INTRODUCTORY MATERIALS

Judicial Review

- Marbury v. Madison (1803):
  - Facts: President Jefferson’s Secretary of State, Madison, refused to deliver a commission granted to Marbury (P) by former President Adams
  - Holding (JM): The Supreme Court has the power, implied from Article VI, § 2 of the Constitution to review acts of Congress, and if they are repugnant to the Constitution, to declare them void.
  - Note: Article III of the Constitution provides that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and where a state is party. For the court to issue a mandamus in this case, it must be an exercise of appellate jurisdiction because the grant of appellate jurisdiction is the power to correct proceedings already instituted below, not create new causes and to issue the mandamus in this case would create a new exercise of judicial power which is unconstitutional in this case. Court cannot expand the jurisdiction.
  - Practical Note: In reviewing statute, courts always look first to statutory issues before turning to Constitutional uses.
  - § 25 of the 1789 Judiciary Act: 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 court could be had
    - 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) or where is drawn 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 law of the United States, and the decision is in favor of such their validity
    - 3) or where is drawn in question the construction of any clause of the Constitution or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission
    - …may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.
  - Martin v. Hunter’s Lessee (1816): The Court is confronted with a question of whether the Supreme Court is constitutionally authorized to review the constitutionality of state court decisions.
    - Holding (Justice Story): The Supreme Court can review the constitutionality of a decision by a state’s highest court. First, state laws are not sovereign because the federal constitution sets forth numerous valid limitations to state sovereignty. Secondly, there is a need for uniformity in decisions throughout the nation interpreting the Constitution.
  - Cohens v. Virginia (1821): Established the Supreme Court’s right to review criminal decisions in state court.
    - Holding: The Supremacy Clause does not grant individuals immunity from state criminal laws when a state law and a federal law are different.

Limits on the Powers of the Government:

- The federal government is one of limited, enumerated, powers
- Contrasted with the state government which has general police powers to protect the health, safety, or general welfare of state residents. A state regulation is valid under federal law unless it violates some specific limitation imposed by the U.S. Constitution, while a federal action must fall within the enumerated powers.
- There is no general federal police power
- Congressional Powers granted by Article I §8 of the Constitution:
  - Lay and collect taxes
  - Provide for defense of the country
  - Borrow money on credit of the US
  - Regulate commerce with foreign nations and among the several states
  - Regulate immigration and bankruptcy
  - Establish post offices
  - Control the issuances of patents and copyrights
  - Declare war
  - Necessary and Proper Clause: “make all laws which shall be necessary and proper for carrying into execution the foregoing powers”
- To establish a law as consistent with the Constitution, you must be able to:
  - Show that the statute is a direct exercise of one of the enumerated powers
  - Show that the statute is a valid exercise of the enumerated powers supplemented by the necessary and proper clause.
- McCulloch v. Maryland (1819):
  - Facts: McCulloch, the cashier of the Baltimore branch of the U.S. Bank issued bank notes in violation of a Maryland statute providing that no bank, without authority from the state, could issue bank notes except on paper issued by the state.
Holding: 1) Certain federal powers, giving Congress the discretion and power to choose and enact the means to perform the duties imposed upon it, are to be implied from the Necessary and Proper clause (power to incorporate a bank). 2) The federal Constitution and the laws made pursuant to it are supreme and control the Constitutions and the laws of the states (state cannot impose fees on the bank).

Marshall’s Pretext reservation: If Congress enacts a law under the pretext of exercising one if its powers when Congress really has ulterior motives, the exercise is not valid.

Application Today: The courts will not strike down a congressional action so long as Congress has employed a means which is not prohibited by the Constitution and which is rationally related to objectives that are themselves within the constitutionally-enumerated powers.


- Facts: Arkansas’ congressional term limitations law was challenged as unconstitutional
- Issue: May the states limit the term limits of members of Congress?
- Holding: Majority struck down the Arkansas provision as being beyond the state’s constitutional authority. Basis: The tenth amendment only lets the state’s retain powers they already had before enactment of the Constitution and the power to add qualifications for federal elections was not an “original power” that the states had before enactment, because there no federal government or electoral system at all. Additionally, if there had been such an original power, the framers intended the Constitution to be the sole source of qualifications for membership in Congress and enactment of the Constitution therefore divested the states of whatever power to add qualifications they may have had.
- Significance: The broad significance of the case is to illustrate how tenuous the once-settled view of federal authority is on today’s court.

THE COMMERCE CLAUSE

- Article I § 8 of the Constitution gives Congress the power to “regulate commerce with foreign nations, and among the several states, and with Indian tribes.”
- Be Alert to the following different interpretations and exercises of the power of the commerce clause:
  1) A direct exercise of the commerce power to regulate interstate commerce itself (trade, traffic, and movement)
     - These cases are easily decided and the power to decide these cases is not doubted.
  2) Prohibit interstate movement (lottery tickets)
     - This raises questions of morality, etc.
  3) The “affecting commerce” approach
     - Depends heavily on the necessary and proper clause
     - Congress’s power to regulate a local activity that Congress thinks has an effect on interstate commerce as a means to an ends.
     - TEST: 1) What is the local activity? 2) How does it affect interstate commerce 3) What is the means that Congress wants to use? 4) What is the interstate commerce related ends?
  4) Bootstrap Approach
     - Regulate local activity as a means of making effective prohibition of interstate movement. Regulating a local activity in order to limit local shipping.

Gibbons v. Ogden (1824):

- Facts: Ogden acquired, by grant from the NY legislature a monopoly right to operate steamboats between NY and NJ. Gibbons began operating boats in violation of the monopoly but under a license granted from a federal statute. Ogden obtained an injunction in a NY court ordering Gibbons to stop operating his boats in NY waters.
- Holding (JM): The injunction was found to be invalid, on the ground that it was based upon a monopoly that conflicted with a valid federal statute, and thus violated the Supremacy Clause. LP: The statute providing for the licensing of the vessels is a constitutional exercise of the commerce power
- JM’s Broad view of the Commerce Power: Congress could legislate with respect to all “commerce which concerns more States than one.” Commerce is defined all commercial intercourse. JM also decided that the congressional power to regulate commerce included the ability to affect matters occurring within a state, so long as the activity had a commercial connection with another state.
- LP: JM says the restraint on the commerce power is in the political process; use of the political process to get rid of the unfavorable policy makers.

The Early Developments of the Commerce Power

US v. E.C. Knight Co. (1895)

- Facts: American Sugar acquired four sugar refineries, such that they controlled 98% of all of the sugar business in the country. §1 of the Sherman Act prohibits any contract, combination, or conspiracy in the restraint of trade or commerce among the several states.
- Holding: The court found that the exercise of the commerce power in this case was invalid because American sugar’s operation only had, at best, an indirect effect on interstate commerce, and Congress cannot regulate those activities with indirect effects.
• **Direct-Indirect Test:** The court draws a distinction between the local matters that have a direct effect on interstate commerce and those that have an indirect effect. Those with only an indirect effect on interstate commerce are not subject to commerce clause regulation.
  
  • **Note:** This rule had a limited impact on Anti-trust cases, but was used frequently in early commerce clause cases.

• **Shreveport Rate Case (1914)**

  1. **Facts:** The Interstate Commerce Commission, after setting rates form transport of goods between Shreveport, LA and various points in Texas, sought to prevent railroads from setting rates for hauls totally within Texas which were less per mile than the Texas to Shreveport rates. The Commission’s theory was that Shreveport competed with certain Texas cities for shipments from other parts of Texas, and that the lower Texas intrastate rates were unfairly discriminating against the Texas-to-Shreveport interstate traffic. The railroads countered that it was beyond Congress’s power to control intrastate rates of an interstate carrier.
  2. **Holding:** The court rejected the railroad’s challenge, and upheld the ICC’s right to regulate interstate charges, at least of interstate carriers. The opinion held that the commerce power necessarily included the right to regulate “all matters having such a close and substantial relation to interstate traffic that control is essential or appropriate to the security of that traffic.” The fact that the activity being regulated was intrastate did not place it beyond congressional control, since the ultimate object was protection of interstate commerce. Look at the effect that the local activity has on interstate commerce.

• **Effecting Commerce Rationale:**
  1. What is the Local Activity
  2. How does the local activity relate to interstate commerce
  3. What is the means that Congress is attempting to use
  4. How does that means relate to the interstate commerce end?

• **Southern Railway v. US (1911)**

  1. **Facts:** Court sustained a penalty judgment under the Federal Safety Appliance Act, imposed for operating railroad cars equipped with defective couplers. Three of the cars were used in moving solely interstate traffic. The act covered all cars “used on any railroad engaged in interstate commerce.”
  2. **Holding:** The court found that the provision was satisfied because the intrastate cars were used “on a railroad which is a highway of interstate commerce.
  3. **LA:** Management of Railroad couplers
  4. **IC Connection:** If there is an accident, it can affect movement both in and out of state
  5. **Means:** Require automatic couplers on all trains, intra and inter state.
  6. **Ends:** Efficiency (but really safety.)

• Both Shreveport Rate and Southern Railway look at what effect the intra state activities have on interstate commerce.

• **The Stream of Commerce Rationale: Swift v. United States (1905)**

  1. **Facts:** Justice Holmes upheld a Sherman anti-trust act injunction against price fixing by meat packers.
  2. **Holding:** From the birth of a cow until it appears on the table, there is a current of commerce that should be regulated by Congress. Commerce has the power to regulate things in the stream of commerce in interstate commerce; therefore the local sale of the cattle because it is part of the stream of commerce of the cattle.
  3. **EM:** An activity could be regulated under the commerce power not because it had an effect on commerce, but rather, because the activity itself could be viewed as being “in” commerce or as being party of the “current” of commerce.

• **National Police Power & the Prohibition of Interstate Commerce technique:**

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

• **Champion v. Ames (1903) The Lottery Case:**

  1. The court upheld the Federal Lottery Act which prohibited the interstate shipment of lottery tickets
  2. **Pretext:** This statute does not purport to address traffic within a state, all it does is regulate commerce itself in order to prohibit interstate movement.
  3. **Holding:** Court has the painful duty to set legislation aside if Congress was using its power outside the enumerated powers.
  4. **Dissent:** Congress does not have a police power, and the power to regulate commerce is being used as a police power.

• **Regulating Local Activity as a Means of Making Efficient Interstate Commerce**

  1. Once it became apparent that the court looked favorably upon the commerce-prohibiting technique as a means of asserting national power, Congress took a significant additional step: it began to regulate intrastate activities as a means of enforcing bans on interstate transport.

• **Exclusion of allegedly “harmful” goods and persons.**

• **Hippolite Egg (1911):**
Court Barriers to the New Deal:

- **Rule**: Congress can regulate a local activity as a means of carrying out a prohibition interstate traffic of dangerous goods.
- **Facts**: Congress passed the Pure Food and Drug Act of 1906. Under this act, federal officials seized a shipment of adulterated eggs after they had arrived in the state of their destination.
- **Holding**: The right to seize adulterated eggs once they had arrived at their destination was “certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to merely prevent the physical movement of adulterated articles, but the use of them.”
- **Majority**: Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing no matter what the motive.

- **Hoke v. United States (1913)**:
  - **Facts**: The Mann Act, prohibiting the transportation of women in interstate commerce for immoral purposes was upheld. LP: This is concerned with interstate commercialized vice—prostitution.
  - **Holding**: “Surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons…the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women.
  - **Rule**: Congress has power over transportation “among the several states;” that power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulation.

- **Hammer v. Dagenhart (1918)(The Child Labor Case)**:
  - **Holding**: The court struck down a federal statute which prohibited the interstate transport of articles produced by companies which employed children younger than a certain age or under certain conditions.
  - **Facts**: This case is distinguished from The Lottery Case, Hippolite Egg, and Hoke because in those cases, the interstate transportation being prohibited was part of the very evil sought to be prohibited. In this case, the good produced by the children were harmless, it was only the employment of the children which was evil and the employment was not directly related to the states.
  - **LP**: Production comes before commerce; it is therefore subject to local regulation
  - **Congress’s arguments**:
    - The evil of the good produced by the child is spread to other states
    - Unfair competition: the transport of good into the interstate trail is unfair because manufacturers are able to employ cheaper labor.
  - **Dissent**: 1) Congress is given power to regulate such commerce in unqualified terms. 2) It would not be argued today that the power to regulate does not include the power to prohibit. 3) It does not matter that regulation of interstate commerce has a collateral effect on local activities typically left to the states.
  - **EM**: Holmes dissent became the rule in the long-run

- **Railroad Retirement Board v. Alton (1935)**:
  - **Facts**: Invalidated a law establishing a compulsory retirement and pension plan for all carriers subject to Interstate Commerce Act
  - **Holding**: Court concluded that this was outside the realm of the commerce power because it only related to the social welfare of the worker; an area for state regulation.
  - **Congress’s Argument**: Good pension plan promotes employee efficiency which affects interstate commerce.

Court Barriers to the New Deal:

- When Congress and President Roosevelt began implementing the New Deal in 1933, The Supreme Court began leaning towards the direct and logical relationship to interstate commerce test, and the court would strike down cases that they believed were reserved for state control under the 10th amendment.

  - **Facts**: At issue was the validity of National Industrial Recovery Act which authorized the President to adopt “codes of fair competition” for various trades or industries; the codes regulated such items as minimum wages and prices, maximum hours, collective bargaining, etc.
  - **Holding**: Court found the act unconstitutional with respect to Schechter because its activities were not in the “stream of commerce” because they only dealt with NY slaughterhouses; Nor was there an “affecting commerce” rationale because there was no direct effect on commerce in the regulation of wages. The local activity does not have a direct effect on interstate commerce.
  - **LP**: Congress Rationale: Wages directly affect prices which has a direct effect on interstate commerce prices.

- **Carter v. Carter Coal (1936)**
  - **Facts**: A challenge to the Bituminous Coal Conservation Act which set maximum hours and minimum wages for workers in coal mines.
  - **Holding**: The act was found not to be a valid use of the commerce power because the court made a distinction between “production” and “commerce.” Production was a local activity, even though the materials would end up in commerce. The Employer-Employee relationship is also a local matter. Nor did the activity directly affect interstate commerce.
  - **Cardozo’s Dissent (only addresses price)**: Cardozo believed that at least the price rules were valid, even applied to intrastate sales because the prices for intrastate coal sales had such direct impact on those for interstate sales that regulation of the latter could not be successfully carried out without regulation of the former.
THE MODERN CASES & RULES

General: Jones & Laughlin (1937) began the modern trend in commerce clause analysis. Beginning with this case, the court showed a vastly greater willingness to defer to legislative decisions. Under the present doctrine, the court will uphold commerce-based laws if the court is convinced that the activity being regulated “substantially affects” interstate commerce. In only one case since 1937 (Lopez) has the court found that Congress went beyond its Commerce Clause powers.

Modern Affecting Commerce Rationale: NLRB v. Jones & Laughlin (1937)

- **Facts**: The Jones & Laughlin case tested the constitutionality of the National Labor Relations Act of 1935. The case involved the NLRB attempt to prevent Jones & Laughlin from engaging in “unfair labor practices” by the discriminatory firing of employees for union activity.
- **Holding**: The court held that NLRA was constitutional as applied to Jones & Laughlin, which operated in more than one state and participated in interstate commerce, and a labor stoppage of the PA intrastate manufacturing operations would have a substantial effect on interstate commerce. Therefore, labor relations at the Pennsylvania plants could constitutionally be regulated by commerce.
  - **LP: Affecting Commerce Rationale**
    - **LA**: employer-employee relationship in manufacturing
    - **IC**: Bad relations may cause a strike and disrupt interstate commerce.
    - **Means**: Prohibit employers from discharging employees who engage in means to form a union.
    - **Ends**: Promote shipment of goods in interstate commerce.
  - **EM: “Stream of Commerce” Rationale not needed**: The court declined to rely on the stream of commerce theory, indicating that stream of commerce cases were particular, not exclusive instances of the commerce power.
    - Because stream of commerce was abandoned in this case, the effecting commerce rationale broadened in its application. *So long as the regulated activity occurs before, during, or after the interstate movement*. Here, the steel production took place before, but subsequent cases will have regulation after the interstate commerce activity has occurred.

Aggregation Effect: Wickard v. Fillburn (1942): still good law!

- **Facts**: This is the broadest stretch of the commerce power ever by the court.
- **Facts**: This case involved the Agricultural Adjustment Act of 1938, which permitted the Secretary of Agriculture to set quotas for the raising of wheat on every farm in the country. The act also set production of wheat that would only be consumed on the farm where it was produced. Wheat raised in excess was subject to a per bushel penalty. Fillburn owned a small farm in Ohio and challenged the statute’s regulation of the wheat he produced solely for personal consumption, on the grounds that this was a purely local activity beyond the scope of federal control.
- **Holding**: The statute was upheld on the basis that even home consumption of wheat has an economic effect because it affects purchases in interstate commerce. *Aggregation*: Fillburn’s own consumption may be trivial however when the activities of all farmers like Filburn are combined, it is far from trivial. A large number of farmers growing their own wheat and therefore not purchasing wheat in interstate commerce will have a substantial effect on interstate commerce and protection of interstate commercial trade in wheat clearly falls within the commerce power, and the regulation of home-grown wheat is reasonably related to protecting that commerce. **LP**: The test is a substantial economic effect test and this passes because of the aggregate effect.

Commerce Prohibiting: US v. Darby (1941)

- **Minimum Wage Requirements Upheld**: The court unanimously upheld the FLSA, which set minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The Act not only 1) prohibited the shipment in interstate commerce of goods made by employees not within the requirements of the act, but it also 2) made it a federal crime to employ workmen in the production of goods “for interstate commerce” at other than the prescribed rates and hours.
  - **LP: Two Rationales**:  
    - **Affecting Commerce**: Use of the Necessary and Proper clause
    - **Boot-Strap**: Regulation of some local activity as a means of making effective a prohibition of interstate commerce
      - **Means**: When Congress decides to ban something from interstate commerce, it may use whatever means necessary to affect that ban.
      - **Ends**: Commerce prohibition power
  - **1) Direct Ban Upheld**: Disposed of the argument that manufacturing conditions are left for the exclusive state control: “The power of Congress over interstate commerce can neither be enlarged nor diminished by the exercise or non-exercise of state power…the 10th amendment states a truism that all is retained which has not been surrendered.”
  - **2) Upheld the provision making it a crime to employ workers in violation of the act**: Given Congress’s right to impose direct prohibitions or conditions on interstate commerce, Congress may choose the means reasonably adapted to the attainment of the permitted ends, even if it involves regulation of a local activity.
    - **Super Boot-Strap**: If this rationalization is taken seriously, it means that Congress may attack any problem by prohibiting interstate activity any way associated with it, then the local activity itself could be prohibited as a means of implementing the ban on interstate transactions.
      - **Overrules Hammer v. Dagenhart.**
  o **Facts:** Involved the interpretation of the incidental registration and reporting provisions of a 1951 statute prohibiting shipment of gambling machines in interstate commerce. The restrictions were placed on any manufacturer and dealer involved in gambling devices, not just those connected to interstate commerce.
  o **Defendant’s Argument:** This statute should not be construed to reach machines that never were involved in interstate commerce.
  o **Government Argues:** Broad interpretation should be applied, without any requirement that the particular activities be shown to have a connection to interstate commerce. **Bootstrap:** “To make effective the prohibition of transportation in interstate commerce, Congress may constitutionally require reporting of all interstate transactions.”
  o **Holding:** The court affirmed the dismissals of all the proceedings on statutory grounds and read the statute narrowly so as to avoid the constitutional issues.
  o **Justice Clark:** Concurred with the majority saying that information acquisition was reasonably necessary, appropriate, and probably essential. Qualifies his statements by saying that this is not regulation of a local activity, it is merely reporting.

  o Sustained federal regulation applied to activities long after the interstate shipment has ended.
  o **Facts:** A GA druggist purchased drugs from a wholesaler in Atlanta, the wholesaler had purchased the pills from a distributor in Chicago. The druggist violated the food, drug, and cosmetic act by re-labeling the drugs without directions for use or warnings.
  o **Holding:** Court held that the statute was constitutional citing an earlier decision which held that it is constitutional for Congress to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce.
  o **LP:** Cannot use stream of commerce anymore (J&L), but there are several other options for arguments:
    • **Affecting Commerce:**
      o **LA:** Local retail sales of drugs
      o **IC:** Druggist who labels properly has a higher cost of production than the druggist who does not label properly.
      o **Means:** Druggist has to properly label ALL drugs
      o **Ends:** Prevents a depression of interstate purchases of drugs that would otherwise occur if they did not have to properly label. (I’ll just buy intrastate drugs so that I don’t have to label.)
    • **Bootstrap:** Regulating labeling as a means of making effective the prohibition of interstate shipment of mislabeled drugs.

• Baby Lopez (1972)
  o **Facts:** Appellants challenge the constitutionality of the Comprehensive Drug Abuse Prevention Act of 1970, which prohibited and made unlawful particular activities in controlled substances without requiring both allegation and proof that the particular activity involved in each individual case had affected interstate commerce.
  o **Holding:** It is lawful for Congress to regulate the use of drugs by regulating the movement of drugs interstate. Intrastate activity in drug use and production is so commingled with interstate commerce, that is constitutional for Congress to regulate in order to effectively control the use of drugs.
  o **Perez Rationale:** It is difficult for Congress to try to determine when local possession does or does not affect interstate commerce.

Federal Criminal Laws: A broad reading of the commerce clause powers has been applied in a number of decisions involving federal criminal statutes.

• Perez v. US (1971)
  o **Facts:** This statute involved the anti-loansharking provisions of the Consumer Credit Protection Act, which forbade extortionate extension of credit, even in entirely local activities.
  o **Holding:** The court found constitutional an application of the Act to a loansharking transaction which occurred entirely in one state.
  o **Rationale:** The court found that Congress was right: loansharking as a whole had an affect on interstate commerce, because organized crime was dependent on loansharking revenues to finance national operations.
  o **Class of Activities:** (Wickard) Petitioner is clearly a member of a class which engages in extortionate transactions, regulation of which falls within the commerce power. **LP:** Although there is no evidence that Perez operated in interstate commerce, it would be nearly impossible to differentiate between loansharks who operate exclusively intrastate and those who are national in scale.
  o **Lopez does not overrule:** Lopez will not overrule this case because it falls within the category of commercial activities.

  o **Statute Unconstitutional:** Congress was not explicit about who is affected by the statute, and unless Congress conveys its purpose clearly, it cannot impinge upon rights normally reserved for the states.

• Scarborough v. US (1977): Same provision as Bass
Statute Upheld: Congress was able to show that the firearms had moved in interstate commerce and the court held that the showing was “sufficient to satisfy the statutorily required nexus between the possession of the firearms by a convicted felon and commerce.

Civil Rights Legislation: Title II of the 1964 Civil Rights Act bans discrimination in places of accommodation. The ban applies against almost all by covering any establishment which serves interstate travelers, or which buys food, a substantial portion of which has moved in interstate commerce.

Heart of Atlanta Motel (1964)

- **Facts:** Motel located in downtown Atlanta refused to rent rooms to blacks in violation of the Act. The motel was near two interstate highways and derived 75% of its occupancy from out-of-state guests, and solicited business through national media.
- **Holding:** The court could constitutionally be reached the Civil Rights Act under the Commerce Clause. Noting that racial discrimination discouraged travel on the part of a substantial part of the black community. The court also found that Congress had power to regulate local incidents of interstate travel which might have a substantial effect on interstate commerce.
- **Police Powers Okay:** It is clear that the national interest here is a correcting a moral wrong in addition to the economic effect, and the court does not seem bothered by this.
- **LP:** Affecting Commerce Rationale:
  - **LA:** Racial discrimination by motels
  - **IC:** People who are discriminated against are discouraged from interstate travel
  - **Means:** Prohibition of racial discrimination
  - **Ends:** Promoting travel by all citizens on equal terms.
- **Douglas Dissent:** This regulation should have been accomplished under the 14th Amendment because each case like this that arises will require proof of the local activity effecting interstate commerce.

Ollie’s BBQ (1964)

- **Facts:** Ollie’s admittedly discriminates against Blacks. Ollie’s was not located anywhere near an interstate highway, nor was there any appreciable evidence that it served out-of-state travelers. However, 46% of the food purchased by the restaurant during the previous year had been bought from a supplier who had brought it from out-of-state (this applies under the statute)
- **Holding:** Court upheld the statute as applied to Ollie’s, because the unavailability of accommodations dissuaded Black from interstate travel. **Aggregation:** Although Ollie’s is small, the combination of similar activities by a number of small operations will certainly have an impact on interstate commerce
- **LP:** Class of Activities: 2 Classes of restaurants that discriminate; one class affects IC, the other does not, it is impossible to tell them apart, so Congress can reach all of them.

THERE ARE STILL LIMITS:


- **Facts:** The statute in question was the Gun-Free School Zones Act of 1990. in which Congress made it a federal crime for any individual to knowingly possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone. **No Findings:** The statute in question did not include any explicit findings by Congress that the activity actually being regulated affected commerce. **No Jurisdictional Hook:** Congress made no connection to interstate commerce with the statute (for example, it did not make it a crime only to possess a gun that had been transported in interstate commerce; rather it banned even possession of a gun that had never traveled in interstate commerce.
- **Government’s Arguments:**
  - Possession of a firearm in a school may result in violent crime
  - Violent crime affects the functioning the national economy in several ways
    - Affects the cost of insurance against violent crime
    - Violent crime reduces an individual’s willingness to travel to areas of the country that they believe are unsafe.
    - Violent crime reduces the effectiveness of education which lessens the economic productivity of students.
- **Holding:** The statute was struck down by a 5–4 majority (CJ Rehnquist writing for O’Connor, Scalia, Kennedy, and Thomas; the Gang of Five, they support limitations to national power) The act neither regulates a commercial activity nor has a jurisdictional hook that the possession be in any way related to interstate commerce.
- **Not commercial**
  - Distinguished Wickard saying that Wickard involved an economic activity which was part of a larger regulation of economic activity in which the regulatory scheme could undercut unless the intrastate activity were regulated.
• Furthermore, if the type of reasoning proposed by the government was allowed to go through, there would be hardly any limitation on federal power. To uphold the act would be to conclude that there is never will be a distinction between what is truly national and what is truly local.
  o **Concurrence (Kennedy and O’Connor):** Think that categorization of local activities is not effective in making these decisions without a look at each situation on a case-by-case basis. Do not have much confidence that classifying activities as commercial or non-commercial, economic or non-economic is effective in these decisions. In this case, the activity was non-commercial and traditionally left to the state

  o Suggests that Lopez will be a major obstacle whenever Congress relied on its commerce power to regulate conduct that is essentially non-commercial. Here, the court says that Congress cannot broadly regulate violence against women.
  o **Facts:** Congress enacted the Violence Against Women Act, holding that all persons shall have the right to be free from crimes of violence motivated by gender, and allowed victims to bring suit against perpetrators in federal court. A young woman from VT had been raped by two members of the football team and sued them under the act. They defended by saying that the act was beyond Congress’s power, particularly the commerce power.
  o **Holding:** Court agreed that the act was beyond Congress’s power, mostly because the court felt that gender-based crimes are not economic in nature.
    - **Rejected Findings:** Although Congress made findings of connections between interstate commerce and violent crimes, the court rejected these claims, finding the connection too attenuated, and if accepted would allow Congress to regulate any criminal behavior, as long as the activity in the aggregate would affect some form of commerce.
    - **Local v. National:** Rehnquist also distinguished between local and national activities finding that Congress could not regulate violent crime that is not directed at the instrumentalities, channels, or goods involved in interstate commerce, leaving this duty to the states.

**General Effects of Lopez and Morrison and the Modern Rules:**
- The activity being regulated must be one that significantly affects commerce, not just one with mere incidental effects on commerce. (Rehnquist is bringing back the direct-indirect test)
- **Commercial Transactions:** Where the transaction being regulated is clearly a commercial or economic one, the court will probably continue to allow Congress to regulate that transaction, even if it is completely intrastate, as long as it is part of a class that in the aggregate substantially affects interstate commerce. (WICKARD IS ALIVE!)
- **Non-Commercial Transactions:** Where the activity is a non-commercial one, the court will not regard the aggregate impact of that activity on interstate commerce as being sufficient unless 1) the causal link is extremely short and direct; or 2) the item being regulated, although non-commercial, crosses state lines or enters the stream of commerce. (We know from Lopez that the link must be more obvious than the link between guns in school and commerce; We know from Morrison the link must be more obvious than the one between gender-based violence and commerce)
  - **Findings:** The fact that Congress has made some findings of links between the activity and interstate commerce may sway a close case, but the impact is usually slight.
  - **Jurisdictional Hook:** Where Congress drafts the statute in a way that requires a jurisdictional hook between the activity and Commerce, the act is likely to be found within the commerce power (Lopez: a ban against guns that had moved in interstate commerce would have been valid).
- **LOPEZ:** 4 categories of activities that Congress can constitutionally regulate:
  - **Not sure where the bootstrap fits in.**
  - **Channels:** Congress can regulate the use of channels in interstate commerce. Thus, commerce can regulate in a way that is reasonably related to highways, waterways, and air traffic. Presumably, Congress can do this even if the activity in question appears to be quite intrastate. (EXAMPLES?)
  - **Instrumentalities:** Congress can regulate instrumentalities of interstate commerce, even though the threat may come only from interstate activities. This category refers to people, machines, and other instruments used in carrying out commerce. (LP: Shreveport Rate, Southern Railway)
  - **Articles Moving in Interstate Commerce:** Congress can regulate articles that move in interstate commerce, even if the article does not substantially affect interstate commerce. Bootstrap?!
  - **“Substantially Affecting” Commerce:** Congress may regulate those activities having a substantial effect on interstate commerce, with respect for the following rules:
    - **Commercial v. Non-Commercial:** See Above.
    - **Congress’s Findings:** Court is more likely to make its own conclusions, and it is not sufficient that Congress had a rational basis or reasoning (Morrison)
    - **Traditional Domain of the States:** If what is being regulated is an activity the regulation of which has traditionally been the domain of the states, the court is less likely to find that Congress is acting within its commerce power. (Look out for areas of Education, Family Law, and General Criminal Law, except where there is a need for a national solution)

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

The Power to Tax:
This is an independent source of federal authority, which means that Congress may tax activities or property that it might not be able to regulate under other enumerated regulatory power (Commerce Clause). It is granted by Article I § 8: “The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises.

- Taxes must be uniform throughout the United States, meaning that the tax structure may not discriminate among the states; it does not matter that individuals are not taxed uniformly.
- Taxes must also be direct, meaning that they must be arranged in such a way that the revenue produced by them comes from each state in proportion to its share of the nation’s overall population.
- No duty may be imposed on exports.

**Regulatory Effect:** If a tax has regulatory effect that could not have been achieved directly through one of the other enumerated powers, then it is possible that the tax may be stricken as an invalid disguised regulation.

### Modern Rules:
- A tax that produces substantial revenue will almost certainly be sustained, and the court will not inquire into Congress’s motive in enacting it.
- Regulatory provisions that accompany the tax are valid if they bear a reasonable relation to the tax’s enforcement.
- A tax which regulates directly through its rate structure is valid.
- LP: Look for a purpose aside from raising revenue.

**Bailey v. Drexel Furniture (1922): Tax Invalidated: Still Good Law**

- **Facts:** The Child Labor Act provides that any company employing children in violation of its provision shall pay a tax of one tenth of its profits, both the IRS and the labor department are given the authority to enter and inspect any facility.
- **Holding:** This is a case of Marshall’s Pre-Text: Congress is using its enumerated powers to pass laws for the accomplishment of object not entrusted to the government. The tax is invalid because the tax is imposed to stop the employment of children within the age limits proscribed.
- **Government Argues:** This is a case of Congress using one enumerated power to carry into effect another enumerated power.
- **LP:** The provisions of the tax must be valid to the end of enforcing the tax and raising revenue.

**US v. Butler (1936): Spending Invalid**

- **Facts:** Involved the validity of the Agricultural Adjustment Act which sought to raise farm prices by cutting back agricultural production. The scheme was to be carried out by authorizing the Secretary of Agriculture to contract with farmers to reduce their acreage under cultivation in return for benefit payments; the payments were to be made from a fund generated by the imposition of a “processing tax” on the processing of the commodity.
- **Holding:** Congress may not regulate in a particular area merely on the ground that it is thereby providing for the general welfare; only taxing and spending may be done for the general welfare. (PRETEXT).
- **LP:** The tax is unconstitutional because the spending is unconstitutional. Lesson Learned: Don’t Earmark funds!! Congress has no right to regulate areas of essentially local control, including agriculture, and it also could not coercively purchase compliance with a regulatory scheme.
- **Conditional Appropriation:** Court held that a conditional appropriation of funds would be valid, which was not the case here because the farmer is economically coerced into contractually binding himself to join the program, it is not voluntary at all.
- **Dissent:** Points out that if Congress could constitutionally make payments to farmers on condition that they reduce their acreage, it was absurd to hold that the measure becomes unconstitutional merely because the farmer is required to promise to reduce the acreage.

**Charles C. Steward v. Davis (1937): Spending Valid**

- **Facts:** Sustained the unemployment compensation provisions of the Social Security Act. Unlike the tax in Butler, the funds were not earmarked. Under the scheme, an employer was entitled to a credit of up to 90% of the federal tax for any contributions to a state unemployment fund certified by a federal agency as meeting the requirements of the act.
- **Holding:** The court abandoned the requirement for distinction between conditional appropriations and appropriations requiring binding promises by the recipient. Even though the credit was given only where the state passed a plan meeting congressionally-defined requirements, the plan was held valid in view of the need to combat unemployment.

**Helvering v. Davis (1937)**

- Upheld the old age benefits provisions of the Social Security act, a federal program that established an entirely federal program.
• Upheld because Cardozo found that a system of old age pensions is best left to the national interests.

• **Oklahoma v. CSC: Spending Invalid??**
  o **Facts:** Federal statute that held that no state official who is primarily employed in activities funded in whole or in part by the national government can take any active part in politics. Oklahoma believed that the state highway commissioner should be an elected official, but the highway system is almost entirely funded by the federal government.
  o **Holding:** The condition for the receipt of funds has to be reasonably related to the attainment of the end that justifies the expenditure. The court found that there is not much of a connection between the elected official provision and the highway system.

The War and Treaty Powers

• Congress is given the power to declare war
• The war power’s impact on federalism has principally arisen in a context of economic regulations promulgated during war time

• **War Power: Woods v. Miller Co. (1948)**
  o **Facts:** This case involved the constitutionality of the Housing and Rent Act of 1947, by which Congress sought to impose rent controls because of the post-war housing shortage.
  o **Holding:** Court held that even though actual combat had terminated, a state of war still technically existed, additionally the court had a right to take all necessary and proper means to remedy the post-war problems.

• **Treaty Power: Missouri v. Holland (1920)**
  o **Facts:** A treaty is enacted between the US and Britain which prohibits the killing or capture of certain birds within the US. The state of Missouri contends that treaty invade rights guaranteed to it under the 10th amendment.
  o **Holding:** The treaty and its regulation are valid exercises of the Treaty Power. Additionally, migration of wild birds is a national problem, dealt with best by a national solution.

INTER-GOVERNMENTAL IMMUNITY

Federal Immunity from State Taxation

• **McCulloch v. Maryland (1819)**
  o **Rule:** A government may not tax those that it does not represent, a state may not tax the nation.
  o **JM:** The power tax bestowed upon the state may run the risk of destroying some governmental exercise. Legislators may not tax an effect with national interests.

State Immunity from Federal Taxation

• **NY v. US (1946)**
  o **Facts:** NY had purchased a mineral water business from a private company. There was a national tax on the business and the state asserted that it should not pay the tax.
  o **Holding:** This case turns on the difference between proprietary activities vs. governmental functions. If the activity is something that only a state could operate, the immunity is valid. However when the activity is something done merely for profit and could be done by private persons, the national tax applies (non-discriminatory).
  o **Rule from NY v. US:** First, ask if the tax is non-discriminatory between states and private individuals. Then, the federal government may not tax in a way which would “interfere unduly with the State’s performance of its sovereign functions of government.”

• **Source of Limitation:** State immunity from federal taxation is implied from the tenth amendment’s preservation of state autonomy.

• **Essential Functions:** Thus, the federal government may not impose a significant tax on property used or income received from a state’s performance of its basic governmental functions. But where a state government engages in a function that is not at the core of traditional government functions, the federal government may tax that function as part of a non-discriminatory, generally-applicable tax.

State Immunity from National Regulation Under the Commerce Clause

**Garcia Overrules all precedent cases in this area**

• **National League of Cities (1976)**
  o Court held that the Tenth Amendment barred Congress from making federal minimum wage and overtime rules applicable to state and municipal employees.
  o **Rationale:** The court held that when wage/hour rules were applied to state employees, they violated the tenth amendment sentiment that Congress may not exercise power in a fashion that impairs the State’s integrity or their ability to function effectively in the federal system because compliance would have cost the states and their municipal subdivisions substantial sums, and the rule stripped the states of their discretion to decide how they wished to allocate a fixed pool of funds available for salaries.
  o **Thus,** if the wage/hour rules were allowed to stand, Congress would have the right to make fundamental employment decisions regarding state employees and there would little left to the states’ separate and independent exercise.
  o **National League of Cities 3-Part Test for Invalidation:**
    * Statute must be regulating states as state
- Statute must address matters that are indisputably attributes of state sovereignty
- Compliance would directly impair the ability of states to perform integral features of state regulation
- **Hodel v. Virginia Surface (1981):** Not invalid under National League of Cities because it involved a federal regulatory scheme of both states and private sector
- **UTU:** Not invalid because there was no interference with traditional functions
- **FERC:** Not invalid because there was an immediate effect interstate commerce.
- **EEOC:** There is sufficiently less serious degree of intrusion, so it is unnecessary to curb Congress’s decision to extend its regulatory authority.
- **Garcia v. San Antonio (1985)**
  - Facts: Justice Blackmun joined with 4 dissenters of National League of Cities and overruled National League of Cities, because he found that the distinction of activities as traditional or non-traditional was unworkable.
  - Rule: The National League of Cities test shows that it is difficult if not impossible to distinguish between traditional and non-traditional government functions and additionally, the test calls for subjectivity on the part of court. The court found that state sovereign interests are protected by procedural safeguards inherent in the structure of the federal system
  - Holding: Once Congress, acting pursuant to the Commerce Clause, regulates the states, the fact that it is a state being regulated has virtually no significance. If the regulation would be valid if applied to a private party, it is also valid as to the state.
- **South Dakota v. Dole (1987)**
  - Facts: Congress enacted a law which directed the secretary of transportation to withhold 5% of federal highway funds to state with a drinking age of less than 21 years old.
  - Rule: Congress may use the spending power to induce states to cooperate with regulations in areas that are not easily controlled. Compliance with this law is voluntary and the stakes are not high. Additionally, if the funds are accepted by the state, the conditions are laid out unambiguously and are fully understood by the states.
- **NY v. United States (1992): statute invalid**
  - Facts: Congress enacted the Low-Level Radioactive Waste Policy Act which attempted to force each state to make its own arrangements for disposing of low-level radioactive waste generated in the state. The Act tried to do this with several types of incentives, most significantly, the “take-title” incentive whereby any state which did not arrange for disposal of its waste would be required to take title of the waste and would be liable for damages in connection with disposal of the waste. NY attacked the statute.
  - Rule: Congress may not simply commandeer the legislative process of the State by directly compelling them to enact and enforce a federal regulatory program. Congress was forcing NY to choose between two unconstitutional options.
- **Printz v. US (1997): Statute invalid**
  - Facts: Under a temporary provision of the Brady Bill, the law ordered local law enforcement officials to conduct background checks on prospective purchasers until a permanent system could be set up. Printz, A sheriff in Montana, objected to the background check provision.
  - Rule: The court concluded that the Brady Bill violated the provision of NY v. US which said that the federal government may not compel the states to enact or administer a federal regulatory program.
  - Holding: The court finds that these responsibilities take away from the duties of the police and diminish the balance of power in the branches of government.
  - Rationale: Congress can compel states to take certain steps, however Congress can condition funds, give states a choice, etc.
- **These Cases Distinguished from Garcia:**
  - Facts: Seem to apply mainly to generally applicable federal law-making: where Congress passes a generally applicable law, the 10th amendment does not entitle a state’s own operations to an exemption, merely because it is a state being regulated along with all the other private entities.
  - NY & Printz: Where the federal government tries to force a state or local government to enact legislation or regulation or tries to force state or local officials to perform particular governmental functions, this is not part of generally applicable scheme, and is directed specifically at the state’s basic exercise of sovereignty. The federal government may not use such coercion.
  - Facts: DPPA restricts the ability of the states to disclose a driver’s personal information without the driver’s consent. South Carolina questioned the constitutionality of this act.
  - Holding: This is a Lopez category 2 and is therefore within the commerce power to regulate. Furthermore, this is a law of general applicability: it regulates both the state and those who have acquired the information and it applies to the public and private sector. The national government is not burdening the public sector any more than it is burdening the private sector.

**DORMANT COMMERCE CLAUSE**
• Gibbons v. Ogden:
  o This is not a dormant commerce clause case:
    o Emphasizes that commerce power is not a concurrent power shared between the states and the federal government
    o Commerce power is for Congress; police power is for the states
  o Wilson v. Blackbird Marsh (1829)
    o Facts: The company was authorized by a Delaware law to build a dam in Black Bird Creek—which flowed into the Delaware River—and also bank the adjoining marsh and low ground, obstructing navigation of the creek. Willson’s sloop broke and injured the dam and the company sued for damages. The company was successful in its suit and the state court rejected Willson’s defense that the law authorizing the dam violated the commerce clause.
    o Holding (JM): Affirmed: If Congress had passed a law intending to regulate state legislation affecting the flow interstate commerce in the area, the law would be void. Additionally, Delaware had some form of a health and safety concern in mind, making the statute valid under the commerce clause. JM implies that a state’s attempt to regulate matters of health or local property concern would not normally be construed as interfering with the dormant federal commerce power. This law was also not discriminatory because all vessels were barred.
  o Cooley v. Board of Wardens of the Port of Philadelphia (1851)
    o Facts: A PA law of 1803 required ships entering or leaving the port of Philadelphia to engage a local pilot to guide them through the harbor, with a penalty for non-compliance. The case also involved a 1789 congressional statute. Cooley was held liable for the penalty
    o Holding (Later Modified): Congress cannot authorize the states to do something barred by the commerce clause ➔ no longer good law
    o Now Held: Congress can grant powers to the states to enact laws that may affect interstate commerce because if all state regulation of commerce was barred by the commerce clause, there would be a regulatory void.
    o EM: Local v. National Distinction: The court held that Congress had a right to regulate those aspects of interstate commerce which were of such a local nature as to require different treatment from state to state.

Intervening Cases: Rise of the Balancing Test

• The court began to move away from the direct-indirect test, finding the approach to be “too mechanical, too uncertain in its application, too remote from actualities.”
• Soon the court looked to the purposes of the law as determinative of the validity of the law
• Buck v. Kuykendall (1925)
  o Brandeis held that while state regulation for the purpose of promoting safety upon the highways and conservation in their use are not obnoxious to the commerce clause, however this was an attempt at prohibition of competition and is therefore unconstitutional. Safety was promoted when the certificate was denied, but the promotion was incidental to the purpose of the denial to prevent competition.
• Bradley v. Public Utilities Commission (1933)
  o Court sustained Ohio’s denial of a certificate to operate a train between Cleveland and Flint, MI because the stated reason of the denial, to alleviate congestion on the highways (health and safety). Brandeis found that the purpose of the denial was to promote health and safety and the effect on interstate commerce was merely incidental.
• South Carolina v. Barnwell (1938)
  o Facts: Challenge to a 1933 South Carolina law prohibiting the use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 pounds. Trial court looked at the effect of the state law on interstate commerce and the purposes of the state law and the extent to which the regulations worked to achieve the state’s interests. About 85 to 90% of the nation’s trucks exceeded these limits. Trial court, noting the substantial burdens on commerce, found the law an unreasonable means of preserving highways.
  o The purposes set forth by the state government were highway safety and conservation.
  o Holding (Stone): Reversed: Few subjects of state regulation are so peculiarly of local concern as are the use of state highways. The state has a primary and immediate concern for their safe and economical administration.
  o LP: Stone is saying that the dormant commerce clause itself does not preclude all state laws, it is inevitable that when states regulate, it is going to affect commerce. Congress cannot be forced to deal with all of the matters that need attention or there will be a void where states are barred from acting and Congress cannot effectively regulate.
  o LP: Stone’s concern is with state regulations that provide advantages over out-of-state residents. When a state enacts a law where the burden fall principally out-of-state, no one in state will provide vicarious representation of the out-of-state interests ➔ this is unfair discrimination.
  o LP: Stone says this is a non-discriminatory regulation (it applies to in-state and out-of-state trucks), there is no benefit afforded to South Carolina, it applies to all parties in the same fashion, therefore it is valid under the dormant commerce clause.
  o Note: Be aware of the difference between Stone’s position here and 7 years later
• Southern Pacific Co. v. Arizona (1945)
Bibb v. Navajo Freight Lines
Southern Pacific and its Aftermath:

- **Facts:** The Arizona Train Limit Law of 1912 prohibited operating railroad trains of more than 14 passenger or 70 freight cars, and the company was sued for violating the law. Trial court found the law to be an unconstitutional burden on commerce. The Arizona Supreme Court reversed, concluding that a state law enacted in the exercise of the police power, with some reasonable relation to health and safety, could not be overturned despite its adverse affect on interstate commerce.

- **Holding (Stone): Reversed:** The findings show that the operation of long trains is standard practice over the main lines of railroads all over the US, and if the length of trains is to be regulated at all, national uniformity in the regulation adopted is practically indispensable to the operation of an efficient and economical national railway system. Enforcement of the law in AZ, while train lengths are unregulated or regulated differently in other states will result in an impediment to the free flow of commerce. Viewed as a safety measure, the law offers at most a slight safety interest and this case differs from those where a state has removed or reduced safety hazards without substantial interference with interstate movement of trains.

- **LP:** Stone applies a balancing test, balancing the nature and extent of the burden imposed on interstate commerce against the state’s interest. The burdens are a need for national conformity; increased expense; delays; and the cost of the regulation falls primarily interstate. Agrees with the trial court finding that the new regulations would not improve safety because they would require more trains to be on the tracks, which would be overridden by the accidents caused by operating a greater number of trains.

- **LP:** Justice Stone changes his mind from Barnwell and inquires into the means-ends relationship because if the regulatory means do not achieve the regulatory ends, the ends is illusory, and interstate commerce should not be countered by such an ineffective state regulation. If the regulation does not work, then there is nothing to apply to the other side of the balancing test.

- **LP on Black’s Dissent:** The court is sitting as a super-legislature, by remaking legislative decisions.

- **Me:** This regulation burdens interstate commerce, and the state cites a health and safety interest, but the safety ends is not really met by the regulatory means, so there is nothing to apply to the other side of the balancing test.

- **Southern Pacific and its Aftermath:**
  - In later trucking cases, the Court moved away from Barnwell and closer to Southern Pacific.

- **Bibb v. Navajo Freight Lines (1959)**
  - **Facts:** Held invalid an Illinois law requiring the use of contour mudguards on trucks and trailers operating on Illinois highways. The requirement conflicted with an Arkansas rule requiring straight mudguards and forbidding contoured ones. At least 45 states authorized the use of straight mudguards. The state’s interest was safety.
  - **LP:** Holding: The court found that the contoured mudguards were no more effective than straight mud flaps and in addition posed an additional threat to highway safety. Therefore the Illinois concern was illusory. The regulation made it necessary for a trucker to “shift its cargo to differently designed vehicles once another state line was reached,” thereby creating higher costs.
  - **LP:** This case is different from Barnwell and South Carolina because it involves “multiple, inconsistent burdens” across states which has not occurred before. Douglas says that if the state had made a stronger showing, maybe the innovating state would not have to give way.

- **Kassel v. Consolidated Freightways (1981)**
  - **Facts:** Trucking companies can operate either 55ft semis, or 65ft doubles, to transport goods all across the country. Most trucking companies prefer the use of doubles because of the increased capacity. Iowa law limits truck length to 55ft, but allows some trucks to go up to 60 ft. Iowa also allows border cities to adopt the length limitations of the adjoining state. Consolidated trucking is prohibited from running its trucks through Iowa and has 4 options in order to comply with the state: 1) use 55ft singles; 2) use 60ft doubles; 3) detach trailers of 65ft doubles and shuttle separately; 4) divert 65ft doubles around Iowa. **LP:** Most state in the West and Midwest allow 65ft doubles, but in the East, several states prohibit the 65ft doubles as well.
  - **District Court:** The district court found that the evidence clearly establishes that the double is as safe as a semi and concluded that the law impermissibly burdened interstate commerce because the total effect of the law as a safety measure in reducing accidents and casualties is so slight that it does not outweigh the national interest in keeping interstate commerce free from interfaces which seriously impede it.
  - **Holding:** **Powell, White, Blackmun, Stevens in Majority:** Affirmed: **LP:** Powell has a four part inquiry: 1) The Ends: Powell accepts at face value the state’s purpose of highway safety; 2) The means-ends relationship: The double is no more dangerous than the semi, thereby making the safety purpose illusory; 3) The burdens on Interstate Commerce: higher costs, may cause more accidents; regulation may be counter productive 4) Outcome based on a balancing test: Iowa imposed this regulation without any countervailing benefit. Furthermore, this is legislation that is not so much concerned with safety but rather is concerned with economic burdens on other states.
  - **Powell in Text:** The Iowa truck length limitation unconstitutionally burdens interstate commerce because the state’s safety interest has been found to be illusory and its regulations impair significantly the federal interest in efficient and safe interstate transportation and cannot be harmonized with the commerce clause. Iowa urges that the court leave the task of safety judgment to the legislature but the court cannot do that because the regulations generally secure benefits for residents of Iowa while imposing burdens of large trucks on neighboring states.
  - **Me:** I think this is a discrimination case and the first protectionist case.
  - **Concurrence:** Brennan, Marshall (LP: This is the approach that will be used in the future):
• Analysis of Commerce Clause challenges to state regulations must take into account three principles:
  • The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation
  • The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the state’s lawmakers, and not against those suggested after the fact by counsel.
  • Protectionist legislation is unconstitutional under the Commerce Clause even if the burdens and benefits are related to safety rather than economics.
• The judicial task is to balance the burden imposed on commerce against the local benefits sought to be achieved by the state’s lawmakers. It is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as the legislative intent is not irrational.
• Iowa sought to discourage interstate truck traffic on Iowa’s highways, so the varying effects of the different types of trucks is not applicable to the decision…This purpose is protectionist in nature and therefore impermissible under the Commerce Clause.
  o **Dissent: Rehnquist:** LP: There really is no independent assessment of burdens imposed on IC. **Text:** Any direct balancing of marginal safety benefits against burdens on commerce would make the burdens on commerce the sole significant factor and make likely the odd result that similar state laws enacted for identical safety reasons might violate the commerce clause in one part of the country but not another. The safety and protectionist motives cannot be separated, the whole purpose of safety regulation of vehicles is to protect the state from unsafe vehicles
  o **Note: Be careful using transportation cases for non-transportation cases, they generally have different standards for application**

**State Barriers to Incoming Trade**

• **Baldwin v. G.A.F. Seelig (1935)**
  o **Facts:** The NY Milk Control Act of 1933 set the minimum prices to be paid to milk producers by New York dealers. Seelig, a NY milk dealer, bought milk in Vermont at prices lower than the New York minimum. The law prohibited NY sales of out-of-state milk if the milk had been purchased below the price set for similar purchases within New York. The state refused to license Seelig to sell milk in NY unless he agreed to conform to the state’s price regulation regarding the sale of imported milk. **The court unanimously held the law to be unconstitutional.**
  o **Holding (Cardozo):** The NY regulation set a barrier to traffic between one state and another, similar to customs duties and NY, in an effort to promote the economic welfare of her farmers, cannot guard them against competition with cheaper prices in VT. The court rejected the state’s argument that the act was justified by the state’s aim to assure a regular and adequate supply of pure and wholesome milk because the supply was jeopardized when farmers could not earn a living income.
  o **LP:** Cardozo finds that NY was exercising its police powers to achieve an economic end; Cardozo is concerned that the police power cannot be used by a state with the aim and effect of establishing an economic barrier against competition with the products of another state.
  o **Me:** Discriminatory with an economic end.

• **Mintz v. Baldwin (1933)**
  o **Court upheld a NY law prohibiting importation of cattle unless they were from herds certified as being free from Bang’s disease.**
  o **LP:** This should have been decided differently because the court did not know that Bang’s disease was widespread in NY (where there were no restrictions) and no steps were being taken to ensure that imported cattle were put in clean herds.
  o **Me:** Discriminatory with an economic end.

• **Welton v. Missouri (1876)**
  o Invalidated a law that was discriminatory on its face: Missouri law requiring a license for peddlers of merchandise from out-of-state but peddlers of Missouri goods did not need a license.

• **Henneford v. Silas Mason (1937)**
  o **Facts:** Upheld a Washington use tax on goods bought in other states. Washington law paced a 2% tax on retail sales within Washington; another section imposed a “compensating tax” on the price of goods (including transportation costs) for the “privilege of using” in Washington goods bought at retail out of state. The use tax was inapplicable to any article which had already been subjected to a sales or use tax of at least 2% for articles previously taxed at less than 2%, there was a prorated exemption for the use tax.
  o **Holding (Cardozo):** Local retail sellers “will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax” and buyers will no longer be tempted to place their orders in other state to escape local sales tax.
  o **LP:** Cardozo recognizes that the purpose of the law is equalization
  o **Distinguished from Baldwin:** NY was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. In effect the law told farmers in Vermont that their milk cannot be sold by dealers in NY unless you sell it to them in VT at a price set here in NY; Washington allows out-of-state dealers to ship as much as they want at any price, but when the goods are used in Washington after the transit has
been completed, there will be an equal burden as if the goods were purchased here. **LP:** There is still an opportunity for there to be competition among the retailers in different states.

- **Dean Milk v. Madison (1951)**
  - **Facts:** A Madison, WI ordinance barred the sale of pasteurized milk unless it had been processed and bottled at an approved pasteurization plant within five miles of Madison. Dean Milk (IL) challenged the ordinance because it bought its milk from farms in Northern Illinois and Southern Wisconsin and pasteurized it at two Illinois plants. Dean was denied a license to sell its milk in Madison because its plants were more than 5 miles away. Dean’s milk was inspected in Chicago and labeled Grade A under US Public Health standards, similar to the standards of Madison.
  - **Holding (Clark):** Statute imposed an undue burden on interstate commerce. While the *purpose* may be health and safety, the *effect* was an economic barrier because Madison erects an economic barrier protecting major local industry against competition from without the state, thereby discriminating against interstate commerce.
  - **LP:** There is a differentiation between purpose and effect; burden falls on those outside the city and benefits fall on the pasteurization facilities within the area. Also, Madison has alternative means of meeting its health and safety goals.

- **Breard v. Alexandria (1951)**
  - **Facts:** A Louisiana ordinance prohibited door-to-door solicitation of orders to sell goods except by consent of the occupants. Breard led a crew of salespeople who solicited subscriptions for national magazines on behalf of a PA corporation. The people in favor of this legislation were the local retailers; the people opposed were the people going door-to-door.
  - **LP:** Argument for Discrimination: Burden falls on those out of state; benefit conferred on local retailers. Argument against Discrimination: It is possible there are Louisiana organizations that go door-to-door.
  - **Holding:** Majority sustained the ordinance on grounds that all peddlers were discriminated against, not just those in interstate commerce.

- **A & P v. Cottrell (1976)**
  - **Facts:** MS had a law that milk and milk products from another state may be sold in MS provided that the regulatory agency of the other state accepts Grade A milk products produced in MS on a reciprocal basis. A & P processed milk in Kentwood LA and the milk there met all of MS’s standards but LA did not sign a reciprocity agreement with MS, so the milk was not allowed in MS. MS cited a health concern for the quality of milk coming into the state.
  - **Holding:** Because this statute is burdensome on interstate commerce, the court applies a Pike Balancing test: *Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.* Holding that the reciprocity clause disregards rather than promotes any higher Mississippi milk quality standards because regardless of quality, any milk can come into MS as long as the state signs a reciprocity agreement. This is a case the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. **Statute is invalid.**
  - **LP:** Mississippi could subject any milk to its own health standards

- **Hunt v. Washington (1977)**
  - **Facts:** *Statute:* North Carolina enacted a statute which required all closed containers of sold, offered for sale, or shipped into the state to bear “no grade other than the applicable US grade or standard. The Washington State Apple Advertising Commission brought suit and succeeded on action that the statute prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce.
  - **Holding:** North Carolina asserted that its purpose was to protect the consumers form differing grades and pursuant confusion. **LP:** The Court found that the statute both burdens and discriminates because in-state growers do not have to change anything in their processes; Washington apples cannot command a premium price by advertising their competitive edge and there is no corresponding injury to NC; Washington apples are brought down to the grade level of North Carolina apples; Washington growers have change their packaging processes; there is an element of economic protectionism. **Statute is invalid.**
  - **New Test:** When a statute discriminates, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

- **Exxon v. Governor of Maryland (1978)**
  - **Facts:** The statute arose out of the gasoline shortage of 1973 and concern that large oil companies were favoring company-owned stations over mom and pop shops; held that a producer or refiner of petroleum products 1) may not operate any retail service station with in the state; 2) must extend all “voluntary allowances” uniformly to all service stations it supplies.
  - **Holding:** The Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since MD’s entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless. The commerce clause was not designed to protect the particular structure or methods of operations in the retail market.
  - The act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. **While the refiners will no longer enjoy their same status in the Maryland market, in-state dealers will have no**
competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself; establish a claim of discrimination against interstate commerce.

- **LP: Likes Blackmun’s dissent:** 99% of the people who were allowed to stay in business were local retailers; 1% were out of state non-producer/refiners. 98.5% of those forced to divest were out-of-state producer-refiners and 1.5% were in state producer-refiners. **Blackmun:** 98.5 % of the burdens fall on the out-of-state producer refiners; 99% of the benefit falls on local, in-state interest. The state interest is in promoting competition, but the state ignores its duties to identify alternatives and there is at least one non-discriminatory option.

- **Blackmun:** This case is no different from Hunt because discrimination in both cases did not knock out all out-of-state competition…some out-of-state interests are burdened, but not all out-of-state interests are burdened. However, Maryland has driven out of business the most powerful out-of-state competition…Most of the benefit bears on the in-state interests, while most of the burden falls on major out-of-state business.

- **Milk Control Board v. Eisenberg** (1939)
  - **Facts:** PA law set the minimum price to be paid by dealers to milk producers and required dealers to obtain a license. Eisenberg was a NY milk dealer who bought milk from PA producers for shipment out of state. The Company operated a milk receiving plant in PA where the milk it bought from PA farmers was cooled, then shipped to NY. Eisenberg claimed that the law was similar to that of Baldwin v. Seelig, and that the application was unconstitutional. **Supreme Court disagreed.**
  - **Holding (Roberts):** The purpose of the law obviously is to reach a domestic situation in the interests of the welfare of the producers and consumers of milk in PA. In rejecting the challenge, he emphasized that the activity affected was essentially local in PA. If dealers who shipped any fraction of their milk outside the state were exempt from the law, there would be a crippling effect on local enforcement of the law. Additionally, only a fraction of the milk produced in PA is shipped elsewhere, so the effect on IC is minimal at best.
  - **Distinguished from Baldwin:** Baldwin is distinguished because that act attempted to wholly affect interstate commerce by setting up a tariff barrier against milk imported into the enacting state.

- ***HP Hood v. DuMond** (1949):
  - **Facts:** Hood was a Boston milk distributor who obtained milk from New York producers and maintained three receiving depots there, he sought a NY license to establish a fourth depot. NY commissioner denied a license for the depot under the state law stating that licenses for new plants could not be issued unless the commissioner was satisfied that “issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. **LP:** The denial of the NY receiving depot is a direct restriction on the amount of milk that Hood can purchase in NY for distribution in another state.
  - **Holding:** The statute is a violation of the commerce clause because a state does not have a right to advance their own commercial interests by curtailing the movement of articles of commerce. NY does not have a right to restrict the sale of milk for out-of-state shipment to protect the economic interests of competing dealers and local consumers.
  - **Black, Dissenting (LP likes??):** “Had a dealer in supplying NYC customers applied for a license to operate a new plant, the commissioner would have been compelled under the Act to protect petitioner’s plants supplying Boston consumers in the same manner that this order would have protected New York consumers.” The language of the act is not discriminatory, nor has the commissioner been discriminatory in its application.

- **Pennsylvania v. West Virginia** (1928):
  - **Facts:** WV required that all local needs for natural gas be met before any gas can be exported and the court found that the requirement was a prohibited interference with interstate commerce.
  - **Holding:** A state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders.
  - **Holmes, dissenting:** There is nothing in the commerce clause to prevent a state from giving a preference to its inhabitants in the enjoyment of its natural advantages.

- **Foster-Fountain Packing** (1928):
  - **Facts:** Invalidated a LA law banning the shipment of shrimp out of the state until hulls and heads (supposedly needed for fertilizer) had been removed. The purpose of the law is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and manufacture of bran in Louisiana by withholding raw or unshelled shrimp from Mississippi plants. Keep the packaging industry in Louisiana rather than Mississippi.
  - **Holding:** A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state.

- **Pike v. Bruce Church** (1970):
  - **Facts:** Church packed his AZ grown cantaloupes in California, and they were not identified as AZ-grown. AZ statute prohibited Church from shipping uncrated cantaloupes from the AZ ranch. Compliance with the statute would have required a $200,000 outlay. The state’s interest was to promote and preserve the reputation of AZ growers by prohibiting deceptive packaging.
  - **New Test:** Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.
o **Holding:** The state’s tenuous interest in having the company’s cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded packing plant.

- **Philadelphia v. NJ (1978)**
  - **Facts:** The court held unconstitutional a 1973 law which prohibited the importation of most solid or liquid waste which originated outside the state of NJ. The law was challenged by operators of private landfills in NJ and by several cities in other states that had agreement with these operators for waste disposal.
  - **Holding (Stewart):** The law is unconstitutional because regardless of a statute’s purpose, a state cannot discriminate against movement of goods in interstate commerce. **LP:** The court finds that the law is discriminatory on its face (and in purpose) and the court recognizes a long-standing per se invalidity rule for state legislation with the intent of simple economic protectionism (Baldwin, Buck, Welton). Stewart sees this regulation as an attempt to economically protect NJ residents from costs associated with waste disposal.
  - **Distinguished from Hunt:** The NC statute in Hunt discriminates in effect whereas the NJ statute discriminates on its face.
  - **Rule (LP):** Per se invalidity for statutes that discriminate
  - **Rehnquist, dissenting:** Takes seriously the health and safety purpose of the legislation and equates it to legislation establishing quarantine laws.

- **Hughes v. Oklahoma (1979)**
  - **Facts:** Held invalid under the commerce clause an Oklahoma law forbidding any person to “transport or ship minnows for sale outside the state which were seined or procure within the waters of this state. Hughes was a Texan engaged in the commercial minnow business who was charged with violating the law for transporting from Oklahoma to Texas a load of natural minnows purchased from an Oklahoma minnow dealer.
  - **Holding (Brennan):** The law discriminates on its face against interstate commerce because it prohibits shipping of minnows out of the state and reserves the benefits of fishing with Oklahoma minnows for in-state residents. The court applies the Hunt test as opposed to the New Jersey test because there seems to be somewhat of legitimate local concern: conservation of a scarce natural resource. The statute fails the Hunt test because OK failed to resort to a non-discriminatory alternative and because it identified its legitimate interest of conservation in a way that discriminates against interstate commerce.
  - **Rehnquist:** The law is not discriminatory because it is simply attempting to preserve and protect its natural resources; burdensome at most.

- **Minnesota v. Clover Leaf Creamery (1981):**
  - **Facts:** Upheld a state law that banned the retail sale of milk products in plastic non-returnable containers but permitted sales in non-returnable containers made of pulpwod. In enacting the law, the legislature found that the use of plastic non-returnable containers “presents a solid waste management problem, promotes energy waste, and depletes natural resources.” The plastic containers originated out of state, while pulpwod is a major in-state product.
  - **Holding (Brennan):** The law here does not effect “simple protectionism”, but regulates evenhandedly by prohibiting all milk retailers from selling their products in plastic, non-returnable milk containers, without regard to whether the containers or the sellers are from out-of-state.
  - **LP:** Brennan applies the Pike test, finds that the legitimate state interests outweigh the burdens on interstate commerce and the court finds that the alternatives are not effective. Brennan also criticizes the trial court and the state Supreme court for second-guessing the purposes of the legislation.
  - **This case has not been overruled.**

- **CTS v. Dynamics (1987):**
  - **Facts:** Court rejected a commerce clause challenge to an Indiana law providing that a purchaser who acquired “control shares” in an Indiana corporation could acquire voting rights only to the extent approved by a majority vote of the prior disinterested stockholders.
  - **Holding (Powell):** The Indiana statute is not discriminatory—it has the same effect on tender offers whether or not the offeror is a domiciliary or resident of Indiana, therefore equally impacting interstate and local business. **LP:** In addition, all states have rules for corporate governance and corporations are only incorporated in one state, meaning there is no risk for inconsistent burdens. The burden that will be imposed is that there will be fewer offers in interstate commerce because the purchaser will not necessarily get all of the benefits of being a shareholder. The benefit is a protection of shareholders. The burden is justified by the state’s interest in defining the attributes of share in its corporations and in protecting shareholders.
  - **Scalia:** The court should limit itself to determining if a law discriminates against interstate commerce or creates a risk of inconsistent regulation by different states. As long as a state’s corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this court’s scrutiny under the commerce clause. Beyond that, it is for Congress to prescribe invalidity. **LP:** Scalia only wants to court to intervene if the law is discriminatory.

- **Maine v. Taylor (1986):**
  - **Facts:** Appellee bait dealer arranged to have live bait imported into Maine, despite a Maine statute prohibiting such importation. He was indicted under a federal statute making it a federal crime to transport fish in interstate commerce in violation of state law. The state’s interests are protection from non-native parasites and the commingling of breeds. There are alternatives to this measure but they are costly and not fully developed.
Market Participant Exception:
- When the state acts as a market participant, spending money to run a proprietary enterprise or to subsidize private business, dormant commerce clause analysis will not be applied, and the state may favor local citizens over out-of-state economic interests.
- **Hughes v. Alexandria Scrap (1976)**
  - Facts: MD, in an effort to rid the state of abandoned cars, purchased crushed auto hulks at an above market price. The state refuses to buy hulks from out-of-state sellers.
  - Holding: MD simply did not violate the Commerce Clause. The Commerce Clause simply does not apply when a state, in its role as a participant in the market, favors its own citizens.
  - Facts: A state-owned cement plant favors in-state customers in times of shortage
  - Holding: This preference does not violate the Commerce Clause; when states act as proprietors, they are free from dormant commerce clause limitations.
- **Different case for Natural Resources or where the state attempts to affect parties beyond those with whom it is contracting.**
- **White v. Massachusetts:**
  - Court construed an executive order issued by the mayor of Boston that 50% of employees on a city project have to be city residents, as not falling under the dormant commerce clause because the city was working as a market participant and was making decisions as a market participant.
  - What is the difference between a city exercising its spending power (You can have this contract if 50% are city residents) or enacting an ordinance that 50% of employees shall be in-city residents??
- **South Central Timber v. Wunnicke (1984):**
  - Facts: Alaska sells some timber from state-owned lands at below-market prices. However, the buyer is required to partially process the timber inside Alaska before exporting it. A non-Alaska firm with no Alaska processing facilities attacked the local processing rule as violative of the dormant Commerce Clause. The state defended on the grounds that it was a “market participant” that was merely selling a commodity it owned.
  - Holding: The court held that the market participant doctrine did not apply, and held that the regulation violated the Commerce Clause. In distinguishing this situation from Reeves, the court pointed out three important differences, each of which militiated towards a finding that there should be commerce clause scrutiny:
    - Raw resource as opposed to processed goods
    - Broader effect: this regulation had effects beyond the particular market, in effect the state was engaging in downstream regulation.
    - Foreign commerce: the timber is exported to foreign countries, thereby economically affecting them as well.

**PRIVILEGES AND IMMUNITIES CLAUSE**
- “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”
- Prevents states from discriminating against out-of-state individuals.
- **LP Note:** The language of this clause does not protect corporations. That is why there are substantially more cases under the dormant commerce clause than here. When using this, make sure that the party plaintiff in the underlying litigation is a citizen.
- **Corfield v. Coryell:** Justice Washington sustained a NJ law prohibiting non-residents from gathering clams, oysters, etc. in the state’s waters and rejected the claim that privileges and immunities clause compelled NJ in regulating the use of common property of its citizen to extend to the citizens of all other states.
- **Toomer v. Witsell (1948)**
  - Facts: This was a constitutional challenge to SC laws governing commercial shrimp fishing in the three-mile maritime belt off the coast of the state. One of the challenged laws imposed a license fee on shrimp boats: $25 for residents; $2500 for non-residents. The challengers claimed that the law violated the clause because its purpose and effect was to create a commercial monopoly for SC residents.
  - Test: First part of test must be satisfied before getting to the second part. Rights that are not fundamental to national unity are not violative of P&I clause. Then, the statement must get an answer of “yes” to either of the second two questions in order to have the statute held as valid.
    - Is this a right fundamental to national unity?
- Usually such rights as the right to be employed, practice a profession, engage in business. Usually not recreational activities.
- Here, YES, Commercial shrimping is within the purview of the P&I clause
  - Are the non-residents a peculiar source of the evil (State must show that they are)? LP: Is there a substantial independent reason for the discrimination?
  - The discrimination will violate the privileges and immunities clause UNLESS non-residents are a “peculiar” source of evil.
  - NO, there is no showing that non-citizens are different from citizens in terms of size of boat, fishing methods, etc.
  - Does the discrimination against non-residents bear a substantial relationship to the problem attempting to be solved?
    - The plaintiff will win if the discrimination against non-residents does not bear a substantial relationship to the problem the statute is attempting to solve.
    - NO, the reasons advanced for the discrimination do not bear a close relationship to the resolution of the problem.
  - Therefore, the statute is valid under the P & I clause.

- Baldwin v. Montana Fishing (1978)
  - Facts: Montana allows Montana residents to purchase a license for hunting elk and other animals for $30, while out of state residents are charged $225.
  - Holding: This scheme does not violate the P&I clause because the right to recreation is not a right that is fundamental. Statute is not unconstitutional.
  - Dissent: Brennan thinks that the court should not be deciding what is and is not a privilege or immunity, but rather should assume that it is privilege and apply the second thread of the test.

- Hicklin v. Orbeck (1978)
  - Facts: Alaska requires that Alaskan residents be given an absolute preference over non-residents for all jobs on the Alaska oil pipeline.
  - Holding: The preference violates the privileges and immunities clause.
    - Test:
      - Pt 1: YES, Access to employment is a right fundamental to national unity
      - Pt 2: To be valid, state must show ONE
        - Are the Non-residents the peculiar source of evil? NO, The state did not show that non-residents were a “peculiar source of the evil (unemployment), because much of the unemployment came from the fact that too many residents were untrained or lived too far from job opportunities, and the influx of out-of-staters seeking jobs was just a small part of the problem.
        - Do the non-residents bear a substantial relationship to the problem? NO, a blanket and absolute preference for all qualified residents over non-residents was not sufficiently “closely-tailored” to the unemployment problem. If there is a less discriminatory alternative that would solve the problem, the substantial relationship will be found to not exist.

  - Facts: The court held that the P&I clause applied to a Camden ordinance that required that at least 40% of the workforce on any construction project come reside in the city. Additionally, the court held there is no market participant exception to the privileges and immunities clause. The Court did not hold that the clause was violated by the ordinance, it remanded for a determination on this issue.
  - Grounds for Distinction from dormant commerce clause market participant exception: The rationale for a market participant exception in the Commerce clause makes sense because the Commerce Clause deals only with regulation, so market participation is clearly not regulation. But the P&I clause bars any type of state conduct, regulatory or otherwise, which discriminates against out-of-staters on matters of fundamental concern.
  - Discrimination Against Municipal Residence Barred: P&I bars discrimination based on municipal residence as well as state residence, conceding that a regulation that discriminates against out-of-towners burdens some in-state as well as out-of-state, but in-state have a chance to remedy the situation through the political process. Out of state residents have no similar opportunity.

- Supreme Court of NH v. Piper (1985)
  - Court held that the right to practice law is 1) sufficiently important and fundamental right that the privilege may not be limited to state residents. Furthermore, 2a) out-of-state residents are not the source of the evil; 2b) nor does the presence of out of state residents bear a close relationship to the problem
  - This case adds a requirement of an inquiry into less restrictive means.

PRE-EMPTION MATERIALS:
- To what extent does the exercise of valid congressional power restrict what the states may do?
- Congress addresses pre-emption issues ahead of dormant commerce clause issues.
In the absence of any express pre-emption clause,
  o Court looks to see if there is an actual conflict between the state and federal regulation
  o Court can look to see if the federal government has regulated so completely that there is no room for state regulation.
  o Read the national statute, then look at the state regulation and see how they relate to each other:
    ▪ Direct Conflict: the state statute is invalid
    ▪ Tangential or Concurrent Regulations: helpful regulations that can work together.

Express Pre-Emption Provision in the federal law: No state has the authority to establish safety requirement which is not identical to the federal standard.

Express Savings Clause in the federal law: Motor vehicle standard set by the state are allowed to remain in effect.

Perez v. Campbell:
  o Facts: Perez had his AZ license suspended and judgment for a fine entered against him in the state. He filed for bankruptcy, which discharged him of all provable debts. AZ law provided that an unpaid DMV judgment suspends license and registration and bankruptcy does not relieve you of this claim.
  o Holding: Congress had the power to establish uniform laws on the subject of bankruptcies which granted the bankrupt person discharge of provable debts, including tort judgments. The AZ statute was pre-empted because there was a conflict between the statute and the full purpose of the federal law.

PG&E v. State Energy Resources (1983)
  o Facts: PG&E maintained that certain provisions of California’s Act were invalid because they were pre-empted by Congress’s passage of the Atomic Energy Act.
  o Holding/Rule of Law: California’s regulation is valid. The federal system of licensing and inspecting was set up solely to deal with safety issues, and with construction and operation of nuclear plants. Since California asserts that its statute was aimed at the economic problems of storing and disposing of waste, not safety problems, the California statute does not come within the area pre-empted by Congress. In passing the Atomic Energy Act of 1954, congress preempted state regulation of the radiological safety aspects involved in the construction and operation of nuclear plants but intended for the states to retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

Foreign Relations: The court is especially likely to find a conflict when a state takes an action that affects foreign policy. The court is quick to conclude that a state regulation that seems intended to influence other nation’s conflicts with federal foreign policy.

  o Facts: Congress passes a statute imposing limited sanctions on Burma in an attempt to induce Burmese authorities to allow democracy and an end to human-rights abuses. The federal statute calls on the president to engage in dialogue with Burma and to coordinate with other nations in trying to bring about change in Burma. Massachusetts then enacts a law barring state entities from buying goods or services from any company that does business with Burma.
  o Holding: The Massachusetts statute is pre-empted because the sanctions imposed by the federal and state laws had inconsistent impacts. Furthermore, the state sanctions compromise the capacity of the president to speak for the Nation with one voice in dealing with other governments.

Black Letter Law from Crosby:
  o Congress always covers its ground with deference to state law in non-foreign affairs regulation
  o Congress has the power to preempt state law
  o Even without an express provision, we have found that the state law must yield to a congressional Act in at least two circumstances:
    ▪ When Congress intends federal law to occupy the field that the state law is trying to regulate
    ▪ And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute