Big Question: Which is better source of const limits on power to ensure fed and state each protected from incursion by the other – Judicial Intervention or the Political Process?

JUDICIAL REVIEW

1) **Cases within the national judicial power:** Article III, § 1 creates one Sup Ct with judicial power of US. Art. III § 2 cl. 1 sets up cases and controversies within the national judicial power of the US (cases arising under const and fed law … ). Art III § 2 cl 2 divides national jud power into orig (state as party, foreign public minister or ambassadors) and app juris (everything else).
   - App and orig juris mutually exclusive – if not orig, must be app. (*Marbury*)
   - Original Jurisdiction set in stone – cannot be limited or expanded by Congress. (*Marbury*)
   - Appellate Jurisdiction determined by *case* (if arises under const or laws of US), regardless of which court case arises from – ex: 1789 Judiciary Act § 25 granted three types of app juris over judgments issued by state’s highest court (state law) when those courts decided against fed law (Cl 1: where ques of validity of fed law and decided against validity; Cl 2: where ques of validity of state law as being repugnant to const and decided for validity; Cl 3: where ques of construction of fed law and decision against claim under such construction). (*Martin v. Hunter’s Lessee*)
     - Exception to app juris over state law decisions against fed law – *adequate and independent state grounds barrier*: where a state ct addresses both fed and state ques, its decision is not reviewable if state ground alone is sufficient to support judgment (b/c Sup Ct only has power to correct wrong judgments, not to revise opinions) - *Martin*

2) **To bring case in federal court, need:**
   - 1) within jud power (b/c party one of orig juris or b/c case arises under fed law for app juris) and
   - 2) statutory grant of juris (but if orig juris, no statute required)

3) **Power of Judicial Review – *Marbury v. Madison***
   - Narrowest Holding: In litigation before Supreme Court, ct may refuse to give effect to a statute it finds unconst where that statute pertains to jud pwr
   - Broader: Sup Ct has authority to decide all const issues in a case within its jurisdiction – the *case* creates occasion for jud review but doesn’t exclude exec and leg from also deciding const issues. (probably best understanding of case)
   - Broadest: Sup Ct is the only government body with the authority to decide const issues, and even non-parties to case must comply with Sup Ct decision – i.e. the law of case is the law of land.

LIMITS ON NATIONAL POWER (BY STATE SOV CONCERNS): 1st ask: is this 1) a private reg, 2) reg of states (w/ some analogous reg on private), or 3) requiring states to reg private; 2nd ask: is this use of 1) commerce clause; 2) spending power; or 3) taxing power (or war or treaty power)?

**Source of National Power: Art I § 8** (Enumerated Powers + N/P Clause)
Corollary: **10th amendment** reserving state pwr to do everything else not unconst

*Note: States *cannot* consent to federal intrusion on state’s role in a federal system because federalism exists to protect the **people** not the states.*

1) **NECESSARY & PROPER CLAUSE (Cl. 18): SOURCE OF MEANS** to carry into execution the enumerated powers.

   a. If the means employed by Congress (i.e. chartering bank, regulating ____, etc) not listed in enumerated powers, which is usually the case, *must use the N/P Clause* in connection with some enumerated power to validate!!

   b. Let the end must be legit and let the means be “appropriate, plainly adapted, and really calculated” to ends (*McCulloch*) - Use of N/P invites courts to inquire into:

      i. means/ends relationship (all our affecting commerce cases) and

      ii. whether end is really a pretext (but pretext reservation pretty much killed in *Darby* –as long as reg directly on IC or on LA affecting IC, doesn’t matter if real end is moral/social welfare/trad’l state police power goals).

2) **COMMERCE CLAUSE (Cl. 3):** “To regulate Commerce . . . among the several states”

   a. **NAT’L REG OF PRIVATE ACTIVITY (effect on states is that it displaces state policy choices):** 3 CATEGORIES of valid c/c reg (*Lopez/Morrison/Raich*). Court has final say (*Lopez/Morrison*), unlike in Marshall’s view in *Gibbons* that political process is sole restraint, *but* Court can hand back final say to leg by limiting to rational basis review (*Raich*).

      i. **Use of Channels of IC:** regulate or prohibit shipment/movement of goods in IC – always okay *without regard to motive – no pretext reservation b/c direct reg of commerce*. Can always prohibit use of IC channels to spread some evil (gambling, prostitution, unfair labor, bad eggs, abuse). Only check is political process.

         1. *Darby* (prohibiting interst shipment of goods produced by unfair labor practices), *Mann Act* (prohibiting movement of women for immoral purposes in IC), *Lottery case* (gambling), and *Hopolite Egg* (bad eggs).

         2. *Morrison n. 5 (VAWA criminal prov):* Ct upheld criminal prov as regulating use of channels of IC b/c reg punished crimes committed against spouses/partners *during interstate travel* and crimes committed by spouses/partners who *cross State lines to continue abuse.*

         3. Nat’l statutes criminalizing transportation of kidnapping victims interst, fugitives travelling interst to avoid prosecution, movement of stolen vehicles interst, etc. *Hobbs Act* (prohibiting threats of violence affecting IC), nat’l statutes criminalizing theft of interst shipments or attack of interst vehicles.

      ii. **Instrumentalities or Persons/Things in IC:** only case in this category is *Reno* “things in commerce” and even that unclear so not sure what this covers. Same deal as use of channels – no pretext reservation b/c direct reg of IC – only check is political process.

         1. *Reno* (Motor vehicle info which is sold and used in IC is a “thing in commerce” and so its release into IC is subject to reg under c/c) – sounds a lot like “stream of comm” but maybe not quite so broad.
2. **Some courts include the following two in this category but they seem more appropriately to fall into “affecting commerce”**
   
   a. **Southern Railway** (reg of trains requiring automatic couplers okay b/c train is instrumentality in IC), **Shreveport Rate** (reg of railroad rates b/c rates for IC movement is instrumentality in IC/direct reg of IC).

iii. **Activities [Substantially] Affecting IC:** through N/P use non-commerce means to carry into execution IC end. **Inquiries:**

1. **Economic vs. Noneconomic LAs:** Economic activities which subst affect IC within c/c (Lopez). Can only aggregate effects when LA is an economic activity. (Lopez- possession of guns in school zones is not econ; **Morrison** – violence against women is not econ). “Economic” can be defined as broadly as “production, distribution, and consumption of commodities” – can make almost anything “economic” (Raich). Also mention dissent’s worries in Lopez and Morrison about use of categories such as econ/nonecon to limit c/c (recall former problems with manf/producr vs. commerce [Carter Coal, Schechter, Knight] and direct vs. indirect effects tests).

   i. **Aggregation Theory** (Wickard): Allows reg of LA that is wholly local and in no way part of commerce, only if in aggregate activity always affects IC. (In Wickard LA was wheat farming for wholly home consumption but, in aggregate, amount of wheat farmed affected prices in IC wheat mkt – all wheat affects IC!!!). – Besides all activity having to affect IC, Morrison further limits aggregation to only econ LAs, all of which affect in aggregate IC (but again can make almost anything “econ”).

2. **Express Jurisdictional Element:** If not economic, may be okay if statutory provision requires a case-by-case showing that particular things subject to statute has explicit connection to IC. (Lopez; Morrison). A statute that includes prov that product being reg must “have moved at one time in IC” satisfies this jurisdictional element (Scarborough-reg guns like Lopez but that time okay b/c only reg only applied to guns “that have moved in IC”) so maybe just trying to make leg jump through hoop to show connection to IC in each particular case. ***Way to redraft stat to make valid under c/c is to include express juris provision – that way Congress, not court, takes responsibility for expanding nat’l power!!

3. **Legislative Findings:** Findings not required, but helpful esp when effect on IC not easily visible (Lopez). Even if findings exist, may not be convincing without empirical/real-world evidence to show IC actually affected (Morrison). But findings can be used as a way to give deference to leg, for court to determine whether Congress had rational basis for believing LA →IC without making leg jump through extra hoop of showing actual real-world effects. (Raich). ***Way to redraft stat to make valid under c/c is to include leg findings!!

4. **Link b/t LA and IC – 4-part inquiry:**
b.  Considerations:
c.  \( LA \rightarrow IC \): how close a link?: not be too attenuated (Lopez; Morrison). Close and substantial in J&L. Not trivial in Wirtz (Wirtz - ct said leg can’t use trivial impact on IC as excuse for broad reg on LA, but ok if LA as whole/whole enterprise subst affects IC, even if individual instances/ind. employees do not). Though not so close and substantial/more deference to leg in civil rights/popular issues like Heart of ATL; Ollie’s BBQ, now back to little more of a check to ensure leg doesn’t go too far (Lopez; Morrison).

i. Examples of okay LA→IC connections:

1.  \( Raich \) –LA: local cult/use of med. marijuana; LA→IC: high chance of locally cult pot diverted into IC channels; M: prohibition of LA; M→IC End: Prohibiting LA decreases vol. of marijuana in IC thereby decreasing IC mkt for drugs.

2.  \( Darby \) – LA: Wages/hrs of employees; LA→IC: wages affect prices set by employers for goods in IC mkt; M: reg wages/hours; M→IC End: reg on wages/hours controls prices in IC mkt.

3.  \( J&L \) – LA: labor relations in production industry; LA→IC: poor labor relations→more strikes→fewer goods produced and shipped into IC; M: require collective bargaining; M→IC End: collective bargaining→fewer strikes→more goods produced and sold in IC.

ii. Examples of more tenuous LA→IC Connections (maybe only okay for civil rights cases/popular causes)!!!

1.  \( Ollie’s BBQ \) – LA: racial disc in restaurant; LA→IC: racial disc→less customers→less sales→less food rest buys in IC; M: prohibition of LA; M→IC End: prohibiting LA increases customers, increasing sales, thereby increasing food bought in IC. But statute here had express juris req req particular showing that substantial portion of food served in restaurant had moved in IC (or restaurant serves/solicit interst customers) !!

2.  \( Heart of ATL Motel \) – LA: racial disc in motels; LA→IC: disc discourages interst travel by blacks; M: prohibition of LA; M→IC End: prohibiting racial disc leads to more interst travel by blacks. Unlike Ollie’s/restaurants, no express jurisdictional req –statute presumes that motels always affect IC.
5. Practical difficulty in distinguishing b/t LAs that do affect IC and LAs that don’t allows Congress to sweep broadly/reg both in order to execute its undoubted power to reg LAs that do (Perez and 5th Circ Lopez): Even if no juris element showing particular connection to IC, may still be okay if some of LA does affect IC (as opposed to all – where could use Wickard aggregation), and practical difficulty to dist which LAs do and which don’t so ets let Congress reg all (Perez – some loan sharking affects IC and some doesn’t but b/c can’t tell diff, leg can reg all loan sharking in order to execute its undoubted pwr to reg those that do). (5th Circ Lopez – some local drug possession affects IC by swelling IC drug mkt and some doesn’t but b/c hard to tell diff, leg can reg all).

   a. Nat’l criminal statutes often upheld under broad understandings of c/c b/c would be unpopular for states to oppose nat’l crackdown on crime.

6. Larger Regulatory Scheme (Raich – Scalia concurring) – sounds like Bootstrap but prob not: If not economic, may also be okay if part of larger regulation of economic activity. If failure to reg a nonecon LA would undercut larger econ regulatory scheme, LA can be reg as long as M reas adapted to IC end. ***Last resort - way to redraft stat to make valid under c/c is to incorporate into larger regulatory scheme of economic regulation!!

iv. Additional categories (rarely used and prob no longer valid – last resort):

1. Stream of Commerce: once good “in” IC, forever labeled IC and subject to reg
   a. Death knell in J&L, but maybe revived in Reno (likely not b/c almost everything has been “in” stream of comm so would be no limits to c/c and would go against Lopez, Morrison, and Raich – which are still good law).

2. Bootstrap: prohibition of interst shipment + reg of LA to execute prohibition
   a. Need only 1) prohibition of interst movement + 2) M→Prohibition End. Don’t need to inquire into LA→IC.
   b. Only ever used in alternative Darby rationale and Five Gambling Devices dissent. But even in Five Gambling dissent, only accepted bootstrap to validate information-eliciting/reporting requirements not reg of LA.

b. NATIONAL REG OF STATE ACTIVITY w/ some analogous private regulation (effect on states is imposes higher costs, affecting choice of goods/services states provide to its citizens): Current rule = 1st ask: would reg on private be valid? 2nd ask: is regulation generally applicable (applies equally to private and public activities). If yes to both = valid exercise of c/c (Garcia and Reno). Reasoning is that a generally applicable regulation (or tax) has a built-in check in the political process to prevent abuse (b/c Congress made up of state representatives applying reg/tax uniformly, including on own constituents, so can appreciate the burdens). [Note: not many cases where reg is not generally applicable b/c very little that is solely a state function and those that are prob wouldn’t be reg b/c of political process check anyways – but if found one could prob use
some version of reading Blackmun’s NLOC / Fry / Stone’s balancing test in NY v. US min waters to balance impact on nat’l interest by allowing immunity vs. impact on state sov through subst cost affecting policy choices by allowing reg].

c. NATIONAL STAT REQUIRING STATES TO REG PRIVATE ACTIVITY (effect on states is shifts state govt resources from state’s own priorities to national priorities): can “encourage” states to reg private activity according to nat’l standards but cannot compel them to do so. Again, 1st ask: would reg on private be valid? 2nd ask: is this valid “encouragement” or invalid “coercion.” Ways Congress can validly make these #3 stat to “encourage” states to regulate private using fed standards:

i. S/P: Give money to states on the condition that states agree to regulate private activity using fed standards as long as pass 4 s/p limitations (see Dole under S/P)

1. Is it coercion if fed creates spending plan to put great political pressure on state to adopt fed-approved plan (say as in Steward where tax on private employers and get 90% credit if adopt fed-approved unempl compensation plan – if state did not adopt fed plan would have to either have no plan [in which case employer taxes would go to other states] or tax employers twice because would have to pay for own non-complying plan)- but ct said this is no more coercion than what accompanies any tax, and ok as long as Congress spending for gen welfare (which unempl is)→ little “coercion” limit on s/p b/c states always have “choice” to turn down money.

ii. Supremacy Clause: Give states choice to adopt fed standards or face fed pre-emption (assuming fed could reg directly using c/c) b/c at least that way full burden/costs of reg would fall on fed (in Hodel Congress gave choice for states to adopt fed surface mining standards or be pre-empted by fed)

1. **Regulatory Void??**: In FERC, states didn’t have much of a choice – could either adopt fed utility rate standards or have no utility reg at all (b/c fed said would not pre-empt but states could not reg according to own standards either) so choice was really b/t adopting fed standards or facing regulatory void→maybe seems like more pressure than Hodel but upheld in FERC and affirmed in NY v. US so prob still valid “encouragement.”

iii. **Imposing Costs**: Can authorize other states to burden IC (consent to dormant c/c violations) by increasing costs on non-complying states and thereby orchestrate political pressure on states to adopt nat’l standards (NY v US).

iv. **Examples of invalid coercion:**

1. Giving states a “choice” to adopt nat’l standards or submit to a command which Congress has no authority to order (b/c Congress lacks power to offer as a choice something that is beyond its authority to order, and then the only “choice” would simply be a direct command to regulate which is unconstitutional standing on its own). *Example in NY v. US* is the take-title provision which gave choice to adopt fed standards or force state governments to take title to waste where Congress had no authority to order such a forced transfer so because both “alternatives” amount to commands, the whole provision is invalid coercion.
2. Language which says states “shall” do something to regulate private activity crosses line into compulsion unless provision also contains incentives which can imply a “choice” (Printz – “states shall conduct background checks on handgun purchasers” was invalid but NY v. US also said “shall” but then included 3 “incentive provisions” which ct read to give choice). Note: probably in Printz if Congress had just authorized w/out requiring state officials to follow these reporting requirements, most would do so and only handful w/ strong lobbies would not →cooperative federalism b/t fed and states is not based on mandates but simply a willingness to cooperate.

3) TAXING POWER (Cl. 1): “To lay and collect taxes, duties, imposts, and excises …”

a. TAXING PRIVATE ACTIVITY: Taxing power allows Congress to tax a purely local activity without any connection to IC. Taxing power is broad and exhaustive – leg can tax anything it wants and the only limit is the inclusion of extraneous “regulatory” provisions not reasonably adapted to t/p end of collecting tax/raising revenue. Questions to ask:

i. Like c/c, there was once an “ends inquiry” / pretext reservation questioning ulterior motives by asking whether tax was really attempt to regulate by use of so-called tax as penalty (Bailey). However, Kahriger eliminated this inquiry from t/p (as it was eliminated from c/c in Darby) so that only limit to t/p is “means inquiry” which asks are the provisions reasonably adapted to the t/p end of collecting tax/raising revenue (under n/p) and not solely extraneous to achieve some non-enumerated end (okay if mostly goes to achieve ulterior motive as long as related to even negligible revenue raising).

1. Examples: Kahriger where ct upheld tax on gambling + registration requirements because the registration requirement provided info on taxpayers to facilitate collection, even if revenues raised were negligible and mostly registration req went to ulterior motive to suppress gambling. See also Doremus where Congress taxed manf/import/sale of drugs w/ very small tax + registration requirement – real purpose was probably to suppress drugs but b/c registration requirement provides info on taxpayers to facilitate collection, ct said means reas adapted to end of collecting tax/raising revenue [so okay if also adapted to ulterior motive]. Even in Bailey where ct said specifying ages/hours of employees not reas adapted to tax collection would now prob be okay b/c identifies object to be taxed [even if also adapted to ulterior motive of suppressing child labor].

ii. Note: though taxing power is a sep pwr, it (or any other enumerated power) can be used as a means to carry into execution another enumerated power under the N/P clause (Veazie Bank could say that tax on personal bank notes was means to carry into execution cl. 5 enumerated power to secure nat’l uniform currency) (McCray could say tax on yellow oleomargarine was really means to carry into execution c/c pwr to protect/promote IC sales of butter).

b. TAXING STATE ACTIVITY (w/ tax on some analogous private activity): Sometimes, states may be immune from federal taxation: depends on 3 understandings of NY v. US mineral waters (nat’l tax on mineral water sales from NY state spring): Though this is the last word on t/p, today court would probably come out on Frankfurter’s nondisc side as did w/ c/c #2 reg on states using same rationale as Garcia and Reno.
i. **Frankfurter’s Non-discrimination** (+ Rutledge’s clear statement by leg): tax which applies equally on private persons upon same subject matter = valid but if on activity uniquely capable of being perf by state = invalid and state is immune (+ Rutledge wanted clear statement from leg that tax intended to reach private and state alike). This approach seems like most in line w/ recent ct decisions re: c/c reg of state activity even though also sounds like proprietary vs. governmental function distinction which ct rejected.

ii. Stone’s Balance loss of revenue against intrusion on state sov: see how much allowing immunity would impact fed revenue collection vs. how much allowing tax would impair state sov functions (but criticism is balancing apples and oranges)

iii. Douglas’s All state activities immune: whether akin to private enterprise or not, all state activities are governmental functions.

4) **SPENDING POWER (Cl. 1):** “to pay the debts and provide [aka: spend] for the common defense and general welfare of the US.” Litigation about scope of s/p rare b/c of restrictive doctrines regarding standing to sue (only when tax goes into special earmarked fund rather than general treasury can a taxpayer attack spending out of that earmarked fund – that’s what happened in *Butler*, but after *butler* leg never earmarked taxes again so immunized from attack by taxpayers on validity of s/p). But s/p important to show gov’t involvement in regulation through conditioned spending. **If can’t reg something directly using c/c, can prob do it using s/p by issuing conditional grants** – s/p is sep pwr not limited by limits on other enumerated power. Objectives not thought to be w/in enumerated powers may nevertheless be attained through s/p.

   a. **POSSIBLE LIMITS ON S/P:** to ensure inducement is not so coercive that it passes point at which pressure turns into compulsion.

   i. Probably, again, no real ends inquiry/pretext reservation: Though s/p supposed to be used to achieve general welfare and not for a particular few because ct has said it is for Congress to decide whether spending is for gen welfare so prob even spending for few would be left alone by court b/c w/in Congress’ discretion)→ also big time national problems may not be justification for c/c but they are for s/p (promoting general welfare).

   ii. There must be a clear/unambiguous statement of funding condition (to clearly outline “choice” to comply w/ condition or turn down money from beginning).

   iii. Means scrutiny: Are conditions (means) reas adapted to the fed interest in spending program (s/p end of promoting general welfare) – note this is a very lax scrutiny and allows attenuation where c/c wouldn’t b/c leaves w/in discretion of Congress to decide whether spending is for gen welfare or not (see examples under s/p conditioned on state activity below)

   iv. Conditions must not violate any independent constitutional provision (such as due process or equal protection).

b. **SPENDING w/ STATE REG CONDITION:**

   i. Means scrutiny can be lax: *Oklahoma v. Civil Service Comm’n* across-the-board condition that no state employee in a federally financed program can take part in politics→condition didn’t seem to be reas adapted to end of promoting efficient hwy transportation but could say employees involved in politics would increase
lihood of corrupt use of funds and decrease efficient hwy transportation
(seems attenuated but not so much concern w/ s/p)

c. **SPENDING CONDITIONED ON STATE’S REG OF PRIVATE ACTIVITY:**
Congress can try to “encourage” states to regulate private activity according to nat’l standards indirectly through s/p rather than directly through c/c by offering states money on condition that they adopt nat’l standards as long as pass four limitations above (South Dakota v. Dole – where ct said drinking age was reas adapted to achieve to hwy safety [gen welfare end]) (cited in NY v. US). Again, encouragement must not be so coercive as to turn into compulsion – but coercion not often found w/ s/p b/c states always have “choice” to turn down money (see Steward). (ct has looked to how much states would lose by turning down money/not following condition but not success of program in achieving Congress’ objectives to say its coercion)

i. Is it coercion is fed creates spending conditions to put so much political pressure on state to adopt fed-approved plan (say as in Steward where tax on private employers and get 90% credit if adopt fed-approved unempl compensation plan – if state did not adopt fed plan would have to either have no plan [in which case employer taxes would go to other states] or tax employers twice because would have to pay for own non-complying plan)- but ct said this is no more coercion than what accompanies any tax, and ok as long as Congress spending for gen welfare (which unempl is).

5) **WAR POWER (Cl. 11):** “To declare war …” includes power to remedy evils which have arisen from war’s rise and progress and continues for duration of that emergency, but Congress has power even after cessation of hostilities to act to control forces that a short supply of needed article (caused by war) created (under N/P clause).

a. **W/P (private):** Means/ends relationship can be very attenuated for W/P and usually justified by the big national interest in remedying “emergency” situations created by war. Sometimes this power lasts long after war b/c debts and effects of war last so long – worry of Justice Jackson in Woods. Ex: Congress has power to regulate rents under N/P as a means to carry into execution its power to declare/run war b/c need to provide housing for troops/families as war winds down (Woods), or Congress can prohibit alcohol to promote efficiency of production of grain as a means to remedy short supply created by war (Hamilton).

b. **W/P (state):** In Case v. Bowles ct upheld leg which set upper limits on prices of goods as applied to state-owned timber under war power by balancing imp nat’l interest in controlling inflation during war against little impact on state sov (not much explanation) – but now could prob use c/c #2 (Garcia) and t/p#2 (Frankfurter nondisc in NY v. US mineral waters) to say as long as reg applies to both private and state activities, w/out even having to look at big nat’l interest in emergency/war situations, to say valid.

6) **TREATY POWER** : N/P can be used to execute Art. 1 enumerated powers as well as all other powers, including Art II § 2 power to make treaties. Congress can use N/P to make national statute to carry into execution treaties. (MO v. Holland). Worry is that leg would use treaty power + n/p to do what could not do under other enumerated powers. But ct responds that there is still a constitutional limit to the treaty power (so prob can still inquire into means/ends relationship though, again, doesn’t really matter if attenuated).

**LIMITS ON STATE POWER (IN INTEREST OF NAT’L POWER):**
1) **DORMANT C/C:** Unlike t/p, c/c cannot be exercised by both state and fed concurrently b/c necessarily conflicts if regulations differ (*Gibbons*). States can regulate by police powers activities which have also have an effect on commerce but dormant c/c limitations arise when the state law burdens or discriminates against IC. Mostly industry brings dormant c/c challenges b/c prefers having to comply w/ one nat’l reg (even if strict) than 50 state regs. **But note:** one consequence of finding dormant c/c prohibits state law is that only Congress can reg and if for some reason Congress can’t, there would be a regulatory void. Also concern that ct is acting like a “super-legislator” and substituting its judgment for that of state leg. **Note:** Congress can consent to / authorize states to enact laws that court would find violates dormant c/c **but the authorization must be in “unambiguous, plain terms”** (so that the responsibility can clearly be laid on Congress) – *Maine v. Taylor*.

   a. **1st ask about Effects: discriminatory or merely burdensome?** Ask: 1) who made the law (city/local or state)?; 2) who is benefitted (INS/INT)?; 3) who is not benefitted, or worse burdened (OOS/OOT)? Try to argue both by changing focus (i.e. in *Clover Leaf* if analyzed by effects on milk retailers, could find burden equally on OOS and INS, but if looked at effects on raw material providers would see discrimination b/c burden fell primarily on OOS w/ benefit to INS).

   i. **Discriminatory:** on face or in effects, burdens OOS w/ no corresponding burden and prob even a benefit on INS (so no political check b/c no burdens on state’s own constituents). **Hunt Test:** where law in practical effects is found to disc against OOS in favor of INS, **state has burden** to show 1) local interests outweigh discriminatory effects and 2) that nondiscriminatory alternatives are unavailable.

   1. **Facially Discriminatory:** examples:
      a. Expressly draws a distinction between INS and OOS
      b. Expressly places OOS businesses at disadvantage or acts to help INS businesses at expense of OOS businesses
      c. Prohibits either import of OOS good (*Philly v. NJ*- prohibited import of OOS garbage; *Maine v. Taylor* – prohibited import of live baitfish) or export of INS natural resource/good (*Hughes v. Okla.* – prohibited export of INS minnows – **but note** if we switched focus from effect on those who could receive minnows [only INS not OOS = disc] to effect on those who could distribute minnows [neither INS nor OOS = merely burdensome], could argue either way but disc more obvious.

   2. **Facially Neutral but Discriminatory Effect:** examples
      a. Effect is to exclude all OOS or most competitive OOS from particular market (*Hunt*)
      b. Imposition of costs on OOS that INS would not have to bear
      c. Actual statistical effects show that vast majority of those benefitted are INS and/or vast majority of those burdened are OOS (*Exxon* dissent) – **note:** statutes which try to undercut biggest OOS competitors but leave insignificant OOS competitors unaffected might reveal state leg’s clever attempt to try to avoid dormant c/c problems – *Exxon* majority fell for this.
      d. Local regulations that place some burden on OOS even if also does on INS that are in other parts of states (especially where INS cities can adopt similar measures in their own cities b/c then clear political process won’t protect OOS).
ii. **Burdensome**: burdens OOS and INS alike (so political process should provide a check b/c state’s own constituents will push for balance). 

**Pike Test**: where law is evenhanded in treatment of INS and OOS interests, the **party challenging stat has burden** to show 1) burdens on IC outweigh local interests and 2) must come up with less burdensome alternatives. Though cts tend to scrutinize the means/ends relationship of local interests to make it easier to say burdens on IC clearly outweigh local interests (b/c no real local interest being served), there is an argument that where burdens fall evenly on OOS and INS, should defer to state legislature b/c the political process provides built-in check on abuse (don’t need jud intervention) - Stone’s *Barnwell* opinion and *Exxon* dissent. Scalia would not apply dormant c/c at all to merely burdensome laws – only to discriminatory laws.

b. **2nd ask about Purpose to help weigh state interest: economic or health/safety? How to det purpose?** Can look to what state gov’t said when leg enacted, what lawyers say at trial (may be more suspicious), or can look at what statute actually does to find that actual purpose is different than avowed purpose (i.e. if avowed purpose is health/safety but there is an exemption for INS, seems more like econ purpose b/c if leg really cared about health/safety, would apply rule equally to INS and OOS, or if avowed helath/safety but doesn’t seem to work well to achieve health/safety, maybe really econ purpose; or if seems very clearly econ/say reg prices – can argue that merely trying to ensure producers don’t cut saety corners so really health/safety). Try to argue both, and then come out one way or other – can usually go by what seems most obvious.

1. **Economic**: if purpose is economic, burdensome laws are harder to sustain (though not fatal – see *Silas Mason* where OOS had compensatory tax to equalize w/ INS sales tax – economic purpose to eliminate sales tax competition but ct upheld because did not go so far as to eliminate all price competition in that OOS could still set prices however low they wanted. *Cf Baldwin* where econ purpose which elim all price comp was invalidated. Econ purpose in discriminatory laws, though, can be arguably per se invalid (*Philly v. NJ*).  
   a. **Examples**: is state trying to restrict competition (protectionism)? Trying to prevent OOS from undercutting/competing w/ INS - better reading of *Baldwin* – can’t sell OOS milk at lower price than INS milk. Trying to deflect traffic around state @ expense of other state – one reading of *Kassel* restriction on truck lengths.

2. **Health/Safety (also includes consumer protection and environmental/natural resources protection)**: If strong health/safety purpose, can make easier to uphold burdensome laws and **maybe** even discriminatory laws if can show outweigh discriminatory effects (*Mintz* – Bang’s disease; *Breard* – privacy of home w/ door-to-door peddling prohibition). However, courts may scrutinize avowed health/safety purposes w/ means/ends inquiry to minimize local interests in the respective balancing tests (making the balance much easier) – and hard to find strong enough health/safety purpose for discriminatory laws, b/c if really cared about health/safety, wouldn’t state have same rule for INS?  
   a. **Examples**: is state merely using valid police powers to protect health/safety/welfare of citizens. Trying to regulate prices merely
to ensure producers don’t cut safety corners and endanger health/safety of product -the other reading of Baldwin. Trying to improve hwy safety by reducing length of trucks so easier to pass – better reading of Kassel. Trying to preserve ecology/protect environment?

c. Less Burdensome or Nondisc Alternatives: Sending INS health/safety inspectors OOS rather than requiring products be inspected/produced/etc INS; limiting export/import rather than banning altogether;

d. MARKET PARTICIPANT EXCEPTION to Dormant C/C: Dormant c/c does not apply to state’s exercises of its own purchasing or selling power (as opposed to when states reg private activity. State may discriminate in favor of INS, even overt facial disc, when it is buying or selling goods/services. Ex: if buying – can offer more to INS than OOS (Alexandria Scrap); if selling from state-owned entity can refuse to sell to OOS until all INS needs met (Reeves); if employing / ”purchasing” labor, can hire more INS public employees than OOS (White). But discrimination is only allowed in the course of the state’s own dealings – not valid when it tries to restrict private parties in mkt in which state is not participant – in Wunnicke Alaska tried to condition sale of state-owned timber on requirement that purchasers process timber INS before shipping OOS and ct said invalidated as disc + econ purpose = per se invalidity w/out considering mkt part exception b/c said state was not a participant in the processing mkt so it could not restrict post-purchase activities in a different, private mkt.

2) PRIVILEGES AND IMMUNITIES CLAUSE (Art. IV § 2): “The citizens of each state shall be entitled to all of the privileges and immunities of the citizens in the several states”: Like dormant c/c, P/I limits state (or city) efforts to bar OOS from access to local resources. When dealing w/ city ordinance, and all cities can adopt similar measures, then INS protected by political process and only real discrimination is against OOS so P/I only protects OOS (Camden).

3-part inquiry (Camden):

a. Whether the law/ordinance burdens one of those privileges and immunities protected by the clause – i.e. a fundamental right?
   i. *fundamental right – rts/activities, interference with which would frustrate purposes of formation of the nation / would affect national economy. Most cts held that private employment / occupations are fundamental rts b/c of importance to nat’l economy but Camden did not reach ques of whether right to govt/public employment (as opposed to by private contractor funded by govt) is fund rt – suggest probably not.

b. Whether there is a substantial reason for discrimination apart from merely difference in state citizenship / municipal residency, and whether the difference in treatment bears a reasonable relationship to these reasons (i.e. whether OOS constitutes a peculiar source of the evil at which the law is aimed).

c. Whether there are less discriminatory alternative means to achieve the same objective (Piper added this inquiry, as did Toomer).

d. Differences b/t dormant c/c and P/I:
   i. P/I does not protect corporations – only individual citizens (why there are few P/I cases).
   ii. Congress may not consent to/waive/authorize violation of P/I
   iii. P/I does not extend to all commercial activity – only to exercise of “fund rts”
iv. No market participant exception to P/I (b/c P/I focuses on ind rts which can be affected both by reg and by conditions on state’s buying/selling goods (whereas dormant c/c focuses only on competing regulatory authority).

3) **SUPREMACY CLAUSE (Art. VI, Cl. 2) / PREEMPTION:** When Congress does exercise any enumerated power, fed law supercedes any contrary state law by the Supremacy Cl. Again, most preemption challenges brought by manf b/c they want one nat’l rule rather than 50 diff state rules. Also, cts prefer preemption challenges to dormant c/c b/c would rather place responsibility for invalidating state laws on Congress than jud limits.

**Ques to ask for preemption (very fact-specific so little meaningful black-letter law):**

a. What’s the fed law?

   i. Does it have either 1) an express savings clause to save certain state laws (“nothing in this chapter shall be construed to affect …”) or 2) an express preemption provision to preempt certain state laws?

   ii. If no express preemption clause, can *imply* complete preemption if 1) federal regulatory scheme so pervasive, leaves no room for state to supplement or 2) federal interest so dominant, assumed to preclude state authority over same subject.

b. What’s the state law? (and if there’s an express savings/preemption clause does the state law fit w/in the defined category?)

c. What’s the relationship b/t the fed and state law?

   i. Even if no complete preemption, to the extent laws conflict, state law preempted. **Can find conflict if:**

      1. Complying with both state and fed impossible, or
      2. State law frustrates / acts as obstacle to *purpose* of fed law
      3. *But note:* if state law falls w/in express savings clause, will not be preempted even if has add’l effect on fed purpose (ct will prob defer to Congress to change law if it wants) – PG&E