Constitutional Law – Spring 2015 – Armstrong

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Constitution

Article I – Legislative Branch

Article II – President

Article III – Judiciary

Article IV –
§1 – Full Faith and Credit Clause
  • Duties that states within the US have to respect – public acts, records, and judicial proceedings of every other state
§2 – Privileges and Immunities Clause
  • Prevents a state from treating citizens of other states in a discriminating manner
§3 – New States to be admitted by Congress
§4 – Guarantee Clause
  • Guarantees Republican form of government

Article V – Amendments
2/3 of House and 2/3 of Senate

Article VI
Clause 2 – Supremacy Clause
  • This Constitution, and the Laws of the Us, which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the US, shall be the Supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any Sate to the Contrary notwithstanding.

Nature of Judicial Review

Judicial Review (Article III)
Review by USSC of the constitutional validity of a legislative act

Source
  • Found in Article III, Section 1
    o “Judicial power of the US shall be vested in one SC and in such inferior Courts as the Congress may from time to time ordain and establish.”
    o Judges have life tenure
  • Article III doesn’t specifically grant federal courts the power to review the constitutionality of federal/state laws or executive actions...
Scope of Federal Judicial Power

- Article III, Section 2 – limits the jurisdiction of the federal courts
  - Cases in law and equity, arising under the Constitution, Laws of the US and Treaties;
  - Cases affecting ambassadors, public ministers, and consuls;
  - Cases of admiralty and maritime jurisdiction;
  - Controversies to which the US shall be a party;
  - Controversies between two or more states;
  - Cases between a state and citizens of another state; and
  - Cases between citizens of different states (diversity of citizenship cases)
  - Cases between citizens of a state and foreign citizens

Jurisdiction of USSC

Under Article III, Section 2 – USSC has original jurisdiction “in all cases affecting ambassadors, other public ministers, consuls and those in which a state shall be a party.”

Congress may neither enlarge nor restrict the SC’s original jurisdiction.
- Marbury v. Madison (1803)

Ex Parte McCordle

Appellate Jx not derived from Congress but from the Constitution

Article III, Section further provides that “in all other cases before mentioned, the SC shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”
- SC has the power to
  - Hold acts of the other branches of the federal government unconstitutional
    - Marbury v. Madison (1803)
      - President Jefferson’s Secretary of States, James Madison (D), refused to deliver a commission granted to William Marbury (P) by former President Adams.
      - SC has he power, implied by Article VI, §2 of the Con to review Acts of Congress and I they are found repugnant to the Con, to declare them void.
      - Judicial oath requires SCOTUS to uphold the Con (Supreme Law of the Land)
      - Declared provision of Judiciary Act 1789 unconstitutional
        - Constitution imposed limits on government powers which would be meaningless without judicial enforcement
        - Mandamus – Judicial writ issued as a command to an inferior court ordering a person to perform a public/statutory duty
  - Hold state statutes unconstitutional
    - Cohens v. Virginia
  - Review state court decisions to ensure that the state act in conformity with the US Con and federal statutes
    - Martin v. Hunter’s Lessee (1816)
• After SC reversed a VA COA ruling, which had held that P had lost title to land in favor of the state, the VA court ruled that insofar as the Federal Judiciary Act extended the SC’s appellate jurisdiction to state courts, the Judiciary Act was unconstitutional.

• Article III, Section 2 limits appellate power to types of cases, NOT particular courts, and thus allows SCOTUS to hear cases “arising under”
  o Tell state officials that they cannot refuse to obey federal court orders resting on constitutional grounds.
    ▪ *Cooper v. Aaron* (1958)
      • Governor/Legislature of AR refused to obey a federal court order to desegregate the public schools in Little Rock based on *Brown v. Board of Education* (1952).
      • State officials have taken oath to uphold the Con and SCOTUS has decided what the Con says...
  o Decide other state law questions in cases of *diversity jurisdiction*
    ▪ Defer to an existing state court interpretation of state law
    ▪ Interpret state law which has not already been interpreted by the state court based on the SC’s prediction of how the state court will interpret the statute
    ▪ Abstain from a decision if the state court’s interpretation of unsettled state law could end the dispute and the SC cannot predict how the state court will rule.
  o Constitutional decision of the Court can’t be overruled by an Act of Congress

11th Amendment (Scope of Federal Judicial Power)

• 11th Amendment – prohibits the citizens from (1) one state suing their own state or (2) one state suing another state on federal claims for money damages in federal courts OR state court without the state’s consent.
  o Recognizes the states’ governmental immunity
  o Applies to both diversity/federal question cases
  o Government/Sovereign Immunity
    ▪ Government may not be sued without its consent
    ▪ EXCEPTION – Subdivisions of a state (e.g. cities, towns, counties) do not have immunity from suit under the 11th Amendment.
      ▪ *Lincoln County v. Luning* (1890)
  o Despite Congress’ enumerated powers under Article I, §8 – 11th Amendment prohibits federal court adjudication (formal judgment on a disputed matter) of claims by private parties against a state.
    ▪ Overruled Chisholm v. Georgia
  o EXAMPLE:
    ▪ *Seminole Tribe of Florida v. Florida*
      • Congress could not use Article I to circumvent the limitations placed on federal jurisdiction and therefore could not allow a Native American tribe to sue a state in federal court.
Congress under its enforcement powers can authorize private suits by individuals to compensate for state violations of post-Civil War Amendments (13th, 14th, 15th Amendments)


- Extending state sovereign immunity from federal to state courts
  - *Alden v. Maine*

**Exceptions to the 11th Amendment**

- Suits against state officials for abusing their power in enforcing an unconstitutional state statute
  - *Ex Parte Young* (1908)

- Federal suits brought by one state against another state, or suits brought by the federal government against a state

- Most suits for injunctions – e.g. Private citizen may sue to enjoin a state official from acting in violation of the P’s federal constitutional rights.
  - Ex. State workers alleging age discrimination under the Federal Age Discrimination in Employment Act may not sue their employers (i.e. The State) using the federal statute as a COA, because Congress lacks the power to override the State’s 11th Amendment immunity from federal lawsuits in the absence of a pattern of unconstitutional action by the states, violative of the 14th Amendment (Citizenship Rights).

**Waiving 11th Amendment**

- Can waive it expressly and unequivocally
- Or by voluntarily invoking a federal court’s jurisdiction
  - *State will be subject to private suit if it engages in certain federally regulated conduct and voluntarily elects to engage in that conduct...*

**Limitations on Jurisdiction of Federal Courts**

**Case or Controversy**

- Article III, Section 2
- Definition – Real/substantial dispute that touches the legal relations of parties having adverse interests that can be resolved by a judicial decree of a conclusive character.

- ADVISORY OPINIONS
  - Supreme Court – NO
  - State Courts – YES
  - DOES NOT preclude federal courts from granting declaratory judgments
    - Declaratory Judgment
      - Decision in which the court is requested to determine the legality of proposed conduct without awarding damages or injunctive relief.

<table>
<thead>
<tr>
<th>FEDERAL COURT JURISDICTION ‘RAMPS’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ripeness, Abstention &amp; Adequate State Ground, Mootness, Political Questions, Standing</td>
</tr>
</tbody>
</table>

**Mootness**
Open to discussion/debate

*If a controversy or matter has been resolved, then the case will be dismissed as moot. An actual case or controversy must exist at all stages of the litigation.*

- If the principal issue has been resolved, but the party still has an interest in resolving collateral or lesser matters then the case **will not be dismissed.**
  - **EXAMPLE:**
      - A case about wrongful termination is not moot even though the P had his employment restored if issues of back pay remain.
  - Will not be dismissed, if the injury is **capable of repetition** yet evading review.
    - Practical impossibility for there to be adjudication or appellate review before the claims of the P, or other individuals who are members of the class, become moot.
      - *Roe v. Wade* (1973)

**Ripeness**

Considers claims before they have been fully developed. Controversy must be ripe for decision otherwise the federal court will decide constitutional issues before it is necessary to do so.

Case may be dismissed as unripe where a statute has never been enforced and there is no real threat that it ever will be.

**Abstention**

Federal Court may abstain or refuse to hear a particular case when there are undecided issues of state law presented.

- State courts to resolve issues of state law, thereby making a decision of constitutional issue unnecessary…

**Standing**

Article III requires a person litigating a constitutional question to show…

1. **INJURY IN FACT**
   - P must show a *direct and personal injury, actual or imminent* caused by an action that he is challenging.
     1. Concrete/particularized

2. **CAUSATION**
   - Injury was caused by the challenged action and the injury must be caused by the violation of a duty affecting the P’s rights arising under the Con or federal law.

3. **REDRESSABILITY**
   - P must show that he will benefit from the remedy sought in litigation.

**Lujan**

- Defenders of Wildlife (P) sued for an injunction ordering the Secretary of the Interior (D) to apply the Endangered Species Act to actions taken in foreign countries.
• RULE→To establish standing, a P must show injury-in-fact, causation, and redressability, and Congress may not create a right in standing based on a generalized grievance against government.

**MA v. EPA**
• A state and several other parties challenged EPA’s (D) failure to enforce the Clean Air Act against motor vehicle emissions.
• RULE→A P has standing if it demonstrates a concrete injury that is both fairly traceable to the D and redressable by judicial relief.

**Clapper**
• Objectively reasonable likelihood/certainly impending is not enough for an injury

**Hollingsworth v. Perry**
• No standing – therefore lower court doesn’t have jurisdiction to consider the appeal…

**US v. Windsor**
• US retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings.
  o Adversarial presentation of issues
  o Adversely affected rights of large population of people

**Specialized Problems of Standing**
As a general rule – federal taxpayers do not have standing to challenge allegedly unconstitutional federal expenditures on the ground that their injury is comparatively minute and indeterminative and their interest is too remote.

  • *Frothingham v. Mellon* (1923)

**EXCEPTION**
• 1968 – USSC held that a federal taxpayer had standing to challenge federal expenditure to aid parochial schools, where the taxpayer was challenging the expenditure of money by Congress under its taxing and spending power and the expenditure allegedly violated the Establishment Clause
  o *Flast v. Cohen* (1968)

  NOTE – Not extended to other areas of government.
  o Ex. Taxpayers do not have standing to challenge a transfer of valuable real estate under the Property Clause, to a Christian college from local government
    • *Valley Forge Christian College v. Americans United for Separation of Church and State* (1982)

Under the traditional view – litigant lacks standing to assert the rights of third parties not before the court.

  • Valley Forge Case
    o P must assert his own legal rights/interests, and cannot rest his claim to relief on the legal rights or interests of third parties.
  • USSC has permitted a party to raise the constitutional rights of a third party where he himself has suffered injury AND
A special relationship exists between the claimant and third party because of the connection between the interests of the claim and the constitutional rights of the third person.

Third party is unable or finds it difficult to bring suit on his own behalf.

An association has standing to assert the claim of its members, even if the association has not suffered any injury itself IF...

- Members would otherwise have standing to sue in their own right
- The interest asserted is closely related to the association’s purpose
- Neither the claim asserted NOR the relief requested would require participation by the individual members in the lawsuit

Zone of Interest
Whether the interest plaintiff seeks to protect comes within the zone of interests protected by the federal law on which P’s claims rest

Political Questions
Federal Courts CANNOT hear cases involving political questions.

Definition – A political question is a matter assigned to another branch by the Constitution or incapable of a judicial answer.

*Baker v. Carr* (1962) Factors

- Whether there is textually demonstrable constitutional commitment of the issue to a coordinate political department
- A lack of judicially discoverable and manageable standards for resolving it
- Impossibility of deciding without an initial policy determination of kind clearly for non-judicial discretion
- Impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government
- Unusual need for unquestioning adherence to a political decision already made
- Potential for embarrassment from multifarious pronouncements by various departments on one question

Guaranty Clause and the Republican Form of Government

Two principal factors – Political Questions

- (1) Separation of Powers
- (2) Limitations of the Judiciary in resolving certain types of Controversies

Cases about PQ’s

- *Powell v. McCormack*
  - Congressional Qualifications
- *Goldwater v. Carter*
  - Treaty Abrogation
- *Nixon v. US*
  - Impeachment Proceedings
- *Coleman v. Miller*
Constitutional Amendment Process

- *Bush v. Gore*
  - Presidential Election Process

- *Zivotofsky v. Clinton*
  - Recognition of Foreign Sovereigns

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Separation of Powers

**Powers of Congress**

**Legislative Power**
Primarily the power to make laws, but incidental to that power is the right to conduct investigations and hearings, consider matters upon which legislation may be enacted and do all other things “necessary and proper” to the enactment of legislation [Article I, Section 1]

- Congress has **enumerated powers** to collect taxes and spend money for the general welfare, borrow money on the credit of the US, regulate commerce with foreign nations and among the several states, to declare war and to raise and support the army, navy, and militia.
  - Article I, §8

- **Necessary/Proper Clause** – gives Congress the implied power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Con in the Government of the US, or any Department of Officer thereof.”
  - Article I, §8
  - Different Views
    - **Jefferson** – Thought it was unconstitutional (STRICT CONSTRUCTIONIST)
    - **Hamilton** – Okay, no new or independent powers but implied powers (BROAD CONSTRUCTIONIST)
    - **Madison** – The clause is extra/superfluous (STRUCTURALIST)

- **Enabling Clauses** – 13th, 14th, 15th Amendments – give Congress the power to enforce those amendments by appropriate legislation

**McCulloch v. Maryland**
Defines the scope of federal legislative power and relationship to state authority

- McCulloch (D) the cashier of the Baltimore branch of the US Bank issued bank notes in violation of Maryland (P) statute, providing that no bank, without authority from the state, could issue bank notes except on stamped paper issued by the state.
- **RULE**
  1. Certain federal powers, giving Congress the discretion and power to choose and enact the means to perform the duties imposed upon it, are to be implied from the Necessary/Proper Clause
  2. Federal Con and the laws made pursuant to it are supreme and control the cons and laws of the states…

- Congress had authority to create bank in light of historical practice
- Compact Federalism – States do not retain ultimate sovereignty because they ratified Con
US Term Limits v. Thorton
- Arkansas’ (D) congressional term limitation law was challenged as unconstitutional.
- RULE ➔ States may not limit the terms of members of Congress.
- States have no reserved powers over composition or operation of federal government because powers may not be reserved for what does not yet exist

US v. Comstock
- Whether statute is rationally related to the implementation of a constitutionally enumerated power
- 5 Considerations ➔ Statute is a necessary/proper means of exercising federal authority that permits Congress to create federal criminal laws, punish their violation, imprison violators, provide appropriately for those imprisoned and maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.

US v. Kebodeaux
- Addressed whether Congress has authority under N/P C to require a convicted member of the Air Force to register as a sex offender under the Sex Offender Registration and Notification Act enacted after his conviction.
- Con explicitly grants Congress the power to make rules for the regulation of the land and naval forces.
- Here under the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice.

Commerce Power
Despite the broad language used by the USSC in Gibbons v. Ogden – subsequent cases used various criteria to restrict the power of Congress to regulate “commerce which concerns more states than one.”
- Gibbons v. Ogden (Steamboat Monopoly)
  - RULE ➔ If a state law conflicts with a congressional act regulating commerce, the congressional act is controlling.

Today, Congress can regulate:
- Channels of interstate commerce
  - Ex. Highways, waterways, air traffic
- Instrumentalities of interstate commerce
  - Ex. Cars, trucks, airplanes
- Activities that substantially affect interstate commerce
  - Under the affectation doctrine – Congress now has the power to regulate ANY economic activity, whether carried on in one state or many, that has a substantial effect (whether directly or indirectly) upon interstate commerce.
    - National Labor Relations Board v. Jones and Laughlin Steel Co. (1937)
      - Upholding the constitutionality of the Wagner Act in requiring collective bargaining in all industries affecting interstate commerce.
        - Direct/Indirect Test – Appreciable Effect
  - Darby
• Wage/hour are okay because commerce power extends to intrastate activities that have a **substantial effect** on interstate commerce. Congress’ motive doesn’t matter.
  
  o Next→cumulative effect doctrine – USSC held that the federal commerce power permitted regulation of the amount of wheat a farmer could grow on his own land, for his own consumption, because his activity, together with that of other growers of what for their own consumption, had a **substantial cumulative effect upon interstate commerce**.
    - *Wickard v. Filburn* (1942)
  
  o Congress’ plenary commerce power is NOT without limits.
    - *US v. Lopez*
      • SC for the first time in more than half a century struck down a federal law that made it a crime for any individual knowingly to possess a firearm in a school zone.
      • Since gun possession near schools is neither itself an *economic* activity nor an activity that *substantially* affects interstate commerce, and since no *jurisdictional element* connecting particular gun possession to interstate commerce was expressed in the language of the statute – SC held that Congress was acting beyond the limits of the Commerce Clause.
    - *Morrison*
    • Federal damages for victims of gender violence is not okay because you can’t aggregate non-economic activity to support an inference of substantial effect on commerce (and congressional findings are not sufficient).
  
  • *Raich*
    • Federal law trumps sate law on pot since growing and using pot is *economic* (so you can aggregate it) and prohibiting intrastate manufacture and home use of an article of commerce is a *rational means* of regulating interstate commerce.

**Substantial Effects Test**

To validly exercise its commerce clause power under this test – Congress must show…

• (1) That the regulated activity is *economic/commercial* in nature
• (2) That the regulated activity (when taken cumulatively throughout the nation) has a **substantial effect** on interstate commerce.

When considering whether there is a substantial relationship or effect on interstate commerce, *Lopez* set forth –

**Five Factors for Analysis:**

• (1) Whether the regulated activity is *economic or commercial* in nature;
• (2) Whether the challenged statute contains a *jurisdictional element* that ensures a close connection to interstate commerce on a case by case basis;
• (3) Whether there are *Congressional Findings* concerning the activity’s effect on interstate commerce;
• (4) Whether the activity’s link to interstate commerce is too **attenuated**; and
• (5) Whether the regulated activity is something that the states have traditionally regulated.

Direct/Indirect Effects Test
Did the regulated activity have direct/indirect effect on interstate commerce?
  • *US v. EC Knight*
    o Power over interstate commerce could not extend into realm since manufacturing was a local activity and regulation of it was a state power
      ▪ Relationship was too indirect to allow federal regulation under commerce

Stream of Commerce Test
Regulate some local activities because they are an integral party of current commerce
  • *Swift v. US*
    o Activities took place within 1 state, but had a direct effect – object of conspiracy was to restrain sales of live stock from other states
  • National Police Regulation (Morality/Public Safety)
    o *Hoke v. US*
      ▪ Congress can prohibit transportation of own interstate commerce for immoral purposes (prostitution)
    o *Champion v. Ames*
      ▪ Lottery tickets from one state to another
    o *Hipolite Egg Co. v. US*
      ▪ Congress could prohibit sale of impure or adulterated food/drugs
    o *Hammer v. Dagenhart*
      ▪ Congress **COULD NOT** prohibit interstate transportation of goods manufactured with child labor. NO inherent dangerousness in shipment. (Overruled).

Court did not consistently apply stream of commerce approach among the states as requiring different effect on interstate commerce – **New Deal.**
- *Schechter Poultry Corp.*
  o Application to intrastate exceeded power and slaughterhouse which only sold to local retailers were not subject to federal control (invalidated New Deal Legislation)
    ▪ Concerned with operation of business in NY
- *Carter v. Carter Coal Co.*
  o The effect of the labor provisions of the act primarily falls upon product and not upon commerce
  o Production is a purely local activity
  o Distinction between production/interstate commerce is not formal but substantial in the highest degree – as the Court pointed out in Schechter

Misc. Commerce Cases
- Commerce Clause has been used as the vehicle to uphold laws aimed at barring racial discrimination in activities connected with interstate commerce.
  o *Katzenbach v. McClung* (1964)
Congress may prohibit racial discrimination in private restaurants if a substantial portion of the food consumed traveled in interstate commerce.
  o **Heart of Atlanta Motel v. US (1964)**
    - Court has upheld provisions of the Civil Rights Act of 1964 barring discrimination in places of public accommodations as “affecting” interstate commerce.

- SC has upheld, under the Commerce Power, a federal law prohibiting extortionate credit transactions (i.e. loan sharking) on the ground that such transactions provide a major source of revenue for organized crime, and that organized crime in turn has an adverse effect upon interstate commerce.
  o **Perez v. US (1971)**

**10th Amendment**
- 10th Amendment (provides that powers not delegated to the federal government are reserved to the states or to the people) serves as a very weak limitation on the federal commerce power today. Generally applicable federal laws that regulate the states (state businesses and/or employees) do not violate the 10th amendment.
  o **Garcia v. San Antonio Metropolitan Transit Authority (1985)**
    - Congress must make the necessary judgments about the scope of any intrusion upon state sovereignty
    - Overruled *National League* (Congress violates 10th when it interferes with traditional state/local government functions)

- 10th Amendment **DOES** prevent Congress from interfering with a state’s law-making process.
  o Congress may not “commandeer” the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.
  o Congress may simply set standards that state/local government must meet and thereby preempt state/local actions.
      - SC held invalid as violating 10th Amendment a federal law that required the state of NY to pass legislation to arrange for the disposal of radioactive waste generated within its borders.
      - RULE→Federal government may not order a state government to enact particular legislation.
  - **Coyle v. Oklahoma**
    - Invalidated condition that federal government could specify state capital.

- 10th Amendment **ALSO** prevents Congress from commandeering state executive officials. That is – Congress may not order state officials to act as administrators of federal programs.
  o **Printz v. US (1997)**
    - SC held unconstitutional the federal Brady Handgun Violence Protection Act because it commandeered state and local law enforcement officers for performance of various acts required by federal legislation.
    - Violated 10th when it conscripts state governments
Conditional Preemption

- Congress may threaten to pass federal legislation under the CC unless states choose to regulate according to federal standards.
- Where does the burden fall could be a problem

<table>
<thead>
<tr>
<th>Pro-Federalism (STATES)</th>
<th>Anti-Federalism (FEDERAL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems vary geographically – tailor policies</td>
<td>Ineffective – negative externalities that flow across state boundaries</td>
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<tr>
<td>Diversify according to varying preferences</td>
<td>Government can provide certain public goods that state government will under produce – cannot completely capture benefits of investment</td>
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<tr>
<td>State experimentation social policy can yield new practices</td>
<td>Large scale and collective resources can provide better social insurance</td>
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<tr>
<td>Government closer to citizenry</td>
<td>Prevent destructive competition and races to bottom among states</td>
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<td>Regulation can help protect basic rights against tyranny of local externalities</td>
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</tbody>
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- **NFIB v. Sebelius**
  - SC upheld the minimum essential coverage provision but did so on the ground that it is within congressional authority as a tax not as a regulation of commerce under the CC or N/P C.
    - Government contends that the individual mandate is within Congress’s power because the failure to purchase insurance has a substantial and deleterious effect on interstate commerce – cost-shifting problem.
    - Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

**Taxing Power**

Article I, §8 provides – “Congress has power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare.

A congressional act purporting to be a “tax” should be upheld as a valid exercise of the taxing power, provided that it does, in face, (1) raise revenue (OBJECTIVE TEST) or (2) that it was intended to raise revenue (SUBJECTIVE TEST).

16th Amendment – gives Congress the power to collect taxes on income derived from any source

Congress has used its taxing power as a necessary/proper means of achieving a regulatory effect

- Generally as long as Congress has the power to regulate the activity taxes, the tax can then be used as a regulating device rather than for revenue raising purposes.
- Even when Congress does not have power to regulate the activity taxes, the tax will nevertheless, be upheld, if its dominant intent is revenue raising. Thus, even though the tax may have a substantial regulatory effect, if the tax in fact raises revenue, it will be valid.
• As a general rule – the modern judicial trend is to uphold any tax as valid if it is in fact a revenue raising measure.

*Bailey v. Drexel Furniture Co.*
- Child Labor Tax imposes a tax upon persons employing children under certain ages.
- **RULE** → A law passed by Congress under the pretext of executing its powers, but which is for the accomplishment of objects not within congressional power, is **unconstitutional**.

*NFIB v. Sebelius*
- 10% of funding – coercive?
- CC could not force to buy but impose tax to encourage
- Consider it a **tax** and not a **penalty**
  - (1) Amount due will be far less than the price of insurance – by statute can never be more
  - (2) No scienter requirement - Imposed only on those who knowingly engage in activity (Punitive)
  - (3) Payment collected solely by the IRS through the normal means of taxation

*US v. Butler*
- Agricultural provision to regulate/control agricultural production as matter beyond power delegated to federal government
- Congress has power separate/distinct from later enumerated powers
- Power to tax/spend is distinct constitutional power fully effective without reference to other granted powers
- **RULE** → Congress MAY NOT, under the pretext of exercising the taxing power, accomplish prohibited ends, such as the regulation of matters of purely state concern and clearly beyond its national powers.

*Steward Machine*
- Congress may use spending power to create incentives for states to act in accordance with federal policies but when **pressure turn into compulsion** – legislation is **against federalism**
- Distinguish from Butler
  - Proceeds are not earmarked for a special group
  - Unemployment compensation law which is condition of credit has had approval of state and could not be law without it
  - Condition is not linked to irrevocable agreement because states can repeal whatever they want
  - Condition is not directed to attainment of unlawful end but to an end: relieve unemployment

**Spending Power**
Article I, §8, Clause 1 – provides Congress with power to lay/collect taxes “to pay the Debts and provide for the common Defense and General Welfare of the United States.”
SC – construed the General Welfare Clause as a limitation on Congress’ taxing and spending powers and not as an independent source of congressional power.

- In other words – Congress’s power to tax/spend must be exercised for the “general welfare” of the US.

By exercising its spending power, Congress can require states to comply with specified conditions in order to qualify for federal funds.

SC held that Congress may place a condition on receipt of federal funds by a state if...

- The spending serves the general welfare
- Condition is unambiguous
- Condition relates to the federal program
- State is not required to undertake unconstitutional action
- Amount in question is not so great as to be considered coercion to the state’s acceptance

*South Dakota v. Dole*

- Congress passed a law withholding federal highway funds to states with a minimum drinking age of less than 21 years.
- RULE: Congress may withhold federal highway funds to states with a minimum drinking age of less than 21 years.
  - 4 Part Test
    - (1) Congress has a purpose to serve the general welfare.
    - (2) Clear statement of the funding condition
    - (3) Whether federal grants to the states are “unrelated” to the spending program
    - (4) Whether federal grants to the states are “other constitutional provisions” provide an independent bar to the conditional grant of federal funds.

*NFIB v. Sebelius*

- Congress had exceeded its spending power by providing that a State loses all Medicaid funding as the penalty for non-compliance with the new conditions.
- Rests on whether the State voluntarily/knowingly accepts the terms of the “contract.”
- Here – financial inducement is much more than relatively mild encouragement

*Treaty/War Power*

Article I, §8
Clause 11 – Declare war, raise/support armies, provide for and maintain navy, make rules for government and regulation of armed forces, etc.
Clause 18 – Necessary & Proper

Validly extended to post-war times to both remedy wartime disruptions and to cope with exigencies

- *Woods*
  - Setting rent control under the Housing/Rent act – established such a power under War Powers
- Includes power to remedy evils which have risen from rise/progress and continues for duration of that emergency
- Where war powers contributed heavily to deficit, Congress has power even after cessation of hostilities to act to control forces that short supply

**Missouri v. Holland**
- Treaty with Great Britain protecting migratory birds – under Necessary/Proper Clause – may enact whatever necessary to execute valid treaty
  - Constitution does not limit Congress to enumerated powers when implementing a treaty
  - Congress has powers pursuant to treaty power to make laws that will implement treaty
  - To extent Congress can make treaty → States’ 10th Amendment power not abrogated