1. Assignment TBO

2. Note on marker board: not past Supp 12-14-16 Granholm. Make sure we get it right here at the start of a challenging section of material. If already read then a leg up for Monday.

3. From C Cl’s empowerment of Congress as the Ct. interprets that clause. Its arguments about limits. Then the Court’s arguments about limits drawn from 10th Amend, from constitutional structure – ou federalism -- and from 11th Amend state immunity.

Then a brief look at the text’s detour into federalism restraints on other federal powers: tax, spending, war, and foreign affairs.

Just begun on the “dormant” C Cl, i.e. where cong. has not enacted a statute implementing the C Cl in some area, does the C Cl nonetheless exert a limiting power on state action?

The answer is yes. It does limit what state’s can do. The arguments about when and how much it limits the states have been gathered into 3 categories of judicial resolution.

1. If a stat measure, on its face, discriminates against IC, the court will bring to bear a strict SOR. It will be per se unconst.
2. If it is not discriminatory on its face but is protectionism purpose, intention or effect than a SOR almost as hig.
3. If it is neither of the above, but does have some effect on IC, the Ct. will undertake a balancing test.

Again begin with Gibbons.

Go to yellow sheet p. 3-5 Where we ended yesterday.
Facial discrimination 257.

Welton as exhibit A.< the

_Phil. V. N.J. 257_

1. Facts; What measure had N.J. legislature undertaken.

2. Who brought suit? N.B. NJ residents and operators.

3. NJ Sup st? Env. Measure. Police power

   258 1st ful para. Middle. Suppress competition.
   A. On its face 259 top.
   B. And effects 258 2/3
      Means 258 1/2 ff.

5. Categories 257 bottom, 258 top
   N.B. 2 categories


7. Stewart anser o.k., but cannot do it in this way. Limit all in and out of state. Not lice pwer.
   Why not:
   Not noxious in itself. Only when buried with other. No difference, NJ and other garbage.

   A. McCulloch structural argument here. 261-62
   B. But out of state represted, and lost?
   C. What being limited here? Import? Export valuable natural resource ...space and ability to bury garbage and use of N.J. land an environment
   D. Police pwer?

Categories/Case yellow sheets 6
Granholm 2005

1. Whether 21st Amnd affects dormant C 1 limits on states.

2. Facts.
   Pol. Out of state wineries vs. states where could not ship to customers.

3. Vs. C Cl an not vaved by 21st amend.

4. Why
1. Assignment

2. Sum

Extent of Cong. power under the commerce clause and then the limits, including limits that the Ct. finds; 1) in its interpretation of the Commerce clause, 2) in its interpretation of the 10th Amend, 3) in its interpretation of the constitutional structure, (such things as state autonomy and "our federalism.")

Then a brief detour into restraints on national powers other than the CC: The powers to tax, spend, declare war and have a part in the conduct of foreign affairs.

Now have returned to the subject of commerce, this time to explore ways in which the Commerce clause may limit what states can do even in the absence of national legislation. The so-called dormant or negative CC.

The story begins with dicta in Gibbons and as discussed in Cooley – the case about state power to regulate pilotage in harbors: What did the states retain, what did they not delegated to the US in Art. 1, Sec 8. Such descriptions as police power (health an safety: prohibition of nuisances and noxious article. Ga - Fla, also shipment of diseased plants from Calif. Nurseries); (purely local and not national matters, or matters local and requiring diverse treatment as vs. national matters requiring uniform response.


Maj: not noxious in itself. No different than N.J. waste.. If concerned: increase fees to all, instate and out of state. Protectionist: price control for local generators.

Not least importance of the case for casebook and teaching purposes: look at the way the categories function:

2. Also effects. Almost equally as stringent test.
3. Not nonprotectionist measure that still may burden IC: balancing test.

Tendency to lump the first two together: discriminatory on face or in purpose, motive or effect.
Then thru note cases illustrating first one thing and then another:

Me. V. Taylor - ban on importation of baitfish: fungi and parasites. Facial discriminatory, but OK: quarantine.

Chemical waste Management: cannot do by imposition of fees what cannot do by a flat ban. Disposal fee imposed on out-of-state waste impermissible.

Home processing requirements also not permissible. Foster-Fountain and attempt to protect La. fish processing industry by providing no Louisiana shrimp may be shipped out of state unless heads and tails removed.

Interesting, close question was raised in Granholm v. Heald: Whether state protection of in-states wineries was allowed by the 21st Amend, ending prohibition and leaving governance of intoxicating beverages to the states.

Already encountered one way around the 21st Amend.; Spending clause. Raise drinking age to 21. If not do so, lost 5% of federal funding for highways.


21st did not repeal the commerce Cl

Go through Cir. Case - 2 places at *

Another post class question: how allow differential tuition? Think about what arguments would you make based on what read so far?
Phila, et al, facial discrimination by states. Now facial discrimination by local
govs..

**Dean Milk (1951) 270.**


Clark, maj.:

3 Purpose unconstitutional/ No.?


alternatives. Ok.
   Here: not fully credit health and safety and alternatives.

Black dissent 271

8. 3 arguments, what are they:
   Not show pl. cannot pasteurize within local area.
   Some burden not = discriminate
   Supposition about alt / SOR

9. See note 1. No difference. — vs. —
   McCulloch type argument? Discriminates vs in state dairies also.

   *   *   *

   [Handwritten note:}
   }
   }
From state and local facial discrimination vs. IC to discriminatory purpose and effect. Quaere. Intro note bottom of p. 274-75. Complex? Trying to sell its scheme, its theory of 3 categories. Already seen Ct. sometime using and sometimes not. often approach as two: if discriminatory on face or disc in purpose or effect then a strict SOR. Per se in facial. Almost per se in purpose and effect. So Dean Milk. Lower standard of review – balancing when not protectionist facilarllly or in purpose or effect.

Baldwin v. GAF Seeling (1935) 275 bottom.

States may not protect local, economic interests by limiting access to local markets. What going on here?


3. What did NY argue in support of th stat?
   Police power. Health.
   NY needs a regular, adequate supply of milk
   For that need to have dairy farmers,
   In order to have dairy farmers, adequate prices. Depression.
   Set minimum prices paid to farmers.
   To protect that scheme no sales of milk purchased more cheaply elsewhere.

4. Cardozo argument vs?
   Police power argument insufficient
   National Free market essential. P 276 at *.

5. Vt. Dairies losing NY market,
   . Not benefit from their lower costs.

How distinguish Henneford? Next case 277
Henneford v. Silas Mason (1937) 277

1. Facts. Washington imposes a use tax on goods bought in other states. Charged 2% tax on goods bought in-state. Out of state goods exempted if 2% or more already paid in th other state. Pro-rated if less.

2. How Cardozo describe and distinguish it from Baldwin?  
   A. Equality. Competition  
   B. Tax not = tariff; not clog on importation.  
   C. 277 3/4 at * Projection out of state  
   [D. Note at bottom of page.277 last 3 lines.]

Facially neutral but discriminatory in fact.

Bacchus Imports (1984) 218

Hawaii tax exemption for a brandy made from distilling a plant indigenous to Hawaii.


Facts:
1. N.C.:requires that apples shipped from out of state must be in closed containers and are to bear no grade except those of the USDA. Could not bear the Washington state grade that was more strict than USDA

2. Ct. Vs IC. Facially discr.? No. Motive or effect. Motive = somewhat suspect. Way to protect NC apples that might not meet as strict a grading as those of Washington. But not have to prove. Rather effect. 279 top ff 1-3 rt.

3. Therefore test 279 ½ citing Dean Mijlk.  
   State has burden: local benefits and no non-diser alternatives. Attty arguments.  
   Here fail both: no benefit, instead confuse consumers  
   and alternative : state grade and USDA.

   Balance? Ie. 3?

Breard next
Breard v. Alexandria (1951) 279 bottom.

No door to door solicitation except by consent.

Ok. Why? No overt discrimination. Favors local business only by implication: local retailers have better, continuing access to local newspapers, fliers, etc.

Those cases: Bacchus, Henneford, Hunt and Breard/ Sellers. Now to out of state buyers:

Eisenberg (1939) 280 Intro. Note


Hood v. Du Mond (1949) 280 bottom

Barrier to out of state buyer. Reverse of Baldwin v. Seelig. NY dealer bought in VT. Less than NY mini.

1. Facts Here Hood = Boston milk distributor. 90% of Boston milk from out of state. Hood supplies Boston with milk bought from NY suppliers. Hood seeks NY license to build a milk processing depot/plant. Near Troy. Already had three


What findings? 281 1st full par 1-3 rt.

3. Ct: vs. Const. Why?
   Go back to findings. All economic unless Troy as a mkt = also a health issue. Jackson op maj 281 ½ +

4. What's wrong with that. "Econ unit = nation. 1st sentence last par 281 bottom, then 282 par.

5. What is the counter argument of Black’s dissent? 282 3/4
A. No disc. vs outsiders. Same for NY applicant. Ok as administered.  
B. No language, no intent  
C. Ok for a state to protect itself vs. destructive competition  

6. FF 283 at * x 2.  
No facial discrimination  
Motive? Effect?  

GO TO YELLOW SHEET 2
From cases about facially discriminatory statutes and protectionist statutes not on their face discriminatory, to those that are neither of the above but may be some burden on IC.

The case: Pike v. Bruce Church, Inc. (1970) 286

1. Ariz grower of cantaloupe ships loose, in bulk, to California where crated and distributed. Crates no label of Ariz origin

2. Ariz prohibits grower from shipping in uncrated form. And requires that crates bear label identifying as grown in Calif.

3. Discriminatory on face? Argue that it is. What SOR? Authority 7.64.

4. Protectionist in purpose, motive, effect? Argue that it is. SOR? Auth?


7. 2d full par. Facially discriminatory? Home processing. Protectionist in effect? Last 4 lines of par.: balancing in transportation cases.

1. Could Congress regulate freight truck lengths? What argue?
   CC, 10th, structure.
   Likelihood that argument prevail. Cite?

2. Can states regulate truck length.
   Cong stat? Preemption. Need to look up.
   Then how proceed?

I. Powell and 3:

What does the statute provide: last full par. 295

A. Facial? What argue?

Look at exceptions n. 1, 295. Other Gov statements?.
If facial, what SOR, what result? High SOR - per se.
But if facial, state still has a saving argument. Of cases we’ve read which have allowed a
ficially discriminatory stat? And of hose not allowed what were the arguments mae by Justices or
attorneys that should be allowed to stand. Rehnquist in Phila and also here:: quarantine, health
and safety. Cite?
So if facial, still save with what kind of argument? health and safety. AND no alt.
What argued here: that safety? What is the argument?
And what counter arguments (exemptions and othyer testimony: Gov. Ray 295 n1; 298
top). No sgtudies showing unsafe and some say safer.

In any event, if a bona fide safety issue, still no alt.

Note that Ct. Adds something. If safety still not automatically uphold – no alt. – but also
296 middle par. Argument from cat 3 cases. Weighting and balancing. Pike. Peculiar to interstate
highway traffic?

In weihing, Ia. says safety but evidence not show 296 III A bottom at * A

[N.B. At *B Same part prior sentenceCong and state and Brandeis]

Consolidated counter argument: susbtantial burden on IC. And may agravate highway
accdinedtd. 297 1st full para

Close to saying facial discrimation
If not fcaillly discr what is the next argument?
B. Protectionist of local commerce in purpose, motive, effect
   What arguments. Any different than Cat 1 argument.
   Summary 298 at **

C. Pike. Arguments.

II. Rehn, Burger, Stewart 4-3 dissent
   A. Rational safety measure 301 top ff.
   B. Not end: consider safety in relation to burdens (commerce costs): to see of pretextual 301 middle
   C. Passes 301 bottom ff *

III NB Op. Of Ct with argument = 4 vote plurality Powell decision, 4 votes. 2 now from Brennan, Marshall 298 bottom: 3 principles 298 last 2 lines - 299

#1 - lawmakers judgment not agtty 299 ½ and at bottom at *
#2 - burdens on IC vs. local benefits
#3 - even if burdens and benefits related to sfty, cannot be protecisionist. Here protectionist. 300 at ***

to yellow sheet
CLnn. 9-20-06

1. Today do need to get thru mkt paticipation and P & I. Will get to the remainder as time allows. Mon. priority will be exam and other questions, i.e. review.  
   Go thru exam and answer. LER for Con Law I “exams.” Mislabeled exam and answer. Do the exam. More questions in class.

2. Finishing dormant commerce clause. Last time; the final category of cases, those neither disc. on their face nor protectionist in effect.
   To balancing test. Kassel and interstate trucking. Seemed to be a case in which the Court was troubled about possible facial disc. or protectionist motive, nevertheless proceeded to balance the instate benefits vs interstate burdens. Struck down. Went thru the arguments.


Note case Exxon p. 303.

Exxon v. Gov of Md (1978) 303

1. Facts: Md. prohibited producers/refiners of gas from operating retail service stations. Favoring own stations in oil embargo of early '70s. Corp. argued that the statute was discriminatory vs IC and imposed an undue burden. Both tests. Disc. Vs. Interstate goods and protected instate dealers from interstate competition.

2. Ct upholds. Why? Neither discriminatory nor protectionist. All gas in Md. is interstate. And there are interstate marketers with stations which compete with Md. independent stationers, like Sears, not a producer but is interstate marketer in direct competition with local independent stations. Only reaches producers with Md. retail stations who were favored by producers with gas supplies. Unfair competition.

Minn v Cloverleaf Creamery (1982) 303

1. Facts: Minn. problems with nonreturnable plastic bottles. Banned retail sale of milk products in nonreturnable plastic containers but allowed sale of nonreturnable containers made mainly of pulpwod. Pulpwood produced in Minn. of plastic bottles.

2. Arguments vs: A) protectionist and B) fails Pike balancing test.

3. A) Not discriminatory: bans all sales in nonreturnable plastic bottles wherever manufactured, in or out of state.
B) burden on IC minor. Milk moves freely over border and most dfairies employ multirole tyoes of packaging. Also the fgrct that Minn pukpwood manufacturers may benefit not clearly excessive in comparison to burden. Allows lastic returnable bottles and does have waste disposal problems.


Statuye of limitatyion issue vs. out of state enttities. Ct strikes down: discriminates vs. IC and loses balancing. Case here because of Scalias's comment that balancing should be discarded. Leave to legislative branch.

* * *

To Mkt Participamnt 311

South Central Timber Development v. Wunnicke (1984) 311

1. If the state is acting as a participant in the market and not as a regularor of the makt, dormant CC not apply. Can discriminate against IC and favor own citizens, Exception. Otherwise is would violate the CC.

2. Case histiory 312 1/3 ff. Go mthru thye three cases
Hughes - bougntyn for Md licensed junk cars, buden on out of stte junk car deals
Reeves - SD cement ionly for own citizens
White - workforce preference for Boston citizens in Boston financed projects. “Employees holderouly working for the city.

3. All may well be vs.CC. Why?

4. Why not: Not gov as regulator, but as particioant in the mkt.

5. Ct. Distinguishes this case from those. How? 313-14 Go thru Hughes v Alexandria Scrap 313 313
Reeves 313
White 313


Rehn dissent 315 bottom