

Federal/State Plant Quarantines and the Constitutional Rules of Engagement

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NANCY S. BRYSON




Framework for Discussion

- How does the **Constitution** allocate power as between the federal government and the states?
- How has the **Supreme Court** interpreted the limitations on the exercise of such power?






Framework for Discussion

- How does this affect State plant quarantine authority?
- Does the King Amendment affect this?





Key Constitutional Principles

- Federal Law is the Supreme Law of the Land.
- State sovereign powers preserved except for those expressly reserved to the federal government in the Constitution.
- Congress has the power to enact laws implementing these federal reserved powers.
- Executive Branch has power to implement laws.
- The Supreme Court decides whether laws are constitutional.




Interstate Commerce Clause

- The Constitution reserves to Congress the power "to regulate Commerce . . . among the several States." Art. 1 Sec. 8 Para 3.





Interstate Commerce Clause

- Supreme Court interpretation:
 - includes the power to pre-empt state law (express or implied) by the enactment of federal law.
 - denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce ("negative" or "dormant" commerce clause) even if Congress has not enacted a pre-emptive federal law.





Federal Pre-emption

- **Express Pre-emption:** Congress passes a law that is within its constitutional reserved powers that expressly pre-empts State law.
- **Implied Pre-emption:** State law enters a field of regulation reserved exclusively for the federal government or state law conflicts with federal law.

Federal Pre-emption

- Conflict may arise because:
 - impossible to comply with both federal and state law or
 - state law stands “as an obstacle to the accomplishment of the full purposes and objectives of Congress.”
- Presumption that the traditional police powers of the state and local governments are not displaced unless that is the clear intent of Congress.

Interference with Interstate Commerce Limits on State Law

- **Supreme Court interpretation:**
 - a state law that directly regulates or discriminates against interstate commerce or which has that effect is per se invalid; examples include
 - × laws prohibiting import of goods from other states
 - × laws imposing taxes on out-of-state goods
 - × laws prohibiting export to other states
 - × laws erecting barriers to out-of-state competition
 - possible exception if state demonstrates:
 - × law serves legitimate local purpose
 - × that could not be served as well by reasonable nondiscriminatory means

Interference with Interstate Commerce Limits on State Law

- A state law that is neutral and regulates evenhandedly is evaluated under a balancing test:
 - nature of the putative in-state benefits.
 - burden the state law imposes on interstate commerce.
 - whether the burden is “clearly excessive” in relation to state benefits.
 - whether the state interests can be promoted as well with a lesser impact on interstate commerce.
- Excessive burden compared to benefits = violation.

Current Standard

- **Current standard:**
 - Under the Commerce Clause, Congress may regulate the channels of interstate commerce, persons or things in interstate commerce, and those activities that substantially affect interstate commerce.
 - × *Wickard v. Filburn*: “activity” includes production of wheat on one’s own farm for one’s own consumption.
 - × *NFIB v. Sibelius*: “activity” does not include non-participation in commerce (i.e. failure to purchase health insurance) (Roberts).



Roscoe Filburn with his wheat

S. Ct. Plant Quarantine Analysis

- 1824: Quarantine laws “are considered as flowing from the acknowledged power of a State . . . to provide for the health of its citizens.” *Gibbons v. Ogden*.
- 1913: “Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with Federal action. . . . [The] power of states to take steps to prevent the introduction or spread of disease . . . is beyond question.” *Minnesota Rate Cases*.

S. Ct. Plant Quarantine Analysis

- 1926: 1917 Legislation authorizing USDA to issue plant quarantines pre-empts state authority to do so, whether or not USDA has acted. *Oregon-Washington R. & Nav. Co v. State of Washington* (Washington State quarantine on import of alfalfa held pre-empted).
- "It is a serious thing to paralyze the efforts of a state to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine federal bureau." (dissent).



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S. Ct. Quarantine Analysis

- 1986: Maine ban on import of live baitfish to protect Maine fisheries against parasites upheld. *Maine v. Taylor* (Commerce Clause significantly limits ability of states to regulate or otherwise burden interstate commerce *but, it does not elevate free trade above all other values*).



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Plant Protection Act (2000)

- Federal government role: prevention, detection, control, or eradication of plant pests or noxious weeds in interstate and foreign commerce.
- Express Pre-emption
 - no regulation of foreign commerce by states;
 - no regulation of interstate commerce if the Secretary has issued a regulation or order except for:
 - ✦ Prohibitions or restrictions on movement that are consistent with and do not exceed Secretary's regulation or order; or
 - ✦ Additional prohibitions or restrictions based on special local need as supported by sound scientific data or thorough risk assessment.

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Special Local Need Criteria

- Data from scientifically sound detection survey of absence of plant pest or distribution if present.
- If not present, risk analysis showing possibility of entry/establishment.
- Quantitative estimates of potential harm to environment or natural resources of State.
- Demonstration of particular vulnerability to harm.
- Proposed additional prohibitions or restrictions, demonstration of necessity and adequacy.
- Approval by APHIS after public notice and comment.



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CANGC v. Kentucky (2004)

- California nurseries challenge Kentucky order that banned all California nursery plants from entering Kentucky for fear of spreading sudden oak death.
- No ban on plants originating from Oregon or Washington where sudden oak death also present.
- Case resolved by consent order: Kentucky agreed that quarantine was pre-empted and agreed to permanent injunction.



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CANGC v. South Carolina (D.S.C. 2010)

- California nurseries challenge S.C. legislation imposing additional requirements on import of plants regulated under federal sudden oak death quarantine.
- Requirements include state phytosanitary certificates that California does not issue.
- No USDA approved special local need.
- South Carolina requirement was withdrawn.

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Does Federal Authority Extend to Intrastate Movement?



- Release permits for regulated articles, Part 340.
- Domestic quarantine regulations for SOD and gypsy moth provide for quarantine of portions of a state if the State has adopted and is enforcing intrastate movement regulations.

The King Amendment- H.R. 2462

- IN GENERAL. – The government of a State or locality therein shall not impose a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce if –
 - (1) such production or manufacture occurs in another State; and
 - (2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to –
 - (A) Federal law; and
 - (B) the laws of the State and locality in which such production or manufacture occurs.

Application to Plant Quarantines

- Standards or conditions on production or manufacture?
- Or measures to protect health and natural resources?
- Federal law requires federal approval of special local needs requirements.



Questions?



Nancy S. Bryson
Chair, Agriculture and Food Practice
975 F. St., N.W.
Washington, D.C.
nbryson@hollandhart.com
202-654-6921