

Constitutional Law and The Regulatory State Outline- Sant'Ambrogio

1. Sources of Power

a. Constitution- constitutes and allocates power to the 3 branches

i. Separates the 3 branches- (due to fear of centralizes power_

1. Art I- Legislative
2. Art II- Executive
3. Art III- Judicial

ii. Defines Powers

iii. Limits Government Power/Protects Individual Rights

1. Separation of power
2. Reserves certain powers for the state (10 amendments)
3. Elections Terms- 2 Year (Reps), 4 Year (President), 6 year Senator
4. Bill of rights
5. All Federal power must have a constitutional hook

b. Agencies

i. Not spoken about in Constitution

ii. They combine all three branches

1. Write details of regulations
2. Enforce the regulations
3. Decide disputes between parties abiding or ignoring regulations

c. State Government Power

i. This comes from the 10th amendment

ii. Presumption is that states may act if Federal Gov isn't given sole power

iii. Prohibited State Powers- Art I, Section 10

iv. Supremacy Clause- when fed and state gov. have conflicting laws, Fed wins.

d. Bill of Rights

i. Amendments passed by very first Congress

ii. Enumerates Individual Rights

iii. Amendment 9- bill of rights in non-exclusive list

iv. Not applied to states until 14th Amendment

v. Rights restrict government, not private citizens

vi. Certain rights are not specifically enumerated, but exist by interpretation

2. Constitutional Principles and Interpretation

a. Authority for Judicial Review

i. Constitution is SILENT, but SCOTUS made decision in *Marbury v. Madison* (1803) to allow for judicial review

ii. *Marbury v. Madison*

1. Article III gives Supreme Court appellate jurisdiction, unless there is an exception by Congress through a regulation
2. Judiciary Act of 1789 states Supreme Court shall have power to issue writs of mandamus to any courts
3. Marbury requested a write of mandamus to Supreme Court, court found it deserved to be issued in the case, but that they did not

have the judicial power to issue it because it was submitted directly instead of appealed.

4. Outcome of this case: Supreme Court may review executive action
 - a. Discretionary power such as an appointment or veto= no review
 - b. Ministerial action such as actions regulated by Congress= reviewable.
5. Important take away from Marbury: The Constitution is regulatory. Congress cannot increase federal jurisdiction or courts. Courts may review legislative and executive action.

3. Limits on Federal Judicial Power

a. Interpretive Limits- 3 Theories

i. Originalism

1. Interpret Narrowly
2. Protect only explicit rights clearly stated in text
3. Protect rights intended by Framers
 - a. Argument against this:
 - i. Hard to know what framers intended
 - ii. Not a majority passed the constitution
 - iii. Desire to have an evolving constitution

ii. Non-originalist

1. Interpret more broadly
2. Protects more than just the powers explicitly stated
3. Constitution should evolve by interpretation, not just amendments
4. Must evolve to meet needs of society and advanced technology
 - a. Argument against this:
 - i. Does it expand the text too much?

iii. Modified/ Abstract Originalism

1. More common than pure
2. Looks for constitutional text, but suggests that each generation has the power to create their own conception of the meaning of words

iv. District of Columbia v. Heller??

b. Congressional Limits:

- i. Ability of Congress to restrict federal court jurisdiction

c. Justiciability Limits

- i. Series of judicially created doctrine that limit the type of matters that federal courts can decide.

4. Constitutional Sources of Power

a. Congress and the States

- i. Congress may act only if there is express or implied authority in the constitution
- ii. States may act unless the Constitution prohibits the action
- iii. Two Questions arise when evaluating constitutionality
 1. Does Congress have the authority under the Constitution to legislate?

2. If yes, does the law violate another constitutional provision or doctrine?
 - a. Infringing separation of power, or interfering with individual liberties
- iv. Three Reasons for Federalism as a constraint on Congress's power (three benefits for protecting state governments)
 1. Decreasing the likelihood of federal tyranny
 2. Enhancing democratic rule by providing government that is closer to the people
 3. Allowing state to be laboratories for new ideas
5. NECESSARY AND PROPER CLAUSE (This must ALWAYS be tied to an enumerated power)
 - a. **McCulloch v. Maryland** (US 1819)
 - i. This case defines what Federalism is. Here, the states opposed the feds operating a national bank.
 - ii. The court found that necessary can mean many things. This broad reading will allow congress more power and therefore it is an expansion.
 - iii. Congress has the power to establish based on an implied power through the necessary and proper clause
 1. If Congress has the power to do something, it has the power to use means necessary to carry out that something
 2. Lay and collect taxes, borrow money, regulate commerce, conduct and declare war, raise and support armies
 - iv. Maryland (and all states) cannot tax the national bank
 1. Does not make sense to allow an inferior state to have tax power over the federal government
 2. Power to destroy would be created, thus not logical
 3. Marshal argues the meaning of the constitution is an outline where congress must "fill in the gaps"
 - b. **Comstock (US v. Comstock)** (US 2010)
 - i. What does Necessary and Proper mean? How broad should it be applied?
 1. This case dealt with keeping mentally ill patients in custody if they have engaged in violent sexual conduct or have a serious mental illness.
 - ii. N/P does not mean essential, it means convenient or useful
 1. This grants Congress broad authority to enact federal legislation.
 - iii. Law must be rationally related to the implementation of some Congressional Power
 - iv. Test after this case is whether the outcome is rationally related to an end which addresses Congress's enumerated powers.
 1. "rationally related to a legitimate end" = finding a pretext.
6. COMMERCE CLAUSE
 - a. 3 Questions:
 - i. What is commerce?
 - ii. What is among the states?
 - iii. Does 10th amendment limit power to Congress?

- b. Congress can use the commerce power to regulate:
 - i. Channels of interstate commerce
 - ii. Instrumentalities or persons or things in interstate commerce
 - iii. Activities with substantial relation to interstate commerce
- c. History of the Commerce Clause:
 - i. 1890-1937: Narrow understanding of commerce by the court. Legislation passed, court struck it down based on substantive due process.
 - 1. Distinction between production and commerce.
 - ii. 1937-1990s: Broad federal commerce power
 - 1. Here, the distinction between production and commerce is gone.
 - iii. Since 1990s- again narrowly defined the scope and revived the application of the 10th amendment as a limit
- d. Two questions now:
 - i. What is commerce among states?
 - ii. Is 10th amendment limiting?
- e. The Initial Era (up to 1890):
 - i. ***Gibbons v. Ogden*** (US 1824)
 - 1. What is the scope of Congress's power?
 - 2. Was the grant of monopoly by NY constitutional? This dealt with the steam boats and where they may travel.
 - 3. Marshall came out with the conclusion that purely intrastate activity could not be regulated by the federal government. If it was between states or was going out of the country it could be controlled by Congress, otherwise, no.
 - 4. Holding, court has the power to regulate interstate commerce.
- f. Next Era (1890-2937)
 - i. The court came up with three important doctrines during this time:
 - 1. Narrowly define "commerce"
 - a. Commerce- one state of business, separate and distinct from earlier phases such as mining, manufacturing, and production (i.e. congress cant regulate mining, manufacturing, and production)
 - b. The court says that they narrowly interpreted the meaning of "commerce" as a means to protect the states autonomy.
 - 2. Restrictively define "among the states"
 - a. The court also required that for Congress to act, the regulated activity must have a direct effect on interstate commerce
 - ii. The overarching idea: Congress has the authority to regulate when there are direct effects on commerce, but where the effect on intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.
 - 1. Problem was distinguishing between direct and indirect effect. The court looked at the stream of commerce approach.
 - iii. Also, the court held that even if an activity was commerce and was among the state, Congress still could not regulate if it was intruding in to the zone of activities reserved to the states.

- g. 1937- 1990s: Broad Federal Commerce Power
 - i. **NLRB v. Jones & Laughlin Steel Corp** (US 1937)
 - 1. This case essentially stopped the distinction of production vs. commerce and comes up with the substantial effect test.
 - ii. **Wichard v. Filburn**- this case dealt with how much wheat Filburn could grow. The court held this was controlling production.
 - 1. Individual effects may be small, but when added together, the effects are significant
 - 2. This case establishes that we no longer look at direct vs indirect and now we look to what the cumulative effects are. Also, they look to a rational basis test now. This case deals with only non-economic activities.
- h. 1190s—Now.
 - i. Narrowing of the Commerce Power and Revival for the Tenth Amendment as a constraint on Congress.
 - ii. **US v. Lopez** (US 2005)
 - 1. Important facts:
 - a. 12th grade student entered school with a handgun, charged with violation of the Gun Free Zone Act of 1990
 - b. Court held that Congress **did not** have power under commerce clause to promulgate such law, slippery slope and too attenuated
 - 2. 3 channels of Commerce Clause
 - a. Channels of interstate commerce (roads, highways, railroads, river)
 - b. Instrumentalities of interstate commerce/person or thing in interstate commerce
 - i. Actual object or persons that travel through interstate commerce
 - c. Activities that have substantial relation to interstate commerce/substantially affects interstate commerce
 - 3. Majority says this is too attenuated. It seems to expand the power too much.
 - iii. **US v. Morrison** (US 2000)
 - 1. Important facts:
 - a. D convicted of sexual assault, but punishment by the school was then set aside, the victim then sued Morrison and the school under sec 13981 Violence Against Woman Act
 - b. Court held that Congress **did not** have the power under the CC to promulgate such law, only possible impact is very aggregated
 - 2. This case affirms the three categories for CC coverage
 - iv. Reasons for economic v. non-economic distinction in state has
 - 1. Local knowledge
 - 2. General police power
 - 3. Traditional areas of authority

4. Ability to act as laboratory
- v. **Gonzalez v. Raich** (US 2005) (THIS IS A RECOMMITMENT TO THE WICHARD IDEAS AFTER LOPEZ AND MORRISON)
 1. Important facts:
 - a. Federal agents seized cannabis in accordance with federal Controlled Substance Act, D's contend they may use under California State act of Compassionate use of Act
 - b. Congress said that if it's a commodity, it can be regulated
 - c. Court held that Yes, Congress has right to regulate per Commerce Clause
 2. Rule: Congress may regulate purely intrastate IF failure to regulate would undercut the regulation of interstate market
 3. Production of a commodity meant for home consumption, has a substantial effect on supply and demand in the national market.
 4. Something more than mere assertion is required when congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, NP clause will always be a back door for unconstitutional federal regulation.
- vi. Distinguishing Lopez and Morrison:
 1. Asking to excise app. Of concededly valid statutory scheme
 2. Activities regulated with CSA are quintessentially economic
 3. Intra state, non-commercial commodity party of interstate commodity.
 - a. Production + consumption = economic activity
- vii. How does the 10th Amendment Limit Congress's Power?
 1. **New York v. United States** (US 1992)
 - a. Facts: this case was about when the fed government implemented regulation which forced the states to provide somewhere for the radioactive waste of their state or to take possession of the waste.
 - i. Question: Can Congress direct the states to regulate in a particular field or a particular way?
 - b. Rule: Congress has power to encourage state to provide for disposal of waste, but not the power to compel or force states. Congress can not commandeer the legislative officials.
 - c. Reasoning: congress has power to regulate individuals, not states. Congress may provide incentive or federal funds to persuade compliance, but not NOT compel or coerce state to the point where they have no actual choice in the matter
 - d. Commandeering the states is not okay.
 - e. There are two ways in which congress can encourage state to play by their rules (these also allow the states to remain a part of the decision)
 - i. With Congress's spending power. Where the recipient of federal funds is a state, as is not unusual

today, the condition attached to the funds can influence the state's choices

- ii. Where Congress has the authority to regulate private activity under the commerce clause, they sometimes give state the option to regulate that activity according to federal standards or having state law pre-empted by federal regulation.

viii. ***Printz v. United States*** (US 1997)

- 1. The government can not commandeer executive officials.
- 2. DISSENT: Congress cannot force state legislatures to regulate, but Feds ;may do the regulation themselves and use State Executive officials to carry out those regulations; use NP clause... ?
- 3. Congress cannot make state officers do anything which forces them to enforce a federal program.

ix. ***Reno v. Condon*** (US 2000)

- 1. Rule: Congress can prohibit, but Congress cannot compel. Ct makes rule. Congress can alter their statute to make it comply.
- 2. If there is a law, which applies to states, but also applies to private companies, then that is okay. "regulatory scheme that regulates state and market"

7. TAXING AND SPENDING CLAUSE- Art I, Section 8, Clause I

- a. Is Congress limited to taxing only when it helps and enumerated power or can it be for any purpose as long as it is generally beneficial to the welfare fo the country?

b. ***United States v. Butler*** (US 1936)

i. Important Facts:

- 1. Congress regulated individual farmers productions and price rates
- 2. Court said not within Congressional Power. They equate regulating the farmers to regulating production which is left to the states.

ii. "To provide for the general welfare of the US"

- 1. 2 views- some interpret as a reference to an earlier line (Madison's view)
- 2. Some interpret is as power that is separate and distinct (Hamilton's view)
- 3. This court read as the second interpretation

iii. RULE: Congress may tax and spend for general welfare- any purpose not prohibited

c. ***Sabri v. United States*** (US ____)

- i. Case if federal spending. This is spending plus NP clause.
- ii. Money is fungible, the money might go into one program into the city, but another part of the city has corruption, that's okay because it can be applied to different areas.
 - 1. They are trying to protect the funding that is going to general welfare and making sure it is actually going to general welfare. Its enough that its going in one place. We can tie the specific funds to a loss, but they are all there together. Fungible.

- d. ***South Dakota v. Dole*** (US 1987)
 - i. Important Facts:
 - 1. Feds said they would withhold 5% of the states highway funding if they did not change the drinking age to 21.
 - 2. South Dakota says this is coercion. Court says not its not enough.
 - ii. Congress may attached condition to federal funding
 - iii. Some limitations:
 - 1. Must exercise spending power in pursuit of general welfare
 - 2. Must clearly and directly explain the condition, so as not to hide it
 - 3. Must be related to federal interest in particular national program
 - 4. Other constitutional provisions may also prevent (10th Amend)
 - iv. Outcome: This case only involved pressure, not coercion.
- e. ***National Federation of Independent Business v. Sebelius*** (US 2012)
 - i. This is the only time the court has used the coercion doctrine to strike down a statute
 - ii. Important facts:
 - 1. Congress withheld all funds if state did not comply with Medicaid expanded program
 - 2. Court held that Congress does not have the power to enact either provision
 - iii. Reasoning
 - 1. Congress cannot regulate something that does not exist, the thing or activity must already exist
 - a. Individual mandate does not regulate preexisting activity, instead compels person to become active.
 - 2. Necessary and proper clause doesn't apply because no original vested right
 - 3. Tax power does not apply because it is not a direct tax that must be apportioned among the several states:
 - a. Spending clause not applicable because this has turned from encouragement to coercion.
 - iv. Rule: Threatening to stop almost 10% of a state's entire funding budget is coercion. There really is no other way for them to get this money. -----
Main idea: Conditions cannot take the form of threats to terminate other significant independent grants.
 - v. Other rules:
 - 1. Congress cannot compel individuals to enter commerce
 - 2. May only regulate existing activity, not inactivity
 - 3. Builds on Lopez's limit on CC- must regulate commercial activity
- f. OVERVIEW:
 - i. Commerce Clause Regulate:
 - 1. Channels of interstate commerce
 - 2. Instrumentalities in interstate commerce
 - 3. Act with substantial effect on interstate commerce. May aggregate intra state act to determine effect but must be in some sense economic or commercial or at least very closely connected to activity. (Lopez, Morrison, Raich)

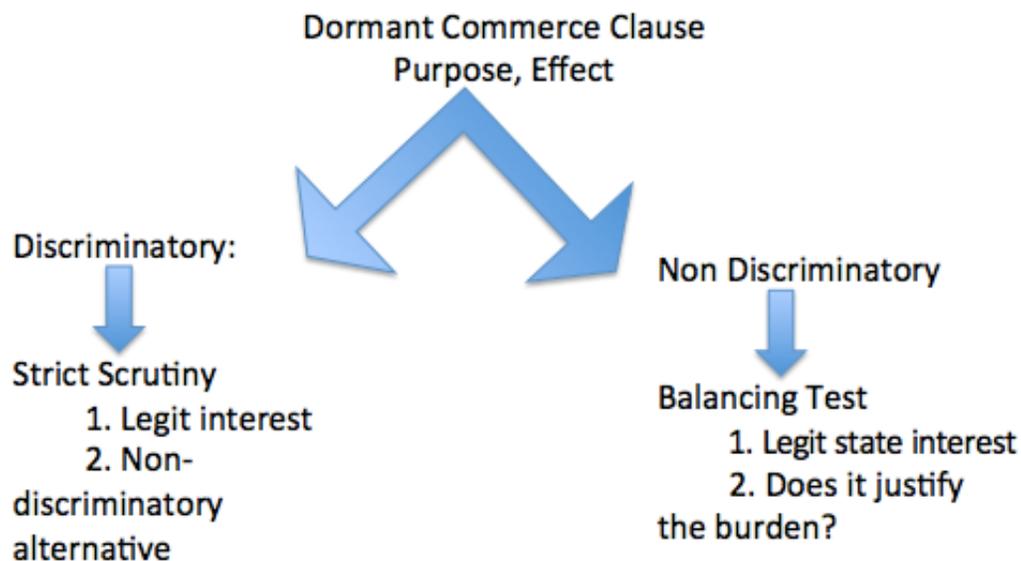
- a. May not regulate inactivity or compel persons into commerce (Sebelius)
 - ii. Taxing and Spending Power
 - 1. Congress may tax for the general welfare (Butler)
 - 2. Not limited by the other enumerated powers
 - 3. 10th Amendment not yet revived in this area
 - iii. Spending Power
 - 1. Exercise of spending power must be in pursuit of “the general welfare”
 - 2. Conditions must be unambiguous, enabling the states to exercise their choice knowingly
 - 3. Federal grants might be illegitimate if unrelated to federal interest in national projects or programs
 - 4. Other constitutional provisions may independently bar to the conditional grant or federal funds
 - a. Conditions cannot take the form of threats to terminate other significant independent grants
 - b. A certain amount might be too much, but the Court hasn’t gone there yet.
 - iv. Necessary and Proper Clause
 - 1. Must be derivative of an in service to an enumerated power, while this vests Congress with the ability to create the necessary predicate to the exercise of an enumerated power
 - 2. Constitutional so long as useful to the exercise of another enumerated power (4 Justices)
 - 3. Only constitutional if absolutely necessary to perfect the exercise of an enumerated power, and one step removed (4 justices)
8. Limits on State Regulatory and Taxing Power
- a. State’s power is limited when congress has acted, or in Congress hasn’t acted but states are prohibited under dormant commerce clause or privileges and immunities clause
 - i. States power is only limited where Constitution does so
 - ii. Congressional intent is very important here
 - iii. Congress can overrule that court in these situations
 - b. 2 arguments for preemption:
 - i. Supremacy Clause
 - ii. Set up of Federalism
 - c. 2 Kinds of Preemption (there is a presumption against preemption)
 - i. Express- written in a statute
 - ii. Implied- not written, but implied by a clear Congressional intent to preempt. Implied preemption can be found where:
 - 1. Conflict between federal and state law, so if complying with one will invalidate the other, the federal law preempts
 - 2. State law impedes the achievement of a federal objective

3. "field preemption" where the scheme of fed law and regulation is "so persuasive as to make reasonable the inference that Congress left no room for the state to supplement". Feds occupy field
 - d. **Lorillard Tobacco v. Reille** (US 2001)—EXPRESS
 - i. This case deals with federal regulation for tobacco advertising and where it can and cannot be places as well as the content
 - ii. Court said the federal regulation for tobacco advertising preempts State
 - iii. Express preemption section of the statute "No requirement of prohibition... shall be imposed by State law... if does not conform with this bill"
 - iv. Dissent believed that based upon senate report, it was not clear that it intended to preempt.
 - e. **Florida Lime & Avocado Growers, Inc. v. Paul, Director of Dept. of Agriculture of California** (US 1963)—IMPLIED CONFLICT
 - i. Fed. Law and state law had two different standards for when avocados are ripe enough to take of the tree and ship. Here, there was actually no conflict, growers could meet both standards so there was no issue and no preemption.
 - f. **Pacific Gas & Electirc Co. v. State Energy** (US ----) IMPLIED -IMPEDED FEDERAL ACTION
 - i. These laws dealt with building new nuclear facilities. The federal goal was safety and to encourage nuclear energy enhancement, state law is econoimc0 they want economic development, so state law is not preempted.
 - ii. If CA focused on safety, then the federal law would have preempted
 - g. **Arizona v. United States** (US 2012) IMPLIED- FEDERAL OCCUPY FIELD
 - i. Here, the state law was imposing harsher consequences for a civil penalty and making it a criminal penalty.
 - ii. Federal law preempts most section of AZ immigration statute because federal government completely occupies the field of alien registration.
 1. Court worried that implementation of state law, even if laws are complimentary, would cause different outcomes due to different approaches taken by federal or state officers.
 - iii. Rule: When a field has been occupied, even supplemental laws will not be accepted. State cant impose a higher/stricter standard when the feds occupy the field.
9. DORMANT COMMERCE CLAUSE (Negative Commerce Clause)
- a. Principle that state ad local laws are unconstitutional if they place an undue burden on interstate commerce. Even if Congress has not acted, even if its commerce power lies dormant, state and local laws still can be challenged as unduly impeding interstate commerce.
 - b. DCC focuses on state law. They are areas where Congress could legislate if there is an undue burden.
 - c. DCC is an expansion of Congress's/court's power, limits state powers.
 - d. When Congress has acted:
 - i. Supremacy Clause preempts state law

- e. When Congress has not acted
 - i. Federal law does not automatically preempt
 - 1. State law unconstitutional if places undue burden on interstate commerce or substantially interfered with interstate commerce
 - 2. State law unconstitutional if violated privileges and Immunities of persons (in state v. out of state)
- f. ***South Carolina v. Barnwell Brothers*** (US 1938) UNDUE BURDEN
 - i. Congress has not acted, so it s DCC case. This state law prohibits use of certain trucks on state highways.
 - ii. No undue burden because state has the primary and immediate interest, being that highways and roads are in the state's arena
 - iii. This is upheld because it applies to everyone fairly. Its facially nondiscriminatory.
- g. DCC Test for Discrimination:
 - i. Determining whether a law is discriminatory:
 - 1. On its face?
 - 2. In its purpose?
 - 3. By its effect?
 - ii. If YES to any → strict scrutiny test
 - 1. Legit state interest, non non-discriminatory alternative
 - iii. If NO to any → Court uses balancing test
 - 1. Incidental burdens are justified by legit state interests
 - 2. Balancing upheld unless: incidental burden on ISC outweigh benefit to state or clearly excessive in relation to state interest served.
- h. Exception to DCC
 - i. Congressional approval
 - 1. When Congress enacts law in these situations it can overstep a SC case because it is giving States explicit permission to regulate
 - ii. Market participant exception
 - 1. If government is a participant in the market and NOT the regulator, DCC does not apply
 - 2. The states can favor their citizens if the states are market participants
 - 3. If they are trying to control future industry or a market which they are nota part of, that is not ok.
- i. The contemporary Test for the Dormant Commerce Clause
 - i. A shift to the balancing approach- the police power/commerce power test of Gibbons and the local/national subject matter test of Cooley- attempted to draw rigid categories of areas where federal law was exclusive and those were states and could regulate. The modern approach is based on courts balancing the benefits of a law against the burdens that it imposes on interstate commerce.
- j. ***City of Philadelphia v. New Jersey*** (US -----)
 - i. You can not discriminate based on origin. The state “draws a line” At the border. States cannot do this.

- k. ***Hughes v. Oklahoma***- Minnows case.
 - i. This case also erects a barrier at the border. They don't want their minnows taken out of the state
 - ii. Discriminatory laws must:
 - 1. Have legitimate purpose
 - 2. No non-discriminatory alternative.
- l. ***Hunt v. Washington State*** (US 1977) DISCRIMINATION, facially neutral laws, discriminatory in its effects.
 - i. This case dealt with North Carolina growers changing the requirements for packaging in such a way that it effected the Washington Growing market.
 - ii. The law is discriminatory in practice because it burdens the Washington growers, but not the North Carolina growers. Also, it doesn't help consumers at all because only the wholesale people would see this packaging
 - iii. Strict Scrutiny applied:
 - 1. Compelling state interest
 - 2. Non non-discriminatory alternatives
- m. ***West Lynn Creamery case*** (US 1994):
 - i. State taxes milk producers and then subsidized their in-state milk producers
 - 1. The court found the purpose and effect of the pricing order were to divert market share to Massachusetts dairy farmers, thus injuring dairy farmers from other states.
 - ii. Court held this was unconstitutional because the out of state companies can not speak against the tax and the in state won't because they want the subsidy.
- n. ***Minnesota v. Clover Leaf Creamery*** (US 1981)
 - i. Not discriminatory in its purpose (this dealt with milk containers being all paper and no longer plastic)
 - ii. Because this law was not discriminatory in regards to the origin of the product, the court had to look at if the Act is "clearly excessive in relation to the putative local benefits". No indication that it will hurt out of state more than in state producers.
 - iii. Both in and out of state producers of plastic will be burdened. No like *Hunt v. Washington*. Court then addresses the substantial effects on the industry.
- o. When a statute is found to be not discriminatory, it's tested under the balancing test. This is less stringent and looks at if the in state benefits greatly outweigh the out of state burdens.
 - i. Key case for this test is *Loren Pike v. Bruch Church*.
 - 1. The court found minimal state interest and high burden in this case and struck down the statute.

p. DCC RECAP:



A. Recap of dormant commerce Clause

- a. Discriminatory?
 - i. Discriminatory on its face? → strict scrutiny
 - ii. Discriminatory purpose? → strict scrutiny
 - iii. Discriminatory in effect? → Strict scrutiny (All burdens fall out and benefits in)
- b. Discriminatory Laws → Strict Scrutiny
 - i. Legitimate purpose?
 1. Yes (2)
 2. No- unconstitutional
 - ii. Less discriminatory alternative?
 1. Yes- unconstitutional
 2. No- constitutional
- c. Non Discriminatory Laws → Balancing
 - i. If not discriminatory on its face, its purpose, or in its effect → do the benefits outweigh the incidental burdens on ISC?
 1. Yes- constitutional
 2. No- unconstitutional

10. Regulatory State:

- a. Almost all government is regulatory
- b. Governmental agencies
 - i. Regulations
 - ii. Restrictions
 - iii. Impose such control upon private persons and businesses
 - iv. Fill in details of Congressional Statutes

11. Justifications for Regulations:

- a. Economic theory:
 - i. Market may fail to supply consumers with their preferred option
 - ii. Assumes people make reasonable decisions
 - iii. Collective action
- b. Social Theory:
 - i. Fairness and Equality
 - ii. Society as a whole should have certain things
 - iii. Marks of advanced and improved society
- c. Democratic Theory
 - i. Sometimes people will demand more for society than any individual will seek

12. Legislation

- a. How a bill becomes a law
 - i. Bicameralism
 - 1. Majority vote in both houses of Congress
 - ii. Presentment
 - 1. Presidential signature
 - 2. President may veto instead
 - iii. 2/3 Majority vote in both houses overrides a veto
- b. Introduction of bill
 - i. By member, staff, committee, lobbyist, executive branch official, etc.
 - ii. Introduced as its own bill, incorporated into another bill, offer as amendment to a different bill
- c. Committee action
 - i. Speaker refers bill to appropriate committee
 - ii. Committee often sends to subcommittee
 - iii. Subs hold hearings and gather information through testimony
 - iv. Report bill in committee report
- d. Floor scheduling
 - i. Listed order of bills reported from committees
 - ii. 4 Calendars in House, 2 Calendars in Senate
- e. Floor consideration:
 - i. House:
 - 1. Committee chairs request Rules Committee to write special rules
 - 2. Committee of the Whole (COW) conducts general debate, votes, amends
 - 3. Each member has 5 min to speak; votes by voice, standing, recorded
 - 4. If no passage, amendments must be reported, and a recommit to legislation must occur, or final passage is denied
 - ii. Senate:
 - 1. No detailed rules
 - 2. Filibuster may occur; must then have cloture or maj leader will withdraw
 - iii. Both houses resolution:
 - 1. Identical legislation required for bicameralism

2. Houses may accept amendments until approved
3. House can accept measure passed by other House
4. May call conference (most common)

13. Statutory Interpretation by Courts

- a. Courts look to:
 - i. Actual statutory language (tools)
 - ii. Interpretative question that needs an answer (theories)
- b. Theories
 - i. Intentionalism:
 1. Actual or specific meaning that Congress meant for a particular work or phrase to carry in the statute
 - ii. Purposivism
 1. Determine the overall aims of the statute
 - iii. Legal Process Purposivism
 1. Determine what a reasonable legislature would have sought to achieve in the circumstances
 - iv. Imaginative Reconstruction
 1. Congress failed to appreciate an issue; court determines how Congress would have resolved the issue
 - v. Textualism and New Textualism
 1. Refuse to consult legislative history, committee to text itself as only took
 - vi. Dynamic Interpretation
 1. Courts are partners with Congress, court apply their own understandings and value in order to interpret statutes
- c. Textual Canons
 - i. Linguistic Canons
 1. Determining how a word fits with other words in the same provision
 2. Eiusdem Generis
 - a. Of the same kind
 - b. Covering subject comparable to a specific it follows
 - c. General work at the end of a specific list (“and other”)
 3. Noscitur Asociis
 - a. This known by its companions
 - b. Work is known by the company it keeps
 - c. Term is interpreted consistently with surrounding words
 - d. More specific term (“harm or injury”)
 4. Expressio unius est exclusion alterius
 - a. Mention of one thing is exclusion of another
 - b. Negative inferences
 - c. Many caveats to this exist
 - ii. Whole Act Canons
 1. Whole Act Rule
 - a. Identical words given same, consistent meaning
 - b. Avoid redundancy and surplusage
 - i. Rule against surplusage

- c. Title sand Provisos- these are often used to verify an understanding of a work, but are not conclusive.
 - 2. Whole Code Canons
 - a. In pari material
 - i. Look to other statutes addressing same subject matter
- iii. Substantive Canons
 - 1. Rule about how the law should look, expressly reflect substantive values
 - 2. Rule of Lenity
 - a. Ambiguity concerning the ambit of criminal statutes should be resolved in rule of lenity
 - b. Tips the balance toward D, purposes of fairness and judicial restraint
 - c. Must be grievous ambiguity
 - 3. Constitutional Avoidance
 - a. Requires court to avoid interpretations of statues that render them unconstitutional or raise serious doubts about their constitutionality, when other interpretations of the statute are permissible
 - b. If you can resolve on statutory interpretation instead of constitutionality, then do it!
 - 4. Federalism Clear Statement:
 - a. Congress will not intrude on the States unless it clearly articulates its purpose and intention of doing so
 - b. Requires Congress to use specific language when affecting certain substantive interest, looks to whether Congress demonstrates the intent to intrude upon the states substantive interests
 - 5. Other Canons
 - a. Punctuation
 - i. Semi-colons are significant, commas usually not
 - ii. Can v. may is used but rarely dispositive
 - b. Last Antecedent Rule
 - i. Under the rule, a limiting phrase or clause should ordinarily be read as modifying only the noun or phrase that it immediately follow
 - c. Conjunctive v. Disjunctive
 - i. Terms connected by disjunctive should be given separate meanings, unless the text dictates otherwise
 - d. May v. Shall
 - i. May connotes a permissive or discretionary action, where as the word "shall" connotes a mandatory one.
 - 6. Intent and Purpose Based Tools
 - a. Types of Legislative History (High to low weight)

- i. Committee Report
 - ii. Author or Sponsor Statements
 - iii. Member Statements
 - iv. Hearing Records
 - v. Other Legislative Statements
 - vi. Presidential agency statements
 - b. **Moore v. Harris** (4th Cir. 1980)
 - i. This was the mining statute and dealt with if the miner had to be employed by someone else or could be self employed to get these benefits.
 - ii. Court relied heavily on the intention of the act.
 - 7. Change Circumstances Tools
 - a. Society, Government, and technology all change and effect the way Court interprets
 - b. **Bob Jones v. US** (US 1983)
 - i. Congress intended the statute to comply with established public policy; the racism demonstrated by BJU conflicts with policy
14. Federal Executive Power and the Regulatory State
- a. Inherent Presidential Power
 - i. Two approaches
 - 1. Art II broad and does not limit President powers like how Art I limits Congress
 - 2. Art II only meant to clarify that President power is n one executive, and many
 - ii. **Youngstown v. Sawyer** (US 1952)
 - 1. 3 zones of Power
 - a. Highest president power when acting with express or implied authorization from Congress
 - b. Lowest President power when acting incompatible with express or implied will of Congress
 - c. “Twilight Zone” when President acts in absence of Congressional grant or denial of authority
 - 2. If president is challenged, he will argue:
 - a. Acting pursuant to statute
 - b. Filling in blanks in absence of Congressional action
 - c. Acting pursuant to Executive Constitutional Authority
 - 3. Court held that there wasn’t anything in the constitution about the President’s potential powers to take over private property, and the court couldn’t assume this under the umbrella of the Presidents power because it would grant him too much power.
 - 4. Main takeaway: all legislative power must come from congress. President’s power must come from the constitution or statutes. Also, president may be allowed to fill in the gaps when congress hasn’t acted.
 - iii. **Clinton v. United States:**
 - 1. Deals with the line item veto act of 1996.

2. Main takeaway: you need bicameralism and presentment to pass laws.
- b. Agency Considered Tools
- i. Statutory
 1. Considers authority that statute grants and the instructions that it provides
 2. First, question of jurisdiction
 - a. Does statutes authorize agency to reach particular subject
 3. Second, question is of allowed and prohibited factors
 - a. Agency must not rely on prohibited or irrelevant statutory factors and it must consider mandatory or relevant statutory factors
 - ii. Scientific
 1. Examines scientific data and existing potential technologies
 2. Integrate or challenge the scientific data or methodologies
 3. Offer alternative interpretations of the data or responses in light of data
 4. Evaluate or critique the state of technology
 - iii. Economic
 1. Assesses the costs in relation to the benefits and other alternatives
 2. Assign dollar amount or benefits to regulation and then examine those benefits in relation to their costs
 - iv. Political
 1. Looks at public attitudes and political preferences
- c. Regulation Reformation
- i. Informal rulemaking/ notice and comment rulemaking / sec 553 rulemaking
 - ii. Organic statute
 1. Creates, commands, and delegates authority to agency
 - iii. Administrative Procedure Act (APA)
 1. Informal Rulemaking (focus of this class)
 - a. Creating, amending, or repealing Rule after notice and opportunity for comment
 2. APA Rulemaking definition
 - a. Rule is whole or part of agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization procedure or practice requirements of an agency.
 3. Process
 - a. Agency decides a new rule is requires
 - b. Prepares new rule
 - i. Published in federal register, Notice of Proposed Rule Making (NPRM)
 - ii. Anyone can submit comments, agency considers comments
 - c. Issues final rule

- d. Some organic statute may require additional procedures; oral presentation
- d. US Constitution art II sec 2- Appointment Clause
 - i. President shall nominate and appoint certain officers of the US
 - ii. But Congress may by law vest appointment of inferior officers to the President, the courts or head of departments
 - iii. **Humphrey** (US 1935)
 - 1. Purely executive position- President may remove for any reason
 - 2. Quasi-leg or Quasi-jud- President must show cause for removal
 - iv. **Morrison v. Olson** (US 1998)
 - 1. Principal Officer
 - a. Selected by President
 - b. Olson argued that Morrison is principal officer, thus appointment by the court is not allowed
 - 2. Inferior Officer
 - a. President, Court, or heads of department may appoint
 - b. Morrison argued that he is inferior officer
 - 3. Court Decision
 - a. Morrison is inferior
 - i. Can be removed by someone lower than President, has limited jurisdiction, limited duties, and limited tenure
 - b. But President can still remove him at will
 - 4. ***New Test- now we don't look to the categorization of the position, but rather its so central to the function of the executive branch.
 - a. Is the position "central to the functioning of the Exec Branch?"
 - i. If yes, President has a will power
 - ii. If no, President must show for cause
- e. Congressional Control of Agency actions (Congressional Tools)
 - i. New legislation- this could abolish an agency or restrict its authority. Threats can happen first, but if action isn't taken, new legislation will set the ball in motion.
 - ii. Appropriation Hearings- Congress can restrict funding for a particular agency or regulatory program to get them to do what congress wants
 - iii. Oversight Hearings- congress can use hearings to pressure agencies to conform their policy to legislative preferences without further legislative action
 - iv. Legislative Vetoes
 - 1. Congress can retain some control over agency promulgation of rules and regulations, even after passing the Act and pushing to an agency
 - a. CONGRESS MAY NOT USE THIS TODAY BECAUSE IT HAS BEEN INVALIDATED BY THE SCT.

- v. **Chada** (US 1983)
 - 1. Legislative vetoes are unconstitutional because it allows Congress to delegate power to itself, ruins separation of powers
 - 2. Notes:
 - a. There is always a presumption that congressional action is legislative
 - b. It is altering legal rights and duties of persons in and out of executive branch
 - c. Does what legislation does
 - d. Bicameralism and presentment
 - e. Four exceptions not here
- vi. **Clinton v. NYC**
 - 1. Congress may delegate too much of its own policymaking power to other branches (line-item veto act is unconstitutional)
- vii. **Free Enterprise Case**
 - 1. Congress may not create more than one layer of "For cause" protection between the president and any officer of the US
- viii. Overarching rules from this section:
 - 1. Congress must be complete when it delegates-may not retain authority to implement statutory mandates
 - 2. When congress makes policy-whether we label it executive, legislative, or judicial, it must do it through bicameralism and presentment (Bowsher + Chada)
 - 3. Congress may not delegate (way) too much of its policymaking power (Schechter, Clinton)
- ix. Morrison says not to put the actions into a specific category, but instead, look to whether restriction impedes the president's power to perform constitutional duties?
- x. Myers says there are some offices where president should be able to remove
- xi. Free Enterprise- only one layer of protection between president and officer in government.

15. Judicial Control of Agency Action

- a. Judicial Branch may control agency statutory interpretation
- b. **Chevron** (US 1984) (dealt with stationary source and pollution)
 - i. Two step test:
 - 1. Has Congress directly spoken to precise question at issue?
 - a. If yes, must follow the Agency Rule
 - 2. Is agency's answer based on reasonable construction of statute?
- c. Judicial branch may control agency statutory implementation
- d. **Motor vehicles Man Association v. State Farm** (US 1983)
 - i. Arbitrary and Capricious Test
 - 1. Previous ruling is invalid because it was made on unreasonable grounds or without any property consideration of circumstances
 - 2. This case authorizes courts to police the agency's decision making process but not the substantive outcomes.

3. State Farm is also important because it holds that the rescission of regulation will be held to the same standard as the regulation when initially adopted.
- ii. Overall arbitrary and capricious test:
 1. Can the agency consider this?
 2. Has Congress given a direct initiative to this?
 3. Was it rational?
 4. Did agency make rational choice based on all of these facts?

16. Justiciability Limits

- a. Limits on the matters that can be heard in federal court
- b. Constitutional limits- congress cannot override
- c. Prudential limits- Congress can override
- d. 5 major doctrines
 - i. 1. Prohibition against advisory opinion
 - ii. 2. Standing
 - iii. 3. Ripeness
 - iv. 4. Mootness
 - v. 5. Political question doctrine
- e. Standing (#2)
 - i. SC Says this is most important
 - ii. Determination of whether a specific person is the property party to bring a matter to the court for adjudication
 - iii. Constitutional Requirements
 1. P must allege he suffered or imminently will suffer an injury
 2. P must allege the injury is fairly traceable to D's Conduct
 3. P must allege that a favorable federal court decision is likely to redress the injury
 - iv. Prudential requirements
 1. P may assert only his own rights and cannot raise the claims of third parties not before the court
 2. P may not sue as a taxpayer who shares a grievance in common with all other taxpayers
 - v. **Standing Test
 1. Is there any injury?
 - a. A. Is it concrete?
 - b. B. Is it actual or imminent?
 - c. C. Is it personal or particularized?
 2. Is there a causal link?
 - a. A. Is P's injury caused by D's Action?
 3. Is the injury redressable?
 - a. Is injury likely to be redressed by the relief requested?