BROWDE GRADING SHEET—CON LAW, FALL 2003 Exam No. 610

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Question #1

Alice (A) v. Wyotana (W)

A probably has standing because under the constitutional requirements, she is alleging the injury-in-fact of losing 10% of her income, that loss is traceable to the legislation prohibiting hunting and trapping of weasels, and the injury would be redressed by an injunction against enforcement of the statute. The controversy is ripe because the legislature has already passed the statute, and if A has already lost some money from not being able to hunt, this would not be anticipatory relief.

The 11th Amendment prohibits suits against the state (including one's own state under *Hans*) in federal court, unless Congress has abrogated the state's immunity under a proper exercise of Sec. 5 of the 14th Amendment. No evidence of that here. However, a federal court can issue an injunction against a state official under *Ex Parte Young*, so if A just wants an injunction, she can get one.

A alleges that W has deprived her of her opportunity to trap weasels as one of her privileges of citizenship, and so her claim purports to be based on a violation of her Article IV Privileges and Immunities. The Privileges and Immunities Clause prohibits unreasonable burdens on pursuit of common callings within the state (work), ownership or disposition of privately held property within the state, access to the courts, and other privileges that are fundamental to bind us together as a nation. The ~~problem here is that~~ the P&I Clause typically is called into issue when a state is discriminating ~~between~~ in-state and out-of-state residents, which is not the case here. The Wyotana statute is applied to all weasel-hunting in the state, and additionally, A is suing her own state. So this claim would probably fail

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If the court does consider the argument, it would have to look at whether A is claiming an interference with a fundamental interest. *Baldwin v. Montana Fish and Game* says that hunting and fishing is not a fundamental interest under the P&I Clause, so that states can discriminate against out-of-state residents. However, A claims that she hunts for an income, and since work is a fundamental interest under P&I, A has a colorable claim

But because there is no discrimination between in-state and out-of-state citizens here, the P&I claim that A seems to be raising will probably fail

missed pg 17 intr.

If, under liberal pleading rules, the court considers whether the state law violates Dormant Commerce, it would look to the *Pike* balancing test. Here the statute is neither facially discriminatory nor protectionist in motive or effect since it applies to everyone, and the effects on interstate commerce are only incidental (since the purpose of the statute has nothing to do with interstate commerce and is directed at preserving the weasel) so the only question would be whether the burden on commerce is excessive in relation to the putative local benefits and whether the local interest could be served with a lesser impact on interstate activities

Here, the local benefits are that the weasels will be protected for animal-lovers and the weasel-hat making industry can continue to thrive these are the sort of health and welfare police powers that are typically left to the states under *Barnwell Bros.* The burden on commerce in this case is that A may lose 10% of her income. Thus the statute probably doesn't violate Dormant Commerce

Alice v. East Dakota (ED) and EDRA

A probably has standing to sue, particularly if she's already paid the $10,000, but she can show that she's been injured by the statute if she hasn't paid the fee, hasn't hunted in ED and lost income as a result.

As for ED's 11th Amendment immunity from suit, A can sue if she just wants an injunction.

State laws violate Dormant Commerce if they are facially discriminatory. This is essentially a per se rule except in exceptional cases when there is no other (nondiscriminatory) way to advance the legitimate state interest (as in *Maine v. Taylor*). ED's law is facially discriminatory in that it sets different times at which in-staters and out-of-staters can apply for licenses and it allows in-staters to get a license for free, while out-of-staters have to pay $10,000 The state interest at stake here is economic, since the legislative history indicates that the discriminatory portions of the statute were passed in response to concerns that out-of-staters would descend like a herd of weasels and take all the profits out of state.

The fee might also be analyzed as a tax under *Complete Auto*. In that case, the fee is only valid if it applies to an activity with a "substantial nexus" with the taxing state, is fairly apportioned, and doesn't discriminate against interstate commerce. Here, there's a nexus with the state since the activity is taking place on state land and the analysis is akin to a Due Process minimum contacts analysis; there is some question as to whether the tax is fairly apportioned since it has no relationship to time spent in the jurisdiction or services rendered by the state; however, it discriminates against interstate commerce, so it isn't valid.

Although the law might otherwise violate Dormant Commerce, there is an exception when the state is a market participant. Because the state (through the administration of the EDRA) is buying pelts for $100 apiece, it has a good argument that, as in *Hughes*, it may restrict sales to out-of-staters when it is participating in the market as a buyer. This case is similar to *Hughes*, because there, the state was purchasing the car hulks with taxpayer funds and imposed more stringent documentation requirements on out-of-state processors that on in-staters. This had

the effect of making fewer out-of-staters qualified to receive the bounties for the hulks. Similarly, here, the state is requiring out-of-staters to pay an exorbitant fee, probably with the same effect, so that the bounties go to in-staters instead. The only limiting principles to this doctrine come from *South-Central Timber*, which says that the market in which the state is a participant must be narrowly defined. This would probably meet that test since the market is the purchase of pelts, and the discriminatory law limits who the state will buy pelts from.

The P&I Clause prevents a state from imposing unreasonable burdens on fundamental interests (state action as to EDRA is discussed below). The state will point out that recreational hunting and fishing is not a fundamental interest under *Baldwin* and will claim that that case controls here. A may try to distinguish her case because she can show that this is a source of income for her (a considerable amount, too—10%), and therefore constitutes work, which is a fundamental interest protected by P&I.

If A's right to pursue her livelihood by hunting weasels is a fundamental interest, then the state can only discriminate against non-residents if there is ~~a substantial reason for~~ the discrimination and the discrimination bears a substantial relationship to the state's objective. ED's activities must meet this test because there is no market participant exception to the P&I Clause. This is because the purpose of P&I is to promote interstate harmony and national unity.

Here, the state asserts that the reason for the discrimination is basically economic protectionism—it wants its citizens and not out-of-staters to get the bounty money. We didn't look at case law discussing whether the economic health of the state's citizens is a valid "substantial reason" for the discrimination under P&I, but it probably isn't, since if it were, it would come into direct conflict with the purposes of the Commerce Clause—to ensure a national economy and prevent balkanization of the market. So, economic protectionism probably doesn't

qualify as a "substantial reason" for discrimination under P&I. If it did, though, the discrimination does have a substantial relationship with the reason, since it is expressly tailored to keep out-of-staters from having equal access to the state's weasel bounties.

We didn't look at any cases in which an Equal Protection claim was brought on the basis of economic inequalities, so it's not clear if A actually has an Equal Protection Claim.[1] If she does, the 14th Amendment Equal Protection clause applies to state actors, and so could be used in A's claim against the state. Because EDRA is a profit-making corporation chartered by the state, there will be some question as to whether it is a state actor subject to the 14th. If this isn't an Equal Protection issue, state action may still be relevant in the context of the above P&I claim, since Article IV P&I relates to the states.

To determine whether a private or semi-private entity is a state actor, the first question is whether it is exercising a function that is traditionally performed exclusively by the government. The "exclusive" limitation was required by *Jackson v. Metropolitan Edison*, and sets the bar pretty high. Buying furs is not an exclusive state function, but issuing licenses might be. It depends on a factual inquiry into whether other states allow private corporations to issue licenses, how long private companies have been doing this, etc, and there are no such findings here. Issuing licenses is probably traditionally an exclusive state function, though, since it's part of enforcing the laws.

Even if it isn't a traditionally exclusive state function, the courts will look to whether there is sufficient government involvement that the private entity's acts can be fairly attributed to the state. The most recent articulation of how the courts will do this is the "pervasive

[1] However, Browde's PowerPoint Slide called "Levels of E/P Scrutiny" lists economic regulations as one of the sorts of discrimination requiring only rational basis scrutiny, so the court may view this as at least persuasive, if not binding, authority that A does have an Equal Protection claim.

entwinement" test from *Brentwood*. This test returns to the totality-of-the-circumstances–like symbiosis test used in *Burton*, rather than the approach in *Blum* and *Rendell-Baker* that looked at the particular instance of conduct in isolation to see if it involved state action. In *Brentwood*, the court found state action when a school athletic league's membership was 84% public schools, when was run by school board members in their official capacity, and when the association replaced the previous state board as the regulatory body that set binding athletic standards. In this case, the EDRA is chartered by the state statute (calling up "encouragement" of discrimination issues from *Reitman*); its board is run by the govt officials in their official capacities, and the non-state members of the board are chosen by the state legislature (which is like *Pennsylvania v. Board of Directors*); the directors are all paid out of a state account; and the board has taken over a function previously managed by the state. Because there's even more pervasive entwinement than in Brentwood, ERDA is a state actor.

If A can bring an Equal Protection claim for economic discrimination, the standard is that the state has to have a rational basis, and the statute is presumptively constitutional. It's rational for the state to want to promote the economic welfare of its citizens, so Equal Protection would probably fail.

Dilbert (D) v. Wyotana (W)

D was injured by the state's quarantine that curdled his ragweed and when state officials took both his ragweed and his weasels for 72 hours. These are injuries in fact, and traceable to the state law. It's unclear how immunity from damages intersects with the 5th's requirement of compensation, but if D can get a remedy from the court, he has standing.

W's law is discriminatory because it creates a barrier at the border of the state. Because it is discriminatory, it would generally be held to be per se invalid. However, *Philadelphia v. NJ*

discussed the fact that quarantine laws are an exception to Dormant Commerce Clause rules because they prevent traffic in noxious articles, regardless of origin. Here, the statute seeks to keep out not weasels, but the ankle-and-chin disease, which is certainly noxious, both for weasels and for everyone who's had Botox treatments. The court in *Maine v. Taylor* upheld a law similar to W's, which kept diseased baitfish out of the state. Thus, there is probably no violation of Dormant Commerce.

The 5th Amendment forbids the federal govt from taking private property for public use without just compensation, and the rule applies to the states through the 14th Amendment. Because the state has great latitude to determine the public welfare, the court will defer to the legislative finding that protecting people and weasels from disease is to the public's benefit. The weasels and ragweed are certainly private property. In order to determine when government regulations become a taking, the court will generally conduct a case-by-case analysis of the private rights and the public interest.

Here, the interference with D's private right as to his ragweed is substantial since it has curdled and lost all economic value. Under such conditions, takings do not require a balancing test, but under *Lucas*, are per se invalid. The state will argue that it the 72-hour period makes this a temporary taking under *Tahoe-Sierra*, but there, the property owners eventually got the economic use of their property back, whereas here, even though D may get the curdled ragweed back, it has lost all economic usefulness. Thus D must be compensated for his ragweed.

The weasels have been confiscated, which is a possessory taking, not a regulatory one, and must be compensated. However, the state may argue that like the IOLTAs, D hasn't actually lost any value, since once he brings the weasels into ED, he cannot legally sell them. For this reason, even though it is a possessory taking, D should not be compensated for the weasels.

Wally (W) v. East Dakota (ED)

W does not have standing if he is raising a generalized grievance. Because he seeks to have the statute declared invalid without asserting that it has hurt him in any particular way, this probably qualifies as an abstract question of wide public significance that is better left to legislative bodies.

If W has standing he can only sue for an injunction under *Ex parte Young*

Under the Supremacy Clause, federal statutes preempt state statutes if Congress expressly states that it intends to preempt state laws, if state and federal laws conflict, or if there is a pervasive scheme of federal law that occupies the field. Here there is no express preemption or evidence that the federal government has established a pervasive scheme of regulation to occupy the field of wildlife management. ED's law does, however, seem to conflict with FESA's intent to ensure that "previously endangered species survive in abundance." Because weasels were once on the verge of extinction, they would be within the scope of FESA's intent. The purpose of ED's law is to get rid of weasels so they'll quit eating the profitable ragweed crops. In addition, while one purpose may have just been to protect ragweed, another (as evidenced by the state-sold "Weasel Hater" T-shirts) seems to be the eradication of the weasel as a separate and distinct goal. Because eradication of the weasel would be an obstacle to the accomplishment of federal purposes and objectives, ED's statute is invalid

Question #2

State v. US

For the NNRA to be valid, it must be made pursuant to one of Congress's enumerated powers. If it's pursuant to one of these powers, Congress has an implied power under the Necessary and Proper Clause to use means that are convenient and appropriate (as per *McCulloch*) to attain those legitimate ends.

Under the Indian Commerce Clause and Treaty power, the federal government has the exclusive right to regulate Native Americans. In its findings, Congress seems to attempt to call up this power by saying that the law has been passed in part to prevent the derogation of tribal sovereignty. Since we haven't seen much case law on the affirmative use of this power, it's hard to tell if this would be a valid exercise. However, the statute has nothing to do with actually regulating commercial activities by the tribes or treaties with the tribes, so it seems to fall outside of these clauses.

Under the Commerce Clause, Congress may regulate channels of interstate commerce; instrumentalities of, and things in, interstate commerce; and activities that have a substantial effect on interstate commerce. Here, articles of clothing are things in (the stream of) interstate commerce, and their sale may have a substantial effect on interstate commerce. However Congress doesn't seem to have invoked this power in its findings and the statute doesn't relate to the commercial activities of manufacture and sale of the clothing, but to the non-commercial activity of using and wearing the symbols. After *Lopez* and *Morrison*, it has become increasingly difficult to claim that Congress may regulate non-commercial activity just because it has an effect (even a substantial one, as per *Morrison*) on interstate commerce. Because there is no

jurisdictional element in the statute, there are no factual findings by Congress as to the extent of the impact on commerce, and the link between the nature of the activity (wearing symbols) and the impact (sales of clothing, etc) is attenuated, this is probably not a valid exercise of Commerce Clause power.

Even if it were, the recognition of state autonomy under the 10th Amendment places limits on the commerce power. Here, Section 2(a), (b), and (d) are generally applicable, since they apply to both private and public universities, along with private individuals who attend college games. Under *Garcia*, such laws don't destroy state sovereignty, because the states' interests are safeguarded by the political process, so the 10th Amendment wouldn't prevent Congress from exercising its commerce power here.

Section 2(c), however, applies to the states as states. Under *New York* and *Printz*, this portion of the act is probably invalid (and if it isn't severable, the whole act is invalid), because it commandeers both the state legislature (by requiring it to pass a criminal law) and state officials (by requiring them to issue a certification to the federal govt) into the service of a federal regulatory purpose.

2(c) might still be valid under the Spending Clause. Under *Dole*, Congress must spend for the general welfare, any conditions on spending must be stated unambiguously, the conditions must be related to the federal interest, the conditions can't violate any independent constitutional bar, and they can't be coercive. Congress has wide latitude to determine the general welfare, so the goal of halting discrimination and poverty is certainly ok. The conditions are unambiguous, related to the federal interest, and don't appear to violate any independent constitutional bar, but they do seem to be coercive. Taking away 35% of federal funding for primary and secondary education is a far cry from the 5% of federal dollars in *Dole,* and because the money would come

from kids' education, which is so critical to a state's socioeconomic well-being, and which is almost universally underfunded already, the conditions are probably unconstitutional.

Here Congress has said that one of the Act's purposes is to discourage discrimination against Native Americans. Congress can enforce Equal Protection under Sec. 5 of the 14th Amendment, so long as its act is remedial and doesn't create new substantive rights. *Boerne*. Congress's means must be "congruent and proportional" to the evil to be remedied. Here, Congress, as in *Boerne*, has not made factual findings as to a recent history of racial discrimination. Poverty is caused by all sorts of factors, and while discrimination may be one of them, Congress hasn't made any effort, beyond general statements, to show that this is the case here. In addition, the remedy isn't closely tailored as it was in *Hibbs*. Rather than saying that the statute only applies to state schools with a history of discrimination, or state schools that at least currently have Native American mascots or team names, the statute applies to all schools and individuals who use the insignia. Thus, the use of the Sec. 5 power is invalid.

KIWI v. State

Under the 11th Amendment KIWI won't be able to get money damages, only an injunction.

Kansas Power and Light says that a state law (here, no evidence of state law, but it's still the state impairing the contract) can't substantially impair the contractual relationship unless there's a significant public purpose and the adjustment of the parties' rights is reasonable. Here the contract has been canceled, which is about as impaired as you can get, but substantial impairment depends in part on the parties' reasonable expectations. The state may argue that state laws change all the time, so KIWI should expect changes (as per *Kansas*), but this case is

different from *Kansas* since state purchases of clothing and insignia isn't regulated in the way that electricity is. The fact that the state is adhering to a federal law under the Supremacy Clause would probably count as a significant public purpose, since for policy reasons, a court probably wouldn't want to force states to face adverse consequences for following the law. The court will defer to the state's assessment of reasonableness of the adjustment of contractual rights—meaning in effect that if the first two criteria are met, the third is met as well. There's still a problem with the fact that we don't seem to actually have a state law, since what the court is willing to defer to is the legislature, not the State Superintendent of schools. But the court can always find that it's the federal legislative judgment that it's deferring to, since that's the reason the contract has been cancelled. This would also help to get around the fact that the state is impairing its own contract, a case in which the court won't typically defer to the state's judgment as to reasonableness. *U.S. Trust.* ~~If so~~, there's no Contracts Clause violation.