.

(3) This health regulation should not be invalidated merely because the Court believes that alternative milk-inspection methods might insure the cleanliness and healthfulness of Dean's Illinois milk. I find it difficult to explain why the Court uses the "reasonable alternative" concept to protect trade. . . . Since the days of Chief Justice Marshall, federal courts have left states and municipalities free to pass

bona fide health regulations subject only "to the paramount authority of Congress if it decides to assume control." . . *Gibbons v. Ogden* (1819). . . . No case is cited, and I have found none, in which a bona fide health law was struck down on the ground that some other method of safeguarding health would be as good as, or better than, the one the Court was called on to review. In my view, to use this ground now elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk.

If, however, the principle announced today is to be followed, the Court should not strike down local health regulations unless satisfied beyond a reasonable doubt that the substitutes it proposes would not lower health standards. I do not think that the Court can so satisfy itself on the basis of its judicial knowledge. . . .