EXAMINERS' ANALYSIS OF QUESTION NO. 6

The Commerce Clause provides that "Congress shall have the power . . . To regulate Commerce . . . among the several states." US Const Art I, § 8, cl 3. The Commerce Clause permits Congress to enact legislation regulating the prices paid to farmers for their products, *Wickard v Filburn*, 317 US 111, 128 (1942), and even permits Congress to enact laws that *prohibit* interstate commerce. *Prudential Ins Co v Benjamin*, 328 US 408, 434 (1946).

In the absence of congressional legislation of the particular subject, a state or municipality retains its authority under its general police powers to regulate local aspects of interstate commerce if the regulation does not discriminate against interstate commerce. *Maine v Taylor*, 477 US 131, 138 (1986). Thus, the "dormant" or "negative" aspect of the Commerce Clause prohibits economic protectionism and forbids "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co of Indiana v Limbach*, 486 US 269, 273 (1988).

The United States Supreme Court has adopted a "two-tiered approach" to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp v NY Liquor Authority*, 476 US 573, 578 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the statute is "generally struck down without further inquiry." *Id.*; see also *Philadelphia v New Jersey*, 437 US 617, 624 (1978). However, where a statute evenhandedly concerns a legitimate local interest and has only an indirect effect on interstate commerce, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit. *Brown-Forman Distillers*, 467 US at 597; *Pike v Bruce Church*, Inc, 397 US 137, 142 (1970).

Under very similar facts, the United States Supreme Court held that the imposed assessment was unconstitutional as violative of the Commerce Clause. See *West Lynn Creamery v Healy*, 512 US 186 (1994). Like the assessment at issue in *West*

Lynn Creamery, the cherry fund assessment is effectively a tax imposed *only* on out-of-state cherries, which in turn makes those cherries more expensive. Although the assessment is equally applicable to cherries grown in Michigan, the cost of the assessment is *more* than offset by the subsidy provided exclusively to Michigan cherry farmers. Thus, the net effect of the tax and subsidy is analogous to a tariff in that it "neutraliz[es] advantages belonging to the place of origin" and discriminates in favor of local products. See *West Lynn Creamery*, 512 US at 196, quoting *Baldwin v GAF Seeling, Inc*, 294 US 511, 527 (1935).

The *West Lynn Creamery* court rejected the argument that because each portion of the program (a nondiscriminatory tax and a local subsidy) was valid, the combination of the two must also be valid. A state subsidy funded from general revenue ordinarily assists local business and does not impose a burden on interstate commerce. Here, however, the subsidy is *not* funded from the state's general revenue, but primarily from cherries produced in other states. Thus, the law violates the cardinal principle that a state may not benefit in-state economic interests by burdening out-of-state competitors.

While it is true that a nondiscriminatory evenhanded tax is generally upheld despite its adverse effects on interstate commerce, this is true in part because burdening local economic interests serves as a safeguard against legislative abuse. "However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *West Lynn Creamery*, 512 US at 200.

It is also irrelevant that cherry wholesalers (the entities who pay the assessment) are not competitors of Michigan cherry farmers. The imposition of a differential burden on *any* part of the stream of commerce is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer.

Thus, under the facts of *West Lynn Creamery*, GGS will prevail, and the assessment will be found to violate the Commerce Clause.