(Last update: May 17, 2000)

LIMITS OF CONGRESSIONAL POWERS

A good student of constitutional law should be conversant not only with cases upholding certain powers of Congress, but also those describing the limits of Congressional and state powers. This file identifies many of those cases and provides links to some of these U.S. Supreme Court cases, making study easy.

(1) *New York ex rel. Cutler v. Dibble*, 21 How. (62 U.S.) 366, 370 (1859):

Purchaser of Indian lands removed from possession pursuant to state law protecting Indians. Court held state law valid:

"The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

(2) *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1866):

Several states criminally punished transactions in liquors and lotteries, probably either with or without license. Congress then enacted certain internal revenue acts which licensed liquor sales and lotteries. Defendants, conducting illegal state businesses in these fields, did not obtain federal licenses and were indicted; they defended by arguing that Congress can't legalize by license an illegal state activity. The Court held that the licenses did not permit conduct of such business, but were merely taxes:

"But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. ... Congress cannot authorize a trade or business within a state in order to tax it," Id., at 470-71.

"But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within state limits, they give none and can give none." Id., at 471.

"There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between national and state

legislation on a subject which the Constitution places under the exclusive control of the states," Id., at 472.

(3) *United States v. DeWitt*, 76 U.S. (9 Wall.) 41, 45 (1870):

Federal revenue act made it illegal to sell illuminating oil of certain flammability and defendant was indicted for violating this law in Detroit. Court held defendant could not be prosecuted:

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation."
See also *Matter of Heff*, 197 U.S. 488 (1905), overruled, *United States v. Nice*, 241 U.S. 591 (1916).

Other authorities re absence of federal police power:

Slaughter House Cases, 83 U.S. 36, 63, 64 (1873):

"No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation."

"[A]s a police regulation the power to make such a law belonged to the states, and did not belong to Congress."

Wilkerson v. Rahrer, 140 U.S. 545, 554, 11 S.Ct. 865, 866 (1891):
The police power "is a power originally and always belonging to the states, not surrendered to them by the general government, nor directly restrained by the constitution of the United States, and essentially exclusive."
Union National Bank v. Brown, 101 Ky. 354, 41 S.W. 273 (1897):
"On the contrary, it may be considered as having been authoritatively settled that the national government cannot exercise police powers for the protection of the inhabitants of a state."
See also *John Woods & Sons v. Carl*, 75 Ark. 328, 87 S.W. 621, 623 (1905), affirmed 27 S.Ct. 99: quoted *Brown*. See *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So.2d 652, 655 (1915).

Shealey v. Southern Ry. Co., 127 S.C. 15, 120 S.E. 561, 562 (1924):

"The police power under the American constitutional system has been left to the states. It has always belonged to them and was not surrendered by them to

the general government, nor directly restrained by the constitution of the United States... Congress has no general power to enact police regulations operative within the territorial limits of a state."
McInerney v. Ervin, 46 So.2d 458, 463 (Fla. 1950):
"The Federal Government has no general police power and that of the states is beyond the reach of Congress, except in rare cases where the people in whom it inheres have released it by the terms of the Federal Constitution."
(4) *United States v. Fox*, 94 U.S. 315, 320-21 (1877):

State law, by construction, did not provide for bequest of land by will to the U.S.; here, this was attempted by will of decedent challenged by his heirs. The Court held this bequest invalid:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated .... The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."
See also *Thurlow v. Massachusetts*, 5 How. 504, 588 (1847):
"The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government."

"The police power, which is exclusive in the States, is alone competent to the correction of these great evils," Id., at 632.

See also *Parker v. Brown*, 317 U.S. 341, 359, 360, 63 S.Ct. 307 (1943); *Sturges v. Crowninshield*, 17 U.S. 122, 192, 193 (1819); and *Ex Parte Guerra*, 110 A. 224, 226 (Vt. 1920).

(5) *United States v. Fox*, 95 U.S. 670, 672 (1878):

Federal law made penal fraud on creditors occurring within three months of filing bankruptcy petition; defendant charged with violating this law, but the Court held it void:

"But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate."

(6) *Patterson v. Kentucky*, 97 U.S. 501 (1879):

Henry DeWitt, of *U.S. v. DeWitt* fame, held patent for heating oil, and assigned it to Patterson, who was prosecuted for violating state law. Patterson claimed that the U.S. patent made heating oil valid in state. In affirming Patterson's conviction, court held that holder of patent acquired no superior rights under state law, and use of patented product in violation of state law could be punished by the state.

(7) *United States v. Steffens (The Trade-Mark Cases)*, 100 U.S. 82, 96-97 (1879):

Revised statutes provided procedure to protect, by registration, trademarks; later act attached criminal penalties. Individuals were indicted for violating trade-mark law, and they argued that these criminal penalties were unconstitutional. The Court, in dismissing indictments, held that Congress had no such express powers over trademarks, and act was unconstitutional. It also noted that this law, not statutorily connected to interstate commerce, could not be valid on this grounds:

"If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

However, valid with a treaty; see *Rossman v. Garnier*, 211 F. 401 (8th Cir. 1914).

(8) Civil rights:

(a) *United States v. Reese*, 92 U.S. 214 (1876): prosecution against election official for denying receipt of vote; held statute was overbroad.

(b) *United States v. Cruikshank*, 92 U.S. 542 (1876): statute like current 42 U.S.C., §1985(3) subject of prosecution; held indictment was defective.

(c) *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601 (1883): statute like current 42 U.S.C., §1985(3) held unconstitutional because it encompassed people and not solely the state.

(d) *The Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18 (1883): statute like current 42 U.S.C., §2000a held unconstitutional (relating to public accommodations).

(e) *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656 (1887): Chinese immigrants run out of Nicolaus, CA, by California citizens, who were indicted for violating civil rights. Habe action instituted, and Court held that the federal penal provisions did not operate "within a state," 120 U.S., at 689. (like 42 U.S.C., §1985(3).

(f) *James v. Bowman*, 190 U.S. 127 (1903): an act which was not valid under 15th amendment.

(g) *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126, 33 S.Ct. 964 (1913): act was not even applicable within US jurisdiction (public accommodations).

(h) *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. 847 (1948): act can apply in DC.

(i) Note: Employers' liability act valid in DC and territories: *Hyde v. Southern R. Co.*, 31 App.D.C. 466 (1908); *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909).

(9) Domestic relations:

De La Rama v. De La Rama, 201 U.S. 303, 26 S.Ct. 485 (1906):

Appeal from Philippines divorce action. Court stated:

"It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce ...," Id., at 307.

"But the general rule above stated has no application to the jurisdiction of the territorial courts, or of the appellate jurisdiction of this court over those courts," Id., at 308.

"[T]hat Congress, having entire dominion and sovereignty over territories, 'has full legislative power over all subjects upon which the legislature of a state might legislate within the state," Id., at 308.

Ex parte Burrus, 136 U.S. 586, 593-94, 10 S.Ct. 850 (1890):

Custody dispute over child in U.S. district court; here, Court held:

"The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."
See also *Sweigart v. State*, 213 Ind. 157, 12 N.E.2d 134 (1938); *McCarty v. Hollis*, 120 F.2d 540, 542 (10th Cir. 1941); *Ainscow v. Alexander*, 39 A.2d 54 (Del. 1944); *David-Zieseniss v. Zieseniss*, 129 N.Y.S.2d 649, 652 (1954); *Morris v. Morris*, 273 F.2d 678, 682 (7th Cir. 1960); *Collins v. Oklahoma Tax Commission*, 446 P.2d 290, 294 (Okl. 1968); *Collins v. Okla. Tax Comm.*, 446 P.2d 290, 294 (Okla. 1968); *Shiffman v. Askew*, 359 F.Supp. 1225 (M.D.Fla. 1973), aff'd, *Makres v. Askew*, 500 F.2d 577 (5th Cir. 1974); *United States v. White*, 545 F.2d 1129 (8th Cir. 1976); *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436, 440 (1978); *Cady v. Cady*, 224 Kan. 339, 581 P.2d 358, 360 (1978).

Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327 (1883): Federal courts have no probate jurisdiction.

(10) *Reagan v. Mercantile Trust Co.*, 154 U.S. 413, 14 S.Ct. 1060 (1894):

A railroad created by federal law was subject to state law, especially since act of Congress did not express such an exemption.

(11) *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277 (1908):

Union case involving right to contract. Held, US cannot make it a crime to discharge employee.

(12) *Keller v. United States*, 213 U.S. 138, 29 S.Ct. 470 (1909):

Federal law made penal the use of immigrant women for immoral purposes for three years after entry; Keller was indicted and convicted of this, but Court reversed. It was held that this was an act within the police power of the states, and Congress could not legislate in this manner.

"[T]here is in the Constitution no grant to Congress of the police power," Id., at 148.
However, such a law is valid if based upon a treaty; see *United States v. Portale*, 235 U.S. 27, 35 S.Ct. 1 (1914).

(13) *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688 (1911):

Oklahoma legislature decided to change capital from Guthrie to Oklahoma City; suit brought to challenge this on grounds state act violated act admitting Oklahoma into Union. Court held Congress had no power to control such a matter after admission of state into Union.

(14) *Hammer v. Dagenhart*, 247 U.S. 251, 272, 38 S.Ct. 529 (1918):

Court found federal law designed to regulate interstate commerce in products made by child labor as unconstitutional, holding that Congress under the interstate commerce clause cannot regulate production of goods before they enter such commerce.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."
Overruled by *United States v. Darby*, 312 U.S. 100, 116, 61 S.Ct. 451 (1941).

(15) *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38, 42 S.Ct. 449 (1922):

Federal child labor tax law was challenged; Drexel made furniture in North Carolina, and was hit with tax of large amount for employing a boy under 14 years of age. The Court held the act unconstitutional as a mere attempt to circumvent *Hammer* via a penalty under the guise of a tax:

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to

enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."
(16) *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453 (1922):

Federal law, Future Trading Act, attacked as unconstitutional by members of Board of Trade in Chicago; the law was a detailed regulation of trade on exchanges combined with a tax. Court held act invalid as beyond Congressional powers, the subject being within province of the states.

(17) *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 407, 42 S.Ct. 570 (1922):

Suit by coal company against United Mine Workers of America for coal field strike which destroyed its business; suit based on anti-trust theory involving restraint on interstate commerce. From verdict in favor of coal company, Court reversed, holding there was no interstate commerce:

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulations as such."
See second case: *Coronado Coal Co. v. U.M.W. of America*, 268 U.S. 295, 45 S.Ct. 551 (1925). See also *Hume-Sinclair Coal Mining Co. v. Nee*, 12 F.Supp. 801 (W.D.Mo. 1935).

(18) *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 44 S.Ct. 623 (1924):

Companies engaged in making leather goods sold in interstate commerce were subjected to a strike, and they sued under Anti-Trust Act. Court held suit could not be maintained because there was no provable, direct restraint on such commerce.

(19) *Linder v. United States*, 268 U.S. 5, 18, 45 S.Ct. 446 (1925):

Doctor indicted and convicted of dispensing drugs contrary to federal narcotics laws which were revenue measures. Court held his conviction void and said:

"Obviously, direct control of medical practice in the states is beyond the power of the federal government."
See also *Young v. United States*, 315 U.S. 257, 62 S.Ct. 510 (1942)(involved insular possession of Hawaii); and *F.T.C. v. Simeon Management Corp.*, 391

F.Supp. 697 (N.D.Cal. 1975), affirmed at 532 F.2d 708 (9th Cir. 1976). *United States v. Anthony*, 15 F.Supp. 553, 555 (S.D.Cal. 1936); *United States v. Evers*, 453 F.Supp. 1141, 1150 (M.D.Ala. 1978); *Ghadiali v. Delaware State Medical Society*, 48 F.Supp. 789 (D.Del. 1943)(practice of medicine is a state concern).

(20) *Industrial Ass'n of San Francisco v. United States*, 268 U.S. 64, 82, 45 S.Ct. 403 (1925):

Builders association in San Francisco was plagued by union difficulties and devised the "American plan", which the government contended violated federal anti-trust law. But, Court held there was no violation, "for building is as essentially local as mining, manufacturing or growing crops."

(21) *Indian Motocycle Co. v. United States*, 283 U.S. 570, 51 S.Ct. 601 (1931):

Motorcycle manufacturer sold vehicle to city government and U.S. sought to collect sales tax. Court held that tax on sales to state and local government could not be imposed by the U.S.

(22) *Levering v. Garrigues Co.*, 289 U.S., 103, 53 S.Ct. 549 (1933):

Company engaged in erection of steel for buildings in NYC sued union under anti-trust laws for restraining interstate commerce. Court held that such commerce was not involved in case and dismissed suit.

(23) *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 368, 55 S.Ct. 758, 771 (1935):

Congress set up retirement system for carriers subject to I.C.C., and carriers challenged act as unconstitutional. Court agreed and held act violated due process and was not a regulation of interstate commerce:

"The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any

regulation of commerce as such? **We think the answer is plain. These matters obviously lie outside the orbit of congressional power."**
Cases after passage of SS Act in Aug, 1935, a mere 3 months after this case: *Davis v. Boston & M. R. Co.*, 89 F.2d 368 (1st Cir. 1937); *Charles C. Steward Mach. Co. v. Davis*, 89 F.2d 207 (5th Cir. 1937), aff'd 301 U.S. 548, 57 S.Ct. 883 (1937); *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904 (1937) (insular possessions basis: see *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 57 S.Ct. 764 (1937)).

See for requirement to get a SSN: 42 U.S.C., §405(c)(2)(B), and 20 CFR §404.1003-05, .1041.

(24) *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935):

N.I.R.A. applied to petroleum production. Court found act permitted President unbridled legislative authority and his executive orders found void on principles of delegation of legislative powers grounds.

(25) *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854 (1935):

Bankruptcy law favored farmers over secured mortgage holders; held this law deprived creditors of property in violation of the 5th (takings by legislation).

(26) *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 546, 55 S.Ct. 837 (1935):

NIRA permitted "codes" to be promulgated by industry groups, which "codes" had effect of law. Schecter officials indicted for violating "code" for acts occurring inside NYC. Court held NIRA unconstitutional on delegation of powers grounds and found the acts in question not a part of interstate commerce. Congress has no power over local wages and hours of work:

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."
(27) *Hopkins Fed. S & L. Assn. v. Cleary*, 296 U.S. 315, 56 S.Ct. 235 (1935):

Court held that federal act permitting state financial institutions to become federal was inoperative if state objected to change of institution from state to federally chartered.

(28) *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312 (1936):

Congress can't regulate agricultural production in the states:

"It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end," Id., at 68.

"And contracts for the reduction of acreage and the control of production are outside the range of that power," Id., at 73.

"The expressions of the framers of the Constitution... will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states," Id., at 77.

Other cases regarding interstate commerce powers of Congress: *Coe v. Errol*, 116 U.S. 517, 6 S.Ct. 475 (1886); *Chicago, Milwaukee & St.P. Ry. Co. v. Iowa*, 233 U.S. 334, 34 S.Ct. 592 (1914); *McCluskey v. Marysville & Northern Rv. Co.*, 243 U.S. 36, 37 S.Ct. 374 (1917); *Southern Pac. Co. v. Arizona*, 249 U.S. 472, 477, 39 S.Ct. 313 (1919); *Atlantic Coast Line R.Co. v. Standard Oil Co. of Kentucky*, 275 U.S. 257, 48 S.Ct. 107 (1927); and *United States v. Yellow Cab*, 332 U.S. 218, 67 S.Ct. 1560 (1947).
But see *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Court allowed for total control over a farmer's production of his domestic crop; this is an extremely important case regarding the interstate commerce powers of Congress.

(29) *Carter v. Carter Coal Co.*, 298 U.S. 238, 303, 56 S.Ct. 855 (1936):

Bituminous Coal Conservation act imposed tax with a drawback provision conditioned upon compliance with a code regarding prices, labor and other regulations. Court held recitals in act were not the law, that tax was really a

penalty, act violated reserved powers of the state, act was not regulation of interstate commerce, and act violated delegation of powers principles:

"One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect to the former, he is subject only to regulation by the state; in respect to the latter, to regulation only by the federal government."
(30) *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 56 S.Ct. 892 (1936):

State governments and their political subdivisions can't use bankruptcy. NOTE: A popular argument in movement circles contends that this whole nation was placed into bankruptcy in 1930 and Roosevelt devised a plan to get judicial approval of the "bankruptcy" via the decision in the 1938 Erie Railroad case. But how can such a legal theory fly in view of the decision in this case?

(31) *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 58 S.Ct. 125 (1937):

The creation and dissolution of state corporations is a matter solely within province of states.

(32) *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503 (1950):

Testator made devise to U.S. through will, but Cal. S.Ct. held devise invalid and contrary to state law. Court affirmed.

(33) *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144, 83 S.Ct. 1210 (1963):

Federal avocado standards less stringent than California standards were challenged, but Court upheld validity of state laws regarding avocados. Court stated that preparation of foodstuffs for market has always been a matter of local concern:

"Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern."
(34) *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970):

Federal voting rights act setting forth qualifications for voters in federal elections could not be applied to state elections.

(35) Drug and related cases:

(a) In *United States v. Jin Fuey Moy*, 241 U.S. 394, 36 S.Ct. 658 (1916), the Court had before it the validity of this act which operated within the jurisdiction of the state, and it held that dismissal of the indictment was mandated because the act invaded the jurisdiction of the state and Congress simply lacked the constitutional power to penalize mere possession of opium within state jurisdiction.

(b) In *United States v. Ah Hung*, 243 F. 762, 764 (E.D.N.Y. 1917), it was stated: "Mere possession of an article injurious to health would not render a person liable to a United States statute unless some constitutional basis for the statute gives the United States the right to regulate upon the subject."

(c) In *Nigro v. United States*, 276 U.S. 332, 341, 48 S.Ct. 388 (1928), defendant was prosecuted, and in discussing the issue, court stated:

"In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid."
(d) In *United States v. Five Gambling Devices*, 346 U.S. 441, 74 S.Ct. 190 (1953), seizure of devices without any proof of interstate transport held invalid.

(e) *United States v. Contrades*, 196 F.Supp. 803, 811 (D. Hawaii 1961): The drug laws "have been bottomed on the taxing power of Congress or on the power to regulate foreign and interstate commerce."

(f) *Turner v. United States*, 396 U.S. 398 (1970): presumption of importation of coke unconst.; mere possession.

NOTE: Please see the memo regarding treaties which explains that the constitutional foundation for federal drug laws are the drug treaties.

(36) Practice of law is a state matter: *Nicklaus v. Simmons*, 196 F.Supp. 691 (D.Neb. 1961); *In re Battelle Memorial Institute*, 172 N.E.2d 917, 919 (Ohio 1961); *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958); *DePass v. B. Harris Wool Co.*, 346 Mo. 1038, 144 S.W.2d 146 (1940); *Baird v. Koerner*,

279 F.2d 623 (9th Cir. 1960); *Schware v. Bd. of Examiners*, 353 U.S. 238: practice of law is occupation of common right.

(37) State controls pleadings, evidence and process in its courts: *People ex rel Gilbert v. Babb*, 415 Ill. 349, 114 N.E.2d 358 (1953); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24, 38 (1946); *Wade v. Foss*, 96 Me. 230, 52 A. 640 (1902); *Central of Georgia Ry. Co. v. Jones*, 152 Ga. 92, 108 S.E. 618 (1921); *Breen v. Iowa Central Ry. Co.*, 184 Iowa 1200, 168 N.W. 901 (1918); 28 Ga. App. 258, 110 SE 914; 137 P2d 1; 122 P2d 655; 21 NYS2d 791 (1940). Deeds: *Sowell v. Rankin*, 120 Miss. 458, 82 So. 317 (1919); *People v. Kelley*, 122 P.2d 655, 659 (Cal.App. 1942).

(38) Education is a state matter: *State ex rel Steinle v. Faust*, 55 Ohio App. 370, 9 N.E.2d 912, 914 (1937); *Steier v. N.Y. State Education Comm.*, 271 F.2d 13, 17 (2nd Cir. 1959).

(39) State controls fisheries:

(a) McCready v. Virginia, 94 U.S. 391, 394, 395 (1877):

"[T]he States own the tidewaters themselves and the fish in them, so far as they are capable of ownership while running."

"The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State..."

See also *Corfield v. Coryell*, 6 Fed Cas. 546, No. 3230 (E.D.Pa. 1823); *Manchester v. Massachusetts*, 139 U.S. 240, 11 S.Ct. 559 (1891)(wherein there is note of US fisheries commissioner being connected with treaties); and *United States v. Alaska Packers*, 79 F. 152 (D.Wash. 1897). See 43 USC §1311.

(b) And wildlife:

United States v. Shauver, 214 F. 154, 160 (E.D.Ark. 1914):

"The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game in a state, and is therefore forced to the conclusion that the act is unconstitutional."
United States v. McCullagh, 221 F. 288, 293 (D.Kan. 1915):

"[T]he exclusive title and power to control the taking and ultimate disposition of the wild game of this country resides in the state, to be parted with and exercised by the state for the common good of all the people of the state, as in its wisdom may seem best."
See also *Clajon Production Corp. v. Petera*, 854 F.Supp. 843 (D.Wyo. 1994): "ownership" of game.

(40) Insanes are a state matter: *Shapley v. Cohoon*, 258 F. 752 (D.Mass. 1981); *Dixon v. Steele*, 104 F.Supp. 904 (W.D.Mo. 1951); *Fahey v. United States*, 153 F.Supp. 878 (S.D.N.Y. 1957); *Edwards v. Steele*, 112 F.Supp. 382 (W.D.Mo. 1952).

(41) State prisons: *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968); *Siegel v. Ragen*, 180 F.2d 785 (7th Cir. 1950):

"The Government of the United States is not concerned with, nor has it power to control or regulate the internal discipline of the penal institutions of its constituent states. All such powers are reserved to the individual states," 180 F.2d, at 788.

"The 14th Amendment does not empower Congress to legislate on matters within the domain of the states' powers, nor to legislate against the wrongs and personal actions of individuals within the state nor to regulate and control the conduct of private individuals," 180 F.2d, at 789.

(42) Traffic & licensing: *Oklahoma v. Willingham*, 143 F.Supp. 445 (E.D.Ok. 1956)(mail carrier removal); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978).

(43) Obscenity: *McGuire v. State*, 489 So.2d 729 (Fla. 1986) (nudity); *United States v. Hicks*, 256 F. 707 (W.D.Ky. 1919) (bawdy house).

(44) Food products: *United States v. Carolene Products Co.*, 7 F.Supp. 500 (S.D.Ill. 1934) (filled milk); *United States v. Greenwood Dairy Farms*, 8 F.Supp. 398 (S.D.Ind. 1934) (milk); *United States v. Seven Oaks Dairy Co.*, 10 F.Supp. 995 (D.Mass. 1935) (milk); *Stout v. Pratt*, 12 F.Supp. 864 (W.D.Mo. 1935) (flour).

(45) Employment relations: *Ferrer v. Fronton Exhibition Co.*, 188 F.2d 954 (5th Cir. 1951) (Jai-alai players); *Love v. Chandler*, 124 F.2d 785.

(46) Occupations: *Martineau v. Ghezzi*, 389 F.Supp. 187 (N.D.N.Y. 1974) (beauty shops); *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830, 836 (1977) (gambling).

(47) Lands: *Franklin Township v. Tugwell*, 85 F.2d 208 (D.C.Cir. 1936)(low income housing is state matter); *United States v. Jeffers*, 90 F.Supp. 356 (D.Or. 1950); *United States v. Certain Lands in Louisville, Kentucky*, 78 F.2d 684 (6th Cir. 1935); *Washington Water Power Co. v. City of Coeur D'Alene*, 9 F.Supp. 263 (D.Idaho 1934); *Missouri Public Service Co. v. City of Concordia*, 8 F.Supp. 1.

(48) New federalism: *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991): state sovereignty and 11th Amend.

New York v. United States, 505 U.S. 144, 112 S.Ct. 2408 (1992): new federalism.

Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395 (1991): authority of states.

(49) Speech: *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886 (1944): "Heresy trials are foreign to our Constitution."

(50) Tax on exports void: *Fairbanks v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915). See also *United States Shoe Corp. v. United States*, 907 F.Supp. 408 (Ct.Int.Trade 1995), affirmed at 114 F.3d 1564 (Fed.Cir. 1997): harbor maintenance tax is unconstitutional (this link is to the decision of the appellate court).Cert has been granted.

(51) Separation of powers: *Plaut v. Spendthrift Farms*, ___ U.S. ____ (1995): Based upon principles of separation of powers, Congress cannot enact law which essentially reviews decisions of the courts.

STATE LIMITS OF POWER

A. POLICE POWERS:

The courts have held that the states have a power known as the "police power." You should know what is the "police power" as well as know about some of the laws which the courts have declared unconstitutional as outside the police power. Here are some of those cases:

Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662 (1917): state law prohibiting employment agencies was void.

Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923): state law forbidding teaching foreign languages in school was void.

Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412 (1924): state law mandating bread weight restrictions held void.

Weaver v. Palmer Bros. Co., 270 U.S. 402, 46 S.Ct. 320 (1926): state law preventing use of "shoddy" in mattresses held void.

Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 47 S.Ct. 426 (1927): state's ticket broker price restriction law held void.

Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939): being mere member of gang can't be made penal.

Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 So. 725 (1887): prohibition on selling used mattresses held unconstitutional.

Crawford v. City of Topeka, 51 Kan. 756, 33 P. 476 (1893): prohibition on advertising signs held unconstitutional.

In re Opinion of the Justices, 207 Mass. 601, 94 N.E. 558 (1911): statute preventing young women under 21 from entering Chinese operated hotels held unconstitutional.

Chenoweth v. State Board of Medical Examiners, 57 Colo. 73, 141 P. 137 (1913): prohibition on placing ad in paper beyond police powers of board.

Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921): law preventing building without consent of neighbors held beyond police power.

Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925): ordinance preventing business in home held unconstitutional (zoning case containing good cites and quotes).

Bruhl v. State, 111 Tex.Cr.R. 233, 13 S.W.2d 93 (1928): law regarding optometrists held beyond police power.

Travlers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007 (1934): state mortgage foreclosure moratorium held unconstitutional.

City of Miami Beach v. Cohen, 47 So.2d 565 (Fla. 1950): ordinance prevented entertainment at night club found beyond police power.

Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855 (Fla. 1952): restriction on building during certain months held unconstitutional.

Berry v. Summers, 76 Idaho 446, 283 P.2d 1093 (1955): dental technicians law held beyond police powers.

Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957): law to control nematodes for citrus trees held beyond police power and constituted a taking.

People v. Bunis, 9 N.Y.2d 1, 172 N.E.2d 273 (1961): prohibition on selling magazines without covers held unconstitutional.

Delmonico v. State, 155 So.2d 368 (Fla. 1963): possession of spearfishing equipment law held unconstitutional.

City of Detroit v. Bowden, 6 Mich.App. 514, 149 N.W.2d 771 (1967): ordinance re shouting at cars on street held beyond police powers.

Bruce v. Director, Dep't. of Chesapeake Bay Affairs, 261 Md. 585, 276 A.2d 200 (1971): crabbing restriction limited to resident's own county held beyond police powers.

Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973): law making distinction between parties allowed to cut male and female hair held beyond police powers.

McGuffey v. Hall, 557 S.W.2d 401, 414 (Ky. 1977): compulsory medical malpractice insurance not shown within police power.

State v. Lee, 356 So.2d 276, 279 (Fla. 1978): law provided funds to good drivers vis a vis "bad':

"The state's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals." *Alford v. Newport News*, 220 Va. 584, 260 S.E.2d 241 (Va. 1979): law preventing smoking in restaurants held unconstitutional.

Rogers v. State Board of Medical Examiners, 371 So.2d 1037 (Fla. App. 1979): chelation treatment held not a valid reason for revocation of doctor's license.

City of Baxter Springs v. Bryant, 226 Kan. 383, 598 P.2d 1051, 1057 (1979): prohibition on dancing in disco found unconstitutional: "Healthful and harmless recreation cannot be prohibited by a municipal corporation."

City of Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979): proscription on merely carrying gun in car beyond police power.

State v. Stewart, 40 N.C.App. 693, 253 S.E.2d 638 (1979): law preventing shining light off road after dark held beyond police power.

Horsemen's Benevolent & Protective Assoc. v. Div. of Pari-Mutuel Wagering, 397 So.2d 692, 695 (Fla. 1981):

"This statute effectually requires payment of money to a private association to do with as it chooses. This is an unlawful exercise of the police power."
Daniel v. Dept. of Trans. & Devel., 396 So.2d 967 (La.App. 1981): cutting down historic tree.

Ailes v. Decatur County Area Planning Comm., 448 N.E.2d 1057 (Ind. 1983): prohibition on junkyards amounted to taking and beyond police power.

Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm., 217 Neb. 487, 351 N.W.2d 701 (1984): prohibition on giving volume discounts for liquor beyond police power.

Illinois cases:

Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920, 922 (1911): city ordinance which prevented the construction and erection of advertising signs within 500 feet of any park or boulevard held void. See also *Condon v. Village of Forest Park*, 278 Ill. 218, 115 N.E. 825 (1917); *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915); *People v. Chicago*, M. & St. P. Ry. Co., 306 Ill. 486, 138 N.E. 155 (1923); and *Heimgaertner v. Benjamin Electric Manuf. Co.*, 6 Ill.2d 152, 128 N.E.2d 691 (1955). See also *State Bank & Trust Co. v. Village of Wilmette*, 358 Ill. 311, 193 N.E. 131, 133 (1934); *East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry.*, 279 Ill. 123, 116 N.E. 720, 723 (1917); *Schiller Piano Co. v. Ill. Northern Utilities Co.*, 288 Ill. 580, 123 N.E. 631 (1919) ("An act which has no tendency to affect or endanger the public in any of those particulars and which is entirely innocent in character is not within the police power"); *Town of Cortland v. Larson*, 273 Ill. 602, 113 N.E. 51 (1916); *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

People v. Brown, 95 N.E.2d 888 (Ill. 1950): a person's trade or business is property.

SCHOOLING:

Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573 (1925): State law requiring children to be sent to public schools held unconstitutional:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

SPEECH, PRESS AND RELIGION:

Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943): freedom of speech and press include right to pass out flyers.

Murdock v. Comm. of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943): license tax to sell religious tracts and books held unconstitutional.

People v. Swartzentruber, 170 Mich.App. 682, 429 N.W.2d 225 (1988), and *State v. Miller*, 196 Wis.2d 238, 538 N.W.2d 573 (1995): reflector law requiring slow moving vehicles to display symbol; held violative of 1st Amendment.

CANNOT LICENSE CERTAIN OCCUPATIONS:

A. Horseshoers:

Bessette v. People, 193 Ill. 334, 62 N.E. 215 (1901)

People v. Beattie, 89 N.Y.S. 193 (1904); see also *Application of Jacobs*, 98 N.Y. 98.

In re Aubrey, 36 Wash. 308, 78 P. 900 (1904)

B. Photographers:

Territory v. Kraft, 33 Haw. 397 (1935)

Wright v. Wiles, 173 Tenn. 334, 117 S.W.2d 736 (1938)

Bramley v. State, 187 Ga. 826, 2 S.E.2d 647 (1939)

Buehman v. Bechtel, 57 Ariz. 363, 114 P.2d 227 (1941)

State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943)

Sullivan v. DeCerb, 156 Fla. 496, 23 So.2d 571 (1945)

Moore v. Sulton, 185 Va. 481, 39 S.E.2d 348 (1946)

State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949)

Abdoo v. Denver, 156 Colo. 127, 397 P.2d 222 (1964)

C. Miscellaneous:

Jackson v. State, 55 Tex. Cr. R. 557 (1908): barbers can't be licensed.

Gray v. Omaha, 80 Neb. 526, 114 N.W. 600 (1908): can't license sidewalk builder.

Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412 (1913): privilege tax does not apply to plumber.

Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1 (1918): can't license masons.

Howard v. Lebby, 197 Ky. 324, 246 S.W. 828 (1923): can't license house painters; see also *Priddy v. City of Tulsa*, 882 P.2d 81 (Okl.Cr. 1994): unconst. to license sign painters; *State v. Wiggenjost*, 130 Neb. 450, 265 N.W. 422 (1936).

Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696 (1926): can't license public accountants.

Rawles v. Jenkins, 212 Ky. 287, 279 S.W. 350 (1926): can't license real estate agents.

Doe v. Jones, 327 Ill. 387, 158 N.E. 703 (1927): can't license private surveyors.

Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936): paper hangers can't be licensed.

S.S. Kresge Co. v. Couzens, 290 Mich. 185, 287 N.W. 427 (1939): can't license florists.

State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940): can't license dry cleaners.

Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948): can't control opticians.