Supplementary Material

Chapter 10: The Reagan Era – Federalism

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)

Federal statutes since the New Deal have authorized the Secretary of Agriculture to issue marketing orders that set a minimum price for payments to producers of raw milk. Even with these fixed prices, dairy farmers in Massachusetts gradually lost market share to milk producers in other states that had lower production costs. In 1992, the Massachusetts Department of Food and Agriculture declared a state of emergency, noting that the cost of producing milk in the state now exceeded the federal fixed price for milk. Jonathan Healy, the commissioner of the department, ordered every milk dealer in the state to make a monthly payment (based on sales) into the "Massachusetts Dairy Equalization Fund." Payments from the Fund were then made to Massachusetts milk producers based on their production volume.

West Lynn Creamery was a milk dealer in the state and initially paid into the Fund. When West Lynn decided to stop making those payments, Healy began the process to revoke its license to operate within the state. West Lynn filed suit in state court seeking an injunction against the commissioner, contending that the Fund violated the federal interstate commerce clause. The court denied the petition, and the license was revoked. On appeal, the Massachusetts high court affirmed the trial court on the ground that the burdens on interstate commerce were only incidental and the tax was nondiscriminatory. In a 7–2 decision, the U.S. Supreme Court reversed the state court, holding that the combination of a nondiscriminatory tax and a legitimate subsidy created an overall scheme that unduly burdened interstate commerce.

What subsidy to an in-state industry would be constitutional under the Court's analysis? How can the combination of two legitimate policies produce one illegitimate policy? Can the Court appropriately examine the operation of the overall scheme rather than its individual components? Can West Lynn appropriately challenge the operation of the subsidy, or only the tax that was imposed on them? If the tax had gone into general revenues, and the legislature had provided a subsidy out of general revenues, would that combination of policies be unconstitutional? Could West Lynn have been positioned to mount a challenge to that combination of policies? Is it surprising that Chief Justice Rehnquist would write an opinion criticizing "a grim sink-or-swim policy of laissez-faire economics"?

JUSTICE STEVENS delivered the opinion of the Court.

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The Commerce Clause vests Congress with ample power to enact legislation providing for the regulation of prices paid to farmers for their products. *Wickard v. Filburn* (1942). . . . An affirmative exercise of that power led to the promulgation of the federal order setting minimum milk prices. The Commerce Clause also limits the power of the Commonwealth of Massachusetts to adopt regulations that discriminate against interstate commerce. "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . ."

The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State. . . .

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"Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin."

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Under these cases, Massachusetts' pricing order is clearly unconstitutional. Its avowed purpose and its undisputed effect are to enable higher-cost Massachusetts dairy farmers to compete with lower-cost dairy farmers in other States. The "premium payments" are effectively a tax which makes milk produced out of State more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products. The pricing order thus allows Massachusetts dairy farmers who produce at higher cost to sell at or below the price charged by lower-cost out-of-state producers. . . . [O]ut-of-staters' ability to remain competitive by lowering their prices would not immunize a discriminatory measure. In this case, because the Federal Government sets minimum prices, out-of-state producers may not even have the option of reducing prices in order to retain market share. . . .

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Even granting respondent's assertion that both components of the pricing order would be constitutional standing alone, the pricing order nevertheless must fall. A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not "benefit in-state economic interests by burdening out-of-state competitors." . . .

. . . . By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because "the existence of major in-state interests adversely affected . . . is a powerful 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. . . .

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Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects. . . .

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. . . . State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional. The idea that a discriminatory tax does not interfere with interstate commerce "merely because the burden of the tax was borne by consumers" in the taxing State was thoroughly repudiated in *Bacchus Imports, Ltd. v. Dias* (1984). The cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation.

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Finally, respondent argues that any incidental burden on interstate commerce "is outweighed by the 'local benefits' of preserving the Massachusetts dairy industry." . . . If we were to accept these arguments, we would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits. In *Bacchus*, we explicitly rejected any distinction "between thriving and struggling enterprises." . . .

The judgment of the Supreme Judicial Court of Massachusetts is *reversed*.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

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The purpose of the negative Commerce Clause, we have often said, is to create a national market. It does not follow from that, however, and we have never held, that every state law which obstructs a national market violates the Commerce Clause. Yet that is what the Court says today. . . .

. . . . It seems to me that a state subsidy would clearly be invalid under any formulation of the Court's guiding principle identified above. The Court guardedly asserts that a "pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," but under its analysis that must be taken to be true only because most local businesses (e. g., the local hardware store) are not competing with businesses out of State. . . . And even where the funding does not come in any part from taxes on out-of-state goods, "merely assisting" in-state businesses, unquestionably neutralizes advantages possessed by out-of-state enterprises. . . .

The Court's guiding principle also appears to call into question many garden-variety state laws heretofore permissible under the negative Commerce Clause. A state law, for example, which requires, contrary to the industry practice, the use of recyclable packaging materials, favors local non-exporting producers, who do not have to establish an additional, separate packaging operation for in-state sales. If the Court's analysis is to be believed, such a law would be unconstitutional without regard to whether disruption of the "national market" is the real purpose of the restriction, and without the need to "balance" the importance of the state interests thereby pursued. . . .

"The historical record provides no grounds for reading the Commerce Clause to be other than what it says -- an authorization for Congress to regulate commerce." . . . As a result, I will, on stare decisis grounds, enforce a self-executing "negative" Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court. . . . The object should be, however, to produce a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further. . . .

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. . . . Although the question [before us] is close, I conclude it would not be a principled point at which to disembark from the negative-Commerce-Clause train. . . .

I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund. . . .

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

The Court is less than just in its description of the reasons which lay behind the Massachusetts law which it strikes down. The law undoubtedly sought to aid struggling Massachusetts dairy farmers, beset by steady or declining prices and escalating costs. This situation is apparently not unique to Massachusetts . . . .

Massachusetts has dealt with this problem by providing a subsidy to aid its beleaguered dairy farmers. In case after case, we have approved the validity under the Commerce Clause of such enactments. "No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias* (1984). . . .

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. . . . But the Court strikes down this method of state subsidization because the nondiscriminatory tax levied against all milk dealers is coupled with a subsidy to milk producers. The Court does this because of its view that the method of imposing the tax and subsidy distorts the State's political process: The dairy farmers, who would otherwise lobby against the tax, have been mollified by the subsidy. But as the Court itself points out, there are still at least two strong interest groups opposed to the milk order -- consumers and milk dealers. More importantly, nothing in the dormant Commerce Clause suggests that the fate of state regulation should turn upon the particular lawful manner in which the state subsidy is enacted or promulgated. Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.

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. . . . No decided case supports the Court's conclusion that the negative Commerce Clause prohibits the State from using money that it has lawfully obtained through a neutral tax on milk dealers and distributing it as a subsidy to dairy farmers. Indeed, the case which comes closest to supporting the result the Court reaches is the ill-starred opinion in *United States v. Butler* (1936), in which the Court held unconstitutional what would have been an otherwise valid tax on the processing of agricultural products because of the use to which the revenue raised by the tax was put.

. . . . The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence.