CON LAW OUTLINE

INTRODUCTION

I. Origins of Republicanism:
   A. Gov’t in a republic is in principal the common business of the citizens conducted by and for the common good. Historically the idea goes back as far as ancient Greece and Rome (liberty and virtue)

   Two Concepts evolved:
   res publica-what is common/public
   the common good

   Republicanism in the 18th Century
   An idea, spoken as representing a utopian movement
   A reaction to the British Crown
   The public good as an underlying theme
   Liberty

II. Origins of the United States
   A. Federalism: is a form of government in which power is divided between central government and several formerly independent regional governments.
   B. In the United States, the individual states surrender partial sovereignty but retain all rights and prerogatives not specifically assigned to the federal government under the Constitution.
   C. Antifederalist:
      1. Private Interests are to be sacrificed for the public good. Civic virtue can be taught, best taught by political discourse (the town meeting). Jefferson suggests the Const should be rewritten each generation
      2. Attacked the proposed const on the ground that it was inconsistent with the underlying principles of republicanism. The removal of the people from the political process, the creation of a powerful and remote national government, and the new emphasis on commerce – all of these threatened to undermine the purpose for which the Revolution had been fought.
   D. Federalist Papers: a series of papers written between (1787-88) by Hamilton, Madison, and Jay
      1. No. 10: Madison rejects the idea that the causes of factions can be eliminated

   Antifederalist had proposed two options: Destroy Liberty or; Give everyone the same opinion
   Rejection of these options: people are fallible, connection between reason and self interest, diversity in ability, a division in society is created with different classes (Hobbs, Hume etc)
   Madison is a proponent of classical liberalism more than republicanism.
   Contrasts his vision of a republic (representative democracy) and democracy (his notion of the antifederalist)
   No. 51: Checks and Balances-bicameralism, indirect election of Senators, electoral college for President, separation of powers, rule of law

III. The Constitution

   Structure: Art I, confers power on Congress; Art II, confers power on Executive; Art III establishes SCt, power to congress to establish lower courts
Original Jurisdiction of Supreme Court: cases affecting ambassadors; and cases in which a state is a party. It cannot be enlarged or restricted by Congress (Art III § 2, c2)
Supreme Court Must Hear Appeals: of only two statutes
Review of State Court Decisions: must be an issue of federal law

Powers
Pre BoR – Gov’t pwr----citizens liability
BoR – Gov’t Disability--------citizens immunity: right to free exercise of religion disabled govt from building church

A. Key Sections
   1. Commerce Clause (Art 1 § 8): the Congress shall have the power…to regulate Commerce with foreign Nations, and among the several states”

   power under the clause is not limited to activities that cross state lines, but include activities that take place wholly within a state but may, nevertheless, affect interstate commerce
   The power of Congress to regulate has extended to: excluding livestock, food, racial discrimination

Supremacy Clause (Art IV): the constitution and the laws of the US…shall be the Supreme Law of the Land…”
where the court cannot find grounds on which to it can uphold a state law because it is an obstacle to federal policy, the rule is that it is invalidated.
Privileges and Immunities (Art IV): prevents a state government from discriminating in favor of its citizens and against citizens of another state.
Full Faith and Credit Clause (Art IV): requires a state to recognize the laws and judicial decisions of all other states rendered by the courts of one state and their enforcement by the courts of another.
Necessary and Proper Clause: in addition to the very specific powers given to Congress, they are given the power to “make all laws which shall be necessary and proper for carrying into execution the specific powers. This means that if Congress is seeking an objective that is within the specifically enumerated powers, then Congress can use any means that is (1) rationally related to the objective to be achieved; and (2) is not specifically forbidden by Const

Federalism

No general police power: no right of the federal gov to regulate for health; safety or general welfare of the citizenry. Instead, each act of federal legislation or regulation must come within one of the very specific, enumerated powers.
   a. Tax and Spend for general welfare: Congress does have the right to “lay and collect taxes…to pay the debts and provide for the general…welfare (Art I § 8)

   2. Review of government action: for government action to be valid, it must meet two distinct requirements:
      a. It must fall within one of the powers specifically enumerated within the Const as being given to the federal gov’t; and
      b. it must not violate any particular limitation on federal power in the Const
Specific Powers: Art I § 8, includes 18 grants of power
Congressional Powers:
lay and collect taxes
provide for defense of the country
borrow money on the credit of the US
regulate immigration and bankruptcy
post offices
control the issuance of patents and copyrights
declare war, and
all laws that are necessary and proper

PART ONE: JUDICIAL POWER AND CONGRESSIONAL “IMPLIED POWER”

IV. The Supreme Court’s Authority and the Federal Judicial Power
A. Marbury: Under Marbury, is the Supreme Court, not Congress, which has the authority and duty to declare a congressional statute unconstitutional if the Court thinks it violates the Constitution.

1. Four Parts of Opinion:
   a. Marbury’s right to commission: Marshall decided that Marbury and the other justices did indeed become entitled to their commissions once these had been signed by the President
   b. Mandamus Question: Marshall had to decide whether the particular remedy sought by the plaintiffs, an application for a writ of mandamus directly to the Supreme Court, could be granted.
      1. Judiciary Act allows: the then effective Judiciary Act of 1789 provided that the Supreme Court would have jurisdiction “to issue...writs of mandamus...to person holding office under the authority of the US.” Thus the Act itself explicitly authorized the relief being sought by the P.
      2. At odd w/Constitution: However, M concluded, this grant of jurisdiction was in conflict with Art III § 2 which grants the Supreme Ct original jurisdiction only....Since issuance of the mandamus is not among the types of cases as to which original jurisdiction conferred on the Sct, held the congressional statute as at odds with the Const.
   c. Jurisdictional Question: the court ruled that Congress exceeded its power in the Act of 1789; thus the Court established the power to review
      1. Article III § 2 sets out the federal judicial power. Const only provides for appellate jurisdiction. There is no general grant, it is limited to enumerated powers
   d. Marshall’s Conceptual Arguments for Const Review:
      1. Constitution takes priority over legislation and is therefore binding on Congress
      2. Courts are authorized to enforce their interpretation respecting a conflict between the const and a statute
   e. Marshall’s Arguments from Const:

2. Analysis:
a. Hamilton upheld theory of const review in the Federalist, he argued that the judiciary, being the most vulnerable branch of the government, was designed to be an intermediary between the people and the legislature.

3. Compared with German Centralized System
   a. Each state has its own constitutional court (Lander)
   b. The Legislature is to provide something that is constitutional, in the event that an act is unconstitutional
   c. Jurisdiction includes real and abstract cases, Fed and state conflicts, and amendments


5. Enumeration ergo limitatio, enumeration therefore limition.

B. Review of State Court Decisions
   1. General Principles of review: When the Supreme court reviews the judgment of a state court, it is of course exercising appellate, rather than its original jurisdiction. Art III § 2 provides that Court’s appellate jurisdiction may be regulated and limits as Congress shall provide. Since the original Judiciary Act was enacted in 1789, the review has always been limited to the federal questions decided by state courts.
      a. No review of state law issues: May not review state court decisions that merely adjudicate questions of state law.

I. Judicial Power, Congressional Power and the Political Question Doctrine

Intro: Article I, §8: Gives the Congress expressed powers.

Withe Const, the more pwr the Govt holds, the greater the burden on citizen liability. Ex. The power to draft an army reduces an indivis liability not to fight.

The Bill of Rights were added to promote freedoms. As Govt disabilities grow, the immunity of citizens increases. Ex. The right to free practice of religion prohibits the govt from funding a church.

Anti-Federalism: Similar to original republicanism/Jefferson. One person one vote, support of non-centralized govt, direct democracy, homogeneity of the people. Anti-factions. Const supported heterogeneity.

A. Judicial Power

1. Judicial Review (Marbury)

Primary Holding: If the SC identifies a conflict btw a constitutional provision and a congressional statute, the SC has the authority and the duty to declare the statute unconstitutional and refuse to enforce it. The very nature of a const is to establish a fundamental and paramount law. Any
legislative act that does not follow is repugnant to the Const. It is the duty of the judiciary to determine what is law, not Congress, in determining when legislation violates the SC.

The writ of mandamus to bring the remedy required by Marbury could not be issued by the SC b/c the writ must was to be issued under original jurisd which the SC does not have in such matters. Article III, Sec 2(2). There was no appeal to require a hearing by the SC. Marbury was truly seeking original jurisdiction which is only afforded in cases "affecting Ambassadors, other public Ministers(Diplomats) and Consuls and those in which a State shall be a party, the SC shall have original jurisdiction. In all other cases, the SC shall have Appellate jurisd..."

Marshall's position is contrary to Marbury.

1. No commission for Marbury
2. Reasonable Holding: Ct doesn’t have jurisd.
3. Stat provision is unconst
4. Unconstitutionality established/Judicial Review

Court exercises power for Const Review for the 1st time.

The Judiciary Act of 1789, Sec 13, allowed for the SC to have jurisdiction to issue writs of mandamus to persons holding office under the authority of the U.S. Again, Marshall held this violated the const under Article III,2,2.

The Political Question: The province of this court , is solely, to decide on the rights of individuals, not to inquire how the exec, performs duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. Pg. 26 See also Baker v Carr. The

Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it is equally clear that the injured individual has a right to remedy in the courts via the law. However, a writ of mandamus was not proper in this case.

Criticism: Nowhere in the Const does it say that the courts, not the Congress, ought to decide whether a statute is in conflict w/ the Const.

Counter: Legislators are elected periodically and subject to the whims of the people. Judges are appointed for life and are not subject to outside influences in making laws but the construction of the const in interpreting laws.

Rationale 4 Judicial Review: Where the Const and Congress are at odds, Congress must yield. The Const provides a government of limited pwrs.

Structural Argument: Ours is a govt of limited of limited pwrs w/ limits from the Const

1. Ours is not a govt of limited pwrs,
2. There are no limits stemming from the Const, but by def the Const means, inter alia, certain limits on govt pwr.
3. Therefore, ours is a govt of limited pwrs.

2. State Court Decision Review (Martin)

S.C. is exercising its appellate review pwr when it reviews a case appealed from a state supreme court. Article III(2). Since the Judiciary Act of 1789 was enacted, the S.C.'s appellate review of state court judgements has always been limited to those of federal questions decided by state courts. (Note: Original jurisdiction under Article III(2) when a State is a party before the Supreme Court.)

VA Courts' Arg: An action commenced in a state should not be reviewed by the SC. It is up to the state to determine if stat violates the Const.

SC ruled against this proposition and stated that the SC could review the constitutionality of a decision by a state's highest court. Justice Story stated there was no infringement on state sovereignty and there was a need for uniformity in decisions throughout the nation in interpreting the Const. W/out uniformity, laws, treaties and the const would not be uniform throughout the union.

Further, states may not want to overturn an unconst law b/c it benefits the state while affecting the Union.

Article 6 states that the Const…shall be the supreme law of the land… and the judges in every state shall be bound thereby.

Further, Article III(2) states: "The Judicial Power shall extend to all Cases..." A limitation was not enumerated in the Const.

Structural Argument: The SC wanted that its review of State court decisions in federal questions, where the decision is contrary to the fedl position, is const under §25 of the Judiciary Act. Such review is necessary to the preservation of the federal system. W/out S.C. review, it is argued that fedlism would have been threatened.

Cohens v. VA: The SC also has pwr to review criminal questions, not just civil questions.

Cooper v. Aaron: Ark insisted it was not bound by Brown decision. State or fed legislatures and execs are not to self interpret the Const or decide which decisions to follow. The SC is to enforce constitutionality and its decisions are binding on the states.

Cong cannot decide what is const either. If several Cong believed the Const gave them the right to limit Roe v. Wade, they could not do b/c the SC has decided and it must be followed. The SC interp must be complied with.

3) Congressional Limitation of Supreme Court Power/Appellate Jurisd

McCordle—§14 of the Jud. Act of 1789 authorized the S.C. to review habeas corpus acts. Feb 1867: habeas corpus act is passed to benefit fmr slaves. McCordle was charged under the Military Reconstruction Act of 1867 for writing against Reconstruction. The act provided for military trials
of civilians without a jury, which was likely unconst. Juries are provided for by the 6th Amdt and Article III.

McCardle filed a writ of habeas corpus to attain a civil trial under the Habeas Corpus Act of 1867. Congress repealed the provision of the act concerning the ability to bring habeas corpus complaints b4 the SC b4 McCardle reached the SC. The SC upheld the repealing act.

The Repealer Act was deemed Const under the Exceptions Clause of Article III, §2(2). All habeas corpus writs, but those emanating from the 1767 Act may still be heard by the SC. "With such Exceptions, and under such Regulations as the Congress shall make."

Paulson: This is not a limitation of the Court's pwr.

Article III Limitations on the SC: The only direct Const grant of pwr to the SC is to hear cases involving ambassadors, ministers, cases which involve states as parties…Article III, §2.

Article III suggests Cong may limit the SC's appellate jurisdiction and the jurisdiction of the lower courts. Unless the court has original jurisdiction, the SC shall have "appellate jurisdiction both as to Law and Fact, with such Exceptions, and Regulations as the Congress shall make." Congress' limitation on the 1767 Act was such an exception and the SC was w/out jurisdiction to hear McCardle's writ.

Lower courts did not exist until they were created by Cong.

*Cong can limit the jurisd of the SC for Appellate but no original jurisd.*

Limits on Congressional Power:

*U.S. v. Klein:* After the commencement of a trial in federal court, Congress passed a statute to deny jurisdiction to Fed Courts to hear cases such as Klein's. The SC argued this was not a legit means to an end but was aimed at prohibiting a ruling against the govt.

Klein Standard: Jurisdictional limitation must be neutral. Congress cannot decide the merits of a case under the guise of limiting jurisdiction. It is unconst to deny jurisdiction by repeal or amendment of an act when the case has already commenced in fedl court. *Violation of sep of pwrs.*

Cong may no longer enact legislation to eliminate an area of jurisdiction in order to buffer itself from an adverse ruling. *McCardle* is overturned.

Modern Limitation Atteptes: Jurisdiction stripping legislation is rarely tolerated.

Structural Argument for *Klein:* 1) What do we want to preserve? The Const scheme of checks and balances and the role of SC as monitor; 2) What is necessary? Recognize and preserve the essential functions of the SC; 3) Conclusion: Cong doesn't have pwr to restrict jurisd.
Congress' Plenary Powers

Curbing of Jurisdiction must be done in accordance w/14th Amdt Due Process. Even if Cong has plenary pwr to restrict jurisd, is it wise and prudent to do so. Sep of Pwrs.

There is a notion that Cong has plenary pwr to restrict jurisdiction.

B. Congress' Implied Pwr and the "Means-End" Matrix

Federalism: The US is based on a federalist system where the national govt co-exists w/ the state govt. The fedl govt is one of limited, enumerated powers – those granted by the Const. All state laws are valid unless they violate a limitation imposed by the Const.

Fedl Police Pwr: Such a thing does not exist. Federal regulation pertaining to health, safety or general welfare must fall within the enumerated pwrs (Comm Cls, tax and spend, etc.)

The enumerated pwrs are spelled out in Article I, §8.

Doctrine of Implied Pwrs: The fedl govt may only act where it is authorized to do so by the Const, but the authorization may be implied rather than explicit.

McCulloch v. Maryland: The question was whether the Second Bank of the US was constitutional b/c the Const did not enumerate the power of the fedl govt to create corporations?

It was not possible to enumerate every pwr and there is no phrase in the Const denying implied pwrs. The government must have some means of executing the enumerated pwrs (the ends). Marshall stated that "Congress has the right to employ necessary means, for the execution of the powers conferred on the govt…To its enumeration of pwr is added that of making all laws which shall be necessary and proper, for carrying into execution..." the pwrs vested by the Const.

MD args that Cong only has the pwr to make laws which are necessary to governance.

Marshall states necessary must not be defined in its strictest sense. There must be room for mitigation of the def to mean "convenient, useful or essential..." MD would have the necessary and proper clause mean "absolutely necessary." The fedl govt must have dominion over the states.

"Let the end be legitimate, let it be within the scope of the Const, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, (and which are consistent) w/ the letter and spirit of the Const, are Constitutional."

After all, Slavery is not specifically mentioned in the Const, but it was legal b/c of the implied reference to slavery in Article I, §9(1)

Jefferson/Madison v. Hamilton
Jeff/Mad are worried about a dramatic increase in govt pwr if the bank is established and "necessary" should be defined strictly. Madison argued there was no Const lang mentioning a U.S. bank.

Only monetary mentions in the Const: The power to collect and lay taxes to pay the debts, and provide for the common defense and genl welfare: Or the pwr to borrow $ on credit of U.S: or the pwr to pass all laws necessary and proper to carry into execution those pwrs. *Nowhere does it mention a bank.*

Feared govt should not extend beyond enumerated powers and that govt could be destroyed if it exceeded such boundaries. Bank is monopolistic. Bank is not necessary to governance.

Jefferson: Exceeding the enumerated powers could lead to a boundless field of pwr for Congress. A U.S. bank is not necessary. A broad interpretation of necessary would *"swallow up all the delegated pwrs, and reduce the whole to one pwr."*

Hamilton does not fear the parade of horribles. *So long as the end is not unconstitutional, the means, the establishment of the bank, should be allowed.*

Necessary should be liberally construed. It is common to say something is necessary when it truly is not and that was the what the Framers did.

**Issue 2: Can a State tax a federal entity? NO**

The power to tax can be the pwr to destroy. Residents of one state should not have pwr to tax the Fed w/out the controls and consent of the collective residents of the Union. No mechanism exists to control state taxation of Fedl Govt. *It would be a tax on people not represented by the taxing body.* *Fed taxes may be turned back by people who have pwr to elect Congress. Virtual Representation – Riding piggy-back on those who are represented.*

*The fed can tax a state bank, so long as the tax is uniform.*

Parts-Whole Model: Whole=s Fed. Parts=s people of the U.S. The whole (Congress) taxes its parts. This is acceptable b/c people choose the Reps and give permission to exercise taxing power. *During the late 1800s until 1930, the courts were not so willing to accept the deference of Congress as to determine if an item is subject to the Commerce Cls.*

Alternate Model – Whole=s particular state. Parts=s people of the state. The state taxes the whole or a portion of it. The state taxes an instrumentality of the fedl govt.

Structural Arg: The case is decided based upon the reasoning from the total structure which the text has created. The implied pwrs are derived from the structure of the Const.

**C. Political Question Doctrine(PQD) & Issue of Justiciability**
PQD: In order for a case to be justiciable the case cannot require a decision based on a political question. Only 2 cases have been decided on the justiciability of a political question since Baker. The PQD does not necessarily involve politics. Rather it involves the:

Separation of Powers: The SC will not decide matters which it concludes are committed by the Const to the other branches of the govt for determination/Would another branch better decide the question; and

Prudential Concerns: It would be unwise for the court to decide the case even if it is not unconst to do so.

Baker v. Carr: The constitutionality of legislative apportionment schemes is not a political question and is, therefore, justiciable. The court set up a "one person, one vote" ruling.

Six(6) factors in establishing Justiciability: One factor must be present to make a case non-justiciable. All the factors relate to the separation of pwrs according to the SC.

1. Commitment to Another Branch: SC won't address issues that should be handled by Exec or Congress;
2. Lack of Standards: A lack of judicially discoverable and manageable standards for resolving the issue;
3. Unsuitable Policy Determination: The impossibility of deciding the issue w/out an initial policy determination of a kind clearly for non-judicial discretion;
4. Lack of respect for other branches: Court won't take up issue if it will show lack of respect for Exec or Congress;
5. Political Decision Already Made: An unusual need exists to adhere to an existing political decision;
6. Multiple Pronouncements: The potential for "embarrassment from multiple pronouncements by various departments on a question.

Paulson's view of PQD: 1 & 2 apply. The rest can be lumped together as "politically imprudent for judicial review."

Carter v. Goldwater: The court ruled that the matter was a political question and non-justiciable. The court should not involve itself in whether the President can negate a treaty enacted by the Senate. It is a dispute among the political departments that should be decided by them. Further, it is a matter of foreign policy (Which branch has Const Auth over foreign policy???)

Coleman v. Miller: Lack of Judicially Manageable Stds The process of by which Const amendments are approved is a matter for Congress and is non-justiciable. Congress is to determine if an amendment is still viable and subject to approval. The Const provided no policy determination.

Luther v. Borden: Lack of Manageable Stds RI citizens were fighting over which of two competing state govts was lawful. The SC declined to decide b/c of the political question. Under Article IV,§4, "the U.S. shall guarantee every State in this Union a Republican Form of Government." The Guaranty Clause. The SC has declared all Guarantee Clause cases
non-justiciable and held in Luther that there was a "lack of criteria by which a court could determine which form of govt was republican." "It rests w/ Congress to decide what government is the established one in a State. For, as the U.S guarantee to each State a republican govt, congress must necessarily decide what govt is established in the State b4 it can determine whether it is republican or not.

Baker did not violate the Guaranty Clause b/c the case was a matter btw the SC and a State, not the SC and another fedl branch.

Frankfurter Dissent: This is a Guarantee Clause claim disguised as something else. Further, the case was not justiciable b/c the SC had to make a policy determination as to what a vote should be worth.

Davis v. Bandemer: Political Reapportionment An equal protection claim was made against an IN gerrymandering statute. Dems claimed the boundary lines were drawn to underestimate Dem voting strength. The SC held that gerrymandering was justiciable. The problem is solvable under the Const…Paulson: Mere failure of a proportional representation does not establish a Const violation. The SC found that there were indeed "judicially discernible and manageable stds by which gerrymandering cases may be decided."

Nixon v. U.S.: Commitment to Another Branch Nixon was a former fedl judge who lost his seat after making false statements to a grand jury. In an attempt to regain his position on the bench, he claimed the Senate did not hold proper impeachment proceedings under Article I. Impeachment articles were sent from the House. The Senate Judiciary Ctte deliberated on the Articles and reported to the full body, but a trial was not held in the Senate.

SC held the case was non-justiciable. There is a lack of judiciably manageable and discoverable standards. Further, the Const gives Congress, especially the Senate, authority to handle impeachment proceedings. The text of the Const provides for impeachment under Article I§3(6). The Senate shall have sole power to try all Impeachments." Nixon contends the word "try" requires a full Senate trial.

A full trial is not necessary as the Senate has pwr to limit proceedings. There was no intent of Framers to imply a set method for the Senate to handle impeachments. The Const does specify three requirements of Congress: 1) Members must be under oath; 2) a two-thirds vote is required in the Senate; and 3) the Chief Justice will preside over impeachment of the President.

If the Const intended a full trial, it would have made specific mention.

Judicial review would violate separation of pwrs. Further, impeachments must have finality or they could drag on endlessly.

Powell v. McCormack: Commitment to Another Branch A House Resolution forbade Rep Powell from taking his seat in the House b/c of a finding that he made false expense reports to the House and wrongfully diverted House funds for personal use.
Powell declared the denial of his seat was unconstitutional because he met the age, citizenship and residency requirements to hold a seat in Congress under Article I, §2(2).

D argued that "each House shall be the Judge of the...Qualifications of its own Members" under Article I, §5(1).

If the D is correct, there would be a non-justiciable political question because of the separation of powers. If Powell's view is correct that the Constitution only requires the 3 enumerated qualifications, then further consideration would be necessary to whether any of the 6 items for the PQD are part of the case.

This is a question for Congress, but the SC must determine the parameters for Cong to proceed.

SC: Congress can exclude a Member who meets the 3 requirements of Article I, §2(2).

*Such a judicial resolution will not result in multiple pronouncements on the same issue. Case is justiciable.*

**II. Congressional Power under the Commerce Clause**

**A. Intro – More on Federalism**

1. The framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal protected from intrusions by the other. Para: J. Kennedy.

2. Framers enumerated powers to quell fears that national government would have unchecked powers. In fact, Hamilton in Fed 84 stated there is no need for a Bill of Rights because the Fed can only do what it is enumerated to do.

3. Federalism provides efficiency. What may not require federal attention, could require state attention.


46: Hamilton argues that the Fed should have limited powers and allow states to do more so people can move about and select the type of state govt most beneficial to them.
5. Interest groups that are minorities nationally, may be majorities locally.

6. Under federalism, states may experiment on policies and such experiments, if effective, could be adopted nationally.

B. Evolution of Commerce Clause – Article I, §8 gives Congress the power to regulate Commerce w/ foreign nations, and among the several states, and with the Indian Tribes."

1. Express?Plenary Pwr: The clause might grant such pwr to Congress by allowing it to do anything reasonably regarded as regulation of anything of interstate commerce (inter comm) of foreign commerce.

2) Implied Limitations: Limitations on state powers to affect commerce.

3. Means/Ends: Let the end be legit w/in the scope of the Const and all means which are appropriate, which are plainly adapted to that end in the spirit of the Const will be constitutional.

4. Congressional action for the accomplishment of objects not entrusted to the fed will require the SC to strike such an action.

D. The Beginnings of The Commerce Clause

1) Gibbons v. Ogden: Commerce Defined

A federal statute concerning the navigation of waters between states will not be trumped by one state's monopolistic regulation on commercial intercourse.

Marshall – Our Const is one of enumeration, and, therefore, one not of definitions to ascertain the extent of its powers. Commerce describes commercial intercourse between nations, and parts of nations, in all its branches, as is regulated by prescribing rules for carrying on that intercourse.

Commerce Clause does not pertain to internal commerce w/in a state. (We will see some expansion of this premise.)
Congress has the right to regulate and prescribe the rule by which commerce is to be
governed w/in the bounds of the Const.

Too narrow a reading of the Const and limitations on the enumerated pwrs will harm the
Union.

Affect on Internal Commerce: Congress can regulate intra state commerce that infringes
upon commerce w/in another state. (prohibiting a NJ boater to operate in NY waters is invalid.)

5 Motifs in Gibbons:

1. Meaning of Commerce
2. The range and application of the commercial regulatory pwr
3. The limits of regulatory pwr
4. The question of exclusivity; role of the state inspection laws
5. The reasons for the rejection of a national regulation of the commercial regulatory pwr

Marshall on Commerce: "If, as has always been understood, the sovereignty of Cong,
though limited to specified to objects, is plenary as to those objects, the pwr over commerce
w/ foreign nations, and among the several States, is vested in Cong as absolutely as it would
be in a in a single govt, having in its Const the same restrictions on the exercise of pwr as
are found in the Const of the U.S. The wisdom and the discretion of Cong, their identity w/
the people, and the influence which their constituents possess at elections…

10th Amdt is no bar to Congress' regulation of Inter-Comm.

SLAVE CASES

A. The Interstate Slave Trade

Groves v. Slaughter (1841)

Miss. Const of 1832 forbade the importation of slaves into the state for sale there,
was attacked as an impermissible restriction of inter comm. MS law was designed to
protect its own slave trade from OOS competition.

McLean Concurrance: Slaves are counted as citizens in the Const; therefore, they
cannot be part of Commerce. States are free to deal w/ slavery as they wished.
Slavery is local in character and belongs to the States. It is an evil up to state
determination.
Taney Concurring: The power over the subject is exclusively w/ the states. Such pwr cannot be controlled by Cong under any mechanism.

Baldwin Concurring: A state may abolish slavery. If it allows for slavery w/in the state, it cannot prohibit the slave trade. Traffic in slaves may be regulated. A state may regulate its slave trade internally, but when it extends beyond the borders to other states and citizens, it is limited by the Const. It's avowed purpose is to prevent them being the subjects of intercourse w/ other states when introduced for the purpose of sale

D. Old Formalistic Approach

Formalism: The Court will examine the statute and regulated activity to determine whether certain objective criteria are satisfied. Upholding regulation triggered by the fact that goods cross state lines is a formal approach that ignores actual economic effects and legislative motivation.

Realism (Counter to formalism): A realist approach attempts to determine the actual economic impact of the regulations or the actual motivation of Congress.

US v. EC Knight – Sherman Act and Interstate Commerce Act Effects on Commerce Clause

The Commerce Clause does not prohibit a monopoly in Manufacturing. Any regulation of manufacturing is for the states. Manufacturing is not Commerce. The effect on commerce b/c of a monopolization of sugar is an indirect effect on inter comm and, therefore, not violative of inter comm.

Govt arg that sugar monopolization was denying Americans a necessity was disapproved.

Commerce is an indirect result of manufacturing and, therefore, not a regulated element of manufacture. Manufacture does not determine when the good passed from the control of the State and belongs to Commerce.

Regulating Manufacture would encroach upon the States.

Dissent: A monopoly directly affects the freedom of in buying and selling articles to be sold out of state. When manufacture ends, the good is an article of commerce.

The common govt of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union and can't be controlled by one state.

Sugar monopolization could endanger prices for all Americans and Congress is the body to regulate and protect.
When manufacture ends, that which was manufactured, becomes a subject of commerce. The buying and selling of the good is commercial intercourse. When the free course of interstate intercourse and trade is disrupted, Congress may restore order.

F. Move to Realism and Away from Formalism

Shreveport Rate Case: Substantial Economic Effect

Shippers of goods internally cannot discriminate against OOS shippers by charging more for the transport of interstate goods than intrastate goods. Congress was granted authority to regulate intrastate practices that negatively affected inter comm in order to 1) provide security for the traffic, 2) provide for efficiency and 3) to maintain conditions upon which inter comm may be conducted on fair, unhindered terms.

Where inter comm and intra comm are so closely connected that one govt is required to provide control over another, the Fed will be supreme over a State.

Intra Comm cannot be injurious to inter comm.

Stafford v. Wallace: Current/Flow/Stream of Commerce:

Packers and Stockyard Act of 1921 regulated rates and set standards for inter comm in livestock to eliminate collusion btw stockyard mgrs and packers.

The transactions at the stockyards are part of the flow of inter comm. They are a throat through which inter comm flows. Such movements should not be adversely affected along the way (by a stock yard.)

This is holding based on functional, not formalism whereby the stock yard collusion would be indirect.

G. Emergence of General Police Power & Commerce Clause

Previously, Cong had attempted to directly regulate intrastate activities. Congress also began to prohibit the transport of certain items or persons for economic reasons and for moral reasons.

The Lottery Case: The Fed Lottery Act of 1895 prohibited the interstate transport of lottery tickets. The Act was upheld on the grounds that the carrying of commodities btw states which have a monetary value constitutes inter comm.

Lotteries were considered immoral, and the Court held that the pwr for Cong to regulate inter comm is plenary and subject only to Const limitations. Cong may, under the power to regulate inter comm, devise methods to protect the people from all states.
No Const clauses give people the right to transport items that may harm public morals. The Const guarantees a person's rights to enjoy his/her faculties, use them in lawful ways, live where he/she wants to live and pursue any calling. Such rights should not be invaded by moral vices transported over state lines.

States are free to sell tickets internally, but not for export. States can be expected to determine their own morals but not for other states.

*The Comm Cls will often be pretext for a Police Pwr which is not allowed under the Const.* Police pwr will be veiled as Comm Cls. Ostensible Purpose v. Real Purpose. See Marbury pg. 63 (btm)-4.

A guard against pestilence.

Dissent: Court is creating a Fed Police Pwr by making any article one of inter comm as soon as it is transported from State to State. An invite to eat in another state could be considered inter comm under the ruling.

*Hippolite Egg v. US* – Eggs failing to meet federal labeling requirements were seized b/c the labels on the eggs failed to mention a contained ingredient. If the eggs did mention the ingredient on the label, they would not have been seized. Eggs called an "outlaw of commerce."

*Hoke v. US:* The Mann Act which prohibited the transportation of women in inter comm for immoral purposes. "Congress has complete pwr over transportation btw the states, and may adopt means that have the quality of police regulation."

A guard against immorality.

H. Limits of the General Police Power

Around 1920, the SC was unwilling to allow Congress to enact pro-labor legislation. The SC saw it as an unwarranted interference w/ the free market system.

*Hammer v. Dagenhart (Child Labor Case)*

Formalist Perspective

The Child Labor Act of 1916 prohibited the interstate transport of goods made in factories employing children under the age of 14 or employing 14-16 year olds for more than 8 hours a day. The Act was declared unconstitutional.

Justice Day stated there was no evil inherent in the goods as was the case w/ lottery tickets. Labor of production is over b4 transportation. Future intended inter comm should have no bearing on regulation and should not make production subject to fedl control.
As in *EC Knight*, manufacture of goods by children precedes transportation and should not be regulated by the Comm Cls.

Cong cannot prohibit movement of ordinary goods or commodities.

Comm Cls was intended to create a uniform market rather than a crazy quilt of regs. Govt args that the Act should stand to bring about uniformity w/in the states pertaining to child labor.

SC says the Act is not intended to regulate transportation, but is designed to standardize child labor laws amongst states.

Child labor may be immoral but Cong cannot regulate production.

States that allow child labor have an economic advantage over states that do not, but the "Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.

Congressional intervention in such a local matter would be an invasion by the fedl pwr.

If Congress could regulate matters entrusted to local authorities by prohibiting movement of commodities, all freedom in commerce would be put to an end.

*The act in a two-fold sense is repugnant to the Const. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local ,matter to which the fedl authority does not extend.*

*The means and the ends do not meet -- Pretext*

*Dissent: If an act is w/in the pwrs specifically conferred upon Congress, it seems to met hat is is not made anyu less constitutional b/c of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.*

Cong has plenary pwr and should be able to regulate an indirect effect of Commerce. That which is plenary should not be reviewable by the courts. *Justice Holmes*

Govt's Structural Arg:

Premise Uniformity of Mkt

Premise Unfair Competition

Child Labor Act is necessary

Conclusion: Unconst

It's rejected.
Lottery Decision should have been applied in this case.

I. Return of Formalism

The New Deal Court, which infuriated FDR, approved of the Knight decision that suggested that there must be direct and logical relationship btw the intrastate activity being regulated and interstate commerce. This thinking proved burdensome for FDR and pointed to the Court's willingness to strike down any regulations that might violate the 10th Amdt. Not part of stream of commerce.

Schechter Poultry v. US

The National Industrial Recovery Act (NIRA) authorized the President to approve codes of fair competition. FDR approved new standards for NY poultry producers to establish higher wages and less hours, prohibit child labor and allow for unionization.

The SC held that once the chickens were trucked into NY, the purchase by slaughter houses for processing and resale was strictly intra state commerce. The chickens did not leave NY.

The Flow had ended. The chickens had come to rest in NY.

There was no direct effect on inter comm. In this case, the intrastate effect on inter comm is indirect and should be regulated by the State. Unlike Shreverport, there is no substantial relationship here.

SLIPPERY SLOPE: If the Comm CIs were construed to reach all enterprises and transactions which could be said to have an indirect effect upon commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the fedl govt.

The hours and wages of Schecter's e'ees have no direct relation to inter comm.

If the govt is willing to set minimums for wages and maximums for hours on those conducting internal commerce, then the govt might want to also regulate the number of e'ees, rents, and methods of doing business.

Again, there is a question of uniformity as was there in the Child Labor case, and the SC states that it is not its job to determine economic advantages or disadvantages.

Cardozo: The Act would obliterate the distinction btw what is local and what is national in commerce.

Carter v. Carter Coal Co.
Fed Act was intended to stabilize the coal industry during Depression. The Act called for local boards to negotiate wage and hour terms that would be binding to mine operators in the area. A stock holder in Carter sued to enjoin the company from complying. SC held the act UNCONST

Justice Sutherland stated, following Knight, that coal production is local. Cong created a police power that should be left to the states.

Cong should not go beyond those pwrs enumerated. "Where the end sought to be attained by an act of Congress is legitimate is wholly a matter of Const power and not at all of legislative discretion." There are many ways to a Const end, but those ends not w/in the Const are closed.

Commerce is equivalent to intercourse for the purpose of trade. The incidents leading up to the mining of coal do not constitute intercourse. Extraction of coal is local. Production is not commerce.

Local Evil: The evils that result from mining are local. Any effect on inter comm is indirect, not direct.

Cardozo Dissent: Like Shreveport, intrastate commerce can have a great impact on interstate commerce. A strike in one state can seriously affect the other states.

"Regulation of prices being an exercise of the commerce pwr in respect of interstate transactions, the question remains whether it comes w/in that pwr as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and Ag and manufacture are not inter comm considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other."

The plight of the coal industry was not merely a menace to the owners and miners; it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy…Commerce had been choked and burdened."

Govt Structural Arg:

Premise I: to be preserved L stable prices; a modicum of efficiency in the market

Premise II: What is necessary: the remedy that Cong has provided in the Coal Conservation Act

Conclusion: The Coal Conservation Act is therefore Const.

The direct/indirect effect should be viewed broadly. The prices for intrastate coal have so inescapable a regulation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other...

The plight of the coal industry did not just a menace to mine owners and workers but to the entire public in need of a fuel supply for the nation.

J. The Revolution of 1937
After 1937, the SC showed a willingness to defer to legislative decisions. The court will uphold commerce-based laws if the Court determines that the activity being regulated "substantially affects" interstate commerce. Only Lopez has affirmed a challenge to Congress overextending its authority.

The Court expanded the reach of the Commerce pwr by recognizing 3 theories upon which commerce-based regulation may be premised: 1) an expanded "substantial economic effect" theory; 2) a "cumulative effect " theory; and 3) an expanded "commerce-prohibiting" protective technique.

Voiding a Federal Commercial Statute: A Ct may invalidate leg enacted under Comm Cls only is if it clear that there is no rational basis for a Cong finding that the regulated activity affects inter comm or that there is no reasonable connection btw the reg means selected and the ascerted ends. 

**Hodel**

**NLRB v. Jones & Laughlin – Substantial Econ Effect**

**Facts:** The National Labor Relations Act established a comprehensive system for regulating labor/management relations. It established the right of e'ees to organize and bargain collectively. It also sought to ensure union members were not discriminated for their memberships.

Workers have a fundamental right to unionize.

U.S. policy seeks to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.

D's ARG: The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It puts Fed into regulation of all labor across the country.

Justification of the Act: The Act purports to only reach what may be deemed to burden or obstruct that commerce and, thus must be seen as regulating w/in Const bounds. 218

It is the effect upon commerce, not the source of the injury, which is the criterion. D has businesses in many other states and exports 75% of products OOS.

Discrimination and coercion to prevent the free exercise of a right is a proper subject for regulation by a legislature.

Schechter and Carter Do Not Apply

Cong's Plenary Power/Reg of Industry/Workforce Congress can regulate beyond to the stream or flow of commerce. Burdens and obstructions may be due to injurious action springing from other sources. The power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement. 219 The power is plenary and may be exerted to protect int. comm no matter what the source of danger is.
The stoppage of commerce b/c of industrial strife would have substantial effects upon inter. Comm. Strikes will cause a "substantial burden" to commerce.

Unions also have the power to create a substantial burden by walking out.

Justice Hughes says there is an effect on commerce and therefore valid. Any break in the flow w/in J&L would have an effect on the nation.

Afterall, Cong has plenary power and Shreveport Rate case should stand. Intra comm that could have a negative effect on inter comm can be regulated. There is no need to need to deal w/ "flow of commerce."

Practical Consequence – It is now irrelevant whether the activity being regulated occurs b4 , during or after the interstate movement. So long as the regulated activity has a "substantial economic effect" upon inter omm, that activity may occur substantially b4 the interstate movement.

*Distinction btw "manufacture" and "commerce" is rejected.*

Cumulative Effect Theory

This expansion of the CommCls provides that Cong may regulate not only acts which taken alone would have a substantial economic effect on intercomm, but also an entire class of acts where the class may provide a substantial effect. *If everyone jumped off the bridge…*

Wickard v. Filburn

Under the Ag Adjustment Act, quotas were set for wheat production. Wickard harvested wheat for sale and for use on his farm and dinner table. He was fined for exceeding his quota b/c farmers were not allowed to grow beyond the quota for home use.

Wickard argued home use is local in character and only has an indirect effect upon inter comm.

SC upheld the Act. Once again, they argued "production" is subject to the CommCls. Further, indirect effects will not foreclose Cong regulation.

Consumption of home-grown wheat would have a cummulative effect on the wheat market and prices. Home growing will lead to less wheat on the market. One farmer's consumption may be trivial, but all farmers together could have an effect on inter comm. Home grown wheat is competing against wheat on the market where the market had seen recent woes. Regulation is reasonably connected to protecting commerce.

Commerce-Prohibiting Technique

The right for Congress to use prohibitions on the interstate transportation of items or people in furtherance of police power or general welfare regulations. This technique was widely expanded after 1937.
U.S. v. Darby – Reversal on Hammer

Hammer held that Cong could not prohibit interstate sale of goods made with child labor.

Facts: Darby was charged w/ violating FLSA. The Act prohibited the interstate shipment in commerce of goods made by laborers who were paid less than a min wage or who were forced to work more than a max number of hours per week.

SC – Manufacture is not commerce. The shipment of such goods is commerce, and the shipment of such goods made in violation of the Act may be prohibited by Congress as a regulation of the commerce. Lottery Case and Mann Act based on same principle.

Cong is free to exclude from commerce articles whose use in the states for which they are destined if they may be injurious to the public health, morals, or welfare even if the state has not sought to regulate its use.

Inter Comm should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the states where the commerce flows. Public Policy Rationale

Such a regulation is within the plenary pwr conferred on Congress by the Commerce Clause. "The motive and purpose of a regulation of inter comm are matters for the legislative judgement upon the exercise of which the Const places no restriction and over which the courts are given no control.

Means/End – The Act criminalized the employment of workers not abiding by the Act. Cong can impose direct rights or prohibitions or conditions on inter comm. Congress "may choose the means adapted to the attainment of the permitted end" even if Cong is involved in controlling intrastate activities.

Does the Court allow for any intrastate activity w/ an element of inter comm to be regulated by Cong? It appears so.

K. Modern Commerce Clause Doctrine

Civil Rights and the Commerce Clause

Civil Rights Act of 1964 (Title II) bans discrimination in places of public accomodation. The ban applied to all but the smallest, localized hotels and restaurants. Any establishment which serves interstate travelers, or in the case of a restaurant which buys food that had moved substantially in inter comm.

Critics/Senate Testimony – Critics argue the 14th Amdt should serve as a means of protection from discrimination, not the Comm Cls.
Supporters of the Comm CIs/Discrimination argue that it is sufficient that discrimination has a direct and substantial effect on inter comm. Blacks curbed their inter state travelling b/c they knew they would have difficulty in finding accomodations.

Heart of Atlanta Motel

A motel that received 75% of its business from OOS travelers driving on nearby interstates refused to rent rooms to blacks. The SC said this violated the Comm CIs and Civil Rights Act. Discrimination discouraged travel and affected inter comm.

"The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." "If it is inter comm that feels the pinch, it does not matter how local the operation that applies the squeeze."

The Police Pwr/Moral/Public Policy reasons behind the Act were also upheld. Article II designed to deal with a moral problem.

Katzenbach

Commerce CIs was used to regulate an overwhelmingly local activity.

Restaurant bought meat from a supplier who got much of its meat OOS. 50% of food costs. The restaurant challenged the application of Title II and argued that serving Blacks would shun white customers.

Justice Clark: Discrimination in restaurants discourages Blacks from traveling. Blacks cannot buy food on the road except in isolated and unkempt restaurants under unsatisfactory conditions. One can't travel w/out eating. Further, such discrimination prevents professionals and skilled people from moving into areas where discrim occurs and thereby caused industries to be reluctant to establish there.

Restaurants that discrim sell less business in inter comm and travel is obstructed by the discrim. Negative flow of inter comm.

Much like Wickard. It is not what one restaurant is doing, but what the cumulative effects are.

It was appropriate for Congress to apply Title II to those restuarants offering to serve interstate travelers or serving food, a substantial portion of which has moved in inter comm.

"Where we find that legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

Perez v. US – upheld a fedl criminal stat prohibiting "extortionate credit transactions."

The problems of loan sharking on the economy were remedied by Cong through legislation.
D contends loan sharking is a traditionally local activity. The stat was upheld upon reliance on *Darby* "a class of activities was held properly regulated by Cong w/out proof that the particular intrastate activity in which was laid had an effect on commerce." Loan sharking has a significant impact on interstate business. Cumulative Effect

Organized crime was siphoning off of local interests in order to finance national operations.

Stewart Dissent; Crime should be treated locally. Reserved for states under 9th and 10th Amdts. All crime is a national problem, so it is not enough to say loan sharking is a national problem.

*Need to Add Lopez and Slave Cases to Comm Cls*

Other Congressional Powers

Treaty Power

The treaty pwr is divided btw Senate and Pres. Pres may make a treaty, but it may be ratified by 2/3 vote. Article II.

When a conflict arises btw a valid fedl stat and a valid treaty, the one that was passed last controls. "The last expression of the sovereign will must control." Tribe The power to ratify treaties in effect an enumerated legislative power, just like the specific pwrs listed in Article I,§8. Even if a treaty's subject area is not w/in Congressional control, if it falls w/in the scope of an otherwise valid treaty, it will be valid as a "necessary and proper means" of exercising the treaty pwr. It will also be binding on the States b/c of the Supremacy Cls.

A treaty may not violate Const guarantees

*Missouri v. Holland*

Facts: MO tried to prevent U.S. Game Wardens from enforcing the Migratory Bird Treaty of 1918 on the grounds that the treaty violated the 10th Amdt. Treaty was passed to protect birds migrating btw U.S. and Canada that were a critical food source to people and controllers of pests for farmers. Hunting seasons were put in place to increase bird populations and the killing, capturing and selling of birds was also prevented except where allowed by Sec of Ag.

Treaties are authorized under Articles I, II and VI.

Treaties are unconstitutional if they aim to do what Cong would not be allowed to do, especially if the aim is derogate state powers.

If the treaty is valid, it will be the supreme law of the land. Then there will be no 10th Amdt b/c it will be deemed a necessary and proper means to execute the powers of the govt. Article I,§8.
The treaty does not violate the 10th Amdt. The treaty is made under the authority of the U.S. There is a national interest to be protected of the highest priority.

Nothing in the Const exists that would deny the govt to protect a food source and our crops and forests. Protection of a resource.

Reid v. Covert – Note 235

Civilians have a right to a jury trial. While Cong has right to regulate the armed svcs, it is limited by the bill of rights to provide a civilian the right to a trial by jury.

The War Power

Cong is given pwr to declare war and to tax and spend for national defense. It also has explicit authority to "raise and support armies" and to provide and maintain a navy. Article I,§8.

The President is Commander in Chief (Article II,§2). Cong and Pres split the war powers.

Woods v. Cloyd Miller Co.

The case hinged on the constitutionality of the Housing and Rent Act of 1947. The Act froze rents at wartime levels.

The Act was upheld b/c the war power sustains this legislation even though the war was officially over in 1946. "The war power does not necessarily end w/ the cessation of hostilities." Cong has the pwr under the war pwr act to control the forces a shortage of a good may cause as an effect of the war.

Court recognized the potential of possible abuse, but the need to regulate in this case was essential.

Justice Jackson (Concurring): No one will question that this pwr is the most dangerous one to free govt in the whole catalogue of pwers.

The Taxing Power

Article I,§8 – "The Congress shall have Power to lay and collect taxes, duties, Imposts and Excises

The power to tax is an independent source of federal authority. Congress may tax activities or property that it might not be authorized to regulate directly under any of the enumerated powers. Ex. Cong could pass a national marriage tax, yet marriage is an area beyond direct fedl legislation as long as the tax is enacted to raise revenues and not dissuade marriage.

All federal taxes must be uniform throughout the U.S. They can't discriminate amongst the states.

Regulatory Effect of Taxes – Almost every tax will have at least an incidental regulatory effect. A tax on cigarettes is likely to cuase people to smoke less. The accomplishment of the same regulatory effect through an enumerated power as a tax will not pose a Const threat to the tax.
Where the regulatory effect is one that could not be achieved directly (the subject matter is so local as not to fall under CommCls) it is possible the tax will be stricken as an invalid disguised regulation.

Bailey v. Drexel – *The Child Labor Tax Case*

Previous attempts by Cong to regulate child labor were struck down – *Hammer*.

In *Bailey*, the SC invalidated another attempt by Congress to place a 10% tax on annual profits of employers of child labor in specified industries. SC held that this was more of a penalty than a tax.

**ISSUE:** "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so called tax as a penalty."

The SC worried that upholding the tax could lead to unchecked taxation of any area of public interest and endanger states' rights. It would violate the 10th Amdt.

When a tax loses its revenue raising purpose and is merely a penalizing feature, the tax loses its character as such and becomes a mere penalty designed to regulate and punish. Here, the tax's prohibitory purpose was clearly evident.

*The Court has willingly accepted other taxes that appear punitive – tax on oleomargarine which wiped out the industry.* One explanation was that the Court saw the child labor tax as a direct attempt to circumvent the *Hammer* decision.

Today, the court would likely uphold the tax. It would probably be upheld under the CommCls and not violate the 10th Amdt since the 10th Amdt is no longer seen as setting aside particular areas for state regulation.

*Kahriger – The existence of regulations will not prevent a measure from being found to be valid if the regulation is reasonably related to collection of the tax.* The requirements on bookies that they report their names, addresses and businesses was upheld b/c the registration requirements were "adapted to the collection of a valid tax."

As long as substantial revenue is produced, the Court will not scrutinize Congress' purpose in enacting a tax.

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 -- Oleomargarine

*Modern Rules -- The Tax v. Regulation* debate is not much of a factor today b/c regulations are likely to be sustained under the commerce power and a tax could be sustained as a "necessary and proper" means of implementing the commerce pwr, even if invalid under the enumerated taxation pwr.
Spending Power

Article I, §8 gives Cong the power "to lay and collect taxes...to pay debts and provide for the common defense and general welfare of he US..." The power to spend is thus linked to the pwr to tax. $ may be raised by taxation and then spent for the common defense and general welfare of he US.

The power to spend is not limited to carrying out the enumerated powers (Butler.) The spending and taxing pwrs are enumerated pwrs in themselves and Cong may spend or tax to achieve the general welfare, even though no other enumerated pwr is being furthered.

U.S. v. Butler – Cong can't regulate for general welfare.

Facts: The Ag Adjustment Act of 1933 was designed to stabilize production in ag by assuring farmers that their products would be sold at a fair price. The act imposed a tax on processors of ag commodities. The proceeds of the tax were to be used to subsidize farmers who agreed to restrict production.

The role of the SC is to lay the Stat in question side by side w/ the Const to see if the Stat is valid. The question is not what pwrs the govt ought to have but what pwrs it has been given. Hamilton and Madison disagree over whether pwr to tax and spend should only extend to enumerated pwrs.

The power to tax and spend for the general welfare is a Const right for Congress.

SC is not concerned w/ determining the scope of "general welfare?" Rather, the act invades the rights of the states. It is a stat plan to regulate and control ag production, a matter beyond the pwrs delegated to the fedl govt. The tax and appropriation of funds to downtrodden farmers are means to an unconstitutional end.

The taxing and spending pwrs may not be used as instruments to regulate a matter of state concern where Cong has no authority. The regulation is not voluntary. Not complying means losing $$$.

The pwr to confer or w/hold unlimited benefits is the pwr to coerce or destroy.

There is an obvious difference btw a stat stating the conditions upon which $s shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.

Dissent: There is no threat of coercion, rather a presentation of hope.

Paulson: Roberts' fears about coercion are unwarranted. People(farmers) may yield, but they have choices. Coercion occurs where there are no choices. Unattractive options are still options.

Butler Today: The Court will not prevent Cong from using its spending pwr in areas of primarily local interest. That is, the 10th Amdt is effectively dead as a limitation upon fedl spending pwr, just as it essentially dead as a limit upon the fedl commerce pwr.

Steward Machine Co. v. Davis
Facts: Under the federal unemployment compensation system, an e'er paid a tax to the U.S. Treasury. If the e'er also made contributions to a state unemployment fund that had been certified by the Sec of Treasury as meeting certain "minimum criteria" designed to assure financial stability and accountability, the e'er received a credit of up to 90% against the fed tax.

The Court concluded that the system was not coercive of the States in contravention of the 10th Amdt or of restrictions implicit in our federal form of govt.

Cardozo: It must be shown that the tax and credit in combination are weapons of coercion against state autonomy to be ruled unconst.

The need for relief from the probs of unemployment is urgent.

Assailants of the stat say its dominant end and aim is to drive state legislatures under the whip of economic pressure into the enactment of unempl. laws at the bidding of the fed govt.

Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and nation joining in a cooperative endeavor to avert a common evil.

The state and the taxpayer were not coerced. Difficulty w/ Petitioner's contention is that it confuses motive w/ coercion. Every tax is in some measure regulatory.

Steward Distinguished From Butler on 4 Grounds

1. Proceeds of tax not earmarked for a special group; 2) system operated in a state only if state approved; 3) State could repeal the law at its whim; 4) the end, unemployment relief, was one which the nation and state may lawfully cooperate.

South Dakota v. Dole – Can Congress regulate indirectly by granting subsidies or tax exemptions to people who meet specified conditions under the taxing and spending clause? YES.

W/holding a portion of hwy funds to states that did not prohibit the purchase of alcohol by people under 21 was deemed valid.

Rhenquist – Spending pwr is not unlimited. It is subject to several restrictions. 1) Exercise of spending pwr must be in pursuit of general welfare. Courts should defer substantially to judgement of Congress when determining if a particular expenditure is intended to serve general public. 2) If Cong decides to condition the States' receipt of Fedl $, it must do so unambiguously. 3) Conditions on Fedl grants might be illegitimate if they are unrelated "to federal interest in particular national projects or programs. 4) Other Const provisions may provide an independent bar to the conditional grant of Fedl funds.

All SD would lose was 5% if it did not comply. Cong is offering mild encouragement to comply.

Katzenbach v. Morgan (pg. 253)
Congress granted authority through to "remedy" racial discrimination in voting. The AG and Director of the Census were given unreviewable pwr to determine if literacy tests were used in state elections. Cong acted appropriately on the grounds that the 14th and 15th Amdts were being violated. Therefore, the enactment of the law was "rational in both practice and theory."

Cong can take preventative measures: Cong has the pwr to forstall the occurrence of acts that would violate rights that the courts have found or would find protected by the Const.

Voting Rights Act of 1965 provides that no person schooled in Spanish in PR can be denied the right to vote so long as they went beyond the 6th grade. This contrasted w/ Lassiter which held literacy tests do not violate 14th or 15th Amdts.

NY argued it had a right to keep uniformed people from the voting booths.

Congress argues it can regulate based on Equal Protection Clause. Court concurs. To deny a community its voting rights is an invasion of rights. Denying voting rights is no way to induce people to learn English. Spanish newspapers can educate about issues as well as English papers.

NY suit may be based on prejudice.

Dissent: NYC established that it had no discrim purpose. The City would not violate the Const in adopting its new rules, and that Congress, therefore, lacked pwr to remedy a non-existant violation by requiring preclearances of the changes.

Justice Harlan: To allow a simple majority of Cong to have final say on matters of Const interpretation is (fundamentally) out of keeping w/ the Const structure...

Choper: Congress may investigate the facts surrounding state action of this type and then prohibit the practice if, in Cong's judgement, it lacks the compelling basis which the Court demands to uphold it. Cong is free to invalidate govt actions that the Court has already upheld or might otherwise uphold in the future.

Wechsler: Courts will not enforce federalism based limitations on Congressional pwr b/c the political constraints on Congress are sufficient to protect against national improvident action.

Morgan is best understood as a tool that permits Congress to use its pwr to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby, "forcing" the Justices to take a fresh look at their judgements.

The means are plainly adapted to the end. – Rational Basis Test

EEOC v. WY: Court upholds that Cong had power under the commerce clause to require that states follow federal standards prohibiting age discrimination in e'ment. It did not decide whether the prohibition "could also be upheld under §5.
Oregon v. Mitchell: Court considers 1970 amdts to Voting Rights Act of 1975. The amdts eliminated all literacy tests and made the voting age 18. The court upholds the literacy test prohibition as a valid regulatory remedy.

The 18 yr old voting amdts would destroy state autonomy in state elections. The state should be able to set the voting age.

Very shortly, the 26th Amdt passed to make the voting age 18.

Jones v. Mayer: A pvt real estate developer was sued for not selling to a black couple under an 1866 civil rights act provision that all people should be able to buy and sell real property. The couple won, and the act was held valid. Congress can legislate to ensure that a black man can buy whatever a white man can buy.

Lopez

2. U.S. v Lopez (1995): for the first time invalidated a federal statute on the grounds that it was beyond Congress’ Commerce Power
   a. Gun Free School Zones: The statute was the Gun Free School Zone Act of 1990, in which Congress made it a federal crime “for any individual knowingly to posses a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone”
   b. Little Connection to Commerce: The statute clearly had less explicitly connect to interstate commerce than most, for example:
      1. No findings: did not include explicit language that the activity being regulated affected commerce.
      2. No Jurisdiction nexus: statute did not include a jurisdiction nexus. Congress could have made it a crime to possess a gun that moved in interstate commerce (jurisdictional approach used in Civil Rights Cases).
   c. Statute struck down: 5-4 struck down the statute
      1. Substantial effect required on Commerce: The majority held that it is not enough that the activity being regulated merely “affects” interstate commerce. The activity must substantially affect.
      2. Requisite effect no present: Had not been demonstrated that possession of guns in schools substantially affects commerce:
         a. Not Commercial: activity being regulated was not itself a commercial activity.
            i. Distinguished Wickard: from the activity at issue here, saying that Wickard, “involved economic activity in a way that the possession of a gun in a school zone does not.” Unlike the wheat growing regulation, this was not part of a larger regulation of economic activity, in which the regulatory scheme cold be undercut unless the intrastate activity were regulated.
b. Government's argument: the federal government, argued that the gun possession in schools does have a substantial effect on commerce. Asserted the following syllogism:
   i. possession of a firearm in a school may result in violent crime, and
   ii. violent crime affect the functioning of the national economy in several way
      a. costs of crime are insured against
      b. violent crime reduces individuals willingness to travel to areas of the country they believe are unsafe; and
      c. violent crime in the schools reduces the schools’ ability to educate their students, who become econ unproductive

c. Argument Rejected: Under economic productivity argument “Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law, for example. Under the gov’t approach “It is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where the states have historically been sovereign…we hard pressed to posit any activity that Congress is without power to regulate.”

d. Parade of horribles: some of the types of federal regulation that would fall within the Commerce power if the gov approach were accepted....”Congress could mandate a federal curriculum for local schools...Similarly, “Congress could...look at child rearing as ‘falling on the commercial side of the line,’ because it provides a ‘valuable service-namely, to equip (children) with the skills they need to survive in...the workplace.’” Such results would make the Commerce power limitless.

e. “To uphold the Govts contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the CC to a general police power of the sort retained by the States” Prior cases may have extended the CC, “but we decline here to proceed any further.” To uphold the act here “would require us to conclude...that there never will be a distinction between what is truly national and what is truly local...”

f. Restore rule of law

d. Concurrence:
   1. Kennedy:
      a. Commercial transactions untouched-stare decisis: to leave untouched prior cases holding that Congress
has full power to regulate what are truly commercial transactions, even if the transaction being regulated is a very local one: stare decisis “mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have single market and unified purpose to build a stable national economy.”

i. Not commercial: the activity being regulated was not essentially commercial

ii. Traditionally left to states: activities that had traditionally been left to the states to regulate should be further off-limits to the federal commerce power than activities that had not been so limited. Education was one of those. Gov would “foreclose the States from experimenting and exercising their own judgment.

e. Dissent: Stevens, Souter, Breyer, and Ginsburg) Breyer principal

1. Rational Basis Test: “whether Congress could have had a rational basis for finding a significant or substantial connection between gun-related school violence and interstate commerce.” (Majority did not mention rational basis, whether there actually was a substantial connection, no merely whether Congress could have rationally believed that there was.) Breyer concluded yes.

a. Gov Arg Accepted: Breyer accepted the Gov arguments on this point. There was ample evidence avail to Congress that gun related violence in the school interfered with the quality of education. And evidence that education was linked to econ viability of nation.

2. Majority view rejected:

a. Contrary to case law: approach was contrary to cases upholding congressional action regulating activities that had less connection with commerce than gun-in-schools. Example: Katzenbach, a single ac of discrimination at a local restaurant

b. Commercial/non-commercial distinction rejected: the line would be hard to draw. The majority drew the line in the wrong place…”Congress…could rationally conclude that schools fall on the commercial side of the line.”

c. Stare Decisis: unwise to “threaten…legal uncertainty in an area of law that, until this case, seemed reasonably well settled.

3. Souter: the court should look into the legis judgment is within the realm of reason. Congress should have plenary
power to legislate under the commerce clause as long as there is a rational basis.

f. Significance:
   1. Effect must be significant
   2. Commercial Transactions
   3. Findings:
   4. Jurisdictional Hooks:
   5. Examples of Questionable Provisions:
      a. crime for a felon to possess a firearm
      b. crime burn down a dwelling
      c. interfere with a person's efforts to obtain reproductive health services
      d. crime to willfully fail to pay past due child support
      e. awarding marriage licenses to anyone under the age of 18

C. Federal Criminal laws: broad reading has been applied to a number of decisions involving criminal statutes.

U.S. v. Lopez

Facts: Lopez, a 12th grader in TX brought a gun to school. He was arrested under TX state law for possession of a firearm. If he is arrested under a criminal state law, then how does the Gun Free School Zone Act come into play? State charges were dismissed after Feds brought charges under FSZA -- §922(q). Dist Ct convicts. Ct. of App reverses that the law is beyond the reach of the Commerce Clause. S.C. sustains by 5-4 margin.

Are criminal laws generally state issues? Yes.

Fed Paper 45 – The powers regulated by the Fed govt are few and defined. In 1888, Cong began to expand its reach w/ the Interstate Commerce Act.

Rhenquist is willing to buck the trend of expanding reg pwr for Congress and harken back to Fed 45.

Justice Thomas wants to fully restore letter of law to pre-1888 days.

Rhenquist on Gibbons – The court acknowledged limitations on the commerce pwr inherent in the very lang of the commerce clause.

He neglects the plenary power position of Gibbons.

3 Criteia to Consider the Pwr of Congress

1) the use of channels of interstate commerce;
2) 922q cannot be justified as a regulation by which Congress has sought to protect an instrumentality of inter comm.

   1. If §922 is to prevail, it must be as a regulation of an activity that substantially affects inter comm.

§922 contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects inter comm.

This differs from Bass which made it a crime for a felon "to receive, possess, or transport in commerce of affecting commerce...any firearm." Bass had an express jurisdictional element and was upheld to limit it to a discrete set of firearms.

§922(q) has no such mechanism.

GOVT's ARG – See Pg. 160

Rhequist – The govt's arg is not substantial. Further, if adopted, it would create a slippery slope of unlimited regulation.

"Slippery Slope"

   1. Causal Factors
   2. Unwanted results – parade of horrible Unlimited Congressional pwr contrary to Constitution

Rhenquist then questions whether divorce affects inter comm. He creates a slippery slope arg to show the fault in the govt arg as commerce.

The Govt is feeding us a whopper. If we swallow it, we'll swallow many more.

What exactly is Rhenquist doing in the opinion?

   A. There is no rational basis for these regs. The means will not achieve the ends. Rational Basis Test
   B. The Congress is wrong on the facts. Causal relations are purely speculative.
   C. Rhenquist is not challenging Congress on A&B, but rather challenging them by looking to the unwanted implications of the Act..

I think C is the right answer. He is not against keeping guns from schools, but he fears Congress will always have his hand in our lives if the Act stands. Educ and crime are to be regulated by the states.
Justice Kennedy

Paulson thinks it is the most thoughtful.

Pg. 164 last para:

We all have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. We need not revert back to pre-Civil War standards.

He says the federalist nature of the Const is key to Comm Clause/Reg. With a system of state govts and fed govt, the fed should not step on the toes of the state govts. 164-5

Political judgement looms largely in Comm Clause and makes federalism a more problematic pillar of the Const than checks and balances, judicial review and seperation of pwr.

Justice Brennan argued the judgements were political and should not be decided by the courts. The legislature should have autonomy.

Federalism is good (Fed 51) b/c two systems are held accountable and check each other to make sure functions are performed. If the Fed takes over all reg, the balance will topple. 165.

§922(q) upsets this balance.

March 8th

Commerce Clause Standard  [Contrast as std. "strict scrutiny (applicable
Reasonable Basis or Rational Relation to discrimination)]

Comm Clause Context

Question of Substantial Effect on Inter Comm (Shreveport)

Left to Congressional Discretion

(Wickard, Darby, etc.) OR Determined Independently by the courts as per

Lopez

Lopez Dissent –

Justice Souter – Suppose we assume that Souter, like rhenquist, believes that a factual case based on a rational relationship of a substantial effect on guns in school is problematic, how does Souter differ from Rhenquist.
Souter states that rationally based legislative judgements from Congress should be left alone. Give deference to Congress.

This is not a case of discrimination that should have a different standard. The courts should not get involved in a policy matter. If the people don't like what the Cong has done, the people can take approp actions, not the courts.

Justice Breyer: Rhenquist alleges that if the Court takes the dissent's opinion, that the Court will have no checks on Congress and a parade of horribles could result.

Breyer replies that the statute is aimed at curbing an acute, specific threat not one that is broadly written.

Rhenquist replies that Congress will issue statute after statute b/c they have seen that the Court will cooperate. Paulson agrees w/ Rhenquist.

10th Amendment Limitations/Immunity from Cong Reg – Implied Limitations

For 40 years after Carter, the SC did not invalidate any Stats on grounds that it violated state or local govt sovereignty. Many scholars believed 10th Amdt was dead as a check upon fedl pwr under the Comm Cls. This remains so today, but from 1976-1985, the court invalidated several stats citing to 10th Amdt violations.

National League of Cities (1976)

Holding: Comm Cls did not empower Cong to enforce minimum wage and overtime provisions of FLSA against "States in areas of traditional govt functions. The application of the Stat to state e'e's was unconst under the 10th Amendment.

The minimum wage/overtime rules, as applied to local govt officials would clearly affect commerce.

Under the 10th Amdt, Cong may not exercise pwr in a fashion that impairs the State's integrity of their ability to function effectively in the fed system.

1)Applying the FLSA would have been too Costly to state and muni govts.

2) Removal of Discretion: FLSA compliance would strip the states of their discretion to decide how they wished to allocate a fixed pool of funds for salaries.

If FLSA were allowed to effect States, Congress would be mkg fundamental decisions re state e'e's.

Not w/in Cong Authority spelled out in Article I,§8,3.

This case was on shaky ground as soon as a decision was reached, and it was overturned.
Brennan Dissent: Court has no business deciding the issue. Cong has plenary pwr.

Garcia v. San Antonio pg. 267

Should the FLSA apply to the e'ees of a municipally owned transit system? Is the municipal ownership and operation of a transit system a "traditional got function?"

It is impossible to determine what is a traditional function and what is not.

Historical approach won't work b/c it "prevents a court from accommodating changes in the historical functions of the States and subdivisions."

"Any rule of state immunity that looks to the traditional integral or necessary nature of government functions inevitably invites an unelected federal jury to make decisions about which state policies it disfavors and which ones it dislikes."

Not all safeguards to States are torn down, but state interests are to be protected by "procedural safeguards inherent in the structure of the fedl system" not by "judicially created limits on fedl pwr."

Structural Protections – Right to vote in elections, 2 senators, electoral collage are all examples of where the structure of the fed govt has been constitutionally arranged so as to protect state sovereignty. Structure of fedl govt and process by which fedl law is made furnished adequate guarantees for state sovereignty.

Significance of Garcia: Once Congress acts, pursuant to commerce pwr, regulates the states, the fact that a state is being regulated has little practical significance. If a pvt party can be regulated so too can the local govt.

No Judicial Review; If Cong has passed legislation and the President has signed it, it means the two branches have concluded state sovereignty has not been impaired and SC would have little opp to review.

State Law Making Mechanisms

One aspect of state sovereignty is a State's ability to make and apply law. Congress may simply not commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.

NY v. US

Congress cannot simply force a state to regulate in a certain manner. Cong enacted the Low Level Radiation Waste Policy Act of 1985 and attempted to force each state to make its own arrangements for waste disposal.

Act tried to encourages states into compliance w/ 3 incentives:
1. Monetary incentives, by which each state that made such waste disposal arrangements would receive Fed $ and those that did not would not;
2. Access Incentives, by which states that did not make arrangements would be denied access to the disposal sites in existence b4 enactment of Stat.;
3. "Take title incentive", whereby any state which did not arrange for waste disposal would have to "take title" to the waste and would be liable for any damages in connection to the waste.

NY had difficulty in establishing waste cites b/c no town wanted the cites and New Yorkers particularly objected to the take title provision. NY sued that all 3 incentives violated the 10th Amdt by forcing the State to regulate in a particular area.

SC agreed. NY was only given unconst alternatives.

Monetary incentives are a valid conditional use of the fedl spending pwr.

Denial of access to OOS facilities was also a valid use Cong pwr to regulate inter comm

Dissent:

White: Congress is not forcing its will upon States. Rather, Congress was responding to a majority of states seeking a solution re nuke waste. NY's refusal to comply means another state will have its rights impugned (public health) by accepting NY's waste. US govt should be able to act as a referee

Several Alternatives in Dissent:

- Spending Pwr: Cong could condition a State's receipt of funds on a state's solving the problem providing the funds in question have something to do w/ the problem.
- Threat of Regulation: Cong could directly regulate the issue, which would be less drastic than Cong telling states what would occur if they do not comply.
- Paulson: Thinks O'Connor opinion is begging the question. The question of whether Cong had exceeded its authority had not been answered but O'Connor declares it so.

   1. Facts: Whether the minimum wage and overtime provisions o the Fair Labor Standards Act should apply to employees of a municipally-owned and operated mass-transit system. Is municipal ownership and operation of a transit system a “traditional governmental” function?
   2. Difficulty of line-drawing: difficult to identify an organizing principle that would distinguish between those functions that are traditional governmental functions and those that are not.
3. Subjectivity: Any rule of state immunity that looks to the “traditional” integral or necessary nature of governmental functions “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”

4. Procedural Safeguards: State sovereign interests are protected by “procedural safeguards inherent in the structure of the federal system” not by judicially created limitations on federal power.”
   a. Examples of structural protection: the requirements that each state have two Senators, the fact that state have control over the electoral qualifications for office, electoral college, are all indicative of a const structure that protects states.

5. Dissent: asserted that the majority approach “effectively reduces the 10th Amend to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”
   a. Powell: contended that National League was correctly decided and that it articulated a workable standard. The majority approach established no effective standard at all. Especially troubles by the fact that under the majority “federal political officials, invoking the CC, are the sole judges of the limits of their own power…”
      i. Marbury: inconsistent with Marshall that the federal judiciary “say what the law is” with respect to constitutionality of congressional actions.

6. Significance: Appears to mean that once Congress, acting pursuant to its commerce power, regulates the states, the fact that it is a state being regulated has virtually no practical significance—if the regulation would be valid if applied to a private party, it is also valid as to the state.
   a. Political Process: whatever limits exist are in the structure of the congressional lawmaking
      i. No Judicial Review: outside the scope of judicial review. Anytime a state argues that its sovereignty has been impaired, the Court’s answer apparently would have to be: The mere fact that Congress passed the bill, and that the bill as not vetoed by the President, necessarily means that the state sovereignty has not been impaired.
   b. Later Cases cut back: post cases seem to cut back the apparently broad scope of Garcia. They place limits on the extent to which Congress can force state or local governments to make or enforce laws. So the principle that there are some limits on the way Congress can regulate a state remains very much alive after Garcia.
2. Use of States Lawmaking mechanisms: There are limits to Congress’ right to interfere with these state legislative or executive processes, and Congress will violate the 10th if it exceeds those limits.
   a. Gov may not compel a state to enact or enforce particular law of type of law; or (NY v US)
   b. compel state/local officials to perform federally specified administrative tasks. (Printz)
   c. New York v US (Nuclear Waste Disposal Case): dramatically illustrates the principle that Congress may not simply force a state to enact a certain statute or to regulate in a certain manner.
      1. Regulatory Scheme: Congress enacted low-level radioactive waste policy Act. The Act attempted to force each state to make its own arrangements for disposing of the waste generated in that state. The Act tired to do this with several incentives including the take title. Whereby any state that did not arrange for disposal of its waste would be required to “take title” to the waste, and would be liable for damages.
      2. NY attacks statute: Argues that the “take title” provision violated the 10th Amend by effectively forcing the state to regulate in a particular area.
      3. 10th Found Violated: Scalia-Congress may not simply “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”
         a. NY was being forced to either regulate its own, or indemnify waste generators. Congress could neither.
      4. Dissent: (White, Blackmun, Stevens): argued that this was not an instance where Congress was forcing its will upon the states. Rather Congress had responded to a request by many of the states to ratify a compromise worked out among themselves, so that waste disposal could be solved.
         a. “The Court’s refusal to force NY to accept responsibility for its own problem inevitably means that some other State’s sovereignty will be impinged by its being forced, for public health reasons, to accept NY’s low level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.”
         b. Alternative Methods: White suggests methods still open to Congress:
            i. Spending Power: may condition the receipt of funding on a states solving the problem (provided the funds have something to do with the problem)
            ii. Threat of regulation: directly regulate the conduct in question, and could therefore take the step if the states don’t take care of the problems themselves.
            iii. Note: political heat for unpopular decisions that are to clever
d. Printz v US (Brady Bill): Congress may not compel a state or local government’s executive branch to perform functions. Even if the functions are fairly ministerial and easy-to-perform, and even if compulsion is temporary.

1. Brady Bill: In 1993, Congress enacted the “Brady Bill,” aimed at controlling the flow of guns. As a temporary 5 year measure, the law ordered local law enforcement officials to conduct background checks on prospective purchasers, until a national computerized system for doing these checks could be phased in. Printz a county sheriff objected to the background check requirement and sued.
   a. Argument: Under NY, Congress could not force them to conduct background checks on the federal government’s behalf.

2. Decision (5-4): The Federal government “may not compel the States to enact or administer a federal regulatory program.” The background check portion of the Brady bill violated this prohibition.

3. Rationale: Scalia rejected the dissent’s distinction between compelling a state to make a policy (like the take title scheme) and compelling state executive branch officers to perform ministerial tasks. Even if no policy making was involved here, this did not prevent Congress’ action from being an intolerable incursion into state sovereignty. “It is an essential attribute of the states’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority…It is no more compatible with the independence and autonomy that their officers be ‘dragooned’…into administering federal law, than it would be compatible with the independence and autonomy of the US that its officers be impressed into service for the execution of state laws.”
   a. Response to Gov’t Arguments Using Federalist No. 26

4. Basis unclear: Relied on a general, non textual, principle of state sovereignty, rather than any specific clause.
   a. Commerce Clause authorizes Congress to regulate interstate commerce directly; it does not, pursuant to Necessary and Proper Clause, authorize Congress to regulate state governments’ regulation of interstate commerce. Federal government may not compel states to implement, by legislation or executive action, federal regulatory programs.

e. Dissents:
   1. Stevens: Federal power gave the Congress the authority to regulate handguns. He then concluded that this being so, “the necessary and proper” clause gave Congress the right to implement its regulation by temporarily requiring local police officers to perform the ministerial step of identifying persons who should not be entrusted with handguns. This is true because Congress could have required private citizens to
help with such identification: “The 10th provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens.”

2. Control over purse strings: Congress could get around the problem by conditioning the state’s or local government’s receipt of funding on its officials willingness to do the bidding. Only compulsion not a quid pro quo seems foreclosed by the majority analysis.

f. Significance: Congress may not (1) force a state to legislate or regulate in a certain way; or (2) require state executive branch personnel to perform even ministerial functions.

Distinguished from Garcia: Garcia seems to apply mainly to generally applicable federal lawmaking; that case holds that where Congress passes a generally applicable law, the 10th does not entitle a state’s own operations to an exemption, merely because it is a state that is being regulated along with all other private entities. But where the federal tries to force a state or local government to enact legislation or regulation, or ties to force state or local officials to perform particular governmental functions, this is not part of a generally applicable federal scheme, and is instead directed specifically at the state’s basic exercise of sovereignty: the state’s right to carry out the business of government. Fed may not use such coercion.

Printz v. U.S.

Supplement, 3-10

Pg. 47

CLEO, local police, are being asked to temporarily administer a federal program designed to make checks on gun buyers.

CLEO’s object to being forced into a fed duty. They claim such a duty by a local offcr is unconst.

The Govt claims that the earliest Congresses enacted statutes that required state officers to implement fedl laws.

Printz argued that Congresses avoided this power for years and believed that such pwr did not exist.

GOVT – The first Congressed enacted stats that required states to record citizenship.

Printz/Scalia: It may be, however, that these requirements applied only in States that authorized their courts to conduct natrlzation proceedings.

PG 48:

The early laws est, at most, that the Const was originally understood to permit the imposition of an obligation on state judges to enforce fedl prescription when they relate to the judiciary.
Such laws did not impose upon the state exec to go into svc for the fedl govt. Indeed, it can be argued that the numerousness of these statutes (judiciary), contrasted with the utter lack of statutes imposing obligations on the State's exec, suggests an assumed absence of such pwr.

Not only do the enactments of the early Congresses, as far as the S.C. is aware, contain no evidence of an assumption that the Fedl Govt may command a State Exec w/out Const auth.

Pg. 49

Efforts in the drafting of the Const were made to compel states to submit to Fed auth, but they did not flourish.

The GOVT args that Fed Papers point to the likelihood that the Fed will employ State officers to carry out fedl duties such as tax collection. Further, the papers say that states are under the majesty of the Fed Govt.

S.C. – None of these statements necessarily implies – what is critical – that Congress could impose these responsibilities w/out consent of the states. The Fed seemed to assume States would help, but it is not mandated.

Class Notes

Brady Bill passes in 1993 and requires state officials to run background checks on hand gun purchasers in the interim while the fed implements a program to begin in 1998.

CLEO's objected to this interim provision. They claim that Congress cannot compel them as state officers to carry out a provision of Fed Law.

Scalia goes into a historical basis for whether the fed can compel states.

Earlier stats compelled state courts to do a number of duties – naturalization of aliens, citizenship matters, etc. Further, other statutes compelled states to adjudicate several matters – btm of 47. However, there were few if any administrative duties required of the states as is the case w/ the Brady Act.

Scalia states the state courts were doing these things in the name of the judiciary b/c state courts at that time heard federal matters.

However, the fed compelled the states to forcefully remove fugitive slaves and deported alien enemies. Scalia must realize these are administrative duties for the states, not judiciary duties.

A better arg would have been to say that in the early days of the Repub that state courts took on admin functions b/c the Fed Syst was in its infancy, but that certainly has not been the case for years.

Scalia's Discussion of Fed Papers: None of these statements necessarily implies – what is the critical point here – that Congress could impose these responsibilities w/out consent of the states.
Paulson—This is Scalia's wekeest arg.

Souter (Pg. 50) The legislatures, courts and magistrates, of the perspective members will be incorporated into the operations of the natl govt as far as its just and const authority extends; and it will be rendered auxiliary to the enforcement of its laws.

Scalia states that this cannot be automatic.

The Draft Question: Scalia opines that the legislation merely gave Fed the right to make requests to the States, not a compulsion for the states. Paulson that is a far fetched reading of the legislation.

Pg. 54

Liberty is strengthened by the two separate govts – state and fed.

Pg. 55

The Brady Bill would shatter the unity of the Exec Branch and reduce role of the President.

Scalia on the Necessary and Proper Clause. It can't be used to make something unconstitutional constitutional.

Pg. 56-7

Pg. 58

10th Amendment Commentary

FED 45 – Madison

Why is the state leg essential to the election of the President? W/out the intervention of the state legs, the POTUS cannot be elected. Further, the state legs appoint members to the electoral college. Article 2,1 para 2.

Prior to 17th Amdt, Senators were elected by state legs.

What has changed greatly today from the time the 45 was written? The number of indivs employed under the Const is much greater than the number of e'ees for the states. Further, Madison thought the states would have more influence than the Fed.

Madison believed that Fed would not infringe upon state rights, but this has not been the case. See pg. 184.

Wechsler 185: Update of Fed 45 – National action has always been regarded as exceptional in our polity. Those who would advocate the exercise of national pwr must answer the preliminary question why the matter should not be left to the states.

Congress has become more nationally motivated than locally motivated. " The problem of the Congress is and always has been to attune itself to the national opinion and produce majorities for
action called for by the voice of the entire nation. It is remarkable that it should function thus as well as it does, given its intrinsic sensitivity to any insular opinion that is dominant in a substantial number of the states.

The national political process is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states. National authority is not expansionist by its nature.

Choper On Fed 45: The Fed Jud should not decide constitutional questions respecting the ultimate pwr of the national govt vis-à-vis the states b/c structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of the practice is the they have not been. Congress still votes positions based on state opinions.

Dormant Commerce Clause

Environmental Regulation: States' attempts to control their environment have sometimes been attacked as violative of the Comm Cls. As a result of the following case, the SC began to strictly scrutinize any discriminatory or protectionist state regs even if they are in the furtherance of of environmental or other non-economic motives. A state may no longer maintain or improve its environment at the expense of another state unless there is no reasonable alternative available.

PIKE RULE/Rational Basis: The regulation must pursue a legitimate state end; the regulation must be rationally related to that legitimate end; and then a balancing test – of whether there are less burdensome alternatives on inter comm.

Where the statute regulates evenhandedly to effectuate legitimate local public interests, and its effect on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits…If a legit local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Local Health, Safety and Welfare – If a state is acting to further such objectives, the Court is likely to hold that these objective meet legit state ends. It is a valid use of a state police pwr. If the State reg is economically based, it will face tougher opposition from the courts.

City of Philadelphia v. New Jersey

Philadelphia v. New Jersey

What does the stat do? It prohibits the importation of solid or liquid waste into NJ in order to protect the health and welfare of the NJ public. Law was in response to large use of NJ landfills by PA and NY. Philly sued arguing the stat discriminated against inter comm.

Ostensible Purpose of the Stat v. the Real Purpose

The Ost. Purp was to protect the public welfare and the NJ envt. Protect its resources and people. Philly argues the real purpose was economically motivated.
"The evil of protectionism can reside in the legislative means as well as the legislative ends."

Footnote 4: Cong has not pre-empted/occupied the field w/ fed law re waste mgmt. In fact, Cong has provided that waste disposal should primarily be the function of the state. The issue is whether the stat is permissible in light of the Comm Cls.

NJ args the demand for landfill space will be reduced, save landfills and control costs by the Stat.

Philly Args: The stat has denied a small group of its entrepreneurs an econ opp to traffic in waste in order to protect the health, safety and welfare of the citizenry at large. Prices will go up and the citizens of NJ will pay more rather than be protected. (Real Purpose)

Stewart: Whatever NJ's ult purp, it may not be accomplished by discriminating against articles of commerce from o-o-s unless there is some reason, apart from their origin, to treat them differently. Principles of nondiscrimination are violated.

The end may be justifiable, but the means are discriminatory and invalid. What would pass muster? Equal taxation of insiders and outsiders. Apply Balancing Test Discriminatory effects/less onerous alts

Garbage different from quarantine cases: PA garbage can't be any more hazardous than NJ garbage.

Rhenquist Dissent seems to disprove Stewart's claim that garbage transport poses no risk to public health. His point that landfills are open to NJ garbage, which is =ly noxious, yet there are no proposed stats to affect NJ garbage is a good one.

Criticism of Quarantine Distinction (Tribe) – Typical quarantine cases had minimal econ impact. Usually effected only a few particular farmers. However, waste disposal is an integral part of the modern industrial process. The people of the several states must sink or swim together even in their own garbage.

Hypo: What if a state were to allow OOS waste but taxed it at a different rate than in state waste? A discriminatory tax scheme will violate the Comm Cls. Can't use OOS tax revenue to defray the cost of in state waste disposal. *Oregon Waste v. DEQ*

Carbone v. Clarkstown:

*Holding:* The SC found that a town's attempt to give a monopoly to a local trash processor violated the Comm Cls by depriving OOS a chance to compete in the flow of processible trash.

The ordinance prohibted everyone but the favored processor from performing the initial processing step. Deprive OOS access to local market and falls w/in purview of Comm Cls.

"We have determined the Comm Cls to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination OOS. *Philly*
The flow of Comm is restricted and the stat is no less discrim b/c it denies in state processors as well. OOS merchants cannot be deprived of access to local demand for their services. OOS comp is squelched by ord.

Ord is a revenue generator. Revenue generation is not a local interest that can justify discrimination on inter comm.

DISSENT: There is no indication any OOS trash business has been harmed. There is no discrim btw locals and OOS.

There may a general restraint on competition, but it is not protectionist b/c OOS and locals are subject to same stat. The monopoly effect does not violate the Comm Cls. There is no Const mandate to break monopolies.

The burden is on the citizens of the town.

The ordinance is a better method of financing than taxation.

Permissible Discrimination

Maine v. Taylor

Court upheld Maine Stat that prohibited the importation of baitfish due to the effect on Maine's fisheries. Justice Blackmun noted that the stat affirmatively discriminated against interstate transactions and therefore could only be upheld if it survived the "strictest scrutiny." The burden was on the state to show the stat served a legit purpose and that the purpose could not be achieved through other nondiscrim means.

Maine pointed to evidence that importation of baitfish could introduce predators, parasites, and other environmental risks to its ecosystem. Further, there was no alternate means of inspecting baitfish for safety.

Stat was not protectionist and Maine has a legit interest in guarding against imperfectly understood environmental risks.

Impermissible Discrimination

Protection of Local Economy – If the purpose of the regulation is to protect in state producers from competing OOS commodities, or otherwise to strengthen the local economy, the Court will generally strike the measure w/out inquiring whether the benefit to the state outweighs the national interest in free commerce. Protection of the local economy is an illegitimate aim.

The mere fact of discrimination, not the magnitude of it, is likely to lead a court to negate a reg that discriminates against OOS commodities.

Health and Safety Regs – If the state is pursuing health or safety objectives in a good faith manner, the Court will apply a balancing test to determine if the reg is discriminatory and the extent to
which less onerous alternatives exist.

Dean Milk v. Madison *Reasonable alternatives and the relevance of harms to in state producers*

The SC invalidated an ordinance adopted by Madison that prohibited the sale of milk in the city unless it had been bottled at an approved plant w/in 5 miles of the city.

"Avowed purpose" of reg was to ensure that bottling plants where the milk was bottled was done so under sanitary conditions. Such a purpose is valid. However, the "practical effect" was to prevent the sale in Madison of milk produced in IL or other parts of WI. "Madison plainly erected an economic barrier to protect a local major industry and discriminates against inter comm. Madison cannot do so even to protect its own people if other reasonable alternatives are available.

Madison had 2 options: 1) Send its inspectors to IL or 2) rely on U.S. inspection standards.

*It does not matter that WI milk made outside Madison is subjected to same provisions as OOS milk*

Sporhase v. Nebraska:

Ground water is an article of commerce. A NE stat prohibited the w/drawal of ground water from NE intended for use in another state. CO residents sued.

Bibb v. Navajo Freight Lines:

IL stat requiring trucks to use curved mud flaps to prevent spatter and road safety was unconst. Straight mud flaps were legal in 45 states and curved flaps were illegal in AK. They were required in no other states. Further, the curved flaps provided no safety advantages and introduced new hazards to hwys – they cause heat build-up which reduces break efficiency.

If the case were merely a matter of cost required to change flaps, the law would have been upheld. However, b/c it was impossible for a truck to comply w/ AK and IL laws, the local safety measure that was nondiscrim placed an unsubstantial burden on inter comm. The law is invalid b/c it places an excessive burden on inter comm.

Cumulative Burden: *Bibb* involved a conflict btw the regs of two states. Even where there is no conflict, it may the case that where regs of a few states affect the rest it is a burden on inter comm. Other states could comply, but it would it would violate the CommCls b/c it gives the most restrictive state authority beyond its own borders. *See So. Pacific v. Arizona*

Discriminatory Intent or Effect – It is vital to remember that, in any regulation of transportation (or other aspect of commerce), the existence of an *intent to discriminate* against inter comm, or even an unintended discrim affect, will make it dramatically more like that the Court will strike the measure as violative of the dormant commcls. *See Kassel*

Subsidies as an Alternative to Regulation

*West Lynn Creamery v. Healy*
MA taxed all milk sales. Taxes collected on in state and OOS milk went to a subsidy to benefit MA dairy producers. An OOS producer challenged the combined nondiscrim tax plus the local subsidy. The SC found the tax violative of the Const.

It's purpose is clearly invalid b/c it aims to protect higher priced MA producers and allows them to compete w/ lower cost OOS producers via the subsidy.

The tax may be nondiscrim, but the effects on the MA producers are offset via the subsidy leaving just the OOS producers affected. It makes OOS milk more expensive.

A pure subsidy funded out of general revenue ordinarily imposes no burden on inter comm, but merely assists local businesses. The stat in this case funds principally on the rev generated from taxes on OOS milk. By cojoining a tax and a subsidy, MA has created a program more dangerous to commerce than either part alone.

In such a case, the state's political process cannot be relied upon to prevent legislative abuse. Groups/organizations normally against such a tax have been mollified by the subsidy. OOS farmers are injured, not just MA milk buyers.

Scalia Concurring Op: "I…would allow a State to subsidize its domestic industry so long as it does so from nondiscrim taxes that go into State's general fund."

Dissent (Rhenquist and Blackmun): There is no precedent for the decision reached. Further, the mollification of interest groups is not a valid ground to nullify the stat b/c two interest groups would still be upset by the tax and subsidy – consumers and milk dealers.

Note: Subsidies from general revenues are generally permissible, but subsidies from industry-specific taxes generally are unfavored.

Market Participant Doctrine (MPD)

The state spends money to run a proprietary enterprise, or to subsidize a pvt business. Where the state acts as a mkt participant, dormant CommCls analysis will not be applied, and the state may favor local citizens over OOS econ interests.

Hughes v. Alexandria Scrap

MD, in an effort to rid the state of abandoned cars, purchases such cars from locals at an inflated price. OOS sellers cannot do the same. The SC upheld the stat b/c the CommCls simply does not apply where a state acting as a market participant, favors local citizens over OOS.

Natural Resources and Regulatory Effects

A state as a mkt participant may still be subject to the CommCls in some instances where the State imposes discrim policies. The State likely cannot impose limits on parties beyond those with whom it contracting. Such restrictions may outweigh the mkt participatory consequences and make State subject to DCC. If a state's participation in the market is concerned with raw products/resources
that the state has not already processed, the MPD is less likely to be applied than where the state has invested labor and capital in manufacturing a product.

South Central Timber v. Wunnicke (pg. 323)

AK proposed to sell 49 million board feet of timber it owned. The proposed K required that the successful bidder process the timber in AK b4 export. The purp was to protect the timber industry and promote new industry and revenue.

SC processes its lumber in Japan and sought an injunction against the state's local processing requirement as a violation of the DCC. The lower court dismissed after finding Congressional intent for such a policy.

Supreme Court (MAJ): There is no such congressional intent. When Cong acts all are represented. There is less of a risk that one state will be in a position to exploit another. If a state is in such a position, it will be w/ Cong approval.

If a state is acting as a market participant rather than a mkt regulator, the Dormant CommCls will not apply. However, the mkt participation doctrine, MPD, is not fully established.

Hughes v. Alexandria Scrap: A MD stat was designed to reduce the # of junk cars. OOS dealers faced stricter requirements than state dealers. Not a CommCls violation bc CommCls is not concerned here bc nothing prohibits a state from participating in a mkt and favoring its citizens over OOS citizens so long as such actions are not prohibited by the State legislatue.

Reeves v. Stake: A SD policy of only selling cement to locals made at a state-run facility was upheld bc the SD plant was mkt participant. A business can choose who it wishes to sell and deny others. No CommCls violation when the state is a mkt participant and refuses to deal w/ particular parties when it is participating in the interstate mkt of goods..

White v. Mass Council of Construction E'ees: A city law that Boston construction projects funded in part or whole by the city be performed by a workforce of at least 50% Bostonians was upheld. The fact that the e'ees were working for the city was crucial to allowing the market participant analysis. Everyone affected was, in a sense working for the city, and the city could have a say in where the workforce came from.

Alaska contends its primary manufact requirement fits the MPD. They argue their case is similar to Alexandria Scrap. However, MD was a purchaser, not a seller. AK imposes downstream conditions on the timber mkt. The purchaser is not free to choose an OOS processor.

Further, Reeves allows a state to sell to whomever it wants, but it did not impose any terms the state wished. Restraint on foreign commerce likely would not have withstood the CommCls. CommCls may also be invoked when natural resources and restrictions on resale are present. That is the case with AK and not SD. Timber is a raw natl resource, but cement is the end product of a long mfctg process.

MPD permits a state to influence a discrete, identifiable class of economic activity in which it is a major participant. The state can impose limits on the mkt it participates in but no further. They can't reg outside the mkt.
What is a mkt?

AK contends it is a participant in the processing mkt, yet it admits it does no processing.

South-Central args that AK may be a participant in the mkt, but it is also uses its leverage in the mkt to create a regulatory effect in the processing mkt, of which it does not participate. The SC concurs.

MPD restrictions on the immediate transaction are not as injurious as down stream reg effect practiced by AK. In sum the state may not avail itself of the MPD to immunize its downstream reg of the timber processing mkt in which it does not participate.

The processing req impedes inter comm. Foreign commerce is burdened.

Dissent: The difference btw MPD and a mkt regulator is artificial. Anti-trust may apply here but not Comm Cls.

The best path for a state should not be stricken automatically b/c of the Comm Cls. The majority ruling seems unduly formalistic.

Class Notes: Why does this case not sit w/ the cases mentioned within the case? It is not wrong for Alaska to be a participant in the market, but it affects downstream commerce. The market participant exception for the states cannot extend beyond the transactions where the state is a player in the market.

When natural resources are at stake, there is a higher degree of scrutiny against the states to regulate. The nation has a voice in the disposition of raw materials. The same goes for foreign commerce and restrictions on resale. W/ foreign commerce, America wants to speak w/ one voice in trade, not 50 different trading entities.

W/ regard to resale of a good, Reeves v. Stake allowed for the resale of concrete to OOS.

Less Onerous Alternatives to Developing AK's Timber Industry

AK could have refused to sell to buyers that did not have local processing facilities.

Direct subsidy to local processors through general fund

Article IV,§2,cl.1 – The Privileges and Immunities Clause

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The PIC in Article IV prevents states from discriminating against OOS individuals. When X from State A ventures into State B, X should enjoy the same privileges as those in State B. Toomer

PIC speaks of citizens of other states, but as a practical matter, discrim against non-residents is what is barred.
Corps and aliens are not protected by PIC, but they are protected by the 14th Amdt.

Even where discrimination has occurred, it is difficult to establish a PIC violation. PIC is rarely applied.

Test for PIC Violation

Only fundamental rights are covered – those fundamental to national unity. Those that do fall under this category are all related to commerce – the right to practice one's profession, be employed or engage in business.

Non-fundamental rights such as non-economic rights like the ability to hunt in another state are not covered b/c they are not fundamental to the union. *Ex. OOS hunting licenses can cost more than in state licenses.* Recreation is not fundamental to natl unity.

Two Part Test once it is determined a fundamental right is at stake: *P only need prove 1 part*

1. *"Peculiar Source of Evil"* -- The discrim will violate PIC unless non-residents are a "peculiar source of the evil" which the law in question was enacted to remedy.

   EX. AK argued that it could mandate that only AK residents be hired to work on the pipeline in order to curb the high rate of unemployment suffered b/c residents were losing jobs to OOS indivs. However, the court said that OOS residents were not the source of evil. Rather, AK residents did not have adequate training or did not live close enough to job sites.

2. *"Substantial Relationship Test"* -- The P will win if the discrimination against the non-resident does not bear a "substantial relationship" to the problem the stat is attempting to solve. If there is a less onerous alternative available to solve the problem, then the substantial relationship btw the OOS indivs and the problem to be solved does not exist.

   Once a right to fund natl unity is shown to be at stake, the SC uses something close to strict scrutiny: the burden is on the State to show that the nonresidents are a peculiar source of evil, and that the discrimination bears a substantial relationship to the prob being solved.

Corfield v. Coryell (337)

This case is an improper application of PIC, but it is applied to Reconstructionist cases.

PIC protects interests "which are fundamental; which belong; of right, to the citizens of all free governments." Right to possess property, enjoyment of life and liberty, etc, nevertheless, *subject to the restraints as the govt may prescribe for the general good of the whole.*

A NJ Stat prohibiting nonresidents from gathering clams in NJ did not violate PIC b/c the clams were the property of the state.
United Building & Construction Trades Council v. Camden (331)

Facts: A state law authorized cities to adopt affirmative action plans. Camden passed an ordinance requiring that at least 40% of the employees of contractors and subs on city projects be city residents.

The Council challenged the ordinance as a violation of the Privileges and Immunities Clause (PIC), Article IV, Cls 2. The ordinance was upheld by the SC.

SC Majority: The SC fist looked at whether the PIC applied to munis.

1. PIC does apply to muny ordinances, as well as State. A muni is a state subdivision.

2. The PIC was phrased in terms of state residency to put all Americans under footing in a state. The purpose of PIC was to provide non-citizens of a state = protections while in the state.

Tooomer: PIC should not apply in muni residency matters. SC does not agree.

Under the Camden ordinance, an OOS resident will enjoy the same rights as a Camden resident. All non-Camden residents will be affected.

Application of the PIC to a particular instance of discrim against an OOS entails 2 steps: 1) Does the ordinance burden one of the privileges and immunities protected by PIC? 2) Does an OOS resident's interest in em'ent on pub works Ks in another state sufficiently meet the fundamental need to promote interstate harmony so as to fall w/in PIC?

The right to a line of work is fundamental, but the SC has held that there is no fundamental right to govt work under the Equal Protections CIs.

Under the Camden ordinance, like White, everyone is working for the city and has no grounds for complaint under the Comm CIs when a city favors its residents.

However, Comm CIs analysis need not apply to PIC. White was determined on whether Boston was a participant or a regulator. That is not necessary for PIC

PIC imposes restraints on state actions that disrupt interstate harmony. Discrim on OOS triggers PIC.

Camden argues it is spending its own funds and can regulate the workforce. SC—Biasing pvt e'ers against OOS residents may not be allowed under PIC. The opportunity to seek em'ent w/ private e'ers is a fundamental right and critical to the Nation despite the ties to work being done for the city/govt.

Under PIC, a State may discriminate if there is substantial reason to do so. Non residents must be shown to constitute a particular source of evil at which the stat is aimed.
Camden args that is trying to protect its blighted economy from suburban flight and offer jobs to residents. Further, they argue that 60% of work force can still be OOS or non residents.

**HOLDING:**
The Court realizes that States should have leeway in PIC when curing ills. Camden's justification needs review, and, therefore, the case should be remanded to the NJ SC.

Dissent: NJ decision should stand b/c PIC does not apply to munis. There is no evidence PIC was concerned w/ intrastate discrim when it was created.

This decision can't be reconciled w/ Zobel which held that discrim not based on state residence that effected both locals and OOS was not an issue for PIC.

Muni discrim is different than State discrim.

**SC of NH v. Piper (338)**

The right to practice law is a sufficiently important and fundamental right that the privilege may not be limited to state residents only. NH tried to bar OOS attys.

SC – The prac of law is a privilege b/c of the atty's role in the national economy and the need for atty's to represent those who may bring unpopular claims (non-commercial).

Under the 2 part test, there was no evidence to show that non-resident attys were less ethical or could not keep up w/ local law.

Less onerous alternatives exist.

Rhenquist Dissent; Practice of law does not readily transfer across state lines.

**Dormant Commerce Clause – Facially Neutral Cases**

Statutes may appear evenhanded on their faces but may nonetheless turn out to be disproportionately burdensome to some or all OOS businesses. Where the disproportionate impact is truly accidental and does not derive from the fact that the burdened firms are OOS, the Court will normally uphold the stat.

**Exxon Corp v. Gov of MD. (343) State stat upheld**

Facts: MD passed a law prohibiting oil producers or refiners from operating gas stations in MD. The law was enacted b/c of evidence that stations operated by producers or refiners had received preferential treatment during the oil shortages in 1973. Since no gas is produced or refined in MD, the rule against vertically integrated operations affected OOS companies only. Conversely, the stat also helped local, non-integrated retailers.

MD commissioned a study to determine that the refiners/producers' stations received privileges during the shortage, and the stat was designed to "correct the inequities in the distribution and pricing of gasoline reflected by the survey."
Exxon had 36 company owned stations in MD that were often used to test innovative mktg concepts or products.

Red Hot and Scot also operated their own stations and were able to offer lower prices to consumers as a result.

3 refiners threatened to withdraw from MD mkt, but there was no evidence that the amount of gas shipped into MD would be affected by the Stat.

Stat does not discrim against interstate goods, nor does it favor local refiners/producers. Claims of disparate treatment btw interstate and local commerce are meritless.

The state is not discriminating against inter comm at the retail level.

OOS dealers who do not produce or refine will not be affected. There is no restriction on the flow of gas. The fact that a burden of a state reg falls on some interstate cos does not, by itself, establish a claim of discrim on inter comm.

The interstate market is protected yet a few firms may not be.

No discrimination, No Burden and No Preemption

Dissent: The effect of the stat is to protect in state stations from the competition of OOS businesses. There must be some less onerous alts. State and localities may not discriminate against the transaction of OOS actors in interstate mkts. Dean Milk

A class of predominantly OOS gas retailers is being excluded while providing protection to a class of nonintegrated local retailers.

The state must justify such discrim stats and prove less onerous alts are not available.

Comp can be preserved w/out banning OOS interests from the local mkt.

"A national econ could hardly flourish if each State could effectively insist that local nonintegrated dealers handle product retailing to the exclusion of OOS integrated firms that would not have sufficient local political clout to challenge the influence of local businessmen w/ their local leaders."

No proof that vertical integration has inhibited competition.

Buck v. Kuykendall (349) – Obstructing Commerce

Buck, of WA, wished to operate an "auto stage" line btw Portland and Seattle. He was licensed by OR, but he was denied by WA b/c it was argued the route was already adequately served by RRs and other auto stage lines. Such a denial violated the Comm Cls. WA was prohibiting competition. WA did not merely burden inter comm, but it obstructed it. Prohibition also defeated Cong intent to provide fedl aid for hwy construction.

Paulson – State finding that auto-stage route is "already adequately served" amounts to protectionism, i.e. usurpation of Cong's comm pwr.
Sales and compensating use taxes

Compensatory use taxes may be valid when they put OOS goods on par w/ in state goods w/ respect to the tax burden.

Henneford v. Silas (350)

WA adopted a 2% tax. In order to avoid losing business to retailers in other states, WA levied a 2% compensating use tax on goods purchased elsewhere for the "privilege of using them in WA." Cardozo upheld the comp use tax b/c it designed to promote equality.

It was distinguished from Baldwin on the grounds that WA's comp use tax negated only a single "artificial" advantage of OOS firms, while NY's scheme in Baldwin wiped out all advantages VT sellers had. There is an = burden.

Substantially Equivalent Events – A comp use scheme must ensure that in state and OOS taxes are imposed on substantially equivalent events. A comp tax scheme could not be used to compensate for genl income.

Intentional Discrimination

Courts are very likely to strike down a statute whose clear purpose is to favor local economic interests by discriminating against OOS interests.

Hunt v. Washington State Apples (352) Stat not upheld

NC enacted a stat requiring all closed containers of apples sold or shipped into NC bear no grade other than the applicable U.S. grade or std. WA, the country's largest apple producer, required that its apples be tested and graded under its own system which was stricter than the U.S.D.A. stds.

NC agreed the stat placed substantial financial burdens of WA apple producers, who could comply w/ the NC stat only by altering the containers used to ship to NC, repackaging those bound for NC or discontinue using the preprinted graded boxes completely.

NC argued the stat was designed to prevent fraud in apple marketing.

1)The NC stat not only burdens the interstate sale of WA apples, but it discriminated against them. It raises costs of doing business w/ NC while leaving NC growers unaffected. NC apple growers were not forced to change packaging or grading system.

2)The stat effectively stripped away any advantage WA had as a result of its strict and expensive grading system. It is better than the USDA system, and yet, again, NC did not have to change.

3. By prohibiting WA apple growers and dealers from marketing apples under their state's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers.
The state acts to put NC apples on par w/ WA apples through the grading system, which they are not.

*Where such charges of discrimin are leveled, the State must justify its actions in terms of the local benefits flowing from the stat and the lack of less onerous alternatives adequate to protect local interests. NC failed to do so.*

The SC also believed the NC scheme was intentionally discriminatory.

**Inferring Intent**

Environmental acts which merely burden (w/out discriminating against) inter comm may be upheld.

**Minnesota v. Clover Leaf Creamery**

MN prohibited the sale of milk in plastic disposable containers but allowed milk to be bottled in cardboard. The SC accepted MN's arg that the state served its stated purpose of promoting conservation, easing waste disposal probs and conserving energy.

The trial court disagreed and stated that the act was designed to promote the pulpwood industry in MN at the expense of the plastic industry and parts of the MN dairy industry. Further, it found the paper was less enviro friendly than the plastic.

The SC stated the MN stat was not protectionistic but an even handed reg. It affects all milk sellers, not just OOS. There is no reason to suspect MN firms will gain while OOS firms lose economically. In fact, the challengers are MN milk producers.

Plastic resin will still be needed and it is made OOS. Plastic will still be used in pouches, returnable bottles and paperboard itself. The OOS impact is exaggerated.

As in *Exxon*, CommCls protects the interstate mkt, not indiv firms. Therefore, a nondiscriminatory reg serving substantial state purposes is not invalid simply b/c it causes some business to shift from a predominantly OOS industry to a predominately in state interest. Only if the burden on inter comm clearly outweighs the State's legit purposes does such a reg violate the CommCls.

**Dormant Commerce Clause – Transportation Cases**

**Regulation of Transportation**

When states have regulated the instrumentalities of inter comm (railroads, hwys, etc.), they have usually done so in the name of public safety objectives, rather than the benefit to local economies. Therefore, the existence of a legit objective is not often in doubt. Therefore, the SC is usually concerned w/ the rational relation btw the means and the safety objective and balancing the benefit to the state w/ the burden on inter comm.

If the reg is =ly nondiscrim against OOS and in state commerce in either intent or effect, the SC is likely to uphold the stat.
The SC will assume the in state political process will supply a sufficient check against abuse.

So. Car Hwy Dept. v. Barnwell (356)

In the 1930s, South Carolina prohibited the use of trucks wider than 90 inches or weighing more than 10 tons on state highways. However, most trucks involved in inter comm violated one of these provisions or both, so the reg clearly burdened inter comm.

"There are matters of local concern, the regulation of which unavoidably involves some regulation of inter comm but which, b/c of their local character and their number and diversity, may never be fully dealt w/ by Congress. Such reg has been left to the states.

Are the means of the reg, reasonably adapted to the end? If so, it is valid.

Yet, the regulation was upheld b/c the regs were applicable to inter and intra comm alike, and "the fact that they affect alike shippers in inter and intra comm in large number w/in as well w/out the state is a safeguard against their abuse.

Hwys are of a peculiarly local concern, especially when they are built by the state and their nature varies from state to state. Heavy trucks may destroy the road and much of So. Car.'s hwys were only 16 ft wide, which would prevent larger trucks from safely passing.

There is a rational basis for the State to reg as it does. The regulation is reasonable, wise and proper.

Transportation Balancing Test

The benefit to the state of the reg will be balanced against the burden it places on inter comm. B/C the SC has been reluctant to substitute its judgement for that of a State Leg, the balancing test is usually performed in a way that is fairly deferential to state policies.

A reg will generally be struck down if the local benefit is marginal or speculative compared to the effect on inter comm.

So. Pacific Co. v. Arizona

A 1912 statute limiting train lengths to 14 passenger cars or 70 freight cars was found unconst. "The matters for ultimate determination" "the nature and extent of the burden which the state regulation (adopted) as a safety measure, imposes on iner comm, and whether the relative weights of the state and national interests are such as to make inapplicable the rule that the free folow if inter comm in matters requiring uniformity of regulation is protected by the omm cls.

The operation of trains longer than those allowed in AZ was standard. RRs would have to spend more $ and operate more trains in AZ to comply w/ the stat. Shortening trains at the border would cause delays. "Enforcement of the AZ law must inevitably result in an impairment of efficient RR operation b/c the RRs are subjected to regulation which is not uniform in its application.

The AZ law does not provide the safety it purports. Shorter trains are no more safe than larger trains.
AZ law would violate Comm CIs by allowing the strictest state reg in the union to have authority beyond its borders.

DISSENT: The court is deciding what should be left to a legislature. Further, Justice Black believed there was some evidence the AZ law was safer.

$ should not outweigh human values.

Kassel v. Consolidated Freightways Corp (359)

The question is whether an Iowa stat that prohibits the use of certain large trucks w/in the State unconstitutionally burdens inter comm.

Consolidated used two types of trucks a 55ft semi and a 65 foot double. However, Iowa prohibited the use of 65 ft trucks w/in its borders with a few exceptions.

Doubles, mobile homes and trucks carrying farm eqpt and animals may be as long as 60 ft. Cities near the state line may permit oversized trucks. Further, Iowa truck makers may ship trucks up to 70 ft and oversized mobile homes made in Iowa may also be allowed on the road. However, Consolidated cannot bring its 65 ft doubles through Iowa. It must divert it routes or switch to smaller trucks in Iowa.

Iowa defended it law on safety grounds. IA asserts 65 ft trucks are more dangerous than shorter trucks. Further, the law protects IA's roads by diverting large truck traffic. Econ and safety

SC – The 65 ft truck is no less safe than the 55ft truck. There is no valid safety reason to ban the 65 ft truck.

The CT is generally willing to allow an effect on inter comm if it is made in the name of public safety.

However, the incantation of a purpose to promote the public health or safety does not insulate a state law from Comm CIs attack. If the safety factor is marginal and the interference w/ commerce is substantial, then the stat is invalid.

The Iowa stat substantially burdens the flow of goods by truck. Substantial Effect The safety interest is illusory.

Iowa stat costs trucking industry $12 million a year to comply.

Iowa urges the SC to defer to the State. The SC normally does so re hwy regs, but this stat is discriminatory on its face.

Brennan/Marshall Concurrence: Commerce Clause challenges to state reg must take into account 3 principles: 1) The courts are not empowered to second guess the empirical judgement of lawmakers concerning the utility of legislation; 2) the burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's law makers, and not
against those suggested after the fact by Counsel. 3) Protectionist legislation is unconst under the Comm CIs, even if the burdens and benefits are related to safety rather than economics.

Part 1 was the main concern w/ the majority.

Dissent: The stat is not unusual. Every state regulates truck length. 17 other states limit trucks below 65 ft.

Safety is a matter of public policy to be decided by elected reps not judges. The safety concerns re 65 ft trucks are valid.

If 5 ft is allowed now, won't they be looking for 5 more feet next time.

IA should not have to yield to policies of other states.

The opinions of attys in court is crucial.

CONGRESSIONAL ACTION -- PRE-EMPTION

The DCC deals w/ areas where Cong has not acted. However, where Cong has acted the results are often similar.

Supremacy Clause – In the case of a direct, obvious conflict btw a fedl and state law, the state law is simply invalid. The Supremacy Clause of Article VI provides that in case of a conflict, state law must yield to fed law. Such clashes of law are not limited to Comm CIs.

Federal Occupation of the Field – A fed/state conflict is only one of two ways in which Cong action can render a state action invalid. The other way is for Cong to occupy the field for the Fedl Govt. This will preempt the entire subject area.

Tests for Preemption – The preemption issue is one of Cong intent. Cong could enact narrow leg in a broad area yet evince an intent to preempt the entire area against state regulation. Recent SC cases point out that Cong will be deemed to have preempted an area only where either its intent is unmistakable or where "the nature of the regulated subject matter permits no other conclusion."

Where existing fedl reg scheme is broad and covers most of the subject area, the Court is much more likely to find federal preemption than where the fedl scheme is less comprehensive.

If the field has traditionally been left up to the states, it is less likely to be found the subject of fedl preemption. If an area is considered more local than national preemption is unlikely. This is especially true of health and safety regs.

Conversely, areas traditionally left to federal control such as bankruptcy, immigration, admiralty, etc will normally be found to be federally preempted.

Rice v. Santa Fe Supplement 8
I. Presumption in force of continuing state power

II. Rebuttal takes either of two forms

   A. Express Preemption
   B. Implied Preemption – Inference by person applying Stat that preemption is warranted.

3 Criteria

1) Pervasiveness

2) Dominant Federal Interest

3) Objects sought to be obtained by fedl law and the character of the obligations imposed (The least common, but used at end of Hines

   4. Express conflicts btw Fed & Stat laws (Avocado Case), This is a Supremacy Cls matter, not preemption. State law yields.

Hines v. Davidowitz

A PA stat pertaining to Aliens required much more than the Fed Stat. Fed Stat should prevail.

Fed law is expressed – Uniform Rule of Natuarlization. After all, nationals of one country should be protected by the host countries when visiting – Pervasiveness. Congress had a broad and comprehensive plan. Leg to make a harmonious whole. The PA reg and other alien bills are in opposition to the fundamental principles of our free govt

There was a dominant federal interest to manage foreign affairs rather than having each state make laws pertaining to the treatment of aliens. Tough rules here on aliens will lead to adverse treatment of Americans abroad. The crux of the court's holding hinges on the dominant federal interest.

Congress has "occupied the field" on the issue to preclude the state's from enacting legislation of their own.

Criteria 4 (pg. 348) PA's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress

Criteria 3 (pg. 348)

Gade v. National Solid Wast Mgmt

Pg. 373
IL Stat pertaining to workers who handle haz mats – training, education, etc.

It is a Dual Impact Statute. The IL stat is designed to protect both the workers and public safety.

Fed Stat exists to do the same. Therefore, under the Supremacy CIs, the fed law pre-empts.

Sec 18(a) – A state agency may exert authority where there is no Fed standard.

Sec 18(b) – A state may submit a plan to self-regulate and may do so if approved. IL did not receive approval.

Is the case being decided on an appeal to Rice #4? See pg. 374

IL argues that 18b allows the state to supplement the Fed Reg w/out receiving approval. SC argues that either the Fed law or the State law must not control. They will not commingling.

IL also argues on 176 that this is a dual impact statute and therefore no preemption.

SC argues Congress intended to control the field. Preemption of states is a given unless the States apply for self reg.

DISSENT: Not Souter's finest hour.

Souter is concerned w/ Congressional intent.

Souter would only be able to accept criteria #5.

Preemption cannot be inferred. There must be Cong intent.

Florida Lime & Avocado v Paul

The Ct decided by a 5-4 margin that fedl mktg regs did not preempt CA's statute prohibiting the sale in CA of avocados containing less than 8% oil. The fedl mktg regs for FL avocados developed in conjunction w/ FL growers determined maturity differently than CA. As a result some FL avocados do not meet the CA stat, but it was determined that the Fed reg and CA stat were not in conflict.

The SC remanded the case where it was determined that the CA stat did infringe upon inter comm. FL had a well developed fruit industry b4 CA stat which encroached upon FL.

Distribution of National Powers – Conflicts Btw Branches

Fed 47 (Madison) Separation of Powers
"Where the whole power of one department is exercised by the same hands which possess the whole pwr of another department, the fundamental principles of a free constitution are subverted. Montesquieu

"When the legislative and executive pwrs are united in the same person or body there can be no liberty, b/c apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.

Fed 48 (Madison)

There must be a system of checks and balances through a blending of the branches to provide for controls or degree of separation essential to a free govt could not be maintained.

The legislative branch is everywhere extending the sphere of its pwr. Leg is first Article. It has access to pockets of the people.

However, the people are a check on the legislative branch. Checks and balances leads to collisions btw branches.

PG. 391 Commentary on Separation of Pwrs/Checks and Balances

The federal judiciary should not decide constitutional questions concerning the respective powers of Cong and the President vis a vis one another; rather, the ultimate constitutional issues should be held non-justiciable, their final resolution should be remitted to the national interplay of the political process. Tie into PQD

Legislative/Executive Conflicts

Youngstown Steel Seizure – Justice Black -- The President may not make laws; he may only carry them out.

Truman seized steel mills in order to thwart the damages a strike could have on the war effort. Truman did not request Congressional approval or authorization.

Govt Arg: The order was made on findings of the President that his actions were necessary to avert a nationale catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting w/in the aggregate of his Const pwr as the Chief Exec and Commander in Chief.

Ruling: The President's pwr, if any, to issue the order must stem from either an act of Congress or from the Const itself. No stat authorized Pres to take control of property. Seizure techniques to stop labor disputes had been expressly rejected by Congress a few years earlier.

Govt argued the case was not about labor but about war and the amendment in? should not apply.

W/out Cong support, the authority must be spelled out in the CONST, which it is not.
**Const limits Pres functions in the awmaking process to the recommendding o laws he thinks wise and vetoing of f laws he thinks bad.**

Congress could have authorized the public taking of pvt prop for public use.

The Founders of this Nation entrusted the lawmaking pwr to the Cong alone in both good and bad times.

Justice Frankfurter: Separation of Pwr is paramount.

Where Cong has allowed for Pres seizure, Cong deemed seizure to be so drastic that it be carefully circumscribed on the rare occasion it is necessary. The failure of the amdt to the Taft-Harley Act emphatically denied Pres pwr to seize industry b/c of strike.

Justice Jackson: Pres may be Commander in Chief, but Congress raises and pays for the military.

Pres has no monopoly in War Powers. Cong can grant emergency pwrs sufficient to deal w/ the crisis. A c crisis that challenges the Pres equally challenges Cong.

Justice Vinson: Work stoppage at steel mills will imperil war effort. This is not a simple seizure of a farm, but something that affects national security.

Quoting Marshall: The Const is intended to endure for ages and consequently should be adapted to the various crises of human affairs where the means are adequate to the ends.

**Implied Acquiescence By Congress**

Congress may sometimes be found to have impliedly acquiesced to the President's exercise of pwr in an area. This may be enough to say Pres has acted w/in scope of Const. The SC relied on such a theory of implied congressional acquiescence in upholding Pres. Carter's pwr to take certain actions to obtain the release of American hostages from Iran.

Dames & Moore v. Regan

In order to bargain w/ Iran to free the hostages, Carter suspended all contractual claims pending against Iran in American courts and the claims would be arbitrated internationally.

Suspension Upheld: The claims suspension was w/in Pres' const authority. Congress had never specifically delegated the pwr to suspend claims to the Pres, it had *implicitly authorized* that practice through a long history of acquiescing in similar presidential conduct. *Pres has implicit approval from Cong to settle claims w/ foreign pwrs using executive agreements.*

Nevertheless, the SC urged a limited scope. The Pres could not suspend all claims under the guise of the Const; rather, the SC was simply deciding that where such settlement or suspension is a "necessary incident to the resolution of a major foreign policy dispute," and
Congress has acquiesced in that type of presidential action, the action will be deemed w/in the Pres' Const authority.

Nota bene – Congress' acquiescence is not a license for the Pres. It is merely a factor in determining legitimacy of Pres' actions.

Executive Authority

Executive Privilege

Several Presidents have invoked a self-proclaimed "doctrine of executive privilege" to justify their refusal to disclose information claimed to be confidential. The only SC case to address the issue was U.S. v. Nixon re the Watergate tapes. The Court held that there is a Const. based executive privilege but that it can be abused and can be overcome by the needs of an investigation.

U.S. v. Nixon

The Watergate Special Prosecutor issued a subpoena duces tecum requiring him to hand over a number of documents and tapes relating to certain mtgs involving the Pres. Nixon did not turn over all the tapes under a claim of executive privilege. The trial court rejected this argument and the case went to the SC.

Holding: SC upheld genl doctrine of exec priv, but held that it did not apply in this case and Pres had to produce.

The Court, not the Pres decides: Separation of pwrs does not preclude judicial review of a Pres' claim of privilege. Judiciary says what the law is Marshall in Marbury. Therefore, Court, not Pres, must evaluate the claim.

Privilege Exists: There is indeed a Pres Privilege for "confidentiality of Presidential communication in the exercise of Article II Pwrs." The privilege of constitutionally "can be said to derive from the supremacy of each branch w/in its own assigned area of Const duties."

Privilege is not absolute. It was qualified and outweighed by the need to develop facts for a criminal trial.

The Const dimension of the exec privilege was outweighed by the Const dimension of the criminal justice system's need for access to relevant info.

The Nixon holding does not affect civil cases.

What is will be privileged? The SC made it clear that "military, diplomatic, or sensitive national security secrets" would be placed upon a different footing from a mere general claim of confidentiality.

How should improper conduct of the Pres be treated? It has been argued that impeachment is the only remedy/exclusive sanction for the improper conduct of a sitting Pres. It is the
only method of sanction mentioned in the Const. Conversely, impeachment might be too mighty of a club for an isolated transgression by the Pres.

Civil Immunity of Presidential Assistants/ Amenability to Process

Nixon v. Fitzgerald

Facts: Fitzgerald brought an action against Pres Nixon on the ground he was discharged for exercising his freedom of speech.

Holding: The SC held the Pres was immune from an action for damages. Powell: The President occupies a unique position in the Const scheme. His duties are singularly important. A diversion of his energies toward fighting pvt lawsuits would raise unique risks to the effective functioning of the fedl govt. He would be an easy target.

Further, there are numeros safeguards to ensure sanctions can be taken on Pres: 1) Impeachment, 2) Scrutiny by the press, 3) a desire to earn re-election, 4) need to main prestige of the Pres influence and historical stature of office.

White Dissent: Pres is not immune from injunctions. The Pres should have the same obligations to those he injures as any fedl officer.

Clinton v. Jones

Issue: Should the President be excused from suits arising out of unofficial actions or actions that occurred to prior to his/her taking office? NO

Pres Arg: He argues for a postponement of the judicial proceedings that will determine whether he violated the law. The character of the office that was created under Article II and the separation of pwrs have structured the Const arrangment since the founding.

He occupies a unique office w/ vast pwrs and the public demands his full attention. B/c of the Sep of Pwrs precludes the Jud Branch from interfering w/ the Exec Branch.

SC: Sep of Pwrs would not be violated. Jud Branch is not being required to form any Executive functions. The decision will not curtail the scope of the official pwrs of the Exec Branch. The litigation of unofficial actions poses no threat to misallocating either jud or exec pwr.

Pres Arg: Allowing suit to go forward would impose an unacceptable burden on the Pres' time and energy, and thereby effect performance.

SC: The Dist Cts can manage time efficiently to allow Pres to tend to nation's business and the litigation.

Sep of Pwrs does not mean that the branches exert no control over each other. Marshall

A burden on Pres' time is not a reason to preclude litigation.
It was an abuse of discretion for the Dist Ct to defer the trial until after the Pres leaves office.

Legislative/Executive/Judicial Conflicts in the Domestic Sphere

Non-Delegation Doctrine – Congress is truly not the only law making body. The Admin agencies have been given regulatory authority. Among other things, agencies can regulate unreasonable risks to consumers and protect the public interest in broadcasting regulation.

Why does Cong delegate broad discretionary pwr to agencies? 1) Cong may know there is a genl problem but it unaware of how to solve it. Agencies may have the necessary expertise. 2) The area may be one that changes rapidly. 3) There could be political costs if Cong were to address an issue and Cong passes on the burden to the agencies and can blame them if the agencies screw up.

Non-Delegation and the New Deal: Under the New Deal, many bills allowed for the President/Agencies to set up boards, commissisons, etc. to regulate insudtry.

In *Panama Refining* the National Industry Recovery Act (NIRA) was partly invalidated whereby it attempted to prohibit, as part of the petroleum code, the transportation in inter comm of oil produced in violation of production quotas. The Court emphasized that the stat did not supply stds to the Pres for when he could exercise pwr.

*Schechter and Non-delegation:* The SC was concerned that Cong was going to delegate interpretation of the statute to trade groups and industry associations to determine what is fair and adequate regulation of an industry.

Legislative Veto – This is a device which enables Congress to monitor actions by the executive branch, including fedl administrative agencies. Typically, such a leg veto provision is included as part of a Cong stat delegating certain pwrs to fedl agencies. If after an agency takes a certain action, and Congress disagrees, the veto provision of in the original bill allows one or both houses to cancel the administrative action via a resolution. The Pres has no opp to veto the resolution.

INS v. Chadha

*Chadha* declared the Leg veto unconstitutional b/c it violated the Pres' veto pwr and the bicamaral structure of Congress.

Congress delegated to the Atty Genl the power to review and suspend the deportation of aliens in certain situations. However, Cong reserved the right to review and/or veto the Atty Genl's decisions. Either house could exercise the veto.

The SC struck down the legislative veto pwr as a violation of the Const on 2 fronts. First the veto violated the *Presentment Clause* (*Art. 1, §7, cl.2*) which requires that every bill be presented to the Pres for his signature so he may have opp to veto.

Additionally, b/c the leg veto need only come from one House, it violated Art I, §1 and §7, by which both houses must pass a bill b4 it becomes law.
It was determined that the scrutiny of the AG's decision through a leg veto was an exercise of leg pwr, which required bicameral approval. It was a leg pwr b/c the veto had "the purpose and effect of altering the legal rights, duties and relations of persons…outside the leg branch, such as the AG, the Exec and Chadha.

In order for Cong to truly override the AG it would have to pass a law in the traditional manner: Approval by both houses and presentment to the President for his signature or veto.

Justice Powell: Cong exceeded its pwr in this case and undertook a judiciary role, but he would declare all leg vetoes as violative of Presentment Doctrine.

Justice White's Dissent: The House's use of the legislative veto was not the equivalent of passing laws. The legislative veto "no more allows one House of Cong to make law than does the presidential veto confer such pwr upon the Pres." Agencies are free to engage in lawmaking decisions which need not meet Cong or Pres approval. "If Cong may delegate lawmaking pwrs to ind exec agencies, it is most difficult to understand Article I as prohibiting Cong from also reserving a check on legislative pwr for itself." It is enough that the intitial stat authorization meets theArticle I stds. Leg veto secures accountability on already enacted law.

White contends the sep of pwrs is not encroached upon and the checks and balances are also supported.

Two House Veto Provisions – Just as a single house veto is unconst, so too is a bicameral veto b/c both deny the Pres of his veto pwr.

Single House Actions that are Valid: 1) Senate confirmation of Appointments

Chadha and Formalism: Editors and Paulson contend the Chadha majority was too concerned w/ textualism and a strict interpretation of the Const question. Justice White in his dissent commented that the Court's approach was inconsistent w/ its previous flexible approach toward sep of pwrs issues. After all, the Fed Govt has seen tremendous expansion under the functional approach used since 1937.

Agencies and the Separation of Pwrs

Presidential Removal Pwr

Myers v. US – This case involved a stat allowing the Pres to appoint and remove postmasters w/ the adivice and consent of the Senate. Pres. Wilson attempted to remove Myers before the expiration of his term. The Ct held that an attempt to limit Pres' removal pwr was unconst.

1. The act of removal is itself exec in nature and must therefore be performed by Pres; 2) under the "Take Care" clause, it is the President, not his subordinates, who must take care that the laws be faithfully executed; and 3) Article II vests exec pwr in the President, not in subordinates.
Quasi-legislative and quasi-judicial officers: Where a fedl appointee hold such a position, Congress may limit or completely block the President's right of removal.

Humphrey's Executor

The Court found that Congressional control over the removal of quasi-legislative/judicial officials was necessary in order to preserve their independence from the executive branch. The Court upheld the FTC Act which limited the Pres' right to remove fedl trade commissioners. Subordinate officers do not serve at the pleasure of the President.

The FTC was created by Cong to carry into effect legislative policies embodied in the stat in accordance w/ the leg standard therein prescribed, and to perform other specified duties as a leg or jud aid. The FTC cannot be seen as an arm of the Exec and, therefore, must be free from exec control.

Wiener – Damn That's a Cooooool Case!!!

The stat creating the War Claims Commission was silent on the question of removal, but since the commission was quasi-judicial, the Court ruled that the Pres could not remove members.

The Importance of Humphrey and Wiener: They recognize a congressional pwr to create independent agencies that are free from the Presidential removal pwr, and, to a certain degree, presidential pwr to supervise and control their decisions. The independent agencies have been called the 4th Branch of Govt.

Appointment/Removal of Exec Personnel

The Appointments Clause: Article II, §2: The President shall "nominate, and by and with the Advice and consent of the Senate, shall appoint Ambassadors...Judges of the SC and other Officers of the U.S." Further, "Congress may by law vest the Appointment of such inferior officers, and they think proper, in the President alone, in the Courts of Law, or in the Heads of the Depts."

Congress cannot appoint any of the inferior officers. Appointments made by the heads of departments brings such appointments w/in pwr of the President b/c the heads of the depts are in the Exec branch, so long as they are not independent agencies.

Buckley v. Valeo

The SC invalidated the composition of the FEC b/c the Act proving for the creation of the FEC stated that a majority of the FEC members were to be appointed by the FEC and Speaker of the House.

The SC held that the duties of the FEC could only be performed by "Officers of the U.S." and Cong had no authority to appoint such officers. Therefore, the members serving were invalidly named.
Removal by the President/Independent Counsel

Morrison v. Olson: Until 1988, it seemed clear the Pres could remove purely executive officers. However, the rule now seems to be that Congress may limit the Pres' right to remove even a purely exec officer, so long as the removal restrictions are not of such a nature that they impede the Pres' ability to perform his Const duty.

ISSUE: This case pertains to the OIC and whether the President's removal pwr was violated b/c he could not directly remove the special prosecutor under the stat creating the OIC.

Holding: The stat does not restrict the President's pwrs or violate the separation of pwrs b/c the A/G can still terminate the AG for "good cause." Therefore, the Exec "retains ample authority to assure that the counsel is competently performing her statutory responsibilities."

Despite the Pres' limited pwr to control the OIC, the Act, on the whole, did not unconst take pwr from the Pres. Pres cannot select the IC or determine IC's jurisd, but the Pres has the right to decide whether to apply for the appointment of a special prosecutor and allows the AG to remove the IC for cause to ensure Pres is able to perform Const duties.

Scalia Dissent: The Act violates the sep of pwrs. The Pres should maintain complete control over the investigation and prosecution of violations of law. Since the Pres' control over the IC was curtailed, the Act was clearly a violation of the const mandate for a separation of pwrs.

Removal by Congress: May Congress reserve for itself the pwr to remove an exec official? NO.

Bowsher v. Synar:

Facts: The Gramm/Rudman Act was to reduce the fedl deficit to 0 by 1991. It established debt limits to be met each year. The Act gave a key role to the Comptroller General in carrying out automatic cut provisions. He was to review OMB and CBO budget estimates and then submit a report to the Pres stating cuts needed in all programs to meet the targets. Pres was then required to issue an order mandating the proposed cuts. Cong could then review the cuts and decrease spending to eliminate the need for some of the cuts. If Cong did not act, the cuts mandated in Pres order would automatically go into effect.

An older stat allowed Cong to remove the Comptroller from office for 5 reasons: 1) permanent disability, 2) inefficiency, 3) neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. The act had never been enforced.

SC Holding: The SC struck down the automatic cut provisions of Gramm/Rudman b/c 1) the Act uses the Comptroller's "exec pwrs"; 2) exec pwrs may not be vested by Cong in itself or its agents b/c Cong is limited to the legislative rather than exec functions; 3) b/c Cong can remove the Comptroller, he is an agent of Cong; therefore, 4) the Comptroller may not constitutionally exercise the pwrs given to him the Act; and 5) the Act's automatic budget reduction mechanism, which is based on the Comptroller's exercise of his exec pwrs, must be invalidated.
The SC holds that the retention of the right of Cong to remove an exec officer for certain types of causes converts that officer into an agent of Congress. The 5 reasons for removal were too broad.

Congressional removal would tantamount to a Congressional veto.

CT is taking a formalistic approach.

White's Dissent: Congress' retention of the right to remove the Comptroller for specified causes did not convert him into an agent of Congress. "The question is whether there is a genuine threat of 'encroachment or aggrandizement of one branch at the expense of another'...Common sense indicates that the existence of the removal provision poses no such threat to the principle of separation of pwr's.

Bowsher's Significance: Congress cannot reserve the right to remove an Exec officer for cause where the def for the cause is fairly – inefficiency, neglect of duty, or malfeasance.

Presumably the 2 other grounds would be valid for removal.

Further, impeachment can still be used to remove an exec officer.

D. Presidential Exercise of Legislative Power
   1. Clinton v NY (Stevens)
      a. The Presentment Clause: provides that after a bill has passed both houses of Congress, but before it has become law, it must be presented to the president; if he approves it, “he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall…proceed to reconsider it.” Art II § 7

      a. Violates Presentment Clause: The majority concluded that the LIVA failed to follow Clause method of enacting or repealing statures. The process laid down in that clause was, the only way authorized in the Const to enact or repeal a bill. The Act failed to follow this procedure in at least two ways: return of the bill occurred after the bill had been signed into law, rather than before and the cancellations could apply to only part of the bill, whereas supposed to veto entire bill
      b. Net effect is to let the President write a new bill: f the act were valid, “it would authorize the President to create a different law one whose text was not voted on by either House of Congress or presented to the President for sig”
      c. Gov Arguments
         1. Field v Hart-const of Tarriff Act, exempted some 300 specific articles from import duties, but provided that the President could suspend certain exemptions upon finding that a country exporting the products to the US had imposed duties on US goods
            a. Tariff Act was prospective-LIVA Does not respond to anything new
b. When the President determined that the contingency had arise, he had a duty to suspend; in contrast, while it is true that the President was required by the Act to make three determination

c. Simply carrying out cong policy, in contrast the LIVA over rides congressional judgment (separation of powers problem)

d. Kennedy Concurrence: Did not explore the sep of powers problems. “Failure of political will does not justify unconst remedies.” The act “establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or extract further concessions from Congress.” This “enhances the president's powers beyond what the Framers would have endorsed.”

e. Breyer Dissenting: Congress has delegated its power.
   a. The Act was passed in the usual way
   b. The President is exercising delegated power
   c. Separation of Powers questions:
      i. Has Congress given the President the wrong kind of power?
      ii. Has Congress given the President the power to encroach upon Congress’ own constitutionally reserved territory?
      iii. Has Congress given the President too much power, violating the doctrine of nondelegation?

Scalia (101-3): no difference between Congress’ authorizing the President to cancel a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion.

Delegation of Legislative Pwr to the Judiciary

Congress has considerable flexibility in assigning to the Judicial Branch tasks that might be considered law-making ones, as least where the subject matter relates to the role of the courts.

Mistretta v. US

Facts: Mistretta invloved the U.S. sentencing commission, set up by Congress to develop guidelines that fedl judges would have to apply in sentencing federal crimes. Cong provided that of the 7 appointees to be made by the Pres w/ the advice and consent of Cong, 3 must be fedl judges. P claimed that this was an unconst delegation of law making pwr to the Judiciary. Judges were being appointed to the Commission to make laws/policy.

Holding: The P's args were rejected. Non-judicial duties may not be traditionally given to Judiciary, but there are exceptions and the Sentencing Commission was a valid one. The Jud plays a major role in sentencing, so it should have a say in the making of the guidelines. Such a role for the Jud does not threaten "the fundamental structural protections of the Const."
Further, the SC stated that the 3 judges entanglement in political work on the Commission would not undermine public confidence in the Judiciary. The sentencing process is carried out entirely by the Judiciary, and allowing the judges to serve would be a neutral endeavor where judicial participation would be appropriate.

Scalia Dissent: This is a pure delegation of the legislative pwr to the Judicial Branch which violates the separation of pwrs.

Scalia's Dissents in Bowsher and Mistretta: He objects to the results reached by the Court b/c they permit Congress to establish arrangements that minimize political accountability.

Congressional Control over Administrative Agencies

If a review board or other oversight body board is staffed w/ members of Cong and is carrying out what is properly viewed as legislative functions, the board's own actions must be approved by both Houses and presented to the Pres for veto.

Metro Washington Airport Case

Congress passed a statute transferring control of Dulles and National to the Metro. Washington Airports Authority provided that the Authority set up a Board of Review composed of 9 Members of Cong. The board could veto any decisions made by the Authority.

Holding: The Board was struck down, bc Members would be in effect administering the airports, which is an Exec role, and would, therefore, violate the separation of powers.

The SC held 2 Possibilities could occur:

Improper Law Making: If the Board's actions were viewed as legislative, the Congress was violating the presentment and bicameralism requirements of the Const, since the Board would be making decisions that were not approved by each House or presented to the Pres. Chadha

Or

Improper Execution of Laws: The Board might be viewed as giving the Board the power to administer and execute the laws. Therefore, Cong would be performing Exec functions. This would also violate the Separation of Pwrs. Exec, not Leg, carries out the laws. Bowsher

The President and Foreign Affairs

Const gives Pres greater authority w/ respect to foreign affairs than does it domestic affairs. Article II, §2 enumerates such pwrs. The need to present a clear unified face to the world dictates that the Pres bear a special role in implementing the nation's foreign policy.

Curtiss-Wright v. US
A resolution of Cong authorized the President to ban the sale of arms to countries engaged in a particular conflict. Pres Roosevelt proclaimed such an embargo, and Curtiss-Wright was charged w/ conspiring to sell arms to Bolivia, a country covered by the embargo. CW challenged it as unconst for being too broad a delegation of legislative pwr to the Pres.

Holding: The Ct stressed "the very delicate, plenary and exclusive pwr of the President as the sole organ of the fedl govt in the field of international relations." The Pres must have a degree of discretion and freedom from statutory restriction in foreign affairs that is not allowable in domestic matters. This is afforded b/c of the Pres' access to information and a need to negotiate w/ world leaders. The Pres would be best suited to determine if Bolivia was in a conflict.

The presidential embargo was in line w/ Congressional intent. If the President acted in an area where Cong had been silent or where Cong openly disagreed, the Pres' pwr to make international policy would presumably be less broad.

Commitment of the Armed Services/Commander in Chief

The pwr to declare war is solely given to Congress. Art. I, §8. However, the President, as Commander in Chief may commit the use of American armed forces abroad. Art. II, §2 in the absence of a Congressional declaration of war.

The courts have not declared whether the commitment of troops w/out Cong assent is Const.

*It is settled that the President may commit forces to repel an attack on the U.S.*

Prize Cases: The Ct narrowly held that Lincoln's blockade of southern ports following the attack on Ft. Sumter was allowable. If the Pres could resist the attack by a foreign nation, so too could he resist the act of some of the states in the Union.

The Prize cases do not settle whether the Pres can commit troops to aid an ally being attacked w/out Cong approval. Would waiting for Congressional action do irreparable harm to the vital interests that executive intervention is designed to serve.

It is also unclear whether the Pres could order a preemptive strike in anticipation of an enemy attack. It would likely be found Const b/c Cong would not have time to consider the wisdom of military action.

Defense Treaties, whereby we will come to the aid of an ally who was attacked, are likely Const b/c they have been ratified by the Senate.

The War Powers Resolution of 1973

Vietnam committed our troops to years of war fighting w/out a formal declaration of war. Many in Congress argued that the Pres had usurped Congressional pwr. To restore what is considered to be proper balance btw the Exec and the Leg branches w/ respect to the commitment of armed services, Congress enacted the War Powers Resolution over Nixon's veto.
Chief Provision: The Resolution is designed to limit those cases where the Pres commits troops to hostilities w/out prior Congressional approval.

I. Consultation: The Pres in every possible instance shall consult w/ Congress before introducing U.S. forces into hostilities or into situations where imminent involvement into hostilities is clearly indicated by the circs...The Pres is to report to Cong w/in 48 hrs any such commitment underlying the circs and the Const and Stat auth under which the Pres was acting and the estimated scope and duration of the hostilities.

II. Congressional Action §5B – W/in 60 days after the Pres does or should report to Congress, the Pres must terminate the use of armed forces, unless Congress "(1) has declared war or enacted a specific authorization for such use of U.S. Armed Forces, (2) has extended by law such 60 day period, or (3) is physically unable to meet as a result of an armed attack on the U.S." If the use of armed forces must continue beyond the 60 days w/out Cong approval in order to extract the troops, another 30 days will be afforded. Total of 90 days at most w/out Cong authorization.

III. Congress' Right to Override: The 60 day period may be cut short under §5(c) if Congress passes a "concurrent resolution" that the armed forces be immediately removed by the Pres.

IV. Where Declaration of War is not Required: Apart from the instances where Cong has declared war or granted specific statutorry authorization, the Pres may only introduce American forces into hostilities where there is " a national emergency created by attack upon the U.S., its territories or possessions, or its armed forces."

The Act required the Comptroller to perform a number of duties. He was to file a report w/ the Pres and the Pres could mandate any of the budget reductions the Comptroller authorized. These mandates would after time would become final unless Congress legislated other spending reductions to obviate the need for the order.

If these provisions were unconst, Cong could consider a joint res subject to a Pres veto embodying the reports of the OMB and CBO, and these reports would be considered equivalent to Comptroller's report.

SC – In light of Myers and Humphrey's Exec, we conclude that Cong cannot reserve for itself the power of removal of an officer charged w/ the execution of the laws except by impeachment. To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Cong could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Cong.
Comptroller Genl should be independent of Cong.

Card Notes

May states regulate intercomm? Non discriminatory regulation is allowed as long as it meets this balancing test – *The burden on interstate commerce (cost, difficulty of compliance & inefficiency created, less onerous alternatives) is weighed against the strength of the state interest in the regulation, to determine whether the burden on inter comm is "clearly excessive."

Can Congress forbid states from taxing interstate commerce? Yes, Congress can, under its Commerce power, forbid states from passing taxes that affect inter comm.

If there isn't any fedl legislation, the states are free to place a fair level of tax on interstate commerce, because such commerce must be expected to shoulder its fair share of a state's burden.

State taxes that discriminate against OOS residents also violate ArticleIV§2, the PIC and Equal Protection Clause

Modern view on Commerce after Lopez: There are 3 broad categories of activities which Congress can constitutionally regulate –

1)Channels: Congress can validly regulate use of the "channels" of interstate commerce of inter comm; e.g. highways and waterways, even though a particular activity may occur wholly interstate;

2)Instrumentalities: Congress can regulate the instrumentalities used in inter comm, even though the regulation affects a solely intrastate activity. Ex: Cong can mandate that every truck have certain safety devices installed even though a particular truck is used only in intra comm.

3)Substantially Affecting Commerce: The biggest category of regulable activities are those which have a "substantial effect" on inter comm. The rule governing Congressional regulation based on this category depends on whether the activity in question is commercial or non-commercial.

Three Principle Types of Congl Pwrs

1. Express or enumerated, Art. I,§8
2. Implied Pwrs, under Necessary and Proper Clause, Art. I, §8
3. Inherent Pwrs: powers inherent in the concept of national government
D. Slavery and the Commerce Clause:

1. Constitutional Background: Slavery appears in different contexts in the Const.:

1) 3/5 Clause Article I, §2, para. 3

2) Capitation for tax clause Art. I, §2 para. 3; Art. I, §9, para. 4

3) Migration and Importation: Art. I, §9, para. 1

4) Prigg case - Art. 4, §2, para. 3 (Fugitive law -- Justice Story)

1. INTERSTATE COMMERCE AND SLAVES

Groves v. Slaughter (1841):

Fact Summary: A provision of the Mississippi Constitution of 1832, which arguably forbade importing slaves into the state for sale there, was attacked as an impermissible restriction of interstate commerce. Mississippi was a slave state, and the provision was designed to protect its own slave trade against competition from other states.

PURPOSE: not an exercise of the state police power, but to protect its own slave trade from competition.

Slaughter's Arg.: to eliminate the force of the Mississippi constitutional provision. He tries to appeal to the Commerce Clause, that slaves are merchandise, and Congress should oversee the slave trade. State law which conflicts with the Commerce Clause should be deemed invalid. \( \rightarrow \) Supremacy Clause.

Justice Baldwin: Not under the police power: "the provision is general in its terms; it is aimed at the introduction of slaves as merchandise from other States, not with the intention of excluding diseased, convicted, or insurgent slaves, or such as may otherwise be dangerous to the peace or welfare of the State."

\( \rightarrow \) Holding: (Thompson) Mississippi statute upheld. The Ct. never gets to the Constitutional question. The State Constitution requires implementing legislation that was missing.
Concurrence: (McLean): He concurs, but substantially dissents.

Exclusivity: if Congress exercises its power, then the state must yield to it; if Congress does not exercise its power, if we assume that exclusivity applies, then states still cannot exercise power. McLean solves this dilemma by stating that:

Congress has exclusive commercial regulatory power, but slaves are no part of commerce; thus the states have exclusive regulatory power over slavery.

- The Marshallian view of congressional exclusivity suggested in Gibbons cast doubt on the validity of any state laws regulating the slave trade...However, McLean denied that slaves were an item of commerce: Even "if slaves are considered in some of the States as merchandise, that cannot divest them of the leading and controlling quality of persons by which they are designated in the Constitution." He went on to argue that the states are free to deal with slavery as they wished."

"The power over slavery belongs to the states respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is an essential part of it."

"The right to exercise this power by a State is higher and deeper than the Constitution. The evil involves the prosperity and may endanger the existence of a State. (state sovereignty)"

Concurrence: (Taney): states have exclusive regulatory power.

Dissent: (Baldwin): The Privileges & Immunities Clause (Art. IV, §2, cl. 1) says that the citizens of the states have the right to do what they want with slaves. The Constitution thus makes slaves the exclusive property of their owners and thus they can go across state lines without worrying about each state's laws on slavery.

3. RETURN OF FUGITIVE SLAVES:

PRIGG v. PA (1842)

Fact Summary: The Fugitive Slave Act of 1793, enacted pursuant to Article IV of the Const., authorized a slave owner to seize a fugitive slave (from non-slave states). In order to remove the slave, the owner must obtain a certificate of removal from a federal or state judge
(certifying that the slave is the owner’s and that the slave owes service to the owner).

Prigg, an agent of a MD slave owner, was denied a certificate of removal by a PA magistrate for the removal of an escaped slave in PA. He forcibly removed the slave from PA and returned her to MD. Pursuant to an 1826 PA statute expressly designed to prevent self-help in the return of fugitive slaves, Prigg was convicted.

Holding: (Story): The Ct. reversed Prigg's conviction and held the PA law unconstitutional.

Art. IV, §2, para. 3: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due."

The Ct. holds that this Article gives the slave owner the full right and title to his slaves which was indispensable. The Ct. argues that this was so central to the passage of the constitution that the Union could not have been formed without it. The clause gives such a qualified/absolute right that no state law can infringe upon it. (The Article's true design was "to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the slaveowners."

→ Story's major argument is that Art. IV, §2, para. 3 is self-executing: "the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent, this clause of the const. may properly be said to EXECUTE ITSELF, and to require no aid from legislation, state or national."

Para. 3 being self-executing meant that it operated on its own force without the need for implementing language and it authorized a slave owner to use self-help in capturing a fugitive slave.

The Fugitive Slave Act of 1793 provided implementing language, although it was unnecessary according to Story. Story thus views that the Statute provided the slave owner/catcher with an option -- if it suited the owner (for prudential reasons) he could go to the magistrate to get a certificate of removal, HOWEVER, he does not have to. The right to capture on the grounds of his absolute right is given by the Const. and this is separate from his right given by the statute (the statute just provides another option).
DISSENT (McLean): Congress has legislated on the constitutional power, and has directed the mode in which it shall be executed. The terms of the Const. are general, and like many other powers, require legislation. If the constitutional language was always an option, then it would be useless to execute the legislation because it would not be binding.

2. STATUS OF SLAVES IN THE FEDERAL TERRITORIES; AND STATUS OF THE SLAVES IN INTER-STATE TRANSIT OR AFTER HAVING SPENT TIME IN A FREE STATE (ARE THEY FREE?)

Dred Scott v. Sanford (1857)

CENTRAL QUESTION: What is the legal status on non-fugitive slaves in free states? Also, when the slave later returns, what effect does his previous residence in a free state have on his status in the free state?

VARIOUS ANSWERS:

1. The status of the slave does not change, it reattaches
2. He becomes a free person and remains free, no matter where he later goes
3. A slave taken into a free state, becomes free there, but when he returns to a slave-holding state, his slave status reattaches.

Fact Summary: Dred Scott was a slave owned by Missourian, John Emerson, who had sojourned with Scott to IL (a free state). Scott brought the case of his legal status upon his return to MO to a MO Ct. which, relying on precedent Rachel v. Walker, found for Scott. If a slave returns to a slave state after he is in a free state, he is free -- "once free, always free..."

The MO Sup. Ct. later rejected the "once free, always free" rationale and remanded the case. However, for fear that the case would be dismissed, Scott brought the action in a federal court on diversity. The case then went to the Sup. Ct.

Holding: (Taney): The Ct. held that slaves were not considered citizens at the adoption of the Constitution. They were only property. Once a slave is in the slave state, because he is colored, he is assumed to be a slave by nature. Slaves are not citizens and cannot sue in a federal court. At the time of the adoption of the Constitution, slaves were considered subordinate and had no rights or privileges but such as the government chose to give them. (However, this is not correct, Blacks who were not slaves did have some rights).
Dissent (Curtis): Blacks were citizens BEFORE the Constitution was enacted. Articles of Confederation and the citizenship of blacks in states during the pre-constitutional period. This is a rejection of Taney's arg. that all Blacks had no rights unless given by the govt. The citizens conferred powers on Congress. Because Blacks in the free states were part of the political community, it made no sense that they would enact the Const. and would allow no rights for themselves. (If you are going to confer powers on Congress, you are also going to claim rights).

IV. PREEMPTION: A Limit on State Power When Congress Has Exercised its Power Under the Commerce Clause

(1) Supremacy Clause: In the case of a direct, obvious conflict between a federal and state statute, the statute is simply invalid. The Supremacy Clause of Art. VI provides that in case of a conflict, state law must yield to federal law. Federal law is said to have "preempted" state law.

1. Unclear cases: Much more likely to arise is the situation where the federal and state action involve similar or identical subject matter, but there is no clear-cut conflict. In this situation, no single rule gives a way of deciding whether the state rule must fall. Rather, the Ct. has applied a # of general principles to determine whether the Supremacy Clause is relevant. Some of these principles are quite similar to rules applied in the dormant Commerce Clause cases.

2. Not limited to Commerce Clause: These preemption problems may arise in Commerce Clause or other contexts. They are related to the Commerce Clause because they involve a similar need to balance local and national concerns.

3. Rice criteria: Placing the Rice criteria in a greater scheme, the "presumption question" looks like this:

*Presumption in favor of continuing state regulation unless rebutted by:*

I. Direct Conflict btw Fedl and state Stat → Fed Prevails through Supremacy Cls
II. Express Preemption (a clear statement of Congressional intent to preempt/ occupy the field)
III. Implied Preemption (applying certain criteria one may be able to infer congressional intent/a showing of preemption that is inferred either by identifying preemption in terms of:

4 Criteria (Rice) Fall under 3:

1. Pervasiveness (the scheme of fed. regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it) Ex. Creating a Fed Agency w/ regulatory authority. Con has just not yet expressed intent.
2. Dominant/overriding federal interest
3. Object sought to be obtained by federal law and the character of the obligations imposed may reveal the same purpose (the least common, but used at the end of Hines)
4. Conflict of state law with federal purpose

IV. Express conflicts between federal and state laws (Avocado). This is a Supremacy Clause matter, NOT PREEMPTION. State law yields.

4. Federal occupation of the field: A federal-state conflict (whether in statutory provisions, or in purposes) is only one of 2 ways in which congressional action may render state action invalid. The other way is for Congress to "occupy the field" for the federal govt. If Congress has made such a decision to occupy the field (if it has preempted the entire subject area), state action in that area must fail no matter how well it agrees with the federal action and policies.

   a. Broad federal coverage of area: Where the existing federal regulatory scheme is broad and covers most of the subject area, the Court is much more likely to find federal preemption than where the federal scheme is less comprehensive.
   b. Areas traditionally left to federal control: banking, patent and trademark, admiralty, immigration, etc. will normally be found to be federally preempted.

5. Field traditionally left to states: If the subject matter is usually viewed as "local" rather than "national," preemption is unlikely to be found. This is especially true in cases involving health and safety concerns.

6. Effect of federal agency: Where Congress has set up a federal agency and given it broad regulatory powers in a particular subject area, this may
indicate a congressional intent to preempt the field. But even where a federal agency has broad regulatory powers, a particular state regulation in that area may be found to be so "local" that it is not preempted.

a. Hines v. Davidowitz (1941)

Fact Summary: A PA statute required aliens over 17 to register yearly; to provide specified information; to carry an alien id card and to exhibit it in order to register a motor vehicle or obtain a driver's license, and on demand of a police officer or agent of a state agency. After a Dist. Ct. enjoined enforcement of the PA statute as an encroachment on federal legis. power, Congress passed the 1940 Alien Registration Act, which required aliens over 13 to register only once, to be fingerprinted and provide specified information, but did not require them to carry a registration card. The Act mandated secrecy of aliens' records, which were available only to persons or agencies approved by the Atty. General.

Holding: The Ct. held that the 1940 Act precluded enforcement of the PA statute.

The PA statute pertaining aliens required much more than the federal statute; the federal statute should prevail.

The Ct. discusses the issue of pervasiveness (the scheme of federal regulation may be so predominant as to make reasonable the inference that Congress left no room for the states to supplement it):

1. re: freedom of individuals
2. international relations (concerns about how US citizens will similarly fare abroad)

→ The crux of the Ct's holding hinges on the dominant federal interest: There was a dominant/overriding federal interest to manage foreign affairs rather than having each state make laws pertaining to the treatment of aliens.

• Criteria 3: pen-ultimate para. on pg. 348: "The nature of the power exerted by Congress, the object sought to be attained, and the character of the
obligations imposed by the law, are all important in considering whether supreme federal enactments preclude enforcement of state laws on the same subject.

STONE's DISSENT: Presumption in favor of continuing state regulation. No conflict; defends PA.

b. Gade vs. National Solid Waste Management (1992)

Fact Summary: In 1988, the IL General Assembly enacted the Equipment Operators Licensing Act and the Hazardous Waste Laborers Act (licensing acts). Their stated purpose was to promote job safety and to protect life, limb, and property. They required license applicants to provide a record of at least 40 hours of training, to pass a written examination, and complete annual refresher courses. The Association sought a declaratory judgment that the licensing acts were preempted by federal regulations promulgated under OSHA which established detailed worker training reqs. for workers exposed to hazardous waste.

Holding: The Court held (O'Connor) that the state "dual impact" statutes, which protect both workers and the general public were preempted. She focuses on the notion of "field preemption" or the pervasiveness of the OSH Act.

Concurrence: Kennedy: there is express pre-emption: "A finding of express pre-emption in this case is not contrary to our long-standing rule that we will not infer pre-emption of the State's historic police powers absent a clear statement of intent by Congress. (defends a terribly restrictive view of preemption).

Dissent: Souter: Not Souter's finest hour. He states that the task is to discern Congressional intent. He finds that the language of the statute is insufficient to demonstrate an intent to pre-empt state law. He defends the presumption in favor of continuing IL's regulation.


The Court held that a federal marketing regulations did not preempt CA's statute prohibiting the sale in CA of avocados containing less than 8% of oil. The federal marketing
regulations for FL avocados, developed by a committee of FL growers, determined maturity based on a schedule of picking dates, sizes, and weights. As a result, some mature FL avocados did not satisfy CA's oil-content test.

The Court held that CA's statute did not conflict with the federal marketing system. FL avocados could be left on their trees until they met the 8% oil req.

However, finding the record inadequate to determine whether CA's statute unduly burdened or discriminated against interstate commerce, the Court remanded for trial (Commerce Clause).