CONSTITUTIONAL LAW

I. JUDICIAL REVIEW – Federal courts, and ultimately the Supreme Court have the power (and perhaps the obligation) to decide if laws enacted by Congress or actions of the executive branch are in violation of the Constitution.

A. Marbury v. Madison – Outgoing president had appointed Marbury a justice of the peace for DC but the commission had not been delivered to him. Incoming President Jefferson’s Secretary of State, Madison, refused to deliver the commission and Marbury filed suit directly in the Supreme Court under §13 of the 1789 Judiciary Act, seeking a writ of mandamus to compel Madison to deliver his commission.

1) Did Marbury have a right to his commission? Yes. Court found that Marbury’s commission was complete upon his signing by the president.
2) Did Marbury have a judicially enforceable remedy? Yes. Marshall concluded that the very essence of civil liberty was for courts to provide a remedy for every wrong. Marshall also admitted that the political acts of the President and his cabinet within their lawful discretion are not reviewable by courts.
3) Was Marbury entitled to mandamus from the Supreme Court? No. Marshall read §13 of the JA to give the Court original jurisdiction of any case in which mandamus against a federal officer was sought. But Article III only gives the Court original jurisdiction of cases involving foreign diplomats or between two states.

<< Questions before the court:
1. Has the applicant a right to the commission he demands? → Is Marbury entitled to commission as a justice of the Peace? Yes.
2. If he has a right, and the right has been violated, do the laws of this country afford him a remedy? → Would a judicial remedy compelling delivery of the commission interfere with the president/executive’s constitutional discretion.
3. If they do afford him a remedy, is it a mandamus issuing from this court? → Can the supreme court issue a writ of mandamus in this case?
   a. Is mandamus the appropriate remedy?
   b. Does §13 of the Judiciary Act authorize the USSC to issue the writ?
   c. Is §13, if so construed, unconstitutional?
   d. Can the supreme court review the constitutionality of an act of congress?

Take questions 3a-d and use them as a framework. The modern justices impose an outline that is often excluded, so you might find the full opinion and look at the outline. >>

Supreme Court has original jurisdiction, when:
- State is involved
- Involves a foreign official

B. Article III, Section 2, Clause 1
- Sets out the federal judicial power (includes: )
  - Cases arising under the Constitution or the “laws of the U.S.” (i.e. cases posing a federal question)
  - Cases of admiralty
  - Cases between two or more states
• Cases between citizens of different states
• Cases between a state or its citizens and a foreign country or foreign citizen
  o There is nothing in the constitution that establishes the power of review.
  o There is nothing in the constitution that say that the s.c. can declare an act of congress void.
  o Marshall argues that provides judicial review because it gives the federal courts jurisdiction over all cases arising under the constitution

C. Article VI Clause 2 → Supremacy Clause
  o Marshall offered as a justification for judicial review that it is implied from the command of the Supremacy Clause (Art. VI, cl. 2) that the Constitution is the “supreme law of the Land” and is to be binding on state courts;

D. Judicial Exclusivity in Constitutional Interpretation
  o L: The supreme court has the authority to interpret all constitutional issues in any case that is before the court in its jurisdiction. However, this might not mean that other actors (such as the president) might be able to decide constitutional issues as well (ex: when pres decides to or not to sign legislation). M v. M gives the court the opportunity to decide.
  o M v. M did not decide the related question of whether the courts have the exclusive power to interpret the constitution.
    ▪ Cooper v. Aaron – involved AK refusal to desegregate in compliance with
      Brown confirmed that the Court’s power is exclusive when the other contender is a state.
      • Note: That conclusion is less firm when the other contender is Congress or the President.

<< Cooper v. Aaron says “the supreme law of the land.”
FALSE because there is the role for the president and legislature to think about and decide constitution issues.
FALSE because the supreme court is only the law for the parties in the case.
TRUE because almost all of the time state legislatures, govts, (i.e. public governmental actors) treat it as the law of the land → usually everyone conforms to the supreme court’s understanding of what the constitution requires>>

E. Supreme Court Authority to Review State Court Decisions
  o The SC may review state court opinions, but only to the extent that the decision was decided based on federal law
  o Fletcher v. Peck – A corrupt GA legislature was bribed to convey to land speculators Georgia’s Yazoo lands for pennies per acre. After public outcry a more virtuous legislature rescinded the Yazoo grant. The Court held that GA’s grant, once made, was a public contract that could not be impaired by the action of the later legislature
    ▪ Note: held that a state statute was unconstitutional
  o Even if there is a federal question in the state court case, the SC may not review the case if there is an “independent and adequate” state ground for the state
court’s decision → No federal court has any power to review state court decisions that are entirely about state law.

- Federal statutes limit SC review to decisions of the highest state court available.
- 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.

**Story’s Opinion Based On:**

- **Article III** – The failure of Article III to distinguish between constitutional cases originating in federal court or state court indicates that the Court has appellate review over constitutional cases coming from state courts
- **No state sovereignty over constitutional interpretation.** The Supremacy clause clearly indicates that state judges are bound by the constitution
- **Need for uniformity.** Supreme Court review of state constitutional decisions was necessary “to control these jarring and discordant judgments, and harmonize them into uniformity.”

- §25 of the 1789 Judiciary Act provided:
  “That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had…
  “Where”:
  1. where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity
  2. where is draw in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drew in question the construction of any clause of the constitution
  3. where is drawn in question the construction of any clause of the constitution
  - §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.

- Cohens v. Virginia - two brothers convicted in a VA court for selling lottery tickets in the state of VA; claimed that their conduct was immunized / protected from VA statute by a federal statute enacted by a federal statute
  - As early as 1793 “controversies” meant civil proceedings and not criminal → there is no way that Cohens v. VA could have been within the article III judicial power based on the parties
  - extends holding to criminal cases

**F. Congress’ Control of Federal Judicial Power**

- **Ex parte McCardle** – McCardle was a newspaper editor imprisoned by the military governor of MS under the post-Civil War Reconstruction Acts. He charged that the RA were unconstitutional. After argument in the Court and
fearing a Court decision invalidating the RA Congress repealed the portions of the 1867 act that gave the Court jurisdiction.

- The court upheld the appeal relying on Article III, §2 the exceptions and regulations clause.
- Congress has the general power to decide what types of cases the Supreme Court may hear, so long as it doesn’t expand the Supreme Court’s jurisdiction beyond the federal judicial power
- **Held that Congress could strip the Court of its appellate jurisdiction, even as to an argued case pending final decision by the Court.**

<< Article III §2 cl. 2

An exception to the s.c.’s appellate jurisdiction is finding all appellate jurisdiction that has been conferred to what could have been conferred and if what could have been conferred is bigger than statutory referrals then congress has >>

<< The legislature’s power to regulate and control the jurisdiction of federal courts

(1) cutting off the circumstances in which a court can exercise the power of judicial review to hold anything unconstitutional
- limiting jurisdiction is a limiting the opportunity
(2) if a case is not some place w/I the article III judicial power the federal ; congress’s power to control the jurisdiction of federal courts
(3) look at congress’s power to ctrl the jurisdiction of lower federal courts
- Art 3 §1 is source of congress authority
- the constitution gave congress the power to create inferior courts to s.c. >>

II. CONGRESSIONAL POWER

A. Necessary and Proper Clause - Art. I §8 cl. 18 – “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

- If congress is seeking an objective that is within the specifically enumerated powers, then Congress can use any means that is:
  1. Rationally related to the objective of Congress is trying to achieve
  2. It is not specifically forbidden by the Constitution

<< NOTE: THERE IS NO SUCH THING AS A POWER TO PROVIDE FOR THE GENERAL WELFARE. (EXAM TIP!!!) THERE IS A POWER TO SPEND MONEY FOR THE GENERAL WELFARE. >>

B. Tenth Amendment - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

- everything that isn’t delegated is reserved → if a whole lot is delegated there will be very little that is reserved
- to show that the statute is a direct exercise of one of the enumerated powers (scope or size not enough)

C. McCulloch v. Maryland - MD imposed a tax on the US bank;
1) **Did Congress have the constitutional authority to create a national bank?**
   Yes.

2) **Was MD constitutionally prohibited from taxing the Bank, an instrument of the national government?** MD was prohibited from doing so. ***deal with the second question later in notes***

   - Why does it have appellate jurisdiction? Look at §25
     - 2nd where clause
     - McCulloch’s argument is that it is repugnant to a law of the US>>

   - **Congressional authority to charter the Bank.**
     - Marshall thought the Court should validate the reasonable means chosen by Congress to execute the powers
       - Establishes that when Congress is acting in pursuit of a constitutionally specified objective, the means chosen merely has to be **rationally related** to the objective, not “necessary” to the objective’s attainment.
     - A bank is a means of helping out an army, instrumentalities set up by the gov’t; means of carrying into affect its means to carry and support armies by setting up a mechanism to pay salaries of the army.
     - Occasionally the court will inquire into the means/end relationship but other times the court may not inquire. NOTE: The court will not generally inquire into the motives of Congress

NOTE You skipped U.S. Term Limits v. Thorton

III. **COMMERCE CLAUSE**
   A. Article I, §8 cl. 3 – “regulate Commerce…among the several states”
   - Test:
     - **Congressional Determination**: Congress has determined that the activity regulated is in commerce, or substantially affects commerce, and
     - **Rational Judgment**: congressional determination is rational
     - **Reasonable Means**: the means chosen by Congress are reasonably related to its regulatory objective

<< OVERVIEW OF WHERE WILL GO WITH COMMERCE CLAUSE
   • look for these things to organize all the cases we go through:
     1) Congress exercises its power **under direct exercise of the commerce power** to regulate interstate commerce itself. (ex: Suppose congress said the rates charged for a fairy ride from NY to NJ, no one doubts congress has the power to regulate movement across state lines)
     2) **Prohibit interstate movement** (congress is concerned with sex without marriage is immoral so they can regulate sex trade);
     3) Congress’ power to regulate a local activity under ________ clause as a means of making effect on interstate commerce as achieving some end local activities → completely internal
     4) Bootstrap approach – prohibition against interstate movement; regulate a local activity not because the local activity because it has any effect on interstate commerce; but as a means to regulate the local activity to make effective >>
B. Historical Development of Commerce Clause (Before 1937)

- **Gibbons v. Ogden** - NY state by statute created a monopoly, only one company could run steam boats between NY and NJ (*Ogden*); Gibbons wanted to operate his own steamboat service between NY and NJ
  - Marshall reversed the NY courts, concluding that the federal statute under which Gibbons held his license was a valid exercise of the commerce power, and thus it preempted the conflicting NY monopoly statute upon which Ogden relied.
  - Congress can regulate commerce w/n a state if that commerce affects other states.
  - **HERE:** No judicial check on the commerce clause – only political ones (i.e. vote them out of office).

- **US. V. EC Knight** - civil action brought by DOJ to prevent American sugar co. from buying 4 more sugar refineries that would have given the 98% control of refineries in country
  - Court held that a monopoly of sugar manufacture could not constitute a monopoly of commerce in sugar. Congress, said the Court could not regulate manufacturing monopolies because “commerce succeeds to manufacture, and is not a part of it.”
  - **NOW:** Judiciary CAN check the authority under the Commerce Clause

<<Court says this is an improper exercise of congressional power:

1. manufacturing isn’t the same as commerce
2. **Kidd v. Pearson** sustained an IA prohibition of the manufacture of intoxicating liquors intended to export to other states – if states can regulate manufacturing, court says there’s a diff. b/t manufacturing and commerce and congress can’t regulate manufacturing.
3. Doesn’t ask or answer question in this case – what is relationship b/t manufacturing and commerce.
4. Court says there’s only indirect relationship b/t manufacturing and commerce, and absent direct relationship, congress can’t regulate it.
5. is this a “means-ends,” or just an “ends” invalidation? Congress thought it could regulate size of business as a means to regulate prices in interstate commerce. Court says congress can’t do this → thinking back to Marshall’s terminology in McCulloch, the difficulty is with the means-ends relationship.>>

<<Rationale/tools of the commerce power:

- Congress involves more states than 1. It involves interstate traffic. The most ordinary power of the commerce power is the regulation of interstate movement, trade, or traffic, communication. (not many cases in this area b/c no one disputes this power.)
- **Prohibition against interstate movement.** Certain goods, people, things, cannot be sent across state lines. Ex. Interstate movement of Lottery tickets (done to prevent the spread of immoral gambling—regulating morals—not commerce!), against interstate transportation of women for immoral purposes (immorality of prostitution, or to take a trip with significant other w/o marriage!)
• **Affecting commerce rationale**—notion that under the commerce clause, Congress can regulate some local activity in order to promote interstate commerce. Ex. Regulating local farmers b/c it affects interstate commerce. Congress can regulate local activities b/c of the affect of the local activity on interstate commerce.

• **Bootstrap Rationale**
  o Prohibit interstate movement
  o Regulate some local activity, not b/c of affect on interstate commerce, but b/c it makes effective the prohibition of interstate movement. >>
  o *Shreveport Case* – Interstate Commerce Commission set maximum RR freight rates for interstate shipment between s’port and TX cities; the RRs argued that Congress lacked authority to regulate intrastate freight rates
    ▪ The court upheld the ICC order because Congress could regulate the “instruments of interstate commerce,” and RRs were certainly such an instrument
    ▪ *Congress could regulate the intrastate activities of instruments of commerce so long as those activities had a “close relation to interstate traffic” → protective principle*
    ▪ WAS THE BASIS OF COURTS’ DECISIONS B/T 1937 -1995

C. **Interstate and Intrastate Commerce**
  o *Champion v. Ames [The Lottery Case]* – Congress prohibited the interstate shipment of lottery tickets to maintain public morality
    ▪ The court found the law to be within Congress’s power to regulate interstate commerce
    ▪ Note: Congress used its “commerce prohibiting” technique to address a variety of perceived public harms
  o **The Mann Act**
    ▪ Prohibited the interstate transport of women for immoral purposes (upheld in *Hoke*)
    ▪ The court also permitted the seizure of banned articles of commerce after they had moved interstate as a necessary aid to the power to prohibit the movement in commerce of harmful articles of commerce
  o *Hammer v. Dagenhart [The Child Labor Case]* – Congress prohibited the interstate shipment of good produced by children
    ▪ Supreme Court held 5-4 that Congress lacked the power to enact the Child Labor Act
    ▪ Court distinguished by:
      1. the articles of commerce prohibited were themselves noxious evils
      2. the interstate shipment itself had been part of the evil Congress sought to suppress
  o *Railroad Retirement Board v. Alton Railroad Co.* – RR Retirement Act of 1934 mandated the rr’s engaged in interstate commerce establish retirement and pension plans for their workers
    ▪ Court brushed aside the argument that pensions were “related to efficiency of transportation” and stated that since the purpose of the Act was to
secure “the social welfare of the worker” it was “remote from any regulation of commerce”

- **Carter v. Carter Coal Co.** – Court struck down Coal Act which set maximum hours and minimum wages for coal miners on the grounds that there was no direct, logical relationship between the hours and wages of coal miners (a local activity failing outside commerce) and interstate commerce in coal
  - Even though the magnitude of the effect of coal mining upon interstate commerce was enormous, there was no direct, logical, and linear link between the specific thing regulated—wages and hours in logical coal production—and interstate commerce
  - Sutherland says the price provisions of part II are not severable; the labor provisions of the act are unconstitutional and if the price provisions cannot be severed from the labor provisions then they must both be unconstitutional
  - **Justice Cardozo’s Dissent**
    - “I am satisfied that the Act is within the power of the central government in so far as it provides for minimum and maximum prices. [Whether] it is valid also in other provisions that have been considered and condemned in the opinion of the court, I do not find it necessary to determine [now].”

- **NLRB v. Jones & Laughlin Steel Corp.** – The NLRB sought an injunction against Jones & Laughlin to prevent it from continuing to fire union organizers; the Court upheld the validity of the Act
  - The court expanded broadened its reach to include any intrastate activity that exerted a **substantial effect on interstate commerce** which were previously confined to those intrastate activities of “instruments of commerce” that bore a close and substantial relation to interstate commerce
  - Rendered useless the “steam of commerce” metaphor
  - we look at actual effects after Jones & Laughlin
  - manufacturing and production are a purely local activity

- **Wickard v. Filburn** – Congress authorized a federal agency to impose limits on the amount of wheat that farmers could plant; effect of Filburn’s wheat trivial, but must consider the **cumulative effects**
  - Cumulative effects doctrine means that the critical effect on interstate commerce is that of the entire regulated activity, not just the impact of one member of the regulated class on interstate commerce
  - 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.

**D. Modern View of Commerce Clause**

(1) **Regulation of the “Channels” and Instrumentalities of Interstate Commerce**
• **United States v. Darby** – Fair Labor Stds Act barred the interstate shipment of goods produced other than in conformity with its minimum wage and maximum hour rules and prohibited employment of people producing goods “for interstate commerce” except at the prescribed wage and hour conditions
  - Court upheld the Act
  - *Hammer* [the child labor case] was overturned
  - **Boot-Strap** – regulating a local activity as a means of making effective the prohibition on interstate shipment.

(2) **Instrumentalities** (ex: things or people in interstate commerce) (i.e. Shreveport, Southern RR, and Reno v. Condon)

(3) **Substantial Affect** - local in-state activities which effect – see Wickard v. Filburn – aggregation of the effect of class members. (See more notably – US v. Lopez)

E. **Affecting Commerce → Bootstrap Rationale**

  - **United States v. Five Gambling Devices** - Statute prohibited the interstate movement of gambling devices; All sales and deliveries had to be registered
    - The court is going to construe the statute narrowly to avoid what Justice Jackson thought was a constitutional issue
    - Clark buys the bootstrap argument generally, but he might not accept the notion of regulating a local activity
  - **United States 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; Act held valid
    - Prohibition is Lopez I, therefore valid
    - The regulation – can use affecting commerce rationale – mislabeling causes less sales, therefore less orders from wholesaler, less orders from manufacturer which affects IC

F. **Activities That Have a “Cumulative Effect” on Interstate Commerce**

  - **Perez v. United States** – Congress enacted Act which prohibited “loan sharking”; the Court found the law to be within Congress’s commerce power, resting its decision on two principles
    - Congress can regulate a class of activities that substantially affects interstate commerce “without proof that the particular intrastate activity against which a sanction was had an effect on commerce”
    - Where the class of activities regulated is “within the reach of federal power, the courts have no power ‘to exercise as trivial, individual instances’ of the class
      - Read carefully justice stewart’s dissent.
  - **Baby 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.
    - <<TWO PROBLEMS WITH ACT p. 149
      1. Neither regulates a commercial activity
2. Nor contains a requirement that the possession be connected in any way to interstate commerce

G. Activities that “Substantially Affect” Interstate Commerce

- **United States v. Lopez** – Congress enacted the Gun Free School Zones Act which made the possession of a gun in or near a school a crime, high schooler was convicted of possession of loaded ground and appealed on the ground that Congress lacked the power to enact the law → Court voided the law as beyond Congress’ commerce power
  - The link between gun-possession in a school and interstate commerce is too tenuous to qualify as a “substantial effect” because if it did, there would be essentially no limit to Congress’ Commerce power

- **Heart of Atlanta Motel v. United States** – racist hotel sought to invalidate Title II on the grounds that it exceeded the congressional power to regulate commerce; court upheld the Act relying on the congressional findings that local racial discrimination inhibited interstate travel by black Americans
  - Congress could regulate local racial discrimination in public accommodations because of its substantial effect on interstate travel and commerce

- **Katzenbach v. McClung** - Ollie’s BBQ catered to a local trade, but b/c 46% of the meat it purchased had moved in interstate commerce it was subject to Title II.
  - Restaurants who purchased a significant portion of their supplies from interstate sources had a substantial effect on interstate commerce
  - Even though Congress made no such specific finding the Court found there was a rational basis for Congress to find a chosen regulatory scheme necessary to the protection of commerce

<<Rationales of the Commerce Power

1. Direct exercise of commerce power itself to regulate interstate commerce. (ex: Price of coal sold in interstate transaction, Rates charged on interstate carrier [Shreveport])
2. Congress prohibiting power (ex: Darby prohibition on shipment of goods that don’t abide by wage standards.)
3. Affecting commerce rationale – aggregate burden of class of activities rationale
  - might construe statute narrowly as to
4. Bootstrap rationale – Also consider regulating a local activity as a means of making affective the prohibition against interstate shipment

Questions to consider

- What’s the local activity that is being regulated?
- What’s the relationship between the local activity and interstate commerce?
- What’s the rule that congress has established for the local activity
- What’s the interstate commerce related end that congress has in mind?
- **CATEGORIES OF ACTIVITY THAT CONGRESS MAY REGULATE UNDER ITS COMMERCE POWER** p. 151

1. Regulate the use of the channels of interstate commerce (e.g. *Darby; Heart of Atl Motel*)
2. Regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate activities (e.g. *Shreveport Rates Cases*)
3. Regulate those activities having a substantial relation to interstate commerce (e.g. *Jones & Laughlin*)

**H. Regulation of the “Channels” and “Instrumentalities” of Interstate Commerce**

- US v. Darby
  - Congress’ motive and purpose for regulating the channels of interstate commerce “are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”
  - Court concluded that the employment ban was substantially related means to the valid end of closing interstate commerce to the products of substandard labor conditions.
  - Court concluded that “substandard” labor conditions affected interstate commerce by giving the products of such labor a competitive advantage in the interstate markets.

**I. Dual Sovereignty – Lopez and Morrison**

- L (1995) and M (2000) represent a revival of the dual sovereignty principle, by reducing the deference the Court gives to Congress concerning the scope of the commerce power. *Violence against Woman Act*
  - Here – there was no deference to the courts
  - **Morrison** - 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 filled 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 do so would allow Congress to regulate virtually any local activity whose combined impact affected commerce, such as family law, marriage, divorce, and childbearing.
  - Lopez and Morrison attempt to regulate a private activity, they establish some limits

**II. TAX POWER**

- **A. Sources of Authority for Federal Taxation**
  - Article I Sec. 8 Cl. 1 “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common
Defense and general Welfare of the United States; but all Duties, Imposts and Exercises shall be uniform throughout the United States”

B. Specific Constitutional Limits on Congressional Power to Tax
1. No taxes on exports.
2. Uniform direct taxation: Indirect taxes (those levied upon an activity rather than upon property) may not discriminate among the states. It does not mean that taxation of all affected individuals must be uniform.
3. Apportioned direct taxes – Taxes imposed directly upon property must be levied in such a way that each state’s proportion of the total revenue produced by the tax is the same as each state’s proportion of the total population of the nation.

<<The due process clause limits the congress’ ability to tax
   o We care about the extent that Congress can use its power to tax as a tool to regulate>>

C. Implied Constitutioonal Limits on Congressional Power to Tax
1. Disguised Regulation
   a. The Child Labor Case [Bailey v. Drexel Furniture Co.] – the Court invalidated the Child Labor Tax law which imposed a 10% tax on the annual net profits on any business that employed children as laborers. → The court reasoned it was more of a penalty than a tax. It’s revenue raising effects were merely incidental.
      ▪ Note: Decision of little importance today because the scope of the commerce power is so much broader now, there is less likelihood that any given tax will exert a regulatory effect that is outside of Congress’ independent power to regulate.
      ▪ We want to evaluate the MEANS/END RELATIONSHIP!!
   b. See Veazie (cited) – increased tax on using state-issued currency. → 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.
      ▪ <<Let’s treat the 10% charge as not a tax, but as a charge to obtain ends, under the necessary and proper clause.
        o The power to tax has been used to achieve the end of one of the other enumerated powers. >>
      ▪ Taxes that “regulate” by means of their rate structure are permissible and valid taxes.
   d. See Doremus (cited) – tax on drugs, plus had to register with the Govt. → tax valid since registration accomplishes a revenue end – more likely the tax will be collected.
      ▪ Where did congress get the power to establish the sales form and registration requirements? S: Congress can use the necessary and
proper clause because we have a tax, but we need a means to collect the tax; it helps for individuals subject to the tax are able to be tracked. N and P applies to power to power to tax, spend, etc (all clauses 1-17)

e. See US v. Kahriger – tax imposed on “bookies” and required them to register with the IRS. → 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.

IV. SPENDING POWER

A. Source of Authority to Spend

- Article I, §8 gives Congress power “to pay the Debts and provide for the common Defense and general Welfare of the US”

B. Scope of Spending Authority

- Consider (1) What is the general welfare for which Congress may spend? (2) May Congress attach conditions to the receipt of federal funds and, if so, are there any limits to such conditions?

  1. United States 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. → 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.
    - Says the spending power is a separate distinct power and should not be confined to carry into execution the other enumerated power; the spending power can be used to achieve ends that Congress could not achieve under its other powers
    - Does not think the program is involuntary because “the threat of loss, not hope of gain, is the essence of economic coercion.” P. 214

  - “There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.” P. 213 → conditional expenditures vs. contracts
2. **Steward Machine Co. v. Davis** – During depression, govt. gave a tax refund if state enacted a Social Security System complying with federal standards. → 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.
   - Court says this measure is not coercive; the employer is not coerced because regardless of what the state does the employer will have to pay the tax

3. **Helvering v. Davis** - Old age provisions of the 1935 Social Security Act; Proceeds of that tax were being used to pay; benefits/pensions to retired workers; Shareholder of a corporation subject to the tax brought a tax → Court reluctantly found that the tax payer could challenge the tax and the expenditure to retire workers
   - The court endorses the Hamilton view of the spending power
   - The spending must be for the national/general welfare
   - The court says it is congress’ power to decide if spending is for the general welfare

4. **Oklahoma v. Civil Service Commission** grant of highway funds given on condition that no state highway employee is elected. → spending is valid since means (condition) are related to the end (building the highway) since elected official may give preference to certain constituents.

**V. THE WAR POWER**
- Article I, §8 gives Congress the power to *declare war, to raise and support Armies, to provide and maintain a Navy, to regulate the armed services, and to tax and spend for the national defense.*”
- Article II. §2 gives the President as Commander in Chief the authority to conduct war.
  A. Legislative power to regulate in order to facilitate waging war.
    1. **Woods v. Cloyd W. Miller Co.** - Act regulated rent after war. → 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.
      - The war power includes the power “to remedy the evils which have arisen from its rise and progress” and continues for the duration of the emergency.  P. 225
      - **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.

**VI. THE TREATY POWER**
A. Source of Authority to Make Treaties
   - Article II, §2 empowers the President to make treaties, but a treaty is not effective until 2/3 of the senate has ratified it.

B. Scope of Congressional Power to Implement Treaties
   1. Missouri v. Holland - federal statute regulated hunting and passed in pursuance of a treaty on migratory birds. → the court upheld the law, ruling that Congress could use any means necessary and proper to implement treaties and that Congress need not rely upon its other enumerated powers to do so.

VII. MODERN FEDERALISM LIMITS ON NATIONAL POWERS
A. Modern Limits on National Powers
   1. McCulloch v. MD - Issue: Whether the State of Maryland may, without violating the constitution, tax that branch? The SC reversed, holding "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. → unconstitutional and void.
      o MD could not tax the Bank, a federal institution, because the power to tax carries the power to destroy.
      o The supremacy clause implies sufficient immunity from state power to enable the federal government to exercise its legitimate powers.
      o The people of all the nation wouldn’t want the people of one state making decisions.

B. State Immunities from Federal Taxes
   1. Collector v. Day – the court held that the salary of a state judge immune from the national income tax; suggested that the state was sovereign and independent as a governmental entity.
      o Many cases sustained private taxpayers claims that their relationship to government entitled them to tax immunity. → Employees of state and federal governments can no longer claim immunities from income taxes simply because of their relationship to the government.
   2. (OLD RULE) Helvering v. Gerhardt – Employees of the Port of NY Authority argued that the federal income tax on their salaries was an unconstitutional burden on NY and NJ. → tax immunity devised for protection of the states as governmental entities cannot be pressed so far as to include common occupations not shown to be different in their methods or duties from those of similar employees of private industries. (i.e. only essential governmental functions)
      o Graves v. O’keefe – an employee of the Home Owner’s Loan Cop established
   3. (CURRENT RULE) New York v. United States (1946) – (mineral water case) – NY’s mineral water business which was to protect Saratoga Spring was taxed. → 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.
- Three Approaches of NY v. US
  - Majority -- Only activity that state can ONLY perform is immune
  - Concurrence -- Balancing test: Impairment of state functions vs. the loss of tax revenue
  - Dissent -- Everything a state chooses to do should be immune from taxation

C. State Autonomy as a Limit on the Commerce Power

1. National League of Cities v. Usery - FLSA extended minimum wages to include all employees of states and their political subdivisions. → the Court invalidated the extension of the law, concluding that Congress could not validly employ its commerce power to
   (1) impinge on essential attributes of state sovereignty or
   (2) “directly impair State ability to structure integral operations in areas of traditional governmental functions,” unless the nature of the federal interest justified state submission to federal regulation
   ➢ Held that the Tenth Amendment prevented Congress from regulating the state in a way that might impair their ability to function effectively in the federal system
     - Note: Overruled by Garcia which held that when Congress acting pursuant to its commerce power, regulates the states as apart of a generally applicable regulatory scheme, the fact that it is a state being regulated has no practical significance – if the regulation would be valid where applied to a private party.
   ➢ First case since the New Deal Revolution to void a federal law based on the commerce power
   ➢ Hodel interprets the Nat. League test as three part: 1) regulate states as states, 2) regulate matters of state sovereignty, 3) law impairs traditional Govt. functions.

<< Three types of national statutes and their affects on state autonomy:
1) regulate private authority
2) regulate states/ (and sometimes local government)
3) require the states to exercise affirmative state authority over private activity

- If you get the states to enforce the national law then you don’t have to pay to administer it

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<table>
<thead>
<tr>
<th>Three Categories of National Legislation</th>
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<tr>
<td>i. Regulating Private Activity</td>
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<td>ii. Regulating States and Local Governments</td>
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<tr>
<td>iii. Regulating states and enquiring them to regulate an activity. States as Agents</td>
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2. **Hodel v. Virginia Surface Mining** - Act told state to enact federal regulations on environmental standards, or face preemption since fed. Govt. itself would regulate with stricter standards. → law is valid since state is not compelled to regulate. Govt. can use threat of preemption and the state then makes a voluntary choice.
   - Congress had a “Rational Basis” for believing that mining affected IC, therefore law is valid.
   - Involves categories 1 and 3

3. **Ferc v. Mississippi** - Act required states to consider national standards for utilities or else face preemption. (there are NO federal utility laws!) → law is valid since states have a choice and are not compelled. The alternative is perfectly valid since utilities are w/ in the commerce power

D. Politically Enforceable Federalism limits
- Political process will protect the states.
- Congress is subject to political pressure from the states b/c they will be voted out of office if their states are not happy.

1. **Garcia v. San Antonio Metro. Transit Authority** – Fair Labor Standards Act (FLSA) applied minimum wages to state employees of transit authority as well as private employees. → 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.
   - Minimal Judicially enforceable limits to CC under Garcia.
   - 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.
   - Overrules Nat‘l League of Cities.

E. Conditional Spending
1. **South Dakota v. Dole** – Govt. gave money for highways on condition that SD have a 21 drinking age. → condition is related to protecting federal highways; condition is voluntary, therefore no federalism concern about Govt. forcing states to regulate.

2. **Conditions on Spending**
   - Must be in **pursuit of the general welfare**, but courts will defer substantially to the judgment of Congress as to what is in aid of the general welfare of the nation
   - Must be **unambiguous**, to enable the states to exercise a knowing choice
   - Must be related to the **“federal interest in particular national projects or programs”** a requirement that means that the condition must treasonably further some particular national project otherwise within federal power.

F. **States Forced To Enforce Federal Regulatory Scheme**
- But Congress may not directly compel the states to enact or enforce a federal regulatory program. [NY v. US, Printz] When Congress does this, it violates the Tenth Amendment (But
Congress may single out the states for regulation when the states are acting as market participants. [Reno v. Condon]

1. New York v. United States (1992) - radioactive waste) – Act, inter alia gave money to states if they met regulatory milestones. → conditions on money are fine here since no coercion; court struck down third “take title” provision
   ➢ “Congress may not simply commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.”

2. Printz v. United States - Act required local law enforcement to perform a background check before person purchases a handgun. → The Court found three principal reasons for finding that Congress lacked power to “impress the state executive into its service”
   ➢ History: Our constitutional practice “suggests an assumed absence of such power.”
   ➢ Structure: The federal government operates upon the people not the states. Conscripting the states into the army of federal administrators would violate the state’s sovereignty
   ➢ Policy: The Brady Act’s directive to local police chiefs and sheriffs distorted the political accountability of both federal and state officials and compromised the independence and autonomy that states retain within their proper sphere of authority.

<<The national govt (In Hodel we know the states were given a choice between state implementation of national standards → regulate our way or leave the private monopolies >>

<<

- Three sources of information to see if this statute is or isn’t consistent with the constitution
  o The court looks initially at our constitutional history to see what the framers had in mind
  o The court looks at the structure of our constitution.
    ▪ There is a reference to dual sovereignty
    ▪ The burden imposed on state and local officials: they have to implement a nationally determined policy
  o The court looks at cases

>>

3. Reno v. Condon - Act prohibited sale of driver’s information. → Act is valid since it applies to both private parties and to the state. Private and public sector are burdened in the same way
   • 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.

<<[Lopez p. 151 “Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power.”]
1) Congress may regulate the use of the channels of interstate commerce
2) Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities
3) Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce in order to be within the congress’ power to regulate it under the Commerce Clause.

VIII. FEDERAL LIMITS ON STATE POWER

- This unit will focus on Article I Sec. 8

A. State Regulation and the Dormant Commerce Clause
- Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce

Evolution
- Marshall’s View: State Laws with a police purpose are valid; state laws with a commerce purpose are invalid
- 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.
- CURRENT COURT (last 70-80 years) applies a balancing test, looks at the weight and nature of what the state’s concerns/interests are and weighs them against the burdens imposed on interstate commerce
  - Inquire into the state’s ends, what were the state’s goals or purposes
  - Look at judicial scrutiny of the means/end relationship
  - Burden on interstate commerce

2. Gibbons v. Ogden – *Marshall’s View* – NY state granted a steamboat monopoly to P in coastal waterways. → Congress could within its powers regulate navigation on NY waters to the extent that navigation was part of interstate commerce and since it had done so its law displaced NY’s

3. Wilson v. Black Bird – *Marshall View* -- 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. → Marshall upheld the law b/c DL’s purpose was not to regulate interstate commerce but to improve the health and safety of its citizens and there was no actual conflict between the LD law and any federal law
  - The NY monopoly law from Gibbons was designed to regulate interstate commerce and was in actual conflict with the federal law

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.

- Potentially conflicting Congressional legislation manifests an intention, with a single exception, not to regulate this subject but to leave its regulation to the several states
- COURT HAS ABANDONED COOLEY DOCTRINE

B. State Regulation of Transportation (Search for Standards After Cooley) →
(Health/Safety Purpose which Burdens IC)

Consider:

- Purpose (End, Goal) of state law
- Effect of state law on interstate commerce

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<thead>
<tr>
<th>Modern Doctrines</th>
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<tr>
<td>➢ All state laws be rationally related to a legitimate state purpose.</td>
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<tr>
<td>➢ Discrimination Doctrine: State laws that unjustifiably discriminate against interstate commerce are prohibited by the dormant commerce clause until and unless Congress permits the states to discriminate.</td>
</tr>
<tr>
<td>➢ Burden Doctrine: Nondiscriminatory state laws that unduly burden interstate commerce are prohibited by the dormant commerce clause until and unless Congress permits the states to impose the burden.</td>
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1. **Southern Carolina State Highway Department v. Barnwell** - law prohibited 20,000 lb trucks and 90 in. wide trucks, → 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).
   ➢ The trial court found that the AZ law had no reasonable relation to safety and made train operation more dangerous
   ➢ Put an unreasonable effect on interstate commerce

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

3. **Kassel v. Consolidated Freightways Corp** - IA banned 65 foot trucks in the state with an exception for bordering. Plurality, law → 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)
➢ **Concur** – must find actual legislative intent, and here it’s protectionist and discriminatory. BUT, if safety purpose was real, defer to the legislature.

➢ **Dissent** – can never find *actual* legi. intent. Defer to legislature, therefore valid state interest, and Congress must regulate if IC burden too high. (Rehnquist) (Barnwell’s “rational basis”)

➢ Purpose was to provide highway safety, but Iowa provided so many exceptions that it undermined its claimed purpose.

<<NOTE: Transportation cases will likely not be cited in other dormant clause cases, so be careful using a transportation case in another context>>

C. State barriers to Incoming Trade: Hindering Access of Out-of-State Competitors to Local Markets

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

2. **Henneford v. Silas Mason Co.** – WA imposed a sales tax on goods sold in the state and a “use tax” on goods purchased outside WA for use within the state → Although the use tax discriminated against out-of-state purchases it was upheld because it was an attempt to equalize tax burdens by taxing substantially equivalent events in like manner. Had WA imposed only a use tax and no sales tax, or imposed higher rates on use, it would likely have been struck down

3. **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 IC. 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.

4. **Mintz v. Baldwin** - cattle from out of state must be disease free before coming into NY. → law is valid. (b/c of health and safety purpose? Easy to argue economic purpose since cattle in NY were diseased too)

5. **Welton v. Missouri** – peddlers of merchandise from outside the state must have a license; didn’t apply to peddlers of MO goods → unconstitutional, the very purpose of the commerce clause was to protect against discriminating State legislation

6. **Dean Milk Co. v. Madison** - city ordinance prohibited sale of milk unless processed 5 miles w/ in the city. → INVALID. Court found the discriminatory effect on this law profound since it completely barred milk from out of state, and valid nondiscriminatory alternatives exist to ensure public health.
7. **Great Atlantic & Pacific Tea Co., Inc. v. Cottrell** - MS. Prohibited out of state milk unless it both passed health standards, and the other state had a reciprocity agreement with MS → law invalid since it burdens IC greatly, and no means-ends fit (reciprocity does not help health and safety purpose).

8. **Hunt v. Washington State Apple Advertising Commission** - NC prohibited any markings on apple crates other than USDA standards, despite the fact that WA grades were superior. → the Court found NC’s claimed benefit (preventing consumer deception) to be slight and concluded that less discriminatory alternatives were available to NC to achieve this small benefit
   - **Hunt test**: Shifts the burden of proof to state, requiring it prove both local benefits and lack of nondiscriminatory alternatives (more stringent than the discrimination doctrine)

| Use Hunt → discriminatory; Pike → Burdensome |

9. **Exxon Corp. v. Governor of Maryland** – MD barred refiners of gas from the retail sale of gas → the Court found no discriminatory effect because the law did not on its fact restrict the movement of gasoline across state lines.
   - The Court found no protectionist purpose despite evidence that one legislative motivation was to protect local independent retailers of gas.
   - **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.

**D. Limiting Access of Out-of-Staters to Local Products and Resources**

1. **Milk Control Board v. Eisenberg Farm Products Co.** - minimum price law for PA milk was applied to a NY dealer who wanted to export the milk to NY. → 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)
   - The distinction between Eisenberg and NY: NY was trying to impose their minimum price on VT

2. **H.P. Hood & Sons v. Du Mond** - Mass. Dealer denied a license for a 4th depot in NY b/c it would take more milk out of NY. → 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 econ. Interests are forbidden
- Jackson “This Court consistently has rebuffed attempts of states to advance their own commercial interest by curtailing the movements 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.” P. 263

3. **Cities Service Gas Co. v. Peerless Oil & Gas Co.** - OK set minimum price for natural gas, most of which was sold out of state. → law is valid; applies to all gas taken from the field, whether destined for interstate or intrastate commerce; justifiable concern of preventing rapid and uneconomic dissipation of one of its chief natural resources.
   - This is more like Eisenberg where burden is small.
   - Valid since it does not discriminate against IC as in Hood

4. **Philadelphia v. New Jersey** – In order to protect its environment and health of its citizens, NJ banned out-of-state garbage from NJ dumps. → NJ’s ban was facially discriminatory and NJ failed to prove its legitimate purposes could not be achieved by less discriminatory alternatives
   - Economic Protectionism is per se invalid.

E. **State Restraints on Exports of Its Natural Resources**

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

2. **Hughes v. Oklahoma** - To conserve its native minnow population, OK prohibited the export of minnows taken from OK waters. → The law was facially discriminatory and although OK’s objective—wildlife conservation—was legitimate there were other less discriminatory alternatives available to accomplish that objective.

3. **Foster-Fountain Packing Co. v. Haydel** – LA law banned the shipment of shrimp out of the state until hulls and heads (needed for fertilizer) were removed → the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce

4. **Pike v. Bruce Church** – AZ required that AZ grown cantaloupes be packed in AZ so that their AZ origin would be clear and the reputation of AZ’s high quality cantaloupes would be enhanced. → INVALID; Court concluded that AZ’s objective was legitimate but of slight importance, and that the burdens imposed on interstate commerce were substantial
F. Barriers to Incoming Trade (Cont’d)
1. Minnesota v. Clover Leaf Creamery – MN banned the sale of milk in plastic jugs, thus encouraging its sale in paper containers. MN has no manufacturers of plastic jugs but does have a paper industry that makes paper milk cartons. → VALID; The Court found the discriminatory effects too slight to invoke the discrimination doctrine and upheld the law under the balancing test

G. State Barriers to Business Entry and Regulations of Internal Corporate Affairs
1. CTS Corp. v. Dynamics Corp. of America – Court rejected a commerce clause challenge to an IN law providing that a purchaser who acquired “control shares” in an IN corporation could acquire voting rights only to the extent approved by a majority vote of the prior disinterested stockholders; imposes the same burden on in and out of state offerors

H. Facial discrimination
1. Maine v. Taylor – To protect its native fish species MN prohibited the importation of non-native baitfish. Though the law was facially discriminatory MN was able to demonstrate that its legitimate goal of preserving native fish species from destruction due to inadvertent introduction of non-native predators and disease could not be accomplished by anything less than an outright ban.
   ➢ MN proved that testing or screening of imported baitfish (less discriminatory alternatives) were not effective and would not accomplish MN’s legitimate objective.
      o There non-discriminatory alternatives because there is no effective way of testing the fish without killing them.
      o There are so many of them there would not be time to determine if they are co-mingled.

I. The “Market Participant” Exception to Commerce Clause Restraints
1. South-Central Timber Dev. v. Wunnicke – AK sold its standing timber pursuant to a contract that required purchasers to mill the timber into lumber in AK. AK claimed that the processed condition was an aspect of its participation in the timber market. The Court rejected that contention, concluding that the condition related to the timber processing market, a market in which AK did not participate.
   ➢ The Court said that AK was trying to control the market too far downstream. Downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction

IX. PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

A. Function and Purpose
1. Article IV §2 provides that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” → This prevents states from denying to all outsiders (whether they are noncitizens or simply nonresidents) the privileges and immunities enjoyed by insiders.
   - Corporations are not regarded as citizens and do not enjoy protection.
   - Privileges and immunities consist of interest that are fundamental to the promotion of interstate harmony or to the maintenance and well-being of the nation.
     - Fundamental interest → pursuit of livelihood

2. Baldwin v. Montana Fish and Game Comm’n – MN imposed a fee of $225 on outsiders to hunt elk, but imposed a fee of only $30 on Montanans. → The Court concluded that hunting elk, a recreational activity, was not “fundamental” to the promotion of interstate harmony or to the “Maintenance and well-bring of the Union.”

3. Toomer v. Witsell - relied on Art IV to invalidate SC’s discriminatory license fee on residents trawling for shrimp in its waters
   - The purpose of the Art IV – to insure citizens of state A who venture into state B are treated roughly the same way the citizens of state B will be treated

4. A state may not require private employers to give a hiring preference to state residents. (Hicklin v. Orbeck—AL law giving preference invalidated)

5. United Bldg. & Constr. Trades v. Camden – Camden, NJ enacted a law requiring that at least 40% of all employees of contractors on city construction jobs must be Camden residents under the pretense that it was necessary to redress the extreme economic depression → Court concluded the law impinged upon the fundamental interest of interstate employment but remanded to the lower court to determine whether there was a substantial reason the differential treatment

6. Supreme Court of New Hampshire v. Piper – NH limited bar to state residents; Powell found that her claim involved a privilege under the Clause because like the occupations considered in our earlier cases, the practice of law is important to the national economy

B. Preemption of State Authority
   <<Which would they look at first: State law is in conflict with federal statute or claim that state law is unconstitutional because it conflicts with
   - Court address preemption claims first then turns to dormant commerce clause analysis
   - If preemption could remove part, but if ruling is constitutionally grounded there may not be as much room for the state to operate
- Preemption analysis
  o Conflict can be between any state statute and a federal statute
  o Most of the time when congress legislates they don’t consider the range of the 50 states, rather they
    ▪ In recent years they have tried to address it with express preemption provisions or savings clause.
    ▪ In the absence of express provision or savings clause the
  o General rules
    ▪ Look to see if there is an actually conflict between state law and national law
    ▪ Or look to see if the national government has so occupied a regulatory field that there really isn’t any room left for state regulation
  o Complex factors
    ▪ Court is trying to figure out relationship between two regulatory schemes and then determine how they might go together (direct conflict → complimentary coincidence)
    ▪ Court issues a wide range of terms. See Hines p. 298
    ▪ Is it using all these different terms and grouping in chronological factor you could find that court is difference between how the court rules
      • Preemption tests as employed by the Rehnquist court tend to favor national power

>>

2. FL Lime & Avocado Growers, Inc. v. Paul – involed avocados certified as mature under the federal regulations but containing less than the minimum CA oil content → Invalid preempted because conflicts with statute enacted under commerce power

3. Pacific Gas & Elec. Co. v. State Energy Comm’n – CA refused to permit new nuclear power generation plants until a state agency had determined that the US has approved and there existed a demonstrated method for the disposal of nuclear waste produced generation; PG&E challenged the validity as impliedly preempted by the federal Atomic Energy Act → Court concluded that Congress intended to occupy the field of the safety aspects involved in the construction and operation of a nuclear plant
   ➢ The Court read the field of nuclear power plant safety so narrowly that it excluded CA’s condition, which the Court regarded as an attempt by CA to regulate the economic rather than safety aspects of nuclear power generation

<<

- SC states a presumption against state law authority, deference to state law authority; if you add foreign affairs and non foreign affairs you will have a convenient example/overview of preemption framework

>>

4. Crosby v. National Foreign Trade Council – MA enacted a law generally barring state agencies from purchasing goods or services from companies
doing business with Burma → the Court ruled that the MA law was impliedly preempted since the state law was an obstacle to the accomplishment of the intended purpose and natural effect of the federal

5. United States of America v. Sabri - Real estate developer indicted on three counts of bribery involving federal funds, moved to dismiss → COA held that statute was legitimate exercise of Congress’ power under N and P clause