I. Overview of Federalism
   • Federal & state governments co-exist
   • Limited, enumerated powers
   • Separation of powers
     – Supreme court can review constitutionality of statutes passed by congress
       1. Oath of office
       2. Supremacy Clause, Art. VI cl. 2
     – Supreme court can review state court decisions to extent they are based on federal law
     – Except for cases decided on “independent and adequate” state grounds
   • Federal Judicial Power: Article III, Sec. 2
     – Cases arising under constitution, federal statutes, admiralty, two or more states, citizens of different states, cases between a state and citizens, foreign country or citizens

II. Judicial Review: Marbury v. Madison
   • Marbury has a right to his judicial commission
   • Judiciary Act of 1789 allows Supreme Court to issue writ of mandamus in this case to Madison to give Marbury his commission
   • Judiciary Act is at odds with constitution (Art. III sec. 2)
     – Only appellate (not original) jurisdiction in this case (“all other cases”)
   • Since congressional statute is unconstitutional, Marshall not authorized to command Madison to issue writ
   • Court has authority to review congressional statutes and declare them unconstitutional

III. Review of State court decisions: Martin v. Hunter’s Lessee
   • Power of review (Supreme Court) limited to federal questions in state court
     – No review of state law issues (unless diversity jurisdiction)
   • VA said only issue involved VA statute
     – Supreme Court said issue was violation of federal treaty
   • Needs to be uniformity of decision
   • If state decision is made on independent and adequate state grounds, Supreme Court has no appellate review power
     – Supreme Court may not render advisory opinion (except in rare cases when mandated from executive)

IV. Congressional control of appellate jurisdiction: Ex Parte McCordle
   • Congress has some power to control bounds of supreme court appellate jurisdiction
• Congress passed act repealing 1867 Act so that supreme court could not rule
  Reconstruction Acts unconstitutional
• Supreme Court power conferred with “such exceptions as congress shall make”

V. **Limited Enumerated Powers**: *McCulloch v. Maryland*

  • “Necessary & Proper” clause – **Article I, sec. 8 c. 18**
    - No general police power
    - Specific powers Art. I, sec. 8 (no ability to “protect” general welfare,
      just to “spend” for general welfare)
  • *McCulloch* – doctrine of “implied powers”
    - Federal government may validly exercise power that is ancillary to one
      of the powers explicitly listed in constitution
    - Must be under pretext of enumerated powers
    - Congress cannot enact a law under the pretext of exercising one of its
      powers when it is in fact doing something else
• Congress may charter a bank
  - Grant need not be explicit
  - Power to raise revenue is an end, for which bank is a *means*
• Maryland act taxing banks is unconstitutional

VI. **Term Limits**: *Thornton*

  • Qualifications clauses are in **Art. I sec. 2 cl. 2**
  • But states cannot extrapolate
    - AK tried in this case
    - Limited term to less than reps in other states
  • Undermines the conformity and national character framers envisioned
    - Representatives in congress are for citizens of the nation, not state
    - Election by the people is the only necessary check
  • Neither congress nor states can add additional qualifications
  • **Dissent**: Justice Thomas says representatives actually do represent people of
    particular states and states should do whatever they want to change term limits for
    own reps

VII. **Commerce Power**, **Art. I sec. 8, cl. 3**

  • *Gibbons v. Ogden* (1824)
    - Congress can reach intrastate matters if it is necessary in order to carry
      out execution of general powers of government
    - Here, regulate monopoly at local level in favor of interstate trade
  • *Knight case* (1895) Manufacturing = INDIRECT
    - Sugar refinery makes acquisition to control 98% of refinery capacity in
      the nation
    - Sherman Act – prohibits contract, conspiracy in restraint of trade
    - Manufacture only has *indirect effect* on commerce
    - Government can regulate commerce, but not manufacture
    - Reference to *Kidd v. Pearson* (states have power to regulate production
      of intoxicating liquors)
• **Shreveport Rate** (1914) AFFECTING COMMERCE
  - Rates for carrying a wagon within TX were different from interstate between TX and LA
  - ICC said rates were unfair and asserted power to regulate (Sup Ct sustained)
  - Rate structure favors intrastate commerce (“affects” interstate commerce); Affecting Commerce TEST
    - Figure out what local activity is
    - Figure out if there is some relationship with local activity and interstate commerce [connection]
    - How can Congress regulate local activity as a means for achieving some end for interstate commerce?
    - End needs to be related to the means
  - **Southern Railway:** “STREAM OF COMMERCE”
    - Requiring automatic couplers on railways from Crawford to Dallas (intrastate)
    - Accidents slow down movement within and without state
      1. Ends: efficient, rapid movement of goods in interstate commerce
      2. Means: automatic couplers on all trains, regardless of intrastate or interstate
  - **Champion v. Ames** (1903): prohibition on lottery tickets
    - Justice Harlan says power to regulate is power to prohibit
    - Fuller thinks this is use of commerce power as a pretext
    - No enumerated power to suppress lotteries
  - **Hipolite Egg** case (1911) BOOTSTRAP
    - Eggs confiscated under Pure Food & Drug Act of 1906 because of failure to disclose deleterious ingredient
    - Regulating local activity makes effective prohibition of eggs in commerce (End)
    - Punishing those who violate regulations = means (apprehending the eggs)
  - **Mann Act**
    - Prohibiting transport of women across state lines for immoral purposes
    - Means = arrest, prosecution, sanctions, fines
    - Not regulating local activity, but punishing for violating
    - End: curb prostitution
    - But taking trip with girlfriend to Vegas is not commercialized vice
  - **Hammer v. Dagenhart** (1918)
    - Federal law barred transportation of interstate commerce of goods produced in factories employing children under age of fourteen or employing 14-16 year olds for more than 8 hours a day, or six days a week, or at night
    - Distinction with lottery/egg cases – clothes are not a “pestilence” being transported
    - Production is a local activity – evil of child labor should be prevented at local level
• Result: court draws line on Congress’ power to prohibit interstate shipment (affecting commerce rationale)

• Holmes’ dissent
  – Indirect consequences do not defeat validity of national legislation
  – When manufacture is looking for interstate markets, no longer just a matter for State
  – Later becomes law in Darby

• Railroad Retirement Board v. Alton
  – Statute requiring certain pension benefits for RR employees
  – Justice Roberts says Interstate Commerce Act is unconstitutional
  – Regulating social welfare is not enumerated power
  – Gov’t argument – pensions create good morale, productive workers, efficient transport system
  – Court says this is indirect

• Schechter Poultry (1935)
  – National Industrial Recovery Act of 1933 established several “codes” of fair competition
    1. Minimum wages, maximum hours, collective bargaining
  – Gov’t said Schechter was paying employees too little
  – Poultry came from out of state, then sold exclusively in Brooklyn
  – Government argued “affecting commerce” → cheaper production would bring about a demoralization of price structure
  – End goal: raise prices at which chicken is sold
  – Justice Hughes says no: This assumes too much; don’t give the government too much latitude to control rent, advertising, etc.

• Carter Coal (1936)
  – Bituminous Coal Conservation Act of 1935 gave coal producers a 90% rebate for complying with federal regulations (minimum prices to sell coal and labor provisions)
  – Sutherland
    1. Excess of commerce power/unconstitutional exercise of taxing power
    2. Price provisions and labor provisions are inseparable and labor provisions are unconstitutional
    3. Labor provisions fall in production camp (not commerce) – indirect, local activity
    4. Workers could strike, but this is too remote
  – Cardozo
    1. Only ripe issue = price provisions (can be separated)
    2. Congress has power to regulate prices intrastate and interstate (look at Shreveport)

• NLRB v. Jones & Laughlin Steel (1937)
  – Individuals try to organize a union and are fired
  – National Labor Relations Act (1935) was designed to prevent any unfair labor practices that would affect commerce
  – Unfair = burden or obstruction of commerce
- Jones is 4th largest steel producer in U.S.; 19 subsidiaries, integrated vertical enterprise, own railroad, own ships, mfg, distribution facilities; 75% product produced sent out of PA in interstate commerce
- Government goes to stream, current, flow Rationale
- “Close & substantial relationship”
- McReynolds (dissent) is horrified
  1. Invades power reserved to states
  2. House that Jack Built argument (this is a major stretch)

• Wickard v. Filburn (1942)
  - Ohio farmer sues Sec. of Agriculture to enjoin enforcement of marketing penalty imposed under Agric. Adjustment Act of 1938
  - Big reach of national authority into “ultra-local” activity of wheat production
  - Government reach upheld
  - Congress trying to raise price of wheat
  - Court says wheat producers will either remove themselves from consumption market, or ultimately find some way to sell their wheat (so there is an effect)
  - Not issue of production or consumption; issue of marketing
  - “Substantial economic effect”

• U.S. v. Darby (1941)
  - Section 15(a)(1) of Fair Labor Standards Act mandates minimum wage and maximum hours worked
  - Section 15(a)(2) says time and a half for overtime
  - Prohibition: violate these and you may not ship the goods
  - Court says motive and purpose of regulation of interstate commerce matters for the legislative judgment (overrules Hammer)
  - Rationales:
    1. Power to prohibit (if you want to ship interstate…)
    2. Affecting Commerce rationale → unfair competition when employers can pay their workers less
    3. Congress does not want to spread evils of substandard work conditions through interstate commerce

• U.S. v. Five Gambling Devices (1953)
  - Statute prohibits interstate shipment of gambling machines; all sales & deliveries must be registered
  - FBI seized Five machines from country club that had no apparent relationship to interstate commerce
  - Justice Jackson for majority construes state narrowly (no broad reach into seizing devices with no relation)
  - Bootstrap rationale: to make the prohibition effective, Congress may constitutionally require reporting of all intrastate transactions
  - For purposes of identification of purchasers, etc. – easier to trace
  - Informational purposes is okay, but Clark says he might not accept regulation in this manner

• U.S. v. Sullivan (1948)
Defendant druggist convicted of violation of Food Drug & Cosmetic Act section 301(k) prohibiting misbranding of a drug which is held for sale after being shipped in interstate commerce

Extracted and sold 12 pills which he bought from a wholesaler who got from mfr (and no directions for use)

No explanation provided for why Congress could regulate beyond the mfr or wholesaler

1. Prohibition rationale? Like regulating means of making goods? Or gathering information?
   a. But having to place label on bottle intrastate may go beyond information reporting

2. Affecting Commerce
   a. Maybe druggist requires higher production cost to put labels on bottles?
   b. Maybe druggist will only buy from intrastate (don’t want to discourage interstate commerce)

3. Another idea
   a. Maybe Congress can regulate local sales as a means of controlling volume shipped interstate (Lopez)

- **Perez v. United States (1971)**
  - Regulation of loan sharking
  1. Statute only makes reference to making loans and threats of violence
  - Affecting commerce: effect on local activities
    1. Organized crime is interstate and international in character
    2. Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce
  - Darby’s “class of activities” test – held properly regulated by Congress without proof of particular interstate activity
  - Stewart’s dissent: under statute any person can be convicted without any proof of interstate movement (bad idea)
  - But difficult to tell which activities have affect on commerce (think of butcher in E. STL who has to jack up prices because he is victim of loan sharking; hard to compete with prices across the river)
    1. Aggregate makes substantial effect (like *Wickard*)

- **Baby Lopez Case (Lopez v. United States)**
  - State prohibits possession of controlled substances without any mention of interstate commerce
  - Defendant challenges constitutionality
  - Congress’ findings – impossible to tell difference between substances manufactured and distributed intrastate and interstate
  - Trying to separate interstate activities in controlled substances from intrastate would be futile activity

Crime Control & Safe Streets Act of 1968 – any person convicted of a felony who “receives, possesses, or transports in interstate commerce or affecting commerce [any] firearm”
  1. No showing that Defendant’s firearm was commerce-related
  2. Government argues that “in interstate commerce” modified “transports”
  Court does not accept this; refuses to adopt broad reading, as Congress did not make intention clear

- **Maryland v. Wirtz (1968)**
  - 1966 Amendment to Fair Labor Standards Act extended to small set of state and local government employees, e.g. workers in hospitals
  - Supreme Court upheld
  - Changed in 1976 (NLC)
  - Changed again in 1985 (Garcia) where Supreme Court changes course and upholds Act for state & local employees in health and education

- **Heart of Atlanta Motel (1964)**
  - Court made decision to hold discrimination invalid based on commerce clause, rather than 14th amendment
  - 75% of hotel guests from OOS
  - **Real and substantial relation to national interest** – substantial portion of food or products have moved through interstate commerce
  - Congress may regulate local activity as a means of carrying out enumerated power
    1. When people don’t stay at hotels, it affects commerce
  - Justice Douglas is uncomfortable: no enumerated power to protect human rights, so 14th amendment justification makes more sense

- **Katzenbach v. McClung**
  - Ollie’s BBQ on the highway refused to serve blacks
  - Much of meat had come from local supplier; 46% of meat from local supplier had moved inter-state
  - **Affecting commerce like Baby Lopez** – swell the volume of interstate commerce – fewer customers, less food, fewer shipments
  - Unavailability of food, lodging might discourage interstate travel
  - **Congress can regulate like loan sharking**; not easy to tell which restaurants only serve intrastate travel

- **United States v. Lopez (1995)**
  - Split in the Court on federalism issues
    1. Chief Justice Rehnquist, plus O’Connor, Scalia, Kennedy and Thomas
    2. Breyer plus Souter, Stevens, and Ginsburg
  - Gun-Free School Zones Act of 1990
  - Federal offense for any individual to knowingly possess a firearm at a place that the individual knows or has reason to know is a school zone
  - First interruption since Carter Coal
  - **Rehnquist** says the Act has two problems:
    1. Neither regulates commercial activity nor
2. Contains a requirement that possession be connected in any way to interstate commerce
   - Three broad categories of activity that congress may regulate under its commerce power
     1. Congress may regulate the use of channels of interstate commerce
        a. E.g. *Darby, Heart of Atlanta*
        b. *Darby* justified under several rationales (15(a)(2) justified under bootstrap and affecting commerce)
     2. Regulate and protect instrumentalities of interstate commerce (persons or things in interstate commerce)
        a. *Shreveport Rate* cases, *Southern Railway*
        b. Free from immoral and injurious uses frequently sustained
        c. Mann Act
     3. Regulate activities having a *substantial relation* to interstate commerce; substantially affects interstate commerce
        a. *Jones v. Laughlin*
   - Since it’s not 1 or 2, it must be 3
     1. No jurisdictional hook that would ensure firearm possession in question affects interstate commerce
        a. If you don’t have economic activity, look for jurisdictional hook
           i. E.g. whether it is important for handguns to have moved in IC
     - *Thomas* wants a more restrictive reading of commerce power
     - *Kennedy and O’Connor* may not be completely on board
       1. Imprecision of content-based boundaries, e.g. manufacturing-commerce distinction

- **U.S. v. Morrison**
  - 5-4 vote; court invalidated VAWA (Violence against women act) that created a civil cause of action for crimes motivated by gender violence
  - Concerns from Lopez:
    1. No economic basis
    2. No jurisdictional hook
       a. Court would be invading state interests such as family law, divorce, etc.
    3. No congressional findings
    4. Link too attenuated
  - The Hallmark of a conservative court is non-interventionism
  - Court does not see requisite “substantial relation”
  - Court says since *Marbury*, the Court is the final expositor of meaning of the Constitution

**VIII. Taxing and Spending Powers**
- **Article 8 section 1 clause 1** – Congress will have power to lay and collect taxes, duties and imposts, to pay the debts, and to provide for the common defense and general welfare of the U.S.
- Taxing power is very broad
- 1961 Supreme Court said that power to tax is “exhaustive, and embraces every conceivable power of taxation”
- Congress can tax whatever it wants to tax

**Bailey v. Drexel Furniture**
- Child labor tax of 1919 at issue – 10% tax on annual net profits for employers who employed child labor
- Same circumstances as Child Labor Act in 1916 under *Hammer*
  1. No kids under 14
  2. 14-16 restricted hours
- Scienter provision – employer who did not know was not guilty
- Not restricted to interstate commerce (*Hammer* was; so fine if producers stayed in-state)
- **Issue of case:** Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve?
  1. E.g. tax on tobacco products – makes them more expensive
  2. Tax on motor boats (luxury tax)
- **Tough issue:** Congress’ purpose here is to stop child labor
  1. Intent of the Framers’ – raising revenue
  2. Pretext reservation? Accomplishing some end not entrusted to national government
- Who enforces this statute? Commission of Internal Revenue? Department of Labor?
  1. Exaction was the same whether the employer employs 1 child for 1 day or 500 children for a year
  2. Heavy-handed; applies regardless of degree or scope
  3. To achieve regulatory ends

**Old Tax Cases:**

**Veazie Bank**
- Tax raised on personal and state notes from 1% to 10%
- **Means Theory:** Necessary and Proper for Congress to carry gov’t power of coinage into execution
  1. **Article 1 sec 8 cl. 5** – power “to coin money,” secure national uniform currency
- **Tax Theory:** It’s a tax; use of one enumerated power to achieve another enumerated power
  1. Raising revenue is not the “end”, but end is one of Congress’ powers

**McCray**
- Tax on yellow margarine – if mfr added yellow dye, it become 10 cents per pound instead of one-quarter of a cent per pound
- Protect dairy industry? Health end?
  1. Maybe oleomargarine is not as healthy, and yellow dye deceives people
- Real purpose is not raising revenue – maybe Congress blinked; this is non-revenue-related end
• **Doremus**
  - Congress wants to drive drugs out of existence – drug dealing suppressed by Registration Act
  - Self-identification helps with collecting the tax (also passes muster under Necessary and Proper clause)
    1. Registration requirement used as means of raising revenue
  - **Purpose of tax is to raise revenue and also to get rid of something**
  - Congress doesn’t like
  - Non-revenue purpose is seen as irrelevant here (held valid)
  - In contrast, *Bailey* had no revenue-raising end
    1. *Bailey* is a means-ends invalidation
    2. Also ends invalidation under Marshall’s pretext reservation

• **Kahriger**
  - **Goals to raise revenue and suppress gambling**
  - 10% charge added to every bet placed
  - People subject to tax must register with IRS – information was then posted and given to prosecutors
  - Held unconstitutional because of self-incrimination

**SPENDING:**
• **U.S. v. Butler** (1936)
  - Statute appropriating funds to raise prices by curtailing production; reduce the volume available, and prices will go up
  - Tax on agriculture commodities
  - When money is earmarked for particular fund, can’t separate taxing and spending powers; taxpayer who had standing to complain about power to tax now has power to oppose spending

• **Views: Madison versus Hamilton**
  - *Madison* = Congress can only use power to spend to create and support the enumerated powers
  - *Hamilton* (prevails) = Congress can spend for and promote the general welfare (separate and distinct power)
    1. Not restricted by the other enumerated powers
    2. Court limits the ends that congress could achieve under the commerce clause
    3. Production can’t be reached under the constitution
    4. In this case, scheme for purchasing with federal funds submission to regulation should be reserved to states
  - **Stone Dissent** (law today)
    1. Says there is no economic coercion if contract is signed based on agreed-upon goals (raising prices)
    2. Enforcing a contract is different from making sure conditions are followed
    3. Making contract conditional would have different outcome
  - **Solomon Amendment**
    1. If you don’t let military recruit, we will take away your money
    2. Is this reasonably related to purpose of the expenditure?
3. Conditions must be reasonably related to end

- **Charles Steward Machine Co. v. Davis (1937)**
  - Federal tax on employers for unemployment compensation, with a credit if state is making payments to a state unemployment compensation fund that meets government standards
  - Tax of 10%, with credit up to 90% of what employer was paying
  - Money paid to state government, given to federal government; state could requisition funds back
  - Employer pays out a certain amount ($10); government sends $9 back, then to state government, then to unemployed persons
  - Almost inevitable result ➔ states would adopt unemployment compensation plans
    1. Congress gets states to do bidding
    2. Otherwise, employers still subject to tax but no benefits get paid to unemployed persons within state, so feds keep $$
    3. Constituents would put pressure on state legislatures
    4. States won’t want to pay doubly
    5. Not coercion

- **Helvering v. Davis** – spending must be for general welfare; can’t coerce
  - 1935 Social Security Act for retirement benefits
  - Tax levied on employers and employees, with proceeds being used to pay retired workers
  - Court reluctantly concluded that taxpayers could challenge both tax and expenditure for retired workers
  - “It is for Congress to decide which expenditures will promote the general welfare” – *Buckley v. Valeo*, 1976
    1. But is this okay?
    2. What if Congress makes money available for people burdened by LSD?
    3. Bailing out failing corporation?
    4. Who counts as the general welfare?

- **Oklahoma v. Civil Service Commission**
  - Provision of Hatch Act regulates activities of state, local and national government employees
  - Section 12(a) of the Hatch Act provides that no state official who is primarily working in activities financed in whole or in part by nat’l government may take any active role in politics
    1. Applies across the board, whatever the federal spending program, just like general prohibition of recipient of federal funds discriminating based on race, religion, etc.
  - OK state highway commissioner was classically an elected official, and to be elected, had to take a role in politics
  - 90% funding for highways comes from feds, so OK would have to give up on something pretty important
  - **Provision has to be reasonably related (Butler) to attainment of end that justifies expenditure**
- Means-end relationship might be highway commissioners taking kickbacks from construction companies during campaign; later making decisions that maybe don’t benefit the highways’ needs

IX. Foreign Affairs Treaty Power and War Power
- Article 1 section 8 cl 11 – Congress has the power to declare war
- Woods v. Miller
  - Power to go to war; power to regulate rents
  - War power gives Congress the power to deal with any evils that arise as a result of war
  - Progress of war → limited housing construction
  - Necessary & Proper clause → Congress has power to regulate rents as means to achieve war-related end
    1. Alleviating housing shortage created by conduct of WWI
    2. Exacerbated by troops who served in that war
  - Justice Jackson was concerned about the relationships being tenuously related to war power
    1. Jackson’s concurring opinion expresses concerns about ends and type of regulations used to accomplish ends
- To what extent can national government accomplish regulatory ends that it could not accomplish under other powers?
- Missouri v. Holland (1918)
  - Statute prohibited hunting of water fowl; previous treaty between US and Canada did the same thing
    1. Article II sec. 2 clause 2 – treaty power with advice and consent of senate
    2. Article I sec. 8 – Congress’ powers in Necessary & Proper Clause
    3. Treaty is self-executing
  - Argument that this statute conflicted with 10th amendment (though general feeling was 10th was nothing but a truism)
  - Commerce clause argument did not work; Congress cannot regulate local matters
  - Necessary and proper clause fully applies, though worry was that Congress could make an end-run around the Bill of Rights

X. Intergovernmental Immunity
- McCulloch (second part)
  - MD cannot impose tax on instrumentality of federal government
  - When state taxes national entity, it is taxing people of the whole nation (many of whom do not have electoral power in MD)
    1. State, however, does have recourse through reps in fed government
  - Marshall says state banks do not enjoy national immunity from taxation
- Collector v. Day
  - National tax on salary on state judge; found invalid
    1. State judge enjoys national immunity, contrary to Marshall
Those who had dealings as suppliers or employees of federal government wanted to enjoy derivative immunity. Supreme Court ultimately abandons that in Helvering and Graves.

- **Helvering v. Gerhardt**
  - Employees of Port Authority resisted a national tax on their salary; claimed it was unconstitutional.
  - State employees in all states are subject to tax in same fashion; political check obviates need for judicial check.
  - Immunity would be protecting state sovereignty at expense of national sovereignty.
    1. Recognizing state immunity here would result in loss of federal tax revenue.
    2. Two guiding principles when deciding whether state instrumentality should be immunized from national taxation:
      1. Excludes from immunity activities not essential to preservation of state governments though the tax collected from state treasury
        a. Want to see gain from limiting national taxing power
      2. Burden on state government should be other than speculative
        a. Should be some corresponding tangible protection to the state
        b. All the state is losing here is ability to pay employees less than going rate.

- Important to this chapter: What is the constitutional source of state immunity from national taxation or state immunity from national regulation?

- **New York v. United States** (1946 mineral water)
  - National tax on NY mineral water for Saratoga Springs.
  - NY had bought business from private company; did not want to pay a tax.
  - Three approaches:
    1. **Frankfurter and Rutledge**
      b. *Ohio v. Helvering* → intra-urban train situation subject to national tax.
        i. Turned on important distinction between proprietary big business activities and governmental activities.
        ii. Gov’t control of liquor stores, for example – proprietary and regulatory reasons.
      c. Saratoga Springs – not just to make money; worried that those operating springs before were draining springs too quickly.
      d. Serves two ends (money and conservation).
      e. Says states are immune from taxation in areas that only state can do.
      f. Anybody’s mineral water business is subject to federal tax.
    2. **C.J. Stone** (4 members)
a. If we’re going to think of consequences to national treasury, should think about other states in analogous activities
b. Even if we have a non-discriminatory tax, might interfere unduly with state’s performance of sovereign functions
   i. Doesn’t want undue interference with something that is essential for the state
   ii. Doesn’t want to impair taxing power of federal government
c. Balancing test – concerned about intrusion on state’s ability (on one hand) and limitations on national taxing authority (other hand)

3. **Black & Douglass**
   a. Any activity in which a State engages within the limits of its police power is a legitimate governmental activity
   b. Constitution is a compact between sovereigns
   c. Want to see national government and states as co-equal

- **Oklahoma v. Civil Service Commission**
  - State had to change structure of highway officials from elected to appointed positions
  - Had to conform with Hatch Act
  - Brennan discusses this as good law in *National League of Cities*
- **Maryland v. Wirtz** (1968); overruled in Nat’l League of Cities (1976)
  - Limited application of Fair Labor Standards
  - Affected employees working in state schools, state hospitals
  - Question of state interest in delivering something it thought important (e.g. healthcare, education)
- **Fry v. United States**
  - Congress can use power under commerce power to regulate wages paid to state and local employees
  - Marshall said this is much less intrusive than *Wirtz*
  - Rehnquist takes solo position which later becomes majority decision
- **National League of Cities**
  - **Holding** – insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional government functions, not in authority granted Congress
    1. Desire to protect sovereign functions
    2. Interference with state policy choices
  - 4 dissenters; in Garcia, Blackmun joins majority
    1. Blackmun advocates a balancing approach here
       a. National Interest versus
       b. Intrusion on states
    2. Rehnquist pays almost no attention to national interest other than salutary effect of spreading employment
- **Three Types of National Statutes:**
  - Regulation of Private Activity (under any power)
1. E.g. regulation that individuals be paid a certain wage
2. *Hodel* – Congress’ power to regulate surface mining because it leaves ugly scars on earth (Congress has power under the commerce clause)

- National statutes that regulate states and sometimes local activities (SAMTA)
  1. States qua states – as a result, states can raise taxes or cut funding in some other area
  2. e.g. *National League of Cities* (extend rules of private activities to public sector)

- National statutes that require states to exercise affirmatively state authority over private activity
  1. Gets states to pay and enforce national law
  2. Also *Hodel* – using states to determine nationally-created standards
     a. Within a year 35 out of 38 states with surface mining decided to appropriate funds

3. “Cooperative federalism”
   - **UTU v. LIRR** – Category 2 (states qua states)
     - Railway Labor Act is designed to deal with employer-employee disputes
     - Congress says no strikes unless there has been mediation and a cooling off period
     - State policy is overridden
     - RR operation not typically a state function (usually private sector)
   - **FERC v. Mississippi**
     - Congress suggests regulation standards for electric & natural gas facilities
       1. WI objected because they had jumped through procedural hoops and done all they wanted to do
     - States had to go through administrative proceedings to decide whether to adopt national standard OR
     - They couldn’t regulate at all
     - State regulation of electric & natural gas is preempted (this is a position like Steward Machine)
   - **EEOC v. Wyoming** – Category 2 (rules for private sector applied to public sector)
     - Age Discrimination in Employment Act gave protection for workers over 50; age can’t be basis for employment decision unless unfit
     - WY game wardens forced to retire at 55
     - National policy interest might justify state submission
     - National League of Cities was “all bark and no bite”
   - **Garcia v. SAMTA** (1985) La Pierre thinks this was correctly decided
     - Issue of Congress regulating SAMTA – extension of rules for private sector applied to public sector
     - *National League of Cities* overruled
       1. Unworkable decision – to hard to figure out what fit
       2. Tripartite test of *NLC* and *Hodel* too difficult
The Fair Labor Standards Act at issue here is the only one ever held unconstitutional (now as applied to city of San Antonio).

Incidentally, San Antonio wages were well above the minimum (Blackmun may have had national across-the-board standards on his mind).

**South Dakota v. Dole** – category 3

- Congress’ policy for minimum drinking age raised to 21
- Enacted 20 U.S.C. 158, directing Secretary of Transportation to withhold 5% of federal highway funds from state which permits purchase or public possession of any alcoholic beverage by a person under 21
  1. Spending Power
  2. Necessary & Proper clause
- States had different ideas of age (e.g. SD said 19)
- O’Connor lists four limitations to spending power
  1. Must be for general welfare
  2. Unambiguously, enabling states to execute choice knowingly, cognizant of consequences
  3. Related to federal interest in particular national projects, programs
  4. Other constitutional provisions may provide independent bar to constitutional grant of federal funds (e.g. 21st amendment)
- No intrusion found here because S. Dakota can make its own choice; can decide how much autonomy they want to sacrifice

**New York v. United States** – radioactive waste case; Congress provides rule for interstate disposal of waste

- **Three sets of incentives:**
  1. Surcharge on radioactive waste received from other states – collected by Sec. of Energy and placed in Escrow account – states receiving milestones receive portions of fund
  2. Regional compacts with disposal sites to increase cost of access to sites, then deny access altogether to states not meeting federal deadlines
  3. Take Title provision – if by 1994 states do not have waste disposal or regional facility, state has to take title to all waste in state and pay for disposal on its own
- States have to undertake planning process if they want federal money
- Court says Take Title provision crosses line into coercion; if Mt. Sinai stored other states’ nuclear waste and injuries occur, NY is responsible
  1. All legal responsibility goes with the goods
  2. Choice between two things that are prohibited by constitution

**Printz v. United States**

- Sheriffs in MT and VT raise objections to statute involving background checks through CLEO (Chief Law Enforcement Officer) before purchase of a firearm
- Two political communities – federal and state
- Burden on state government officials; extra time and money
State officials given no discretion
Accountability completely on state and local CLEO’s even though it’s not their policy
O’Connor doesn’t want to decide whether other “purely ministerial” reporting requirements imposed by Congress through commerce clause are similarly invalid
  1. e.g. kidnapping – local law enforcement reporting to DOJ

- **Reno v. Condon** (2000) – This case was “dumbfounding”
  - Driver’s Privacy Protection Act (DPPA) – states and private parties can’t sell information from people’s DMV records without consent
  - South Carolina made tons of money selling this information; Wisconsin was making $8M a year
  - Court says that driver information is a “thing” in commerce
  - *Lopez* talks about “persons and things” in interstate commerce (category 2 “stream, current or flow” of commerce)
    1. Lopez was intended to confine reach of commerce power
  - In the court’s view, this is unlike *Printz* and *New York*
    1. DPPA does not require States in their sovereign capacity to regulate their own citizens
    2. DPPA regulates the States as owners of data bases – does not require state legislatures to do anything
  - General applicability – to public sector and private sector (this is valid)
    1. Sounds like endorsement of vicarious protection
    2. Burdens on public sector are no greater

XI. The Dormant Commerce Clause: Limits on statute regulatory power imposed by Courts in protection of national power
- Art. I sec. 8 clause 3 – commerce power as a limit on state regulatory authority in two distinct ways:
  - Dormant Commerce power (Marshall)
    1. Power to regulate commerce among the several states
    2. Where Congress has not acted
  - Conflicts between state legislation and statute enacted under commerce power → Supremacy clause [court will address this first]
    1. Preempted
    2. Where Congress has acted

- **The Dormant Commerce Clause**: determining the appropriate bounds of state and national authority
  - Consider Marshall’s early view of distinction between regulations of commerce (for Congress) and regulations of police power (states)
  - Taney’s view (espoused now by Scalia) is that states can regulate commerce in absence of express regulation (no dormant commerce clause)
  - Cooley view – room for concurrent power
  - Fourth view – some matters “directly” affect commerce; others only indirectly (for the states)
For the last 70-80 years, the Court has employed a “balancing test,” looking at the nature of state concerns, weighing this with burdens imposed on interstate commerce

OUR JOB:
1. Inquire into state ENDS
2. Scrutinize means-ends relationship (to what extent does state law achieve this end?)
3. Look at burden on interstate commerce
4. Look at interest state intones (economic? Health & safety? Can’t have bad purpose)

- *Gibbons v. Ogden* (1824); NOT a dormant commerce clause decision
  - No monopoly permitted for steamboat ferry from NY to NJ
  - National statute is valid exercise of commerce power (anti-monopoly)
  - Ogden argues for analogizing commerce power to tax power (since states have power to tax, should have power to regulate commerce)
    1. Marshall rejects this argument, since the power to tax is indispensable
  - Quarantine laws, health laws okay for states (power to states as necessary under Article I sec. 10 cl. 2)
  - Here, state law in conflict with national statute; nothing here on unexercised commerce power

- *Wilson v. Black Bird Creek* (1829) – source of dormant power
  - Delaware authorized Black Bird to build a dam in Black Bird Creek
  - Wilson resorted to self-help and broke down dam to sail sloop through it
  - Black Bird sued Wilson for damages
  - Wilson says DE’s law authorizing construction of dam violated the commerce clause
    1. DE was trying to enhance property values – dry land is worth more
    2. Also, diseases were problem, so health interests in mind
  - Marshall says there is no conflict between state law and commerce power
    1. Did not see any national statue that applied
    2. Also, act is not repugnant to power to regulate commerce
      a. States can enact laws under police powers to promote health and state purposes

- *Cooley v. Board of Wardens*
  - 1803 PA law required local pilots to navigate waters
  - Violations went into fund for retirement for pilots and dependants
  - Problem with 1789 congressional statute part 2 – 1) pilots continue to be regulated in conformity with existing state laws 2) with such laws as states may hereinafter enact for that purpose
  - Congress cannot authorize states to do something that is inconsistent with dormant commerce clause
  - Pilotage is a local matter that can be left to the states

- *Southern Railway*
  - GA statute required trains to blow whistle and slow down before tracks
– Sup Ct first said this was a noble purpose
– But then said that compliance with law increased time of trip from 4.5 to 10 hours – held invalid

**South Carolina State Highway Department v. Barnwell** – Deferential View of state legislation
– SC statute contains width and weight requirement for trucks
  1. Greater than certain width barred from highways; also weight limitation of 20K lbs
– Trial court looked at **effect** and **purpose** of state law on interstate commerce; also looked at extent to which state’s regulation worked to achieve the **state’s interests**
– 85-90% of interstate truck traffic would be barred by these regulations
– Trial court said this was unreasonable burden on interstate commerce
– **Purposes:**
  1. Highway safety
  2. Conservation – reduced wear and tear on state’s highways
– Stone was concerned about discrimination giving advantage to in-state actors and disadvantages to OOS actors (unlikely to be alleviated by political restraints)
  1. Think of Garcia and tradeoffs between economic burdens for employers and protecting state interests
  2. Look to political process and how it functions
– Stone says this law is not discriminatory because it burdens alike in-state and OOS actors
– **Inquiry** should be:
  1. Whether state legislature has acted within its province
  2. Whether means of regulation chosen are reasonably adapted to end sought
– Conclusion: legislation here was within state’s power and was non-discriminatory
  1. Means adopted are related to end sought
  2. Court looked at whether there was some “rational basis”

**South Pacific Co. v. Arizona** – Beginning of modern court’s “balancing test”
– SPC ran some trucks in excess of limit and AZ wants to collect statutory penalty
– 95% of rail traffic in AZ was interstate; SPC suffering economically
– Court says law is unconstitutional
– Stone uses balancing test to reconcile conflicting claims of state and national power (significant change since *Barnwell*)
  1. Looks at nature and extent of burden on interstate commerce
  2. Looks at what state is trying to achieve by regulation
  3. Means-ends analysis
    a. Reality is statute makes railroads more dangerous
    b. More shorter trains will increase number of accidents
– Black comments about Court acting as “super-legislature”
– Why Stone’s switch?
1. Burden here primarily on OOS interests
2. Any advantage here is slight but dubious
3. Serious burden on commerce without much counterbalancing scale on state’s side

- Bibb v. Navajo Freight Lines (Contoured mudguards); Justice Douglas
  - Contoured mudguards required in Illinois
  - AK and 45 states required straight mudguards
  - Law found invalid
  - State’s interest = safety measure; preventing debris and mud from being kicked onto other vehicles
  - Court found contoured no more effective than straight; in fact, caused more problems
  - Illinois’ interest is illusory
  - Douglas looks at whether regulations actually work to offset the higher costs, delays
    1. Would have been different if there were stronger showing of safety

- Kassel v. Consolidated Freight Ways – Court’s last word on dormant commerce clause on transportation regulation
  - NOTE: Be careful of using these cases in other contexts; transportation is a field of its own
  - Consolidated wanted to run tractors pulling double trailers (65 ft in length)
    1. Greater capacity and
    2. Possibility of separate routing
  - Most states in west and Midwest allowed 65-foot doubles; Iowa and some others prevented them
  - Mobile homes and adjacent city exceptions
    1. Livestock may be hauled in 65 foot trucks
  - Powell’s plurality opinion says Court will only question burden on illusory safety interests
  - Four-part Inquiry:
    1. Look at state’s END
    2. Identify means-end relationship
    3. Identify burdens imposed on interstate commerce
      a. Higher costs
      b. More singles on the road = more accidents
      c. Burden of de-coupling
    4. Balancing test – state interests versus burden on IC
  - Evidence shows double units are just as safe as singles → indicates illusory interest
    1. No significant countervailing safety interests; not fair for Iowa to dump all burdens on OOS
  - Brennan says majority answers wrong question → look at state interests and it is clear they are concerned with economic benefits
    1. Look at actual reason for legislation
2. Defers to legislature’s judgment as long as decision is rational (e.g. Barnwell)
   - Rehnquist is only dissenter
     1. Useless to speculate why legislators voted for certain policies
     2. Line-drawing is not for the Court; state legislature is more intimately attached to issue

- **Baldwin v. G.A.F. Seelig** – Milk is frequent source of litigation; here, discrimination is invalidated
  - NY’s Depression-era milk legislation at issue
  - Rule is minimum price in NY for milk above prevailing market price
  - NY’s concern: out of state dairy farmers would try to sell in NY because they could undercut the pricing scheme
  - Seelig was NY milk dealer who went and bought milk in VT
  - OOS farmers were required to sell at higher price in NY even if they wanted to sell at lower price – dormant commerce clause barrier
  - NY argues health & safety purposes
  - Cardozo says economic welfare can always be related in some way to health and safety – slippery slope

- **Mintz v. Baldwin**
  - NY statute requiring all cattle shipped from OOS into NY state be certified to be free of Bang’s disease
  - Health and safety (not economic) purpose

- **Wellton v. Missouri**
  - MO required peddlers of out of state goods to apply for a license; produced in-state did not need license
  - Purpose: health & safety?
    1. Shoddy techniques were same in-state and OOS; hard to argue sanitation end
    - Seems real purpose is protecting local economic interest

- Note potential pitfall when at times neither level of government is able to come up with policy solution
  - E.g. NY cannot make a law prohibiting importation of goods made by children under 16 – purpose seems more economic than health & safety
  - NY already has this law; puts burden on OOS producers, and seems like extension of police power

- **Henneford v. Silas Mason** – Grand Cooley Dam case
  - Contractors for WA dam purchased materials OOS to avoid 2% WA tax
  - WA assessed 2% “use tax” ($18K) for goods shipped into state
  - Cardozo says this is economic purpose, but distinguishable from Baldwin because OOS and in-state actors are all treated equally
  - There can still be price competition here – WA merely removes one advantage OOS sellers had (no tax in other states)

- **Dean Milk**
  - Madison ordinance prohibits sale of pasteurized milk in WI unless it had been pasteurized within 5 mile radius from the center of Madison
- Second provision prohibited sale of milk unless it came from Madison farm with inspection certification; Madison reps only required to inspect plants within 25 miles
- Dean Milk Co. collected milk at 950 dairy farms in S. WI and N. IL – each was more than 25 miles from Madison; so were pasteurization facilities (one 65 mi away, the other 85 mi away)
- Dean Milk’s product was high quality milk – US grade A
- Milk produced in Madison not grade A under US standards simply because there were hypertechnical distinctions of measuring quality
- **Purpose** (according to court):
  1. Health & safety? Could personally inspect plant with own inspectors, insure that plants in radius were up to specifications
  2. Madison trying to get some control over milk products originating in remote areas → get it pasteurized locally
- Court has no doubt about general police power to ensure safe pasteurization (good purpose)
- Problem: economic barrier erected; local industry safeguarded from discrimination
- Court says it is immaterial that some WI interests are also burdened
  1. Burdens are put on people outside of political decision-making
- Court discusses alternatives:
  1. Madison could accept milk inspected under different standards
  2. Madison could send its own inspectors to other plants and charge for the service

**Breard v. Alexandria**
- Door-to-door solicitation ordinance in Louisiana restricting solicitations of magazines distributed in IC
- Seems like discrimination, since solicitors are penalized and mom and pop shops get more business
- But ordinance held merely burdensome, because applies to in-state as well as OOS solicitors
- Purpose = privacy; protect citizens from being fraudulently induced to buy stuff
- Alternatives?
  1. Mail with reply cards
  2. Opt-out policy
  3. No-trespassing signs
  4. Ads in newspapers

**Out of State Sellers in In-state Markets**
- **Polar Ice Cream** (not assigned)
  - Florida legislation required milk distributors to accept total supply of milk from designated in-state sources and designated dairy farmers
  - Before legislation enacted, Polar got 30% of milk from in-state; 70% OOS
After legislation, Polar could turn to OOS suppliers only if it had completely exhausted in-state supply.

Court saw this law directly analogous to *Baldwin*

1. Complete barrier to OOS dairy farms servicing FLA demand unless FLA supply falls short
2. In *Baldwin*, VT farmer had access if willing to sell for same price as in-state – NY dealers had no incentive to go to OOS seller
3. Analogous because seller is cut out

*Great A & P v. Cottrell*

- MS took federal government milk standard regulations, but added a reciprocity provision – if LA milk is to be marketed in MS, LA has to permit marketing of MS milk in LA
- A & P processed milk at Kentwood, LA facility; milk processed met all of LA’s health standards
- Kept out of MS solely because LA had not signed a reciprocity agreement because LA thought that MS milk didn’t satisfy their health standards

*How do we classify this measure? Discriminatory? Burdensome? Economic measure or health & safety measure?*

Court uses *Pike* Balancing Test (p. 371)

1. Legitimate local interest
2. Effects on IC only incidental
3. Legislation will be upheld unless burden imposed is clearly excessive in relation to local benefits

*Arguments:*

1. This is state’s only way of making sure trade continues
2. This is a health measure

- Court finds this completely wanting
- MS would allow lower quality LA milk if they participated in reciprocity
- Held to be invalid – burdening interstate shipment of milk

1. Burdens imposed
2. Alleged health & safety interest
3. Alternative ways for state to achieve interests

*Two Balancing TESTS*

1. When legislation is viewed as merely burdensome (effect on both IS and OOS), legislation tested under *Pike Test*
2. Conversely, if challenger is successful in demonstrating that law discriminates, balancing test will be test from *Hunt*

*Hunt v. Washington State Apple Advertising Commission*

- WA state at time is country’s largest producer of apples
- Stringent mandatory inspection of apples superior to USDA grades
- Ships 40M closed containers OOS; 500K end up in N. Carolina
- NC statute said all containers of apples should bear USDA grade or none at all

1. WA could either repackage crates to NC (very costly)
2. Or take out existing grades (greater cost)
   - State purpose: consumer protection? NC says substantial state interest
     1. Seems suspicious, since NC has allows no grade at all
     2. Plus, NC admitted that the main lobbyists were NC apple growers
   - Balancing Test Applied
     1. Burdens and discriminates against IC
        a. Increases costs of doing business for OOS apple growers
        b. WA apple industry loses competitive advantage
     2. Discriminatory, since NC apple growers were behind legislation
   - Burden falls on state to demonstrate unavailability of non-discriminatory alternatives
     1. Failed to sustain burden
     2. Failed means-end inquiry
        a. Regulatory means do not achieve state ends (illusory end)
        b. No information does not provide consumers with helpful information
        c. Also, consumers don’t buy closed containers; it is distributors, wholesalers who buy these who know better
   - Alternatives
     1. Require grades at least or beyond USDA grade
     2. Require USDA grades in addition
   - Here, discrimination outweighs state burden

- *Exxon v. Governor of MD*
  - MD statute prohibited producers and refiners of petroleum from operating gas station in MD in response to 1973 gas shortage
  - MD’s solution is to force these guys to divest themselves of retail operations
  - 8-1 majority opinion; Blackmun dissents (and La Pierre agrees)
  - Blackmun discusses that there were
    1. 3,780 local retail gas stations in MD;
    2. 233 company owned stations; of those,
       a. 197 owned by OOS P/R companies;
       b. 34 OOS non-P/R companies, e.g. Sears Roebuck, Giant Food;
       c. 2 In-state producer/refiner owned)
          i. 34 could stay in business –
             1. 99% of local retail protected;
             2. 1% OOS protected (OOS non-P/R)
    3. Burden of divestiture requirements (98%) fall OOS; Benefits – overwhelmingly in-state
    4. OOS actors have no political sway
  - Justice *Blackmun* Uses the *Hunt Test*
    1. Burden falls upon State to justify the legitimate local benefits to justify inequality
    2. Show that alternatives are inadequate
a. State has an interest in fostering competition in the marketplace
b. Don’t let them favor their own stations
3. At least one non-discriminatory alternative (e.g. the one used by Congress, prohibiting competitive pricing)
4. MD had not knocked out ALL competition; just clobbered the most effective OOS competitors; very clever but discriminatory
   - Justice Stevens said there isn’t even a burden imposed (unusual for Stevens to get majority to follow him)
   1. Focuses on 34 OOS non-P/R companies in light of 3,780 local retailers
   2. Others can still compete in the market; the flow of gas in IC will not cease
      a. No discrimination on sales once gas is in the state
      b. Plenty of OOS retail dealers left to compete with MD independent retailers (Sears, Wal-Mart)
   3. La Pierre wants us to think about considering distinction between 197 OOS and 34 OOS non/P/R
   - Possible the Court sustained this legislation b/c there were other states with in-state refineries in which measure would have been non-discriminatory because burden would have fallen in equal fashion on in-state and OOS

Limiting OOS-ers to Local Products & Resources
• *H.P. Hood & Sons v. Du Mond*
  - Hood is Boston milk distributor; already has 3 depots in NY to collect milk from dairy farmers
  - NY Commission decides he can’t have a fourth depot
  - Denial of permit for that depot is restriction on amount of milk he can produce for MA
  - Justice Black says that someone who wants to get more milk for in-state, there would have been another denial
  - NY state concern is that diversion of dairy farmers would adversely affect in-state interests
    1. Hadn’t been enough milk in Troy that year
    2. Didn’t want NY dairy farmers selling to Hood and sending all milk to Boston
  - Justice Jackson says NY’s measure has the avowed purpose with the practical effect of curtailing the volume of interstate commerce to aid local economic interests (look at purpose and effect)
  - Would treat in-state and OOS interests the same
  - So no discrimination (Black and Frankfurter dissent – economic interest)
• *Milk Control Board v. Eisenberg* (1934)
  - NY milk dealer ships to NYC from PA receiving depot
  - PA set minimum price regulations for dairy products; milk dealers had to pay dairy farmers a minimum price
If some were exempt, would reduce income on milk for other producers; price might go down, and supply of wholesome sanitary milk might disappear.

Opinion says Baldwin was different – Roberts insisted that that decision invalidated legislation attempting to set up tariff barrier of milk into enacting state.

1. In this case, in-state dealers were being regulated.

PA law affects PA dairy farmers; NY practice affects NY dairy farmers and OOS dairy farmers

1. PA → states imposing burdens on own constituents; but minimum prices will increase receipts on dairy farm → will lead to more purchasing power in economy and help us out of Depression.

In Baldwin, burdens will end up primarily on OOS dairy farmers; NY market was burdened somewhat, but they benefited from gaining more of the local market if OOS competitors were forced out.

- **Pike v. Bruce Church** –
  - State of AZ attempts to control local resource of un-crated cantaloupes
  - Interested in enhancing reputation of cantaloupe growers
  - AZ law prohibited shipment of AZ grown cantaloupes OOS unless crated
  - Company at issue grew in CA and AZ; building new crating facility in AZ would cost company $200K
    1. When crated in CA, company didn’t distinguish between AZ or CA grown
    2. AZ was concerned about reputation – wanted them crated in AZ and stamped “AZ grown cantaloupes)
  - Big burden on IC – crating industry would be forced to relocate into AZ
  - Court says state’s tenuous interest in having company’s cantaloupes identified as originating in AZ cannot constitutionally justify the requirement that the company build and operate an unneeded $200K packing plant in the state.

- **Philadelphia v. New Jersey** – Justice Stewart says this law is facially discriminatory
  - NJ ban prohibits waste disposal from OOS into NJ
  - Operators of private landfills in NJ and several cities in other states with disposal agreements challenge statute
  - NJ didn’t want garbage from other states → safeguard health & safety of citizens
    1. NJ trying to assure its citizens of relatively low-cost waste disposal
    2. Stewart doesn’t have to decide which purpose drove legislature
      a. Can protect pocketbooks as well as health and safety (new)
  - **Stewart** says Court is alert to evils of “economic isolation” and protectionism when state wants to safeguard its people
  - NJ has no right to discriminate against articles of commerce from OOS unless there is some reason to treat them differently
    1. Close call as to whether to use Hunt test
2. State has to show no alternative means
3. Why didn’t Justice Stewart apply the *Hunt* test?

- Competing possible **purposes**
  1. Purpose of aiding economic interests is fatal
     a. *Hunt*: USDA grades or none at all; discriminated in effect
     b. NJ statute discriminated on its face
  2. **Rehnquist** disagreed – waste leeches into ground and corrupts groundwater; scavenger birds create more hazards; no different from quarantine laws

- **Hughes v. Oklahoma**
  1. Statute prevents exporting minnows for commercial purposes and Hughes violates it
  2. **Brennan** says statute discriminates on its face → minnows can’t go out of state, opposite of Pa v. NJ where garbage can’t come into the state
     1. Only OK residents (and visitors in-state) get benefits of minnows (bait)
     2. Outside the state cannot use natural minnows
  3. Court here wants to use *Phila v. New Jersey* of per se invalidity
     1. Facial discrimination cases
     2. State is interested in conservation of scarce natural resources
        a. Overt discrimination
        b. But health & safety type purpose
  4. In NJ case, all court wanted to see was economic interests and not as much hazards and dangers of sanitary land fills
  5. OK statute only applies to natural, not hatchery minnows; if there is really no difference between the two and there is ample supply of hatchery-bred, not discriminatory, but there probably is a tangible difference
  6. **Rehnquist** says no discrimination; just burden
     1. Everyone in-state and out-of-state is treated the same
     2. TX person and OK person residing in OK cannot export
     3. Use reserved for in-state purposes; in-state economic benefit
     4. In this case, no increase of costs on doing business for out of state
     5. IC interest does not outweigh state interest of conservation

- **Purposes**:  
  1. Prevent exploitation of scarce natural resources  
  2. Regulate even-handedly  
  3. NJ could have done it another way – could work to achieve reduction of waste in even-handed fashion, treating everyone the same

- **Minnesota v. Cloverleaf Creamery**
  1. Statute prohibited retail sale of milk in plastic containers; only wax paperboard non-returnable, non-refillable allowed
  2. **Purpose**
     1. Conserve energy
     2. Promote resource conservation
     3. Reduce solid waste disposal
Trial court said ban was completely counterproductive to purposes
No facial discrimination, so we are talking about **discriminatory or burdensome effect** on IC
  1. Seems there is in-state benefit, since paperboard local industry
  2. But Brennan says burdened in-state activities safeguard against legislative abuse (like *Barnwell, Southern Pacific*)
Court criticized trial court for second-guessing state legislature; says state interests outweighed the IC burden
This case is the place to go if we need to look at state ENDS
Court blinks and accepts at face value the state’s articulation of end

- **CTS Dynamics Corp. of America**
  - Indiana business corporation law says any person who buys shares in IN corporation does not get voting rights unless and until there is a vote by disinterested shareholders to convey the ability to vote
  - Court says that same effects on offers exist whether or not the offeror is a domiciliary or resident of Indiana
    1. Imposes no greater burden on out-of-state offerors than similarly situated Indiana offerors
  - Think back to *Bibb* case (contoured mudguards)
    1. Was there any risk of having multiple inconsistent burdens?
    2. Not in this case (Scalia)
  - Companies are incorporated only in one state, so for Indiana corporations there can only be one rule
    1. No risk of multiple inconsistent burdens
  - Regulation of corporations, regulation of shares is indeed standard exercise of **regulatory, police powers** (every state has extensive corporate code)
  - **Powell** says on its face, Act evenhandedly determines voting rights of shares of Indiana corporations
    1. To a limited extent Act affects IC
    2. This is justified by state’s interests in defining attributes and shares in corporations and protecting shareholders
    3. Many shareholders may be IN residents

- **Maine v. Taylor**
  - Maine enacts a statute preventing importation of baitfish
  - National Statute = Lacey Act, which forbids IC in fish and wildlife where IC of wildlife is contrary to some state law
    1. Prohibits violations that occur in IC of state laws
    2. Criminalizes violations of state law
  - **ISSUE**: whether state law being enforced by Lacey Act prosecution is or is not consistent with dormant commerce clause
  - Generally speaking, Congress does not have authority to authorize states to take action that would violate dormant commerce clause
    1. Congressional intent must be unambiguous
  - Court of Appeals thought several factors “cast doubt” on finding of legitimate local purpose
1. Maine is only state to bar all importation of live baitfish
2. Maine accepted importation of other fish, subject to inspection requirement
3. Aura of economic protectionism
4. Nothing prevented fish from swimming from NH into ME
   - Court discusses *Pike* and *Hunt*; burden on state to establish legitimate local purpose (outweighs discrimination, no discriminatory alternatives)
   - Court refers to *Philadelphia v. NJ* in discussing arbitrary discrimination based on legitimate local means
   - Magistrate said statute is constitutional
     1. Concern about parasites
     2. Concern about co-mingled species non-native to Maine
     3. No non-discriminatory alternatives
        a. Hard to test minnows for parasites without destroying them
        b. No way to figure out whether there are other species when you have 158K fish
   - At appellate review, only question is whether finder of fact’s determination was clearly erroneous
     1. Here, no basis for saying it was clearly erroneous
   - Lesson: very important to win in trial court; don’t stake hopes at appellate level if you’re only working with facts
   - Court sees that ME’s waters are especially fragile
     1. Purpose is not undercut just because they didn’t do everything they could have done
   - Stevens dissents – talks about shifting the burden of proof – needs to make some showing that bad consequences outweigh state’s interests
     1. Doesn’t think the state made a strong showing about how co-mingled species are going to do damage
     2. No real showing of non-discriminatory alternatives
     3. Looking for more demanding, rigorous application

XII. **Market Participation Exception**: when government is viewed as participating in market instead of regulating commerce
   - State governments are subject to commerce clause restraints only when they act as market regulators
   - *Hughes v. Alexandria Scrap* – dormant commerce clause does not apply to exercises of state’s purchasing power
     - MD, riddled with junked automobiles, came up with scheme to clear highways
       1. State paid a “bounty” to “hulk suppliers” (tow trucks) to take junked vehicles to metal processors; processors shared bounty
       2. Paid junkyards money for every vehicle formerly titled in MD that they scrap
     - Much more onerous documentation for ownership with respect to tow-truck operators coming from OOS
1. VA metal processor argued that different documentation requirements
   - Every court agreed that statute burdened interstate commerce
     1. Trial court said substantial burden; most trucks would go to MD processor
     2. MD does indeed have in-state interest
     3. MD could of course be concerned that funds would be used in neighboring state to clean up highways of PA or DE
   - Trial court said there are less burdensome alternatives to accomplish ends
     1. Needs to be same requirements of ownership
     2. BUT, Supreme Court said this was a type of state action immune for dormant commerce clause analysis; state activity as market purchaser, even if burdens on IC, state was free to prefer its own citizens or its own businesses
     3. Reeves v. Stake – Same applies when government enters market as a seller
        - State-owned cement plant in state of S. Dakota, and 40% of cement shipped out of state (1970-77)
        - Board of Officials prescribed a policy to address 1978 economic boom in stead (heavy demand for cement): only sell cement OOS after in-state demand has been satisfied
          1. Like Philadelphia v. West Virginia
        - Immune from dormant commerce clause restraints; state is free to favor its own citizens, despite the fact that WY businesses had long relied on factory’s output
        - Alternatives to achieving adequate supply of cement?
          1. Leave it to private sector to figure out supply and demand
        - Garcia case – subways in NYC were once privately owned, built by industry barons like Vanderbilt
          1. Private industry
          2. Then regulation and/or subsidy
          3. Then state regulation
        - NY v. United States (mineral water); S. Carolina liquor case too
          - Private parties aren’t subject to dormant commerce clause
          - When state chooses to act like a private market participant, why should state be disadvantaged? Shouldn’t they be treated like private parties?
          - Private businesses will sell to whoever will pay the most
     4. White v. Massachusetts
        - Executive order by mayor of Boston that on all public works projects, 50% of employees had to be city residents
        - Supreme Court said dormant commerce clause does not apply to mayor’s order because state was acting as market participant; purchasing labor, etc.
          1. Dissent notes that economic choices the city restricts in favor of its residents are the choices of private entities engaged in IC
2. But, since the city had expended its own funds in entering into construction contracts for public projects, it was acting as market participant
   - **Question**: What is the difference between a city exercising its spending power and telling contractor putting up city building You can have this contract only if 50% of employees are city residents
     1. Rule for private contractors as market participant
     2. Rule for city’s purchasing
   - Why is one of these activities subject to dormant commerce clause?
     • *South-Central Timber v. Wunnick*
       - Alaska requirement protected existing timber-processing industries by requiring processing of timber to be done within state
         1. When state goes beyond market participant, becomes market “regulator” and slips out of exception
       - Requirement is too far downstream – state has gone from market participant seller to market regulator
         1. Regulating processed timber
         2. State participates in market for raw timber
       - Contrast *White* case – argument that in *White*, everyone affected by order was working for the city (*Rehnquist* not impressed)
       - Regulatory goals sometimes are a little too visible
         1. Although not as visible in *Hughes* and *Reeves*
       - Court’s conclusion is that it falls within rule of **virtual per se invalidity** of laws that block the flow of interstate commerce at state’s border (*Philadelphia v. NJ*)
         1. AK is garnering a benefit for economic interest
         2. Getting timber processed in AK
       - Basis for invalidation here is dormant commerce clause, applying *Phila v. NJ*
         1. Purpose is discriminatory economic protectionism
         2. *Maine v. Taylor* – *Phila* did not work because Court bought into the conservation purpose
         3. Should we view AK’s law as burdensome or discriminatory?
           a. Maybe the real key is when court senses a purpose of economic protectionism
           b. Processed timber can be used by anyone (with respect to who gets to use it, law is merely burdensome)
       - Can discuss *Pike* and *Foster Fountain Packing* (maybe we should have viewed those laws as discriminatory tho)

### XIII. Privileges and Immunities Clause, Article IV, Section 2

- **Threads**
  - Look to see whether interest is *fundamental right* of citizenship
  - Illustrated by decision in *Toomer* – focus on *rights created by state law* and discrimination between citizens of one state and citizens of another state
There is not a whole lot of case law on privileges and immunities. Corporation is not a citizen for purposes of the clause:
1. Most dormant commerce clause analysis is driven by economics
2. Business and corporations often burdened
3. Discrimination against entity that can’t bring litigation

- **Corfield v. Coryell**
  1832 – Justice Washington read clause as extending to citizens of all other states same advantages as are secured to their own citizens
  Privileges are in their nature fundamental; belong to citizens of all free governments which compose this union:
  1. Protection by government
  2. Enjoyment of life and liberty
  3. Pursuit of happiness and safety
  Sets up that citizens of all free governments have certain fundamental rights; access to shellfish and grounds is not so fundamental; NJ could restrict access solely to own citizens

- **Toomer v. Witsell**
  South Carolina rules for shrimp fishing – in-state fishermen paid $25; OOS $2500
  Privileges and Immunities primary purpose: to help fuse into one nation a collection of sovereign states:
  1. Guarantees doing business within state in terms of substantial equality with citizens of that State
  2. Purpose is to ensure that citizen of A competes, lives, functions on same terms of citizens of state B
  3. Court tries to make sure that State B’s interests are represented since they have no political say
  When may a state treat differently citizens and non-citizens?
  1. E.g. state university – charges citizens less than non-citizens
  2. Needs to be substantial independent reason – concerned with relationship of some classification to government’s end
  No real showing that South Carolina has devoted substantial funds to shrimping industry (like education)
  Alternatives:
  1. Graduated license fees with respect to boat, restrict type of equipment, size of boat, etc.
  2. Impose rules evenhandedly on in-state and OOS fishermen regardless of place of their residence
  Might think about Hunt, Pike, or even Philadelphia – invalid on its face

- **Baldwin** – Montana elk-hunting
  Non-residents pay 7.5 times as much as residents or 25 times higher (elk-only); could only purchase combination license
  Hunting elk is not a “fundamental right” in terms of privileges and immunities clause (following Corfield)
  **Toomer** (fishing shrimp) is more than just recreation; it is a livelihood:
  1. Concern only kicks in if privilege and immunity of citizenship
2. Montana’s interest is elk conservation; lets some people hunt elk
   - Brennan’s view is if a state says that its citizens can do something, treat that as a privilege & immunity, recognizing that interest doesn’t mean that state can never make distinction between residents and non-residents
   1. If State A lets its citizens do something, citizens of State B should have constitutionally protected right
   - **Brennan’s two-part test:**
     1. Is the presence or activity of non-residents the source of problem?
     2. Does discrimination practiced against nonresidents bear a substantial relation to the problem they present?

- **Hicklin v. Orbeck**
  - Alaska created jobs for oil & gas reserves; giving preference to residents over non-residents
  - Brennan now writes for unanimous court, deciding to follow *Toomer*
    1. Very different framework for analysis – Brennan’s dissent now is followed
  - Employment with private contractors within privileges and immunities clause
  - **Conclusion:** statute is invalid because there is not substantial enough relationship between excluding non-residents and getting rid of “evil” of high unemployment

- **United Bldg & Construction Trades v. Camden**
  - Municipal ordinance restricting construction contracts – 40% of employees of private contractors on city public works projects had to be residents of Camden
  - Article IV sec. 2 – citizens of each state shall be entitled to privileges and immunities in the several **states**
  - Two objections:
    1. Article IV could only apply to state legislation, not to a muni ordinance
      a. Rejected because a city derives its authority from the State
    2. Clause only applies to laws that discriminate on the basis of **state** citizenship
      a. Much more complex inquiry
  - Camden ordinance says you have to be resident of Camden, NJ, so people living in Newark are discriminated against
  - Adverse impact? (*Dean Milk?* Burdens falling on OOS as well as in-state interests)
  - **Blackmun** refers to the political check; people in NJ can take grievances to the polls
    1. Vicarious representation for OOS interests
  - **Rehnquist** is unimpressed – other municipalities could enact similar ordinances (and have)
  - So burdens are strictly on OOS-ers while benefits are in-state
  - **Overall Test = two-step inquiry**
1. Court must decide whether ordinance burdens one of those privileges and immunities protected by the clause
2. If we have an interest, we go on to ask whether the degree of discrimination bears a close relation to state’s non-discriminatory end (triggered by answering #1 affirmatively)
   - No final determination as to whether ordinance is valid or invalid
     1. Needs to be inquiry into in-state economic interest and
     2. Whether interest necessitates differential treatment
   - City makes distinction between public employees and private contractors
   - Purpose of Privileges and Immunities clause – citizens treated with substantial equality
     1. Concerned with something different from regulation
     2. Court is looking for **interstate harmony**

- **Piper**
  - Rule = bar admission limited to state residents in Vermont
  - **Powell** found that claim involved privilege under the clause
  - Application of “less restrictive means” analysis (from *Toomer*) – not a whole lot different from dormant commerce clause inquiry
  - Here privilege = practicing law
  - Argument – non-residents not as likely to
    1. Be familiar with local rules and procedures in MO
      a. Court says where you live has nothing to do with fulfilling your professional responsibility
    2. Behave ethically
      a. Lawyers’ interests for reputation and threat of discipline is exactly the same for in-state and OOS attorneys
    3. Be available for court proceedings that must be conducted in-state (emergency matters; hard to get across large distances fast)
      a. Could have someone stationed there – less restricted alternative
    4. Pro bono work and other volunteer work in state
      a. Lawyers don’t do pro bono work out of goodness of heart; out of reputation → required pro bono cases, so no difference between residents and non-residents
    5. Also less restrictive: have representative in that state to appear on your behalf
  - **Rehnquist** objects – occupation fundamentally differs
    1. State wants more lawyers in state legislature; so they wanted to reserve practice to in-state residents
    2. Says with respect to alternatives, that court is second-guessing the legislature; could always find a way to justify alternatives

XIV. **State or Local Laws in Conflict with Federal Statute** (under Supremacy Clause)
Preemption claims can arise when a state law conflicts with a statute enacted under any one of Congress’ 17 heads of legislative power, coupled with nec & proper clause

**Florida Lime & Avocado Growers case**
- Federal law involves minimum rather than uniform standards; no “physical impossibility” here of complying with both CA and federal standards certifying avocados as mature
- **TEST**
  1. Start with **preemption claims** (analog to discrimination inquiry under dormant commerce clause)
  2. If statute has been **preempted**, Congress could amend the statute, remove conflict, and free states to legislate
     a. Conflict can be between state statute and any federal statute under Congress’ legislative powers
     b. Arguments that congress had so heavily regulated the area that no room for states
  3. Look for **conflict**
     a. Look to see whether there is any room left for states
     b. Read national statute, then look at state regulatory scheme
     c. Figure out how they might go together; one extreme = direct conflict, or tangential or complementary coincidence
        i. State requires local pilots on ships
        ii. Congress requires double holds on tankers – probably a good idea to ensure safety
- Over the years, Court has been at times deferential to the states and at times has tried to limit state authority
- **Rehnquist** court expresses concern about reach of commerce power over private activity
- National interests rely on preemption doctrine to preempt state laws that would impose burdensome requirements

**Perez v. Campbell (1971)**
- Conflict between AZ Motor Vehicle Safety Responsibility statute and under Congress’ Bankruptcy Power – conflict between state law and statute enacted under any one of Congress’ legislative powers
  1. 1965, Perez was uninsured driver who had an accident
  2. 1967, judgment of $2000 entered against Perez
  3. One month later, Perez goes to federal bankruptcy court and files; federal district court grants him discharge of all provable debts, including tort judgment
- AZ Act provided that if you didn’t pay motor vehicle judgment, would have license and registration suspended
  1. Also said a discharge in bankruptcy does not relieve you of this penalty
  2. Worried about problems caused by uninsured motorists; viewed statute as a lever
- National Bankruptcy provision, Article 1 sec 8 cl 4 – bankruptcies throughout US
  1. Sec. 17 of bank. Act gave all discharged persons relief of all debts, including tort judgments
  2. Purpose: fresh start in life
- Perez won by 5-4 decision; Court concluded that AZ statute was preempted
- Majority found a conflict between AZ statute and full effectiveness of federal law (give debtors a fresh start in life)
- 4 dissenters said AZ statute only had tangential effect on national act
- State act had different purpose → highway safety
- **Pacific Gas & Electric Co. v. State Energy Comm’n**
  - CA State Energy Commission imposed moratorium on certification of nuclear energy plants until State energy resources conservation & development commission approves of means for disposal for high-level nuclear waste
  - Required method for permanent disposal
    1. At the moment, waste was in cooling pools
    3. Nation could handle safety concerns (product of wartime development of atomic energy; national government had resources to determine safety)
    4. States free to engage in regulating rates charged to various classes of consumers for electric energy
      a. Express savings clause
      b. Radiological safety → national government
  - Court looks to see whether state laws were preempted
    1. Where state law stands as obstacle to purposes of Congress
  - Possible that CA state legislatures figured that radioactivity is bad for people (adverse health interests)
  - Court does say it should not become embroiled in attempting to ascertain CA’s true motive
    1. Seems there was an economic purpose – poor planning, not safety related; storage space was limited while more nuclear wastes were continuously produced
  - Statute and judgments that underlie it are in conflict
    1. Nuclear regulatory commission said it is not a safety problem until there is a permanent waste disposal facility
  - Frustrates goal of developing atomic energy
    1. No conflict here because legislation said federal government regulated safety and states could regulate economics
  - Rehnquist court on the whole has taken a view that tends to favor national interests; falls in favor with industries that are subject to national regulation (so they can fend off statue challenges)
- **Crosby v. National Foreign Trade Council**
Massachusetts passed law saying state could not do business with other persons who are engaged in economic activity with Burma.

Federal statute gave president power to make certain restrictions
  1. Can prohibit new investment in Burma.

Parties:
  1. Companies who do business with Burma (now subject to federal and state statute).

State law violates the foreign commerce clause
  1. Article I sec. 8 cl. 3 (commerce) – regulate commerce among nations.
  2. Dormant commerce clause reference – authority to regulate commerce with foreign nations.
  3. Issue of preemption – dormant (foreign) commerce clause claim. AND a preemption claim.

Almost invariably, court will go first to claim of conflict, inconsistency, adjusting state & national statute before turning to dormant foreign commerce clause.

Article I sec. 8 cl. 4
  1. Congress shall have power to construct uniform laws of bankruptcies.
  2. Dormant bankruptcy power – Congress doesn’t legislate, dormant clause limits state power; matters between creditors and debtors.
    a. State is barred by dormant bankruptcy power.

Analysis
  1. Look for express provisions and express savings clause.
  2. Questions of implied preemption – did Congress want to oust state legislation?
  3. Whether or not it should imply from federal statute preemption of state law.
    a. Would work if we added one thing not present in this case.
    b. Context of foreign affairs → greater deference to national authority; extra boost toward conclusion that state law is preempted.
  4. Presumption against preemption in other non foreign affairs context → pretty convenient example of non-preemption framework.
  5. Why was it preempted?

Scalia
  1. Only authoritative guide to meaning of statute are words used by legislators in that statute.
  2. Typical Scalia: look only at the face of statute.
  3. Chastises lawyers for using footnotes.