

Doctrine of Enumerated Powers

Article 1 §8 (1-18)

States retain all powers not delegated to the Nat'l Gov.

Congress has power to legislate only if the legislation comports with a §8 item

Necessary and Proper Clause – Article 1 §8 Clause 18

- Congress has power to make all laws that are necessary for the execution of other enumerated powers
- Must be used with another Constitutional provision – N&P is not a power in and of itself
- Expands Federal power
- 2 types of Inquiries under N&P Clause
 - (1) Means/Ends → does the regulation actually promote an enumerated power?
 - (2) Ends → Is enumerated power being used merely as a pretext by Congress to take power that is not entrusted to Congress under the Constitution? (Marshall's Pretext reservation)

McCulloch v. Maryland

Holding: Congress has the power to incorporate a US Bank.

Reasoning:

1. Power of the Gov't comes from the people of the US, not the States
2. State governments do not have the power to reject an act passed by the US people
3. Congress not prohibited from creating a US Bank
4. Constitution grants power to conduct war and raise and support navies and armies
5. Necessary and Proper clause grants power to facilitate this end
6. Gov't should execute power in a way that will benefit the US people
7. Therefore, Congress (under N&P clause) can incorporate a US Bank

Holding: States cannot tax the US Bank

Reasoning:

1. States are forbidden from acts that are repugnant to the US Constitutional laws
2. Power to tax is power to destroy
3. Where US taxes States, the individual states' political process works to correct any evils because state representatives are accountable to their people. People of the US tax their constituents in a uniform manner.
4. Where States tax the US, political process doesn't work to alleviate any evils. Not uniform.
5. States do not have the power to tax Gov't

Commerce Power

Composition of the United States Supreme Court:

States Rights → Thomas, Scalia, Alito, Roberts, Kennedy

National Rights → Stevens, Souter, Ginsburg, Breyer

Process for CC Questions

1. What is the local activity being regulated?
2. Identify the local activity's affect on interstate commerce → direct, indirect, substantial?
3. What is the rule/means that Congress has prescribed
4. What is the means/ends relationship → what is the end the means seeks to accomplish? Is this end enumerated?

Congress can regulate three broad categories of activity under the Commerce Power:

1. Direct exercise of the Commerce Power
 - a. Regulation of interstate movement, trade, traffic, or communication
2. Instrumentalities of interstate commerce or persons or things in interstate commerce, even if the threat may come only from intrastate activities
3. Affecting Commerce Rationale: Activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce.
 - a. *Raich* → Congress can regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.

To sustain the use commerce power under Affecting Commerce Rationale:

1. TEST: (1) What is the local activity? (2) How does local activity affect interstate commerce (3) What is the means that Congress wants to use (4) What is the interstate commerce related ends
2. Other Considerations:
 - a. Economic intrastate activity has to have a substantial effect on interstate commerce.
 - b. Where not economic activity - Statute must contain an express jurisdictional element which limits reach to a connection with interstate commerce
 - c. Congressional findings enable court to evaluate the legislative judgment that the activity substantially affects interstate commerce even though no such substantial effect is visible to the naked eye.
 - d. However, just because Congress says activity substantially affects interstate commerce does not necessarily make it so.
 - e. The link between the activity and interstate commerce must be more than attenuated – it must be a substantial affect.
 - i. Court rejects “costs of crimes” and “national productivity” arguments because it would allow Congress to regulate everything.
 - f. Stream of Commerce – *Jones & Laughlin* test – was the local activity part of the stream of commerce? This test is dead until Reno. Did it come back?? Not sure.

Congress needs only a “rational basis” for concluding that an activity, taken in the aggregate, substantially affects interstate commerce.

Aggregate theory (*Wickard*) → Congress has the power under the Commerce Clause to regulate local activity that, aggregated together, will have a substantial effect on interstate commerce. Court doesn't look to the effect that one individual's activity will have, because aggregated, the effect is substantial.

Bootstrap Rationale (*5 Gambling Devices, Darby*) → regulation of a local activity is a reasonable means for making effective the prohibition of an activity that substantially affects interstate commerce.

1. Prohibit an activity in interstate commerce
2. Regulate, or prohibit, local activity to make effective a prohibition of that activity in interstate commerce.
3. Super Bootstrap → prohibit production (actual activity) to prevent it from entering into interstate commerce

Class of Activities Baby Lopez Cocaine Theory (*Baby Lopez / Raich*) → Where congress regulates a class of activity that affects interstate commerce, it is not necessary to make a separate showing that the similar local activity also affects interstate commerce where an attempt to separate interstate activities from intrastate activities would be a futile exercise.

Scarlet Letter Theory of CC (don't ever call it this on the test) → something that ONCE moved in interstate commerce is forever branded as part of interstate commerce and Congress can regulate that item or the individual that holds that item. *Scarborough*.

Tax Power -- Art I, §8, Clause 1

“The Congress shall have power to lay and collect taxes, duties, imposts, and excises, and to pay the debts and provide for the common defense and general welfare of the US...”

Tax power can be used as a necessary and proper means (Clause 18) to further another enumerated means. Cf. *Veazie Bank*. However, the tax power is a separate and distinct power that can be used without reference to any other enumerated power Cf. *Butler*

Veazie → tax power can be used to regulate activity that would otherwise not be able to be reached (for example – using tax power as a penalty) because the tax power employs less intrusive means than the commerce power.

Questions to ask:

1. Does legislation raise some revenue? Yes = tax (doesn't matter how minimal – *Kahriger*)
2. Does measure function as a penalty? If Yes, tax power not appropriate. If No, Court will sustain. However, every tax in some measure is regulatory, so there must exist more than a scintilla of evidence to corroborate a 'penalty' claim – *Sonzinsky*.
 - a. Tax might be considered a penalty when: (1) part of a regulatory scheme – child labor case *Bailey* or (2) has a criminal trigger with intent to penalize

Congress has the power to raise revenue using the tax power as long as the legislation has some reasonable relation to the end of raising revenue. Any other motives that might have instigated the legislation cannot be used to invalidate the tax measure. Other effects of the legislation that may be to accomplish another purpose other than raising revenue do not invalidate the legislation. *Doremus*.

Under *Doremus* Congress has the power to enact legislation that taxes specific activity to raise revenue. Failure to pay this tax can result in criminal sanctions. Thus, it is possible for Congress to tax

the sale of a product and institute reporting measures. These reports may be used to track usage of the product or activity. Two effects result from this legislation – (1) raising of revenue and (2) reporting on the movement of the product/activity.

Tax power is kept in check by the political process. If States are injured by the tax, they should use political process to change the tax measures. But they are not invalid merely because of any side effects that they may produce.

Note: Court has not struck down a tax since 1930.

Spending Power

- Spending power is a distinct power – separate from all the other powers.
- Power to spend for the general welfare, but does not amount to a national police power.
 - Congress decides which spending is for national welfare → circular argument *Helvering*
- Spending power is not limited to achieving the ends of other enumerated powers.
- Spending power cannot be used to coerce. If the expenditure is for a national public purpose, the purpose will not be thwarted because payment is on a condition that will advance that purpose.
 - Any conditions must be imposed on the recipient of funds
 - Congress can use funds to provide incentives for action *Steward Machine Co.*
 - Coercion = threat of loss
 - Incentive = hope of gain
- Congress given deference – no limits on ends – given wide discretion by the Court

South Dakota v. Dole – 4 Part Inquiry:

Congress may use the spending power where:

1. Purpose of spending power is in pursuit of general welfare & truly national
Court's defer to Congress' judgment that something is for general welfare
2. Power cannot be exercised coercively to obtain power reserved to the states. If Congress desires to condition the States' receipt of Fed'l \$ - it must do so unambiguously – enabling the states to make its choice knowing the consequences.
3. There must be a reasonable means/end relationship between spending and national purpose (judicial scrutiny of this means/ends relationship). Conditions on a federal grant might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.
4. Other Constitutional provisions may provide an independent bar to the conditional grant of federal \$

War Power & Treaty Power

War Power:

1. Congress has the power to regulate as a means of dealing with the evils of war.
2. Seemingly expansive power to regulate activity that bears some reasonable relation to the evils that war has produced.

Treaty Power

1. Treaties are used to further international and national goals
2. Where a state law conflicts with a treaty, the treaty will preempt the state law
3. Only case we read was *MO v. Holland* – migratory birds between US and UK. Upheld as a valid use of Congress' treaty power.
4. Limit → treaties can't contravene any prohibitory words in the constitution nor transcend constitutional boundaries *Reid v. Covert* (1957)

State Gov't Immunity From Federal Tax

Tax

1. National Gov't may tax State activities that are not uniquely capable of being performed by a State as a State.
 - a. Essential Functions: Fed Gov't may not impose a significant tax on property used or income received from a state's performance of its basic gov't functions. But where a state gov't engages in a function that is not at the core of traditional gov't functions, the fed'l gov't may tax that function as part of a non-discriminatory, generally applicable tax.
 - b. For example, the Gov't may tax the sale of mineral water that is bottled by a State owned company (Cf. *New York v. US*) however, the National Gov't may not tax activities surrounding the ownership of a Statehouse or regulate the State's methods of collecting state taxes. For these are activities that can only be performed by a State as a state.
2. National Gov't cannot discriminate against a State for taxing purposes – if National gov't seeks to tax an activity, it must tax evenly across the board. National Gov't has the power to refrain from taxing State activity if it so wishes, when it could otherwise tax such States.

State Gov't Immunity From Federal Regulation

3 categories of National Statute Regulation

1. Statutes that regulate private activity
2. Statutes that regulate state and local gov't
3. Statute that require states to exercise state gov't authority over private activity

Congress may not directly compel a State to enact or enforce a regulatory program (*NY v. US, Printz*). When Congress does this, it violates the 10th Amendment (But Congress may single out states for regulation when the states are acting as Market Participants (*Reno v. Condon*))

N&P → Congress can not use the N&P clause to force states to regulate. This constitutes a “mere act of usurpation” (Federalist) → (*Perez*)

1. Under *Garcia* the Court refuses to look at ‘traditional’ or ‘integral’ gov't functions in determining whether National Gov't can regulate. Structure of Gov't itself is the means to insure the role of the States. Political process insures that unduly burdensome regulations will not be cast onto the States. Each State has a voice in the national political process and this Federal system protects from burdensome regulation.

Exception: Court may still intervene where it is evident that there has been a gross failing in the national political process

2. Under *New York v. US* (radioactive waste) the 10th Amendment provides limits on the power of the National Gov't to regulate states.

- Congress can regulate (1) the interstate market in a commodity (2) preempt the regulatory field under the Supremacy clause, (3) encourage States to regulate in a particular way through the tax/spending power or (4) offer States a choice between enacting regulations themselves or accepting that Congress will preempt the regulatory field. But, it cannot direct States to regulate in a particular field by using States as implements of regulation.
- Reasoning: State lawmakers remain accountable to their electorate when State lawmakers enact legislation. Where National Congress mandates States to regulate in a particular field, accountability is diminished.
- State lawmakers cannot ‘consent’ to national government’s coercion to regulate in a particular manner.
 - Why? If State lawmakers accept the National Government’s coercive actions, won’t the political process right the wrong if indeed there be a wrong? Isn’t this the essence of *Garcia*? State citizens ultimately blame National Congress for the coercive behavior and then act through the political process to ensure that their elected National officials refuse to coerce their state to act.

3. Under *Printz* Congress can’t compel State’s to enforce national legislative actions. Making law and enforcing law are not mutually exclusive – enforcement necessarily encompasses a bit of legislation. States must be left independent and autonomous political entities.

- Congress takes credit for ‘solving’ problems without having to pay for the solutions. States must absorb the costs of implementing the federal program, but also must take blame for burdensomeness and defects.
- “Shall” goes over the line into compulsion

Dormant Commerce Clause

1. State laws that apply evenhandedly to in-state and out-of-state interests do not invoke as much judicial scrutiny
 - a. Political safeguard against state legislative overreaching (*Clover Leaf Creamery*)
2. Discriminatory Laws: (*Hunt*) Where there is little or no burden on in-state interests that correspond to any burden imposed on out-of-state interests the law is said to be ‘discriminatory’. These laws are invalid unless
 1. The discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.
 2. Less discriminatory alternatives are unavailable.
 - State has burden of proving these last 2 things.
 - No political safeguard - burden is primarily on out-of-state interests (*Southern Pacific*)
3. Burdensome Laws: (*Pike*) State statutes will be upheld where:
 - a. They regulate evenhandedly to effectuate a legitimate local purpose, and its effects on interstate commerce are merely incidental
 - i. State must show these local interests (health and safety interests are positively regarded by the Court – States retain police power)
 - b. Burdens incidentally imposed on interstate commerce are not ‘clearly excessive in relation to the putative local benefits’
 - c. No reasonable less-burdensome alternatives available that would accomplish same end.
 - d. Party challenging the ordinance bears the burden of showing burden is excessive in light of local benefits.
1. Statutes are *per se* invalid where they amount to simple economic protectionism.
2. Courts scrutinize the actual burdensome and discriminatory effects of a regulation (*Exxon*)
3. Superlegislature – In looking to alternative means Court should not sit as a superlegislature and determine whether those alternatives should have been pursued. If
4. Burden on a particular business operating in a market, does not necessarily prove that there is a corresponding burden on interstate commerce. *Exxon* → commerce clause protects the interstate market, not particular firms operating in that market. The goal of the dormant commerce clause is to ensure the unimpeded free flow of commerce between the states. It accomplishes this end by prohibiting regulatory measures designed to benefit in-state economic interests by burdening out of state competitors (*Wyoming v. OK*)
5. Commerce clause concerns are at their ‘nadir’ when state or local laws impose burdens on local interests → *Fort Gratiot*
6. Increased costs are not necessarily enough to sustain a dormant commerce clause claim. There must be more of a burden than merely increased costs. *Bibb*
7. Smoking gun – where the persons primarily responsible for the legislation are the same people who will ultimately benefit from the legislation – indicates smoking gun of discrimination. *Hunt*

Market Participant Doctrine

- State acting as a participant in the market, not a regulator
- Immune to dormant commerce clause scrutiny
- To the extent that a State enters the market as a participant, its activities do not fall within the purview of the dormant commerce clause, *however* Courts typically define the ‘market’ narrowly. Thus, when a State seeks to regulate downstream markets, the court may find that the

state has reached beyond its market participant protection – court will find that these downstream regulations violate the dormant commerce clause. *Wunnicke*

Privileges and Immunities Clause

- Generally states cannot discriminate against non-residents while reserving benefits for residents
- P&I Clause is invoked where a State discriminates against non-residents with respect to a fundamental right.
- However, there are times when a state may discriminate against non-residents:
 - Substantial reason for discrimination, beyond the mere fact that they non-residents (*Toomer*)
 - Discrimination bears a close relationship to the valid and independent reasons
 - Is the type of activity ‘fundamental’ to a citizen’s rights?
 - Being a lawyer? Earning a living?
 - Hunting elk?
- Court looks to the means/ends relationship between discrimination and method of preventing the evil inherent in the non-resident’s partaking in the activity.

Preemption to State Authority

- Supremacy Clause (Art VI §2)
- National Gov’t can preempt state law in 3 ways:
 - Express statement of preemption
 - Congress explicitly preempts State law
 - Implied occupation of a regulatory field (“field preemption”)
 - Court requires a clear showing that Congress intended to occupy a field
 - National regulatory schemes are so pervasive as to make reasonable the inference that Congress left no room for States to supplement the regulation
 - Field preemption leaves a regulatory vacuum → Congress not acting, States not able to act
 - Implied preclusion of conflicting state regulations
 - Conflicting state regulations
 - Sometimes a physical impossibility with adhering to both regulations (*Florida Lime & Avocado*)
 - State law poses an obstacle to the accomplishment of Congress’ full objectives under the Fed’l Act (*Crosby*)

Consent to State Laws that Violate the Dormant Commerce Clause

- Congress may give consent to States exercising power that would otherwise violate the DCC
 - Example: McCarran Act gave States power to impose regulations and taxes on insurance companies (*Prudential*), however in a later case (*Metropolitan*) the Court found that the 14th Amendment – Equal Protections Clause – limited State’s right to condition the right of a foreign corporation to do business within its borders.
- However, in the absence of affirmative Congressional consent a Congressional ‘negative’ will be presumed against State action that interferes with interstate commerce.