I. JUDICIAL REVIEW

1. **Marbury v. Madison**—Right before leaving office, President J. Adams appointed Marbury as justice of peace and his commission was not delivered before he left office. New president, Jefferson, told Madison, the Secretary of State, not to deliver the commission. Marbury sued Madison seeking a writ of mandamus forcing him to deliver the commission. He sued on §13 of Judiciary Act of 1789, which gave SC original jurisdiction to issue writs of mandamus. Marshall said that §13 was invalid because it was a congressional attempt to enlarge the constitutionally proscribed original jurisdiction of the SC. This established power of judiciary to declare Acts of Congress invalid. Another part declared that a federal court could issue a writ declaring a federal branch to perform something which they had a legal duty to do. (Established Judicial Review)

1. Is Marbury entitled to commission as Justice of Peace? Yes. Because it was signed and sealed, the commission is complete.
2. If there is a right, must there be a remedy? Generally yes. Exception is with separation of powers or political (There is no unconstitutional interference by the judiciary in issuing a writ compelling delivery of the commission)
3. Is the correct remedy a mandamus from the US Supreme Court?
   a. Is a mandamus appropriate remedy? Yes
   b. Does sec. 13 of the Judiciary Act authorize SC to issue? Yes
   c. Is sec. 13 so construed to authorize SC unconstitutionally? Yes
   d. Cab SC review the constitutionality of an act of Congress? Yes

2. **Arguments for (Against) Judicial Review**

1. Without it the legislature may alter the constitution as it pleases (Political Check? Executive Branch?)
2. If both the law and the Constitution apply, judges have to give Constitution supremacy so this gives them the power (But they could only rule on the issue of the case and not stare decisis)
3. Constitution has some peculiar expressions with judicial review:
   a. Art. 3, sec. 2, clause 1—“under the Constitution”—if under, then have to look to it
   b. Constitutional provisions clear on their face
   c. Art. 6, cl. 3—oath that Judges have to abide by Constitution (all other branches take this oath too)
   d. Supremacy clause—Art. 6, clause 2—“and judges bound thereby”—court must decide in pursuance of Constitution.

3. **Supreme Court Review of State Cases**

1. Section 25 of Judiciary Act of 1789: “A final judgment or decree in a state Supreme Court that questions the validity of a treaty, statute, or authority of state or US because they are unconstitutional or if construction of a clause is in question and the decision is against a title or right claimed by a party under such clause, the SC may examine and reverse or affirm: (SC CAN REVIEW STATE COURT JUDGMENTS ONLY IF STATE COURT RULED AGAINST FEDERAL CLAIM OR IN FAVOR OF STATE CLAIM)
   A. Three where clauses:
      1. Where it is drawn in question the validity of treaty, statute or authority of the US and decision is against its validity (A state court’s decision says that a treaty, statute, authority of US is unconstitutional)
      2. Where is drawn in question the validity of a statute of or an authority of a State on the ground that it is repugnant to the Constitution, treaties, or laws, of the US and the decision is in favor of its validity (A state court’s decision favored a state law over a conflicting federal law, Constitution, or treaty)
3. Where it is drawn in question the construction of any clause of constitution, statute, treaty, or commission held under US and the decision is against that title, right, privilege, or exemption claimed by either party. (A state court’s decision goes against someone’s right or title under a federal law, treaty, constitution)

2. Martin v. Hunters Lessee-VA claimed lands at issue belonged to Commonwealth because they took prior to 1783, Hunter claims through state of VA. Martin claims under will of Lord Fairfax, protected by Peace Treaty of 1783. Hunter sued Martin. VA court rules in favor of Martin, Court of Appeals reverses in favor of Hunter because VA had seized lands as of 1782 prior to 1783 treaty, VA act of state legislature is binding. SC reverses and orders judgment for Martin because title hadn’t vested in VA prior to 1783 and under VA law an escheat proceeding was required for it to be effective. VA Ct of Appeals then failed to enter judgment in favor of Martin (ignored mandate) because they said Section 25 of Judiciary Act unconstitutional because Congress lacked power to give judges power. SC reverses again.

1. In first decision, SC had jurisdiction because it was drawing into question the validity of the 1783 treaty and decision was against the title set up and claimed under the treaty. (3rd clause)
2. In second decision, SC had appellate jurisdiction because it was drawn into question the validity of statute of US (Sec. 25 jud. Act) and decision was against its validity (1st clause).

3. Appellate Jurisdiction-every case set out in Art. III Sec. 2, clause 2 that isn’t within the court’s original jurisdiction (Court doesn’t give jurisdiction, case does)

4. Cohens v. VA-Cohens convicted of selling lottery tickets in VA (D.C> could establish lottery). VA prohibited sale of lottery tickets. Cohens argued that selling lottery tickets authorized by federal law (supremacy clause) so VA law conflicts with a federal statute. VA wins because statute said in the “district of Columbia” and didn’t include outside therefore didn’t conflict. Marshall sustains SC jurisdiction over state court decisions in a criminal case.

VA had three arguments against appellate jurisdiction:

A. State was named a party in the case and Art. III sec. 2 clause 2 gives cases in which the state is named a party is original jurisdiction. If SC has original it can’t also have appellate.

Marshall’s response-appellate jurisdiction turns not on nature of parties but on nature of question (“Under the laws of the United States” Article III sec. 2 clause 1 and clause 2 allocates it under Appellate Jurisdiction. It divides into original and appellate jurisdiction only what is in clause 1. You have to find original jurisdiction only in clause 1). In other words, VA could have never been under jurisdiction of US based upon the parties.

B. Constitution doesn’t give federal power between a state and its citizens

Marshall-case can be under power either based on party or question involved. (here even though it can’t be based on parties, since it is state and citizen of that state, it can be based on the question)

C. 11th Amendment

Marshall-not citizens of another state and citizens outside state suing state in federal court (designed to protect states from suits brought by citizens of another state).

4. Political Restraints on the Supreme Court

1. Ways to Restrain:

a. Amendments
b. Impeachment of justices
c. Congressional power over size of Court
d. Selection process (consent by Senate)
e. Article III power to make exceptions to SC appellate jurisdiction

2. Regulating Jurisdiction is Important because it gives court opportunity to exercise Judicial Review

3. Original Jurisdiction is self executing but statute is out that grants less than all possible original jurisdiction

4. Original and Appellate Jurisdiction ARE NOT mutually exclusive. Therefore, jurisdiction could also be held by lower federal or state court and SC could review these decisions.

5. Appellate Jurisdiction— all cases other than the first two and with such exceptions and under such regulations as Congress shall make

6. Article III Sec. II Clause II- with “such exceptions as Congress shall make”-Congress hasn’t readily received this power

7. Ex Parte McCardle-1867 Statute allows individual to go to court to get writ of habeas corpus and then challenge or appeal in SC. McCardle was an editor of the newspaper who published libel and incendiary articles, military officials arrested him. Questions the Military Reconstruction Act. Congress repeals the US SC appellate jurisdiction while the case was pending. Eliminating appellate jurisdiction on a certain issue locks the issue in (can no longer rule on the issue) RULE: Congress can limit SC appellate jurisdiction under the exceptions and regulations language of Article III.

8. Most of the time, government actors accepts the SC decision as law of the land and not just of the case.

II. CONGRESSIONAL POWERS UNDER THE FEDERAL SYSTEM

A. Enumerated and Implied Powers

1. Enumerated Powers-Most of Congress’ are found in Art. 1, sec. 8. And Congress authority in 13, 14, 15 Amendments to enforce by appropriate legislation

2. Doctrine of reserved/residual state powers-assumption that state government have any power possible unless limited by state or Nat’l Constitution -Typically look to 10th Amendment-what’s not delegated is reserved for states what is delegated?

3. Doctrine of Enumerated Powers-1 consequence, undisputed, significant: national government can’t regulate simply because big national problem or because state can’t deal with it very well. May create political demand but doesn’t const’l justify Nat’l legislation. You have to be able to justify as:
   a. valid exercise of one of the enumerated powers or
   b. valid exercise under the necessary and proper clause (Art. 1 sec. 18) to carry out one of the enumerated powers

4. Mcculloch v. MD- A MD statute prohibited any bank operating in the state without state authority from issuing bank notes except upon stamped paper issued by the state. The law specified the fees payable for the paper, and provides for penalties for violators. An Act of Congress established a U.S. Bank. McCulloch, the cashier of 2nd National Bank, issued bank notes without complying with the Maryland law. MD sued McC for a failure to pay taxes. McC contests the validity of the act requiring taxes passed by legislature of MD. The state court imposed penalties on and D appealed.

   A. SC gets appellate jurisdiction because it arises under statute chartering the bank of the United States (your statute inconsistent with statute creating bank so state tax is unconstitutional because of supremacy clause) This is the ∆ invoked by McC OR because Sec 25 Judiciary Act of 1789- 2nd where clause because it draws into question the statute of a state (MDs tax on banks) on the ground that
it is repugnant to a federal statute (Charter of Bank of US) and the decision was for the state statute.

B. Issues: 1. Does Congress have the power to create the bank of the US? (Was the charter under Congress’ power?)
   1. legislative precedent (have for a long time)
   2. this case doesn’t involve liberty, in which Congressional precedent is not given much weight, but rather it involves equal representation and allocation of power, in which Congress precedent gets more weight.

C. Maryland’s Argument (and Marshall’s answer):
   1. National government got it’s power from states, states alone possess supreme dominion (Not the power to the people but power from the people. Sovereignty existed in people of the nation).
   2. No enumerated power to create a bank (but no exclusion of implied powers, which WAS excluded in the articles of confederation. Also, 10th amendment doesn’t say everything not expressly created in national is reserved for states. If Framers wanted to exclude implied powers, they would have said expressly AND Constitution shows implied powers: 1. Constitution is not like statute or code, and complex. It lays great outlines only. And 2. Article I, sec. 9 lists of things Congress can’t do, so why have this if the only things they can do were already listed. And 3. no restrictive terms that direct a restrictive interpretation) Also, article I sec. 8 clause name lists enumerated powers. Big powers are enumerated. This doesn’t necessarily mean that Congress has lesser powers inferred but big powers necessarily mean that there must be a choice of means to carry the big powers into execution.

   2 sources: 1. implied means and 2. necessary and proper clause (Congress can create a bank as an implied means to carry out enumerated powers)

3.Necessary and Proper clause restricts power of national government:
   a. language of clause-power to make all laws is the source of Congress’ power to enact statutes
      (Article 1 clause I, not n and p clause gives power)
   b. “necessary” construed very narrowly to mean only those means which are indispensable, most direct, most simple (If necessary means only one way to do it, you wouldn’t have phrase and proper because you don’t need the qualification if only one way and common use of the word necessary is convenient, useful, essential, and does not say absolutely necessary whereas it does in Art I sec. 10 clause 2)
   c. (Policy Goal-Constitution should be flexible and last over the ages)

5. How should Congress go about determining whether Congress choice of means is Constitutional?
   -no inquiry into the degree of necessity but no carte blanche
   -Current court thinks it can find means unconstitutional: “plainly adapted,” “reasonably calculated, etc.”
   -Does Congress use an enumerated power as a pretext of executing a power it was never entrusted with?
6. US Term Limits v. Thornton-5-4 decision. States can’t add qualifications for candidates for US Congress because it is not reserved for state in 10th amendment since only powers reserved were the original powers. Even if it had originally, Framers intended Constitution to be the exclusive source of qualifications thereby divesting states of these powers.

COMMERCIAL POWER

1. DIRECT REGULATION OF INTERSTATE COMMERCE ITSELF-
   - no one doubts Congress has this power
   - example: no one doubted in Shreveport Rate that Congress could set rates for goods being shipped between LA and TX.
   - example: Carter Coal dissent by Cardozo

2. PROHIBITIONS ON INTERSTATE COMMERCE
   - usually for non-economic purpose
   1. Champion v. Ames (Lottery Case)(1903)- Champion was indicted for shipping a box of lottery tickets from TX to CAL in violation of Federal Lottery Act, which prohibited importing, mailing, or interstate transporting of lottery acts. Court affirmed lower court’s denial of constitutionality challenge. Lottery tickets are subjects of commerce and are therefore within the regulatory power of Congress. Power to regulate includes the power to prohibit. It hasn’t prohibited any “local activity” (VALID)
   2. Hipolite Egg (1911)- Shipment of eggs confiscated because label failed to disclose ingredients. Challenged on ground that it had not yet passed out of interstate commerce. Court unanimously rejected and upheld the action because outlaws of commerce can be seized wherever they are found. (VALID)
   3. Hoke v. United States(1913)- Mann Act prohibited transportation of women in interstate commerce for immoral purposes. It was challenged but upheld because Congress has power over transportation among the several states and Congress can adapt means necessary and convenient to its exercise and the means may have the quality of policing. (Compares it to lotteries, obscene literature, diseased cattle, impure food and drugs) (VALID)
   4. Hammer v. Dagenhart (1918)- statute prohibited any Er from shipping goods in Interstate commerce if shipper was shipping goods produced by children under 14, and more regulations. Statute declared invalid because Congress was trying to get its hand on mfg (local activity). Holmes dissent said that Congress has the power to prohibit interstate movement because there are already so many cases giving Congress power to regulate including power to prohibit. Indirect effect on states doesn’t matter. States can do whatever they want within the state but nothing wrong with Congress doing this because its directly connected with interstate commerce. (INVALID)---(OVERRULED LATER IN DARBY)
   Holmes Dissent (good law): If an act is within powers given to Congress then regardless of its indirect effects, it is valid. Congress is given power to regulate, which includes power to prohibit, in unqualified terms.

3. RELATIONSHIP OF LOCAL ACTIVITY TO INTERSTATE COMMERCE
   1. US v. EC Knight (1895)- Sherman Act prohibits contract, combination, or conspiracy in restraint of trade or commerce among several states. No enumerated power to regulate size, shape of businesses, but under McCulloch, Congress has power to select means to carry out enumerated powers (therefore, this was a combination of the commerce clause and necessary and proper clause). Congress has prohibited a 98% monopoly of sugar refinery. Court holds statute unconstitutional because it is attempting to regulate manufacturing activity, not commerce. Court says even if mfg has an effect on interstate commerce, it is only indirect.
RULE: Congress cannot regulate local activities (under Sherman Act) that have only an indirect effect on interstate commerce. (INVALID) **Test-direct or indirect effect?**
- who decides if means achieve the end?
  Gibbons-political check (people)
  McCulloch-judicial inquiry into Congress’ choice of means crosses separation of powers, legislature can decide how to carry into effect –vs.- judicial inquiry into if means are plainly appropriate
  Knight-court disapproves Congress’ means

2. **Shreveport Rate Case** (1915)- Interstate Commerce Commission set points for transportation of goods between LA and TX and ordered RRs to end setting rates for hauls between points in TX lower than rates to LA. They said it “unjustly discriminated” against interstate commerce. RR argued that Congress can’t control intrastate rates. SC said that in all matters that have a close and substantial relations to interstate traffic such that the control is essential or appropriate for the security of that traffic, then Congress could regulate. If intrastate rates are cheaper, interstate shipments will be reduced or burdened. Local matter has a close and substantial relationship. Use necessary and proper clause to carry out Article I power to “foster and protect” interstate commerce.(VALID) **Test-real world effect of the local activity and can’t divide into categories like mfg, production, distribution, etc. (today)**

3. **ALA Schecter**- NIRA Act by Congress authorized president to promulgate codes regarding unfair trade practices, collective bargaining, wages and hours. Convictions of Schechter, a slaughterer for violating the wage, hour, trade provisions of Fair Competition practice. Schechter sold only to local poultry dealers. Purchased from men in NYC, trucked to Brooklyn slaughterhouses, sold to retailers. Government defended act based on stream of commerce and affecting commerce rationale. Court rejected-not transactions in interstate commerce because the interstate transactions ended when shipments reached slaughterhouse. Governments argument: hours and wages affect prices, slaughter house men sell at a small margin of operating costs, labor is a great deal of costs and so someone paying lower wages or working men more hours would be able to charge lower prices, so demand for cheaper goods and this would lower the price and therefore hurt interstate commerce. Court says this goes too far and is only one step away from controlling any elements of cost, such as advertising, production, etc. Also, distinction between direct and indirect effects, and the hours and wages had no direct relation to interstate commerce. (invalid)

4. **Carter v. Carter Coal**- invalidated the Bituminous Coal Act that sought to regulated maximum hours and minimum wages in coal mines. Binding on all code members. If they didn’t comply, they had to pay a tax. Carter brought stockholders suit against his company to enjoin it from paying tax and complying with the code. SC held invalid because production is a purely local activity and the effect of the act falls on production. Local character of mining, mfg, and crop growing is a fact.(INVALID) **Test-relation between the activity or condition and the effect on interstate commerce (Knight test)-(NO LONGER GOOD LAW)**
  Carodozo’s Dissent (GOOD LAW)-Relation to commerce is such that for the protection of one there is need to regulate the other. Look at the relationship between inter and intra to see if it close, intimate, or obvious. Don’t put so much emphasis on word direct or indirect.

5. **NLRB v. Jones and Laughlin**- NL Relations Act in question. NLRB found that company had engaged in unfair labor practices by discriminatory discharges of employees who where in unions. Company failed to comply with NLRB order. NLRB sought judicial enforcement, court of appeals denied because they said it was beyond range of federal power. SC reverses and holds valid. Look at real world effect. Close and intimate. Effect of labor strife is not indirect or remote. It could be immediate and catastrophic. If industry went on strike, industrial war, everyone would be effected. Experience has shown that the right of Ees to self-organization
and collective bargaining is essential to peaceful industry. (VALID) **Test: Close and Substantial Effect (Practical effect on interstate commerce)**

1. Local Activity: Employer/Employee relationship
2. Local activity’s relation to interstate commerce: Strike will stop the flow of interstate commerce
3. Rule for local activity: Employers must engage in collective bargaining
4. Interstate commerce end: Keep it moving, promote and encourage shipment and manufacturing of interstate goods (strike rationale)

**6. Wickard v. Filburn.** ***One of the broadest reaches of the commerce power***. Marketing penalty from Agricultural Adjustment Act on wheat that was grown in excess of quota. Filburn attacked marketing quota provisions as beyond the commerce power.

1. National power exercised over local production and personal consumption (he was only going to eat the excess wheat), regulation applied regardless of what wheat was being used for
2. Aggregate burden: Even though one farmer would have no effect on interstate commerce, it doesn’t matter (not close and substantial relations) but with all of them combined, it would have close and substantial.

Farmers argue: can’t regulate my land because planting and consuming is a local activity and any affect is at most indirect. Purpose of statute (Congress’ end goal) is to raise prices to give farmers better life

Government argues: statute is regulating marketing not production or consumption.

Court says what matters is not labels but rather actual effects. Even if it is beyond marketing, it is sustainable under necessary and proper clause because it has a substantial economic effect. Rejects the distinctions in Knight and Carter of production vs. commerce and local vs. national. Labels don’t matter, effects do. (VALID) **Test: Substantial economic effect**

1. Local Activity: production of wheat and consumption of wheat
2. Relationship of Local Activity to Interstate Commerce: The less wheat produced, the higher the price because the demand will be up.
3. Rule for Activity: quota on production
4. Interstate Commerce End: high prices for wheat sold in interstate commerce

**7. US v. Darby.** Darby, GA lumber mfr, challenged an indictment charging him with violating the Fair Labor Standards Act, saying it was unconstitutional because it sought to regulate hours and wages of Ees in purely local Mfg activities. SC upholds

1. Prohibition: Congress can prohibit shipment of interstate goods. While mfg is not interstate commerce, the shipment of mfg goods is and prohibition of such shipment is a regulation of commerce, which is allowed. Congress’ motive to restrict is okay. Power to regulate is plenary subject to specific prohibition in the Constitution (nude magazines and First Amendment). Motive and purpose of interstate commerce regulations are “matters for the legislative judgment upon the exercise of which Constitution places no restriction. (overrules Hammer v. Dagenhart). End is irrelevant.

2. Bootstrap: Congress can regulate intrastate activities that have a substantial effect on commerce or the exercise of Congressional power over it. Here, no goods can be in interstate commerce that don’t conform to labor standards. Congress chose means reasonably adapted to the end, so it is okay. (Prohibiting the shipment of goods that have not met standards can be achieved by specifically saying that they must conform to wage and hour provisions with any employees engaged in production of goods for interstate commerce)

3. Affecting Commerce: Evils aimed at act is substandard labor conditions through the use of interstate commerce. Act seeks to end unfair competition in interstate commerce. Means adopted to protect interstate commerce are sol related and so affects it as to be within
commerce power. “Competition by a small part may affect the whole and the total effect of the
competitors may be great.” 10th amendment is just a truism,

a. Local Activity- local manufacturer of goods
b. Relationship of the Local Activity to Interstate Commerce-unfair competition and if you can sell goods at a lower price, it spreads low wages or may discourage shipment from certain states, thereby affecting interstate commerce
c. Rule: minimum wage is 25 cents
d. Interstate Commerce End: fair wages and promote fair competition between manufacturers in different states or avoid the use of interstate commerce as a means of spreading substandard labor conditions.

8. Perez v. United States-Questions validity of statute (Consumer Protection Act) that had two loan shark amendments. Shown that Perez was a loan shark. Statute itself does not mention interstate commerce anywhere. Congress enacted because organized crime operates on a national scale and one of the principal sources of revenue of organized crime comes from loan sharking. Organized crime is interstate in character and a substantial amount of income comes from loan sharking. Extortionate credit transactions are carried on in interstate commerce and even if not, there is an aggregate effect. Rationale: Commerce Clause reaches three categories of problems:

1. Channels of interstate or foreign commerce (ex: shipment of stolen goods or of person who have been kidnapped)
2. Instrumentalities of interstate commerce (thefts from interstate shipments
3. Affecting Commerce (this is what court is concerned about)

Looks at Darby, and a regulation of a class of activities was held valid without proof that the particular intrastate activity had an effect on interstate commerce. In this case, Perez is a member of the class. Test: Look at the real world effect on interstate commerce measured by the class of activities of the practice on commerce.

If class of activities is regulated and that class is within the reach of that power, its valid. Applying here: extortionate credit transactions, though purely intrastate, may affect Commerce. Congress had findings that show loan sharking gives organized crime its second highest revenue, coerces victims into crimes against proper activities, and loan sharks taking over legitimate business. Also hard for Congress to distinguish loan sharks who do/don’t do IC.

Congress can reach local activities not shown to affect interstate commerce if separating them would be futile to regulate the local activity that does affect.

1. Local Activity: extortionate credit rate loans
2. Relationship of Local Activity to IC: the money from the loans go to feed organized crime which operates interstate. The loans are also used to commit crimes against property in interstate commerce and to cause takeover of legitimate business that can operate interstate commerce
3. Rule: loan shark amendments
4. Interstate Commerce End: Stop interstate organized crime

9. Maryland v. Wirtz-FLSA extended from employees engaged in commerce or production of goods for commerce to an employee who is employed in a business that is engaged in commerce of production of goods for commerce. Upheld on unfair competition theory of Darby or labor dispute theory of NLRB. Enterprise is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees. If a general regulatory statute has substantial relation to commerce, then individual instances arising under that statute are valid even if that instance has no character to interstate commerce. Can’t be trivial effect on interstate commerce. (VALID)
10. Hodel v. VA Surface Mine—regulation of strip mining was challenged on the basis that private land within states can’t be regulated. Court said that commerce power permits regulations of activities that cause air or water pollution or other environmental hazards that may have effects in more than one states. Inquiry into Congress finding that an activity effects interstate commerce is only whether the finding is rational. (VALID)

1. Local Activity: strip mining
2. Relationship of Local Activity to IC: strip mining causes air pollution and water pollution in more than one state. Destroys utility of land by causing erosion, landslides, fish and wildlife
3. Rule: regulation of strip mining
4. IC End: Stop pollution so that the land and fish and so on and utility of the land in many states is not affected.

11. Heart of Atlanta Motel v. US—Complaint of unconstitutionality of Civil Rights Act. Heart of Atlanta Motel clearly interstate (solicit outside business, conventions, 75% out of state). Court says that Congress has the power to use the commerce clause to assure equal access to public places. Though no Congressional findings, testimony shows that people are increasingly mobile. Black encounter much difficulty when traveling. Hotels and Motels discrimination impeded interstate travel. Test—whether the activity sought to be regulated is commerce which concerns more state than one and has a real and substantial relations to national interest. Just because Congress regulates moral wrongs doesn’t make the enactment invalid. This act seeks to end disruptive effect that racial discrimination has on commerce. Furthermore, even if operation of a motel is purely a local business, if interstate commerce feels the burden then it doesn’t matter. Congress has power to regulate local incidents of interstate commerce that might harm commerce.

12. Katzenberg v. McLung—Complaint for injunctive relief that attacks constitutionality of Civil Rights Act of 1964. Injunction issued restraining the enforcement of the Act against a restaurant. Barbecue restaurant located on state highway refused to serve to blacks in the restaurant. Court below said that the restaurant would lose substantial business if it were to allow blacks to dine there. No claim that interstate travelers eat there. However, claim that must food that is there has moved in commerce. Claim that Congress had enough basis to find that racial discrimination at restaurants which receive substantial amount of food from out of state imposes burdens on national commerce. No formal findings are necessary but testimonies help to understand the problem and whether the means is appropriate to solution aimed at in act. Less spending where discrimination is practiced, less food a restaurant sells and less it buys (if blacks allowed, would have more customers and hence more food bought in interstate). Flow of merchandise is interfered with. Unrest and depressant effect on general business conditions. Discrimination also had a highly restrictive effect upon interstate travel by blacks. Deterring professional people from moving into discriminatory areas, thereby discouraging development. Even though one restaurant alone would not be enough to truly effect IC, the aggregate effect would be bad. Court’s role is to find 1. if Congress had rational basis for finding a law necessary to protect commerce. Since the restaurant serves a substantial potion of interstate foods, then it can be upheld as applied.

13. United States v. Lopez (I)—Statute—Drug Abuse Prevention Act prohibits possession and distribution of all controlled substances (inter and intra). Charged with distribution of cocaine and heroin. Well settled that commerce power extends to intrastate activities that affect interstate commerce as to make their regulation an appropriate means to achieving a legitimate end. Can regulate those activities that are so commingled with or related to interstate that all must be regulated to effectively control commerce (Darby). If separating interstate activities from intrastate would be futile and interfere substantially with power of Congress, then it is not required that they be separated. Congress has power to determine if particular activity against
which a sanction was imposed had an effect on interstate commerce (Perez) Court must only
determine whether Congress had a rational basis to find that a class of activities has an effect
on interstate commerce or that an attempt to separate inter and intra would be futile. Congress
found in this case that intrastate traffic of controlled substance has a substantial and direct
effect on interstate commerce and that it was impossible to separate. Therefore, obviously they
had a rational basis for findings. Statistics, testimony, etc. Large percentage of controlled
substances are unlabeled, so hard to tell its origin. Congress could reasonably assume that it
would be futile to try to separate intrastate and interstate. Past attempts to regulate have failed
because of the difficulty of determining origin.

Congress. It makes it federal offense to knowingly possess a firearm in a school zone. Court
says not interstate commerce because 1. it doesn’t regulate commercial activity and 2. Doesn’t
have requirement that the possession be any way related to interstate commerce. Jones and
Laughlin Steel, Darby, and Wickard recognize changes in businesses that have become more
national but it is still subject to outer limits. Court has duty to decide if rational basis existed for
concluding that a regulated activity affected interstate commerce (Heart of Atlanta, Wirtz).
Three broad categories of activity that congress can regulate:
   a. Use of Channels of Interstate Commerce (Darby’s first rationale, Heart of Atlanta,
      Douglas’ Perez decision)
   b. Regulate and protect instrumentalities of interstate commerce or persons or things in
      interstate commerce even though the threat only intrastate. (Shreveport Rate)
   c. Substantial Relation to interstate commerce (NLRB v. Jones) (question of whether it
      must affect or substantially effect)

Local Activities Can Be regulated only if the effect on interstate commerce is substantial.
Have upheld many cases of this: coal mining, extortionate credit transactions, restaurants that
have food from out of state, inns and hotels catering to out of state guests, and consumption of
home grown wheat. However, this one does not. Possession of a gun in a school zone has
nothing to do with commerce not an essential part of larger regulation of economic activity that
could only be carried out with this regulation. No aggregate effect. NO jurisdictional element
that would ensure case by case inquiry. Government argues that it does substantially effect
because possession of fire arm in school zone can result in violent crimes and the costs are
spread throughout nation. Plus, it reduces willingness to travel to areas within the country that
are unsafe. Furthermore, threatens educational process by harming learning environment,
which will result in less productive citizens, which will have adverse effect on nation’s
economy. This reasoning would lead to Congress ability to regulate basically any activity that
might tenuously relate to violent crime and the national productivity reasoning would lead to
Congress ability to regulate things such as family law that are found to relate to productivity.
(would support a federal police power) No findings also by Congress
-Some say this was a big change, but it was a 5-4 decision.
DISSENT:-must look at whether Congress had rational basis and commerce connection must
be a practical one. Reports and studies show that there is a connection between gun related
school violence and interstate commerce. Extent of gun related violence problem, extent of
negative effect on classroom learning and extent of negative commercial effects indicate threat
to trade and commerce that is substantial. Threatens inadequately educated workers,
communities and business that would otherwise gain from well educated workforce. Wouldn’t
lead to too broad of power because this statute is aimed only at one actual threat to education.
Immediacy of connection between education and economics is well documented that may not
be true for other things (family law, for example). Majority’s opinion goes against precedent of
laws that were seen less significant connections than gun and school violence. Distinguishes
between commercial and noncommercial, which goes against Court’s idea that Congress should be responsible for formulas and categories (Wickard), and it threatens legal uncertainty in a well settled area of law. DISSENT: falling pack into old pitfall by treating deference under rationality rule as subject to commercial or noncommercial distinction. DISSENT: guns are articles of commerce and articles that can be used to restrain them. Power to prohibit possession at any location because of harmful use and because they are interstate items.

15. United States v. Morrison (2000)-Violence Against Women Act, rape case. Makes it illegal to have gender motivated violence. Court says statute is invalid, given the Lopez case. Gender motivated crimes are not economic activity. No jurisdictional element establishing that the federal cause of action is in pursuance of Commerce power. Numerous findings that it has serious impact on victims and findings but that is not enough to show commerce clause power. Congress found it affects interstate commerce by deterring potential victims from traveling interstate, engaging in employment in interstate business, doing business interstate, diminishes national productivity, increases medical costs, decreases supply and demand for interstate products. If this reasoning was accepted, Congress could regulate any crime as long as aggregate impact effects employment, production, transit, or consumption. And it may apply to family law.

4. BOOTSTRAP
-no need to show any connection between the local activity and interstate commerce.
see Darby v. US

5. STREAM/CURRENT OF COMMERCE
1. See NLRB v. Jones-government urges this stream of commerce argument but court doesn’t address it

6. OTHER
5 Gambling Devices-statute prohibited shipment of gambling machines in interstate commerce. They had special information disclosure for every manufacturer an dealer in gambling devices (not just if in interstate commerce).FBI Seized gambling machines by a country club in Tennessee of someone who had not followed it. Affirmed (VALID) in a 5-4 decision. Rationale:
1. Super Bootstrap of Darby-Government regulates local activity as a means of implementing the interstate prohibition
2. Wouldn’t be able to sustain if it was not shown it was “in,” “mingled with” or “found to affect” commerce

7. GENERALLY
A. Two theories to uphold based on commerce
1. channels or facilities of interstate commerce-plenary power to prescribe the rules of conduct to be applied to any activity that can rationally be characterized as interstate commerce. (channels- selling and shipping of interstate goods) (instrumentalities-railroad, airlines, trucking companies and can impose safety standards) (Prohibition and direct regulation)
   examples: interstate carriers, roads, transmission facilities
   -includes authority to exclude any goods found to be harmful
   -Congress’ motive is irrelevant
   -can regulate even after the interstate commerce has ended (example: bottle labels in McDermott can be still required even after shipment ends because it made inspection convenient and insured that bottles were so labeled while they were in interstate commerce). (Doesn’t apply to use of such goods or people that have ended interstate travel)
2. National Economic Effect-Congress can regulate if it affects more than one state by using the necessary and proper clause in connection with the commerce clause if it has a substantial effect on commerce. (Affecting commerce Rationale)
   -includes power to prohibit and encourage commercial and noncommercial even if wholly intrastate if it affects other states
   1. Intrastate railroad rates (Shreveport Rate)
   2. Factory that produces goods within state if the goods compete with goods in other states because substandard working conditions may destroy competition in other states (Darby)
   3. Factory that produces goods to be sold locally and interstate may have all conditions regulated since labor strife among employees producing local goods may effect employees producing interstate goods (Maryland v. Wirtz)
   4. Motel that serves interstate travelers may be barred from racial discrimination because it discourages traveling interstate (Heart of Atlanta)
   5. Restaurant that purchases supplies from other states may be barred from racial discrimination because it may affect quantity of restaurants business thus effecting other states (Katzenbach) Racial unrest has a depressant effect on business, which shows that Congress has broad power to regulate racial discrimination because of its affect on other states
   6. Home grown wheat consumption because the more the farmer produces, the less he will buy, thus affecting demand for wheat and its price (Wickard)
   7. Coal Strip Miners may be required to comply with regulations since strip mining may create environmental problems and affect agricultural production in other states (Hodel)

B. If Congress has made findings to show the affect on interstate commerce, the court will give great deference to findings upholding them if they are on a rational basis. (Hodel)

C. Crucial question is whether there is an aggregate effect on other states by the class of activities regulated (NLRB) not if a single business or individual does. (Example: Perez and the loan sharking case)

D. Limits:
   1. Individual Rights
   2. Must substantially affect interstate commerce or be connected to it

TAXING POWER

I. Article I Section 8, Clause I- Congress has power “to lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common defense and general welfare of the United States”

II. Independent powers to tax to raise revenue and to spend for general welfare are independent (taxing and spending are independent).
   -tax power, unlike commerce power, is not very refined.
   -Good political check on tax power because it is not popular to tax.
   -another problem of using the taxing power to get what you want is that many corporations could care less about the charge because of its cost of doing business.
III. Must be uniform among several states (geographically among them).

III. Purpose/Effect of Regulation:

A. If Congress has the power to regulate the subject of activity taxed, then it does not matter if the purpose is regulatory or revenue raising because it can be seen as a necessary and proper exercise.

Example: A tax on banknotes issued by state banks is upheld even though it ended banknotes, because Congress has the power to regulate the national currency, so it was immaterial if it was valid as revenue raising.

Hence, because Congress’ power to regulate under Commerce Clause is almost limitless, almost all federal taxes can be seen as necessary and proper exercises of commerce power.

B. If Congress does not have the power to regulate the subject matter being taxed, then it must be justified under the taxing power. However, just because tax regulates the activity to some extent, doesn’t mean it is invalid.

Test: The dominant intent is revenue raising rather than prohibition or regulation (the tax will be invalid only if its dominant intent is penal rather than fiscal)

1. Objective Approach (sometimes)-If the tax in fact raises revenue it will be upheld and its dominant intent will be considered fiscal If is raises revenue, it is presumptively a tax even if the amount is minimal.

   A. Examples:
   1. Tax of 10 cents per pound on yellow oleomargarine which was much more than the tax on white oleo (McCray)
   2. Special excise tax on narcotics dealers (Doremus)
   3. Tax on dealers in firearms (Sonznisky)
   4. Tax on bookmaking activities (Kahriger)

2. Subjective Approach (sometimes)-Look at statute closely to see language and operative effect

   A. Examples of Penal/Regulatory Taxes
   1. Tax on those who employ child labor (Bailey)
   2. Special Tax on Liquor businesses contrary to state law (Constantine)
   3. Gambling tax upheld since it produced revenue despite its regulatory effect because the filing of much information aids collection of the tax and since gambling is not illegal everywhere, it is not an added federal penalty.

III. Questions to Ask: 1. Does the measure operate as a tax (does it raise revenue?) If no, then it is not a tax and valid only if authorized by some other authority. If yes, then 2. does it function in a fashion that is prohibitory or penal? If yes then invalid unless authorized by some other authority.

-Court unwilling to look into hidden motives of Congress

IV. Three Specific Limitations on Power to Tax:

1. must be uniform throughout US
2. direct taxes must be in proportion to population and
3. no duty or tax on exports

III. Examples of Cases

A. Bailey v. Drexel Furniture Company (Child Labor Tax Case)-Child Labor Tax Law of 1919 imposed excise tax on employers of child labor (had to be scienter requirement). SC said the tax was invalid because it was a penalty to enforce a regulation, not a tax. The purpose of the law was clearly to regulate child labor. If Er departs from it, he has to pay 10% and
regardless of how many times and how much he departs, it is the same penalty. Scienter is typically associated with criminal things. (INVALID TAX)

**B. Veazie Bank**-statute increased tax from 1-10% to drive out of business state notes. Article I sec. 8 clause 5 gives power to secure national uniform currency so it is upheld because it imposes a charge as a means under necessary and proper clause to carry out power to secure national currency. Or you could say the tax was a means to carry out clause five (power to tax being used as pretext)

**C. McCray (Oleomargarine)**-purpose was consumer protection(make sure they are not deceived) or raise revenue or aid the dairy industry. Court didn’t apply Marshall’s pretext reservation. 1. Power to regulate commerce-This was a means under necessary and proper clause to promote high prices for butter/interstate market for butter or 2. power to tax was being used to achieve a commerce end.

**D. Doremus**-tax on opium, cocoa leaves (and registry requirements). Purpose was to suppress drugs and raise revenue. Minimal tax, though, so seems to not be a revenue raising tax. Registration provisions had reasonable relation to enforcement of the tax. Source of power-necessary and proper clause. Congress can have two motives but the regulatory provision can’t be related to only a non revenue end.

-Courts are more comfortable looking at means ends rather than just motives and ends.

**E. US v. Karhigher**-gambling tax on bookies, charge on all wagers accepted and their registration information was to be posted in a public place. Purpose was to suppress gambling. Arguments against tax: exercise of taxing power here because no requirement of interstate matters but taxing power doesn’t apply solely to interstate. Court said that the mere fact that this tax produced negligible revenue is not enough to invalidate its use of the taxing power. Another argument was that requirements don’t really lead to end of revenue raising. Court accepts dual purposes, says indirect effect on gambling and no reason power to tax should raise more doubts on indirect effect. Registration provisions make tax similar to collect. Unless penalty provisions are extraneous to any tax need, courts can’t limit the tax power. End is to raise money, suppress gambling, means was a register

**SPENDING POWER**

-courts rarely get hand on it because it is hard for someone to find standing with spending power because we all have same undifferentiated say in spending tax money. Spending is also good to achieve because constituents don’t like tax but like getting money. Therefore, spending power is the single most important national power by which Congress controls allocation of power of federal government

-Congress has power to spend for general welfare but not to regulate. The issue of what is for the general welfare is left to Congress and court will uphold as long as rational basis to support Congress’ idea that it is for general welfare.

**I. Regulation through the Spending Power**

-If Congress has power to regulate the material in which persons must engage to receive funds, it is valid as a necessary and proper exercise of powers.

-If Congress imposes conditions on receipt of federal money, Court will uphold the spending measure so long as the recipient is free to reject federal money and exercise his or her rights or powers.

1. Is the law voluntary? (As long as theoretical choice, Court hasn’t struck down on this basis since 1936.)
2. Is the condition on the receipt of money related to the general purpose of the federal grant? (Example: If Congress conditioned receipt of federal highway funds on a state’s willingness to pass abortion law.
3. Are there other Constitutional Provisions that would Limit Congress’ Ability to Impose Condition?
   1. 10th Amendment (unlikely, hasn’t used to invalidate since Butler)
   2. Individual Rights
   3. Checks: judicial? Political? Limits on tax base that Congress has to spend

A. United States v. Butler- The 1933 Agricultural Adjustment Act levied a tax on certain agricultural processors to pay for a subsidy of farmers who agreed to reduce their acreage. The power invoked for this Act was the taxing and spending power. P challenged the tax in court, stating that it was part of an unconstitutional program to control agricultural production. The court of appeals held that the tax was unconstitutional. Government said that it was authorized by the spending power. Madison said spending power can only be used to execute other enumerated powers, but Hamilton said the power is separate and distinct from later enumerated and Congress has tax and appropriate power only limited by requirement that it be for general welfare. (court adopts Hamilton’s view) Court says act invades reserved rights of state. Regulations are not voluntary. Congress can’t just purchase individual action that states have jurisdiction over. MODERN UNDERSTANDING OF SPENDING POWER IS WITH STONES DISSENT(COURT IS MORE DEFERENTIAL TODAY): spending power is separate and distinct power and not confined to achieving ends under Congress’ other enumerated power. Program isn’t’ coercive because no threat of loss, only a hope of gain.

B. Steward Machine Company v. Davis-unemployment compensation provisions of SS Act, which imposed payroll tax on employers of eight or more. Tax not earmarked, went into general funds. Credit provision in the tax sought to induce state laws that complied with federal standards because employer got up to 90% of federal tax credit for any contributions to a state unemployment fund certified by federal agency. Scheme was valid because it wasn’t shown that they are weapons of coercion. Line between duress and inducement. Widespread unemployment is important thing to be dealing with. Act is attempt to find a way that the agencies can all work together. No duress in this case. The federal program also satisfied a federal fiscal purpose since if the states did not provide unemployment compensation, Congress could do so for general welfare.

C. South Dakota v. Dole-Congress can condition some percentage of federal highway funds on a state’s adopting a minimum drinking age.

D. Summary: General Rule-any condition on the receipt of federal money is constitutional
   Exception (SD v. Dole)-if the condition is unrelated to the purpose of the federal grant it may be unconstitutional.

TREATY POWER

A. Article II, Section 2, Clause 2, President has power to enter into treaties with other countries. A treaty must be ratified by two thirds of Senate. Treaty is considered supreme law of land under supremacy clause

B. Ability of Congress to pass a law to implement a treaty constitutes an independent source of congressional power over and above any enumerate powers the Constitution gives Congress. Court treated Congress’ power to pass laws to implement treaties as necessary and proper to effectuation of treaty power.
   1. Example: Missouri v. Holland-Court upheld federal Migratory Bird Treaty Act implementing treaty with Canada that regulated taking of migratory birds. Court said treat can legislate an area which it otherwise would have no power if necessary and proper for implementation of a treaty.
C. A Treaty Cannot violate the Constitutional Rights of Individuals because Constitution is the supreme law of the land.

1. Example: Reid v. Covert—court martial jurisdiction over civilian dependents of American soldiers abroad cannot be justified by international agreement giving armed forces jurisdiction to try such civilians for crimes. Treaty cannot authorize violation of constitutional rights such as right to trial by jury in fifth amendment.

**INTERGOVERNMENTAL IMMUNITIES**

I. Intergovernmental Immunities: Tax

1. Power to tax is held concurrently with states and nation
2. Marbury v. Madison—states have no power by taxing or otherwise to impeded, burden, control, operation of Constitutional laws enacted by Congress

**STATE IMMUNITY FROM FEDERAL TAX:**

3. Collector v. Day—Court held state judge salary immune from national income tax because state is sovereign and independent and for the sake of self preservation, the judges are exempt from tax by States

3. Helvering v. Gerhardt—federal income tax on port authorities of NY and NJ. No express limitation on power of either government to tax the other but there are implied limitations (McCulloch). State immunity form national taxing power (Collector v. Day) is narrowly limited to state judicial officer performing that function that states couldn’t exist without.

Why Narrowly Limited?

1. people have created a national government. All states are represented in exercise of national taxing power so when exercising power it is on themselves (political check)
2. Any allowance of tax immunity of the state is at the expense of the sovereign power of nation to tax. Enlargement of one involves diminution of the other.

If the activity is not essential to preserving the state government or if the burden on the state government is so speculative that it doesn’t tangibly protect, then state is not immune.

4. Requirements for State Immunity:

1. activity is essential to preservation of state government
2. only affects state as a burden passed to taxpayers

5. New York v. United States—US brought suit against NY to recover taxes on mineral waters. NY claimed immunity because it was exercising traditional and essential government functions. Tax is upheld because federal government has all states that share in process (no reciprocal immunity) and is only immune if it is uniquely state activities, then you can tax. (example of uniquely state activity is a state house). As long as the tax is nondiscriminatory and taxes public and private then the tax is valid.

3 approaches:

1. tax-discriminatory or non?
2. Balancing act-impairment of state functions vs. national loss tax revenue
3. everything the state does is immune

**FEDERAL IMMUNITY FROM STATE TAX:**

-A state may not directly tax an instrumentality or agent of federal government, but can tax federal employees salary as long as nondiscriminatory.

6. Graves v. O’Keefe—Home Owners Loan Corporation is wholly government owned instrument. An employee challenged income tax by NY on his salary. Courts reversed the state courts decision that he could not be taxed and upheld the tax because no unconstitutional burden upon the Corporation. No immunity from income tax of salaries of employees.
II. National Regulation and State Autonomy

A. When Congress passes a law that interferes with some attribute of state sovereignty, a state may assert the Tenth Amendment as a defense.

B. U.S. v. CAL-CAL owned RR in San Francisco and goods transferred to privately owned. Federal law requiring safety appliance act. Court upheld application of commerce power based regulation on states (unwilling to compare it to state immunity from national tax). Different because failure of safety regulation has same effect regardless of who violates it.

C. CAL v. Taylor-Federal Statute (Railway Labor Act) restricted employees wages, working conditions, collective bargaining required. Cal viewed it as civil service and almost all states prohibit strikes by Ees for public policy. RLA authorized strike if collective bargaining failed. SC upheld the act.

D. Parden v. Terminal Railway-FELA-national standards for negligence that apply to interstate carriers. Court upheld these standards to any private or state RR.

E. Case v. Voles-validity of war time price regulations under emergency price control act. State sold timber to finance education. Congress had maximum prices. SC upheld the national price controls on state owned timber. Overtly employed balancing test (national interests in war time inflation trumped any burden on states interest in revenues to finance public education)

F. Oklahoma v. Civil Service-none of Ees could take any part in political activities in grant. State had elected official in that position. Condition of grant upheld.

G. Maryland v. Wirtz-FLSA minimum wage and max hours to all Ees of enterprise in IC. Amendments to extend to state schools and hospitals. Upheld national requirement. (later overruled).

H. Fry v. US-8-1 decision, temporary freeze wages of state employees is valid

I. National League of Cities v. Usery-(later overruled in Garcia)extended FLSA to state government employees. SC says Congress regulating directly states as public Employers and this exceeds its power. Express declaratory of limitation is 10th amendment. Essential role of states in federal system. Essential question is if the activity is essential to separate and independent state existence.

Applying here: adverse effects to state because costs go up, end training program, displace state policies, forbids choices as state. Function such as police, parks, etc. are traditionally states and if Congress withdrew states choices, they’d lose separate and independent existence. In other words, even though general subject matter of wages and hours is within commerce power, can’t regulate them set by the state as an employer because it directly displaces the State’s freedom to structure areas of traditional government functions. Rhenquists test: interfere with traditional state functions? Effects of this: program reduction, structuring of work force, Costs go up taxes must increase or must get rid of employees

Compares Fry and Wirtz

Fry- Economic Stabilization Act of 1970 temporarily froze wages of state and local government employees which was brought about by serious problem that threatened all government. Means were carefully selected so as to not interfere with states except for specific limited time. It also reduced burdens on state budget rather than increased them

Wirtz-OVERTURNED because it relied on US v. CAL but that is wrong and only dicta.

(In Wirtz, the court upheld application of FLSA to state schools and hospitals because same standards as private employers) (Wirtz ruling is good law now under Garcia)

Dissent: 10th amendment is a truism, political checks protect states and they are represented in the government and don’t need protection by the courts.

J. Hodel v. VA Surface Mining-federal regulatory scheme directed at private sector restates National League of Cities as a three-part test. Limits on private mining operations passed
commerce clause and 10th amendment. Commerce Clause-courts must defer to Congress and ask if rational basis for finding. 10th Amendment: National League of Cities: 3 requirements: 1. Regulating states as states 2. Address matters that are of state sovereignty 3. States compliance with law would impair ability to structure traditional government functions Concurrence says not rational basis but substantial effect test. (number 1 and 3 type of laws below)

K. Three Types of Laws (Lopez):
1. national laws that regulate private activity
   example: Congress sets policy that displaces state laws under supremacy clause.
2. national laws that regulate states
   example: Nat’l League of Cities applying to state activity has effect number 1
3. national laws that require states to exercise affirmatively state authority over private activity
   use states as agents of the national government

L. Ferc v. Mississippi—required utility commissioners to consider the rates. Some states had already done them so why waste. Mechanism to get states to regulate was to exempt private electric utilities from state regulations unless they went to the hearings. This program approved.

M. EEOC v. Wyoming—challenge to age discrimination act to state and local government.
Upheld because the degree of federal intrusion is not too serious. Three part test in Hodel:
1. states as states-clearly met
2. not clear of whether issue of state sovereignty but even if it was:
3. doesn’t directly impair states ability to structure integral operations in areas of traditional government functions (even though state parks is traditional state function, the purpose is to protect states from losing separate and independence and the degree of intrusion is not high)

M. United Transpiration Union v. Long Island RR—Congress law allowed strikes. NY rule for state Ees didn’t allow strikes saying that keeping this service is critical function of government.
Upheld because traditionally RR private and not state so it doesn’t interfere with traditional state activities

N. Garcia v. Samta—minimum wage requirement of FAFSA applied to public owned authority.
Overrules National League of Cities (unlikely that minimum wage will unduly burden state since it applies to private employees too and therefore political force). Test-destruct state sovereignty or violate constitution
Political check not judicial process
Traditional government function test is unworkable because states change 10th amendment truism model
Immunity if: (quoting National League of Cities)
1. regulates states as states
2. matters regulated are “undisputed attribute of state sovereignty”
3. directly impairs ability to structure important traditional functions
4. nature of federal interest justifies submission of states (relation to federal interests must not justify state submission) (balancing test)
Historical federal involvement is relevant but not controlling
Court is extremely deferential to congressional action which regulates both states and private entities.
Absent some showing of extraordinary defects in procedural safeguards, court will not find that it violates Tenth Amendment.

O. South Dakota v. Dole—national grant to states on condition that states set minimum drinking age. Expenditure must be for general welfare (courts defer to Congress), condition
unambiguous and enables states to exercise choice freely (clear statement rule), means end inquiry (relation between the condition or means and the goal of the expenditure or ends)
Lopez-findings not required but helpful in a close case
READ AGAINP. Exception to Garcia: New York v. United States-low level radioactive waste-NY imposed on states obligation to provide for disposal of waste using incentives such as money, access, take title provisions. Argue that rather than regulate generators of waste, Congress has impermissibly directed the states to. Congress can’t commandeer states to regulate by directly compelling them. Although Congress can’t regulate states it can encourage a state to act in away and can provide incentives as long as they bear some relationship to the purpose of federal spending. Court invalidates law because this law was not generally applicable and only regulated state governments. Law commandeered states by directly forcing them to enact and enforce a federal regulatory program.
R. New York v. United States-(addendum 3)(1992)-low level radioactive waste policy to promote availability of disposal sites and ensure states accepted responsibility for it. Incentives:
1. monetary (given money for complying with federal plan)-upheld because free to entice states using federal money and under commerce clause congress could offer choice between adopting a federal regulatory program or be preempted by federal regulation of private activity at issue.
2. states with federally approved sites can deny access to their sites to waste generated in states that did not conform to federal guidelines. --upheld because exercise of commerce power by delegating congressional power over interstate commerce to the states
3. required state that failed to meet standards would be required to take title to the waste generated within its borders and accept liability for nay damages. --unconstitutional because it gave a state only two unacceptable options: 1. state take title and risk liability or 2. accept and implement federal scheme. Either way, states forced to participate in and implement the scheme (commandeered into federal service). Violates 10th amendment and federalism principles.
No distinction between policy-making and implementation
“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Congress can take credit for solving problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when states are not forced to absorb the costs, they are still put in the position of taking the blame for its burdensomeness and its defects.”
“Where it is the whole object of the law to direct the functioning of the state executive and hence compromise the structural framework of dual sovereignty, a balancing analysis is in appropriate.” Federal government may not issue directives requiring states to address problems or command officers to administer or enforce a federal regulatory program.
Q. Reno v. Conden-South Carolina brought action against US challenging constitution of DPPA saying that it violates the 10th amendment and exceeds Congress’ commerce power. DPPA restricted release of info to those who haven’t consented to release. Also, regulates resale and redisclosure by private persons who have obtained from state. SC had a law that info was available to anyone filling out the form. DPPA was held constitutional because drivers license info is an item and stream of commerce and so regulating states activity but doesn’t make state regulate private parties. Distinguished from NY and Printz because it did not required the legislature to enact any laws or regulations nor did it require them to assist in the enforcement of federal statutes. ( 2nd category in Lopez.) Affecting commerce rationale:
1. Local Activity: release of drivers information
2. Relationship of Local Activity to IC: It is released to people in interstate commerce and those who are in state can use it to sell goods in IC
3. Rule: No release without signature
4. Interstate Commerce End: Protection of consumers from interstate goods and privacy

R. Summary: Congress power to:
   a. regulate private activity
      commerce power, spending power, tax power, foreign affair
   Lopez-3 categories of national regulation
   b. regulate state/national government
      commerce, spending, war (Case v. Bowles), FLSA
   c. using states as agents to carry out national rules
      commerce (Printz, Ferc, Hodell)
      spending (SD v. Dole)
   tax (Steward)
   --Congress can regulate the states (such as minimum wages in Garcia) but it cannot force the states to implement federal policy. Distinction between enticement (which is okay) and coercion (which is not)
   --Example: Brady Act in Printz: not okay to force officer to enforce but if the state:
      1. used money to entice states to adopt a scheme
      2. give states a choice between federal scheme (assuming it is within a power) or to do it themselves.

DORMANT COMMERCE CLAUSE

I. Two situations of commerce clause:
   a. dormant commerce clause-Article I, Sec. 8, clause 3-where Congress hasn’t regulated, judicial authority can limit the reach of state authority
   b. Where Congress has regulated, the supremacy clause (Article 6, clause 2) will preempt or oust the state laws in favor of federal laws if they conflict.

II. Court has had a series of tests in exercising dormant commerce clause:
   a. Early view (Marshall)-regulation of commerce is for national government but state could use police powers to regulate certain things
   b. States have plenary power to regulate regardless of purpose, unless congress has enacted a statute (dormant commerce clause doesn’t check state power) Only check is supremacy clause and preemption
   c. Both national and state can regulate (Cooley). Some types of commerce require one rule, others have diverse rules (national commerce is for Congress, local is for state).
   d. State laws that directly affect interstate commerce are invalid and ones that indirectly affect interstate commerce are valid.
   e. (TODAY)-balancing test (Scalia doesn’t like because says balancing things that can’t be compared) Balance: 1. importance of states regulatory concern --vs.- 2. adverse effects on interstate commerce (burden, discrimination)
      -state laws that discriminate against interstate commerce are unconstitutional and majority says also if unduly burdensome compared to benefits

III. Analysis:
   1. Purpose of law (police power, health and safety vs. Benefit of state economics)
   2. Effect of law (who can or can’t participate, equally or unequally treated? Burdensome equal or discriminatory?)

IV. Discrimination analysis
1. Identify Discrimination (show the law, by purpose or effect-facially or as applied) classifies along state lines) (disadvantage to out of staters, such as denial to instate market or benefit to local instaters such as exemption form otherwise generally applicable tax)

2. Identify Reason for Discrimination (Local Economic Protectionism is per se invalid, but if it is shown it is for police power and no alternative means then it is valid.)

V. Examples of Restriction of Out of state sellers:

A. Gibbons v. Ogden- NY steamboat monopoly grant, NY says inseparable attribute of sovereignty to regulate commerce and is secured by 10th amendment and grant of power not exclusive unless inconsistent with grant. Congress says full power to regulate something implies full power to regulate something implies a whole power and leaves no residuum for states. Power to regulate implies full power. Court found invalid because conflicted with US licensing law and so supremacy clause preempts (not really a dormant commerce clause case).

B. Wilson v. Black Bird Creek (Marshall)-Company authorized by law of state to build a dam and bank that obstructed navigation. Wilson and others owned sloop license under federal navigation law and the sloop broke the dam to pass through. Company sued for damages and won, rejecting the defense that the law violated the commerce clause. Marshall said that measures to produce objects of excluding water from marsh are within states powers. However, the measure by this state act stops a navigable creek and abridges rights of those who use it. Wilson’s argument: state didn’t have authority to give private party right to build a dam that interferes with interstate transportation (even though no conflicting statute, dormant commerce clause kicks in.) Delaware-enacted statute for public health and property values end and it is a legitimate exercise of states police power.

Marshall-If states acting for police power then the law is valid, if regulating commerce then invalid.

Taney (Marshall’s successor)-all state laws valid unless Congress has already acted.

C. Cooley v. Board of Wardens NO LONGER GOOD LAW(addendum 4, 219) (1851)- Pennsylvania law required ships to engage in local pilot to guide them and would get a fine if not. PN held Cooley liable. Before PN law, Congress had statute that all ports shall be regulated with existing laws of states or later enacted. Clearly a regulation of commerce because it regulates navigation. 1789 act implies state power to regulate. Some laws demand single uniform rule and require exclusive legislation by Congress, whereas some demand locality and diversity. Until Congress should deem it necessary to exert its power, it should be left to state. No exclusivity but there are also some limits on states. Determining factor: subject of regulation not the power. Cooley test: 1. If national nature or demands single uniform rule-exclusively Congress 2. If local in nature and demands diversity then local is appropriate. Applying the test here: regulating ports or vessels is local because different conditions in different ports so local authorities know best how to regulate. Also the statute of 1789 shows Congress felt regulation of ports was appropriately left to locals. If courts say not local, Congress would have to worry about all specific ports, etc.

D. Judicial Inquiry: Effect or Purpose?

1. Purpose- Buck and Bradley-denied licenses of interstate motor carriers denial was economic/convenience-invalid denial was safety-valid

   -this suggests that if state acts for economic purpose, dormant commerce clause is more scrutinized than if health and welfare.

2. Effect-

   no showing made about effect of this on interstate commerce-valid show the effect of the burden on interstate commerce-invalid
E. South Carolina State Hwy Department v. Barnwell- (addendum 4, p. 226) (1938)- Barnwell was very deferential standard (later scrutiny becomes stricter)-challenging South Carolina law having truck weight limits that were greatly below the average truck’s load. Supreme Court said no basis shown that states power should be curtailed. State highways are a local concern and are built, owned, and maintained by them. So long as state action doesn’t discriminate, the burden is allowed by Constitution because it is an inseparable exercise of legislative authority left to states. (trial court looked at effect and how well it worked to serve the purposes and said the requirement was burdensome). Who is affected by this law? Anyone who ships goods to or through SC (always have to change trucks or use smaller amounts of trucks at border), those who ship only goods in SC and those who produce in SC and want to ship out of state. (doesn’t matter who owns truck) It affects all truckers, so you could argue that it safeguards the abuse through political process If it discriminates, then it is probably curtailed by dormant commerce clause IF legislative burdens fall outside state, unlikely to have political check Burdens here fall alike on both Stones Test:
1. Regulation to ends-Legislative end within states province
2. If means are reasonably adapted to ends sought (means here are the weight requirement/ends sought-roads up kept, safety?)
TEST: Valid is some rational basis for means end connection
F. Southern Pacific Company v. Arizona (addendum 4, p.228) (1945)-AZ law prohibited trains greater than 14 passenger or 70 cars. State sued company for statutory penalty violations. SC said burden on commerce is unconstitutional. Substantially impedes free flow of state to state commerce. Determined by competing demands of state and national interests. The burden would be great and practical effect is to control train operations beyond state boundaries. Total effect of law in reducing accidents is so slight as to not outweigh national interest in flow of interstate commerce. Not essential for safety. (dissent says leave balancing to legislature)
- means end inquiry (means not related to end enough): will the means really work to achieve legislatures end?
- inquiry-no rational basis or some rational basis (in Barnwell)
- TEST: valid if the means actually work
G. Bibb v. Navajo Freight Lines(Addendum 4, p.233)(1959)-greater scrutiny invalidated IL law requiring contour mudguards on IL hwys that conflicted with other states, which used straight ones. Made it necessary for trucker to switch at state lines. Interferes with changing of trailers. Therefore, it is a massive burden on interstate commerce. TC said contour guards are no more effective than straight. Burdens: change flaps or change trucks and multiple inconsistent burdens on trucking company. Invalidated because actual inconsistent requirements and big costs on interstate commerce. No problem with ends (safety). No problem with means ends.
H. Kassel v. Consolidated Freightways-(Addendum 234) (1981)-Iowa statute prohibits use of certain large trucks, Consolidated trucks go through Iowa. Most trucks were 65 feet, Iowa limits to 55 feet except cities on the state lines can adopt rules of connecting states. Iowa manufacturers could get permit to ship trucks 70 feet and oversized mobile homes to be delivered to or coming from Iowa permitted. State’s end: safety and road wear prevention. Total effect of safety law is so minimal that it doesn’t outweigh national interest of keeping flow of interstate commerce. Local law in area of local concern has strong presumption of validity but you must weigh safety against degree of interstate interference. State didn’t present persuasive evidence that smaller trucks are safer than larger and the law is different than all other states in the area. Substantial burden on IC and Consolidated showed burden. Safety is illusory. IA motivated by economics as well.
I. Baldwin v. Seelig-(Addendum 4, p. 254) (1935)-One of strongest and broadest statements against economic isolationism. NY state law had minimum prices to pay milk producers by NY dealers in order to stabilize milk prices. Prohibited NYY sales of out of state milk if it was bought for lower price than NY milk. Commerce clause barred the application of the law to out of state milk producers because set a barrier between states as effective as duties had been laid. Doesn’t matter if direct or indirect burden if it obstructs competition between states. Purpose of commerce clause was to prevent state aggression NY says they’re aiming to assure supply of good milk and farmers must earn a living income. Court says can’t use police power to reduce competition.

J. Henneford v. Silas Mason(addendum 4, 255, 1937)-Washington use tax on goods from another state was upheld (2% tax on retail sales within Washington and on price of goods for using in Washington goods bought at retail out of state that was inapplicable to any article already subjected to tax of at least 2%). Purpose of law-help local retailers competes with other retail dealers in other states exempt from sales tax. Upheld because burden is same in state and out of state. Motives alone don’t matter especially if the end is equality. Difference with Baldwin was attempting to project legislation into another state in Baldwin, whereas here it applies only when goods are used within the borders. (still permits some competition, Baldwin had none). Washington isn’t telling retailer what price to sell goods, only wiping out one advantage of out of state, but NY law wipes out all economic competition

K. Breard v. Alexandria-LA ordinance prohibiting door-to-door sales without consent of occupants. (Breard was TX national magazine that solicited door to door). Breard said undue burden on commerce. Court said it doesn’t discriminate against interstate commerce like it did in Dean Milk. Interstate commerce “knocks on local door”. Dissent says look at practical effects and it leads to favor of local retailers. Purpose of law-homeowners privacy

Who Benefits? Homeowners, local retailers.

Discriminatory? Other means to solicit orders (ads, flyers, etc.)

No fixed criteria (equal in and out of state) (purpose) (alternative means to same end)

L. Dean Milk v. Madison-Madison ordinance barred sale of milk unless processed/bottled at a plant approved and within five miles of central Madison. Even though purpose is safety and practicality, “the practical effects” exclude interstate commerce and therefore it discriminates. Reasonable alternatives to protect available, so the regulation is not essential. This is economic isolation. Dissent says it doesn’t bar wholesome milk.

Does the law discriminate? Yes-favors intra over inter (Southern Pacific or Barnwell)

Discriminatory because no political check on ordinance by people who are burdened because in town interests are benefited.

If burdens are placed on people who can’t do political check and not on those who can effect decision making unit, then it is discriminatory (look more than just on the fact of the statute)

M. Polar Ice Cream v. Andrews (class)-FLA milk distributor in FLA must accept all supply from designated daily farmers and you have to take all they produce. Polar got 30% from FLA and 70% out of state. Court says just like Baldwin because economic disincentive to going out of state and barriers to incoming trade and both purpose was to protect local economic interests (state law invalid)

N. Great Atlantic and Pacific Tea Company v. Cottrell- (addendum 5, 367) (1976)-Mississippi regulated sale of milk in Miss. Products from out of state could be sold in Miss only if that state took milk from Miss. As well (reciprocity agreement). Milk fully complied with safety and health requirements but it came from LA. Commerce Clause purpose is free trade among states.
If local and national interests are concurrent and no congressional guidance, balance needs of both. (local interest vs. burdens on interstate commerce)

If legitimate interest local then look at degree of burden. Also look at adequate less burdensome alternatives. Burden is excessive given benefit and other means are less burdensome (example is to inspect shipments from out of state if you want to ensure health)

**Pike balancing test:** merely burdensome (not discriminatory)-if law is merely burdensome and incidental effects on commerce then it is upheld unless the burden is clearly excessive in relation to the benefits.

O. Hunt v. Washington State Apple Commission-(Addendum 5, p.17 (335)(1977)-NC statute required all apples to have a grade equal to the US standard. Washington state apple commission had their own special grading. Law declared invalid. NC end to protect citizens from fraud and deception. Applies balancing test: 1. Costs fall not on NC but other states (NC not forced to alter their grading practices) 2. Strips Washington of competitive economic advantages it earned through expensive grading system 3 leveling effect advantages local producers because Washington apples were at or above average and had distinct market advantage but if marketed under USDA grades, effect of an embargo.

Hunt Test: if legislation is **discriminatory (not merely burdensome)**-Burden is on state to justify in terms of local benefits and unavailability of nondiscriminatory alternatives adequate to accomplish same local alternatives

Pike Test: if legislation is **merely burdensome**-burden of showing that the negative consequences are more important than the benefits falls on the \[ \] Differences between the two: 1. Who has the burden and Hunt requires stricter scrutiny Under Hunt test, this fails because it doesn’t really work to achieve consumer protection end (means don’t work because closed containers of apples are only dealt with by wholesale mfg, not consumers. Also if confused consumers, it is to your benefit (better apple) and regulations won’t do anything to achieve consumer protection end. Court also says different means to ends are less burdensome (could allow state grades and USDA grades or prohibit grades inferior to USDA grades.)

P. Exxon v. Governor of Maryland-(addendum 5, 37/120)(1978)-MD statute that producer/refiner of petroleum may not operate retail station within state and must extend all voluntary allowances uniformly to all service stations it supplies. Statute was a response to a 1973 shortage and refiners or producers operating stations had preferential treatment. Exxon filed declaratory judgment challenging it, saying it discriminates against interstate commerce. Court says no because entire gas supply is interstate and no local producers or refiners, so no barriers against interstate independent dealers, in state independent dealers will have no advantage over out of state. Also say undue burden on IC commerce because refiners would stop selling in MD. Court says commerce clause doesn’t protect a specific structure or market. Also say no state has power to regulate retail marketing of gas because nationwide market or cumulative effect. Court says commerce clause rarely preempts entire field from state regulation and it is not a problem of national uniformity. Dissent applies Hunt test, says it discriminates. Local retailers and out of state non producers are beneficiaries (99% in state), and Burden falls mostly on out of state producers and refiners. Majority says not discriminatory because all petroleum comes from out of state and commerce clause doesn’t protect specific structure. Same amount of petroleum will come in from out of state. Out of state companies can still continue in business. MD placing burden on all producer refiners who operate service station so no difference between in and out of state. In Hunt, burdens fell only on out of state apple people. (dissent-here it does discriminate but in a state with more producer refiners, a law could be sustained under dormant commerce clause because there would be in state political checks.)
Look at allocation of benefits and burdens to see if local government has allocated fairly. Who is winning and who is losing?

IV: Examples of Limiting Access of Out of Staters to Local Products (Out of State Buyers of Locals)

A. Eisenberg-PN minimum price regulation to NY milk dealer who bought milk from PN producers for shipment out of state. PN set minimum price to be paid by dealers to milk producers and required dealers to obtain a license. Law upheld because purpose is to reach domestic situation in welfare of producers and consumers interest in PN. The activity affected was essentially local and dealers in PN had to obey them. Only small amount of milk produced in PN is shipped out of state so the burden on interstate commerce is only incidental. Different than Baldwin because that act was aimed at interstate commerce and regulate the price to be paid for milk by another state. Harm would be caused to PN dairy farmers and therefore may not guarantee supply of adequate milk. In NY statute, barrier on VT farmer, but in PN statute, barrier on PN farmer. (regulates dairy farmers regardless of where they are from) If you are Δ a law, look at money, costs, etc. and say all treated same. If opposing look at burden of in state vs. out of state and think about all possible parties that are burdened.

B. HP Hood and Sons v. DuMond-Hood, Boston milk distributor, sought a license to establish a fourth NY depot and was denied because there was a state law that licenses for new plants couldn’t be issued unless it would not destruct competition. State law invalid. (purpose was to protect and advance local interests) NY was in short supply of milk. Dealers who intended in state distribution had receiving depots in same area as Hood. Interest is to either protect citizens economy by keeping milk prices down or to protect safety? Black says effects: same result would happen regardless of intent to distribute inter or intra state so it is nondiscriminatory. Jackson (majority) says it curtails interstate commerce to aid local interest.

C. Cities Services Gas Co. v. Peerless-state regulated natural gas prices to conserve natural resource. OK agency fixed minimum price taken from a field and required pipeline company to pay more than prevailing rates. Most of gas destined for OK. SC upheld because there is no clear national interest so harmed that state price fixing orders are barred by commerce clause. Different than Hood because Hood denied facilities to a company in interstate commerce only because it would divert milk supplies needed by local consumers (discriminated against interstate) but here, the price regulation applies to all gas regardless of who it is going to.

D. Philadelphia v. New Jersey-addendum 4, p. 243 (1978)-NJ law prohibited importing waste from outside other states. Private landfills in NJ challenged. Law unconstitutional because it was economic isolationism. If a statute is discriminatory on its face, per se rule of invalidity. But if other objectives advanced, look at Pike. Inquiry-protectionist or directed to local legitimate concerns with only incidental effects on IC? We assume NJ has every right to “protect its residents’ pocketbooks as well as their environment.” It can’t accomplish this, however, by discriminating against interstate commerce unless there is some reason to treat it differently. NJ if really concerned about health and safety, could find other means such as restricting all waste regardless of where it came from.

If simple economic protectionism-invalid per se virtually
If non economic and no patent discrimination-Pike balancing test
If discriminatory in effect but not on face-Hunt

E. Hughes v. Oklahoma-Hughes transported natural minnows in violation of law that prohibited shipping for sale if stream natural (vs. hatchery) outside of the state. Brennan and majority says that this discriminates on its face because you couldn’t use the fish anywhere but OK. Dissent says it doesn’t because not much of a burden because fish are basically the same from both and it doesn’t matter if company that wants to sell out of state is from OK or somewhere else. F. New England Power Co. v. New Hampshire (addendum 4, 268)(1982)-strong and succinct modern statement condemning state restrictions on export of natural resources. State law
banned exportation of energy if it was required for use within the state. Overturned because it is protectionist regulation that is not allowed under the Commerce Clause. The exportation ban places direct and substantial burdens on interstate commerce that cannot be justified under commerce if they are only advancing simple economic protectionism.

G. Foster Fountain Packing Co. v. Haydel (addendum 4, 269) (1928)-Invalidated home state processing requirement. LA law banned shipment of shrimp outside of state until it had been processed in LA. Invalidated because purpose of the law is to favor canning of meat and mfg of bran in LA. Practical operation an effect of provisions burdens interstate commerce. (who wins-in state processors. Who loses-out of state processors)

H. Pike v. Bruce Church(addendum 4, 269)(1970)-AZ law prohibited Church, an AZ cantaloupe grower, from shipping uncrated cantaloupes. They had to be packed in AZ and identified with AZ. Law first passed to protect AZ growers reputation by not letting shipment of inferior produce, state also wanted to promote and preserve reputation of AZ growers by prohibiting deceptive packaging. Law invalidated. **Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.** Applying balancing test, law not intended to promote safety or protect consumers but rather help reputation of AZ growers. The burden on the companies are very costly which is more significant than its extent. Therefore, invalid.

I. Minnesota v. Cloverleaf Creamery-sale of milk in paperboard okay but prohibits plastic non-returnable and not reusable paperboard. Purpose-conserve energy and resources, reduce waste problems. State court found the ban wouldn’t work to achieve those ends and actually was counter productive. Court uses Pike test because it is burdensome but not discriminatory. Not discriminatory because-someone is adversely affected in state and they could use political process (merely burdensome).

MN statute upheld because burdens are no clearly excessive in relation to interests of promoting conservation, etc. (dissent says ignoring findings of trial court.). SC defers to ends as stated by legislature without examining if means fit the ends.

J. Questions: Burdensome or Discriminatory? Health and Safety or Economic?

K. CTS Corp. v. Dynamics-IN law-if you acquire control of shares in IN corporation, you could only get voting rights if approved by majority of prior disinterested stockholders.

Discriminatory or Merely Burdensome?

Discriminatory because it doesn’t matter who buys the shares –vs.- Discriminatory because if IN has special law to protect from takeovers and IN corp. would know about it and out of state wouldn’t.

Purpose?

General Welfare- protect shareholders-valid

Protect Corporations-invalid.

L. Maine v. Taylor (own addendum, front) (1986)-Maine statute prohibited importation of live baitfish. Uncertainties of baitfish parasites and effect on wild fish population. SC says constitutional because evidence shows that there is a legitimate local purpose that can’t be served by other means. (SCs framework for dormant commerce clause p. 138).

1. Does it burden interstate commerce incidentally (merely burdensome) or does it discriminate against interstate commerce?

If merely burden then constitutional unless burdens are clearly excessive in relation to local benefits (Pike)
If discriminatory then burden falls on state to show local legitimate purpose and that it couldn’t be served by other non discriminatory means.

### Dormant Commerce Clause Analysis

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### Market Participation Exception

A. A state is a market regulator when it acts to regulate what other parties can do within their contractual relationships. It is a market participant when it is a party to a contract and makes business decisions for itself. When a state acts as a market participant rather than a state regulator, it can discriminate against out of staters for any reason including local economic advantage and is immune to dormant commerce clause analysis. As soon as a state tries to control terms of a contract to which it is not a party, it is acting as a regulator.

A. Theory for Exception-state is analogous to privately owned business when it is participating in the market. Rules of private companies in running their business applies.

- Does the government really operate the same as private? Not really
- What is the difference between regulating private company by saying no one can sell cement outside state until all in state demand satisfied or SD choosing not to?

B. South Central Timber Dev. V. Wunnicke (addendum 4, 276)(1984)-Alaska had special provision in timber sales requiring that it was partially processed in Alaska. Court said market participation exception doesn’t apply here because there were conditions that have substantial regulatory effect outside that particular market. Here, Alaska is regulating business between the processor and the purchaser that Alaska itself wasn’t a party to.

C. Hughes v. Alexandria Scrap-MD statute-pay bounty to junkyards to dispose of junk cars that had been registered in MD. Junkyard shares bounty with truckers. MD junkyard had to submit simple document about where from. Out of state scrap yard had to fill out much more detailed records. Alexandria said interference with flow of bounty eligible tow trucks across state lines. SC doesn’t even look at the tests. **When a state enters the market as a purchaser of goods (purchasing hulks) then state is immune to commerce clause analysis.**

D. Reeves v. Stake- (addendum 4, 282)(1984)-State owned cement plant and 40% used to be sold out of state but later when SD boom in industry, state demand exceeded in state supply so commissioner of plan said that all in state demand must be met before selling out of state. SC says dormant commerce clause is irrelevant because state has entered market as a seller of goods.

E. White v. Mass.-mayor of Boston issued an executive order that said all city construction projects funded by the city must have ½ employees Boston residents. SC said city is buyer of labor so it can do what it wants. Constitutional right to contract.
Privileges and Immunities

I. General Rule

Privileges and Immunities Clause of Article IV prohibits a state from denying out of staters privileges that it grants to its own citizens. Protects only individuals, not corporations, and applies only when a state is discriminating against out of staters with a basic or fundamental right.

Examples: right to pursue occupation, own or dispose of property, access to state courts, right to come into a state.

II. State must show that it has a substantial reason for discriminating against an out of staters and that it is substantially related to achieving the states goals.

III. Cases (infrequently litigated)

A. United Building v. Camden-municipal ordinance requires that at least 40% of employees of contractors and subcontractors working on city construction projects be Camden residents. Municipal ordinances are subject to privileges and immunities doctrine.

Two step inquiry: 1. does ordinance burden a privilege and that is protected?
   (only those that bear on vitality of nation as single entity)
   (fundamental interest)
   -here, yes pursuit of common calling.

2. Is there a substantial reason for the difference in treatment?
   (does a reason exist and is the degree of discrimination closely related to those reasons?)
   -here it is remanded because not enough evidence

B. Corfield v. Coryell- fundamental rights inquiry (all citizens have same fundamental rights)

C. Toomer v. Witsell-Court invalidated law that charged 2500 for shrimp license when in state was only 250.

states justification for discriminatory treatment

Purpose of this clause is that citizens of all state have same privileges. Test: 1. substantial reason for discrimination and 2. the discrimination bears a close relationship to reasons for it.

Can charge in state and out of state different tuition because interest in disc. Tuition is to let taxpayer money go to its own students.

What if state’s end is well educated work force? Probably wouldn’t work because in state may leave or out of state may state so the end doesn’t work.

Is education in another state a fundamental right?

D. Baldwin v. Montana-hunting elk not a fundamental right because not a basic essential activity and interference of it wouldn’t interfere with purposes of nation. (Brennan dissent says that it doesn’t matter if fundamental right. If a state lets its citizens do it, it is deemed important.)

E. Hucklin v. Orbeck-Brennan uses Toomer test (Baldwin dissent)

F. Piper Case-can’t be member of bar unless you’re a resident -adds a third step to the test (3. availability of less restrictive means)

-Interest in practicing law is fundamental right
-Law is vital to economy and out of staters may be more willing to represent unpopular party or client.

Reasons for discrimination

1. Nonresidents less likely to know court rules and procedures
court: no reasonable lawyer would not know

2. In state lawyers more likely to be ethical
court: if member of bar, subject to same sanctions regardless of where you live

3. More available for court proceedings
court: maybe but could still make sure this is the case without discriminating such as saying that you must have office in there or another contact.

4. more likely to do pro bono work in state
court says that everyone does it as a matter of court rule and lawyers volunteer to cater good image and court rules regulate it), none of these ends are served by distinction and the only one that might be served can be served by less burdensome ways.

Examples of invalid discrimination: excess shrimp licensing fee because it involved pursuing a livelihood, statute giving resident creditors priority over nonresident creditors involved basic rights of ownership and property, statue imposing residency requirements for abortion involved basic right to seek medical care, state law requiring employers to give hiring preference involved essential activity of pursuing a livelihood and rule limiting bar admission involved basic right to pursue an occupation.