Introduction:

- Limits on Congress:
  - Can’t pass laws for the “general welfare”
  - Acts must fall within one of the enumerated powers given to C in the Const’n (States have reserved/residual powers → everything not given to the Federal Gov’t)
    - Enumerated Powers:
      - Article I: Section 8
        - Tax
        - Spend (for the general welfare)
        - Regulate interstate commerce (among the states, foreign nations, Indian tribes)
        - Immigration
        - Bankruptcy
        - Coin money
        - Postal service
        - Declare war
        - Raise and maintain armies/navies etc.
        - Acquire property for public use upon just compensation
        - Create federal courts below the S.Ct.
        - Necessary and Proper Clause
  - Police power allows the states to adopt any law not prohibited by the Const’n → there is no national police power
  - For a federal statute to be constitutional, must show
    - (1) It is a direct exercise of one of the enumerated powers, OR
    - (2) It is a valid exercise of one of the enumerated powers + the N&P clause

- When is a Congressional Statute Unconstitutional/Invalid?
  - Two ways to invalidate a statute:
    - Show that Congress has exceeded the scope of its powers
    - Show that while the law is presumably within a Constitutional power, it contradicts another provision in the Const’n

The Judicial Function in Constitutional Cases

Supremacy Clause:
- If Federal and State law conflict → Federal law wins
- If a State law interferes with the achievement of a Federal objective, it is invalid
- Even if a state law does not conflict with federally regulated conduct or objectives, if it appears that Congress intended to “occupy” the entire field, any state or local regulation is precluded.
Necessary and Proper Clause:
- Must be used with another Constitutional provision – not a power in and of itself
- Expands federal power
- “Useful or convenient” means not necessarily “necessary and proper”
- 2 types of inquiry under the N&P Clause
  (i) Means/Ends: Does the regulation actually promote an enumerated power/end? I.e. is the regulation actually a means to an appropriate end?
  (ii) Ends: Is the enumerated power really being used as a pretext by Congress to do things not entrusted to them under the Constitution? (Marshall’s “pretext” reservation)

National Powers and Local Activities: Origins and Recurrent Themes

a) *McCulloch v. Maryland* (Part I):
- MD imposed a tax on a US Bank – can Congress create a national bank?
- Congress must have a choice of means b/c the Constitution does not enumerate the means to enacted the enumerated powers – Constitution only enumerates ends.
- Interpretation of the NECESSARY AND PROPER CLAUSE: no need for the means to be absolutely necessary – Congress has a very broad power to select the means it wants to use to achieve its ends.
- 2 checks on Congress’ choice of means:
  (1) Pretext Reservation: If Congress enacts a law under the pretext of exercising one of its powers when Congress’ end is really an un-enumerated power, the Court can invalidate the law
  (2) Ends Invalidation: “Let the end be legit, let it be w/in the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional.”
  (a) Other than these two checks that Marshall reserved, the Court defers to Congress’s choice of means
  i) *U.S. Term Limits, Inc. v. Thornton*: (AK voters passed an amendment to state constitution limiting the terms of AK Congressional representatives) → Allowing a state to set term limits for its federal representatives is contrary to the democratic maxim that the people should choose whom they please to govern them, and is inconsistent with the Framers’ vision of a uniform and national legislature
    (1) Majority: members of Congress represent the people of the nation as a whole
    (2) Dissent: members of Congress represent the people their state

b) The Terms Limits Case and Structural Analysis
1) The Commerce Power

a) The Interpretation of the Commerce Power from 1824-1936
   i) *Gibbons v. Ogden*: Supreme Court adopted an expansive view of the scope of the Commerce Clause
      - NO judicial check on the CC, only a political check
      - Congress can regulate IntrastateC if it affects other states
   ii) *US v. EC Knight*: Supreme Court CAN CHECK the means/ends relationship to make sure that it is an appropriate use of Congress’s Commerce Power and NOT a PRE-TEXT
      - Congress cannot regulate the manufacture of products; Congress can only regulate IntrastateC that has a DIRECT EFFECT ON IC (Note: Congress cannot regulate Intrastate C that has only an INDIRECT EFFECT ON IC)
        (a) *Hammer v. Dagenhart* (1918): Statute prohibiting the transfer of items made by child labor was invalid because it was regulating the MANUFACTURE of goods and not Interstate Commerce (i.e. it was regulating an activity that only indirectly affected IC)
        (b) *Carter Coal* (1936): Statute setting minimum hours/wages in coal mines was held invalid because it was dealing with PRODUCTION of goods (not IC)
   iii) *Shreveport Rate* (1914): Congress can regulate IntrastateC as long as it has a SUBSTANTIAL ECONOMIC EFFECT on InterstateC
   iv) “Stream of Commerce” Theory
      1. Two cases:
         (a) *Stafford; Swift v. US*:
            (i) At issue: Packers and Stockyards Act of 1921; regulating the price at which commission men bought and sold cattle
            (ii) Court said that the transaction of selling a cow from one person to another was “IN THE FLOW OF COMMERCE” and thus was InterstateC
               1. Note: *Schecter Poultry*: Statute set a minimum price/wage – chickens moved in InterstateC, but D’s only transaction was IntrastateC, outside of the “stream of commerce” and thus the act was invalid.
               2. This theory is set aside in *Jones v. Laughlin*; eventually merged with Congress’s power to control state activities that effect IC
                  a. Court MAY have revived this theory in *Reno v. Condon*
         (b) Isn’t everything at some point “IN THE FLOW OF COMMERCE”? Is this a theory of boundless power for Congress?
v) **Champion v. Ames** (1903): Lottery case; Congress has the power to PROHIBIT INTERSTATE MOVEMENT under the Commerce Clause; Court focused on MOVEMENT of the lottery tickets as Commerce, not on the means/ends relationship?

1) There is an obvious moral END in this case → looks like a pretext. But, Court says that the statute is still valid. Not analyzing the means/ends relationship; just saying that the MEANS are within the Commerce Power.

- **Hipolite Egg Co. v. U.S.** (1911): Statute prohibited the shipment of eggs in InterstateC; end looked like health and safety, which is not one of Congress’ enumerated powers; BUT, the statute was held to be valid anyway b/c Congress has the power under the Commerce Clause to PROHIBIT INTERSTATE MOVEMENT
  - Since the Commerce Power is one of Congress’ enumerated powers, any abuse of it is not to be checked by the court, it’s to be checked by the political process

- **Hoke v. U.S.** (Mann Act – 1913) – prohibited transfer of women in InterstateC for immoral purposes – “Congress has power over transportation among the several states and as an incident to it can adopt means not only necessary but convenient to its exercise; and the means may have the quality of police regulation.”
  - Congress made violation of the statute a crime; means we typically see are regulating a local activity, here we have criminal sanctions as a means of regulating InterstateC.

vi) **Hammer v. Dagenhart**: statute prohibiting the transfer of items made by child labor was held invalid

1) Why was this statute held invalid when other acts prohibiting the transfer of goods in InterstateC were held to be invalid? Our previous cases said that the power to regulate included the power to prohibit and the check would have to be political and not judicial…

a) In other cases where Congress was allowed by the Court to prohibit interstate movement, its ulterior purpose was protecting the public (Hipolite Egg) or suppressing the lottery, but here it’s trying to get its hands on MANUFACTURING as a sphere it can regulate.

i) Use of interstate transport was necessary to accomplish the deleterious results in the other cases… the only way to regulate the activity was to prohibit the interstate transport.

   1. In this case, a firm could just change its intrastate practices. Congress is only regulating a local activity insofar as that firm wants access to the interstate market – it’s not really regulating a whole local activity. This still sounds like the dissent – but basically saying that the power to regulate is not the power to prohibit – but this is dead law anyway, so don’t worry too much about it.
2. DISSENT: (becomes law after Darby): The statute only regulates manufacture IF the manufacturer wants access to the interstate market → Sees no interference here. The power to regulate includes the power to prohibit, and it’s ok if there are indirect consequences for the state’s police power.
a. The state doesn’t have to change its policy – can allow kids of any state to work. The firm will just have to change its policy if it wants access to the interstate market.

vii) Railroad Retirement Board v. Alton Railroad Co.: Statute said all RR in IC must have a retirement/pension plan for their employees → Invalidated.
(1) Court analyzes the means/ends relationship, and ultimately substitutes its understanding of the means for Congress’.
(a) Note: Marshall said that inquiring into the degree of necessity of the means would be to tread on Congress’ ground
(b) Rejected the argument that a pension plan would make RR workers more efficient and that would help InterstateCommerce → said a pension plan was only INDIRECTLY related to Interstate Commerce.
(i) The source of the INDIRECT/DIRECT dichotomy that the Court uses here is Knight.
(2) There is also an “ends” analysis here: Justice Roberts thought that the end was really social welfare, and that the commerce power was being used as a pretext.

viii) Schecter Poultry Corp. v. US: Statute set minimum price/wage – chickens were moved in InterstateCommerce, but from then on the stream was entirely IntrastateCommerce, since D’s only transaction was IntrastateCommerce, (outside of the stream of commerce, see above) the statute was held to be invalid.
(1) Congress relied on two primary Commerce Clause rationales:
(a) Stream of Commerce (see above)
(b) Affecting-Commerce
   (i) Main inquiry: Can Congress control wages as a means of executing an InterstateCommerce Clause end?
   1. Congress’ end: Raise prices (this is Depression era legislation)
      a. Court’s response: D’s actions only INDIRECTLY affected commerce
         i. Again, the source of the INDIRECT/DIRECT dichotomy that the Court uses here is Knight.
         ii. Again, the court is substituting its judgment about what is an appropriate (or “direct-enough”) means to an end
         iii. Court says here that “extraordinary conditions do not create or enlarge Constitutional power”… here, the Depression. Modern Day: the War on Terror. Need to ask yourself if this is really true.

b) The Decline of Limits on the Commerce Power from 1936-1995
For 59 years, (until *Lopez* in 1995), the Court held nothing to be exceed Congress’ scope of power under the Commerce Clause. During this time, there was complete deference to Congress’ determination about the appropriate bounds of the Commerce Power. Belief that checks were exclusively political and not judicial.

1. *NLRB v. Jones and Laughlin Steel Corp.*
2. *United States v. Darby*
3. *Wickard v. Filburn*
4. Judicial Deference Toward Exercise of the Commerce Power
5. *United States v. Sullivan*
6. *United States v. Five Gambling Devices*
7. *Heart of Atlanta Motel v. US*
8. *Katzenbach v. McClung (Ollie’s BBQ):*
9. *Maryland v. Wirtz:*
10. *Perez v. United States*
11. *United States v. Lopez:*
14. *Hodel v. VA:*

c) **New Limits on the Commerce Power since 1995 (Court becoming more conservative) ➔**
   iii) *Eldred v. Ashcroft:*
   iv) *Raich Case*: (2005)

Rationale/Tools for Analyzing the Commerce Power:

Tools:
Direct/Indirect Analysis
Prohibition against Interstate Movement Rationale
Bootstrap Rationale
Affecting Commerce Analysis

1) **Direct/Indirect Analysis:**
   a) A direct exercise of the commerce power to regulate interstate commerce itself (i.e. trade, traffic, etc.)
      i) Congress involves more states than just one! The most ordinary power of the commerce power is the regulation of interstate movement, trade or traffic.
         1) Not many cases in this area because **no one disputes this power.**

   b) CASES
i) *Gibbons v. Ogden* (1824): National Statute is a Valid Exercise of the Commerce Power

- NY had given Ogden a monopoly to ferry b/w NY and NJ; Feds gave K to Gibbons
- Exploring limits of the commerce clause
- Marshall: “Commerce” = commercial intercourse (includes traffic)
  - Two reservations of power for Congress → can regulate intrastate commerce if:
    - Intrastate commerce affects other states, or
    - If it is necessary to interfere to execute some of the general matters of the Federal Government
  - “Power to regulate is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than those in the Constitution.” → Includes the power to prohibit InterstateC
  - Limits on the commerce clause come from the political process, NOT the Court
    - BUT, the Court will inquire whether the means used by Congress are appropriate (“plainly adapted, appropriate, really calculated to achieve some end for InterstateC”)

ii) *E.C. Knight* (1895): National Statute is an Invalid Exercise of the Commerce Power (often used to invalidate statutes)

- Act = Invalidated because it regulated a local activity that with only an INDIRECT effect on InterstateC
  - End: Keep prices low to promote InterstateC
  - Means: Regulate the size of business/manufacture (CC + N&P)
    - Manufacture is not directly related to InterstateC
      - States regulate manufacture
    - Manufacture and commerce are distinct categories
  - Illustration of the formalistic category approach → distinguishing b/w manufactures and commerce, direct and indirect effects, local and national activities
  - This case is at odds w/ Marshall’s statement that Congress should have broad power to select its means in *Gibbons*

iii) *Shreveport Rate* (1914): National Statute is a Valid Exercise of the Commerce Power (often used to validate statutes)

- Act = regulate railroad rates in TX (Intrastate rates were lower than interstate rates) → CC + N&P
- Congress can get its hands on intrastate commerce b/c of its undoubted power to regulate interstate commerce rates
  - Here, the local activity has a “close and substantial relation” to InterstateC
PRACTICALLY, the local activity (lower rates for transport within TX than b/w TX and LA) will encourage IntrastateC and discourage InterstateC shipments

- This is how Congress can regulate local activity (as a means of executing its InterstateC policy)
- This case is at odds w/ Knight → gives Congress broad power to select its means

iv) **Carter Coal (1936): National Statute Invalid Exercise of CC → no longer good law (overruled by Jones and Laughlin)**

- Act: set price for intra/interstate sales of coal → real end were the labor provisions
- Majority said the employer/employee relationship is purely local; no such thing as a federal police power → Every act must be justified by one of the enumerated powers + N&P Clause (the power of the federal government does not inherently extend to matters affecting the nation as a whole w/ which the states severally cannot adequately deal)
  - Congress may not (apart from those powers delegated by the Const’n) enact laws to promote the general welfare.
- Production is for the state; Schechter said distribution was for the state (see below); do the Feds only get to regulate transport?

v) **Stream of Commerce**: (activity is within the direct exercise of the CC b/c the local activity can’t be distinguished from IC – this theory is set aside in Jones v. Laughlin, basically just merged w/ Congress’ ability to regulate local activities that effect InterstateC)

(1) **Swift v. US (1905): National Statute is Valid**
- Congress can regulate the price of cattle sales because f’ the birth of the cow to the consumption of hamburger is one big stream of interstateC
  - So, when a cow is bought within one state just to be killed and processed into hamburger to be sold in another state, that’s SOC
  - The effect on commerce was “direct” since the object of the conspiracy was to restrain sales of livestock arriving from other states

(2) **Stafford v. Wallace (1922): National Statute is Valid**
- 15 years after Swift, Congress successfully used the stream of commerce theory to regulate stockyards
- Stockyard is but a throat through which the stream flows – there is an expectation that the cow came from out of state and is going back out of state → InterstateC!

vi) **Schecter Poultry (1935): National Statute is Invalid**

- Act regulated the minimum wage/price for poultry in NY
Congress relied on the affecting commerce (direct vs. indirect) AND stream of commerce rationale

SOC:
- “violation of the code provision for any transaction IN InterstateC” (=SOC)
- Congress says the SOC doesn’t end until the final consumer (seems too long)
- Court – rejects the SOC argument; says InterstateC ends when the chickens get to the slaughterhouse
  - Court does NOT give an explanation of why SOC doesn’t go all the way to the consumer
  - The statute is invalid b/c the relationship is too attenuated (too “indirect”?) (recall: house that jack built)
- Note: Schecter’s activities were purely within NY
- “Affecting Commerce”: No direct effect on InterstateC by the regulation of wages (i.e. the local activity did not have a direct effect on IC)

vii) **NLRB v. Jones and Laughlin (1937): National Statute Valid Under Affecting Commerce Rationale, but NOT SOC**

- Fed’s SOC argument: D’s ships, trains, factories are all 1 big flow of commerce
- Ct. says that SOC is just a metaphor of the power of the Government to protect InterstateC from obstructions (i.e. Congress can regulate the local activity b/c it AFFECTS InterstateC)
- The approach here is different f/ Carter Coal, b/c it’s more like Shreveport Rate (looking at the practical effect of the LA on InterstateC, not at categories)
- Test: Court is looking for a close and substantial relationship b/w the local activity and its effect on IC (Congress can regulate only local activities that are deemed to burden or obstruct InterstateC, in the 1980’s Rehnquist goes back to this language, but we see this test in very few cases that follow)
- Congress here can require an employer to allow its employee’s to form a union b/c:
  - If workers strike, there could be a significant effect on InterstateC
  - Local activity regulated: employer/employee relationship
  - N&P clause allows Congress to regulate this relationship as a means to regulating InterstateC
- **SOC dies until Reno v. Condon, where we get a “strange reference to it”**

2) **Prohibition Against Interstate Movement:**
   a) Congress prohibits certain goods, people, things from being sent across state lines.
i) E.g. Prohibiting interstate movement of lottery tickets (done to prevent the spread of immoral gambling – regulating morals and not commerce!); prohibiting interstate movement of women for immoral purposes

ii) Questions of morality arise here

iii) Questions of which ends are appropriate arise here – seems like morality ends are ok, but when Congress tries to usurp an area that’s traditionally for the state to regulate (manufacture), Court will invalidate the statute for having an improper end

b) General notes:

i) 3 differences b/w this tool and the Affecting Commerce tool:
   1) Moral goal
   2) Technique is different: at the state line, Congress prevents movement from 1 state to another state
   3) This is a direct use of an enumerated power NOT in conjunction with the Necessary and Proper Clause

ii) A state will always want to examine the federal government’s “ends” here
   1) States’ argument: McCulloch “Pretext” Argument
   2) Federal government’s argument: political restraints of federalism will control

iii) This tool ONLY regulates InterstateC (can’t do ANYTHING within IntrastateC)

iv) National Police Power issue: Instead of regulating intrastate local activities directly, Congress began prohibiting interstate transport of certain items or persons. This technique was used not only to regulating economically, but also for the “police power” or “moral” regulation.

c) CASES

i) Champion v. Ames (1903): Lottery Case → National statute is VALID

   - Act prohibited the interstate transfer of lottery tickets; if Congress has the power to regulate, it has the power to prohibit movement → movement of tickets = Interstate Commerce

   - Majority: focuses on the fact that the trafficking of the lottery tickets is interstate commerce, NOT that Congress ultimately had a moral goal/end in mind (suppress lotteries)

   - Says the limits on the use of the CC are political (see Marshall in Gibbons v. Ogden) → people can elect different representatives if they are unhappy with this use of the CC

   - Says that the potential abuse of the power to prohibit is no reason to say that it’s not there

   - Dissent: accuses the Majority of giving Congress a general police power – concerned w/ national intrusion on state powers; say that Congress is using the CC as a pretext

ii) Hipolite Egg (1911): National Statute is VALID
- Act prohibited the shipment of impure foods (Pure Food and Drug Act of 1906)
  - Looks like the goal is to protect consumers; but Congress doesn’t have an enumerated power to do this
- Majority: movement of eggs (like lottery tickets) = InterstateC; Congress has the power to regulate (including to prohibit)
  - The limits on the use of the CC are political; the Ct should not inquire into Congress’ real motives
    - Ends: prohibit shipment of bad eggs
    - Means: seizure and destruct of bad eggs (destroying the eggs upon arrival eliminates the interstate market for bad eggs, but doesn’t interfere w/ intrastate market)
- NOTE: Congress COULD prohibit production of the eggs as a means to keeping the eggs from being shipped in InterstateC (this would be an example of bootstrapping, infra)

iii) *Hoke v. US (1913): National Statute is VALID*
- Mann Act: Prohibited the interstate transportation of women for immoral purposes
  - End: Prohibit interstate transportation
  - Means: fine/jail sentence (criminal sanctions/police power of the states)
- Since Congress has power over transportation among the several states, this act is valid

iv) *Hammer v. Dagenhart (1918): National Statute is INVALID (no longer good law)*
- Act prohibited the interstate shipment of goods made by underage children
- Invalid b/c Congress is trying to regulate manufacture \( \rightarrow \) Congress cannot touch manufacture w/ the CC
- Why is this act invalid, while the above three were valid? (i.e. how distinguished?)
  - This act rests solely on the way the good was manufactured, not on the good itself
- Even though the statute facially regulated InterstateC, the Court concluded that the real end was to regulate manufacture – a purely local activity reserved for the states to control
  - **CONGRESS INVALIDATES THE ENDS!**
- Dissent: the Act only affects those seeking the interstate market; regulation is of interstate transportation and therefore is directly within the power of Congress \( \rightarrow \) this becomes the majority opinion in *Darby*

v) *US v. Darby (1941): National Statute is VALID*
Abandons SOC and direct/indirect tests; destroys the categories of manufacturing/commerce → net effect is a serious expansion of federal power

Fair Labor Standards Act: (1) no interstate shipping from companies that don’t follow the federal wage requirements (prohibition) (2) all companies must follow the federal wage requirement (rule for employers)

Valid even though it places regulations on manufacturing and labor (Overrules Hammer v. Dagenhart)

Part One: (the prohibition)
- Manufacturing and production are not “commerce,” but shipping is and Congress has the power to regulate and prohibit that → appears that Congress can use its power to prohibit under any pretext – the power is complete (PLENARY) in all respects, so long as it doesn’t infringe upon some other constitutional provision (i.e. couldn’t prohibit shipment of NRA materials b/c would violate the first amendment)

Part Two: (the rule for employers)
- Upheld by both the Affecting Commerce and Bootstrap Rationales (see below)

3) **Bootstrap Rationales:**

a) Congress’ goal here is to prohibit interstate movement BY regulating some local activity, not because that activity has an effect on IC, but because regulating the local activity makes effective the prohibition of interstate movement.

i) E.g. Hipolite Egg (1911): Congress can regulate LA as a means of carrying out a prohibition (could prohibit the manufacture of bad eggs)

   (1) Congress may arbitrarily exclude from Commerce among the states any article, commodity, or thing NO MATTER WHAT THE MOTIVE

   (2) SUPER bootstrap here because the statute prohibits the making/selling (actual activity) to prevent it from going into interstate commerce (rather than regulating the already made thing.)

   (a) **Never officially adopted by the court.**

b) **CASES:**

i) **Us v. Darby (1941): National statute is VALID**
- Fair Labor Standards Act: (1) no interstate shipping from companies that don’t follow the federal wage requirements (prohibition) (2) all companies must follow the federal wage requirement (rule for employers)
- Note: for Part One (the prohibition), see above

Part Two (the rule for employers) is supported by the Affecting Commerce and BOOTSTRAP rationales (for Affecting Commerce, see below)

Means/ends relationship: if no eggs are made under sub-standard conditions, then none will be shipped in InterstateC (CC + N&P)
- Broader and requires less rationale than the affecting commerce rationale
- Majority: while manufacturing is not of itself InterstateC, the shipment of manufactured goods IS commerce and the prohibition of such shipment by Congress is within the CC (so, can regulate the local activity (production of bad eggs) as a means of effectuating the prohibition on shipment)

ii) **US v. Sullivan (1948): National Statute is VALID (very broad reach of the CC)**
- Act: (1) no mislabeled drugs can be shipped in InterstateC (2) cannot mislabel the drugs AFTER they have been shipped in InterstateC
- Once a good has moved in InterstateC it is subject to Federal Regulation
- Pretext?: Protecting Customers
- Court: refuses to end the “stream” at the first in-state customer – extends it to the end consumer
  - *Hipolite Egg* is not on point → all bad eggs were banned there; here, only mislabeled drugs
- How does labeling after interstate shipment affect the InterstateC prohibition?
  - It doesn’t keep mislabeled drugs out of InterstateC
  - But, if the druggist turns around and sells the mislabeled drugs in InterstateC then it does affect InterstateC
  - OR, end consumer may take the wrong amount of drugs due to the mislabeling and either increase or decrease the flow of goods in InterstateC
  - May also say that if a consumer finds properly labeled drugs intrastate, then it increases his confidence that the drugs were properly labeled at the end of the InterstateC chain (druggist) and before InterstateC began – could affect whether people will buy the drugs
  - Note – the drugs are usually not labeled as local or from another state → would be difficult for the government to prove that a particular drug affected InterstateC, so we allow Congress to sweep broadly and regulate all drugs (see Perez)

iii) **US v. 5 Gambling Devices (1953): National Statute is INVALID**
- Act prohibited the interstate shipment of slot machines – required everyone who has ever owned one to register with a report of who sold it to whom, etc.
- Majority: Doesn’t decide the constitutional issue (construes the statute narrowly to avoid it)
- Government
  - argued for the *Darby* super-bootstrap rationale → regulating a local activity as a means to make effective the prohibition against interstate movement (bought by four members of the dissent – would have given Congress the power to reach local activities that did not affect IC)
D
- Statute shouldn’t reach transactions of gambling machines unless they are somehow related to InterstateCommerce
  - If the Court construes the statute to reach purely intrastate transactions with no connection to InterstateCommerce, there is a constitutional problem (scope of Commerce Clause would be too broad – would allow national regulation of a purely local activity)

4) **Affecting Commerce Rationale:**

a) Under the Commerce Clause, Congress can regulate some local activity in order to promote interstate commerce, because that activity “affects” interstate commerce.
   i) Can regulate any activity that either in itself or in combination with other activities has a substantial *economic effect* upon InterstateCommerce or effect on movement in InterstateCommerce
   ii) Depends heavily on N&P clause
   iii) Idea is that Congress has the power to regulate a local activity that has an effect on interstate commerce as a means to an end
   iv) Questions to ask:
      1. Is there a close and substantial relationship between the local activity and interstate commerce?
      2. Is there an aggregate burden: i.e. many small effects amount to a substantial effect
      3. Class of activities: entire class is regulated even though some individual actors don’t affect IC
      a) Note: it’s too hard to prove which individual actors don’t affect IC
      4. The Court will generally give deference to Congress’ determination that there is an effect on IC (this is particularly true in Civil Rights cases)

b) **CASES:**

i) *Southern Railway v. US (1911): National Statute is VALID*
   - Federal Safety Appliance Act – required all trains to have automatic couplers, regardless of whether they only traveled intrastate \(\Rightarrow\) CC + N&P
   - How does the local activity affect InterstateCommerce?
     1. When a train has an accident it backs up the rails, delaying InterstateCommerce
     2. If the local trains aren’t required to have automatic couplers, could be cheaper to ship goods intrastate, thereby reducing InterstateCommerce

ii) *Schecter Poultry (1935): National Statute is VALID (no longer good law -- overruled in Jones and Laughlin)*
   - Note: see also direct/indirect analysis, supra
   - Act set min. wage/price for live poultry in NY
How does the local activity affect InterstateC?

- If we allow collecting bargaining and make employers pay higher wages (the means); this will drive up the price of chicken (end)
  - Regulating wages $\rightarrow$ higher cost for the employer $\rightarrow$ higher price for the consumer AND employees have more money $\rightarrow$ spend more money
  - No collective bargaining leads to strikes, and strikes reduce InterstateC

Majority: Invalid b/c this is a house that Jack built argument (i.e. it’s too attenuated)

- Just b/c there is a need (here, were in Depression), doesn’t mean that it’s within Congress’s power to remedy it
- No direct effect on InterstateC f/ the regulation of wages

iii) **RR Retirement v. Alton (1935): National Statute is INVALID**

- Act: all intrastate/interstate carriers must set up pension plans for their employees
- Government’s argument: setting up pension plans will reduce strikes, which reduce the flow of InterstateC

Majority:

- No enumerated power to regulate the employee/employer relationship (i.e. the ends are invalidated)
- Pension plan only indirectly related to InterstateC
  - Even though Congress had detailed findings that strikes slow down InterstateC, the Court doesn’t buy this argument
  - Court substituting its means-ends understanding for Congress’s

iv) **NLRB v. Jones and Laughlin (1937): National Statute is VALID – close and intimate relationship to InterstateC (act was VALID under affecting commerce rationale, but not SOC – see above)**

- Court is concerned with the “practical effect” on InterstateC (CC + N&P)
- Test: looking for a close and substantial relationship b/w the local activity regulated and InterstateC; abandons the direct/indirect test (see above)
- Court: SOC is just a metaphor for the power of Congress to protect InterstateC f/ obstructions
  - Allow unionization (means) to end strikes and stop disruption of InterstateC (ends)
- Overrules Schecter and Carter Coal $\rightarrow$ In place of the bright-line tests that the Court had sought to apply in Knight, Schecter and Carter Coal, the Court suggests here that it will proceed on a case by case basis to determine whether the activity Congress was regulating had a close and substantial relationship to InterstateC

v) **US v. Darby (1941): National Statute is VALID**
Abandons SOC and direct/indirect tests; destroys the categories of manufacturing vs. commerce \(\rightarrow\) net effect is a serious expansion of federal power.

Fair Labor Standards Act – (1) no Interstate shipping from companies that don’t follow federal wage requirements (prohibition) (2) all companies must follow federal wage requirements (rule for employers)

- Second provision upheld under the BOOTSTRAP (see above) and AFFECTING COMMERCE rationales
  - If wages of intrastate companies are cheaper, people will always buy from them and other states will have to push wages lower to compete
  - Harms InterstateC:
    - Makes InterstateC an instrument for the spread of substandard labor conditions
    - Causes a dislocation of InterstateC through the unfair destruction of businesses adhering to higher labor standards
    - Looks like a pretext to protect workers

vi) *Wickard v. Filburn (1942): National Statute is VALID – aggregate rationale*

- Agricultural Adjustment Act \(\rightarrow\) Farmers can only grown allotted amount of crop
- D grew more than the allotted amount, but it was for “home consumption” LOCAL
- Ends: Increase/Stabilize the market for wheat; Means: Quota
- Is there a close and substantial relationship b/w the local activity and InterstateC?
  - Quota will push up price for wheat \(\rightarrow\) higher market price means that the farmer will sell his excess wheat. If the market price is low, the farmer will not sell his excess wheat and then will have no reason to purchase wheat (decreasing demand and reducing prices)
  - Aggregate effect: Court doesn’t look at the farmer here as an individual \(\rightarrow\) if a bunch of farmers do what he did, this would create a serious market problem… in the aggregate, would have a substantial effect on InterstateC

vii) *US v. Sullivan (1948): National Statute is VALID – v. broad reach of CC* (See also Bootstrap rationale, above)

- Local activity: mislabeling drugs
- Relationship to InterstateC:
  - (1) Drugs might be taken across interstate lines (any jurisdictional hook?) \(\rightarrow\) Increase in volume
  - (2) People who get sick might buy less Interstate drugs b/c worried that they’re not properly labelled
(3) Local possession swells the volume of misbranded drugs (harmful goods) in InterstateC – people would buy more pills b/c taking more pills (see Baby Lopez)
- Rule: require labels on all pill bottles

viii) Civil Rights Act of 1964 – be very careful using these cases to support non-discrimination statutes:
   (1) Heart of Atlanta Motel v. US (1964): National Statute is VALID
   (2) Katzenbach v. McClung (Ollie’s BBQ -1964): National Statute is VALID
   - Act: Right to be free from discrimination in places of public accommodation (those who let 5+ rooms and restaurant = public accommodation); statute finds that all motels affect InterstateC – creates a conclusive presumption
   - Court says that Congress could have reasonably found that racial discrimination by motels/restaurants substantially affects InterstateC
     - Ct. relied on Congress’ findings
   - How does the local activity (discrimination) affect InterstateC?
     - Impedes travel b/c AA don’t know where they will sleep or eat = artificial restriction on the interstate market
     - Query: Does racial discrimination really have any effect on the volume of food bought and sold in InterstateC?
       - Wouldn’t AA’s just eat elsewhere?
       - NOTE: Court defers to Congress here as long as there is a rational basis
   - With Ollie’s BBQ: Government relied on the fact that a substantial portion of the food served there had moved in InterstateC \(\rightarrow\) puts a heavy burden on the government to show this in every case (could have made the same travel argument as it did re: Heart of Atlanta Motel.
     - Note: when we get Perez later, the burden will be greatly reduced. (Government just needs to show that the CLASS affects InterstateC; hard to differentiate b/w those restaurants that serve interstate customers and those that don’t, so we can regulate the WHOLE CLASS (any restaurant COULD serve interstate customers))
   - End here looks moral – like a pretext… Court here is asking whether the local activity has a real and substantial relationship to a national interest not interstate commerce \(\rightarrow\) can’t do this.
   - Bottom line: Court says that regulating the local activity as a means for an InterstateC end is ok – so it doesn’t matter that Congress had more than one purpose/intent

ix) Maryland v. Wirtz (1968): National Statute is VALID
- Fair Labor Standards Act – applied labor standards to all employees engaged in Commerce (not just InterstateC)… also extended to state governmental employees
  - Appears to infringe on state powers
- VALID  $\xrightarrow{\text{upholds}}$ the enterprise concept: an 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
  - BUT, the court asserts limits on the affecting commerce rationale
    - Congress may NOT use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities
    - Only where the general regulation statute bears a **substantial relationship** to InterstateC can the very small character of individual instances arising under that statute be of no consequence
- **Note:** State autonomy defense rejected here and the act was upheld, BUT it was overruled in *National League of Cities*, and then reinstated in *Garcia* (1985)

**x)** *Perez v. US (1971): National Act is VALID  $\xrightarrow{\text{CLASS rationale}}$*
- Act: whoever makes or conspires to loan shark goes to jail (no mention of InterstateC)
- Government defended w/ affecting commerce rationale – some loan sharking affects banks, generally has InterstateC ties
- **Means/Ends Analysis:**
  - The class of activities (loan-sharking, generally) affects InterstateC
    - Used to funnel funds to organized crime (which is an InterstateC activity)
    - Majority hearkens back to *Wickard*: aggregate effect of the activity affects InterstateC (class here = loan sharks, some intrastate and some interstate; class in *Wickard*: all farmers had an effect on InterstateC)
    - If the Government had to prove a jurisdictional hook every time (i.e. show that the particular loan shark affected InterstateC) it would frustrate Congress’ ability to regulate loan sharking
  - Dissent: Nothing shows that this individual act affected InterstateC
- Court says Congress can regulate criminal local activity w/o any showing of any connection b/w the individual local activity and InterstateC (broad reach of affecting commerce rationale)
  - This is a good example of how can find many broad reaches of the CC when Congress is doing something we all think is good!

**xi)** *US v. Lopez (BABY -1972): National Statute is VALID*
- Act: can’t make or traffic drugs
- No jurisdictional hook → no mention in the statute of Interstate commerce
- Ct. used the argument f/ Perez, supra, to uphold the statute as Constitutional
- It’s impossible to tell drugs apart, so prohibiting all drugs will prevent the negative effects on Interstate commerce
- **Congressional findings:**
  - Local distribution of drugs leads to swell of drugs in Interstate commerce
  - Impossible to distinguish b/w interstate and intrastate drugs (Ct. relied on this)
    - Congress could reasonably believe that an attempt to separate these activities would be a futile exercise substantially interfering w/ Congress’ power to regulate Interstate commerce
    - Congress is regulating a 2-part class → (1) intrastate drugs w/ no connection to Interstate commerce (2) intrastate drugs w/ a connection to Interstate commerce

**xii) US v. Bass (1972): National Statute VALID but construed narrowly (D’s conviction reversed)**
- Act: applied to felony-convicts who receive, possess or transport any firearm in Interstate commerce in a way that affects Interstate commerce (made it a federal crime)
- Government made no showing that D’s gun had a connection to Interstate commerce (no “jurisdictional hook”) – but, the Court didn’t require one in Perez or Baby Lopez
- Court said that because this statute, unlike the ones in question in Perez/Baby Lopez, actually mentioned Interstate commerce, the Government had to show some effect on Interstate commerce
  - Constrained the statute narrowly to disallow punishment UNLESS a connection to Interstate commerce is shown
  - In the absence of clearer direction f/ Congress, Court chose not to read the statute so broadly as to allow punishment of a purely local activity
  - Would this act have worked under the prohibition power?

**xiii) US v. Scarborough (1977): National Statute is VALID**
- Same Act as in Bass, supra
- Here, Feds alleged that the gun once moved in Interstate commerce
  - How does the local activity (possession of a gun that once moved in Interstate commerce by a felon) affect Interstate commerce?
    - Felons are a big part of the firearm market → by preventing them from having guns, Congress reduces the Interstate commerce market for firearms
    - End: Reduce the volume of guns shipped in Interstate commerce and the potential disruption to Interstate commerce f/ a felon having a gun
  - **Scarlet Letter Theory of Interstate commerce:** → something ONCE moved in Interstate commerce is forever branded as part of Interstate commerce and Congress can regulate that item or the individual that holds that item
- **Congressional findings:** (like Baby Lopez) – the more people that possess guns, the more likely they will be shipped in InterstateC

xiv) **Hodel v. VA (1981): National Statute is VALID**
- Act: Regulate strip mining
- Relationship: Strip mining injures the environment in 1+ states
- Means/Ends: Congress shows a lot of evidence that mining affects InterstateC
- Even though the statute is held VALID, this is the beginning of the Court’s efforts to cut back on CC power forces Congress to show a close and substantial relationship b/w the act and InterstateC (more skeptical laying groundwork for reinvigorating judicial enforced limits on the CC)

1. Statute: Gun-Free School Zones
2. Congress’ argument: guns disrupt learning, which means people don’t make as much $ to spend in IC
3. Majority: Invalid (for the first time since Carter Coal in 1936) because:
   a. Statute doesn’t regulate a commercial activity AT ALL
   b. Statute doesn’t contain a “JURISDICTIONAL HOOK”: no provision in the statute that says the possession of the gun must be connected in SOME WAY to IC
4. Three categories of IC that Congress can regulate under the Commerce Clause:
   1. **CHANNELS:** (Congress can regulate the use of “channels in IC” – this is to say that it can regulate in way that is reasonably related to highways, waterways, airways, etc. (includes the power to prohibit shipment))
      a. E.g.
         i. **Darby:** Congress can prohibit the shipment of goods made by individuals making less than min. wage
         
         ii. **Heart of Atlanta:** Congress can keep channels free from immoral use (i.e. discrimination) (really an affecting commerce rationale)

         iii. **Hoke:** (Mann Act): Congress can prohibit the transportation of women for immoral purposes
   
   b. Cases that fit here ➔
      - Darby, Sullivan, 5 Gambling Devices, Perez, Bass, Baby Lopez, Heart of Atlanta, Hoke, Katzenbach v. McClung (Ollie’s BBQ)

   2. **PROTECT INSTRUMENTALITIES OF IC:** (Congress has control over IC “instrumentalities”, even if the threat comes from an intrastate activity – “instrumentalities” refers to people, etc. used in carrying out IC – e.g. RR and Airlines are conduits of IC)
      a. E.g.
i. **Southern Railway (1911):** Federal Safety Appliance Act required all trains to have automatic couplers (regardless of whether they were just traveling intrastate) = fewer accidents → fewer delays in InterstateC → Congress is protecting/securing clear railways for InterstateC

ii. **Shreveport Rate:** Congress could regulate rates of intrastate trains to protect interstate trains from being undercut (SOC here too)

b. Cases that fit here →
   i. **Shreveport Rate,** *Southern Railway,* national criminal statutes prohibiting theft from IC, *Champion v. Ames* (Lottery was harmful to IC); *Swift v. U.S.*; *Schecter Poultry*

3. **ACTIVITIES THAT HAVE A “SUBSTANTIAL AND CLOSE RELATIONSHIP TO IC”:** (this is another way to say “affecting commerce.”) **NOTE: LOPEZ IS A CATEGORY THREE CASE.**
   a. **E.g.**
      i. **Jones and Laughlin:** substantial relation test began
      
      ii. **Wickard v. Fillburn:** Act upheld when the Court believed the local activity has a substantial effect on InterstateC (aggregate effect)

b. Cases that fit here →
   i. **Jones and Laughlin,** *Lopez,* MD v. Wirtz; Hodel v. VA; Wickard v. Fillburn; US v. Morrison; US v. Raich; Knight; RR Board v. Alton; Hammer v. Dagenhart; Carter Coal; Heart of Atlanta; Katzenbach v. McClung (Ollie’s BBQ)

c. This category is subject to some **rules:**
   i. **Commercial vs. Non-Commercial Activity**
      - The aggregate impact of commercial activities will suffice to justify a Congressional statute regulating IC
      - The aggregate impact of non-commercial activities WILL NOT be sufficient unless: (1) causal link is short and direct or (2) the item crosses state lines or enters the Stream of Commerce
      - Lopez and Morrison are non-commercial activities; Raich majority saw it as a commercial activity.

ii. **Congressional Findings:**
   - The Court is more likely to make its own conclusions, and it is NOT sufficient that Congress had a RATIONAL BASIS (Morrison)

iii. **Traditional domain of the states:**
- If w/in this, Ct is less likely to find the statute w/in Congress’ CC power

iv. **Under Category 3, Congress can:**
- (1) Regulate local activities that the Court concludes SUBSTANTIALLY AFFECT IC
- (2) Regulate situations where it has shown a “JURISDICTIONAL HOOK” (i.e. the law says that it applies to things that have been shown to move to move in IC) → This ensures on a case-by-case basis (inquiry) that the activity SUBSTANTIALLY AFFECTS IC

- **Lopez** → category 3
  - No jurisdictional element here – P not required to show that the individual activity substantially affects IC under this statute (i.e. no “jurisdictional hook”)
    - *Bass*: In the absence of a clear connection, the Court is unwilling to read the statute as encompassing all interstate activity
    - Court says here that Congressional findings as to the relationship b/w the activity and IC are not required, but would be helpful in doubtful cases
      - Court ignores *Perez* (class rationale)
  - Court suggested that “economic activity” establishes a “threshold requirement” for regulating activity under the CC
    - To be “economic” the activity must:
      - [the activity being regulated itself must] be properly characterized as economic in nature OR
        - McCulloch: Court can’t tread on Congress’ power to judge the relationship between the local activity and InterstateC
        - Court has since taken back the power to judge the affect on InterstateC
          - Cardozo’s dissent in Carter Coal; Perez; Katzenbach; Heart of Atlanta; Wickard; Morrison (VAWA is not economic and no jurisdictional hook)
      - [the regulation itself must] be an essential part of a larger regulation of economic activity
        - Bass – penalized felons that rec’d/possessed/transported firearms in InterstateC
          - The particular local activity must be related to InterstateC

- THEN, the activity must SUBSTANTIAL AFFECT INTERSTATE COMMERCE as well.
- The majority rejects the rational/reasonable conclusion of Congress test

*Constitutional Law I Outline – (Professor LaPierre) – Andrea Perry*
The Court MAY require the activity to be economic AND to substantially effect Interstate commerce OR the economic inquiry may be a way of determining whether the activity substantially affects Interstate commerce.

These are two competing views of the Lopez decision.

**LOPEZ LINEUP: Where the Justices Fell:**

**MAJORITY: (Rehnquist, joined by O’Connor, Thomas, Scalia & Kennedy)**
- Defects in the statute:
  - (1) No jurisdictional hook
  - (2) Not an economic/commercial activity
- An extension of the commerce power to cover activities with such an attenuated connection to Interstate commerce would allow for no rational limits on Congress’ regulatory authority
  - If Congress is left free to regulate here something which is “in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of Interstate commerce” it could conceivably control almost any area of the law for which the States have traditionally taken responsibility, including education or even family law
- To find the possession of guns near schools a commercial activity subject to congressional regulation would require the piling of “inference upon inference” and would open the door to a “general police power”
- Even under the broadest interpretation of Wickard (affecting commerce), the Court has not considered regulation of activities that are not remotely related to an economic enterprise allowable
- Protection of fundamental liberties demands a limited federal government w/CLEARLY enumerated powers → the S.Ct.’s commitment to limited government has been a “hallmark” of CC jurisprudence

**CONCURRING: O’Connor and Kennedy → Intrusion upon States’ rights**
- **Federalism:** In order for the federal system to work, two types of political accountability are required – b/w citizens and states and citizens and the federal government
- To hold both accountable, citizens must be able to easily identify the spheres of responsibility of each government → need clarity of roles and sensible transparency
- Kennedy: this statute is an invasion b/c states have long governed our education system and have thus been held responsible for its effectiveness – so not only is the regulation beyond the commerce power in the normal sense, but it is an activity traditionally left to the states to regulate
- *Knight* labels don’t work, don’t go back there – get rid of labels
- Respect the immense stake in the history of CC jurisprudence – don’t want to repudiate all the earlier cases
  - Disagree w/ Thomas: he’s working on an 18th Century economic model. CC has to reach more than it did in the 18th Century.
Why does KENNEDY join here? He typically supports political and not judicial restraints on CC (*Gibbons v. Ogden* and Federalist Papers)… suggests that even he thinks that the court doesn’t ALWAYS have to defer to the political process.

**CONCURRING: Thomas**
- Easy case b/c gun control doesn’t have anything to do w/ commerce
- In anticipation of more difficult cases, says that the Court should entirely reconsider its “substantial effect” test → go back to the original intent in the 18th Century
- “Substantial Effects” Test allows for an inappropriate, unhistorical and unconstitutional extension of Congressional authority.

**DISSENT: Breyer (joined by Stevens, Souter and Ginsberg)**
- Congress had a rational basis for its belief that guns affect commerce, so the Court should defer  
  - (1) Congress has allowed regulation of activities which “significantly affect Commerce” before  
  - (2) In prior cases, the Court has allowed for regulation of activities by allowing regulation of the WHOLE CLASS (*Perez*)  
  - (3) Congress decides whether the means fit the ends, NOT THE COURT!  
    - Studies support the effect of school violence as a threat to educational quality  
    - Well educated citizens are essential to commerce  
    - At the very least, the Court could conclude that Congress fund the guns to have a “substantial effect”  
  - Response to Majority:
    - Not all statutes will meet the test, but this one does b/c it is a particularly acute threat and national problem, the immediacy of the connection has been documented and accepted in a way that may not be true of other social institutions (like family law, etc.)  
    - Rehnquist’s opinion is contrary to earlier Court decisions, such as Katzenbach (*Ollie’s BBQ*) where the court approved regulation of activity w/ an even more remote connection to InterstateC

**DISSENT: Stevens**
- Importance of education process  
- Echoes Breyer, emphasizes that guns are a COMMERCIAL PRODUCT and their possession is always a direct or indirect result of commerce  
- National interest is substantial enough today to justify, even if it wouldn’t have been in 1789

**DISSENT: Souter**
The Court must defer to Congress if there is ANY RATIONAL BASIS for finding that the activity affects Interstate commerce. Agree with the pre-Lopez hands-off approach – the only inquiry is whether the means chosen by Congress are “reasonably” related to the ends.

xvi) **US v. Morrison (2000): National Statute is INVALID**

- Act: Violence Against Women Act – federal civil remedy for victims of gender-based violence
  - Relationship b/w gender violence and commerce?
    - Violence increases medical costs, causes women to quit school and earn less, deters women from traveling in Interstate commerce
  - Court split is the same as in *Lopez* (see below)
  - Uses same three-category framework (this case is a Category 3)
  - Court sees no substantial relationship b/w the means and the ends b/c:
    - Doesn’t involve any kind of economic activity
      - (but *Wickard* was economic)
    - No jurisdictional hook (doesn’t require that the activity affect Interstate commerce)
      - Notion that you can regulate anything that has moved in Interstate commerce (*Scarlet Letter* theory)
    - Congress’s formal findings
      - Here, Congress had extensive findings – but the Court did its own review of the findings
      - Findings alone are not enough – Court is the one that decides whether the relationship is substantial
        - *Cooper v. Aaron*: Court decides what the Constitution says
    - Link to commerce is too attenuated (just like *Lopez*)

xvii) **Eldred v. Ashcroft (2003): Copyright Case**

- Ct. says that the judiciary should defer to Congress and doesn’t have the final say
  - Contrary to *Lopez* and *Morrison*
  - This was Copyright Clause, not CC
  - Why are there different limits on Congress when it uses different powers?

xviii) **US v. Raich (2005): National Statute is VALID**

- Act: Prohibits manufacture, possession and distribute of marijuana
- Challenged by CA medical marijuana statute
- D argues:
  - No economic transaction – so not like *Wickard* (supporting a business there)
Congress’s findings are vague and even so, the Court disregarded the findings in *Morrison*

- Link is too attenuated b/w local activity and InterstateC
- The class here should be differentiated; the class = medical marijuana, not ALL marijuana

**Government argues:**

- Can’t differentiated the local marijuana f/ interstate marijuana
  - Getting around the need for a jurisdictional hook (i.e. regulate the class)
- Local possession of marijuana contributes to the swelling of InterstateC (*Wickard* – aggregation should apply regardless of whether the activity is commercial or not)
  - But see *Lopez* category 3 → don’t aggregate non-commercial activities)
  - **SO, is the issue of aggregation of commercial v. non-commercial activities still viable? I.e. can you argue now that you CAN aggregate non-commercial activities? What has this decision done to *Lopez***

- The mere growth of marijuana is commercial
  - *Lopez* and *Morrison* decisions focused on whether the activity was commercial (concluding both times that it was not) – here the activity clearly isn’t commercial….

**RAICH LINEUP: Where the Justices Fell**

**MAJORITY: Stevens** (joined by Kennedy, Souter, Ginsberg and Breyer – Scalia concurs)

- Defer to Congress: *Gibbons v. Ogden* (the political process is the limit)
- Same findings as in *Baby Lopez*, but the Court likes them now
  - Can’t differentiate b/w intrastate drugs and interstate drugs, so must regulate the whole class (*Perez*)
  - Would cause an enforcement problem if the Court required a jurisdictional hook (would frustrate Congress’ purpose)

- Uses *Lopez* framework: this is a category 3 case
  - Local activity has a substantial effect on InterstateC
  - *Wickard* aggregate argument
    - If the price is high – sell marijuana on the market, if low, keep it at home

- End: prohibit InterstateC of marijuana; Means: prohibit all manufacture of marijuana
- Court goes back to the rational basis test – deferring to Congress (*Heart of Atlanta*)
  - Court only asks whether Congress has a rational basis to conclude that the activity substantially affects InterstateC

**CONCURRING (Scalia)**
Use N&P instead of affecting commerce rationale
Congress has the power to regulate even if it’s not an economic activity – when regulation of an intrastate activity is none the less part of a larger regulation of economic activity and it is necessary to make sure that Congress’ legitimate regulation of larger economic activity is not undercut by the interstate activity

Is he encouraging Congress to legislate broadly?

**DISSENT: O’Connor (Joined in part by Rehnquist and Thomas)**
- Court is giving Congress too much power
- Majority’s definition of commerce is too broad
- Non-commercial possession of marijuana = non-commercial acts in *Lopez* and *Morrison*
- Government has not shown that medical marijuana affects InterstateC (no jurisdictional hook)
- Activity is not economic, and even if it were – lacking the substantial requisite effect
- Recall *Morrison* – findings weren’t enough
- Fundamental issue: degree of deference that the Majority gives to Congress

**DISSENT: Thomas**
- Majority is giving Congress a police power
- Disagrees w/ substantial effects test (as he did in *Lopez*)
  - “Must be an obvious, simple and direction relationship b/w the intrastate ban and the regulation of interstateC” (*Knight*)
- Wants a narrow view of Comm.
- As for N&P → looks to *McCulloch*, means must be “plainly adapted” to meet a legitimate end
  - The Court decides if the means are necessary and proper

**2) TAXING POWER**
- Art 1:§8:1 → the power to lay & collect taxes, duties, imposts and excises”
  - tax will be upheld if it bears some reasonable relationship to revenue production OR if C has the power to regulate the taxed activity under another enumerated power
- Federal tax immunity exists whenever the state seeks to tax the United States or an agency or instrumentality closely related to it so the two cannot be viewed as separate entities.
- Can be valid in 2 ways:
  - (1) Revenue-Raiser
    - tax is presumptively valid as a tax if raises some revenue
      - even if minimal – Kahriger & Bailey
      - if no revenue – then not a tax and valid only if under different enumerated power
    - can be a penalty if –
      - its part of a reg. scheme (child labor cases: Bailey)
• it has a criminal trigger (intent to penalize)
  o (2) As a means to achieve a valid regulatory goal (N&P)
    ▪ even if penalty can still be valid
    ▪ if the activity can be regulated under another enumerated power – gov’t can use tax as a means to achieve that reg goal
  • theory: if C can reg w/ other power – then its use of tax is less intrusive
  • note: C has not struck down a tax since 1930
  o Taxing power + N&P might be used for regulation
    ▪ Unlike CC – you can tax anything whether intra or inter – major advantage
• Brushhavor v Union Pacific RR
  o Nat’l tax power (“TP”) is exhaustive and embraces every conceivable power of tax
    ▪ only limit on extent of tax is due process limit of confiscation
• Bailey v Drexel Furniture (Child Labor Case) – Act is Invalid
  o tax: 10% charge on profits of er of child labor
    ▪ statute has same breadth as Hammer v Dagenhart
    ▪ lack of knowledge that ee was child is a defense
    ▪ enforced by dept of treasury and dept of labor
  o Issue – is the tax a penalty?
    ▪ penalty to enforce a reg scheme (not for rev-raising)– looks at knowledge defense (“scienter”), enforced by dept of labor, didn’t matter if employed 1 or 300 kids
    ▪ ct ➔ it’s a penalty; tax is being used as a pre-text
  o Gov’t argues that Ct cant do ends-invalidation anymore (pretext) b/c of Veazie, McCray & Doremus
    ▪ Ct disagrees
      • Bailey/Doremus cant be reconciled w/ ends invalidation
        ▪ both ends were impermissible
        ▪ cant distinguish on this – (note Bailey might have been ruled on by ends validation though)
      • Bailey/Doremus can be reconciled w/ means-ends invalidation
        ▪ Doremus: registration helped both tax and drug suppression
        ▪ Bailey: scienter/reg agency doesn’t help tax end but only reg end here
  o Ct invoked ends-invalidation ➔ tax is INVALID (uses Marshall’s pretext quote)
  ▪ means must be naturally and reasonably adapted to the collection of tax
  o Ct saw this as C trying to make an end-run around Hammer v Daggenhart
  ▪ TODAY: if tax invalid, Ct try to uphold under CC using Darby (probably…)
• Veazie Bank v Fenno – Act is Valid
  o tax on state and person bank notes
  o purposes could be:
    ▪ (1) raise revenue
    ▪ (2) drive these other bank notes out of service (using tax as pretext – so Bailey is inconsistent)
    ▪ (3) using N&P – tax as a means of making effective C’s power to have a uniform nat’l currency (direct use of N&P)
- (4) it is a tax in service of another enumerated power (direct use of TP)
  - Ct – this is the use of a tax to get nat’l currency under N&P
- **McCray v US – Act is Valid**
  - bigger tax on yellow margarine vs. white margarine
  - purposes could be:
    - (1) raise revenue
    - (2) confuse consumers – consumer protection (buy butter)
    - (3) stop people from buying yellow margarine (protect dairy industry) -> pretext; would make Bailey inconsistent
    - (4) using N&P, C taxes yellow margarine as a means to make effective C’s power of regulating InterC
    - (5) it is a tax in service of CC (direct use of TP)
  - Ct – this is a tax in service/as a means of using C’s CC – valid
- Ct was comfortable as seeing McCray and Veazie not as pretext → BUT in Darby court quotes these cases to show that Ct will not inquire into C’s motives; and does not care about prohibiting to reach a non-enumerated end
- **US v Doremus – Act is Valid**
  - Tax – on all transactions involving Opium; dealers must register and have to use sales form → may be criminal sanctions (not in tax though)
  - purpose may be:
    - (1) raise revenue
    - (2) outlaw opium (pretext! – would be inconsistent w/ Bailey)
    - (3) under N&P tax may be used to suppress drugs…
  - Tax is okay
    - the means – registering + sales form – make it easier to tax AND easier to suppress drugs (tax and non-tax ends)
  - Reconcile w/ Bailey → right to tax not questioned here just the means – and the means here have a strong and reasonable relation to tax ends; the means in Bailey do not a means for facilitating tax collection
- **US v Kahriger – Act is Valid**
  - Tax on Gamblers = $50/year + 10% of wager – give name and add. of all ees/customers
    - this might also lead to criminal sanctions (as in Doremus)
  - purpose may be
    - (1) revenue raising
    - (2) suppress gambling
  - P argues → only raises a negligible amount
    - legis history says intent is to suppress gambling
  - Ct → negligible revenue does not matter
    - unless there are penalty provisions that don’t support a tax end, the Ct cant do anything – all of the provisions here are adapted to collection of a valid tax
      - means-end analysis (example of provision extraneous to tax = Bailey)
      - means are related to the tax ends
    - legislative history = ends analysis (pretext?)
      - like Darby – backs away from this analysis – doesn’t matter that there are 2 purposes → no judicial scrutiny of ends
• just b/c it merely discourages the activity being taxed does not matter

• OVERVIEW
  o Nondiscriminatory taxation is restrained by the political process
    ▪ spending usually isn’t
  o A tax cannot be imposed primarily as a penalty (means-ends inquiry)
    ▪ can’t be a pretext for Cong to exercise a non-enumerated power
    ▪ but any tax will have a discouraging effect
  o Any non-revenue provisions in a tax law must be related to collection
    ▪ Sometimes there is more than one purpose/end for taxing, but it is only good when the means get to the taxing ends also.
  o Tax Purpose: Although some cases earlier in the 20th century suggested that Congress could not use the taxing power as a pretense to regulate an activity rather than raise revenue and could not reach activities it could not otherwise regulate, these limitations have been rejected. Thus in United States v. Kahriger, the Court upheld a tax on bookies even though the statute’s primary purpose was to regulate the activity, not to generate revenue. Nonetheless, Congress cannot tax in a way which would otherwise violate some constitutional prohibition. (e.g. a tax on newspapers alone)
  • ASK: what is the means-ends relationship in terms of the TP?

3) SPENDING POWER (Art 1 §8)

• Note – C can spend incident to other powers w/o relying on SP
• Spending power can be used to promote the nat’l general welfare, pay debts, & defend nation
  o C will be given deference - no limits on ends – given wide discretion by Ct
    ▪ Helvering: discretion in defining general welfare belongs to C
    ▪ Dole: “general welfare” is not a judicially enforceable restriction
      (interesting…)
    ▪ BUT if really a disguised regulation – Ct will not let it pass as under SP (Butler)
  o any conditions must be imposed on the recipient of funds
  o any N&P provisions in a spending act cannot be pretexts (means-ends inquiry)
  o The General Welfare Clause is a limitation on the power to tax and spend, not a separate source of Congressional power.
• When taxes are earmarked for a particular expenditure, the tax and spending power are inseparable therefore a tax payer can sue – otherwise it is very hard to find someone with standing to sue on a tax OR an expenditure
• C can spend for the Gen. welfare –not an all purpose power to provide for Gen. welfare
• Stone’s Limits (from Butler Dissent):
  • (1) Purpose must be truly national – must be for the general welfare.
    o But Helvering said that the “general welfare” inquiry is for Congress, not the courts.
- **Congress decides** which spending is for the General Welfare unless the court has to decide b/c: Clearly wrong; Arbitrary; Not an exercise of judgment
  - Ct doesn’t scrutinize ends – (Buckley v Valeo)
- (2) May not be used to coerce action left to state control.
  - **Steward Machine Co:**
    - During depression, govt. gave a tax refund if state enacted a Social Security System complying with federal standards. HELD, spending is valid since it’s not coercion, rather it’s an incentive; conditions are related to a national end, i.e. saving the money and time Govt. would have to spend on a nat’l program.
  - **Oklahoma v. CSC:** grant of highway funds given on condition that no state highway employee is elected. HELD, spending is valid since means (condition) are related to the end (building the highway) since elected official may give preference to certain constituents.
  - **South Dakota v. Dole**
    - Govt. gave money for highways on condition that SD have a 21 drinking age. HELD, condition is related to protecting federal highways; condition is voluntary, therefore no federalism concern about Govt. forcing states to regulate
  - **Conditions must be stated unambiguously** (States can only make a reasoned choice if it knows for sure what is being asked of it) - States have to have knowing choice
- (3) Conscience and patriotism of Congress and the executive: Political Checks
  - Reference to the political checks. We can have some confidence that the executive is not going to abuse the spending power.
- (4) Means-ends inquiry: the means have to be reasonably adapted to the ends.
  - Conditions reasonably adapted to the attainment of the end which alone would justify the expenditures.
  - But Oklahoma v. CSC didn’t worry about this restraint.
- **SP + N&P allow conditions to be attached to fed grant as long as not coercive:**
- **United States v Butler – Act is Invalid**
  - 2 view of the SP
    - Madison: power to spend merely carries into execution the other enumerated powers
    - Hamilton: power to spend is separate and distinct from other powers (Ct chooses this)
      - *the power to tax & spend stands on its own and may be exercised whenever doing so comes w/in the terms of the Art 1:8:1 and does not exceed applicable limits*
  - Fund: Gov’t gave farmers $ from a tax on the company who processes the grains
    - taxes were earmarked (special account) – last time C did this
  - Ct – this is INVALID
    - C cannot make a K for spending on something that it couldn’t do otherwise
    - the Plan = C to coerce a result they don’t have the power to compel; getting their hands on agriculture – which is a state controlled activity (is Ct saying that C cannot use SP to reach things unreachable under CC? – sounds like Madison)
      - Farmers had no choice – b/c if refused would be placed at a substantial competitive disadvantage
• Ct adhered to “enclave theory” – C cannot touch production, manufacturing
  ▪ Ct no longer follows enclave theory
  ▪ Ct does endorse conditioning $ for educ on what is taught
  ▪ THIS IS COERCION: farmer must accept $ - or go under; even if not coercion MAJ says it wont stand
  ▪ If decided today – even if coercion and regulation were found – would be valid under CC
  ▪ DISSENT – Stone (eventually prevailed as the law!)
    ▪ Spending is a distinct power
    ▪ This is not coercion – b/c not a threat of loss, this is a hope of gain
    ▪ (eventually dissent wins – Gov’t drops the req that farmers must sign K)
    ▪ Stone’s 4 Limits on SP (above)
• Steward v Davis Machine Co – Act is Valid
  ▪ fed tax on er, but er gets credit when er pays into state retirement scheme approved by fed
    ▪ SP: C spending, under certain conditions, nat’l gov’t gives back 90% of the original tax on er
    ▪ all but one state adopted b/c they got the er and ee push
  ▪ If state adopted a non-complying plan– then essentially getting taxed twice
    ▪ if no plan – then taxed once but no $ coming back to citizens of state
    ▪ State effectively had no choice – appears to be coercion
      ▪ Ct says SP are voluntary b/c choice to play the game or not
  ▪ law is okay – distinguished from Butler
    ▪ no earmarking for a special group
    ▪ state has approved the program
    ▪ no K, not irrevocable
    ▪ relief for unemployed is a lawful end
  ▪ MAJ – state is not coerced; state is not complaining; state could choose not to implement program up to fed standards
• Helvering v Davis (1937) – Act is Valid
  ▪ upheld old age benefit provisions of 1935 Social Security Act
  ▪ Key question is whether spending is for general welfare or particular interests
  ▪ Whether spending is for general welfare or not is a Q for Ct – it’s a Q for C
    ▪ even if small class is being helped – it is the general welfare – b/c you know you will be saved if you need it (benefit from knowledge that if we have particular needs C will be able to address those)
  ▪ Cardozo found that a system of old age pensions is best left to the nat’l interest
• OK v. Civil Service Commission 1947 → Valid Limit imposed on States who took national funds; OK has to structure its government differently if it wants federal $
  ▪ Hatch Act – granted hwy $ on condition that no state hwy ee be elected
    ▪ State made decision that hwy commissioner should be elected
  ▪ Ct – its valid → spending is valid since means (condition) are related to the end (building the hwy), since elected officials may give preference to certain constituents
- intrudes on state affairs – people of state may like one form of gov’t but can’t have it if want funds
  - **DISSENT – Stone:** how is this reasonably related to the purpose of the fed spending (90% hwy funding)?
    - if election coming up may postpone buying up land for hwy until after that
    - might only give indiv of your party K to make hwy
    - might give the job to inefficient workers who will vote for you
  - **Restraints on SP**
    - political process – elect indiv who would impose fewer conditions on $ 
    - state could turn down the grant (very rare)
    - Ct analysis of means/ends relationship – unlikely that modern ct will scrutinize the ends – but may analyze the relationship
      - Ct is not likely to say – C was wrong – there is no relationship
  - **C can encourage states to enforce nat’l legis/to regulate but cannot coerce them**
    - see 10th Amdmt section of Outline
  - **NY v. US** (radioactive waste disposal) → Act gave money to states if they met regulatory milestones. Held: conditions on $ are fine here (Ct invalidated a provision but not under SP)
  - **South Dakota v Dole (1987):** Act is Valid: Gov’t gave $ for hwy on condition that SD have a 21 drinking age. (or Gov’t would withhold 5% of funding)
    - C may use the SP to induce states to cooperate w/ regulations in areas that are not easily controlled. Compliance w/ this law is voluntary and the stakes are not high. Additionally, if the funds are accepted by the state, the conditions are laid out unambiguously and are fully understood by the states
    - Condition is related to protecting fed hwy
    - **4 Part test!**
      - (1) Exercise of SP must be in pursuit of general welfare
        - Cts should defer substantially to the judgment of C in considering whether a particular expenditure is intended to serve general public purposes
      - (2) if C desires to condition the States’ receipt of fed $ - it must do so unambiguously – enabling the state to make its choice knowing the consequences
      - (3) Conditions on fed grants might be illegitimate if they are unrelated “to the federal interest in particular nat’l projects or programs”
      - (4) Other Const’n provision may provide an independent bar to the conditional grant of federal funds

4) **WAR POWER**
- **Art 1: §8: cl. 11**
- Issue is the impact of war powers on federalism
- C can declare war, raise armies/navies, and provide for the nat’l defense
  - Under N&P – C may use this power in peacetime to
    - prepare for future wars
    - deal w/ the social and economic consequences of past wars
  - WP is much more limited than the other powers
• War power can justify laws that correct the problems of war after war is over
  o however, legis in the field of veteran’s rights and limitations thereon may be extended indefinitely as long as veterans or their relatives may survive

• **Woods v. Cloyd Miller** – **Act is Valid**
  o Act regulated rent after war – b/c of post-war housing shortage due to demobilization
  o Rent regulation is *necessary and proper* as a means to address the housing shortage caused by the war.
  o WP does not nec end w/ cessation of hostilities
    ▪ can remedy conditions made by mobilization of war
    ▪ as long as the effects of war are reasonably traceable to the war, C can use its WP to remedy those effects
  o Ends are related to means – since setting rent remedies the damage to the housing market cause by the war
  o Even though actual combat had terminated, a state of war still technically existed, + C had right to take all N&P means to remedy post-war problems

• **Hamilton v. Kentucky Distilleries** – **Act is Valid**
  o C used WP to limit alcohol production b/c grain (and non-hung-over males) needed for war effort
  o Concurrence (Jackson) – WP is subject to passions
    ▪ WP is very broad and could be easily abused
      • could hurt liberties
      • especially if used for indirect effects
        o Ct may need to inquire into means/end relationship
    ▪ However – uphold b/c we’re still currently at war
    ▪ Concerned that WP could go on forever – debt effect of war is felt for decades

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**5) THE TREATY POWER**

• **Article 2: §2** – gives Pres power to make treaties & Supremacy clause makes them supreme
  o Pres can make treaties w/ advice & consent of Senate
  o A law is const if the treaty that requires it is const; the treaty is const unless it allows C to go beyond its enumerated powers

• Treaties put into affect by National Legislation – Treaties carried into execution by statute
  o treaty is equivalent to fed statute – which ever enacted later controls
  o both win over state due to supremacy clause

• Ratify treaties = an enumerated legis power, thus even though a subject area might not otherwise be w/in C control, if it falls w/in the scope of an otherwise valid treaty – it will be valid as N&P means of exercising treaty power (and binding on states under Supremacy Cl)

• **MO v Holland** – **Act is Valid** (broadens scope of C’s affirmative authority under Const’n)
  o Ct upheld the treaty b/w the US and UK protecting migratory birds
  o MO argued that it violated 10th Amdmt (and went against federalism)– Ct explained that Const’n expressly grants fed gov’t the power to make treaties and
thus states could not claim that the treaty or the statute adopted pursuant to it violated the 10th Amdmt

- US could not regulate this under CC – so tried Treaty
  - N&P applies here just like all other enumerated powers
  - 10th amendment only reserves what is not delegated & Ct held that treaty and N&P were delegated to C thus not reserved to the state;
  - Ct – Treaty does not contravene any prohibitory words found in Const’n – no violation

- Problem w/ MO case was that there was a worry that C could make an end-run around other restrictions, such as Bill of Rights. However, in Reid v Covert, Ct held that an executive agreement could not violate any distinct const’n prohibitions or guarantees. “No agreement w/ a foreign nation can confer power on the C, or on any other branch of Gov’t, which is free from the restraints of the Const’n” (Ct has never held a treaty unconst’n)

- Broad statement that fed gov’t can exercise only N&P enumerated in C is for internal affairs only – Foreign affairs power of Fed different from normal power → internal: fed cant do anything not in Const’n; external: fed powers of sovereignty don’t rely on Const’n

- Missouri v. Holland suggested that the President and Senate could achieve ends through treaty which were beyond the constitutional power of Congress. It seems unlikely the Court would adhere to this result today. In Reid v. Covert, 354 U.S. 1 (1957), the Court held, in a plurality opinion, that a foreign agreement could not transcend constitutional bounds.

6) PRIVILEGES AND IMMUNITIES

Federal Immunity from State Taxation

- McCulloch v. MD – Tax is Invalid
  - Issue: Whether the State of Maryland may, without violating the constitution, tax Nat’l Bank branch?
  - SC: “the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. → unconstitutional and void.
    - Also – MD is effectively taxing entire nation which is not entirely represented in MD legis; gov’t may not tax those it does not represent
  - MD could not tax the Bank, a federal institution; because the power to tax carries the power to destroy (state might operate tax in hostile manner and destroy a nat’l instr.
  - Normal Check on taxing power is the political process
  - If Fed is subject to tax that all citizens subject to as well – then okay b/c gets vicarious protection by the fact that MD constituents will ward off extensive taxing
“the difference is b/w the action of the whole on a part and the action of a part on
the whole” – political check on whole that isn’t present on part

- Fed Immunity to taxation only exists when US is the one w/ the obligation to pay –
  Gov’t ees are not immune from state taxation; the fact that this burden might be
  passed on to the gov’t is not enough to confer tax immunity.

**State Immunities from Federal Taxes**

**Collector v. Day – Act is Valid** subsequently overruled in **Graves v O’Keefe**

- SC held that a state judge doing state functions is immune from the national income
tax; SC believed state itself was immune from the tax – so by derivative ee was
  immune
  - notion that if you are taxed, you are going to pass back to state the demand for a
    higher salary – burden on state treasury
  - derivative immunity allowed here (immunity for people who deal w/ gov’t)
    - rejected in Helvering v Gerhardt

**Helvering v. Gerhardt (OLD RULE) – Act is Valid (1983)**

- ees of the Port of NY Authority argued that the federal income tax on their salaries
  was an unconst’n burden on NY and NJ
- tax immunity devised for protection of the states as gov’t entities cannot be pressed so
  far as to include common occupations not shown to be different in their methods or
duties from those of similar employees of private industries
- derivative immunity rejected – confines Collector to its facts
  - it’s a generally applicable tax – not focused on state ees
  - this is an action of the whole on a part – so okay
- No Deriv. Immunity b/c
  - limits fed power to tax (giving this immunity to states takes it away from fed)
  - people of all the states have a political check
- State might have immunity when
  - activities are essential to the state functions
  - when the burden on state is significant (balance b/w loss of $ to fed & state
    burden)
- Const’n basis for state immunity from nat’l tax →
  - Idea of federalism
  - Structural provisions w/in Const’n
    - Const’n → federal system
    - 10th Amdmt is not the source here – federalism is the source and finds
      embodiment in 10th Amdmt

**BABY - New York v. US (CURRENT RULE) 1946 – (mineral water case) Act is
VALID**

- Tax on NY mineral water (ran by NY state); no restriction upon C to include states in
  levying a tax exacted equally from private persons upon the same subject matter
- MAJ – old cases based on gov’t v proprietary → didn’t work → lets look at whether
  tax is discriminatory:
  - (non-discrimination) TEST: as long as C merely taps a source a revenue by
    whomsoever earned and not uniquely capable of being earned only by a state, the
Const’n of the US does not forbid it merely b/c its incidence (obligation to pay) falls also on a state
  • tax is valid since bottling is something that a state and private business can do, and not something only a state can do.
  • BUT NY has an interest in preserving the states natural resources – isn’t that uniquely gov’t
• Stone (concurring) non-disc test can still mess up state functions → we must look at whether the tax is discriminatory and whether it unduly interferes w/ state’s sovereign functions
  o Rehnquist seizes on this in Nat’l League
• Rutledge (joining Stone) – ok to tax if C makes a clear intention of wanting to tax the states → makes political protection of states apply directly and C will determine this (blame C not the act) → THEN apply the discrimination test
• Douglas (dissenting) – this interferes w/ state sovereignty b/c state gets less $; state dignity reduced
• Three Approaches of NY v. US
  o Majority -- Only activities unique to state gov’t are immune
  o Concurrence -- Balancing test: Impairment of state functions vs. the loss of tax revenue
  o Dissent -- Everything a state chooses to do should be immune from taxation
• RULE: ask if the tax is non-discriminatory b/w states and private indiv. Then, the fed gov’t may not tax in a way which would “interfere unduly w/ the State’s performance of its sovereign functions of gov’t”
• Essential Functions: the fed gov’t may not impose a significant tax on property used or income rec’d from a state’s performance of its basic gov’t functions. But where a state gov’t engages in a function that is not at the core of traditional gov’t functions, the fed gov’t may tax that function as part of a non-discriminatory, generally-applicable tax

State Autonomy as a Limit on the Commerce Power, etc.

Principle of federalism as an independent check on the exercise of enumerated power

3 Categories of National Statute Regulation
• (1) Statutes that regulate private activity
  o C attempts to control private businesses, etc (private er must pay ee $x/hour)
  o Darby; Lopez; Hodel; (private + public = Wirtz; Nat’l L; Garcia; baby NY; Frye; Long Island RR; EEOC; SC v Baker; FERC)
• (2) Statutes that regulate state and local governments
  o feds put the same rules on state wages – FLSA – state er must pay state ee $x/hour; displaces state policy decisions – increase tax revenue or cut programs (Nat’l League)
  o US v CA; Case; MD v Wirtz; Frye; Nat’l; Long Island RR; Hodel; EEOC; Garcia; Reno
• (3) Statutes that require states to exercise state government authority over private activity
C has each state enforce the min wage, make an agency to do so, fund that agency, etc

states as agents of nat’l gov’t

If you get the states to enforce the national law then you don’t have to pay to administer it, nor do you feel the heat if the law is unpopular among citizens

Hodel; FERC; Dole; NY v US; Printz;

2 big cases → Nat’l League and Garcia (both saying different things)

Cases in b/w: Hodel; Long Island RR; FERC; EEOC

Category 1 Cases → statutes regulate private activity

Category 2 Cases → statutes regulate state and local gov’ts

note: legislation is unlikely to be subject to 10th Amendment Limitations

Category 1 Cases

US v CA (1937) – valid

State owned RR charged w/ not following the automatic couplers regulation

upheld b/c problems caused by not having the couplers are the same regardless of who owns the RR (breakdown upsets InterC regardless of who owns RR)

Case v Bowles (1945) – valid

enacted under C’s war power, C imposed price limits to hold down inflation; State owned timber, cut it and sold it to raise money to finance state education (public)

Ct used a balancing test and found fed interest greater than state interest, upheld

Maryland v Wirtz (1968) – valid

overruled by Nat’l League – then valid again when Garcia overruled Nat’l League

FLSA – extended to state ees

upheld b/c applied to private and public sector equally

Douglas dissented b/c it was a burden on the states → would have to make a choice to either reduce services or increase taxes (intrudes on states’ roles → federalism argument)

Frye v US – valid

Economic Stabilization Act – Pres can control wages and stop inflation; Ohio requested permission to increase wages b/y Pres’s limits; Ct upheld C’s right to control wages

Ct (Marshall) drew an impt dichotomy:

(1) Is the statute w/in CC

Ct decides YES; C expressly spelled out its intent to apply to both public & private sector; wages affect InterC; State raises wages = inc InterC purchasing power

(2) If so, are there any federalism limits that make an otherwise valid use of CC, invalid?
does the fact that the statute applies to state make it invalid? NO b/c there was must of a burden imposed on the state (Ct says it helped the state)

10th Amdmt is a “truism” (Darby) – it has some significance but Ct dismissed all the state autonomy limits here

National League of Cities v Usery (1976) – invalid (overruled by Garcia)

- Ct viewed 10th Amdmt as a reflection of philosophy of federalism embodied in Const’n (not as a truism (Darby Ct did))
- C applied FLSA to state gov’t ees (already applied to private sector)
- Rehnquist changed his lone dissent in Frye into MAJ opinion here
- Ct does not recognize a retreat on C’s CC – but states there is check on C’s CC by the state sovereignty – this is an integral gov’t function so invalid as to states under CC
  - Act is w/in CC but may be unconst’n for other reasons; CC over private activity is only limited by means/ends relationship (Heart of ATL)
- SOURCE of state sovereignty limits on CC
  - R = Frye: “10th Amdmt expressly declares the Const’n policy that C may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a fed system”
  - Brennan = 10th Amdmt = truism; only ques is whether C is using an enumerated power or not (no sovereignty limits on CC)
- WHO enforces these limits; R = Ct; B = political process (Gibbons)
- TEST - R = essential/traditional/integral state gov’t functions are protected
- ESSENTIAL FUNCTION (here)
  - R = interferes w/ state policy decisions on where to allocate $$
    - states costs increase = must reduce services or increase taxes; (NY v US: taxes that increase costs do not nec interfere w/ states)
    - “we don’t need particularized assessments to show policy interference”
    - (1) impinge on essential attributes of state sovereignty or (2) “directly impair State ability to structure integral operations in areas of traditional governmental functions,” unless the nature of the federal interest justified state submission to federal regulation
  - B = no interference b/c feds gives states tons of grant $$ (states don’t have to change policy just adhere – no interference!)
- R does not balance state v nat’l interests here; just states it may be good economic policy to adhere
- OVERRULES?
  - US v CA – good law
    - RRs are not integral state functions
    - does this reinstate the proprietary v gov’t distinction discredited in NY v US?
  - Case v Bowles – good law
    - ok b/c under war power not CC
  - OK v Civil Service Commission – good law
    - ok b/c under spending power not CC
  - Frye v US – good law
    - ok b/c big nat’l problem and limited interference w/ state
  - Maryland v Wirtz – overruled
    - this statute interfered w/ an integral gov’t function
- INTERPRETATION
(1) no consideration of nat’l interests, state functions are totally immunized – don’t look for “particularized assessments”

(2) Nat’l only applies to CC
   - North Carolina v Calafono – reaffirmed that Nat’l does not apply to SP
   - SP – State has a choice; WP – only belongs to C so not interference

(3) use a balancing test of nat’l interest and limited burden on the states – Frye is still good law; Blackmun (concur) said this

(4) Nat’l doesn’t affect the 14th Amdmt

**Dissent:** this should be left to political process NOT judicially enforced limits

**United Transportation Union v Long Island RR** – valid

- RR owned by state; act allowed state ees to strike (against NY law)
- Ct: RR is not a traditional gov’t function – it used to be private; footnote in Nat’l says that RR is a business activity (*static view of history*)
- this is category 1 and 2 since regulates private activity and states

**EEOC v Wyoming** – valid

- C wants to apply anti-discrimination employment rules to state game wardens
- The state argued that mandatory retirement ensured the physical fitness of its wardens, and that Act interfered in state functions in violation of Nat’l League.
- The Ct focused on the 3rd of the Hodel test = traditional gov’t functions (see below) – and found that the Act did not “directly impair” traditional gov’t functions b/c the Act did not req the states to keep physically unfit persons on the payroll, but merely to afford them individualized consideration.
  - however forces states to retain ees w/ more seniority and thus higher wages – imposing such a cost on the states, tog w/ controlling who will perform the tasks seems to be exactly what Nat’l League disapproved
  - Even if a fed act affects a traditional state function, as long as it does not affect the states’ ability to structure integral operations in that area of traditional gov’t, it is okay

**Garcia v San Antonio Metro. Transit Authority (SAMTA)** – valid (returns to 10th = truism)

- Overrules Nat’l – takes us back to MD v Wirtz; overrules third part of Hodel – that the federal legislation not burden areas of “traditional state concern.” There is no such thing – states experiment so the traditional gov’t function analysis must be discarded.
  - statute is valid since political check exist, and no possible destruction of state sovereignty exists so no need for judicial intervention, thus Nat’l L is overruled – Stevens is only one from here still on Ct – ripe to be overturned

- La Pierre – agrees that this is the right result – puts power w/ political process (something conservatives are usually happy w/ - but not here) – thinks Nat’l maybe just needed to be qualified
  - Nat’l political process works fine as a check as long as the private sector is being regulated as well

- C extends wage/hour reg to state ees; Ct refuses to use judicial review to limit C’s CC
- Ct – old test of gov’t v. proprietary is unworkable; impossible! (may be manipulated by what justices like and don’t like) → no federalism limit on CC
• States only protected by political process – states are vicariously protected when reg affects private sector as well; if good under CC then Ct will not scrutinize app to states
  o in a lot of cases we can trust the political process; but may not be enough – need background possibility of a judicial check (Baby NY v US)

• the fact that it is a state being regulated has no practical significance – if the regulation would be valid where applied to a private party it is valid as app’d to state!

• State sovereignty interests = protected by proc. safeguards inherent in fed gov’t structure

• Rehnquist & O’Connor itching to reinstate Nat’l League


• Law stopped states from selling drivers license info
  o burden: states lose revenue and sales policy

• REHNQUIST
  o is it valid under CC?
    ▪ Stream of Comm – “article in InterC – first time SOC used since Jones & Laughlin
    ▪ Info is in SOC so C can regulate it
    ▪ Regulation affected private companies as well as the state – after state sold the info (under consent of indiv) then the private co also had to get consent to re-sell
      • BUT – private co couldn’t get the info IF state never sold it
        o so cutting them off at the source as to un-consented to info
      ▪ This isn’t a 3rd category case b/c C is regulating under CC and the reg affects States AND private sector
  o Does this violate federalism/10th Amdmt?
    ▪ this is a law of general applicability → same rules apply to gov’t and private sector
      • but isn’t the gov’t the only one who can collect this info??
    ▪ STATE – this is a 3rd category case → puts burdens on the state, making IT regulate private parties
      • CT: it doesn’t make state reg the buyers of info → feds do this
        o does not req states to regulate their citizens – this is regulating states as owners of databases – not as states
        o also – this is a prohibition on conduct not a mandate (like in Printz & NY) it does not req the states to pass any legis or req state officials to assist in the enforcement of fed statute reg private indiv
    ▪ STATE – this regulates states exclusively – fed can only reg states generally
      • CT: doesn’t get to this
        o but seems that CT is saying this regulates an article in InterC that is sold by states AND sold by private industry – so this is not regulating the states exclusively
        o this is not burdening the public sector any more than it is burdening the private sector
      o CT did not address the possibility that this is “affecting commerce”
- LA: sale of personal info
- Affect on InterC: info used by marketers/insurers/etc; these cos may be from outside of state – leads to increased solicitation of goods through InterC
- Means: prohibition (w/o consent)
- InterC End: reduces solicitation of goods through InterC from direct marketers
  - Since this is a Category 2 cases and C is not trying to reg states as states – no fed limits!
  - not a 3rd category like FERC, NY v US, or Printz

**NOTE** – Current SC. Justices Rehnquist and O’Connor dissented in Garcia. Only Stevens was in majority. Thus, Nat’l League might still be alive today

**Category 3 Cases – States as Agents**

**Hodel v VA** – valid (this is category 1 & 3) – b/f Garcia
  - **under Category 1** – Ct upheld as a valid act of CC reg on private activity
  - C didn’t like the way states were regulating mining – so they made fed regs for it; initially enforced by fed agency BUT then if states enforced the standards the regs would be less strict (C would relax them if states took over enforcement)
    - this made ers lobby the state gov’t
  - state enforcement of federal standards → cooperative federalism
  - Marshall’s interpretation of Nat’l League – statute is invalid IF:
    - (1) regulates states as states; (2) addresses matters of state sovereignty; (3) harms states’ ability to structure operations in areas of traditional gov’t functions
      - (3) is invalidated in Garcia – don’t know what “traditional” means; holding is on tenuous ground (Lopez and Morrison mention “traditional” gov’t functions)
    - Also – balance nat’l v state interest and if all 3 met; state interest wins! feds lose
  - If state did not meet fed standards then feds could take over all regs here – threat of preemption; state has a choice! Ct found this did not regulate states as states
  - Ct – this allows states w/in limits to enforce own regs
    - allows – not really b/c political pressure forced states to assume enforcement (if didn’t then the fed gov’t would continue to enforce their standards)
    - own – not really “own” there were some details state could hammer out but really set by feds
      - law is valid since state is not compelled to regulate

**FERC v MI** – valid – (1982) decided b/f Garcia
  - **read handout from class and incorporate it??**
  - Act req’s state reg agencies consider C’s approaches to rate structuring, use certain hearing procedures in doing so, and give reasons for not adopting the approaches.
    - C wanted to shift responsibility and cost onto state – state didn’t like C allocating the state’s admin resources
  - Ct – state did not have to enact anything! merely had to hold hearing and consider
    - hearings appear to be traditional gov’t functions
    - Ct notes that C could have come in under CC and enforced the regs themselves
      - found this to be less intrusive so better?
      - however there are NO fed utility laws – but would be valid under CC
• Ct Split the same as in Nat’l League (except Blackmun switched sides and voted to uphold fed law here)

• After States decided on a rule – they have to implement it – this is ok b/c states normally reg/implement this stuff

• **Dissent**: compelling states to consider adopting fed reg was, in essence, to conscript the state reg process and thus violate the 10th Amdmt
  - *(O’Connor)* Cts decision undermines the most valuable aspects of our federalism.
    - Ct and Commentators freq have recog’d that the 50 states serve as laboratories for the development of new social, economic, and political ideas.

**South Dakota v Dole** – 1987 (after Garcia) – valid – this is use of SP

• *condition is related to protecting federal highways; condition is voluntary, therefore no federalism concern about Govt. forcing states to regulate.*

• C conditioned 5% of hwy $ on state raising the drinking age to 21 (SD = 19)
  - Nat’l League → limits only on CC not SP (so Rehnquist is fine w/ this)

• Limits on SP:
  - (1) furtherance of public welfare (up to C to decide if w/in general welfare)
  - (2) condition is unambiguous (if say has choice – must fully inform state of choice)
  - (3) rel b/w condition and expenditure
    - *condition must R further some particular nat’l project otherwise w/in fed power*
  - (4) must not be barred by other constitutional limits

• *(4)* in question here → state claims barred by 10th Amdmt;
  - However, the independent const’n bar limitation does not mean C may not indirectly achieve objectives it could not achieve directly; the bar prevents C from inducing states to engage in otherwise unconst’n behavior; b/c a state may const’n raise its drinking age, C is not barred from imposing such a condition on the expenditure of fed funds
  - Stone (Butler case) – C cant use SP to make state do something unconst’n
    - Steward Machine – some things are so coercive that cross line to command (not allowed) → this Ct also recognizes this here but says that isn’t the case in Dole

• NOT COERCIVE b/c → state has choice – can refuse $; and only a small portion of the $

• C clearly has authority to impose conditions on the receipt of fed funds, even to attain objectives it might not be able to attain directly. This authority is incident to the SP
  - “relatively mild encouragement” and was const’n “even if C might lack the power to impose a nat’l min drinking age directly, we conclude that encouragement to state action…is a valid use of the SP.”

• **Dissent**: no real relation b/w drinking age & hwy; need stronger connection to satisfy (3)
  - MAJ – end = system of safe travel; DIS – end = interstate hwy system
    - definition of the end changes the relationship
  - under inclusive – if really wanted to regulate drunk driving would directly regulate it b/c anyone 21-150 can drive drunk; over inclusive – some teens wont drink & drive

**NY v US** – (1992 after Garcia) – invalid – *radioactive waste disposal*
• good case to look at to understand what the Ct has been doing up to now – use O’Connor’s order in this case to get a grasp

• RULE – C can encourage not coerce states to regulate!!
  o O’Connor cites Hodel & FERC as encouragement – there is coercion here

• Provisions of Statute
  o (1) $ Incentives = valid (Ct was unanimous)
    ▪ fed charges a surcharge to states w/o sites when they dump then gives a % of this $ to states that comply w/ fed plan
      ▪ surcharge may be invalid as use of CC under Dormant CC b/c discriminates and only charges those states w/o sites – but okay under TP or SP (under Dole)
        ▪ SP = surcharge collected then given to states to encourage compliance w/ fed regulations (must still satisfy Dole req)
          ▪ gave state a choice, like a federal tax, thus w/in enumerated powers (CC or TP)
          ▪ Since C can burden InterC, C can authorize state to burden InterC (of waste)
  o (2) Access Incentives = valid
    ▪ states w/ cites can ↑, ↓, or stop access to citizens of states not doing fed plan
    ▪ states not compelled to change their operation – conditional exercise of CC
    ▪ the increasing cost to dispose of waste would cause political pressure on state to comply w/ fed plan (or at least to set up own disposal site)
      ▪ burden on private indiv which in turn puts burden on the state
      ▪ C can only directly regulate individuals – not the states directly
    ▪ C is allowing states to burden InterC (not originally allowed to do this)

• 2 ways C can use states to execute nat’l policy – condition $ or burden private indiv
  o (3) Take Title Provision = invalid
    ▪ state can either (1) take title and L over the waste OR (2) comply w/ fed plan
      ▪ C cannot make state choose b/w 2 unconstitutionally coercive things
        ▪ C cannot const’n force state to take title/L
        ▪ C cannot const’n force state to regulate
      ▪ Hodel: C cannot force state to adopt a reg program – this is compulsion here!
        ▪ outside C’s enumerated powers – state has no choice at all – this is “comandeering” – not allowed!
    ▪ (Hodel & FERC still good law b/c they don’t command the state to regulate)
      ▪ choice of preemption or regulation is fine; conditional $ is fine (Dole)
    ▪ If Feds command state to regulate – the political process fails – those who draft the regs are insulated b/c the states must enforce – problem w/ accountability
    ▪ No matter how great the fed interest, the Const’n does not give C authority to req the states to regulate. C must legislate directly, not by conscripting state gov’ts.
    ▪ RULE: if the states have no choice, C has issued a command – invalid!

• C could have done (3) under SP →
o Attach conditions to fed funds (as long as meets Dole req)
o C could have threatened pre-emption; where C can regulate private activity it can
    offer States the choice of following their rules or of losing the power to regulate
    ▪ Hodel – feds can pre-empt state legislation that is contrary to fed interest
  • Clearly rejects Garcia’s conclusion that the fed Judic would not use the 10th Amdmt
to invalidate fed laws – it appears that if a fed law compels state legis or reg activity,
the statute is unconst’n even if there is a compelling need for the fed action
  • Dissent (White, Blackmun): states requested this legislation – states agreed to it – fed
gov’t is allowed to referee b/w the states when the states try to renege on their
agreements w/ one another; (Stevens): Fed can impose limits on states just as under
AOC and has the right to resolve issues among the states
  • C can usually get states to enforce fed legis – if states think legis is a good idea, so
look to legis and see if disfavored b/c this is when compliance is objected to. State
officials usually follow & support safety fed system legis, etc that is categorized as
“cooperative federalism”
  • Bottom Line: C has to make sure it does not use words like “command” “order” and
that there is another way of viewing their actions besides “ordering” or
“commandeering”
o Power of C to legislate so as to impact state autonomy has been analyzed both by inquiring
whether C has the power under Art1 to act and by determining whether C has invaded the
province of state sovereignty reserved by the 10th Amdmt. But these inquires are mirror images,
b/c where a power is delegated to C, the 10th Amdmt expressly disclaims any reservation of power
to the states, and if a power is an attribute of state sovereignty reserved by the 10th Amdmt, it is
nee not conferred on C
  ▪ The 10th Amdmt merely states a truism (Darby) that all is retained by the states which has not
been surrendered to the fed gov’t; yet it req the Cts to determine whether an incident of state
sovereignty is protected by a limitation of Art 1 power.

Garcia + NY = C can directly regulate the states but cannot use the states
as an agent to implement federal regulatory policy

Printz v US (1997) – Statute Invalid
• RULE: Fed Gov’t may not compel state/local officials to perform federally specified
admin tasks
• Brady Act – temporary provision = ordered local law enforcement to conduct
background checks on prospective buyers of guns until permanent program was set
up. Sheriff (Printz) objected
• Ct found 3 principal reasons that C lacked pwr to “impress the state exec into its
service”
o History: Our constitutional practice “suggests an assumed absence of such
power.”
o Structure: The fed gov’t operates upon the people not the states. Conscripting the
states into the army of fed administrators would violate the state’s sovereignty
o Policy: The Act’s directive to local police chiefs and sheriffs distorted the
political accountability of both fed and state officials and compromised the
independence and autonomy that states retain within their proper sphere of
authority
• Ques: Can C make state officials implement fed policies? fed: this has always been ok; state: this takes our resources away
  o SCALIA: this isn’t a Category 2 case so we don’t care about temp burden on state or great interest of fed (process = text of statute & const’n; early C & framers intent; Structure that Const’n set up; Prior judicial precedence)
    ▪ Historically – ok for feds to make state judges do exec duties
    ▪ why not let feds make state execs do exec duties as well?
      o state judges are diff b/c they always were meant to enforce state law
    ▪ history does not resolve this
    ▪ dual sovereignty of Const’n structure …
      o TESTA: only means state judges must enforce fed law; not that fed can command state exec to execute fed policy
    ▪ Policy b/h saying feds cannot command state to do this
      o people who register might think it’s a state policy and not know where to complain – state officials will be blamed
      o interference w/ nat’l electorate – C gets the rule they want w/o having to pay for it
    ▪ Separation of Powers
      o Pres should enforce nat’l laws – not C; C is diminishing the scope of the exec power
      o O’CONNOR (CONCUR) – wants a balancing test (burden of state vs. interest of fed)
        ▪ suggested that state officials could be required to perform certain information reporting functions (such as reporting missing kids identity to fed gov’t)
      o THOMAS: look to 2nd Amendment – right to bear arms
      o SOUTER, Stevens, Breyer and Ginsburg DISSENT
      o STEVENS: this would not confuse the electorate states officials would TELL locals it was a nat’l policy NOT a state policy. TESTA means that state must enforce fed law, no matter how crowded the state dockets are (more commanding)
  • Ct has a problem w/ provisions under which the fed gov’t compels states to take certain steps BUT C can condition funds to reach this end b/c it gives states a choice
  • 11th Amendment → KEY is that it can be used to address federalism issues
    o 11th = state cannot be sued unless it consents
    o C can abrogate some of this immunity under 14th Amdmt §5

OVERVIEW of Fed Limits!!
• Congress may not directly compel the states to enact or enforce a federal regulatory program. [NY v. US, Printz] When Congress does this, it violates the Tenth Amendment (But Congress may single out the states for regulation when the states are acting as market participants. [Reno v. Condon]
• Distinguish from Garcia
  o Garcia: applies mainly to gen app fed laws – 10th Amdmt does not entitle a state’s own operations to an exemption merely b/c a state is being regulated along w/ all other private entities
  o NY & Printz: where fed gov’t tries to force a state or local gov’t to enact legis or reg; or tries to force state or local officials to perform particular gov’t functions;
this is not part of gen app scheme! and is directed specifically at the states basic exercise of sovereignty – fed gov’t may NOT use such coercion

- Regulation of States as Actors
  - BUT – if state chooses to conduct certain activities themselves, C may reg how they dos so w/o being deemed as “commandeering” state processes. If states maintain info identifying drivers and choose to sell info, there is no 10th Amdmt problem when C attempts to reg how states make such sales. C is not req states to reg their own citizens, but is instead reg the state as a comm. actor (Reno v Condon)

**To analyze Congress use of the CC under the present state of law:**
- If you see a federal law based on the CC, ask who is being regulated
  - If BOTH private and government actors are subject to the law, Garcia applies, and the only protection that the state receives is from its participation in the national political/legislative process
  - If only a state is regulated, and Congress is effectively commandeering a state legislature or state executive officer, the federal law will be INVALID b/c Congress cannot force state officials to perform federal functions
- This kind of law violates the principle of dual sovereignty, under which states must be free to structure themselves and their essential activities in accordance w/ the wishes of the state electorate

7) Dormant Commerce Clause

a) **There are two limits on states arising f/ the Commerce Clause:**
   i) Congress has exercised the CC in the form of a statute and there is a state law conflicting w/ that exercise → state law is invalid (preempted by Congress’s Constitutional powers)
   ii) Mere fact that Congress has CC at its disposal → the delegation of the CC to Congress is a basis for limitation on the states even where Congress has not exercised the CC – judicial check on state legislature → DORMANT CC

b) **State may NOT impede the free flow of commerce!**
   (1) Two ways that states do this:
      (a) Burden IC (w/ either a health and safety purpose OR an economic purpose)
         (i) If a law is merely burdensome, then it’s less likely that it will = protectionism or balkanization (fractioning of the national market into discrete small markets separated by barriers)
      (b) Discriminate against IC (w/ either a health and safety purpose OR an economic purpose)
         (i) We want to prevent destruction of InterstateC by local protectionism → may be discriminatory in that it benefits either an in-state interest or disadvantages an out-of-state interest

<table>
<thead>
<tr>
<th>Effect on IC</th>
<th>State’s Purpose →</th>
<th>Economic</th>
<th>Health and Safety</th>
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<tbody>
<tr>
<td>“Merely Burdensome”</td>
<td></td>
<td></td>
<td>State wants to be HERE</td>
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</tbody>
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**Constitutional Law I Outline – (Professor LaPierre) – Andrea Perry**
e) **How to analyze a DCC problem:**
   i) Where do the burdens fall?
      - What does the statute say? What language raises the problem?
   ii) What is the purpose of the measure (both purported and practical)?
      - $ or H/S
   iii) What is the effect of the measure?
      - Discriminatory or merely burdensome?
   iv) Apply the appropriate test
      - HUNT – if you think the law is discriminatory
        → If it’s discriminatory on its face AND it has an economic purpose, also apply *Philadelphia v. NJ*
      - PIKE – if you think the law is merely burdensome
   v) NOTE: decide how YOU view the law, but keep the other views in mind (disc/burdensome & $/H&S) and rebut them throughout your analysis
      - As long as we tell him WHY we think X, and have a reasonable argument, we’re right

   d) **Evolution of Dormant CC Analysis (Five Approaches)**
      i) Early S.Ct. (Marshall): State law w/ a health and safety purpose – Valid; State law w/ an economic purpose - Invalid
      ii) Tawney/Scalia: No effect given to the DCC. States can do whatever, unless what they do conflicts w/ a national statute. Only look at whether a state statute is void b/c it conflicts w/ a national statute (Supremacy Clause)
      iii) Cooley: DCC exists, state can regulate commerce BUT when the subject of regulation is national, the law is INVALID; when the subject of the regulation is local, the law is VALID
      iv) State laws that directly affect IC (as opposed to indirectly affecting IC) are INVALID. If the effect is only indirect, the law is VALID.
      v) CURRENT Court (last 70-80 years): apply BALANCING TEST
         - Look at the weight and nature of the states’ concern/interest and balance it against the burden on IC
         - Inquire into state’s ends (was its goal economic or health/safety)
         - Look at the judicial scrutiny of the means/ends relationship
         - What’s the burden on IC
         - NOTE: THERE WILL NEVER BE A DCC ENDS INVALIDATION!

i) **Gibbons v. Ogden: NOT a DCC case, but…**
   - Emphasizes that the CC is not a concurrent power shared b/w the states and the federal government
   - CC is for Congress, Police Power is for States

Constitutional Law I Outline – (Professor LaPierre) – Andrea Perry
- State Police Power Laws – even if they burden IC – are NOT BARRED by DCC – but, if the state attempts to regulate commerce w/o its police power – that is barred!
- Areas like inspection laws, quarantine laws, health laws, and laws regulating internal commerce of a state ARE FOR STATES

ii) *Wilson v. Black Bird Creek Marsh Co. (1829):* Looks at State’s Purpose (Marshall)
- Applies the purpose test – if the law is for Health and Safety, it’s ok, but if it’s for economic, that’s NOT ok
- DE authorized a dam that impeded navigation on the river, D broke dam and defended using DCC
- CT – no conflict b/w the state dam and CC b/c this is a police power law → valid
  - DE’s purpose was not to regulate IC, but to improve Health and Safety of its citizens (and no actual conflict b/w DE law and Congressional law)
  - Law was NOT discriminatory since all vessels (both in-stated and out-of-state are barred)

iii) *Cooley v. Board of Wardens of the Port of Philadelphia (1851):* National vs. Local Subject Matter Test
- Congress allowed the state to regulate port pilots; PA mandated use of local port pilots
- Local subjects of commerce can be regulated by states and so the law is valid
  - State has a right to regulate those aspects of IC which are of such a local nature as to require different treatment f/ state to state (here, ports – Congress cannot waste time making a lot of separate rules)
  - “Whatever subjects of the comm. power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by Congress”
    - DCC bars some but not all state reg.
    - Note: the Court has abandoned the COOLEY DOCTRINE (it offered no clear way to determine which activities require a uniform national rule and which require local rules → abandoned for the direct/indirect test, below.
- RULE NOW: Congress can grant power to a state to enact laws that may affect IC b/c if not then there would be a regulatory void in some areas. → Congress can authorize states to take action that would be prohibited under DCC (note here: the law benefits local pilots – unless Congress had given the state power to enact the law, it would be invalid b/c it would be discriminatory)
The Modern Balancing Approach ➔ (burden vs. local benefit)

PIKE TEST: (burden is on the challenger to prove...)
- Law is valid if it has a legitimate (meaning non-economic) purpose AND only incidentally burdens InterstateC
  - Unless the burden is clearly excessive in relation to the local benefits, the law will be upheld
  - Also looks for alternative, less burdensome means

HUNT TEST: (burden is on the state to prove...)
- WHEN THE LAW IS DISCRIMINATORY, the state must show
  1. Statute has a legitimate (non-economic) purpose
    - If the statute is discriminatory and has an economic purpose, it is virtually per se invalid (Philadelphia v. NJ)
    - If statute has H&S purpose, go to #2
  2. Purpose couldn’t be served equally well by less or non-discriminatory means
    - Maine v. Taylor (don’t have to invent new technology)
    - If no non-discriminatory alternatives, then the discriminatory law is VALID

RECIPROCITY AGREEMENTS: Court equates these to low level trade war/tariffs
- Condemns them in A&P v. Cottrell and in Granholm v. Heald

1) LAW IS MERELY BURDENSOME WITH AN ECONOMIC PURPOSE – USE PIKE TEST

a) Baldwin v. Seelig – State law is INVALID
- Law: prevented importation of milk if the importer didn’t spend the NY required $ for it; that way can’t charge less for the milk in NY
- Analysis:
  - Purpose: ECONOMIC (NY trying to raise milk prices)
    - Argument for H&S: higher prices mean that farmers won’t cut safety corners b/c they’re fighting to stay in business
  - Local Benefits: prevents NY milk producers from competing w/ VT producers – higher milk prices
  - Burden on IC: prevents cheaper milk f/ coming into the state
- UNANIMOUS DECISION: law creates a barrier similar to custom/tariff
- Rejected state’s argument that higher prices assured an adequate supply of milk in NY (supply jeopardized when farmers can’t earn enough)
- Police power cannot be used to establish an economic barrier against competition w/ products of another state
- Economic purpose/burdensome (out of state and in state have to pay same price) (could make an argument that this was discriminatory)
- Even if protectionism was a stepping stone to a valid end (health) the law was invalid b/c the burdens were too strong
b) **Henneford v. Silas Mason (1937) – State law is VALID**

- Law: WA imposed sales tax on goods sold in the state and a “use tax” on goods purchased outside WA in states w/o a sales tax or w/ a lower sales tax than WA’s
  - Use tax appears discriminatory b/c only applies to out of state goods
  - BUT, this law was upheld b/c it was an attempt to equalize tax burdens by taxing equivalent goods in the same manner – so only burdensome
  - If WA had imposed a use tax (and no sales tax) or a higher use tax – it would be invalid
  - Distinguish f/ **Baldwin v. Seelig**: WA only took away one aspect of price competition – still allows some competition
    - **Baldwin**: NY trying to regulate outside its borders (VT can sell milk in NY only at NY price)
    - Here: other states can sell at whatever price they want, but once the good reaches WA, a use tax will be applied

c) **Milk Control Board v. Eisebberg Farm Products (1939) – State law is VALID**

- Law: milk producers in PA must sell milk at or above a minimum price
  - Analysis:
    - Purpose: Economic: Trying to raise price of milk H&S?: keep farmers in business to ensure adequate supply of milk and keep farmers f/ cutting safety corners
    - Burden: PA local buyers and milk exporters
  - Distinguish f/ **Baldwin**: B wanted to bring milk into NY, here E wants to take PA milk to NY
    - Unlike B, burdens are on PA and not OOS (very few exporters of PA milk) \(\rightarrow\) political process provides a check
      - B: no one can buy milk f/ anywhere and sell in NY w/o buying at min. price
        - Benefits in-state milk (forces out cheaper milk); burden: OOS milk (tarrif!)
      - Here: PA is preserving interstate competition

d) **Foster Fountain Packing v. Haydel (1928) – State law is INVALID**

- Shrimp case
- LA prohibited the export of shrimp until the heads and shells had been removed
  - LA said it needed them f/ fertilizer (health and safety)
  - But, LA used tails for other products shipped OOS, so the purported purpose didn’t hold up
  - CT: this appeared to be an effort to force the packing industry to relocate f/ MI to LA (help local industry \(\rightarrow\) economic purpose!)
  - Not facially disc. b/c IS and OOS had to remove heads/shells in LA
  - BUT, practically it discriminated against OOS fish cutters

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*Constitutional Law I Outline – (Professor LaPierre) – Andrea Perry*
A state cannot prevent privately owned articles of trade from being shipped and sold in Interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state.

e) **Pike v. Bruce Church (1928)** – State law is INVALID

- **Law:** AZ prohibited shipment of uncrated cantaloupes
  - **Purpose:** ECONOMIC to enhance reputation of AZ cantaloupes b/c if crated OOS won’t have the AZ stamp
- **CT:** State brand is a legitimate purpose (seems odd) but loses on balancing test
  - **LP says this should be seen as discriminatory**
  - Too burdensome on IC because this would force Pike to build a very expensive plant to AZ’s interest in promoting its brand cannot constitutionally justify the requirement that Pike build a new plant

- **PIKE TEST:** law is valid if it has a legitimate purpose and only incidentally burdens IC, unless the burden is clearly excessive in relation to the local benefits (also looks for less burdensome alternatives) 

  "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on IC are only incidental, it will be upheld UNLESS the burden imposed on such IC is clearly excessive in relation to the punitive local benefits. If a legitimate local purpose is found, then the question becomes one of degree."

- If the CT concludes that the law is not disc, then presumption in favor of upholding law that the law is NOT DISC, then the presumption is in favor of upholding the law and will only invalidate it if it is shown that the law burdens IC more than it benefits the state

- **ALSO** – look for less burdensome alternatives

- **CT will view with particular suspicion a state statute that requires business operations to be performed in-state that could be more efficiently performed OOS**

f) **CTS v. Dynamics (1987)** – State law is VALID

- **Look at possible preemption first, then look at DCC** (here, no preemption, b/c just state law)
- **Law:** buying shares in a corp. does not mean that you get control – you must be voted into control (just b/c have shares doesn’t mean you get to vote)
- **Not disc:** applies to IS and OOS equally; Burden: buying corps. (fewer offers for Indiana Corps. in IC)
- **Principle purpose** of DCC scrutiny is to invalidate disc – not a problem here
- **Purpose:** protect IN economy and shareholders and existing management (don’t want more voters in the corp.)
  - State interest in protecting shareholders and defining attributes of shares of its corps.
- **Scalia: this economic purpose is okay… Ct should limit itself to asking (1) does law disc against IC (2) does it create a risk of inconsistent regulation by different states?**
- Only wants CT to intervene if law is disc; Scalia HATES balancing tests
- No multiple or inconsistent burdens here b/c firms only incorporate in one state

2) **LAW IS MERELY BURDENSOME WITH A HEALTH AND SAFETY PURPOSE – USE PIKE TEST**

a) *Mintz v. Baldwin* (1933) – State law is VALID
- Law: no importing cattle unless certified that they don’t have disease
- Benefits: less disease in NY; CT viewed this as H&S measure
  - Counter: later evidence showed that NY cows had this disease too
  - Should have prohibited movement both IS and OOS if true H&S concern
    - LP says this is facially discriminatory!
    - Easy to argue economic purpose since NY cows were sick too

b) *South Carolina v. Barnwell* (1938) – State law is VALID (the highway is a special case, so don’t use this case unless dealing w/ a hwy)
- Law: imposed width and weight restrictions on trucks
  - If law discriminatory against IC then invalid, or if it benefits state while burdening out of state (disc.); here, no disc. b/c applies to all trucks (IS & OOS)
- CT: State legis. Had a rational basis for H&S
- TC: said law would bar 85-90% of nations trucks and gross weight is not what matters – it’s weight per axle
- CT thinks that hwy regulation is special to states (vs. train reg., see *So Pac*)
  - “few subjects of state regulation are so peculiarly of state concern as are the use of state highways”
- CT defers to state legislature’s means/ends relationship – just asks if it is rational
  - SC didn’t even look to burden on IC, said if the law is not discriminatory, then politics will protect everyone f/ the burdens
  - Counter: this is NATIONAL – affects national trucking industry and national flow of goods!

**Stone:**
- Inevitable that when states regulate they will affect comm. → but if purely disc then OOS will not be protected by political checks, so that is invalid
  - *Stone's position changes 7 years later in So. Pac.*
- Absent disc, the Judicial function stops w/:
  - (1) whether state legis has acted w/in its province (reference to state ends – is this w/in states police power), AND
  - (2) whether the means are reasonably adapted to the ends sought (only look to whether the state legis’s choice is rational – rational basis!)
- Doesn’t discuss burden on IC – says that is inevitable
LP: if we shift focus to who owns the trucks, may be able to say this is discriminatory!

c) *Southern Pacific v. AZ (1945)* – State law is INVALID

- **First real balancing test!!!!**
- Law: limited length of trains
  - Local benefits (CT deferred to TC) – safety?
    - Did NOT DEFER TO STATE LEGIS → this is not safety! There will be more accidents since shorter trains means more trains; means/ends are not reasonably related
  - Burdens:
    - Impeded flow of RR
    - Most of the burden was on OOS → 95% of RR was IC
      - But, CT did not say that this was disc, just that it was a huge burden!
  - If this is to be regulated: needs to be national
  - Employs balancing test → burden on IC vs. benefit to state
    - No state benefit and an IC burden → Invalid
  - Distinguishes *Barnwell*: hwys are special b/c state owned (unlike RR)
    - DISSENT: CT should not act as a **SUPER LEGISLATURE**
      - This reg. burdens IC and the state cites a H&S interest, but the safety ends are not met by this regulation, so nothing to apply to the state’s side of the scale
        - Inquiry: do the means actually achieve the ends?!
  - Stone’s test: (1) what is the nature and extent of the burden which the state regulation imposes on InterstateC? (2) what are the relative weights of the state and national interests?
  - This decision essential overruled *Barnwell*, even though Stone won’t say so → **we’re in a So. Pac. world now!**
  - Aftermath: In later trucking cases, CT moves toward SO PAC and way f/ Barnwell

d) *Bibb v. Navajo Freight (1959)* – State law is INVALID

- Law: IL law required contoured mudguards but AK and 44 other states required straight ones
- No state interest b/c means/ends don’t fit → contoured guards are actually more dangerous (illusory safety purpose!)
- Burden on IC: Forces trucks to change flaps b/w states b/c local laws conflict (increase costs)
- CT does not treat hwy regulations as special here
- IL concern was illusory, burden was real → Law invalid
- This case involves multiple, inconsistent burdens… if IL had made a more convincing argument, AK might have given way
- When assessing burdens, may be **relevant to take account of the existence of other legis**
Here, the burden becomes substantial b/c other states didn’t require contoured mudflaps and one state barred their use.

e) **Kassel v. Consolidated Freightways (1981) – State law is INVALID**

- Law: banned twin trailer trucks (w/ an exception for border cities and some instate deliveries)
- Purpose: provide hwy safety but IA provided so many exceptions that it undermined its claimed purpose.
- Plurality: (4)
  - Benefits: none; Burdens: change trucks or divert goods around IA leads to increased cost; law = invalid (also benefits IS and burdens OOS)
  - **Four Part Inquiry:**
    (i) What are the ends? PLU accepts lawyers stated ends
    (ii) Means/ends relationship? Safety purpose is illusory (twin is just as safe)
    (iii) Burdens on IC?: higher costs, more accidents (b/c changing trucks and more short trucks on hwy b/c have to move same amount of goods)
    (iv) Outcome based on balancing? IA has no benefit, so burden tips → Invalid
  - PLU justifies its inquiry into means/ends b/c says the law is discriminatory… disproportionate burden OOS

i) **NOTE: CONCURRENCE (2) BECOMES THE APPROACH**

- Must find legislative intent… here it’s protectionism, so the law is invalid (if it had been H&S would have been ok)
- Defer to the legislature don’t scrutinize the benefits *(Barnwell)*
- **Three principles:**
  (i) Cts are not empowered to second guess the judgments of the legislature concerning utility of the legislation
  (ii) Burdens imposed on IC must be balanced against local benefits actually sought by legislature (not against those suggested after the fact by lawyers)
  (iii) Protectionist legislation is unconst’n under CC even if burdens and benefits are related to safety rather than economics.

ii) **Dissent: (3) (Rehnquist)**

- Can never find the actual legis intent so use lawyers’ stated intent – but defer to legis as to means/ends; therefore, valid state interests here *(Barnwell’s rational basis)*
  - Cannot separate safety and protectionist motives: purpose of safety is to protect the state
  - Direct balancing is apples and oranges → hates balancing tests!

f) **Transportation Cases → be v. careful applying to non-transportation cases**
g) Philadelphia v. NJ (DISSENT): valid H&S purpose b/c keeping excess waste f/ NJ (equates to quarantine laws)
   - Waste seeps into ground water, attracts rodents and birds, and sometimes catches on fire

h) MN v. Clover Leaf Creamery – State law is VALID (this case is still good law today)
   - Law: prohibited use of plastic, non-returnable containers for milk but allowed non-returnable containers made of pulpwood
   - Stated purpose: plastic presents a solid waste management problem, promotes more energy waste, and depletes natural resources
   - No plastic manufactured in MN, the big industry is pulpwood; looks disc when look at raw material
   - CT – looks to retail
     - NOT DISC – political checks will protect the plastic industry (many companies in MN that use plastic to make these bottles and whose plants are set up to use these containers)
   - All milk sellers must use same packaging (IS and OOS) and burdens are minor
     - APPLIES PIKE:
       - Legit state interest outweighs burdens on IC and the alternatives are not as effective
       - Regulates evenhandedly OOS and IS – distinguished based on container not OOS vs IS, so no disc AND the state’s environmental arguments outweigh the burdens on IC
     - We can manipulate how we come out by looking in a different area (i.e. look at retail vs. raw material!!)

3) LAW IS DISCRIMINATORY WITH AN ECONOMIC PURPOSE – USE HUNT TEST (and Philadelphia v. NJ)

a) Welton v. MO: State law is INVALID
   - Discriminatory on its face ➔ INVALID
   - Law: Peddlers of merchandise produced OOS must have a license; peddlers of MO goods didn’t
   - Barrier to IC trade for pure economic purpose ➔ Invalid!

b) PA v. WV (1931): State law is INVALID
   - WV Law: prohibited export of natural gas until all IS demand satisfied
   - MAJ – State cannot give preferred right of access to IS over OOS to natural resources

c) HP Hood v. Dumond (1949): State law is INVALID
   - Law: no new depots (for milk) if not in public interest
   - MAJ: Discriminatory in effect b/c not allowing goods to enter IC (milk f/ NY to Boston)
LP says that denial of depot is a direct restriction on the amount of milk Hood could purchase in NY and sell in another state → attempts to destroy competition by limiting the amount Hood can take
- Purpose: seems to be – by reducing milk sold to depots that service NY, increase unit cost to NY (b/c fixed cost remains same)
- State CANNOT restrict IC to advance its own commercial interests
- Economic purpose is virtually per se invalid
- **DISSENT:** belongs in category 4 → Disc w/ H&S Purpose
  - Another depot would divert milk away from Trenton, NY b/c shipping that milk to Boston → not enough milk for NY
  - Valid exercise of police power
  - Says we can’t assume that this is applied disc; if a different guy wanted this depot to service NYC and was not allowed, then we could say it was disc!
  - Language of the statute not disc – AND doesn’t appear to be disc practically
  - ATTACKS THE AUTOMATIC PRESUMPTION THAT AN ECONOMIC PURPOSE IS BAD AND H&S IS GOOD!
    - BUT, the CT has consistently seen a big difference b/w the two → economic purpose is less important and harder for the state to win on whereas H&S is more important and easier for the state to win on

d) **Philadelphia v. NJ (1978): State law is INVALID**
- Law: NJ prohibited importation of garbage
- Stated purpose: preserve limited natural resources (land) and H&S of citizens (waste seeps into ground water, etc.)
  - BUT the CT thinks the purpose is ECONOMIC
    - FACIAL DISCRIMINATION: the means are disc
    - Regardless of the state’s purpose, discrimination against movement in IC is PER SE INVALID
- IS processors of garbage are benefited b/c less competition for room in the landfill, so lower prices; however OOS producers are burdened b/c can’t send garbage to NJ
- LP: MAJ sees this as an attempt to economically protect IS residents f/ costs associated w/ waste disposal and recognizes a LONG STANDING RULE of per se invalidity for laws w/ an economic purpose (also always applies strict scrutiny when the law is deemed disc)
- Why didn’t the CT apply the HUNT TEST?
  - Hunt: discriminatory in effect
  - Here: facially discriminatory
    - Maybe there are two different rules…
      - If discriminatory in effect (not on face), might arguably have H&S purpose
      - If discriminatory on its face – obviously bad and must have an economic purpose
    - If CT had applied Hunt...
- Purpose? NJ said H&S (arguably for lower costs though)
- Any less disc means?
  - Could regulate evenhandedly the waste for everyone regardless of OOS vs IS
    - SO, CT could have invalidated under HUNT as well…
- DISSENT: (Rehnquist)
  - Law is valid b/c H&S b/c keeping excess waste f/ NJ – equates to quarantine laws

e) *Carbone v. Clarkstown* (1994) – State law is INVALID
- Law: must process (transfer depot) non-recyclable waste at the town facility (can’t ship out of town)
  - Town was using this law to guarantee a specific amount of tonnage to the facility in order to meet K w/ private party who was subsidizing the building of the facility
- BURDEN: OOS plants, plants who want to ship their stuff OOT (b/c higher fee at in-town facility); BENEFIT: City Plant
- MAJ:
  - This regulates IC – forces waste to be processed before entering IC
    - Takes the IS market away f/ OOS processors (but takes it away f/ IS too)
  - It’s discriminatory!
    - State: No, b/c ALL PRODUCERS must use this plant – not disc b/c based on where the waste comes f/ - burdens waste generated in town and waste that enters the town f/ outside the same
    - CT: OOS waste PROCESSORS are deprived of the market b/c of this rule
  - Alternatives? If safety was the purpose, can just impose standards for processing before waste comes in
- CONCURRENCE: (O’Connor) LP: this is more persuasive
  - Look at the processors for the burdens
    - *Dean Milk* and *Foster Fountain* aren’t relevant here b/c they benefited local industry… THIS MEASURE BENEFITS THE CITY ITSELF!
  - Usually there are political safeguards, but here the potential for conflicting laws is high (*Bibb*)
    - If lots of different rules through nation, then market will be fragmented – inability to comply w/ mutually inconsistent regulations
    - No political safeguards b/c people don’t care about this issue → so, the political check is ineffective
    - There are less disc. Means
- DISSENT: (Scalia, Souter, Blackmun)
  - This isn’t the same as our other cases b/c here the plant is owned by the state and not by a private party! And, Carbone’s pant is inferior to the city’s plant!
This law is burdensome – it creates a monopoly; but no discrimination b/c it burdens IT and OOT

- Shouldn’t second guess the legislature
- This isn’t TOO burdensome b/c waste disposal is a traditionally government function
- ALSO, this burdens IT residents as well as OOT
- Only benefits the municipality! NOT A PRIVATE ACTOR!
- Wants to see an OOT/OOS harm; Dissent says there isn’t one
- Doesn’t look like a protectionist measure – since burdening IT generators and processors; actually hurting IT economy – also, vicarious political protection for OOS b/c IS is burdened and won’t let that burden be too large

\textit{West Lynn Creamery v. Healy (1994)} – State law is INVALID

- Law: tax on all milk retailers in MA and that $$ was put in earmarked fund for MA farmers
  - Normally tax/subsidies are not subject to DCC but here it was used in a way to advantage MA farmers
  - Most of the milk is produced OOS but the entire assessment of tax goes back to benefit only MA farmers (not OOS farmers)
- On its face: all milk dealers are burdened – benefits IS b/c sell at lower price due to subsidy and then retailer can jack that price way up to equal the OOS and get a higher profit
- \textbf{MAJ: (to help or hurt this argument, look to see where the burdens fall)}
  - Discrimination against IC b/c benefits local dairy industry at the expense of OOS interests
    - (a) Disbursement f/ fund = subsidy to IS dairy interests
    - (b) If we look at farmers, easy to say this is disc; if we look at consumers/dealers – looks like the majority of the burden falls on IS
  - Subsidy keeps those who would otherwise object to the tax from acting – therefore, no political check (and, no vicarious protection to people OOS)
  - But what about consumers and retailers? These are strong interest groups who want to contest the tax! (CT should not balance these interest groups out, or say one is stronger, b/c that is for political scientists – may serve many useful purposes, not a basis for DCC analysis)
- \textbf{CONCURRENCE: (Scalia)}
  - Hughes v. Alexandria Scrap (MP case) validated subsidies?
  - How? \rightarrow MD wanted junkyards so subsidized them – this was okay; MA wants dairy farmers so subsized them… why isn’t this ok too? State spending $$ to aid domestic partners
  - If a non-disc tax and subsidy to state industry f/ general revenue (no earmarked fund), then this would be OK.
    - If this $$ was in a general fund, it’s competing w/ all the other state interests and there would be a political check; this way we don’t
get lots of subsidies b/c other political actors would claim they are being disfavored.

- **DISSENT: (Rehnquist)**
  - Don’t extend the sin of the DCC – only invalidate a law if it looks like something we have invalidated before
  - What about MARKET PARTICIPANT exception to DCC?
    - Normally businesses don’t give their $ away
    - When MA gives $ away they get it back through cheaper milk (also benefits other states b/c can buy MA milk for cheaper)
    - MA citizens are burdened too b/c have to pay for the subsidy through taxes

4) **LAW IS DISCRIMINATORY WITH A HEALTH AND SAFETY PURPOSE – USE HUNT TEST**
   a) *Exxon Dissent and Hood Dissent to in this category, according to LP*
   b) *Dean Milk v. Madison (1951) – State law is INVALID*
      - Law: prohibited sale of milk unless processed w/in 5 miles of Madison
      - Ct found discrimination profound since it completely barred milk from out of state and there were reasonable less discriminatory alternatives that would ensure public health
      - Benefits: helps Madison processing plants
      - Burdens: economic barrier on out of state plants and other in-state plants
      - Less Discriminatory Alt: send inspectors to out of state and make those plants pay add cost
        - counter: may lead to litigation over $$ and Ct is acting as super legis by thinking of alts
      - While purpose may be H&S the effect is Discriminatory w/ an economic barrier
      - DISSENT: P can have its milk processed in Madison plants and then sell it – milk itself is not excluded (*counter: but then it cant use its own plant → more costs*);
        - non disc b/c applies to in-state plants as well
          - depends on how we analyze this → if look to instate vs. out, then not disc BUT if look to in-county vs out, then it is disc
            - also no political check here – other WI citizens DO NOT have a vote for Madison laws (places burden on those not w/in Madison’s political process)
      - MAJ made no mention of the balancing test (safety v burden) and instead invalidated on other grounds
      - Look at this in terms of who is happy w/ law and who is unhappy & whether the law is state or county – tells us what burdens to look at
   c) *Breard v. Alexandria (1951) – State law is VALID*
Law: LA prohibited door to door solicitation (opt-in provision) applied to TX crew selling mags for a PA corp
  - may have been discriminatory against InterC
    - burden: no InterC or out of state door-to-door sales w/o opt-in
    - may be easier for IS to get the opt-in
    - ALSO this benefits those who sell mags in stores, etc
      - (b/c if people aren’t getting these through the mail then they are buying in store) – benefits local economy
        - treating local LA retailers diff from PA corp (by cutting down public’s options)
    - HOWEVER – only eliminates one form of solicitation can still advertise through mail; internet; newspaper; the actual mag
      - may be evenhanded → b/c affects LA and OOS peddlers the same
        - upheld b/c purpose was to protect rights of homeowners privacy rights not to provide an economic advantage to instate businesses
        - and applied to all peddlers not just out of state ones
        - BUT – what if there are no LA peddlers…
  - Can be viewed as:
    - burden: no InterC or out of state crews
    - benefit: help local merchants – protect privacy

d) *Great Atlantic and Pacific Tea v. Cottrell* (MS) (1976) – State law is INVALID
  - Law: reciprocity agreement otherwise cant sell milk in MS
  - LA didn’t signed the recip agreement b/c MS standards were really low, so even though met those standards LA milk was barred
  - Stated Purpose: H&S – ensure healthy milk in MS
    - CT – NO: MS would let any grade of milk in if LA signed the agreement
      - possible purpose: protect dairy industry – if import a lot want to make sure can export a lot that way all the MS Milk produced can be sold; burdens fall ONLY on OOS b/c only ones limited in selling their milk
    - not facially disc – but disc in effect (keeps out healthy LA milk)
    - CT finds less disc alternative → inspect LA and charge them for it
  - Recip promotes isolation! doesn’t promote free mkt – cant force another state to take your goods
    - MS said: (1) promotes free trade by eliminating barriers (insuring recip) CT: MS is using recip as a threat – if MS thought LA disc against their milk should have sued under DCC
    - MS said: (2) H&S purpose; CT: rejects! MS doesn’t care about quality
    - MS said: (3) enables MS to assure itself that the recip HS are the substantial equiv of MS’s; CT: what? we cant see the connection and in order to get that you should just inspect LA’s milk and charge them for it
- **PIKE TEST** application
  - where regulates evenhandedly and its effects on InterC are incidental – upheld unless the burden imposed on InterC is excessive in relation to the local benefits
  - here CT said the law diserved the stated purpose so burden on InterC is clearly excessive in comparison to the non-existent local benefit
  - no means-ends fit

e) **Hunt v. WA Apple Advertising Comms’n (1977)** – **State law is INVALID**

- North Carolina Law: closed containers of applies must only show USDA grade or no grade at all (no state grade)
  - facially nondisc – however NC did not have a state grade so no burden on IS
  - Burden on WA: couldn’t use its marketed grades (brand – lose competitive advantage), would have to deface its crates or order different ones (increased costs + used the pre-printed ones to facilitate handling) – brought WA superior grades to level of NC
    - however, not all states had indiv grades so didn’t disc against all OOS
    - 7 of the 13 importing states had indiv state grades
- Stated Purpose: consumer protection – too many grades create consumer confusion/fraud
- Ct determines that this discriminates b/c raises costs and strips competitive advantage of WA and “levels” the field to the advantage of IS → once know this we move to the test

- **HUNT TEST** (when disc is shown burden on state to prove both elements below)
  - (a) does statute have legit purpose/prove the benefits? (H&S legit; economic is not)
    - here – H&S isn’t advanced! WA apples ARE better, no deception – also deals on w/ crates (wholesale) not anything consumers see (no means-ends fit); doesn’t allow even helpful grades (CT: confusing info is better than no info)
      - evidence of economic purpose → NC Agric Comms’n told WA that in order to grant them an exception from the statute they would have to check w/ the NC apple growers who were responsible for the legis.
    - *Ct says that economic purpose is virtually per se invalid*
  - (b) could the purpose be served equally well by less or non-disc means?
    - yes – can put both state & USDA grades on it; or only allow state grades IF they are superior to USDA grades
  - NC does not meet its burden so the law is invalid!
- Since CT finds NC’s interest illusory the burden on InterC obviously outweighs it (NC loses)
- **HUNT DISSENT GOES IN CATEGORY #3**
f) *ME v. Taylor (1986)* – State law is VALID
- Law: prohibits importation of live minnows (Fed Law, *Lacey Act*, makes it a fed crime to transport animals/wildlife in violation of state law)
- Congress CAN authorize states to do things that are in violation of the DCC!
  - State claims that C’s Lacey Act allows disc here (for InterC)
  - If C speaks CLEARLY then can be true; but C did not speak clearly here – no clear intent to allow state to do this – so we say C did not allow it
- CT – this is disc on its face & seems to be economic purpose (virtual per se invalidity)
  - *Phil v NJ* per se rule is not applied here → is it still alive and working? yes not applied here b/c purpose is H&S not economic protectionism
    - when law is disc on face and points to economic protection we have two lines of attack → 1\textsuperscript{st} Hunt & 2\textsuperscript{nd} Phil v NJ
  - CT finds that the H&S purpose outweighs the burden!
    - (parasites, disrupt ecosystem, impossible to find the non-native species or the parasites; ME waters are unusually fragile) → not a true economic purpose SO didn’t apply Phil v NJ
    - but what about fact that fish can swim in? CT says that even though doesn’t address every point of the problem, the reg can still have a H&S purpose – law doesn’t have to be perfect
  - HUNT test applied → Legit Purpose (H&S) + no less disc alternatives (means ends fit)
    - if there is a health problem OOS but not IS – reasonable disc is okay (but see Baldwin – if problem IS and OOS then disc is not okay)
- DISSENT – we should defer to lower ct findings and only overrule when clearly erroneous; AC saw economic protectionism
  - doesn’t appear Hunt really applied here b/c MAJ doesn’t force State to PROVE that there are no less disc measures
  - State should have to prove (1) the parasites ACTUALLY harm Maine’s fish and (2) the non-disc alternatives aren’t yet available (here the challenger suggested developing a test to find parasites on the fish (right now can only do this by killing the fish))

G) *Hughes v. OK (1979)* – State law is INVALID
- Law: cant export natural minnows but can export hatchery-bred minnows
- Stated Purpose: conserve natural minnow supply
- Disc on its face! (Given Phil v NJ rule expect to see that applied here, BUT we don’t)
  - benefits the IS hatcheries and allows IS to use natural minnows for free
  - OOS can only access hatchery minnows NOT the natural ones
could increase tourism b/c can only use the natural minnows if in OK

- **MAJ (HUNT test - Brennan)**
  - disc b/c minnows can only be used in OK (hoarding a natural resource) and no means-end fit b/c if really trying to conserve supply would limit the # of minnows that can be harvested (by IS and OOS) as it stands IS can harvest as many as want
    - conservation of natural resource is a valid purpose BUT there are better means
    - could be economic purpose since conservation not achieved • and forces OOS to buy minnows from the hatchery

- **DISSENT (PIKE test – Rehnquist)**
  - not disc b/c no one can export natural minnows (not OOS or IS), not even really burdensome b/c can buy minnows from hatcheries – so applies PIKE and says law wins
  - maybe OK citizens are the ones wanting to export and this applies to them as well

- **LP ➔ this is disc w/ H&S purpose**
- WE CAN MANIPULATE DISC EFFECT BY CHOOSING WHERE WE LOOK

<table>
<thead>
<tr>
<th>Effect on IC ↓; Purpose →</th>
<th>Economic</th>
<th>Health &amp; Safety</th>
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</thead>
</table>
| Merely Burdensome (use PIKE test) | (1) **Baldwin v. Seelig**  
**Henneford v. Silas Mason**  
**Eisenberg**  
**Foster Fountain**  
**Pike v. Bruce Church**  
**CTS v. Dynamics** | (2) **Barnwell** - Transport  
**So Pac** - Transport  
**Kassell** - Transport  
**Bibb** - Transport  
**Mintz v. Baldwin**  
**MN v. Clover Leaf** |
| Discriminatory (use HUNT test) | (3) **Welton v. MO**  
**Hood** (Majority)  
**PA v. WV**  
**Hunt v. WA** (Dissent)  
**Philly v. NJ** | (4) **Hunt v. WA** (Majority)  
**Dean Milk**  
**Exxon** (Dissent)  
**Hood** (Dissent)  
**Great A&P v. Cottrell**  
**Hughes v. OK**  
**ME v. Taylor** |

5) **CASES THAT DON’T FIT IN THE FRAMEWORK**
   a) **Exxon v. Gov. of MD (1978)** – **State law is VALID** (LP says no discrimination here AND no burden on IC)
   - Law: MD prohibited integrated producer/refiners f/ owning gas stations
     - There was no gas production in MD; thought refiners were favoring their own gas stations in the gas crisis (b/c make more $ f/ company-owned
station v. franchise) – stated purpose was to maintain competition in gas retailing

- Not facially discriminatory – and not disc in effect b/c all gas will still come f/ OOS law just shifted who sells it to customer

- MAJORITY:
  - Focused on flow of gas into the state (not on the fact that the law bars these retailers)
    - If Exxon loses its stations it will ship (or some other OOS guy) will ship gas into MD
    - Nondisc. in retail? MAJ: 1.5% of IS is divested and 1% of OOS is protected (*not complete discrimination – but still appears pretty biased*)
      - CT claims that even though refiners are burdened it is not disc b/c no resulting advantage for IS retailers over OOS (non-refiner) retailers
        - Relied on: didn’t prohibit flow of IC, place added cost on them, or distinguish b/w IS and OOS companies in the retail market
      - CC was not designed to protect the structure or method of operations in retail mkt; the fact that the burden falls on some Interstate competition does not by itself = disc against IC
  - DISSENT: (this fits in category 4 (disc + H&S) – Blackmun) – focused on the retail gas situation → LAPIERRE LIKES THIS
    - This is a HUNT case (disc = disc even if only against one state) b/c disc does not knock out ALL OOS competition, however MD disadvantages the “strongest OOS” in favor of IS
      - No need for 100% disc for law to be disc
    - Approx. 98.5% of the burden is on OOS and 99% of benefit is on IS! There is at least one less disc alternative… invalid b/c disc w/ respect to retailers
    - IF however, there was production w/in the state then no disc b/c there would be a POLITICAL CHECK
  - Dissent is the state of the law TODAY
    - CC purpose is to prevent self-interest when the local political system is unresponsive to problems felt by non-constituents
    - LP’s explanation: Other states may have production w/in the state so the MAJ realized that MD is an exception and doesn’t want to deny MD this when other states can do it

b) *American Trucking Ass’n v. MI Public Service Commission* – State law is VALID

- Law: MI charged flat $100 fee annually for trucks engaging in intrastate comm. hauling

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*Constitutional Law I Outline – (Professor LaPierre) – Andrea Perry*
- Challenger: combo truckers travel less intrastate than pure intrastate trucks, making the cost per mile discriminatory
- CT: law is not disc on its face or in effect – its evenhanded
  - Found no significant practical burden on IC
  - No less burdensome means → changing the cost structure to $/mile is too difficult on state and not free of burdens on IC
  - Plus there was a 72 hour intrastate permit you could get for $10
  - Challenger failed to prove burden on IC (it was his burden b/c of PIKE test)
- MEASURE NEITHER BURDENS IC NOR DISC – so valid!

**PUTTING IT ALL TOGETHER?**

a) *Sabri v. US (2004)* – State law is valid under SPENDING POWER (Dissent discusses validity under CC)
   - Law: if an entity rec $10K+ per year f/ federal government, then if an individual attempts to bribe someone at that entity w/ a bribe of $5K+, that individual can be charged w/ a federal crime for bribery
   - Challenger: statute doesn’t require a jurisdictional hook! (i.e. doesn’t require that the bribe be related to or effect federal funds)…. Wants DA to have to prove that the bribe impacted the use of federal dollars
   - This law is validated under SP… why?
     - CT is acting as a partner w/ Congress and trying to validate the law under ANY OF CONGRESS’ ENUMERATED POWERS
       - Can say criminal statute is an exercise of the SP + N&P b/c →
         - Under SP → Congress has power to spend $$ for the general welfare
         - Congress wants federal $ spent efficiently, in order to ensure that Congress prohibits bribery
           - If bribe, entity may divert federal $ f/ the way it would be best spent
             - But what if they only divert state $? … since can’t distinguish b/w state $ and federal $, Congress must regulate both in order to realize its end
       - MAJORITY: *Lopez/Morrison* are not applicable here b/c they are CC and this is SP – so there is NO NEED TO LOOK FOR JURIS HOOK HERE
         - Plus → in L/M trying to see if the local activity was economic; here SP is always economic so L/M analysis doesn’t help us
       - MAJORITY: facial invalidations are disfavored, us “as applied” invalidations of statutes
       - CONCURRENCE: (Kennedy and Scalia)
         - If discount facial discrimination, CT will have to try every single case in order to determine the constitutional validity of a statute
Facial invalidation/validation is a much more comprehensive tool

**DISSENT: (Thomas)** → **takes us to CC (VALID UNDER CC)**

- He doesn’t see the law as valid under SP, but wants it to be under CC
  - Not valid under SP b/c no real fit b/w means/ends; Thomas wants more than a rational relationship; he wants a tight fit
    - Quotes McCulloch’s pretext reservation

- Under CC, look to **Perez**
  - C has the power to reach a local activity that does not affect IC b/c of its undoubted power to reach a local activity that does affect IC (when you cannot distinguish b/w the two)  → f/ **Perez, Raich and Baby Lopez**
  - Use N&P as a means of making effective its undoubted CC power

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**Market Participant Exception to DCC Scrutiny**

*When the state acts as a market participant, spending $ to run a proprietary enterprise or to subsidize private business, DCC analysis will NOT BE APPLIED and STATE MAY FAVOR LOCAL CITIZENS OVER OOS ECONOMIC INTERESTS*

- Mkt regulator sovereign capacity of regulating what others can do in their K relations
- Mkt participant = state is a party to a K and makes business decisions for itself
  - Must ask if state is really ever a mkt participant (trying to max tax revenue by increasing local business) – in the private sector business don’t care where their products go as long as they make $$
- Applies to the state as a buyer/seller
  - Rationale: if gov’t is MP they can make the same decisions a private company can – as to who to buy f/, sell to, etc. – and private decisions concerning this are not subject to DCC so government decisions concerning this are not subject to DCC either
  - NOTE: NO MP Exception if state is attempting to affect parties b/w those w/ whom it is contacting (not a MP if it tries to control the terms of K to which it is not a party)

1) **Hughes v. Alexandria Scrap** – State Law is VALID

- Give scrap car to processor who gets bounty from state and passes it on to you; to get this $$ you had to submit title info, but OOS faced more
stringent requirements in MD AND other states had more stringent req (like VA)
  ▪ effect → decreased the amt of MD scrap cars crossing over to other states (like VA)
  o Lower Court – applied PIKE and said goal of cleaning streets was legit but there was a less burdensome way (just show that it was a MD car + picked up in state of MD)
  o SC → MP immunity b/c state is BUYER of cars here; so ok that uses lower req for IS than OSS (when state is a MP it can discriminate if it wants)

2) Reeves v. State – State Law is VALID
  ▪ State owned cement plant refused to sell to OOS until all IS demand was met
  ▪ CT: MP immunity b/c state is SELLER of cement
  ▪ HOWEVER – it really appears that legis is trying to ensure an adequate supply of cement for state – doesn’t look like acting as a market participant…
    o think about whether the actions are due to reg goals OR private co goals → does this different motivation move the gov’t out of MP and back to MR?

3) White v. Mass Council of Construction Employees – State Law is VALID
  o City req’d that 50% of ees on city-funded construction projects be Boston residents
  o MP is not limited to state owned businesses; state may favor its citizens in receiving benefits from gov’t programs
  o MP immunity b/c city is BUYER of labor
    ▪ how is this different from using spending power?
  o HOWEVER, City could have done this by passing an ordinance and that would be subject to DCC, same outcome but different method → should we really have different rules?

4) South Central Timber v. Wunnike – State law is INVALID
  ▪ State sold its wood to buyer but req’d that they process it inside the state
  ▪ by putting req on the wood after the sale – state was acting as MR
    o helped its instate processors
    o normal MP don’t care what is done w/ good after the sale
    o states cant act in the mkt and put regs on industries in which it isn’t a participant
      ▪ state was not a participant in the timber processing industry (IMPT to see what mkt state is participating in and which it might be regulating)
      ▪ MP allows state to impose burdens on comm. in mkt in which it is a MP but no further
state wasn’t acting like a MP so law was invalidated using DCC analysis (Phil v NJ)

Ct pointed out 3 impt differences from Reeves
  o (1) Raw resource vs. processed goods
  o (2) Alaska had broader effect: this reg has effects b/y the particular mkt, in effect the state was engaging in downstream reg
  o (3) foreign commerce: the timber is exported to foreign countries, thereby economically affecting them as well

iv) South Carolina State Highway Department v. Barnwell Brothers:

v) Southern Pacific Co. v. AZ:
  (1) Contrast b/w So. Pac. And Barnwell:
  (2) The Aftermath of So. Pac.:
    iii) Welton v. MO:
    iv) Henneford v. Silas Mason Co.:
    v) Dean Milk:
    vi) Breard v. Alexandria:
    vii) GEA:
    viii) Hunt v. WA State Apple Advertising Commission:
ix) Exxon v. Governor of MD:

f) Limiting Access of Out-of-Staters to Local Products and Resources
  i) H.P. Hood and Sons v. Du Mond:
  ii) Milk Control Board v. Eisenberg Farm Products, Co.:

g) Economic Purposes, Per Se Rules, and Balancing
  i) State Restraints on Exports of its Natural Resources
    (1) Philadelphia v. New Jersey:
    (2) Hughes v. OK:
    (3) Pennsylvania v. West Virginia:
    (4) Foster Fountain Packing Co. v. Haydel:
    (5) Pike v. Bruce Church, Inc.:
    (6) Minnesota v. Clover Leaf Creamery Co.:

h) State Barriers to Business Entry and Regulations of Internal Corporate Affairs
  i) CTS Corp. v. Dynamics Corp. of America:
  ii) Maine v. Taylor:
  iii) American Trucking v. Michigan Public Service:
  iv) Granholm v. Heald:
8) **PRIVILEGES & IMMUNITIES CLAUSE**

**Overview**
- Article IV: §2 (not the 14th Amdmt): “The citizens of each state shall be entitled to all P&I of citizens in the several states” → State cannot deny OOS the P&I it gives to its own citizens in matters of FR and impt economic activities
- only protects individuals (not corporations) – few cases here b/c DCC covers most of the area
  - plaintiff party must be a citizen and an indiv to get P&I protection
  - diff b/w P&I & DCC: P&I only used if law is disc against OOS, DCC applies to nondisc laws as well; corps cant sue under P&I can under DCC; no consent or MP exception to P&I
- Primary Purpose: fuse states into a nation and ensure State A citizen who ventures into State B has the same P&I that the citizens of State B enjoy (thwart discrimination)
  - P&I = interests that are fundamental to the promotion interstate harmony or to the maintenance and well-being of the nation
- BLACKMUN – when OOS exercise a fundamental right (“FR”)
  - right to pursue an occupation
    - to compete for jobs (Hicklin), practice law (Piper), commercial shrimping (Toomer)
  - right to own/dispose of property in the state
  - right to access state cts
  - right to come into the state to exercise a FR
- BRENNAN: Law is valid if…
  - state has substantial reason for treating OOS differently from IS (other than residence)
  - discrim is substantially related to achieving the state’s goals
- PIPER (final test)
  - is it fundamental?
  - what is the nature of the act?
    - substantial reasons for treating OOS differently from IS
    - disc bears a substantial relation to the end
  - availability of less restrictive means? (less disc)

**Corfield v Coryell – VALID**
- P&I is a guarantee of FR – prohibits disc legislation
- Law: restricted access to NJ shellfish beds to ONLY NJ citizens
- Access to NJ shellfish beds (for oysters) is not a FR
  - BUT doesn’t this deny an occupation (a fundamental right)?
  - this case is an aberration

**Toomer v Witzell – Invalid**
- Law: higher license fee for OOS shrimp boats ($25 for IS and $2500 for OOS)
- Stated Purpose: preserve fish (appeared the purpose was to create monopoly for IS)
• Test → (1) is this a FR? (2) whether there is a substantial independent reason to distinguish b/w OOS and IS (b/y mere fact of residency) & (3) whether the degree of disc bears a close relationship w/ this reason
  o no substantial reason for the disc (maybe if OOS drove bigger boats or used a different fishing method); and less restrictive alternative → charge more for bigger boats
• FR = ability to earn a living

**Baldwin v Montana Fish & Game Comms’n - Invalid**
• IS can get a hunting license for just elk; OOS must buy a combo license and are charged much more than an IS would be (IS combo = $30; OOS combo = $225)
• Fundamental Rights Approach (FR to nat’l unity?)
  o hunting is not a fundamental right (right to recreation is not fundamental)
  o Can we argue that hunting elk is earning a living? (if so then FR)
• P&I only applies to distinctions b/w OOS and IS regarding basic and fundamental activities the interference of which would frustrate the purposes of the formation of the nation
  o no argument advanced here that elk hunting is integral to livelihood
• DISSENT (BRENNAN)
  o Ct should not be figuring out what a FR is; should assume the right is a P&I
  o Then any disc MUST be justified under inquiry:
    ▪ (1) is there a substantial reason apart from the fact of residency
    ▪ (2) is the reg closely related to that reason
  o Trigger the inquiry if there is ANY disc b/w OOS and IS
  o If allowed for IS then it is impt and protected; looking to see what state lets its citizens do

**Hickland v Orbeck – Invalid (Unanimous decision)**
• A few weeks after Baldwin – and we get a different approach
• Law: absolute preference for Alaskan residents in certain jobs (Alaskan pipeline)
  o state may not req private er to give a hiring preference to state residents
• Brennan: don’t look to FRs
  o non-residents are not the source of the evil (unemployment)
  o means-ends: disc against OOS didn’t bear a substantial relationship to the evil of unemployment
• Alaska did not justify this under either prong of Brennan’s inquiry

**United Building & Construction Council v Mayor of Camden – Remanded for sub reason**
• 40% of ees on publicly-funded construction job must be Camden residents
• State argues (purpose: redress extreme economic depression)
  o P&I only applies to states, not cities
    ▪ CT: no – cities get their power through states so applies to cities too
  o Disc based on city residence doesn’t matter
    ▪ city classifications aren’t under P&I, just state
    ▪ CT: it only follows that if don’t live w/in state then you don’t live w/in this city
this produces the adverse OOS effect
  o CT: there no political protection for OOS
    ▪ IS who isn’t Camden-resident is just as screwed as the OOS but the IS can make similar laws to protect their city (has political protection – can also go to state legis and say make Camden stop this nonsense)
• P&I applies even though some IS are disadvantaged as well
• There is no FR to gov’t employment
• OUTCOME: law impinged on FR of employment BUT remanded to determine whether there was a substantial reason for the differential treatment
• MAJ (Rehnquist) – there is no real political check so need a judicial check
  o b/c all parts of the state are enacting laws like this making each area w/in state happy so no one complains and OOS is not protected
  o FR right b/c limiting employment and finding an occupation in the private sector is a FR
    ▪ but if this was working for gov’t specifically/directly it would not be a FR b/c no FR to public employment – Ct making a distinction b/w working for private er on project funded by gov’t and pure gov’t employment
• DISSENT (Blackmun): no discrim b/c OOS have political protection – OOS can rely on the in-state vote of the Non-Camden residents to vote out the bad law
  o there is a political check – so don’t need a judicial check
    ▪ IS and OOS are both burdened so OOS has vicarious protection
• NOTE: P&I applies even though there is a MP exception to DCC here
  o MP doesn’t apply for P&I b/c under DCC when gov’t acts as a MP the concern about distribution of reg power is stifled b/c gov’t is not acting as a regulator (so concern is moot); however, concern of P&I is the issue of harmony/agreement b/w the states as well as the indiv rights of citizens so acting as a MP does not make this concern moot.
  o P&I bars any type of state conduct, reg or otherwise, that disc against OOS on FR

**Supreme Ct of New Hampshire v Piper – Invalid**
• Law: Non-NH residents cannot practice law in NH
• New Test ➔
  o is it a FR?
  o Nature ➔ (1) substantial reason for disc (2) disc bears sub relationship to end
  o availability of less restrictive means?
• Earning a living = FR!
• State puts forward 4 reasons for disc
  o (1) OOS are less likely to remain familiar w/ local rules
    ▪ CT: OOS lawyers need to know rules too!
  o (2) OOS are less ethical
    ▪ CT: they are the same
  o (3) OOS wont be available for emergency hearings
    ▪ CT: there is a less restrictive alternative to meet this problem: force OOS to have IS co-counsel
  o (4) OOS wont do pro bono work
• CT: pro bono is only to curry favor for others AND can req that OOS do this w/o banning them from NH
• DISSENT (Rehnquist – agreed earning living is FR)
  o disagreed on the disc test
    ▪ State has interest in max the pool of lawyers the state can choose legislators from
    ▪ Here the CT is taking the place of the legis

9) PRE-EMPTION AND CONSENT

Overview
• 2 ways to go after state law → (1) DCC challenge (2) Preemption challenge
• Ct begins analysis w/ a presumption that state law is not preempted
• Congress can exclude state reg in a certain area by:
  o (1) express savings clause → facial non-preemption (and/or an expression that its not meant to preclude states from regulating the area)
  o (2) express preemption decision → facial preemption, “all certain types of state laws are pre-empted” – expressly tells us what state laws are preempted by the Act or where C expressly tells us what area/field it intends to wholly regulate
  o (3) implied preemption decision
    ▪ (a) C intends to occupy the field
      • preemption if comprehensive fed standards and state supplements but not if minimal fed standards and state supplements
      • fed reg is so predominate that it is assumed to preclude state laws on same subject
      • the purpose of the fed law & character of oblig under it may reveal that it intended to reg the entire field (no state laws!)
    ▪ Factors of Field Preemption:
      o (1) Is it an area where fed gov’t traditionally has played a unique role?
      o (2) Has C expressed an intent in text or legis history of law to have it be exclusive in an area?
      o (3) Would allowing state/local reg in the area risk interfering w/ comprehensive fed reg efforts?
      o (4) Is there an impt state/local interests served by the law?
    ▪ (b) Conflict b/w state and fed law
      • cannot follow the rules simultaneously; fed law wins (supremacy clause)
    ▪ (c) State Law impedes achievement of fed objectives
      • even if fed law doesn’t dominate field – preemption can still be found if CT concludes that state law interferes w/ fed goal (if an obstacle to the accomplishment and execution of the full purpose/obj of C)
        o turns on how Ct characterizes the fed purpose
        o if wants to uphold state law – define fed purpose narrowly
• Consent → C can authorize states to violate DCC, etc. Feds can consent to let states do something unconst’n
C’s violation of Const’n must be clear and gross in order for consent power to be declared invalid

FYI:
- C can preempt under all enumerated powers
- Ct likes to decided preemption b/f DCC
  - economic actors have an interest in saying a law is preempted b/c they only want to be regulated by one rule
- Determination under this is VERY VERY fact specific
- Rehnquist Ct tended to favor nat’l power – so lots of preemption

Perez v Campbell – State Law PREEMPTED
  - AZ: drivers license suspended if did not pay judgment from motor vehicle case AND a discharge in bankruptcy did not clear this debt (so still lost drivers license if didn’t pay)
    - purpose: make people pay & get the uninsured off the road
  - Fed: C has power to establish uniform laws regarding bankruptcy under Const’n → law discharged debtors of all provable debts, including tort judgments
    - purpose: give debtor a new opportunity in life and clear field for future, unhampered by burden of pre-existing debt
- CT: AZ law preempted b/c it interfered w/ the full effectiveness of the Fed law (conflict)
  - decision turned on Ct’s understanding of the nat’l statute measured against AZ law
  - Purpose of Fed law = create uniform bankruptcy laws and AZ law interfered w/ this
- DISSENT: this is only a tangential effect; AZ can do this but cant force him to directly pay (this not a direct conflict)

Florida Lime & Avocado Growers
- Law: sets maturity of avocados at a certain oil content (fed law has a lesser amt of oil req’d)
- CT: it is possible to follow both laws
  - since min standard – allows states to set stricter standards w/o conflict

Pacific Gas & Electric Co v State Energy Resources Conservation
- State Law: CA put moratorium on the certification of nuclear plants, until there’s a ssfe disposal mechanism for nuclear waste
- Fed Statute: Atomic Energy Act of 1954 (reserving safety regs on Nuclear power for feds)
- CT – Fed purpose/area is safety, State purpose/reg is economic ($$!)
  - i.e. – if there is no place to put the waste, then plant must be shut down – shut down is not profitable
  - express saving clause in AEA → leaves power to reg the distribution/profit of the nuclear power/electricity
  - Fed argued for pre-emption
- states aren’t actually concerned w/ $$ but w/ safety
  - CT – no, its $$
- state law conflicts w/ fed decisions
  - i.e. Fed said that nuclear waste was disposed of safely already
  - CT – as long as CA is not regulating safety its okay PLUS can follow both rules simultaneously → Fed law does not REQ the building of plants
- state law frustrates fed goal of having nuclear energy
  - CT – state can prevent plants from opening – they have power to determine what is profitable
    - the Fed Law let states keep their traditional role (setting price, evaluating costs, etc)
  - fed objective = promote nuclear energy ONLY when economically feasible
- **Sidenote:** CT is esp likely to find a conflict when a state takes an action that affects foreign policy – the CT Is quick to conclude that a state reg that seems intended to influence other nation’s conflicts w/ fed foreign policy