LaPierre Constitutional Law Outline – Spring 2004

JUDICIAL REVIEW

- **Is this case within the judicial powers of the US?** – Art. III, Sec. 2, Clause 1 says cases that arise under the Constitution
  - When you look at Art. III, Sec. 2, Clause 1, make sure you think about the case being within the power b/c of 2 alternatives:
    - Type of Question
    - Parties to the dispute

- **Did Congress intend this case to be heard by the Supreme Court on appeal?** – §25 of 1789 Judiciary Act, “where” clauses

- Supreme Courts Jurisdiction:
  - Appellate
    - **Exceptions and Regulations Clause** = of the world of possibilities that could be within the SC’s appellate jurisdiction under the Constitution subtract what was conferred by the Congress (Title 28 of USC); the exception is what was not conferred by Congress
  - Original = self-executing; don’t need to look for a statutory grant of jurisdiction – 28 USC §1251 (Congress confers original jurisdiction); this jurisdiction is granted directly from the Constitution

- **FEDERAL STATUTES AND PRESIDENTIAL DECISIONS**
  - **Marbury v. Madison** → Marbury appointed judge under Adams (Federalist Pres.); Jefferson becomes president and through Madison refuses to acknowledge Marbury’s judgeship
    - **Separation of Powers Judicial/Executive issue** – could a court issue an order to the sitting secretary of state? – yes
      - Sometimes a court can do it, sometimes it can’t – if the president is acting under constitutional or political discretion then the court can’t interfere. – if there is a fixed duty assigned by law, then the court can interfere.
      1. Why is there a duty? – Legislature imposes the duty.
      2. The other option is to try to get it through the Legislature.
    - Does § 13 of the 1789 Judiciary Act authorize the Supreme Court to issue a writ of mandamus in this case? – Yes
      - § 13 authorizes the case to begin in the Supreme Court
      - § 13 addresses cases in which the Supreme Court has original jurisdiction and following that it addresses cases where the Court has appellate jurisdiction.
      - Marshall’s interpretation of the statute may not be correct – the Supreme Court may not have original jurisdiction in this case, but only appellate jurisdiction.
      - First question should have been the one of jurisdiction.
    - Is § 13 so construed as to allow mandamus unconstitutional? – Yes
      - Article III, Section 2, Clauses 1 (matters over which the Supreme Court rules) and 2 (original v. appellate jurisdiction)
1. Can Congress expand the original jurisdiction of the Supreme Court beyond the bounds set by Article III, Section 2, Clause 2? – NO = Good law today.
   a. Organic Act = law of the US, thus under the Supreme Court’s jurisdiction
   b. Original jurisdiction and appellate jurisdiction are mutually exclusive to John Marshall = NOT good law today
2. Section 1 – judicial power vested in the Supreme Court
d. Can the Supreme Court review the constitutionality of an Act of Congress? – Yes
   i. Who gets to decide repugnancy/ consistency with the Constitution? = The Real Question
      1. Constitution is superior to a mere act of the legislature.
   ii. Nowhere in the Constitution does it expressly say that the judiciary branch reviews statutes.
   iii. Nowhere in the history surrounding the birth of the nation is there an indication that the judiciary reviews statutes.
   iv. Categories of evidence he points to:
      1. Arguments stemming from the fact that the Constitution is written.
         a. If Constitution doesn’t control legislature, then the legislature can change the Constitution as it pleases – a mere statute cannot amend the constitution. Article V deals with amendment of the constitution.
            i. President can veto, decide not to put in the necessary resources, or people can not vote for legislature in the next election.
         b. Courts must expound and interpret rules. If 2 rules conflict, the court must decide on the operation of both. – Court decides there is a conflict, but the legislature may be able to decide whether there is a conflict.
         c. Not appealing to abstract principles that have never been put down, we have a written constitution. But being written means other people can look at it and interpret it as well.
   2. Arguments stemming from particular provisions of the Constitution.
      a. Article III, Section 2, Clause 1 – judicial power is extended to the Supreme Court in cases arising under the Constitution. Courts are going to have to consider cases that involve the constitution requiring interpretation. Is it
possible to inquire into the meaning of the Constitution without having an occasion to invalidate a legislative act? – Yes.
b. Article I, Section 9, Clause 3, 5; Article III, Section 3 = Marshall picks 3 of the most straightforward provisions of the Constitution to prove that the legislature could change anything unless the courts step in with judicial review. – **Marshall may be worried about legislative abuses, but his suggestions open the possibility of judicial abuse.**
c. Article 6, Clause 3 – Judges have to take an oath to support the Constitution, but so do the executive and legislature.
d. Article VI, Clause 2 – **The Supremacy Clause** – **Supreme Law of the land** =
   i. The Constitution
   ii. Just those laws in pursuance to the Constitution – courts decide which laws are in conformity with the Constitution
   iii. Treaties

- Marshall begins with the statute, then construing the statute, Marshall decides that signed and sealed is good enough. – Consistent with practice of courts to deal with statutory grounds first then move onto Constitutional law
  - Legislation can try to re-enact the statute. Less interference with a co-equal branch of government. Congress can more easily change statutes than change the constitution.
- Scope of power of judicial review?
  - Minimalist Claim = statute is attempting to control the power of the judiciary branch; maybe all he’s doing is claiming the power to protect the court from another branch of government.
    - In litigation before the SC, the Court may refuse to give effect to a statute the court finds unconstitutional where the statute is one attempting to control the exercise of judicial authority.
  - Middle Claim
    - The SC has the authority to decide all Constitutional issues in any case before the Court, but not denying anyone else can decide constitutional issues.
      - McCulloch v. Maryland – Congress has the power to create the Bank of the United States (Federal Reserve). Jackson vetos statute establishing 2nd Bank of the US. Jackson invokes the Constitution to veto it.
      - President can pardon people convicted under another president/ statute if he thinks the statute is unconstitutional.
Sometimes people follow the rulings of the Supreme Court (law of the land). Sometimes they do not (law of the case). Most of the time the SC ruling is seen as the law of the land, but when the matter is extremely heated parties wait until the ruling is applied to them specifically.

The Supreme Court has special and exclusive authority to interpret the Constitution. Everyone else should defer to the Supreme Court.

- Cooper v. Aaron – bound other parties not just litigants to the decision of SC.
  - False b/c other actors make decisions based on their understanding of the Constitution. Any time a court speaks, its decision is only the law of the case.
  - True b/c most of the time when the SC speaks the pres., the congress, and state officials acquiesce to the decision

STATE COURT DECISIONS THAT INVOLVE MATTERS OF FEDERAL LAW

- Martin v. Hunter’s Lessee → Hunter’s Lessee (Va.) – VA seized the land in 1782 as land belonging to a British Loyalist and this was confirmed in Federal Act of Compromise; Martin – 1781 will from Lord Fairfax and US Treaty → National Treaty v. National Statute
  - 1810 – Va. court of Appeals reverses trial court, decides in favor of Hunter and Va’s seizure of the land. 2 grounds:
    - State of Va. validly seized the land in 1782
    - Act of Compromise approves disposition of land
  - 1813 – US Supreme Court reverses and orders Va. judges to enter judgment in favor of Martin
    - Va. did not validly seize the land in 1782.
      - When the commonwealth of Va. goes about seizing land they must go through a proceeding of escheat, but they did not.
  - 1815 – Va. judges say they will not follow mandate of US Supreme Court.
    - § 25 of Judiciary Act is unconstitutional
    - 1st “where” clause of § 25 of 1798 Judiciary Act (now 28 USC §1287) allows Supreme Court to review 1815 decision.
      - All “where” clauses have to go against fed. Law.
      - SC is given review only of State Court decisions that reject Fed. Law.
  - 3rd “where” clause allows SC to review 1810 decision.
    - Va. says treaty did not exist when Va. made its claim on the land, therefore the Va. court did not even look at the treaty.
SC says Va. did not go through escheat preceding, therefore Va. did not have good title to the land in 1782.
- Modern court would allow state court decision on state law to stand unless the SC thought that the decision was based on state law only to frustrate Federal Rights.
- SC gets to uphold § 25, construed to authorize SC to review state court judgments on matters of federal law.
  - Art. III, Sect. 2, Clause 1 – list of appellate power of SC
    - It is the case, not the court that gives jurisdiction – Power of review is NOT limited by the court (state or federal) but by the case.
    - Art. III, Sect. 1 creates one court, the Supreme Court. Framers of Constitution let the Congress decide whether there will be more than just the Supreme Court.
- Historical Argument = § 25 was drafted by many of the same people who drafted the Constitution
  - Precedent against State questioning power of SC = 1st time any state has complained about review of state decision after many reviews.
- Story repudiates Va.’s arguments
  - The power of the national government under our constitution operates only on individuals not on states – Art. I, Sec. 10 operates directly on states, therefore national authority can be exercised over states.
  - Independence of the state courts – State court judges are bound by the Constitution by the Supremacy Clause (Art. VI, Clause 2)
  - Abuse of power – always a potential for abuse when given the final word
  - Policy argument: no great public mischief can result from a construction which shall limit US appellate jurisdiction to cases in their own courts:
    - State Court judges have to take an oath to support the constitution, so they have the same obligation as SC judges to uphold the Constitution – Framers of the Constitution worried about state prejudices as evidenced by the constitution granting diversity jurisdiction to the SC in Art. III, Sec. 2, Clause 1.
    - Legislature can remove cases from State court to Federal Court; Removal is tied to uniformity of judgment of similar questions of federal law b/c the Congress can make federal courts and then congress can remove from state to federal courts – D’s ability to remove does not ensure uniformity b/c Ds may be
happy in the state court. If Va. concedes that there is removal before judgment, then there must be removal after judgment.

- Congress has never vested all of the Art III power in federal courts – some matters have always been left to state courts. = Diversity jurisdiction = citizens of diff. States that involve less than $x stay in the state courts

- **STATE CRIMINAL DECISION INVOLVING FEDERAL STATUTE**
  - **Cohens v. VA. →** Cohens sell DC lotto tickets under Fed. Statute in VA. violating VA. law
    - **Pre-emption/Supremacy Clause Argument** = when state statute conflicts with federal statute, federal statute wins
    - Va.’s arguments that SC did not have jurisdiction:
      - Constitution provides that SC has original jurisdiction over cases that involve the State as a party – Marshall’s own argument that appellate and original jurisdiction are mutually exclusive.
        - Marshall says the case and question involved not the parties determine jurisdiction. Question involved is the interpretation of a federal statute. Case arises under the Constitution.
      - Constitution did not confer Federal judicial power between a State and its own citizens.
        - Marshall says again that the parties don’t matter.

- **LEGISLATIVE CHECKS OF JUDICIAL POWER**
  - Congressional Check on Supreme Court
    - Increase the size of the Supreme Court – Jefferson is elected, and on his way out the old president cuts down the size of the court
    - Amend the Constitution – very difficult process
      - Only done 4 times – 11th, 14th, 16th and 26th Amendments
    - Play with time that court can meet – Republican Repeal Act of 1802
    - Impeachment – never successfully done
    - Replace retiring justices with judges that have similar political leanings
      - Doesn’t always work – Earl Warren (thought to be conservative, ended up being liberal)
  - Congressional Check on Lower Federal Courts
    - Congress determines how many federal courts exist
    - Controlling jurisdiction gives legislature power to control judicial power of decision on the merits.
      - Jurisdiction of Federal courts must be granted by Congress.
        - Courts created by statute can have no jurisdiction except as such that the statute confers.
        - All lower fed. Courts are created by statute.
    - **Ex Parte McCordle →** Confederate Soldier being held in jail uses a statute to get into court through a writ of Habeus Corpus – the statute says that the
decision can be appealed directly to the Supreme Court; While his case was before the Court (sub judice), Congress repealed SC’s appellate jurisdiction under the statute

- 2 ways the Court could have exercised appellate jurisdiction:
  - The way McCardle took.
  - Another way.
  - Taking away one route just regulates the SC’s power of review, but does not take appellate jurisdiction away altogether.
- Cutting off Supreme Court jurisdiction to get around an unpopular decision is counterproductive b/c you lock in place the very decision you don’t like – no other lower federal court will be able to break stare decisis.

**FEDERALISM - BALANCE OF POWER BETWEEN NATION & STATES**

- National government is a government of numerated or delegated powers – delegated by the Constitution – **Art. 1, Sect. 8, Clauses 1-18**
  - Corollary: States have residual or reserved powers = States have all conceivable powers that any government at any time could exercise unless: 1) there is some limit imposed by State Constitution or 2) there is some limit imposed by National Constitution
    - 10th Amendment = viewed as a statement of this proposition; everything that isn’t delegated is reserved – What is delegated?
      - What I don’t give you, I have.
  - The fact that something is a big national problem or that one state can’t deal with it by itself creates a political demand for national power. 1 of two things justifies a national statute that affects the States:
    - The statute is a valid exercise of one of Congress’ enumerated powers
    - The statute is a valid exercise of Congress’ power under the “necessary and proper clause”
      - If you can show either of these two things, the mere fact that the national government is controlling something the states could control does not invalidate the power to do so.

**FEDERAL STATUTE v. STATE STATUTE**

- **McCulloch v. Maryland** → Congress charters 2nd Bank of US, which is extremely unpopular among the States; Md. passes statute imposing tax on all banks not chartered by Md. including 2nd Bank of US; McCulloch runs 2nd Bank in Md. and loses case in Md.
  - Not a case of which great individual liberty is involved but a case of which the respective powers of those who are equally the representatives of the people are to be adjusted – everyone has 2 sets of representatives (State and National)
    - Federalism = ability to fight for your causes at the state level and/or at the national level; courts adjust the powers
    - When we’re in a case that involves equal representatives of the people (state and nation), some weight can be given to the
actions of the national legislature – greater power of judicial
review to protect individual rights

- What is the extent of the enumerated powers?
  - There is no enumerated power to make a bank or charter a
corporation.

- Implied powers
  - Anything in the Constitution that rules out implied powers? –
    No. The Articles of Confederation said that the states retained
every power not expressly delegated, but the 10th Amendment
is lacking the “expressly” language and consequently was
intended to allow for implied powers.
  - Does the Constitution suggest that there could be implied
powers? – Yes.
    o General nature of constitution = we have a short
constitution that marks great outlines, we don’t have a
legal code that marks out all the details.
    o Art. I, Sect. 9 = Limits on power; if we have limits on
powers not expressly made, then there is the possibility
that there are powers not enumerated
    o No general injunction to construe it narrowly.
    o “we must never forget that it is a constitution we are
expounding."
  - Article I, Sec. 8 = list of powers that are similar to the powers
that a bank has
    o B/c framers gave national government big powers, they
must have intended Congress to have ample means to
carry into execution those great powers.
    o Implied means to carry into execution the enumerated
powers.
    o Power to create a Bank is a means to executing
enumerated powers
    o Constitution adds the “necessary and proper” clause –
Art. I, Sec. 8, Clause 18
      ▪ Grant of power to make all laws necessary and
proper to carry out the enumerated powers.
      ▪ Maryland argues that the clause is a restriction
of the power of the national government not a
grant of power.
        o Clause confers power to make laws –
members of Congress could go out
themselves and collect taxes, but
Congress could not pass statutes to do
that.
      ▪ Marshall says – power to legislate is given in
Art. I, Sec. 1 and the constitution is not
redundant.
• “Necessary” = indispensable, most simple and direct
  • Plain meaning interpretation = don’t go outside of the word to determine the meaning
  • “Necessary” = convenient, useful, or essential, helpful
  • Art. I, Sec. 10, Clause 2 – “absolutely necessary”; therefore necessary and proper clause does not mean indispensable b/c they would have used “absolutely”
  • Contemporaneous historical sources
  • Construction of word depends on subject, context and intention of the user of the word
• Proper too – which means something close to absolutely necessary
  • There must be more than one kind of necessary means. Of those, Congress must pick the means that are also proper
• Post offices and post roads and Penal Code – Constitution does not enumerate power to punish, yet power to punish must be implied even though that power is not indispensable
  • Here Congress is allowed to pick the means that are best to achieve some end
• Bank is a means to the fiscal operations of the government – taxing and spending (Art. I, Sec. 8, Cl. 1) → people can pay taxes at the bank
  o Judiciary will not and should not second guess Congress’ choice of means
    • Congress alone can choose what is the proper means to executing its enumerated powers.
    • Congress decides on the ends/means relationship and if judiciary treads on Congress’ power, that constitutes a separation of powers problem.
  o However, there are a few Judicial Checks
    • Marshall’s pretext reservation = “Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”
    • Ends invalidation = “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which
are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

- **MODERN INTERPRETATION OF STATE v. NATION**
  - **U.S. Term Limits, Inc v. Thornton**
    - Majority = Stevens, Kennedy, Souter, Ginsberg and Dryer
      - Kennedy usually stands with dissent in Federalism cases
    - Dissent = Thomas, Rehnquist, O’Connor, Scalia,
      - This group + Kennedy has imposed significant restrictions on Federal Power
        - Inquired into the means-ends argument; means-ends deficiency
        - Pretext – ends are not trusted to Congress by the Constitution
        - Until now, court had almost always deferred question of power between State and Federal to Congress
    - Great principles of individual liberty v. questions adjusting power of nation and states (equally representatives of the people)
      - Congress’ determination of constitutional power gets some weight in questions adjusting power of nation and states
      - Stevens says Congress represents people of the nation
      - Kennedy says framers of constitution split the atom of sovereignty – each will be protected from incursion by the other
        - 2 different political entities
      - Thomas says Congress represents people of the states – nation and state representatives represent people of the states
        - Default rule: when in doubt leave the power to the states
          - If the power is not expressly delegated or delegated by necessary implication in the Constitution, then the states have the power and not the nation.
          - Which decisions should be left to Congress? – Congress represents the people of the states, consequently Congress should respect state interest in their decision making

**COMMERCE POWER = ART. 1, § 8, CL. 3 = To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes = intercourse between states**

- **US v. Lopez** → 3 broad categories of activity that Congress may regulate under its commerce power:
  - 1) The use of the **channels of interstate commerce** → power to prohibit
    - Moral Objective = ok
    - Direct exercise of the commerce power – no use of the necessary and proper clause
- Punishing those who violate interstate shipment = use of the necessary and proper clause
- *Champion v. Ames* → Lottery tickets – function of Congress’ moral judgment that gambling is bad; pretext to accomplish an end not given to the Congress
- *Hoke v. US* → Mann Act – can’t bring women across state lines for commercial purposes
  - Congress may adopt not only means necessary but convenient to exercise commerce power, and the means may have the quality of police regulations.
    - Fines and jail time for violators = ok means to reach the ends of regulating commerce
  - *Caminetti v. US* → Mann Act should only be applied to commercial prostitution, not individual acts of prostitution
- *US v. Darby* → Fair Labor Standards Act → §15A1 prohibited interstate shipment of goods produced by individuals working under substandard working conditions (working for less than minimum wage or for more than 45 hours/week without being paid overtime)
  - 2) The instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities
    - Shreveport Rate → Congress can regulate local rates to prevent lower prices in interstate travel
    - Southern Railway
    - Prohibition of destruction of aircraft
    - Affect on interstate commerce rationale still ok? – justify statute under category 2 and try to justify it under category 3 at the same time
  - 3) Activities that have a substantial relation to interstate commerce → substantially affect interstate commerce
    - A) Intrastate economic activity where the court has concluded that the activity substantially affected interstate commerce
      - McCulloch – Court can’t tread on Congress’ power to judge relation between local activity and interstate commerce
      - Here the court takes back the power to judge affect on interstate commerce
      - Cardozo’s Dissent in Carter Coal
      - Perez
      - Ollie’s BBQ
      - Heart of Atlanta
      - Wickard v. Filburn
      - VAWA is not an economic activity and has no substantial jurisdictional hook
    - B) Act must contain jurisdictional element which would ensure that the firearm possession in question affects interstate commerce
      - Bass → penalized felons that received, possessed or transported firearm in interstate commerce
- Particular local activity must be related to interstate commerce

Other ways in which the commerce power might be used to achieve the legislature’s political ends:

- **Regulate interstate movement, trade or traffic itself** – no one disputes this
  - *Gibbons v. Ogden* → Ogden has steamboat monopoly from NY legislature; Gibbons has National license to operate steamboat in NY in the coasting trade
  - Supremacy Clause = Federal Statute trumps State Statute

- **Affecting Commerce Rationale** = some notion that under the necessary and proper clause, Congress can regulate some local activity as a device of regulating interstate commerce
  - 4 parts
    - Identify Local Activity = LA:
    - Identify the Local Activity’s affect on Interstate Commerce = IC: → Is the affect direct/indirect/substantial?
    - Identify the Means Congress is using to regulate = M:
    - Identify the Ends Congress intends the Means to accomplish; should be enumerated = E:
  - Direct or indirect
    - **Indirect** = *US v. E.C. Knight* → sugar anti-trust case
      - Necessary & proper clause + enumerated power - Congress is trying to regulate size and structure of American business corporations as a means to regulate interstate commerce
        - More competition = lower prices
      - Congress can NOT regulate b/c monopolies are an indirect affect on commerce as seen through logical relationships
      - Manufacturing is not commerce
        - Kidd v. Pearson = State has the power to regulate manufacturing
      - Means/ends defect – Indirect relationship indicates that regulatory means are not appropriate to produce ends
        - *Schechter Poultry v. US (Sick Chicken)* → NIRA (National Industrial Recovery Act) – codes of fair competition; violation of which was a misdemeanor = indirect affect
    - **Direct** = *Shreveport Rate Case* → Congress has power to set RR rates from 1 TX city to another b/c it affects interstate rates
      - Affecting Commerce argument:
        - LA = rates charged for goods moving entirely within the state of Texas
IC = promotes and encourages intrastate commerce at the disadvantage of interstate commerce
M = making the price per mile of shipments inside Texas equal the price per mile of interstate shipments
E = encourage, promote or foster interstate commerce

Congress does not have power to regulate local activities, but it does have the power to foster or regulate interstate commerce and the power under the necessary & proper clause allows Congress to take the necessary and proper means to regulate commerce even if it has to control intrastate activity in the meantime.

Real world, practical, economic affect of local activity on interstate commerce

**Southern Railway Co. v. United States** → Federal Safety Appliance Act
- Physical disruption of interstate commerce
- Affecting Commerce Rational:
  - LA = using automatic railroad car couplers
  - IC = injuries may delay interstate commerce
  - E = efficient transportation of goods in interstate commerce
  - M = reduces number of accidents that disrupt, burden and slow interstate commerce

**NLRB v. Jones & Laughlin steel Corp** → National Labor Relations Act – J & L fired people who engaged in Union activities – J & L controlled the production of steel interstate – NLRB is empowered to prevent any person from engaging in anti-union behavior affecting interstate commerce
- Close and substantial relationship between local activity and interstate commerce
- Affect on interstate commerce can be seen prospectively or retrospectively – US v. Bass
- Real and substantial relation to interstate commerce – Heart of Atlanta
  - Indirect and remote relationship = outside of Congress’ power
- LA: labor relations between manufacturers and employees – strife – strikes – no production – fewer goods shipped in interstate commerce
- IC: close and substantial affect
- M: manufacturers can’t fire employees for unionizing is a means of avoiding strikes that disrupt interstate commerce – necessary and proper clause
- E: efficient supply of manufactured goods in interstate commerce

**Wickard v. Filburn** ➞ big reach of the commerce power b/c this regulation is controlling ultra local activity – growing wheat for consumption entirely on the farm that it was grown. Legislation restricts number of acres that farmers could grow of a particular crop (lowers the # of acres)

- **Aggregates local activities** to determine what the affect was on interstate commerce
- **Substantial economic effect** on interstate commerce
  - Becomes substantial thanks to aggregating all the farmer’s production
- Labels like production, manufacturing, direct and indirect don’t matter anymore
- LA: growing wheat
- IC: price at which wheat is traded in interstate commerce; when price is low, farmer doesn’t take wheat to market
- M: Regulate # of acres/supply
- E: Congress is trying to increase prices in interstate commerce

**US v. Darby** ➞ Fair Labor Standards Act ➔ §15A2 required all employers to pay minimum wage and overtime – this applies to manufacturers who don’t want a piece of interstate commerce

- LA: wages
- IC: happy workers leads to more production leads to higher market prices
- M: regulate wages paid to employees
- E: don’t want to create competition between the states

**US v. Sullivan** ➔ §301 of statute prohibited interstate shipment of misbranded drugs (drugs that don’t include directions for use or warnings)

- Supplier of drug located in Chicago (labeled correctly) ➔ Wholesaler in Atlanta (labeled correctly) ➔ Local sale to Druggist in Georgia (mislabeled) ➔ Local sales to consumers
- LA: sale of drug from druggist to consumer must be labeled correctly
- IC: consumers get mislabeled drugs and misuse, the consumer stops buying drugs from local druggist, local druggist stops buying from the wholesaler and the wholesaler stops buying drugs from interstate shipper
- M: regulate labeling of drugs
- E: promote interstate sale of drugs

**Perez v. US** ➔ Loan Shark – Consumer Credit Protection Act prohibits extortionate credit practices; fine of not more than $20,000 with no reference to interstate commerce
Organized crime is a part of interstate commerce and extortionate credit practices are a part of organized crime.

Extortionate credit practices makes less money for the debtors putting less $ into interstate commerce.

Prosecution did not have to show how Perez’s extortionate collection practices had anything to do with interstate commerce.

**Congress must be able to regulate all loan sharking, including strictly local forms, to get to the interstate loan sharking**

- **Hodel v. VA Surface Mining and Reclamation** → surface mining has an affect on interstate commerce

  **Bootstrap rational:**
  - Prohibit interstate movement
  - Regulate local activity to make affective the prohibition of interstate movement
  - Don’t have to say how local activity is related to interstate commerce

- **Hipolite Egg Co. v. US** → Congress prohibited interstate movement of adulterated eggs; and prohibited manufacturing of bad eggs – if they’re not made, they can’t be shipped.
  - Eggs were seized and destroyed → means to carry into affect the power

- **US v. Darby** → Fair Labor Standards Act → §15A2
  - No limits on Congress’ power to regulate intrastate commerce as a means to regulate interstate commerce

  Possible Limit on Bootstrap = **Five Gambling Devices** → every time a slot machine changed hands, the old seller and new buyer had to register; Government seized machines at a country club and there was no evidence offered that the machines had any connection with interstate commerce
  - Court does not reach Constitutional issue, but decides case on statutory construction
  - Dissent: Information reporting distinguished from regulating local activity – information reporting is ok under bootstrap, regulating local activity may not be.

- **US v. Sullivan** → Statute prohibits interstate shipment of mislabeled drugs. Regulating the local labeling of drugs is a means to the ends of prohibiting the interstate shipment of mislabeled drugs b/c checking to make sure drugs are properly labeled at every stage of shipment is a means of ensuring that the drugs were properly labeled when they were shipped.

  **Stream, Current or Flow of Commerce rational**
  - Swift & Co. v. US → government wants an injunction to bar meat dealers from setting prices
    - Stream of commerce from calf being born to food on the table and Congress has the power to regulate this stream.
- Stafford v. Wallace → Meat packing is in the stream of commerce
  - Too broad = every activity could technically be considered a part of the stream of commerce
    - **Dies in** NLRB v. Jones & Laughlin steel Corp
  - Jones v. Laughlin → stream of commerce = affect commerce (burden or obstruct)
  - “In interstate commerce” = in the stream of commerce

- Distinction between **interstate commerce** and intrastate commerce = Congress has power to regulate commerce among the several states.
  - Among the several states = commerce which concerns more states than 1
  - Intrastate commerce = Congress can’t regulate **completely internal** commerce that is carried on between man and man within a state and which does not extend to or affect other states
    - Congress can interfere if the commerce affects other states for the purpose of executing some of the enumerated powers

- Limits on commerce power
  - **Political Check** = the wisdom and discretion of congress, their identity with the people, and the influence which their constituents possess at elections = the people’s right to choose
  - **Judicial limitations** → Conservative = reluctance to exercise judicial restraints
    - **RR Retirement Board v. Alton RR Co** → Statute requiring RR engaged in interstate commerce to establish pension plans for the employees is unconstitutional
      - **Ends invalidation** = no enumerated power to support the social welfare of the worker
      - **Means/ends invalidation** = if a contented mind can be related to interstate commerce efficiency, then there’s no limit to Congress’ power
      - **Indirect effect** on interstate commerce to be distinguished from Southern Railroad’s direct relationship

**OTHER NATIONAL POWERS: TAX, SPEND, TREATY, WAR**

**MODERN FEDERALISM LIMITS ON NATIONAL POWERS**

- **Tax Power** = The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises

- **Limits**
  - Constitutional = Due Process; can’t take away someone’s property without Due Process
  - Political = vote for the party with the right tax and spend policies
  - **Tax** = ok; incidental restraint and regulation which a tax must inevitably involve
    - Purpose must be **to raise revenue**
• A federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible.

- **Penalty** = illegal and bad
  - Pretext reservation attacking the ends
  - Taxes should be used to raise revenue
  - Provision needs to be extraneous to any tax need for tax to be invalidated

- Sometimes there is more than one purpose/end for taxing, but it is only good when the means get to the taxing ends also.
  - Tax meant to end child labor is no good b/c it doesn’t really raise revenue

  o State immunity to Federal taxation – *Helvering v. Gerhart*
    - Recognition of state immunity has adverse consequences on the national government’s ability to raise revenue through taxes.
    - 2 limits when immunity might be available:
      - Activities essential to preservation of state government
      - The burden on the state must be more than just speculative and uncertain that if immunity is allowed it would restrict the federal taxing power without any tangible protection to the state
      - 10th Amendment may be the Constitutional source for State immunity to National taxation

  - No immunity if Tax is non-discriminatory = levied against private parties and States at the same time

- **Spending Power** = to pay the Debts and provide for the common Defense and General Welfare of the United States

  o 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

  o Limits:
    - **Purpose must be truly national** – for the General Welfare
      - Congress could spend for the General Welfare, which was not confined to the enumerated powers – Helvering v. Davis
        - General Welfare v. Particularized few
          - **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
          - Spending for unemployed people – Charles v. Steward Machine

    - **Cannot be used to coerce action left to State control** – Steward Machine Co. Case, OK v. Civil Services Commission, National
League of City, Garcia, South Dakota v. Dole, NY v. Prince, Reno v. Conditt

- 10th Amendment
- **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
  - Conscience and patriotism of Congress and the Executive → political check
  - Judicial scrutiny of the means/ends relationship → Is the condition related to the purpose of the spending?
    - Condition of raised drinking age sufficiently related to purpose of safe highways that highway spending has – SD v. Dole
    - If you don’t like the condition, don’t take the money
      o **OK v. Civil Service Commission** → 1947 – Limit imposed on States who took national funds; OK has to structure its government differently if it wants federal funds
      o **NY v. US** (radioactive waste disposal) → Monetary incentives = States must come up with their own facilities or band together and come up with a site on their own
        - Waste facilities are allowed to charge tax against States without facilities

- **The War Power**
  - After cessation of fighting, but before official peace. The war power does not necessarily end with the cessation of hostilities
  - Rent regulation is necessary and proper as a means to address the housing shortage caused by the war.
  - Hamilton v. Kentucky Distilleries → Congress can regulate grains used to create alcohol as a means necessary to carry out goal of providing grains that were used during the war

- **The Treaty Power**
  - Treaties put into affect by National Legislation – Treaties carried into execution by statute
  - Executory Treaties
  - Necessary and proper clause also covers all other enumerated powers not just the ones in Art. I, Sec. 8
  - Treaty trumps State Statutes – Hauenstein v. Lynham

**MODERN FEDERALISM LIMITS ON NATIONAL POWERS**

- Framework – 3 types of National Statutes and the effects of each one on the States
  - National Statutes that regulate private activity
    - Fair Labor Standards Act → National statute is regulating private activity, which means one set of policies (National) displace another set of policies (State)
  - National Statutes that regulate the States as States (States qua States)
- Extend rules applicable to private sector to the public sector; statute increases cost of operation of state government affecting state delivery of goods and services
- SC’s last word on Feds attempting to regulate States as States = Reno
- Dichotomy between areas of traditional governmental functions/government and non-traditional government/proprietary functions established by National League of Cities overruled in Garcia, with a threat that it will return by the Dissent ➔ Meant to protect State Sovereignty
  - Owning railroad is NOT traditional function ➔ UTU v. Long Island RR Co and US v. CA
  - EEOC v. WY ➔ operating a park = traditional State function, but there was no usurpation of State power, so Congress can prohibit age discrimination
- Balancing Decision – National interest balanced against State interest ➔ Blackmun’s concurrence in National League of Cities forgotten in Garcia
  - Fry is still good law ➔ National interest was great and statute in Fry did not interfere with State policies
- Garcia v. San Antonio Metro Transit Auth. ➔ Structure of the government and the Political Check implicit in this structure guarantees that State autonomy is not threatened by Feds applying Fair Labor Standards Act to State owned transit authority
  - Mostly b/c Congress has applied this statute non-discriminatorily across the board to the private and public sectors and the private sector would not allow unfair legislation
- Printz v. US ➔ O’Connor’s Concurrence = when the law is generally applicable and not directed to the states alone, Blackmun’s balancing formula may apply
  - National Statutes that require States to exercise State law authority over private activity – States used as agents to enforce National law
    - Steward Machine Co. v. Davis ➔ makes states agents of law enforcement
    - Congress loves using the states to enforce its policies b/c people complain to the states not the national government and it is cheaper for national government
    - Demands on legislature, executive and judicial departments of the States ➔ Sometimes Congress wants standards enacted into State law; also may want State legislature to appropriate funds to enforce the law – Congress may want the law enforced by the executive department of the States – Congress wants the State’s judiciary to uphold the law
    - Court’s last word on Congress’ power to use the States as agents of the Federal Law = Printz, NY, FERC, Hodel
- Cooperative Federalism – Statute allows States to enforce legislation in any way they wanted ➔ Hodel – Congress wanted States to enforce
the land reclamation and surface mining program, if they refused, Congress would continue to enforce it itself
- Standards enforced by the States would be less restrictive if the States enforced the standards themselves
- **NY v. US (radioactive waste disposal)** → Access Incentives = NOT coercive for Congress to impose increasing costs on private parties until they force their states to act – simply encouraging
- Take title incentives =
  - Choice between two unconstitutional things
    - Force the states to take physical and/or legal possession of the wastes
    - Implement Federal regulations – enact a law → Congress can’t order the State to make laws
- **Printz v. US** → Brady Act required CLEO (Chief Law Enforcement Officers – head of State police department or local officials) to do a background check on gun purchasers involving no more than making an inquiry into a certain set of National and State databanks then the CLEO can do 1) Nothing 2) Tell the dealer and the prospective purchaser that the transfer would NOT be legal 3) Destroy search results if the transfer is fine
- State Courts can be forced to enforce federal law, but SC doesn’t want to apply that to the State executive branch
- **Congress can NOT compel States to act**
  - Diversion of State resources from local priorities to national priorities
  - States that don’t like the policy are being forced to accept an unpopular policy
  - Costs States money to implement the program
- No balancing formula necessary

- Art. VI, Cl. 2 → **Supremacy Clause** = Constitution and laws made in pursuance of the Constitution are Supreme

- **Discriminatory Laws = subject to greater judiciary review**
  - No political check = people of State A are not represented in State B therefore State B should not be allowed to tell people in State A what they can or cannot do in State A; same applies to Federal discriminatory taxation of States not private individuals
  - Difference between Feds acting on citizens of States and States acting on the Federal Government = “The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole – between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.”

- **Severing statutes** is acceptable unless Congress would not have enacted the whole legislation without the bad part

**FEDERALISM LIMITS ON STATE POWERS**
**Pre-emption** Decisions = Art. VI = Supremacy Clause (This inquiry before Dormant Commerce Clause - B/c there is a statute, an invalid state law is invalid b/c of Congress not b/c of the Courts alone)

- State Laws that conflict with exercises of National Legislative Power (Statutes and Regulations)
- Congress has recently given more thought than in the past to how national legislation will interact with state laws
  - **Express Pre-emption Clause** = certain types of State laws are overturned by the foregoing National law
    - National Traffic and Motor Safety Act – State can’t have different rules for aspects of motor safety
  - **Express Savings Clause** = certain types of State laws are saved by the foregoing National law
    - Clean Air Act – State standards enforced prior to 1970 are ok
- Preemption turns on statutory construction – state v. federal statutes
  - Total conflict on one side, complimentary coincidence on the other – tangential interference in the middle
  - Sometimes the Court is more deferential to State authority than to National authority
    - Renquist Court = more deference to National interests and consequently to Nationally organized corporations
- **2 times when State Law yields to Fed. Law without an express Pre-emption Clause**
  - **When Congress intends federal law to “occupy the field”**
  - **Actual Conflicts** between state and national law – can’t comply with both laws at the same time
    - Challenged State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress
    - **Step 1 = identify the Fed. Purpose**
    - **Step 2 = identify the State Purpose**
- **Perez v. Campbell** → conflict between Arizona Motor Vehicle Responsibility Act and National Bankruptcy Code; Perez = uninsured driver who has an accident and owes a $200,000 tort judgment that he can’t pay; Perez files bankruptcy, and federal court says that he doesn’t have to pay outstanding judgment; AZ statute says not paying outstanding tort judgment makes you lose your driver’s license and vehicle registration – filing bankruptcy doesn’t save your ass; National Law §17 = judgment in your favor in bankruptcy excuses you from all provable debts including State court judgments – purpose = give debtors a fresh start
- **PG&E** → Congress says its concerned with safety; State says its concerned with economics; CA law imposing moratorium on certification of Nuclear energy plants until CA commission thinks high level nuclear waste can be disposed of permanently
  - Nuclear power plants could comply with both CA and Federal laws at the same time
  - Deference to CA’s claimed economic purpose
**Dormant Commerce Clause** = Unexercised Power to regulate interstate commerce → mere conferral of power by the Constitution is a source of judicially enforceable limitations on State legislation - the accommodation of National and State regulatory authority

- **Black Letter Framework of Dormant Commerce Clause**
  - 1st - Burden OR Discriminates against interstate commerce
    - See where the burdens and the benefits fall:
      - All burdens on out of state and all benefits in state = discriminatory
      - Some burdens/benefits on out of state, some on in state = merely burdensome
  - 2nd – Economic or Safety/Health purpose
    - Economic protectionism = ends invalidation
    - Investigate means/ends relationship to determine whether safety/health purpose is legitimate
    - **If Burdens = PIKE TEST;**
      - Do the benefits of the good purpose outweigh the burdens on interstate commerce
      - Less burdensome alternatives that serve the same purpose?
    - **If Discriminates on its face (Philly) OR through effects (ME) then the burden on the state to prove; HUNT TEST – STATE HAS BURDEN OF PROOF:**
      - Local benefits outweigh the National discrimination b/c of the legitimate purpose
      - No non discriminatory way to affect the same benefits
      - Per se invalidation rule applied when → Philly v. NJ = discriminatory on its face + purpose is to assist the evil of economic protectionism

- **Scalia** = No Balancing Formula; doesn’t think there should be a dormant commerce clause at all – can’t balance apples and oranges

- **Super-legislature** – Court must not act as a super-legislature second guessing the legislature and overstepping separation of powers

- **Locate the purpose:**
  - **Gibbons v. Odgen** → Difference between State Police Power and Federal Commerce Power
    - Commerce Power may be Concurrent – Power to tax is different than Commerce Power, but Court refuses to rule that only Feds can exercise the power
  - **Willson v. Black Bird Creek Marsh Co.** → Wilson sails vessel through the dam; DE has a state law authorizing the dam; DE says it was a health measure to stop swamps, but it was also enacted to enhance property values
    - Not repugnant to the Dormant Commerce Clause b/c State was using its police powers
  - **Cooley v. Board of Wardens of Philly:** Commerce divided into National Subjects (Fed.) and Local Subjects (States)
- The PA statute forcing ships to take a local pilot to guide them through port = regulation of commerce, but it is still ok; States can regulate commerce in their use of the police power
- Court defers to Congress’ interpretation of the Constitution concerning which matters are local and which are national → Lasting part of a dead test

Transportation Cases = viewed by the Court as a distinct area
  - Kassel v. Consolidated Freightways Corp. → IA statute limiting truck length to 60’ doubles, truck company wants more than 65’ double trailers – Both NJ and PN on interstate highway 80 required 60’ trailers; Border cities exemption = cities on border of IA could receive trucks of greater length
    - Judicial deference to state highway safety regulation – where the state’s safety interest is not illusory, SC defers to the states
    - Means/Ends Relationship = 65’ trucks aren’t more dangerous than 55’ trucks and in fact were safer in many respects – info. raised by trucking industry lawyers and not available to IA when it wrote the law
      - State’s ends are illusory b/c means may increase the number of accidents
      - IA’s real interest was in protecting economic interest (evidenced by the border city exemption – b/c the citizens in those cities will be exposed to the longer trucks)
      - Axel weight, not overall weight, affects highway conservation according to trial court overturned → S. Car. Highway Department v. Barnwell
  - Whether the means of the regulation chosen are reasonably adapted to the end sought:
    - Rational basis? – gross vehicle weight as opposed to weight per axle is reasonable, width requirement is also reasonable – Barnwell
  - State safety purpose undermined - more trains leads to more accidents leads to less safety → Southern Pacific v. Arizona
    - AZ worried about slack action, but the court doesn’t think the safety issue is substantial
  - State safety purpose = invalid b/c contoured mudguards led to more accidents → Bibb v. Navajo Freight
- Balancing Test = burden on interstate commerce with no benefit to IA
  - Burdens =
    - Higher Costs
    - Inconvenience
    - Multiple inconsistent burdens = you can not at the same time comply with both AR and IL rules → Bibb v. Navajo Freight
  - 85 – 90% of nation’s trucks would be affected by the legislation → trial court concludes statute was an inappropriate
burden on commerce \(\rightarrow\) *S. Car. Highway Department v. Barnwell*

- Judicial intervention against majority legislative decisions is most appropriate where there is a reason to believe there is a failing in the political process. \(\rightarrow\) *Reynolds v. Simms* = 1 person, 1 vote requirement b/c a malproportioned state legislature had no motivation to change the proportion - *Barnwell*

  - Renquist’s dissent \(\rightarrow\) defer to legislature’s evaluation of means/ends relationship – is there a rational basis for the legislature’s evaluation
  - Also, doesn’t like investigation of legislative history

- **State barriers to incoming trade** – seller’s access to local in-state market
  - **Purpose**
    - **Economic:**
      - **Customs Barrier** = purpose of the law is to economically isolate VT; NY law says NY milk dealers have to pay all dairy farmers in state and out of state the same minimum price set by the statute that is higher than the FMV \(\rightarrow\) *Baldwin v. GAF Seelig*
        - NY could NOT prohibit the sale of wholesome VT milk in NY – not valid exercise of police power of the State
        - **Polar Ice Cream v. Andrews** = FL regulation requires local milk distributor to accept all milk produced by FL dairy farms at a particular price until FL supply falls short of need
        - **Great Atlantic & Pacific Tea Co v. Cottrell** \(\rightarrow\) reciprocity agreement assured MS dairy farmers threatened by a loss of market a new market in a new state
          - MS can’t use the **threat of economic isolation** as a weapon to force sister States to enter into even a desirable reciprocity agreement
      - **Equality is the theme** = WA law imposes 2% tax on goods bought in another state, WA also has a 2% sales tax; if other states have a 2% tax, then no tax \(\rightarrow\) *Henneford v. Silas Mason*
        - Economic Purpose as long as its not eliminating all possible competitive advantages= ok

- **Safety/Health:**
  - **Mintz v. Baldwin** \(\rightarrow\) upheld NY law prohibits the importation of cattle unless they were from herds certified as being free from Bang’s disease
  - **Means/Ends invalidation** = *GAP v. Cottrell* \(\rightarrow\) LA would not sign reciprocity agreement b/c their milk quality was higher than MS’S’s therefore, MS’S health reasons are illusory
  - **Discriminatory or Burdensome?** \(\rightarrow\) **Look at where the burdens and benefits fall**
• **Discriminatory:**
  - *Baldwin* = discriminatory b/c it completely denies VT dairy farmers the NY market, but does not have the same effect on NY dairy farmers
  - *Welton v. Missouri* ⇒ Have to have a license to go door to door with out of state merchandise, don’t have to have license if you are selling MO goods
  - *Dean Milk* ⇒ Madison, WI ordinance prohibiting sale of pasteurized milk in Madison unless it had been pasteurized within 5 miles of Madison also milk could not be sold in Madison unless the farm had a Madison inspection
    - Effect = discriminates against IC only in terms of pasteurized milk, *economic barrier* excluding wholesome milk produced in IL
      - Big *winners* = local pasteurization facilities
      - Big *losers* = out of state pasteurization facilities
      - Dissent says: IL farmer could get their milk pasteurized in Madison – forces Dean milk to engage a 3rd party to pasteurize milk instead of pasteurizing it themselves
      - Applies to in-state and out-state pasteurization facilities – still discriminatory b/c the relevant political unit is within Madison not necessarily within WI
  - *Hunt v. WA State* ⇒ all of the burdens of the NC statute requiring closed containers of apples to either use USDA labels or no labels at all fell on out of state apple producers, and all the benefits fell on NC apple producers
    - Inability to rely on reputation can be an *injury* = WA apple growers had a superior reputation that would be injured by not being able to sell in NC
  - *Polar Ice Cream v. Andrews* ⇒ FL regulation requires local milk distributor to accept all milk produced by FL dairy farms at a particular price until FL supply falls short of need

• **Burdensome:**
  - *Bread v. Alexandria* ⇒ no door to door solicitations unless occupant permits to door to door solicitation; in-state solicitors and magazine distributors have to get the same permission as the out of state solicitors and magazine distributors
    - Very little burden on magazine sales in general b/c the market is still there – sellers could call, or send mail or advertise on the radio or television
  - *Exxon v. MD* ⇒ Court finds no burden whatsoever
    - Less burdensome alternatives?
      - *Dean Milk* ⇒ Madison can keep its inspection standards, but it just needs to send its inspectors to farther locals and charge it to the
facilities; Madison can allow milk pasteurized outside of Madison to be sold as long as the inspection agency has substantially the same standards as Madison’s

- **Bread v. Alexandria** → Why should community compromise about how it might achieve its interest just b/c the court can offer an alternative way?

- **GAP v. Cottrell** → MS could inspect the milk coming from other states to see if the milk met their health standards;

  - Political Check = One of the basic assumptions of the Commerce Clause is that local political systems will tend to be unresponsive to problems not felt by local constituents; instead, local political units are expected to act in their constituents’ interests.

- **State barriers to exportation** - Limiting access of out of staters to local products and resources

  - **Economic Purpose:**

    - **Milk Control Board v. Eisenberg** → PA law set minimum price for milk

    - **Hood v. Du Mond** → NY law prohibiting NY milk sent to Boston; Hood just wants to establish a 4th depot in NY to get more milk

      - “This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety

  - **Health/Safety Purpose:**

    - **MN v. Clover Leaf Creamery Co.** → MN statute prohibited retail sale of milk in plastic, non refillable containers but permitted the sale of paper containers

      - **Judicial Deference to State Legislatures**

      - Court took State’s purpose of conserving energy, promoting resource conservation, reducing solid waste disposal problems at face value

    - **ME v. Taylor** → ME statute prohibiting the importation of live bait fish; Taylor arranged to bring into the state bait fish and was prosecuted under the National Statute (The Lacey Act = Nat. prohibition against violations of State Law)

      - Environmental Purposes: save ME’s bait fish from being exposed to parasites only carried by out of state bait; protect ME’s delicate ecological balance and prevent commingling of species

  - **Burdensome:**

    - **Milk Control Board v. Eisenberg** → PA dairy dealers are affected in the same way that NY dairy dealers who use PA milk are affected → both have to pay the minimum price
- **Pike v. Bruce Church** → AZ law prohibited the export of uncrated cantaloupes
  - Good Purpose = maintain and foster positive attitude about AZ cantaloupes; problem with that is that the cantaloupes were crated in CA without reference to AZ – this would have cost the CA company a bunch of money
  - Bad Purpose = promoting State’s economy
  - **Balance formula** = State had a good purpose, but the burden on interstate commerce was excessive in light of the putative local benefits

- **CTS v. Dynamics Corp** → IN law says purchaser of stock in IN corporation could acquire voting rights only to the extent approved by prior disinterested parties
  - **Burden not discrimination** = applied equally to out of state and in state parties interested in acquiring stock in IN
  - **Burden** = fewer out of state residents will make offers to IN corporations but those out of state residents can make offers to other out of state corporations, just not IN corporations

- **Discriminatory:**
  - **Hood v. Du Mond** – aided local interest at the expense of out of state interest
  - **Per Se invalid b/c discriminatory on its face for an economic purpose** = *Philadelphia v. New Jersey* → NJ statute prohibiting importation of waste collected outside of the state
    - If the statute is discriminatory on its face, but there is a good purpose, then go to the Pike Balancing formula
  - **Hughes v. OK** → prohibited exporting minnows caught in the state; TX resident convicted of violating statute for exporting minnows caught in OK
    - Hunt Test not Pike Test

- **Less Discriminatory/Burdensome Alternatives:**
  - **Hughes v. OK** → you can’t take more than a certain number of minnows out of the stream

- **Congress has the power to authorize the State to enact statutes that the Court would conclude violates the Dormant Commerce Clause** – *ME v. Taylor*
  - Must be clear, unambiguous statement of intent by the legislature

- **Market Participation Exception to Dormant Commerce Clause analysis** = where the Government is acting as a participant in the market as a buyer or seller of goods, the Government is not subject to Dormant Commerce Clause Constraints
  - **Alexandria v. Hughes** → MD pays a bounty to metal processors (junkyards) for clearing MD highways of junk cars and destroying them
    - SC said MD entered the market as a purchaser and the way MD chose to spend its money was beyond the reach of the Dormant Commerce
Clause – Less Burdensome alternatives don’t matter; substantial burden on interstate commerce doesn’t matter
  o **Reeves v. State** → SD built a cement plant; most of the cement it produced was sold in interstate commerce
    ▪ SD cement plant could not sell cement out of state until all in state demand was satisfied – but SD was a market participant
  o **White v. MA employers** → 50% of employees on a project had to be Boston residents; City of Boston entering the market as a purchaser of labor; Boston exempt from the Commerce Clause; Options:
    ▪ K in which Ker employs 50% Boston residents – No Dormant Commerce Clause – if this was an ordinance instead of a K then it would apply
  o **Market Regulator Exception**
    ▪ **South-Central Timber v. Wunnicke** → AK owns timber, in sales Ks it says timber must be partially processed in AK; Court says no
      ▪ AK was acting as a market regulator not a market participant therefore it doesn’t enjoy immunity
      ▪ Reeves distinguished b/c 3 things were present here that weren’t present in Reeves:
        o Foreign commerce
        o Natural resource
        o Restrictions on resale
      ▪ Did State go into business to accomplish non-business ends or just to make a profit?
        o 2 Purposes = make money + protect local interests

**Art. IV, § 2 = Privileges and Immunities Clause** = Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states – **Interstate Harmony**
  - **Purpose** = Protect out of staters who aren’t allowed to participate in the political process
  - “Citizens” does NOT include corporations → if plaintiff is an individual you should do both a Commerce Clause Analysis and Privileges and Immunities Clause
    ▪ Trade Union considered “citizens”
  - **2 step inquiry:**
    ▪ Whether the interest of the litigant is a **privilege or immunity** protected by the clause
      ▪ How do we figure this out?
        ▪ **Fundamental right** = Interference with which would frustrate the purpose of the formation of the Nation
          o **Baldwin v. MT Fish and Game** → MT residents could get a license for $10 (just elk) or $30 (combination); Nonresident could only get combination licenses for $235
        ▪ Interest is protected = being able to work on a public works project for a private company
- Working for Government as a construction worker = a **common calling**
- Piper = whether being a lawyer is **important to the national economy** – employment tied to livelihood
- Hicklin = generally working
- Toomer = shrimp fishing
- Baldwin = elk hunting in MT is NOT
- Corfield v. Coryell = fishing for shellfish in NJ is NOT
- **Whether purpose for discrimination is substantial** and whether degree of discrimination bears a close relation to State’s purpose
- **Availability of less restrictive means**
  - *Toomer v. Witsell* → SC imposed license fees to shrimp boats - $25 for residents; $2500 for non-residents
    - There could be differential charges on boat sizes not on different citizens
  - **Municipalities = State Legislation in terms of Priv. And Immun.**
    - Both Municipal and State distinctions are subject to the clause
    - *United Bldg. & Constr. Trades v. Camden* → municipal ordinance required 40% of all those employed on a public works project have to be from Camden

Sabri → Change in reach of the spending power? The Lopez and Morrison of spending power?
- # of times the government lawyers refer to the CATO Institute’s amicus brief – usually parties ignore amici briefs
- Spending power used as a means to regulate – once money is being spent, to what extent can that power be used as a condition to regulate
- Sabri = private developer who offers money to Herron, a member of the city council who has a role in administering federally funded programs
  - Statute applies b/c whoever gives, offers or agrees to give (Sabri) anything of value with intent to award agent of organization (Non-governmental recipient of federal funds) or State local or Indian Governments or their agencies (Herron) has to be worth more than $5000, and agency has to get more than $10,000/year
    - Limiting factors = bribe has to be greater than $5000 and agency has to receive more than $10,000/year from the government
    - Dissent: must be a nexus between the offering of the bribe and the federal funds – must be a Lopez, jurisdictional hook
      - Bass and Scarborough – Interstate commerce connection must apply to all part of gun possession
      - Showing that bribe has affect on federal interest (i.e. federal money) – absent this, we risk expansion of federal authority into state government
      - Criminalizing a bribe – Fed government has no Federal police power, but states do – Lopez and Morrison
        - Probably already state laws that punish bribery
- No enumerated power to police – this must be an exercise of the necessary and proper clause
- Means must be both necessary and proper – I’ll give you necessary but it’s not proper
  - Bye wants proper to be read as a limit – Printz = proper means not invading traditional state function; Congress cannot mandate State or local CLEOs to enforce federal laws
    - This case does not involve Feds commandeering State officials
- Congress shouldn’t be able to do something under the spending power that it can’t do under the Commerce Power
  - Majority: Nec. And Proper Clause use of the enumerated Spending Power
    - 666 is NOT a condition of the grant – Spending power has a built in power to attach conditions to the expenditures
    - 666 does not require money recipient to do anything for the money – no obligations or constraints on the recipient of federal funds
    - Regulation falls on 3rd party to the agreement between fed and state
    - 666 is valid under the necessary and proper clause
- Means/ends investigation
  - End = whether end is for the general welfare is a question for Congress not Court; Disbursement of funds to improve community is ok
  - Means/ends inquiry = plainly adapted
    - Lopez and Morrison = local activity did not bear requisite relationship to IC – some overlap with means/ends relationship
    - Court has for the most part ignored means/ends inquiry b/c that is treading on legislative turf
  - Can Congress enact criminal laws as a means to achieve enumerated power
    - Yes – punishing those who rob from mail as a means of achieving enumerated power of establishing post offices and roads
  - Statute plainly adapted, reasonably calculated or rationally related to achieving Congress’ ends
    - Punishing those who bribe are adapted to achieve Congress’ ends

- Unconstitutional on its face – in any conceivable application or almost all of its applications v. Unconstitutional as applied
14th Amendment – Due Process + Equal Protection
- Judicial interpretations of the constitution and comparing Congress’ use of the constitution v. judiciary’s interpretation of the constitution
- Congress’ legislative power under § 5 of the 14th Amendment – Congress shall have power to enforce by appropriate legislation the power of the amendment; Limits on the reach of the power:
  o 14th Amendment limits State government
- US v. Morrison ➔ remedy for unequal treatment of women = cause of action against private parties not against state government
  o § 2 of the 13th and 15th Amendments also – don’t forget
  o Similarities between the limits imposed on Congress power to protect civil rights and the limits imposed on the Commerce Power