I. JUDICIAL POWER AND REVIEW
   a. The S.Ct. can declare an act of Congress unconstitutional.
   b. Marbury v. Madison, held, he gets his commission.
      i. Particular expressions of the constitution that come together to confer judicial review:
         1. Art. III §2 c.1 – the judicial power of the US is extended to all cases arising under the
            constitution.
         2. Clear commands in the constitution – “no tax or duty shall be laid…”
         3. Oath of office to support the constitution (judges take it)
         4. Supremacy Clause (Art. VI. Cl. 2).
         5. Somebody has to determine.
      ii. BUT -- Federalist 78 (Hamilton) – no purse and no sword
         1. See Cooper v. Aaron – Brown v. Board is binding and the Supreme Court is the supreme law
            of the land and shall be followed by ignorant people in the south.
   c. POWER TO REVIEW STATE COURT JUDGMENTS
      i. It is the case, not the court of origination that grants jurisdiction. Thus, if issues of federal question
         originate in state court, the federal appellate courts still have jurisdiction.
         1. See Martin v. Hunter’s Lessee – land acquired in VA. Held, S.Ct. has jurisdiction over the
            state court’s judgment b/c of the federal question re: deciding against validity of title set up by
            treaty.
      ii. S.Ct. has NO jurisdiction over a state court’s judgment which rests on “adequate and independent
            state grounds” (unless diversity). But, they do have it over everything else:
            1. Need uniformity of decision.
            2. Const. has lots of clauses that restrain the states (i.e. 10th Am.).
            3. State judges are not independent and must obey the const. One sovereign = nat’l govt.
            4. States would inevitably try to undermine the fed.
               a. See Cohens v. VA – extends holding to criminal cases.
               b. See MI v. Long – if state wants to preclude federal review, they must explicitly say that
                  they are ruling on “separate and independent grounds.”
   d. STATUTORY GRANT OF JURISDICTION MUST BE PRESENT IN ORDER TO PUT INTO EFFECT THE CONST.
      FRAMEWORK.
      i. §25 of the Jud. Act says that court can review state court holdings where state court: 1) decides
         against the validity of US law or treaty; 2) decides in favor of state law being const.; 3) decides
         against a right claimed under US law or const.
   e. NECESSARY AND PROPER CLAUSE (N/ P)
      i. Art. I §8 cl. 18 – “To make all laws which shall be necessary and proper for carrying into execution
         the foregoing powers.”
      ii. McCullough v. Maryland – MA imposed a tax on the US bank. Held, if there are great powers, there
          must be ample means to carry out those powers – and Congress must have the choice of means b/c
          the const. does not enumerate the means to those powers. Const. enumerates the powers (ends),
          but does not enumerate the means. No need for the means to be absolutely necessary – very broad
          power to select the means. (Marshall’s pretext reservation: if Congress enacts a law under the
          pretext of exercising one of its powers when Congress is really doing something else, then it’s not
          cool).
II. THE COMMERCE POWER - OLD VIEW

   i. No judicial check on the commerce clause - only political ones (i.e. vote them out of office).
      Gibbons v. Ogden (Marshall = widest interpretation of the commerce clause).
      1. Congress can regulate commerce w/ in a state if that commerce affects other states.
   ii. Look out, the judiciary CAN check the authority under the Commerce Clause.
      1. Congress can only regulate “intrastate” activities that have a direct effect on interstate commerce, not only an indirect effect. US v. EC Knight (Also used in Schecter).
         a. Manufacturing (Indirect) v. Commerce (Direct).
         b. Carter v. Carter Coal - Statute set minimum hours and wages in coal mines. HELD, unconst. B/ c mining is production, not commerce, therefore the effect on interstate commerce is indirect.
         c. Hammer v. Dagenhart - prohibited transport of goods produced with child labor. HELD, production is outside of the commerce power b/ c it is indirect.
      2. Congress can regulate intrastate activities with a “substantial economic effect” on interstate commerce. Shreveport Rate Case.
         a. TEST – Close and Substantial Relation to Interstate Commerce.
         b. No more direct and indirect - look at the real world effect. If the means are reasonably calculated to the interstate end.
            i. See also Holmes’ Stream of Commerce rationale (now dead). Swift v. US. (revival in Reno but dead until then).
            ii. Schecter Poultry v. US - Act set minimum prices and wages. HELD, chicks moved interstate, but from then on the stream was entirely in-state since D’s only interaction was w/ n the state, therefore outside the stream of commerce = unconst.

iii. Moral Legislation – Technique = Prohibition of Movement - (Channels)
    1. Earlier cases invoked the NP clause as a means.
    2. These cases are a direct exercise of the commerce power.
       a. Look out for PRE-TEXT Objections.
    3. Champion v. Ames (Lottery case) – Congress may regulate “BAD” things being transported. (treats commerce power like a federal police power)
       a. Goods harmful to interstate commerce itself (i.e. sick animals)
       b. Harmful commercial items (misbranded)
       c. Non-commercial items that constitute an evil activity (stolen goods, lottery tickets)
    4. Hipolite Egg Co. v. US - Congress can prohibit transport to protect health under the pre-text of the commerce clause.
    5. Mann Act (Hoke v. US) - Congress “may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”
       a. Should apply to private acts (See. Caminetti).
b. MODERN VIEW OF THE COMMERCE POWER (ALSO – N/ P)

   i. Commerce may not be used as a justification to criminalize local activity that does not, even when aggregated, have a substantial effect on interstate commerce.

   ii. Congress can regulate in 3 areas:

       1. Channels (i.e. prohibiting interstate transport of goods, Darby).
          a. I.e. the “Jurisdictional Hook” – prohibiting something b/c and only if it had moved in interstate commerce. (i.e. if in Lopez the govt. only regulated guns that had moved in interstate commerce = would have enough of a connection).

       2. Instrumentalities (i.e. the things or people in interstate commerce – truck or plane, Shreveport, Southern RR, and Reno v. Condon).

       3. Substantially Affect (local in-state activities which effect – see Wickard v. Filburn – aggregation of the effect of class members). (See more notably – US v. Lopez)
          a. If the activity is commercial, then it doesn’t matter whether the particular instance of the activity directly affects interstate commerce, as long as the instance is part of a general class of activities that, collectively, substantially affect commerce. (WICKARD)
          b. If the activity is not commercial, then there has to be a pretty obvious connection b/n the activity and interstate commerce. (LOPEZ)
             i. I.e. no jurisdictional hook.

iii. Affecting Commerce Rationale – the power to regulate local activities as a means of carrying into execution through the NP Clause, to regulate among the states:

       1. Look for a local activity
       2. The relation b/n it and the interstate commerce
       3. Identify a rule or regulation for the local activity
       4. An interstate commerce related end/purpose.
          a. With 3 and 4 – try to understand the means/ end relationship.
          b. Jones & Laughlin – close and substantial relation
          c. Maryland v. Wirtz – can’t use a trivial impact on commerce for an excuse of broad regulation.
          d. Hodel – Rehnquist – must be a substantial connection b/n the local activity and commerce.
             i. Katzenbach
             ii. Heart of Atlanta
             iii. Wickard – Aggregate Approach (See Also Perez, Baby Lopez, Lopez)
          e. Deference to the Legislature (McCoulough – plainly adapted)
             i. Rational Basis (See Darby, Heart, Katzenbach, and Perez)
             ii. Possibility that court will insist that Congress spell out its intention to expand national power and reduce state power (Five Gambling Devices, and US v. Bass (Lopez endorses))
          f. Direct/ Indirect (EC Knight – making a come back with Rehnquist)

iv. Boot-Strap – regulating a local activity as a means of making effective the prohibition on interstate shipment.

   1. US v. Darby – an alternative ground for sustaining the legislation.
      a. §15(a)(1) – prohibiting the shipment of goods that were made with child labor.
      b. §15(a)(2) – bootstrap – makes employers pay a certain minimum wage and maximum hours to be worked.
      c. §15(a)(2) – affecting commerce.
c. CASES AND RATIONALES: COMMERCE POWER

i. AFFECTING INTERSTATE COMMERCE:

1. **NLRB v. Jones & Laughlin** – D prosecuted for unfair trade practices by not allowing employees to form a union. HELD, local activity of production has a substantial effect on IC, and Congress’ rule is a good means to an IC and since employee strikes would affect IC (Lopez iii(a)).

2. **Heart of Atlanta Motel v. US** – Motel prosecuted for discrimination. HELD, Act is valid since local activity is commercial and affects IC b/c of less interstate travel by Aas, and Congress’ rule is therefore a means to an IC end. (Lopez iii(a)).
   a. Has a real and substantial relation to nat’l interest (i.e. promoting racial equality).

3. **Katzenbach v. McClung** – Restaurant refused to serve Aas, 46% of food was meat bought from out of state. Substantial portion of food moved in interstate commerce and less likely that Aas will travel – Thus, racial discrimination by restaurants affects and reduces the amount of food bought in interstate commerce.
   a. CLASS ARGUMENT – difficult to distinguish restaurant that serves only local customers from those that serve interstate customers. B/c they can’t distinguish then they can regulate ALL.

ii. AFFECTING IS BY AGGREGATION/ CLASS OF ACTIVITIES/ RATIONAL BASIS

1. **Wickard v. Filburn** – local small farmer forced to comply with Congress’ wheat production quota. HELD, local activity in aggregate with other farmers substantially affects IC, therefore Congress’ rule is a means to an IC end. (Lopez iii(a)).

2. **Perez v. US** – D convicted of loan sharking. HELD, law is valid since the class that D is in affects IC. No need to prove he personally affects IC. (broader than Wickard since not all people in the Prez class affect IC, not even a de minimum effect. (Lopez iii(a))

3. **Baby Lopez (US v. Lopez)** – D prosecuted for conspiring to possess cocaine. HELD, Act is valid. Local activity of drug possession affects IC in the aggregate. Congress had a “Rational Basis” for so finding. (Lopez iii(a) or (b) - economic activity?)

4. **Hodel v. VA Surface Mining** – Act applied to private surface mining. HELD, Congress had a “Rational Basis” for believing that mining affected IC, therefore law is valid.

5. **FERC v. Mississippi** – Act applied to utilities. HELD, law is valid exercise of commerce power since Congress had a Rational Basis for believing that the activity affected IC.

iii. AFFECTING COMMERCE \( \Rightarrow \) UNFAIR COMPETITION & BOOTSTRAP Rationale

1. **US v. Darby** – Congress’ Act 1) prohibited movement of lumber in factories with non-complying hours and wages; and 2) regulated the hours and wages. HELD, Congress may prohibit movement of goods interstate (Lopez category I) even though purpose may not be commerce related. (What about McCullough pretext reservation?) Congress may also regulate wages since they affect IC (Lopez category iii(a) or (b)). The spread of substandard wages is unfair competition against other states, and Congress’ rule is a means to achieving this IC end.
   a. Alternate Holding, Congress may regulate wages since this makes effective the prohibition on interstate transport o lumber. The more factories which comply with wage provisions, the less non-complying lumber wil move in IC. (“Bootstrap” rationale). (Is this like affecting commerce rational?) Bootstrap most likely void today.

2. **US v. Sullivan** – D retailer convicted of possessing mislabeled pills. They were bought from a local wholesaler who got them from an out of state manufacturer. HELD < Act is valid. (Prohibition is Lopez I, therefore valid. The regulation - can use affecting commerce rationale - mislabeling causes less sales, therefore less orders form wholesaler; less orders from manufacturer which affects IC; (Lopez iii (a) or (b)); can use bootstrap rationale: prohibition on interstate movement of mislabeled pills is made effective by regulating possession since this regulation makes it less likely the consumer will violate the prohibition.)
US v. LOPEZ

I. THREE CATEGORIES OF PROBLEMS:
   a. Channels (Darby, Heart of Atlanta)
      i. Heart of Atlanta - authority of congress to keep the channels free from injurious uses has been frequently
         sustained and is no longer open to question.
      ii. Darby - prohibiting
      iii. Power to regulate interstate movement. See p. 138 Perez... overlapping framework.
   b. Instrumentalities (Shreveport, maybe Reno v. Condon)
   c. Substantial Relation (NLRB v. Jones & Laughlin)
      i. Substantial relation test disappears until Hodel in 1981.
      ii. Commercial, non-commercial; economic, non-economic.
      1. Wickard was a local, economic activity, even though it was the most far-reaching.
      2. Souter wants us to understand that in Wickard, it wasn't important that it was economic.
      iii. Jurisdictional Element – proof in each case the local activity affects interstate commerce.
      1. Souter – Congress should re-write the legislation to say that no one should possess a handgun where that gun has
         moved in interstate commerce.
   II. TWO IMPLICATIONS OF LOPEZ
      i. Nature of the Activity Being Regulated
      ii. The relation of the activity to “IC”.
      i. TWO POSSIBLE INTERPRETATIONS
         1. Must it be both economic and have a substantial affect - So - economic activity here is the
            threshold and if not "economic activity – no dice.
         2. OR – Are they separate, and the economic prong is only a suggestion that the court will be more
            deferential to congress if the activity is economic & it will be harder, but not impossible to
            convince a court that the non-economic activity substantially affects commerce.
      iii. CLEARLY – If leg. is of economic activity WHICH substantially affects IC, it should be okay.

LOPEZ: WHERE DO THE JUSTICES COME OUT

I. Think about how this court would decide earlier cases.
II. 3-2-4 Decision of 3-6 Decision
   b. First time since Carter (1936), in 59 years, that any statute is held to be beyond Congress' power under the commerce power.
III. Rehnquist (O'Connor, Thomas, Scalia, Kennedy) = Gang of Five that supports limits on national authority
   c. Kennedy and O'Connor write separate, Thomas writes a sep. concurrence – more limits
   d. DISSERT (Breyer, Stevens, Souter and Ginsburg)
   e. In the statute, no reference to commerce. If you don’t vote for the legislation, you’ll be seen as soft on crime.
      (Does the court feel a special compulsion to vote this down because they’re not voted)
   f. All reject any "categorical" directives such as manufacture/production and direct/indirect, but adopt different
      views.

1) Rehnquist: Gun-Free school zones doesn’t regulate a commercial activity nor require that there be a connection
(read: "jurisdictional hook") in any way to interstate commerce, so not constitutional
   a. According to Rehnquist, an extension of the Commerce Clause power to cover activities with such an attenuated
      connection to interstate commerce would allow for no rational limits to Congressional regulatory authority.
   b. Protection of fundamental liberties demands a limited federal government with CLEARLY enumerated powers,
      and the SC commitment to limited govt has been a HALLMARK of the commerce power jurisprudence
   c. If Congress is left free to regulate gun possession near schools - something which is "in no sense an economic
      activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce" n6 - it could
      conceivably control almost any area of the law for which the States have traditionally taken responsibility,
      including education or even family law.
   d. Rehnquist says that this act falls only in the "affecting commerce"(3d category), and even under that, in the
      broadest interpretation of Lopez Wickard the court has not considered regulation of activities that are not at all
      remotely related to economic enterprise.
   e. To find the possession of guns near schools a commercial activity subject to Congressional regulation would,
      according to the majority, require the piling of "inference upon inference" and would open the door to a "general
      police power, which FEDS do not have
J. Good

LOPEZ: WHERE DO THE OTHER JUSTICES COME OUT?

1) O’CONNOR AND KENNEDY CONCURRENCE: INTRUSION ON STATES RIGHTS
   a. Federalism – In order for the federal system to work, two types of political accountability are required, between citizens and states, and citizens and the federal gov’t.
   b. To hold both app. accountable, citizens must be able to easily identify the spheres of responsibility of each gov’t, Clarity of Roles and Sensible Transparency.
   c. Kennedy says this is an invasion, because the State’s have long governed our educational system & have thus been held responsible for its effectiveness, so not only is the reg. beyond the commerce power in the ORD sense, it is an activity which HAS been and should be regulated by the States.
   d. Imprecision of content-based boundaries (EC knight)
      i. Labels didn’t work and the court walked away from them in 1937 – replicating mistakes that were made before.
   e. Immense stake in commerce clause jurisprudence – they don’t want to repudiate all the earlier cases.
      i. Mad at Thomas’ position – 18th century economy. Commerce Clause has to reach more than it did in the 18th Century.
         1. [Activism always in the beholder’s eye... conservatives have become the activists]

2) THOMAS CONCURRENCE
   a. In his own concurrence, Justice Thomas suggests that this is an easy case for the Court as gun possession has precious little to do with commerce.
   b. In anticipation of more difficult cases, Thomas calls on the Court to entirely reconsider its "substantial effects" test.
   c. According to Justice Thomas, even those words allow for an inappropriate, a historical and unconstitutional extension of Congressional authority.

3) BREYER DISSENT – Congress could rationally conclude that it needed a law - Defer to Congress
   a. Justice Breyer said that Congress could rationally conclude that it needed such a law in order to protect interstate commerce.
   b. First - the court has held before regulation of activities which "significantly affect commerce"
   c. Second – In Prior cases the court has allowed for regulation of activities by a class of activities of similarly situated
   d. Third – Investigating the fundamental connection between the regulated activities and IC is the province of congress, not the courts (Ddeference, baby, deference)
      i. Empirical studies support the effect of school violence as a threat to educational quality
      ii. Well-educated citizens are essential to congress
      iii. At the very least, court could conclude that congress found the guns have a "substantial affect"
   e. Response to the majority
      i. Not all statutes will meet the test, but this one does because it is a particular acute threat and national problem, and the immediacy of the connection has been documented and accepted in a way that may not be true of other social institutions
      ii. Finds Renquist’s opinion contrary to the earlier Court decisions, such as Katzenbach where the court approved regulation of activity with even more remote connection to IC

4) STEVENS BRIEF DISSENT
   a. Importance of the educational process
   b. Echoes Breyer and emphasizes that GUNS ARE a commercial product and their possession is always a direct or indirect result of commerce
   c. National interest is enough today, even if it would not have been enough to justify in 1789.

5) SOUTER
   a. Deference to congress if there is ANY RATIONAL BASIS for finding that the activity affects commerce.
   b. Souter agrees w/ pre-Lopez hands off – the only inquiry is whether the means chosen by Congress are "reasonably" adaptable to the ends.
US V. MORRISON
Violence against Woman Act
* Here - there was no deference to the courts
1. The Court by a 5-4 vote, invalidated a provision of the 1994 Violence Against Woman Act (VAWA) that created a civil cause of action for crimes motivated by gender bias. The plaintiff alleged that she was raped by three students at VA Tech, and she filed a federal law suit under VAWA. The Court ruled that Congress exceeded the scope of its commerce power by criminalizing what was a purely local, non-economic activity. The Court, applying Lopez, refused to aggregate the effects of localized criminal activity, reasoning that to so would allow Congress to regulate virtually any local activity whose combined impact affected commerce, such as family law, marriage, divorce, and childbearing.

FOUR THINGS THAT WERE CRITICAL TO LOPEZ:

1) WASN’T ECONOMIC IN NATURE
   a. All other commerce cases upheld had a commercial character.
   b. Substantial Effect is a judicial question, not a legislative one.
   c. However – Did not categorically exclude non-economic activity which subs. affects commerce
2) NO JURISDICTIONAL HOOK
   a. No requirement in the statute that the violence is connected to interstate commerce.
3) NO CONGRESSIONAL FINDINGS
   a. Congress gets a mountain of evidence.
   b. BUT – it’s bad, aggregate reasoning and if the court adopted it, you could regulate everything.
      i. But-for causal chain is bad logic
      ii. Judicial inquiry— Congress can say that there’s an affect, but it’s the court’s responsibility to determine whether that relationship exists.
1. McCollough... warning that court treading on legislative turf. (Rehnquist doesn’t care)
2. Federal Judiciary is Supreme (Cooper v. Aaron)
4) LINK B/ N LEGISLATION AND ACT BEING REGULATED TOO ATTENUATED.
   a. Nothing left for the states to regulate.

PRESENT STATE OF THE LAW WHEN CONGRESS REGULATES UNDER THE COMMERCE POWER

- If you see a federal law based on the Commerce Clause, determine who is regulated.
- If both private and governmental actors are subject to the law, Garcia applies, and the only protection the state receives is from it participation in the national 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 state must be free to structure themselves and their essential activities in accordance with the wishes the state electorate.
FEDERALISM CHECK ON THE COMMERCE POWER (10th Amendment re: Commerce)

d. Three Categories of National Legislation
   i. Regulating Private Activity
   ii. Regulating States and Local Governments
   iii. Regulating states and enquiring them to regulate an activity. → States as Agents

e. Category i) legislation is not subject to a 10th Amendment limitation

f. Category ii)
   → NOTE: legislation is unlikely to be subject to 10th amendment limitations if the state is treated just like any
other citizen or private actor b/c Court will find analogy and treat it like Category 1, therefore, there is a vicarious
political check on Congress form the private sector, as well as from state’s representatives in Congress. Also,
remember that regulating the states has a separate effect and state choices on goods and services will be changed
as a result.
   1. BUT – if regulating the State as Gov’t actor, more towards Cat. 3.
minimum wages to state employees of transit authority as well as private employees. HELD, statute is valid
since political check exist, and no possible destruction of state sovereignty exists so no need for judicial
intervention, therefore Nat. League of Cities is overruled. (NOTE – Stevens is the only surviving member of
the majority - ripe to be overturned). Minimal Judicially enforceable limits to CC under Garcia.
      1. A L S O – 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. function analysis
must be discarded.
   iii. Reno v. Condon – Act prohibited sale of driver’s information. HELD < Act is valid since it applies to
both private parties and to the state.
      1. NOTE – Current S.Ct. Justices Rehnquist and O’Connor dissented in Garcia. Only Stevens was in
majority. Thus, Nat’l League might still be alive today.
   iv. Nat’l League of Cities v. Usery – FLSA extended minimum wages to state employees as well as private
employees. HELD, statute invalid since employer-employee relationship is an “integral govt. function”
therefore immune from commerce clause (and commerce clause only)
      1. Concurrence – need to balance nat’l versus state interest here, state interest wins.
      2. Hodel interprets the Nat. League test as three part: 1) regulate states as states, 2) regulate matters of
state sovereignty, 3) law impairs traditional G ov t. functions. Also, balance national v. state interest, and
if all three are met, and state interest wins, then federal law is invalid.
         a. NOTE – 3rd Part is invalidated in Garcia – don’t know what is “traditional” – but holding is on
tenuous ground.
         b. L opez and M orrison make mention of “traditional” areas of state

g. Category iii
Legislation is void if state legislature or executive is compelled to regulate certain activity or compelled
to enforce national regulations.
   i. NY v. US (radioactive waste case) – Act, inter alia, forced states to take title to radioactive waste or else
states must regulate by building a facility. HELD, this portion of the Act is invalid since it is coercion as the
two options are equally unconstitutional - both force the state to regulate pursuant to Congress’ direction.
Choice of preemption or regulation is fin, Hodel, and granting money with conditions is fine, Dole.
   ii. Hodel v. VA Surface Mining – Act told state to enact federal regulations on environmental standards, or
face preemption since fed. G ov t. itself would regulate with stricter standards. HELD, law is valid since state
is not compelled to regulate. Gov’t can use threat of preemption and the state then makes a voluntary choice.
   iii. FERC v. Mississippi – Act required states to consider national standards for utilities or else face
preemption. (there are NO federal utility laws!) HELD, law is valid since states have a choice and are not
compelled. The alternative is perfectly valid since utilities are w/o the commerce power.
   iv. Printz v. US – Act required local law enforcement to perform a background check before person purchases
a handgun. HELD, law invalid since it compels the state’s executive to enforce regulation. But, fed. G ov t.
can require the state exec. To report information to it.
TIPS FOR ANALYZING THE COMMERCE POWER:
Under Lopez, there are three categories, but there is also a fourth, hidden category

1. **Channels**
   a. Waterways, highways, and air traffic.
   b. Presumably, even if these are completely intrastate, because they are ways to transport in IC
      i. Darby
      ii. Heart of Atlanta
      iii. Lopez gives ringing approval to *prohibition* against interstate movement or shipment of certain goods.

2. **Instrumentalities**
   a. People, machines and other "things" used in carrying out commerce.
   b. This is NOT an affecting commerce rationale just because it may be intrastate

3. **Articles in Commerce** (This one is "hidden" because it is a given) –
   a. Congress can regulate actual articles in commerce.
   b. Reno v. Condon

4. **Substantially Affecting Commerce** - This is the BIG one and it has limits.
   a. Activity is Commercial
      i. If the activity is commercial, then it may not matter so much whether the particular instance of the activity
directly affects interstate commerce, as long as the instance is part of a "class of activities" that
   **substantially affect interstate commerce**
      1. So - completely interstate activities can be regulated if they are commercial
      a. Here - Lopez refers to Wickard, so if commercial, this rationale works.
   b. Activity is NOT Commercial
      i. If the activity is NOT commercial, there needs to be AN OBVIOUS CONNECTION between the activity
and interstate commerce.
      1. The modern court will not allow for a "rational basis" deference
      a. Lopez, and Morrison, in both cases the modern court found that the activities connection to interstate
commerce was too attenuated to have a "substantial affect" on IC
   ii. **JURISDICTIONAL HOOK**
      1. If congress limits the regulation ONLY TO THE activities which have a direct link - the reg. will
usually be upheld → So - remember this on the test!!! This will usually save a leg.
   c. Little **D** erence to Congress these days
      i. Rational basis afforded in previous cases is not enough
         1. Baby Lopez, Hodel
      2. The court does an independent analysis
      3. Congressional Findings - although these are not the be all, end all, Lopez and Morrison had
problems with them being conspicuously absent
   d. Traditional domain of the states
      i. Education, Family Law, and Criminal law → Where the states have expertise the court is more likely to
"really inquire" into the motive of congress and the "interference"
      1. However, if it is something which requires a "national solution" the courts have generally been in
areas such as the environment, where the acts of some states will adverse the others if it is not
nationally regulated.

TENTH AMENDMENT LIMITS TO THE COMMERCE POWER

1. **Generally Applicable Law**
   a. If the law is generally applicable, the fact that the states are affected is not too significant. So, generally, if the
law is valid if applied to private parties, it would also be valid applied to the states.
      i. Garcia - commerce clause reg. is valid even if no exemption for state employees

2. **Use of State-Law's Mechanism**
   a. Cannot interfere with the states law-making process - No commandeer the legis. or the executive branch.
   b. NY v. US (radioactive) - Congress cannot force state to enact and enforce regulatory program and that it
what the take title provision did
   c. Printz - Brady-Act
THE TAXING POWER, THE SPENDING POWER, AND WAR POWER

a. The Taxing Power as a Regulatory Tool (Art. I, §8, cl. 1)
   ii. A tax is invalid if it is a “penalty.”

1. **TWO WAYS A TAX CAN GENERALLY BE VALID**
   a. **Tax as Revenue-Raiser**— as long as the purpose of a taxing measure is to raise revenue, it will be upheld, even if the amount of the tax is oppressive or even destructive. (Bailey v. Drexel Furniture Co.)
   b. **Tax as a Means to Achieve a Valid Regulatory Goal of Congress**— a taxing measure will also be valid if it is a means to achieve a valid regulatory goal of Congress. If Congress can regulate something under its commerce power, it may tax that activity as a means to achieve it permissible regulatory purpose. The theory is that if Congress may regulate or even prohibit an activity under its commerce power, it certainly may employ the less intrusive means of taxing that activity. B/c of the broad scope of the modern commerce power, it is not surprising that, since the 1930’s, the Court has upheld every federal tax attacked as a regulation.

iii. Taxing power plus necessary and proper clause might be used for regulation.

1. **Child Labor Tax Case** (Bailey v. Drexel Furniture) (1922) - 10% tax on employers who employ children; regulations as to certain ages and hours. HELD, this is a penalty b/c of exorbitant amount and it only burdens the departure from a detailed and specific course of conduct in business. Its regulatory in purpose and effect. Its revenue raising effects are merely incidental.
   a. Look to Congress’ motive -- Purpose of taxing power is to raise revenue – the objective of this statute is to regulate child labor (IT’S A PRE-TEXT). Evaluate the means/ends relationship!!!
   b. See **Veasey** (cited) – increased tax on using state-issued currency. HELD, charge/tax is related to achieving an enumerated power to regulate currency, therefore is valid since means-ends fit.
   c. See **McCray** (cited) – higher tax on yellow margarine. HELD, tax/charge is valid since it accomplishes an IC end.
   d. See **Doremus** (cited) – tax on drugs, plus had to register with the Govt. HELD, tax valid since registration accomplishes a revenue end - more likely the tax will be collected.
   e. See **US v. Kahriger** – tax imposed on “bookies” and required them to register with the IRS. HELD, tax is valid despite minimal revenue, since means are related to the tax ends - registration makes it more likely that IRS can collect the tax.

**INTERGOVERNMENTAL IMMUNITY FROM TAXING POWER**

i. **FEDERAL IMMUNITY FROM STATE TAXATION**
   1. See **McCullough v. Maryland** – MA taxed Bank of the US. HELD, tax is invalid since Govt. has power to preserve the Bank, and a tax can destroy it, especially in the hands of a state where no political check exists. Thus, by Supremacy Clause, national power trumps the state’s tax.

ii. **STATE IMMUNITY FROM GOVERNMENT TAXATION**
   1. Old standard: only essential government functions are immune.
      a. **Helvering v. Gerhardt** – Employees of Port of NY claimed taxing them was a burden on the state. HELD, tax is valid since only “essential governmental functions” are immune, and the burden must not be speculative. DISSENT - how to distinguish b/n essential and non-essential functions, since states have a right to govern however they want?

2. **THE RULE NOW: STATE IMMUNITY FROM TAXATION**
   a. Only an activity which can **only** be performed by a state is immune
      i. (most likely a harder test to pass than the old standard).
      a. **NY v. US** (mineral water case) – NY’s mineral water business which was to protect Saratoga Spring was taxed. HELD, tax is valid since bottling is something that a state and private business can do, and not something only a state can do. Possible prejudice to the state is ephemeral short-lived. CONCUR - test should be whether the tax will impair state sovereignty.
   b. **THREE APPROACHES OF NY v. US**
      i. **Majority**
         1. Only activity that state can ONLY perform is immune
      ii. **Concurrence**
         1. Balancing test: Impairment of state functions vs. the loss of tax revenue
      iii. **Dissent**
         1. Everything a state chooses to do should be immune from taxation
THE SPENDING POWER (Art. I §8 Cl.1) (“to pay the debts and common welfare of the US”)

A. Regulation Through The Spending Power— when Congress imposes conditions on the receipt of federal money, the Court will uphold the spending measures so long as the recipients is free to reject the federal money and exercise his or her rights or powers. There are three issues to look for when analyzing a congressional spending measure to see if it constitutional:

1. Is the Law Voluntary?— if the law leaves the recipient with a theoretical choice to accept or reject the federal strings accompanying the grant, the law will be upheld. The last time the Court invalidated a spending measure on the basis that it was coercive rather than voluntary was 1936 in US v. Butler.

2. Is the Condition on the Receipt of the Money Related to the General Purpose of the Grant?— although the court has never invalidated a law on the basis that a condition on the receipt of federal funds was unrelated to the general purpose of the federal expenditure, it has raised the possibility that conditions on federal grants may be invalid if unrelated to the federal purpose in passing the spending measure.

3. Are There Any Other Constitutional Provisions Which Would Limit Congress’ Ability to Impose a Condition on the Receipt of Money?—
   a. Tenth Amendment— has not been done since Butler in 1936
   b. Individual Rights— congress may not spend money in a way that violates constitutional rights of individuals
   c. Establishment Clause— money cannot be spent to establish religion in contravention of the 1st Amendment.
   d. Equal Protection— cannot spend money in a way that violates the equal protection principle of the Due Process Clause of the 5th Amendment.

BTW – General Welfare – is a limit on the on the spending and tax, NOT a grant of a police power

i. Congress can spend for the “general welfare” which is not restricted to just the other enumerated powers.

ii. Very few people have standing to challenge on the spending power.

iii. Spending power plus N/P allows conditions to be attached to the federal grant, as long as the condition is not a coercion.

1. US v. Butler – Act taxed the first processing of farmer’s commodity, and then earmarked this money for spending to farmers in exchange for reduced production. HELD, tax is valid, but spending is invalid since regulation of agricultural production is not a power granted to Congress – thus, it’s left to the states. Stone's DISSENT (states the law today). Only FOUR restraints on the spending power are: 1) purpose must be national; 2) must not be a coercion in order to regulate an area of state control; 3) means must be related to the ends; 4) political check exists.

2. Steward Machine v. Davis – 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.

3. Oklahoma v. Civil Service commission – 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.

iv. Congress can use the conditions on money to encourage (but not coerce) states to enforce national regulation/ to regulate. (Not much of a federalism check).

4. NY v. US (radioactive waste) – Act, inter alia gave money to states if they met regulatory milestones. HELD, conditions on money are fine here since no coercion.

5. 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.
b. **THE WAR POWER**
   a. under Article I, Section 8 of the Constitution, Congress has the power to declare war, raise armies and navies, and provide for the national defense. When used together with the Necessary and Proper Clause, Congress may exercise this power in peacetime as well as in wartime. Not only may Congress declare war, it may also prepare for future wars, wage war once it has begun, and deal with the social and economic consequences of past wars.
   
   i. Coupled with NP, Congress may regulate activities even after war is ended, as long as the effect from the war is direct and immediate, or to act on evils that arose from the war.
   ii. Super-Duper low scrutiny
      
      i. **Woods v. Miller** - Act regulated rent after war. HELD, law is valid b/c means are related to ends since setting rents remedies the damage to the housing market caused by the war. As long as the effects of war continue to be felt in society and are reasonably traceable to the war, Congress may use the war power to alleviate problems, which flowed from the hostilities.
      ii. **Hamilton v. Kentucky Distillery** - (from Woods). Met the means-end test. Here there was a grain shortage and this stopped Ky. Dist. from distilling in order to make sure there was grain for food.

   c. **THE TREATY POWER**
   
   i. Art. II § 2 gives Pres. the power to make treaties, and Art. VII c. 2 (Supremacy Clause) makes treaties supreme.
      1. **MO v. Holland** - federal statute regulated hunting and passed in pursuance of a treaty on migratory birds. HELD, statute is NP to carrying out the treaty.
   ii. Treaty must still comport with the constitution (bill of rights).
LIMITS ON STATE POWER

g. THE DORMANT COMMERCE CLAUSE

The fact that Congress has the power to regulate IC bars the states in certain circumstances from burdening or discriminating against IC even in the absence of Congressional legislating.

i. FOUR CATEGORIES OF STATE LAWS:

1. Economic purpose, and burdens IC
2. Health and safety purpose, and discriminates against IC
3. Economic purpose, and discriminates against IC.
4. Health and safety purpose, and discriminates against IC.

** WHEN LAW BURDENS IC (#1 AND #2 ABOVE), USE PIKE TEST:

→ Law invalid if national interest outweighs state’s (i.e. if no means-ends to state law), or if other less burdensome methods exist.

** WHEN LAW DISCRIMINATES AGAINST IC (#3 AND #4), USE HUNT TEST:

→ State must justify the law by showing good means-ends (actually achieve), and that no other non-discriminatory alternatives exist. (note: in Maine v. Taylor, state did not really bear burden)

** WHEN LAW DISCRIMINATES AGAINST IC FOR AN ECONOMIST PROTECTIONIST PURPOSE (#3), USE PHILADELPHIA v. NJ RULE OF PER SE INVALIDITY (Hughes v. Oklahoma)

→ Most of the following fact patterns in the cases can be shifted from one category to another. This has led the Court to say that Dormant Commerce Clause analysis is “hopelessly confused.”
→ Note here that Phil. v. NJ and Maine v. Taylor leave room when the law should be per se, but there is a valid reason for discrimination (i.e. noxious, dangerous, quarantine)

IMPLICATIONS OF THE DORMANT COMMERCE POWER

- The commerce clause serves not only as a source of power for congressional action, but also serves as a limitation on state action that impedes the free flow of commerce.
- The dormant commerce clause doctrine applies when a state, in the absence of any preempting federal action, passes a law which interferes with interstate commerce.
- In the absence of congressional action, the Court applies the Commerce Clause as a limitation on state action. Keep in mind that Congress, as the ultimate holder of the commerce power, may overrule a Court decision interpreting the Commerce Clause as a limiter of state action.
- There are two ways that a state may interfere with the free flow of commerce:
  - Burden interstate commerce.
    - Economic Purpose - Category One
    - Health & Safety/ Environmental - Category Two
  - Discriminate against interstate commerce
    - Economic Purpose - Category Three
    - Health and Safety Purpose - Category Four

DORMANT COMMERCE CLAUSE → THINGS TO LOOK FOR:

- Undue Burden on IC - Pike Test
  - Conflicts: If there is a conflict btw different states there is more likely to be undue burden because a business in several states would find it hard to do business.
  - Transportation: Classic scenarios where states have diff. laws - most are uniform by national regs now, but these place a huge burden on IC.
  - Remember to do a burden analysis even when it looks even-handed to oos and in-state even when there is a truly legitimate, non-protectionist purpose.

- Protectionism
  - If a state is intentionally discriminating ag. oos, in order to promote its own econ. interests, this is not legit, and will almost always be struck down.
  - Look for:
    - Rules restricting the export of good stuff, Rules restricting the import of bad stuff, Rules limit the import of good stuff (These are protectionist of the “good stuff” inside to get sold.
STATE BURDENS INTERSTATE COMMERCE - CATEGORIES ONE AND TWO

- Treats in-staters and OOS the same → treated under a balancing test
- Fact that in-staters are subject to the same burdens as oos will make is less likely the law will violate the CC principal that there should be one national market not a number of regional or state markets
- A non-discriminatory state law that interferes with IC is constitutional if it is supported by a legitimate state interest and only INCIDENTALLY affects interstate commerce, unless the burden on IC is clearly excessive in relation to local benefits

Steps to Follow in the Determining the Constitutionality of a State Law That Burdens Interstate Commerce

1. Make sure there is no discrimination, by purpose or effect, against out of staters → Instaters and OOS are subject to the same burdens and regulations
2. Identify the local interest advanced by the law. Economic protectionism is never a valid state interest, so the state should assert some police power goal such as health and safety. (Look to per se, unless no alt. means)
3. See if the law only incidentally affects interstate commerce. The primary purpose and effect of the law must be to advance the state’s police power interest.
4. Balance the adverse impact on IC against the extent to which the state’s goals are advanced by the law.
5. See if there are any less drastic means by which the state could achieve its goals. (Alt. means available)
6. See if the law, if upheld, would create too great a risk of multiple burdens.

ISSUES TO LOOK FOR WHEN APPLYING DCC ANALYSIS TO A STATE LAW THAT BURDENS INTERSTATE COMMERCE

1. DETERMINE WHETHER THE SUBJECT MATTER REGULATED IS LOCAL OR NATIONAL IN NATURE— In conducting a dormant commerce clause balance, consider the nature of the subject matter regulated. If the subject matter is national in scope, then requiring uniform regulation, a state law will be harder to uphold.
   a. Cooley v. Board of Wardens— the court upheld a PA law that required ships using the local harbor to take on a local pilot. The court focused on the nature of the SM regulated, concluding that the specific needs of local harbors required diverse, local regulations rather than a uniform, nation scheme of regulation.
   b. Southern Pacific v. AZ— the court invalidated an AZ law that limited the length of trains in the state to 70 cars. The court said the AZ law imposed too great a burden on an aspect of I-commerce that is national in scope, and thus required uniformity in regulation.
   c. Kassel v. Consolidated Freightways Corp— the court invalidated an IO law that required sh ips using the local harbor to take on a local pilot. The court focused on the nature of the SM regulated, concluding that the specific needs of local harbors required diverse, local regulations rather than a uniform, nation scheme of regulation.

2. DETERMINE WHETHER THE LAW CREATES A RISK OF MULTIPLE BURDENS
   If a state law creates the potential for conflicting laws to be enacted by other states, that may be enough to invalidate the law under the dormant commerce clause.
   a. Bibb v. Navajo Freight Lines— the court invalidated a IL law requiring that special mudguards be welded onto all trucks operating w/in the state. This law caused long delays for trucks entering IL from other states. State highway safety regulations carry a strong presumption of validity, but the IL law imposed too great a burden on I-commerce. There were less drastic means by which IL could have achieved its safety goals, and the law created too great a risk of multiple burdens. If the IL law were upheld, any number of other states could pass law requiring their own kind of contoured mudguards, thereby causing a multiplicity of burdens.

3. DETERMINE WHETHER A PRICE AFFIRMATION LAW HAS EXTRATERRITORIAL EFFECTS— a state may not pass a law which effectively sets prices in other states.

4. DETERMINE WHETHER THE STATE LAW CAUSES BUSINESS TO SHIFT FROM ONE OOS TO ANOTHER
   It is not unconstitutional for a state law to cause some interstate business to shift from one interstate supplier to another, as long as the total flow of goods in interstate commerce is not diminished.
   a. Exxon Corp. v. Maryland— the ct upheld a MD law that prohibited petroleum producers from operating retail gas stations in the state. The purp. was to avoid the situation in which, during a gas shortage, big producers would supply their own retail stations and shut out independent gas station owners. There was no discrim. against the interstate market b/c all petroleum sold in the state would continue to come from oos. There is no impermissible burden on I-commerce where a state law causes some business to shift from on interstate supplier to another.

5. DETERMINE WHETHER THE STATE LAW SIMPLY PREFERENCES ONE KIND OF CONTAINER OVER ANOTHER
   It is not unconstitutional for a state to distinguish between the kinds of containers, even though there may have been an incidental effect of out-of state suppliers.
   a. Minnesota v. Clover Leaf Creamery— the court upheld a MN law that banned nonreturnable milk containers made of plastic, but allowed other nonreturnable milk containers, such as those made of pulpwood. Since the law differentiated between the type of container rather than instate versus out of state producers, the court found no discrimination against interstate commerce. The State’s environmental and ecological arguments outweighed any burden on I-commerce.
FIRST CATEGORY (ECONOMIC PURPOSE WHICH BURDENS IC).

1. **Pike v. Bruce Church** – AZ prohibited cantaloupes from being shipped outside the state w/o being packaged in the state so that they are identified as coming from AZ. HELD, law is invalid since the state interest in protecting its producers is not enough to justify the huge burden on IC.

2. **Baldwin v. Seelig** – NY dealer prevented from importing VT milk into NY unless it was bought at NY’s minimum price. HELD, law invalid. Not even the police power can be used to establish an economic barrier to prevent out of state competition.

3. **Henneford v. Silas Mason** – WA taxed goods bought out of state. HELD, law is valid, since it is not an economic barrier - out of state companies still have competition if their prices are lower. (purpose is still economic, though, but not discriminator)

4. **Milk Control Board v. Eisenberg** – minimum price law for PA milk was applied to a NY dealer who wanted to export the milk to NY. HELD, law is valid. Effect on IC is small— not many exporters; also this law is not like Baldwin which tried to force a minimum price on a Sister state. (i.e. political check is present in this case since exporter gets vicarious protection from local dealers, which was not true in Baldwin)

5. **Cities Service Gas v. Peerless** – OK set minimum price for natural gas, most of which was sold out of state. HELD, law is valid since it does not discriminate against IC as in Hood. This is more like Eisenberg where burden is small.

SECOND CATEGORY (HEALTH/SAFETY PURPOSE WHICH BURDENS IC) TRANSPORTATION CASES

1. **South Carolina State Highway Dept. v. Barnwell** – law prohibited 20,000 lb trucks and 90 in. wide trucks, HELD < if law discriminates against IC, it’s invalid; or if it benefits state while burdening out of state, it’s invalid. Here, no discrimination since law applies to all trucks. State legislature had a rational basis for health and safety. If IC burden is too great, Congress must regulate. (“rational basis” test).

2. **Southern Pacific v. Arizona** – AZ law prohibited trains with 14 or more passengers or 70 freight cars. HELD, no discrimination, but serious burden on IC; state interest is nonexistent b/c no means-ends fit – no showing how law increases rather than decreases safety. Therefore, law invalid.

3. **Bibb v. Navajo Freight Lines** – IL law required contoured mudguards, and AR law required straight ones. HELD, INVALID -- large burden on IC; no state interest b/c no means-ends fit since contoured guards actually more dangerous, not safer.

4. **Kassel v. Consolidated Freightways** – IA banned 65 foot trucks in the state with an exception for bordering. Plurality, law INVALID - large IC burden b/c free movement restricted, and longer trips diverting around IA required. No state interest b/c no means-ends fit since 65’ trucks just as safe as 55’ ones. Also, benefits inside state (bordering cities) but burden outside state. (Current S.Ct. – only Stevens)
   a. **Concur** – must find actual legislative intent, and here it’s protectionist and discriminatory. BUT, if safety purpose was real, defer to the legislature.
   b. **Dissent** – can never find actual legis. intent. Defer to legislature, therefore valid state interest, and Congress must regulate if IC burden too high. (Rehnquist) (Barnwell’s “rational basis”)

5. **Mintz Case** – cattle from out of state must be disease free before coming into NY. HELD, law is valid. (b/c of health and safety purpose? Easy to argue economic purpose since cattle in NY were diseased too!)

6. **Minnesota v. Clover Leaf Creamery** – MN law banned sale of milk in plastic containers, but allowed sale in cardboard containers. MN is a large producer of pulp (cardboard stuff), while plastic is from out of state. HELD, law is not discriminatory nor economic protectionism since it applies evenhandedly to milk producers. Effect on IC is incidental, and not outweighed by the state interest in preserving energy and waste management. (But, if we look at producers of plastic and pulp, we see it discriminates against out of staters. Discrimination depends where you look.)
State Discrimination Against Interstate Commerce - Categories Three and Four

Must be able to show that a state law, by its purpose or effect, treats OOS different than in-staters.

Main rationale for the rule against a state discriminating against OOS’ers is to prohibit local protectionism and the economic balkanization of the country through retaliatory laws passed by various states.

Analysis of a State Law That Discriminates Against Out-of-Staters

1. **Identify the Discrimination** — you must show that the law, by purpose or effect, classifies along state lines— that instaters are treated better than OOS. The discrimination may take the form of a disadvantage imposed on out-of-staters, or a benefit given to instaters.

2. **Identify the Reason for the Discrimination**
   - you have two choices: 1) local economic protectionism; or 2) some valid police power reason such as health or safety.
   - Discrimination against interstate commerce for the purpose of favoring local businesses or investment is per se invalid. It is not a legitimate state interest for a state to try to secure an economic advantage for local business interests.
   - If the discrimination is justified by a valid police power interest unrelated to economic protectionism, and there are no others means to achieve that interest the law must be valid.

Some Aspects of Discrimination Analysis Under the Dormant Commerce Clause

1. **Strict Scrutiny of Facial Discriminatory Laws** — facial discrimination against out-of-staters invokes judicial scrutiny. Under strict scrutiny, a state must show that it has a compelling reason for its discrimination against out of states, and that the discrimination effected by the state law is narrowly tailored to achieving the state’s goal.

2. **Requirement that the Discrimination be Between Similarly Situated Entities** — to be a violation of the Dormant Commerce Clause, the alleged discrimination must be between similarly situated entities. Two companies are not similarly situated if they provide different products and serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

3. **Risk of Multiple Burdens** — if a state law creates a risk of multiple burdens, it may be unconstitutional. Ask what would happen if other states had the same kind of law. The cumulative impact of a number of states each passing a law which prohibited out-of-staters from doing business instate would severely hurt the interstate market. The Q under the multiple burdens doctrine is “What if everybody did it?” If the answer is that everybody doing it would severely impair interstate commerce, the law is invalid.
   a. **Baldwin v. Seeling** — the court invalidated a NY law that prohibited the sale in NY of milk bought outside NY below a price set by NY law. This law created too great a risk of multiple burdens. If others states passed the same kind of law, the national market would be fragmented.
   b. **Reciprocity Requirements** — reciprocity requirements violate the dormant interstate commerce clause because they create too great a risk of multiple burdens on interstate commerce. If such laws were to be upheld, the result would be to balkanize the national market.
   c. **Great A. & P. Tea Co. v. Cottrell** — the court invalidated a reciprocity requirement under which Mississippi said that milk from another state could be sold in Mississippi only if Mississippi milk could be sold in the other state.

4. **Requiring Business to be Performed Instate**
   - A state cannot require business to be performed instate if that business could be performed more efficiently out of state.
   a. **Pike v. Bruce Church** — the court invalidated an AZ law requiring that growers of AZ cantaloupes pack them in AZ. The court noted that it would view w/ particular suspicion state statutes that required business operation to be performed instate that could more efficiently be performed out of state. The court said that this kind of law is virtually per se illegal, even if it has a legitimate purpose.

5. **Discrimination by Political Subdivision of a State**
   - It is discrimination against interstate commerce for a political subdivision of a state (such as a city or a county) to exclude out-of-staters from doing business within their boundaries.
   a. **Dean Milk v. Madison** — the court invalidated a Madison, WI ordinance that prohibited the sale of any milk in Madison that was not pasteurized w/ in 5 miles of the town square. The court ruled that this law discriminated against I-commerce even though some people in WI were also disadvantaged. The court also ruled that the law was unconstitutional b/c Madison had less drastic means available to achieve its goal of ensuring healthy milk.

6. **Subsidy for Instate Economic Interests**
   - a state may not set up a system under which it subsidizes instate economic interests at the expense of out-of-state economic interests.
   a. **West Lynn Creamery** — the court invalidated a MA pricing order which imposed an assessment on all fluid milk sold by dealers to MA retailers. Most of the milk is produced out of state, but the entire assessment is paid into a fund to be distributed to MA dairy farmers. Ct. ruled that the law discrim. against IC b/c it benefited the local dairy industry at the expense of OOS interests. The disbursements from the fund amounted to a subsidy of instate dairy interests.

7. **Protecting Privacy Rights of Residents**
   - a municipality may protect the privacy rights of its citizens, even if interstate commerce is indirectly affected by the regulation.
   a. **Breard v. Alexandria** — the court upheld a local ordinance which prohibited door-to-door solicitation, even though the ordinance may have had the effect of discriminating against I-commerce. The court upheld the ordinance b/c its purpose was to protect the privacy rights of homeowners, not to provide an economic advantage to local businesses.
**CATEGORY THREE (ECONOMIC PURPOSE WHICH DISCRIMINATES AGAINST IC)**

1. **Philadelphia v. NJ** - NJ law banned import of out of state waste. HELD, law invalid since although economic purpose can be protected, this law is facially discriminatory, therefore PER SE INVALID. **A state may not restrict privately owned resources from shipment in IC b/c they are needed to satisfy in-state needs. Economic Protectionism is per se invalid.**

2. **Hunt v. WA State Apple Advertising** - NC prohibited any markings on apple crates other than USDA standards, despite the fact that WA grades were superior. HELD, law is invalid since it not only burdens IC, but discriminates against it (** even though not all other states are discriminated against). Therefore apply HUNT test, and make the state justify the discrimination. But here, no means-ends fit since consumers never see the markings on closed crates, therefore they cannot be protected from confusing grading by this law. Non-discrim. Alternatives exist too (NOTE – purp. may be described as health and safety too, but same analysis would apply).

3. **Welton v. MO** - goods produced OOS require a license. HELD, law invalid (b/c of econ. Purpose?) shoddy mattress case - OOS are no worse and you can get them in-state.

4. **HP Hood v. DuMond** - Mass. Dealer denied a license for a 4th depot in NY b/c it would take more milk out of NY. HELD, law is INVALID. Local econ. Interests cannot be protected by aiming at and preventing flow of IC. Health and safety purpose can impede IC, though. (An econ. Purpose tips scale away from state interest; arguably a per se rule that con. Interests are forbidden).

5. **Pennsylvania v. West Virginia** - law mandated that in-state natural gas needs be filled before gas is exported. HELD, law INVALID since state cannot restrict IC to protect in-state needs.

**CATEGORY FOUR (HEALTH AND SAFETY PURPOSE WHICH DISCRIMINATES AGAINST IC)**

1. **Maine v. Taylor** - ME law prohibited importation of live bait fish. HELD, law is valid. Law discriminates on its face, therefore apply HUNT test - purpose is legitimate since means-ends fit as the ban achieves protection from parasites even though small number of fish can swim into the state (law doesn’t need to be perfect!). Also, no alternatives exist since science has not advanced that far yet to allow inspection on these small fish.

2. **Hughes v. OK** - OK law prohibited exportation of natural minnows. HELD, INVALID. It is facially discriminatory, therefore use HUNT test. Less discriminatory alternatives are available. DISSENT – burden on IC is minimal as law is not discriminatory, since minnows are fungible and state’s police interest of conservation is great (Pike Test).

3. **Dean Milk v. Madison** - city ordinance prohibited sale fo milk unless processed 5 miles w/ n the city. HELD, INVALID. Effect of law is to discriminate against IC (the out of state processors of milk), and valid nondiscriminatory alternatives exist.

4. **Exxon v. Gov. of Maryland** - MD law prohibited producers of petroleum from owning retail service station in the state. HELD, law is valid since there is no discrimination against producers as law applies to all producers in and out of state. DISSENT (state of law today), law invalid since the discrimination exists with respect to the retailers, since 98% of the affected retailers are owned out of state and so have no recourse to the legislature. By Hunt, no need for 100% discrimination for law to be discriminatory.

5. **Great Atlantic & Pacific Tea v. Cottrell** - Miss. Prohibited out of state milk unless it both passed health standards, and the other state had a reciprocity agreement with Miss. HELD, law invalid since it burdens IC greatly, and no means-ends fit (reciprocity does not help health and safety purpose).
MISCELLANEOUS (Can conceivably fit into Every Category)

1. **Breard v. Alexandria** - LA ordinance prohibited door to door sales. HELD, law is valid since it does not discriminate against IC (can argue the other way, though, since the effect is to discriminate against out of state companies who don’t have access to the local market!)

**Progression of Viewpoints on Dormant Commerce Clause**

1. Marshall’s view – Laws with a police purpose are valid; laws with a commerce purpose are invalid.
   a. **Gibbons v. Ogden** - NY state granted a steamboat monopoly to P in coastal waterways. HELD, no analogy b/n commerce power and taxing power, where both federal and state govts. can exercise it. Court does not decide whether dormant commerce clause exists. State law is INVALID here on Supremacy grounds – conflicts with federal licensing law allowing anyone to use the waterways.
   b. **Wilson v. Black Bird** - Delaware state authorized P to build a damn, but it impeded navigation on the river. D broke the damn and defended using the dormant commerce clause. HELD, no conflict with commerce power b/c this is a police law, therefore it’s valid.
      i. **Buck case**: purpose is restricting competition, therefore invalid; versus **Bradley case**: purpose is health and safety, therefore law is valid.

2. **Cooley** view – Dormant commerce clause exists, and state can regulate commerce. But, when the subject of regulation is nat’l, law invalid. When the subject of regulation is local, law is valid.
   a. **Cooley v. Board of Wardens** - Congress allowed state to regulate port pilots. Pennsylvania passed law mandating use of local port pilots in its ports. HELD, Congress may not delegate its constitutional powers to the states (opposite holding of NY v. US – radioactive waste), but here Congress did not. Local subjects of commerce can be regulated by states, and so the law is valid.

**The Market Participant Exception to the Dormant Commerce Clause**

i. When the state is acting as a market participant, the Dormant Commerce Clause does not apply.
   ii. Rationale is that a state is acting like any other private market participant, and since they are not subject to the dormant commerce clause, the state isn’t either.
      1. This rationale is questioned, since the state is not really acting like just another participant; rather it is trying to regulate.
         a. A state is a market regulator when it acts in its sovereign capacity to regulate what other parties can do within their contractual relationships.
         b. It is a market participant when it is a party to a contract and makes business decisions for itself. When a state acts as a market participant, rather than a market regulator, it may discriminate against out of staters for any reason, including local economic advantage, and be immune from a Dormant Commerce Clause analysis. In such cases, a state may limit its sales to instate buyers or limit its purchases to instate sellers.
      2. Counter-Argument is that the state IS acting like a mkt participant since state is trying to maximize its tax revenue by feeding local businesses.
         A. Examples of “Market Participant” Cases— the court has upheld the ability of a state to prefer local economic interests over those of out-of-staters
            a. **Hughes v. Alexandria Scrap** — the court upheld a MD law that was designed to rid the state of old, inoperable autos. Under the law, a person who owned one could transfer it to a scrap processor who could claim a bounty from the state for the destruction of the auto. Under the law, a processor had to submit title documentation to the state to claim a bounty and the title requirements were more lenient for instate processors than for out of state processors. The court upheld the different requirements b/c the state had entered into the auto salvage market and could thus discriminate if it chose to do so.
            b. **Reeves v. Stake** — the court upheld a SD policy of preferring in state buyers of cement produced at a state owned plant. During a cement shortage the state entered the market and fulfilled all instate needs before they would sell to out of staters and the court upheld the policy b/c SD was in the market.
            c. **White v. MA Council** — the court upheld a executive order by the Mayor of Boston requiring that all construction projects funded by the city be performed by a work force made up of at least 50% Boston residents.
      3. **Limits on the Market Participant Doctrine** — a state will be treated as a market participant as long as it is making purchase or sales decisions in relation to a contract to which it is a party. As soon as it tries to control the terms of a contract to which it is not a party, it is acting as a market regulator and the Dormant Commerce Clause will restrict its actions.
         1. **South Central Timber v. Wumnice** — a plurality of the court found that AL was not acting as a market participant when it sold state owned timber to buyers, but required as part of the contract that the timber be processed in state before it could be shipped out of state. The court said AL was trying to control the market too far downstream.
**The Privileges and Immunities Clause of Art. IV §2 cl. 1**

**General Rule**—the Privileges and Immunities Clause of Article IV (not of XIV Amendment) prohibits a state from deny to out-of-staters privileges that it grants to its own citizens. This clause only protects individuals, not corporations, and applies only when a state is discriminating against out of staters in relation to the exercise of a basic or fundamental right. For Article IV purposes the basic rights protected are the right to pursue an occupation, the right to own or dispose of property within the state, the right to access state courts, and the right to come into the state to exercise a fundamental right.

**Standard of Review in Privileges and Immunities Cases**—to justify a discrimination against out-of-staters and to withstand an Privileges and Immunities attack, a state must show that it has a substantial reason for treating out of staters differently from its own citizens, and that the discrimination is substantially related to achieving the state’s goals.

- Clause only applied to person, not corporations, therefore clause less frequently litigated than dormant.
- Used to invalidate state laws which discriminate against out of staters.

**Two Lines of Cases:**

- **Defines what the fundamental privileges and immunities are**
  - Earning a livelihood is fundamental
  - But recreation is not, so the state may discriminate.

- **Discriminatory effect of law**
  - Must be a reason for the discrimination
  - Means of discrimination must relate to the ends, i.e. the reason.

**Application of Privileges and Immunities Analysis**

A. **Duration Residency Requirements for Voting**—a one year residency requirement for voting is unconstitutional. In Dunn v. Blumstein, the court said that under Article IV it is permissible for a state to require voters to be residents, but it is unconstitutional for a state to require that voters live in the state for one year and the county for three months.

B. **State Statute Limiting Abortions to State Residents**—a state may not prohibit out of staters from coming in state to have an abortion. In Doe v. Bolton, the court invalidate a GA law the required patients to certify they were state residents to receive abortions.

C. **Elective Office Limited to Residents**—a state may limit the right to hold elective office to state residents. In Kanapaux v. Ellisor, the court upheld a SC law that restricted out of state residents from running for office in SC.

D. **Higher License Fee of Out of Staters**—higher license fees for out of staters are constitutionally suspect. Such fees run afoul of the central purpose of the Privileges and Immunities clause, which is to outlaw classifications, based on non-citizenship of a state unless the non-citizen constitutes a particular evil at which the statute is directed.

  1. **Toomer v. Witsell**—the court invalidated a SC law which charged out of staters $2500 for a shrimping license and instaters only $250. This law also created a risk of multiple burdens.

E. **Hiring Preferences for Instaters**—a state may not require private employers to give a hiring preference to state residents. (Hicklin v. O’neck—AL law giving preference invalidated)

F. **Construction Set-Aside for Local Residents**—a city ordinance requiring that certain number of jobs on a city funded construction project be set aside for city residents is subject to attack under the Privileges and Immunities Clause. In United Building and Construction v. Camden, the court said the Clause was available, but rejected their arguments and remanded for a showing as to whether there was substantial reason for the local preference.

G. **Excluding Out of Staters from the Practice of Law**—a state may not exclude non-residents from the practice of law within the state. (NH v. Piper; SC of Virginia v. Friedman)

H. **Privileges and Immunities Clause Does Not Apply to Non-Basic Rights**—the protections of the clause only apply when a basic right is abridged. If one of the basic rights is not affected, an out of stater will not be able to assert the Clause as a challenge against the discriminatory state law. In Baldwin v. Fish and Game Commission of Montana the upheld a Montana law charging out of staters more for a non-commercial hunting license b/c recreational hunting is not a basic and fundamental right.