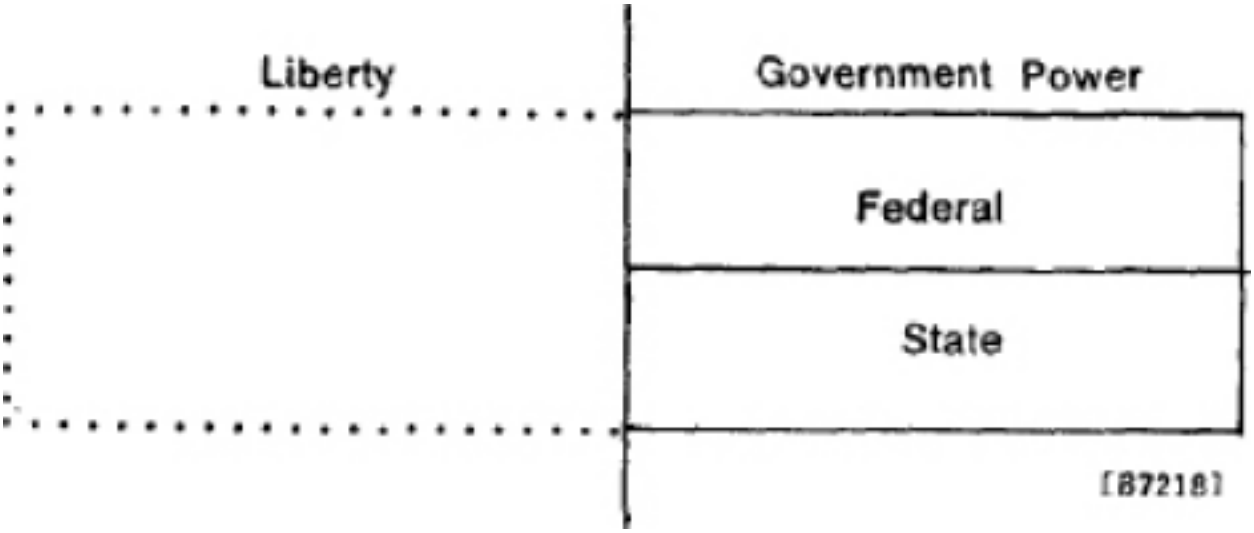
FEDERALISM

From *Constitutional Analysis in a Nutshell* by James Baker and Jerre Williams

1. Constitutional Powers

The Constitution of the United States constitutes a federal system of ordered liberty that contemplates a balance between individual liberty and government power. The people are sovereign—the ultimate source of all power and legitimacy. The Tenth Amendment describes the allocation of powers in these constitutional relationships: certain powers are delegated to the government of the United States, some powers are either prohibited or reserved to the states, and still other powers are reserved to the people. U.S. Const. amend. X. The "powers reserved to the people" correspond to the rights that were the subject of Chapter 4 (Constitutional Liberty). Individual persons have rights. Governments have powers. The Constitution ordains and establishes and grants powers to the national government. State governments existed before the Constitution, but the Constitution limits their powers. This Chapter is about the "powers delegated" to the national government and the "powers prohibited" to the states by the Constitution. The emphasis here is on the right hand side of the Williams diagram—the government powers side of our constitutional analysis:



National powers include express powers, implied powers, and inherent foreign powers. State powers are not created by the Constitution but have their source in the sovereignty of the people and are manifested by the sovereign state "police power" to regulate for their health, safety, morals, and general welfare. The Constitution prohibits particular exercises of the state police power that violate its guarantees of individual

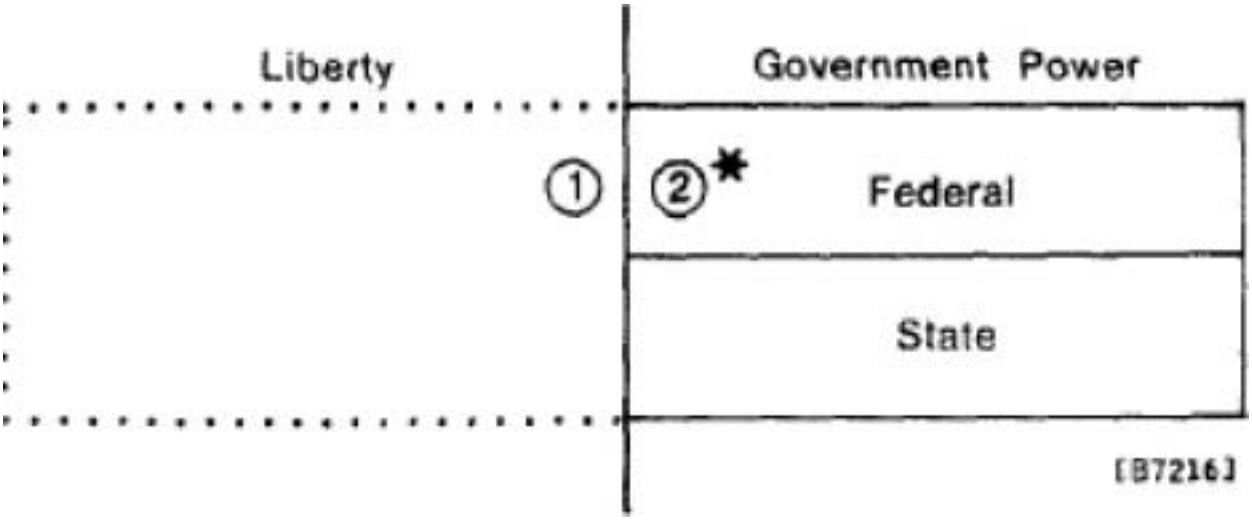
liberty or that interfere with the enumerated and delegated powers the Constitution allocates to the national government. The next Chapter will elaborate on the ebb and flow of power that has taken place between the national and the state governments over time and function as well as the competition for power and influence among the three branches of the national government. That the concepts of federalism and separation of powers are equal parts constitutional law and political philosophy is reflected in how Supreme Court decisions have gone back and forth to favor federal interests during some eras and state interests during other eras and in how the Justices have chosen to side with the President sometimes and with the Congress other times.

Implicit in all the cases involving the scope of federal power and state power is the preliminary conclusion that the liberty versus power balance has already been resolved in favor of government power and against individual liberty. Otherwise, if the attempt by the state or federal government to regulate and control private individuals falls within the area of constitutional liberty, then we never get to the issue about the allocation of power between the national government and the states. The individual liberty versus government power issue is always primary. In some cases, however, the liberty versus government power issue is so obvious and predictable that it falls away and the Court simply begins with the power allocation issue to determine the federal power versus state power issue. In other cases, both fundamental issues require the Court's careful attention.

Consider the leading case of *United States v. Darby*, 312 U.S. 100 (1941). The Supreme Court upheld the federal Fair Labor Standards Act, which prohibited the shipment in interstate commerce of goods manufactured by employees who worked more hours than a statutory maximum or who were paid less wages than a statutory minimum. First, this holding sounded the death knell for substantive economic due process and the "right to contract" that had prevailed under earlier cases like *Lochner v. New York*, 198 U.S. 45 (1905), to strike down economic regulations of the marketplace. The statute was constitutional under the Fifth Amendment even though there may have been some employees and employers who would have been willing to contract for more hours or lower wages—the law did not deprive them of liberty. Second, this holding affirmed the exercise of the congressional power under the Commerce Clause plus the Necessary and Proper Clause. Congress possessed the authority to regulate intrastate activities that affected interstate commerce even when its purposes coincided with a purpose available to the states under their police powers, *i.e.*, regulating wages and hours in manufacturing. Furthermore, the shipment of goods between states is clearly within the purview of the congressional power over interstate commerce. Third, this

holding reconciled the statute with the Tenth Amendment to explain that the enumerated power under the Commerce Clause was delegated to the federal government and therefore could not be a power reserved to the states.

Thus, in order to uphold the statute, the Supreme Court had to decide two fundamental issues of constitutional law. First, the Supreme Court had to decide that the statute did not violate individual liberty but instead came within the proper scope of government powers. Second, the Supreme Court had to decide that the statute was a constitutional exercise of the federal power to regulate commerce among the states and did not fall within the powers of the states. The asterisk locates the conjunction of these two holdings:



2. Express Federal Powers

The Constitution creates the national government and grants it powers. All the traditional powers of government, consistent with American constitutionalism, are expressly provided in Article I, Section 8: to lay and collect taxes; to spend for the general welfare; to borrow money; to regulate commerce; to regulate immigration and naturalization; to regulate bankruptcy; to coin money; to fix standards of weights and measures; to regulate the mail; to regulate patents and copyrights; to establish federal courts; to define crimes; to declare war; to raise and support military forces; to regulate the militia; and to perform several other particular powers. To be sure, there are other clauses in the first Article, dealing with the writ of *habeas corpus, ex post facto* laws, and bills of attainder, that restrain the Congress. But it was intended that the Congress would wield the great powers of government.

As we shall discuss, the federal powers over foreign affairs are plenary, but the federal powers over domestic affairs are limited and enumerated. Article I begins, "All legislative powers herein granted shall be vested in a Congress of the United States * * *." U.S. Const. art. I, § 1, cl. 1. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Therefore, any and every act of Congress must come within some authorization in the Constitution. The federal government is a government of limited and enumerated powers. In contrast, the state legislatures have a sovereign police power to enact any and all laws, so long as they do not violate the particular prohibitions of the Constitution. Congress has this expansive police power only in the narrow circumstances of legislating for the District of Columbia and other federal territories and even then it is enumerated in so many words in the Constitution. U.S. Const. art. I, § 8, cl. 17.

Defending the proposed constitution against the complaint that it did not contain a bill of rights, Alexander Hamilton argued that the enumeration of national powers was the best protection of the people and their rights. "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations * * *." Continuing he asked rhetorically, "For why declare that things shall not be done which there is no power to do?" *Federalist Paper No. 84*.

As we shall come to appreciate, however, some of the enumerated powers of the federal government are at once exceedingly important and remarkably broad, particularly when they are coupled with the Necessary and Proper Clause. Nevertheless, for a federal statute to be "above the line" that separates federal power from state power in our Williams diagram, there must be some arguable textual referent for it in some clause in the Constitution. Admittedly, Congress and even the Supreme Court sometime lose sight of this basic proposition, now that the modern administrative role of the federal government is so taken for granted.

3. Implied Federal Powers

Perhaps the most expansive power the Constitution vests in Congress—or in any other branch for that matter—is the 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 Constitution in the Government of the United States." U.S. Const. art. I, §

8, cl. 18. This Necessary and Proper Clause is sometimes called the Elastic Clause or the Sweeping Clause. There are similar provisions in the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments.

In what is perhaps the greatest opinion of our greatest Chief Justice, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), John Marshall wrote for a unanimous Supreme Court to uphold the power of the federal government to create the Bank of the United States, although there is no specific reference to the power to create a national bank in the text of the Constitution itself. He insisted that "we must never forget, that it is a constitution we are expounding." He eloquently described the nature and character of our Constitution as a document containing the "great outlines" of government and its "important objects," a document granting "ample powers" and "ample means for their execution," a document governing a "vast republic" and the "exigencies of the nation," a document "to be adapted to the various crises of human affairs," a document "intended to endure for ages to come."

The Constitution creates a limited national government and grants it enumerated powers, *i.e.*, specified powers that are limited but supreme within their sphere. These enumerated and delegated powers do not amount to inherent powers, *i.e.*, the federal government cannot do anything and everything imaginable within the internal, domestic affairs of the country. The Necessary and Proper Clause, however, is a separate grant of incidental or implied powers. Congress has legislative discretion to choose the particular means to achieve its general enumerated powers. Chief Justice Marshall put it this way: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id*. at 421.

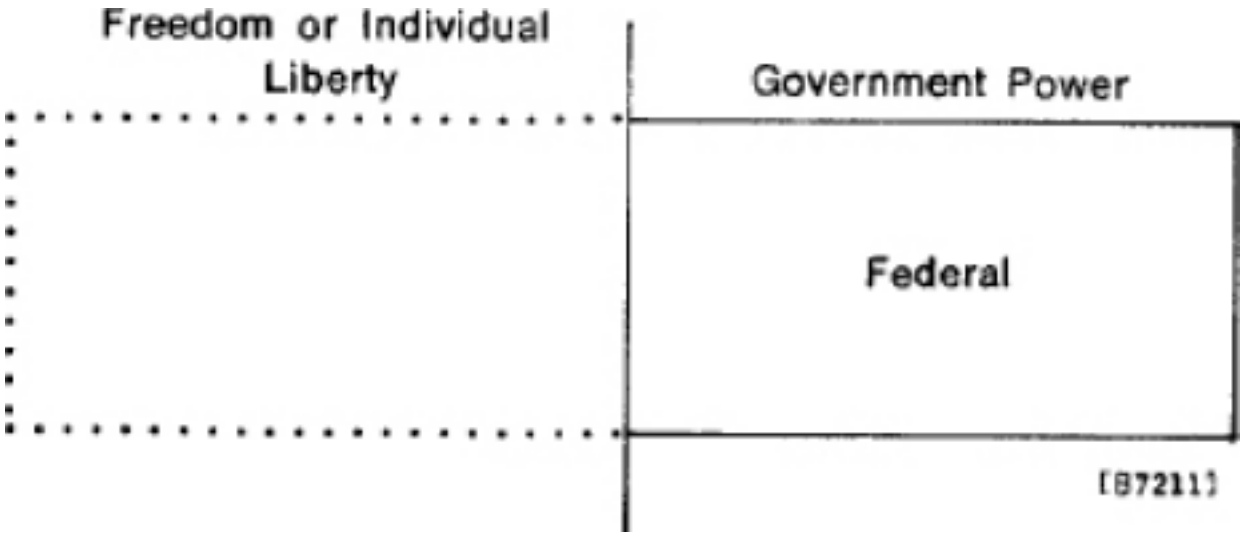
The Court reasoned that the creation of a bank was the establishment of an instrumentality of government to aid in carrying out other powers granted to the federal government, such as the power to coin money and regulate currency, the power to tax and spend, the power to regulate interstate commerce, the power to raise and support the military, and so on. The bank was an "appropriate" means towards these government ends and therefore it was a constitutional exercise of congressional power. The bank certainly is not "necessary" in any strict sense of the word—the first Bank of the United States had been allowed to lapse when the second was incorporated in 1816 and we have been without one since 1836—but it was "appropriate" and that is enough

to be constitutional. Indeed, the language of modern amendments simply authorizes Congress to enforce the measure by "appropriate legislation."

4. Federal Commerce Power

Article I, Section 8, Clause 3 delegates to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is the constitutional reference for most of federal laws that regulate domestic affairs today.

The federal power over foreign trade and trade with the Indian tribes is plenary and complete. There is no comparable state power. Thus the Williams diagram of the governmental power to regulate foreign commerce and commerce with the tribes of Native Americans looks like this:



The federal power to regulate "commerce among the states" is far more complicated and nuanced. In a famous early case, Chief Justice Marshall defined that "Commerce undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and part of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Commerce Clause power was intended to create a kind of common market among the states—200 years before the advent of today's European Union—to put an end to the trade barriers and tariffs that had developed among the newly-independent states and to place legislative control over that national market in the national legislature which alone was politically accountable to the people of the entire nation. Therefore, Congress has the power to

regulate interstate commerce inside the territory of the states, not just at their borders, as well as the power to regulate intrastate commerce that affects interstate commerce.

The scope of the modern federal Commerce Clause power has three dimensions. First, Congress may regulate the use of the channels of interstate commerce. Congress can prohibit the shipment in interstate commerce of goods manufactured by workers paid less than a federal minimum wage or employed for more than a federal maximum number of hours. *United States v. Darby*, 312 U.S. 100 (1941). Congress can prohibit racial discrimination in hotel accommodations that qualitatively and quantitatively diminish interstate travel for persons of color. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Second, Congress can regulate and protect the instrumentalities of interstate commerce or persons and things in interstate commerce, even though the harm may be caused only from intrastate activities. Congress can regulate intrastate rates of common carriers that discriminate and harm interstate transportation. *Houston, East & West Texas Railway v. United States*, 234 U.S. 342 (1914). Congress can criminalize local loan sharking activity that funds organized crime syndicates at the national level. *Perez v. United States*, 402 U.S. 146 (1971).

Third, Congress can regulate those activities that have a substantial relation to interstate commerce, i.e., those kinds of intrastate activities that substantially affect interstate commerce. This third dimension of the congressional power over interstate commerce deserves some elaboration. When the Congress has relied on the Commerce Clause power plus the Necessary and Proper Clause, the Supreme Court has upheld federal regulations that bear at least a resemblance to state police power regulations. Indeed, in *United States v. Darby*, 312 U.S. 100 (1940), the Court held that Congress possessed the authority to regulate intrastate activities that affected interstate commerce even when the congressional purpose coincided with a purpose within the traditional police powers of the states, *i.e.*, regulating wages and hours in manufacturing. The Court went so far as to state that the Tenth Amendment was of no consequence whatsoever and amounted to a "truism" in that the Commerce Clause power was enumerated and delegated to Congress and by definition the congressional exercise of the power could not interfere with any reserved power of the states. Thus, with the Tenth Amendment read out of the constitutional analysis, the only significant limitations on the congressional commerce power are to be found in the Bill of Rights.

During President Franklin D. Roosevelt's New Deal, the Supreme Court upheld a federal statute that explicitly regulated unfair labor practices "affecting commerce."

Such an economic impact was enough to justify federal regulation as a necessary and proper exercise of the Commerce Clause power. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Congress and the Supreme Court pushed the envelope of this theory in the famous case of *Wickard v. Filburn*, 317 U.S. 111 (1942). Farmer Filburn owned and operated a small farm. It had been his practice to raise a small acreage of winter wheat and to sell a portion of it, to feed a portion to his poultry and livestock, to use some in making flour for his own family's consumption, and to keep the rest for seeding. Under the Federal Agricultural Adjustment Act of 1938, Filburn was allotted 11.1 acres. He violated his allotment to sow 23 acres and harvested 239 excess bushels of wheat from the 11.9 extra acres, again, for his own use and not intending to bring it to market. He refused to pay the assessed penalty of $117.11.

Our constitutional analysis duality comes into play on these facts. There is first and foremost the genuine liberty question: whether either government, state or federal, can control the amount of wheat a farmer can grow on his own property for his own use. The Court's answer to this issue was that Farmer Filburn's "right" to grow how much wheat he wanted to grow on his own farm for his own use did not fall in the area of individual liberty. For purposes of regulating the overall national production of wheat, the government could control the amount of wheat a particular farmer grows, even for his own use. There was no deprivation of property without due process of law; the statute was not so arbitrary and capricious as to amount to a violation of individual liberty under the Fifth Amendment. Matters of the wisdom or effectiveness of the policy were for the legislature. The soundness of this conclusion can be demonstrated if one simply imagines how the individual liberty issue would be decided if Farmer Filburn had decided to grow marijuana, again only for his own consumption.

But then the Supreme Court was called on to answer the second question of our constitutional analysis: did the national government have the constitutional power to reach so deeply into local affairs to regulate a single, solitary family farm? This presented an important issue of federalism. Even if we assume that a state government could impose such strict production quotas on individual farmers under its police power to regulate the market for wheat—given the Court's holding against Farmer Filburn on the individual liberty question—does the federal power to regulate interstate commerce reach this kind of private, individual, local activity that is wholly intrastate?

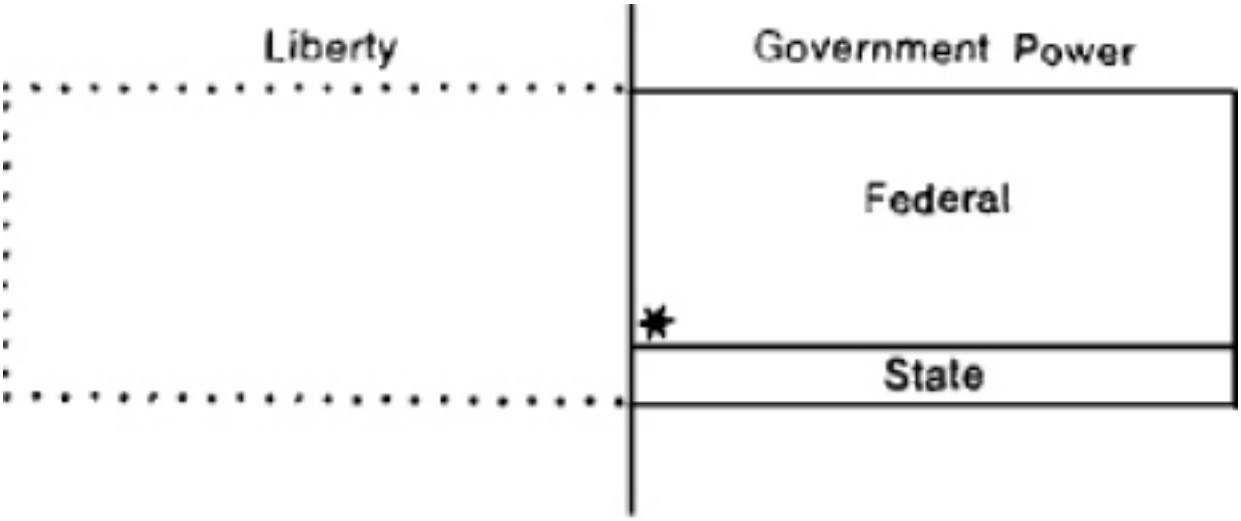
The Supreme Court's answer was to uphold the federal power to regulate. The power to regulate commerce includes a power to regulate prices, which includes a power to regulate practices that affect prices, which, in turn, includes a power to

regulate production for personal use. Farmer Filburn's 239 bushels may not appreciably affect the overall demand and supply of wheat in the country, but in the aggregate the total of home-grown wheat was a significant variable factor in the marketplace which accounted for 20% of national production. Cumulatively, home-grown wheat overhangs the market, i.e., it results in a reduction in market demand for wheat or, if higher prices induce it into the market, it results in an increase in market supply.

When Congress regulates a category of actors or activities and that whole category, considered cumulatively and aggregately, substantially affects interstate commerce, the courts have no power to immunize one single transaction within the category simply because the isolated actor or activity, considered alone, is itself too trivial or insignificant for regulation. It is enough if the aggregated activity affects interstate commerce in a substantial way. What the Supreme Court is doing is to defer to Congress's interpretation of its own power; Congress enacts such legislation based on its interpretation of the balance between federal and state powers.

Another example of this inter-branch dialogue is the Civil Rights Act of 1964 which prohibited private racial discrimination in any place of public accommodation "if its operations affect commerce." The statute was upheld as applied to a motel that had just over 200 rooms that was located near an interstate highway that had advertised nationally and that served about 75% out-of-state guests. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The statute was also upheld as applied to a family-owned restaurant, not because its customers were interstate travelers, but because a substantial portion of its foodstuffs had traveled in interstate commerce before being purchased from a local supplier. *Katzenbach v. McClung*, 379 U.S. 294 (1964). Together, these Court holdings deferred to Congress to find there was a rational basis for concluding that private discrimination in public accommodations affected interstate commerce and the legislation was a reasonable and appropriate means to eliminate it, under the Commerce Clause and the Necessary and Proper Clause.

Given such a broad interpretation of the federal Commerce Clause power, where is the constitutional limit? If the federal government can reach into an individual home of a small family farmer, have we not defined the scope of federal power so broadly so as to violate the fundamental principle that the federal government is a government of limited and enumerated powers? An old constitutional law professor used to muse, "The federal commerce power covers everything except a naked man in a tree, and it covers him when he climbs down." The logic and reasoning in *Wickard v. Filburn* makes us wonder whether our Williams diagram should look like this:



Note: The location of the asterisk shows the case of *Wickard v. Filburn* close to the liberty line and extending federal power deeply into local matters

[57220]

Of course, the guarantees of individual liberty remain as important restraints on any and every exercise of government power, state or federal. Likewise, we must recognize that there is overlap between state and federal powers so that the great breadth of federal power does not automatically mean that state power is reduced to nothingness. Here is a simple exercise to keep distinct and separate the two fundamental questions in our constitutional analysis, the question of liberty versus government power and the question of federal power versus state power.

Assume that Congress passes a statute requiring all motorcyclists and bicycle riders to wear helmets. Suppose you are doubtful about the constitutionality of such a federal statute. Ask yourself this question: could a state or local government pass such a statute? If your answer is: "No, I don't think a state or city could do this," then your concern is about individual liberty. If your answer is: "Oh, yes, a state or city could do this," then you have no individual liberty question; your real concern is only for the proper distribution of power between the federal government and the states.

Or take a reverse situation where a state simply outlaws all two-wheeled motor vehicles on public highways. Suppose it applies this law so that motorcyclists cannot even drive into the state from other states. If you doubt the constitutionality of this state

law, as well you might, ask yourself this question: could Congress outlaw all motorcycles on public highways? If your answer is: "No," then you are thinking in terms of individual liberty. You are asserting that constitutional liberty forbids either the federal government or the states from outlawing all motorcycles on public highways. But if your answer is: "Yes, Congress could do this," then you are thinking in terms of the distribution of power between state and federal governments. You are asserting that the state is placing a burden on interstate transportation and that this violates the distribution of powers between the state and federal governments but that the federal government could pass this law under the power to regulate interstate commerce.

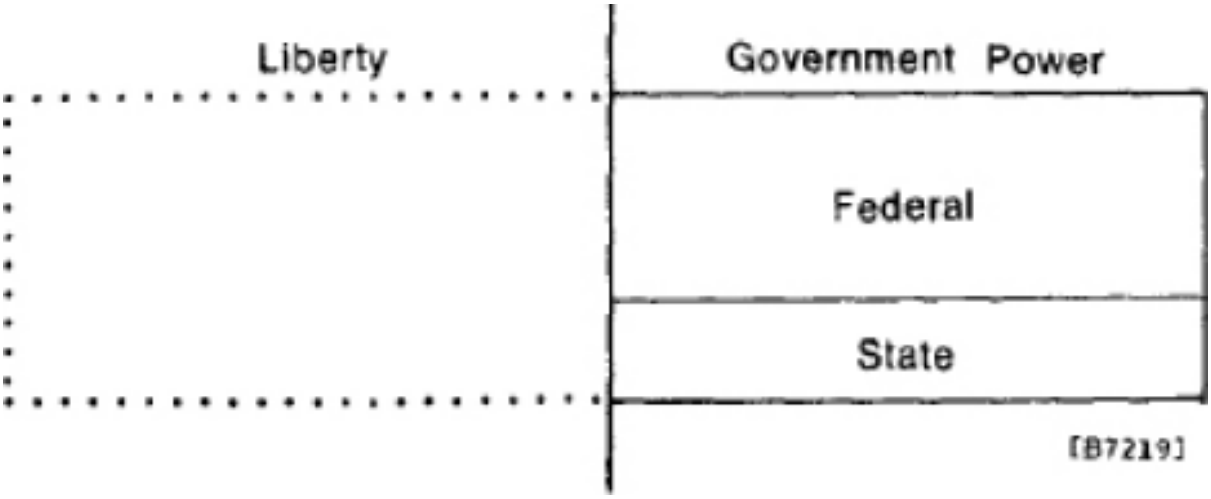
The purpose of this thought exercise with these two hypotheticals is to make you aware of the constitutional analysis of any case when it contains both a substantial liberty issue and a distribution of government power issue, as did the case of *Wickard v. Filburn*. By asking whether the other government could engage in this regulation, you are separating and isolating the distribution of governmental powers question from the individual liberty question. Likewise, you will better understand the essential nature of whatever constitutional doubts you have with respect to a particular statute.

Between 1937 and 1995, the Supreme Court did not strike down a single federal regulation for exceeding the scope of the Commerce Clause power. Then, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated the Gun Free School Zones Act which had made it a federal crime to knowingly possess a firearm in a school zone. The defendant was a 12th grade student who had been convicted for bringing a handgun to his high school. The statute had nothing to do with "commerce" or any sort of economic enterprise. Nor was there a jurisdictional element that would have required proof that the particular firearm had been transported in interstate commerce. The Court rejected the government's nexus argument that tried to string together inferences that guns threaten the educational process and learning environment leading to a less educated and less productive citizenry resulting in a harmful effect on the national economy. The logic of the government's argument, the Court insisted, would allow Congress a plenary power to regulate "any activity by an individual." But Congress has no police power. The broadest interpretation of the Commerce Clause power allows Congress to regulate intrastate activity that substantially affects interstate commerce, but the underlying regulated activity must be commercial. The Court noted that Farmer Filburn's home-grown wheat was "in commerce" in a way that a student bringing a gun to a high school simply was not.

The Supreme Court defended the constitutional distinction between commercial and non-commercial activities in *United States v. Morrison*, 529 U.S. 598 (2000). The decision followed the same basic analysis to invalidate a provision of the Violence Against Women Act that had created a federal civil remedy for victims of violent crimes that were motivated by gender bias. The Court reasoned that a gender-motivated crime, like the weapons offense in the *Lopez* case, is not economic or commercial activity, notwithstanding the statute's legislative history and congressional findings that had followed the government's same line of logic previously argued and rejected in *Lopez*. No civilized system of justice could fail to provide a remedy for the victim of the brutal sexual assault in the case, but according to the majority her remedy was to be found in the state power over crimes and torts, not in the federal power to regulate interstate commerce.

These two holdings mark the outer limits of the federal power under the Commerce Clause plus the Necessary and Proper Clause in the current thinking of the Supreme Court. The federal power is broad and deep but not without constitutional limitations. There is a judicially-enforceable limit to the congressional tendency to nationalize more and more of the law in area after area of public policy. Some subjects, like the environment, seem necessarily to require national regulation. Still, much of the law that controls our daily lives today is state law, considering the scope and importance of criminal law, property law, contract law, tort law, family law, and other traditional exercises of the state police power.

How far can Congress go? As we have seen, ultimately, that is up to the Supreme Court in the exercise of its power of judicial review. As Justice Black once explained, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring). Congress has demonstrated a willingness to push the envelope of its Commerce Clause power and the Supreme Court generally has acquiesced. The Court has demonstrated a willingness to strike down particular federal statutes that in the opinion of the Justices do not substantially affect commerce or the economy, leaving those subjects to the police power of the states. The constitutional analysis may be depicted in our Williams diagram:



5. Federal Taxing and Spending Powers

The very first enumerated power delegated to Congress in Article I, Section 8, of the Constitution is the power to tax and spend, one of the most important of all the federal powers. James Madison interpreted the clause narrowly to mean that Congress was limited to taxing and spending only in the exercise of one of its other enumerated powers. Alexander Hamilton interpreted the clause broadly as an additional power to tax and spend for any purpose Congress believed served the general welfare. In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court adopted the Hamiltonian broad reading and subsequent judicial opinions have consistently assumed a posture of deference towards changing congressional judgments of what is in the "general welfare."

In one old case, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the Court managed to strike down a federal tax on goods manufactured using child labor because the tax was considered to be a legislative pretext for regulating child labor. But that old holding was only following an interpretation of the Commerce Clause that is thoroughly discredited today, namely, that the federal commerce power did not allow federal regulation of manufactured goods produced with child labor. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Such federal regulations today are valid under the broad contours of the modern Commerce Clause power, and we can be confident that such federal taxes would be upheld, as well, under the modern Taxing and Spending Clause power. *United States v. Darby*, 312 U.S. 100 (1941); *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). That an otherwise valid exercise of the taxing and spending

power cannot be a violation of the Tenth Amendment, because a delegated federal power cannot be a power reserved to the states, is obvious from our fundamental constitutional analysis, and the Supreme Court has overcome its own confusion in that regard.

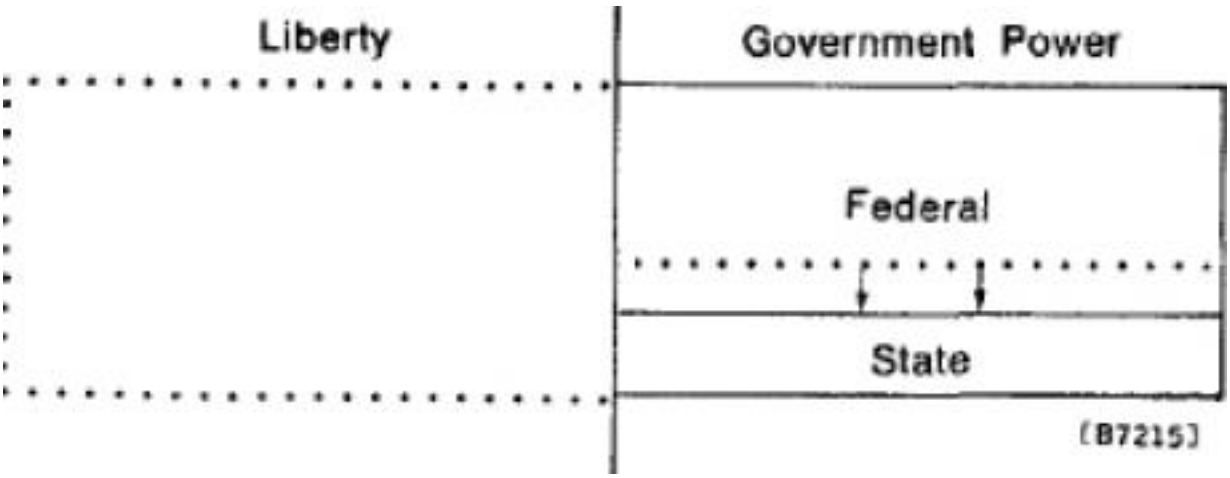
Today, a federal tax will be upheld under the Taxing and Spending Clause if it in fact raises revenues or if it is intended in theory to raise revenues, regardless of any ulterior legislative motive of Congress to regulate, even when the practical effect of the tax may likely be to regulate the activity out of existence. The Court upheld against a Tenth Amendment attack a federal occupational tax that required persons engaged in the business of wagering and gambling to register and pay taxes on their illegal proceeds. *United States v. Kahriger*, 345 U.S. 22 (1953). The Tenth Amendment reserves to the states those powers not delegated to the federal government but the Taxing and Spending Clause is a delegated federal power, so the Tenth Amendment is not any kind of restriction on the power to tax and spend for the general welfare. Disapproving some contrary language in earlier cases, the Supreme Court maintained that courts cannot invoke either the Tenth Amendment or their own views of the general welfare to limit the exercise of the congressional taxing power. That holding was about the federal versus state government power question in our constitutional analysis.

Of course, Congress cannot exercise the taxing and spending power—or any other power for that matter—in a manner that would violate the guarantees of individual liberty. For example, the Supreme Court held that an individual's assertion of his Fifth Amendment privilege barred his prosecution for violating the same federal occupational tax imposed on illegal gamblers because registering and paying the tax would have been self-incriminating under state and federal criminal laws against gambling. *Marchetti v. United States*, 390 U.S. 39 (1968). That holding was about the individual liberty versus government power question in our constitutional analysis.

The modern Congress has innovated to tie strings to exercises of its taxing and spending power in order to "encourage" the states to go along with policies Congress could not otherwise impose on them. Despite the fact that the Twenty–First Amendment reserves the power to regulate intoxicating liquors to the states, the Supreme Court upheld the power of Congress to threaten to withhold federal funding for highways from any state that did not raise its drinking age from 18 to 21. Apparently, the Court's concerns for separation of powers override its concerns for federalism. It will defer to the Congress in such matters, to the consternation of the states. *South Dakota v. Dole*, 483 U.S. 203 (1987). These conditional exercises of the

spending power are constitutional so long as Congress is acting in the general welfare and the conditions are related to the purpose of the federal spending program, but the conditions cannot violate some other guarantee of individual liberty. It mattered not that Congress might lack the power to impose a national minimum drinking age directly. It was enough that the states could theoretically turn down the federal funding.

The scope of the Taxing and Spending Clause power, augmented by this congressional technique of "bribing" the states into doing the bidding of Congress, has the effect of increasing the federal power at the expense of state power. This can be depicted in our Williams diagram this way:



6. Foreign Affairs Powers

The United States is a sovereign nation among the nations of the world. The Constitution contains some specific references to federal powers over foreign affairs. Article II enumerates various powers of the President, to make treaties subject to the ratification of two-thirds of the Senate, to appoint and receive ambassadors, and to act as Commander-in-Chief of the armed forces. U.S. Const. art. II, §§ 2 & 3. Congress is given the powers to declare war, to enforce international law, and to regulate immigration and naturalization. U.S. Const. art. I, § 8, cls. 4, 10 & 11. In the history of these powers, the Executive Branch has dominated the arena of foreign affairs.

The nature of the federal power over foreign affairs is different than the federal power over domestic affairs. There are no inherent powers in domestic affairs, *i.e.*, the federal government is a government of limited and enumerated powers. *Kansas v. Colorado*, 206 U.S. 46 (1907). In foreign affairs, however, the federal government

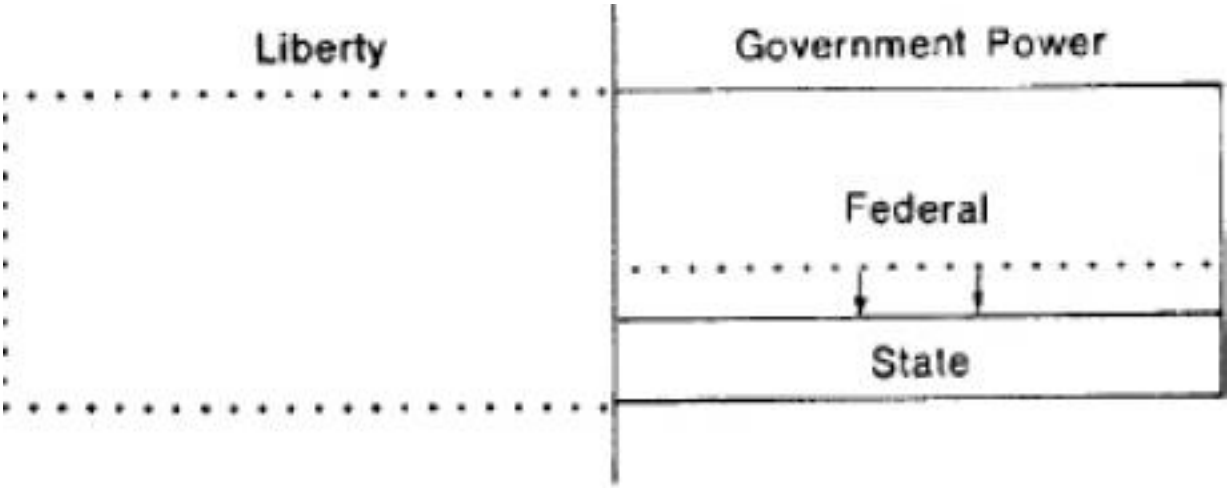
possesses extra-constitutional powers, powers that are inherent in the national sovereign as a nation-state among the other nation-states of the world: the United States government exercises the "external sovereignty" of the nation to the exclusion of the states. According to the Supreme Court, national powers over foreign affairs were transferred from the Crown of England to the United States of America by the Declaration of Independence; the Union, not the states, was endowed with these powers that do not depend on the affirmative grants in the Constitution. *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936). According to this theory, the powers to conduct foreign affairs—to declare war, to make peace and to enter into treaties—would be vested in the federal government even if there were no mention of them in the text of the Constitution. Our federal system—the relationship between our states and the federal government—is an internal domestic matter. It is not of concern to the nations of the world in their relations to us as a nation. See U.S. Const. art. I § 10 (prohibiting states from entering into treaties).

The treaty power, like all the other powers in the Constitution, is necessarily subject to constitutional limitations. Beyond peradventure, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). The rules of international law and provisions of international treaties are subject to the provisions of the Bill of Rights and other guarantees of individual liberty; neither a treaty nor an executing statute can be given effect in violation of the Constitution. This is contrary to international law, which places no limits on the purpose or the subject matter of international agreements other than that they may not contravene some peremptory norm of international law. But the Constitution, not international law, is the supreme law of the land in the legal system of the United States.

In *Missouri v. Holland*, 252 U.S. 416 (1920), Justice Holmes delivered an opinion for the Court upholding the Migratory Bird Treaty Act of 1918 against the state's challenge based on the Tenth Amendment, even though an earlier federal statute, before there was a treaty, had been struck down on that same ground. The treaty and the statute protected birds migrating between Canada and the United States. Between the federal government and the states, the treaty and the statute were "the supreme Law of the Land" and superseded all state laws about the migratory birds. U.S. Const. art. VI, cl. 2. The federal government possessed a power to regulate the migratory birds after the treaty that it did not possess before the treaty. Before the treaty the first statute did not implement any federal power and it was invalid; after the treaty the second

statute did implement a federal power—the federal treaty power—and it was a valid exercise of that power plus the Necessary and Proper Clause power. The treaty power is one of the federal government's enumerated and delegated powers, so the second statute did not violate the Tenth Amendment's reservation of state powers to the states.

In our constitutional analysis, therefore, for a treaty to be valid we must answer the liberty versus government power question in favor of government power. The vertical line between individual liberty and government power remains constant. Turning then to the subject of this Chapter, however, the federal treaty power can be exercised to increase federal powers and to diminish state powers, *i.e.*, the horizontal line separating federal and state powers can be moved. This can be drawn in our Williams diagram:



Effect of treaty-making power on federal power—note it has no impact on liberty

[B7223]

7. State Police Powers

The founders described their design of government powers in *Federalist Paper No. 45*:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. * * * The powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs, concern the lives,

liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

There are many discontinuities between their time and ours. Today, we take for granted the expansive role that government plays in all aspects of our lives. Federal powers are still delegated and enumerated, but have grown apace, like the power over interstate commerce; the power is still limited to "commerce among the states" but that commerce has grown and become more complex and integrated into a national economy that itself is now situated within a global economy. Wars and depressions and other crises have grown the modern administrative state into the Leviathan the federal government has become. But the increased prominence of the federal government has not correspondingly diminished the power of the states, which have also become modern governments with their own comprehensive programs and pervasive regulations.

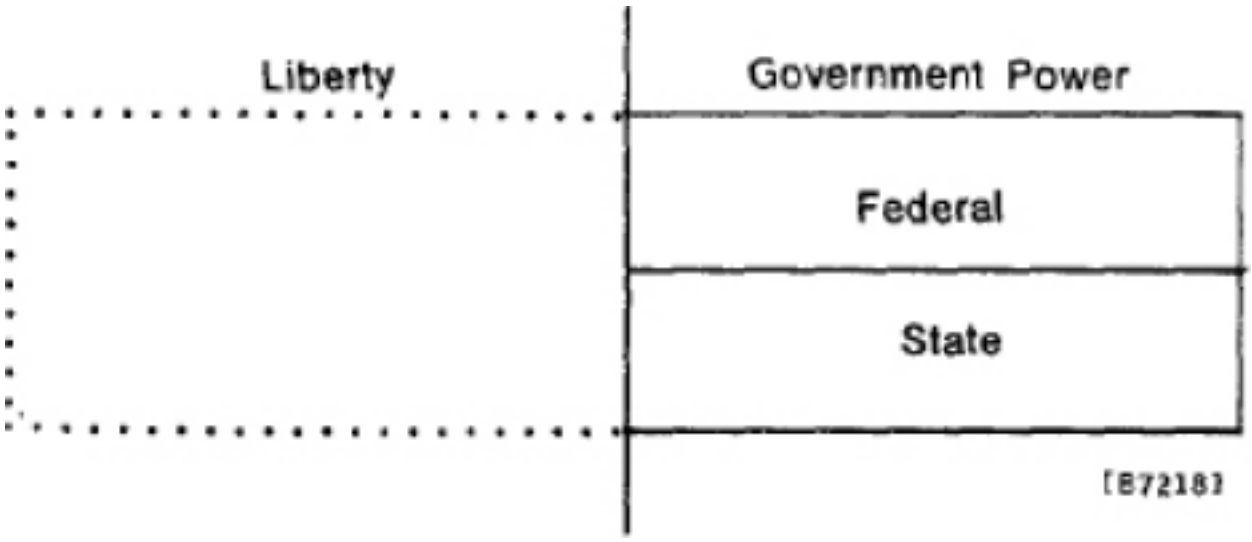
The states possess a kind of sovereign power that the federal government does not possess: the state "police power"—the general power to regulate for the health, safety, morals, and general welfare of its citizens and for the common good of society. The only limitations on the police power of a state are found in the prohibitions in the United States Constitution and in the state's own constitution.

Article I, Section 10 contains many of the federal prohibitions on state sovereignty. States may not enter any treaty, unilaterally wage war, coin money, or pass a bill of attainder, an *ex post facto* law or a law impairing the obligation of contracts. U.S. Const. art. I, § 10. States may not violate the civil rights and civil liberties guaranteed in the Constitution. The Fourteenth Amendment Due Process Clause incorporates most of the provisions of the Bill of Rights and applies them to the states and that amendment contains the Privileges or Immunities Clause and the Equal Protection Clause as well. U.S. Const. amend. XIV. See Chapter 3, § 4 (History of Constitutional Liberty). The Supremacy Clause also is an important limitation on the state police power that provides that the Constitution and all valid constitutional federal laws and all treaties are the "Supreme Law of the Land" and consequently preempt any and every state law, including a state constitution, that is in conflict with the federal law. U.S. Const. art. VI. The Constitution also explicitly reserves some powers to the states, for example, the power to conduct elections for Congress and the President, the power to ratify proposed amendments, and the power to regulate intoxicating liquor. U.S. Const. art. I § 2 & § 3, art. II § 1, art. V & amend. XXI. The Constitution preserves the states and relies on them to structure the Union.

Many state constitutions contain state bills of rights and protections of individual rights that go beyond the rights protected in the United States Constitution. Sometimes these state provisions guarantee wholly new and completely different protections that have no federal counterpart, like a state constitutional right to a free public education. Sometimes these state provisions resemble their federal counterpart but are interpreted more broadly, like a state free speech provision that is interpreted by the state supreme court to protect obscene material, i.e., material that is not protected under the First and Fourteenth Amendments to the United States Constitution. These state provisions are limits on the exercise of the state police power but for our purposes they are not part of our study of constitutional analysis under the United States Constitution.

This sequence of state powers tracks the familiar Tenth Amendment typology of rights and powers and the fundamental principle of American constitutionalism that the source of all sovereignty is in the people: (1) powers are delegated to the federal government; (2) powers are reserved to the states; and (3) powers are reserved to the people, i.e., the rights and individual liberties guaranteed by the United States Constitution. Instead of "power to the people" the more appropriate chant is "power from the people."

For purposes of our constitutional analysis, the basic content of the residual state government powers in our Williams diagram follows upon our two fundamental inquiries. First, we take away the individual liberty and freedoms guaranteed by the Constitution. That balance of individual liberty versus government power was the subject of the last Chapter. Second, we take away the enumerated and delegated powers of the federal government, a national government limited in its objects but supreme within its sphere—and consequently we divest the states of some of their original powers. It is this balance between federal power and state power that is the subject of this Chapter on Government Powers. What is left in the state government power portion of our Williams diagram is the state police power as modulated by the Constitution:



8. Dormant or Negative Commerce Clause

Early on in our constitutional history, the Supreme Court struggled to reconcile the delegation of limited and enumerated powers to the federal government with the police power of the sovereign states. The question was whether the delegation of powers to the national government under Article I, Section 8, of the Constitution constituted an implied denial of the same powers to the states.

For some of the federal powers it appeared rather obvious that the nature of the power delegated did constitute a necessary denial of similar power to the states. Sometimes the text makes it redundantly certain, as for example the power to "coin Money" that in so many words is expressly delegated to the Congress and at once expressly denied the states. U.S. Const. art. I, § 8, cl.5 & § 10, cl.1. Sometimes the language of the delegation makes it certain, as for example when Article I, Section 8, Clause 17, expressly provides Congress with the power "[t]o exercise exclusive Legislation in all Cases whatsoever" over what has come to be known as the District of Columbia. Other powers, like the postal power or the power to wage war must reasonably be interpreted to be exclusively federal. But at the same time, other federal powers, like the taxing and spending powers or the power to borrow money, must reasonably be interpreted to be concurrent, i.e., the grant of the power to the federal government 228did not deny the same power to the state governments. Thus, determining the negative implications for the state police power from the federal delegated powers has been a matter for the Supreme Court to resolve on a clause-by-clause or power-by-power basis.

How and when to interpret a particular federal enumeration to effectuate an "implied prohibition" on the states is an important issue for our understanding of government powers in this Chapter. Consider the Commerce Clause power. What should be the effect of this delegated power in the absence of federal legislation, when Congress has not positively exercised its delegated power to legislate on the subject? How should the Supreme Court interpret the "great silences" of the Constitution? How should the Supreme Court interpret the sounds of silence on the part of Congress?

Logically, the Supreme Court had three possible interpretations of the Commerce Clause power to chose among: (1) the power is exclusively federal, like the war-making power, to impliedly prohibit any and all state regulations affecting interstate commerce; (2) the power is concurrent in the state and federal governments, without any implied prohibition on state power to regulate interstate commerce and therefore any state regulation is valid unless and until Congress actually exercises its commerce power to preempt the state law; or (3) the power is concurrent state and federal but with 229an implied prohibition that is judicially enforceable to invalidate some state laws even in the absence of federal legislation. Eventually, the Court would select choice (3) and would conclude that when the federal commerce power lies dormant the Commerce Clause still may act as a negative on some state legislation, *i.e.*, the constitutional provision itself is a self-executing limitation on the state police power and is judicially-enforceable. This "dormant" or "negative" Commerce Clause power creates the boundary in our Williams diagram separating the federal commerce power from the state police power.

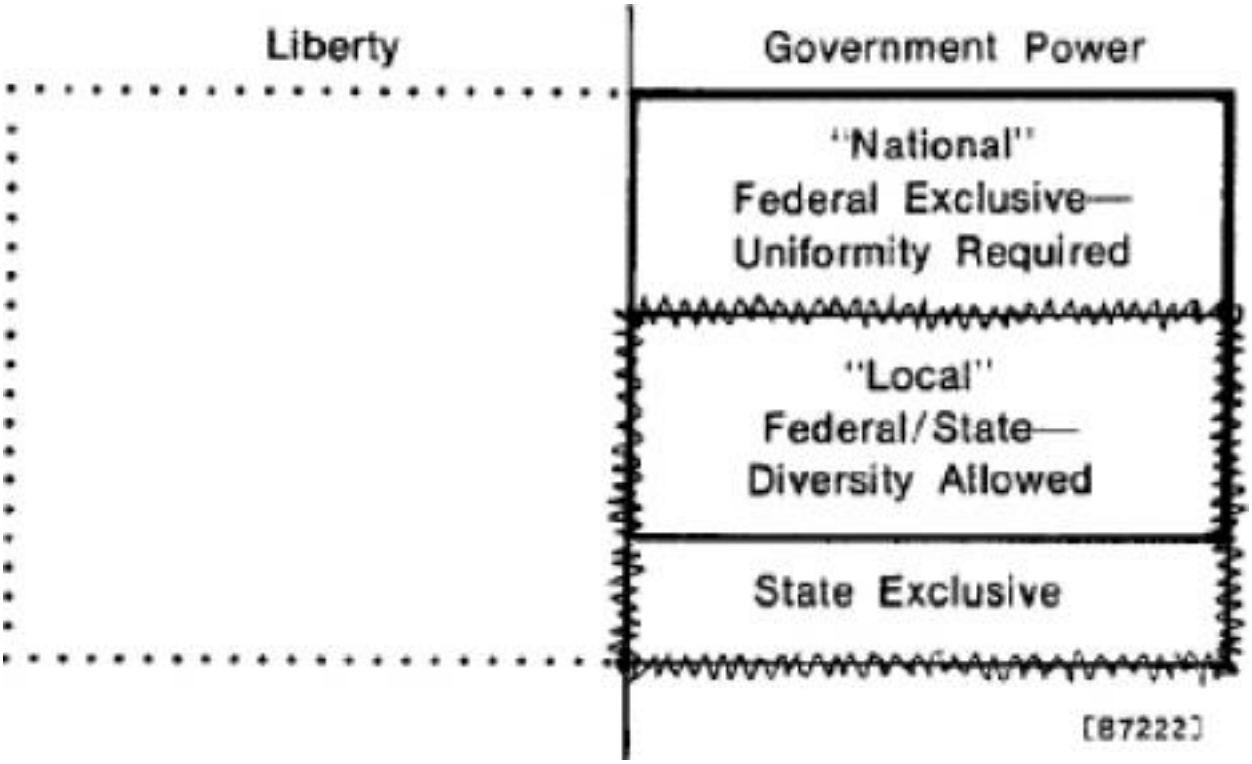
In his famous opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall, devout Federalist and determined nationalist, seemed to flirt with the first interpretation above and paused to comment that it had "great force" and that the Court was "not satisfied that it has been refuted," but the Court did not end up holding that the federal commerce power was exclusive. Nor did the Court accept the second interpretation above to the effect that the power to regulate interstate commerce was like the power to tax and so any state commerce regulation was possible so long as it did not conflict with an actual federal commerce regulation. But the Court did not need to decide the legal effect of the dormant Commerce Clause, *i.e.*, the effect of the constitutional provision when there was no federal regulation. Instead, the Court held, as between the two litigating competitors, that the state steamboat license that gave the plaintiff-operator a monopoly was in conflict with a valid federal steamboat license that had in fact been issued to the defendant-operator and, therefore, under the Supremacy Clause the state license had to give way to the federal license.

Five years later, in what otherwise is merely a note case, Chief Justice Marshall squarely rejected the first interpretation above. *Willson v. Black–Bird Creek Marsh Co*., 27 U.S. (2 Pet.) 245 (1829). The state had legislatively authorized the building of a dam across a creek. Because the creek was navigable, there was no question that the federal government had power to control the uses of the creek and the building of a dam across it. But Congress had not in fact engaged in any such regulation. Chief Justice Marshall found that the authorization of the dam by the state could not be considered "as repugnant to the power to regulate commerce in its dormant state."

In a series of transition cases, the Supreme Court went back and forth to hold that some state regulations originated in the state police power and were valid but other state regulations originated in the federal commerce power and were invalid. Then the Supreme Court coalesced behind the distinction between those matters involving commerce in which the states continue to have constitutional power to regulate and those matters in which the Constitution itself forbids the states to regulate.

In *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), the Court formally announced this rule of "selective exclusivity"—rejecting interpretations (1) and (2) above and basically settling on interpretation (3)—what we call today the dormant or negative Commerce Clause doctrine. The Court's basic distinction was between "national" interstate commerce and "local" interstate commerce. As to national matters, the states have no power per the Commerce Clause itself. But as to local matters, the states do have power. The justification for the distinction was the need for some kinds of interstate commerce always to be regulated on a uniform basis. These matters require exclusive control by Congress. But other kinds of interstate commerce require diversity to allow for local needs. These are the local areas that permit state control. In the case, a state statute that required ships to engage a local pilot when entering or leaving the port was deemed to be a local matter and a proper subject of state regulation. This basic distinction remains part of the constitutional analysis today, although there have been some refinements and adjustments, as will be discussed.

To represent this in our Williams diagram, we continue to use a solid line for the federal powers, and we will use a wavy line to show the extent of the state powers. This is how we represent the basic nature of the government power—federal and state—to regulate interstate commerce:



In too many cases to annotate them all here, the Supreme Court has refined this basic understanding of the dormant commerce power to elaborate on its intricacies. For a time, the Court pretended that there was a discernable distinction between state laws that "directly" regulated interstate commerce, and thus were invalid, and state laws that merely "indirectly" regulated interstate commerce, and thus were valid. But that fiction eventually gave way to a kind of balancing analysis. See *DiSanto v. Pennsylvania*, 273 U.S. 34, 43 (1927) (Stone, J., dissenting). The modern judicial understanding of the Commerce Clause is based on an essential economic concept and a fundamental political principle.

The essential economic concept is the common market, the idea that the United States is one country populated by one people who will prosper together as buyers and sellers in an integrated national market for goods and services. The internecine jealousies of the several states—as witnessed during the period between 1776 and 1787 under the Articles of Confederation—must be guarded against and cannot be allowed to Balkanize the economy with divisive fiscal aggressions like the customs and tariffs that characterize international trade between independent nations. Justice Jackson put it this way:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free

> access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation from any. Such is the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

The fundamental political principle is that the Congress is the national legislature with the necessary and proper powers to control the national economy consistent with the interdependence of the states and that the Congress is politically accountable in a way that the state legislatures are not. Congressional accountability is national. State legislatures have an internal political check only insofar as instate consumers and in-state producers are concerned. Out-of-state consumers and out-of-state producers do not vote and do not participate in the in-state political processes. Therefore, the dynamic of state politics allows for the untoward potential of state laws that might advantage in-state interests or disadvantage out-of-state interests in a way that the dynamic of national politics would simply not allow. The Supreme Court often has recognized this underlying political reality: "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely subjected to those political restraints which are normally exerted on legislation when it affects adversely some interest within the state." *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 184–85 n. 2 (1938).

An oft-quoted summary of the two levels of analysis describes how the determination is based on the nature of the state regulation:

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

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

At the first level of analysis, a state law that discriminates against out-of-state competition will be struck down as economic protectionism and unconstitutional, as will a state law that acts extraterritorially to regulate commerce wholly beyond the borders of the state. For example, when a state prohibited the sale of out-of-state milk at a price lower than the state-controlled price of in-state milk, the discrimination against interstate commerce was struck down for contravening both the constitutional design of the national common market and the idea that the state police power cannot reach beyond its own state borders. *Baldwin v. G.A.F. Seelig, Inc*., 294 U.S. 511 (1935).

At the second level of analysis, state laws that do not discriminate on their face or in their purpose are subject to a more forgiving judicial balancing that weighs the importance of the state interest against the burdensome effect on interstate commerce. These cases have an ad hoc quality: a state law that limited the number of rail cars in trains was invalid because it was burdensome on cross-country railroads and did not actually contribute to better safety, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), while a state law setting a maximum width and weight of trucks was a valid measure to assure safety and protect state highways, *South Carolina State Highway Dept. v. Barnwell Brothers, Inc*., 303 U.S. 177 (1938).

A state law that is discriminatory in its purpose, means, or effects must pass a "least restrictive means" scrutiny, i.e., the law can survive if and only if it is justified by a legitimate police power purpose and there is simply no other alternative that is less burdensome on interstate commerce. Requiring inspections of pasteurization facilities or imposing product ratings and uniform standards for outside facilities were less burdensome alternatives and, therefore, a city ordinance that required milk to be processed only within the city was struck down. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

Our previous Williams diagram needs to be revised. In the bottom "state power" segment, a state law that affects interstate commerce must have a legitimate state police power purpose and cannot have as its stated purpose the regulation of interstate commerce. As we have discussed earlier in this Chapter, however, the police power to regulate health, safety, morals, and general welfare is broad and malleable. An otherwise valid exercise of the police power that happens to affect interstate commerce is not for that reason alone invalid.

In the middle segment of government powers in our previous Williams diagram, where federal and state power overlap, note that diversity is allowed but not constitutionally required. The states can regulate. But if the federal government decides

to undertake regulation in this overlapping area, the federal regulation necessarily would preempt the state regulation. This necessarily follows from the Supremacy Clause. That is not remarkable, as we shall see.

What is remarkable is that in the top segment of government powers in our previous Williams diagram, where the Court has interpreted the dormant or negative Commerce Clause to invalidate a state law—either because the state regulation is discriminatory or because the state interests are outweighed by the need for national uniformity—Congress can nevertheless override the Court by enacting a statute authorizing the state regulation, so long as the authorization is unmistakably clear. *South–Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

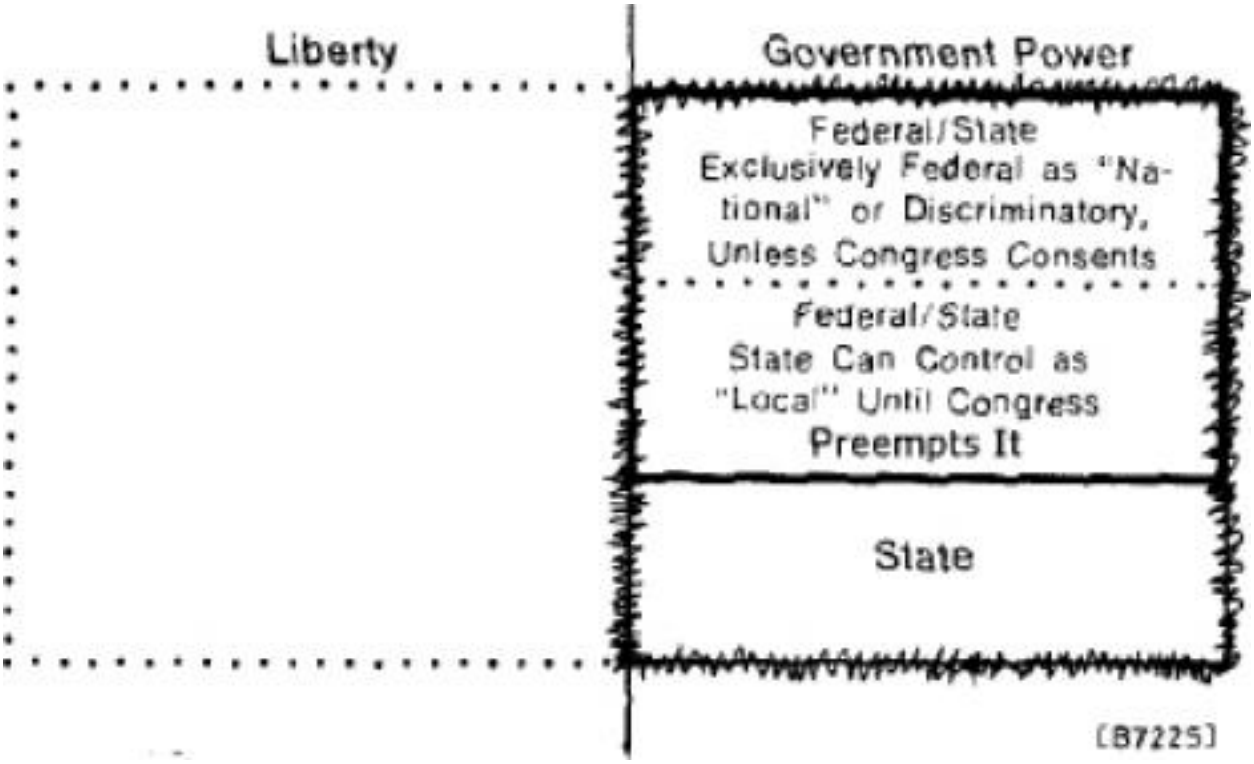
How can this legerdemain be accomplished? How can Congress by a mere statute change the Constitution? What happened to the requirements of Article V for constitutional amendments?

The Supreme Court has exercised its power of judicial review to interpret the Commerce Clause to mean the implied prohibition we call the dormant or negative commerce power when Congress is silent. But the Commerce Clause is a grant of power to Congress—not to the Court. Once Congress speaks, there is no need for the Court to interpret or imply anything. The statute is an act of Congress exercising its delegated power to adopt a federal policy favoring non-uniformity or discriminatory regulation by the states. The only limits on the congressional power to override the Court are the limits inherent in the Commerce Clause power itself.

An intratextual reading of the Constitution demonstrates that what is going on here is nothing ultra vires or improper. There are several explicit provisions in the Constitution in which the words of the constitutional prohibition itself give Congress the power to consent to what otherwise is prohibited. In a provision that is closely related to interstate commerce, the states are prohibited from laying export and import taxes "without the Consent of Congress." U.S. Const. art. I, § 10, cl. 2. Article I, Section 10, Clause 3 contains a whole list of prohibitions against the states, including an important one about interstate compacts, and yet the states are prohibited from engaging in any of those activities only "without the Consent of Congress."

These other provisions demonstrate that congressional consent can be and has been written into the Constitution to allow Congress to affect the impact of the Constitution itself in certain particular instances. A similar kind of congressional power has simply been recognized under the Supreme Court's dormant or negative Commerce

Clause doctrine. As with any other judicial interpretation or Court doctrine, at least until the interpretation or doctrine is revised, it is as if the text of the Commerce Clause itself contained these words: "The states are prohibited from regulating commerce in ways which are unduly burdensome or when national uniformity is required or when the effect is discriminatory, unless Congress consents." Our Williams diagram can be revised to represent this interpretation of the Commerce Clause taking into account the dormant 239or negative commerce power and the congressional authority to override the Court:



There are two important observations about the power of Congress to consent to a state law that would otherwise violate the dormant Commerce Clause. First, actual exercises of the power are neither frequent nor forthcoming. Indeed, the current general trend is for Congress to federalize or nationalize more and more areas of public policy. And, as we shall see, federal preemption of state laws is more the norm than congressional acquiescence in diversity of state regulations or state taxes. Second, one should not generalize about the congressional power to consent to the exercise of one of its delegated powers by the states. Some clauses explicitly allow for consent, like the Interstate Compact Clause. U.S. Const. art. I, § 10, cl. 3. Other clauses have been interpreted by the Supreme Court to imply a power of congressional consent—the dormant or 240negative Commerce Clause under discussion is the best example. But

still other clauses delegate an exclusive power to Congress with a corresponding prohibition on the states from performing the specified function and the state prohibition is binding on the Congress, i.e., a federal statute that purported to authorize the states to make treaties or coin money would be beyond the power of Congress and unconstitutional. U.S. Const. art. I, § 10, cl. 1. Likewise, Congress could not waive the Article IV guarantee of privileges and immunities to the citizens of the states or undo the Supremacy Clause to enact a statute that purported to make the law of a particular state supreme over future federal laws. U.S. Const. art. IV, § 2 cl. 1 & art. VI, cl. 2.

The dormant commerce power is an aspect of the relationship between the federal and state governments and, therefore, does not apply to limit the actions of private market participants. Likewise, there is a recognized exception for state proprietary activities, *i.e.*, when the state is merely acting as a market participant, and not acting in its sovereign governing role, the state enjoys the same marketplace freedom. So, for example, a state-owned and state-operated plant can discriminate and sell its product only to in-state residents. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). However, the Privileges and Immunities Clause in Article IV, Section 2, does apply to such discriminations by states as market-participants against out-of-staters in terms of some protected privilege, like being employed by the state. To pass constitutional muster under that clause, there must be a substantial reason for the discrimination, *i.e.*, some demonstration the out-of-staters are a peculiar cause of the mischief for which the reasonable remedy is to treat them unequally. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

The Supreme Court and Congress engage in an elaborate pantomime over the dormant commerce power. Congress is silent. The Court interprets that silence. Congress can always speak its mind. The Court must bow to the legislative will once expressed. The states must follow the federal lead of both Court and Congress. Some of the Justices have been critical to complain that this is merely an elaborate judicial charade and the Court should not take an active role when Congress has chosen to be passive, but as we have seen, this is the way the Court has interpreted the Commerce Clause for at least 140 years. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J. joined by Thomas, J., concurring in the judgment).

9. State and Local Taxation

The Supreme Court's jurisprudence on the state and local power to tax interstate commerce has gone through an analytical development similar to the development just

described for the state police power regulations under the dormant or negative commerce power. There are twin competing constitutional priorities: maintaining the free flow of interstate commerce in goods and services while at the same time allowing the states to extract equitable tax revenues to pay for the legitimate cost of government. The emphasis is on fairness and proportionality so as to avoid the burden of multiple taxation.

For a time, the Court's decisions went off on formalistic distinctions between "direct and indirect" taxes and whether a tax unduly interfered with the "privilege" of conducting a business in interstate commerce. In 1977, the Supreme Court abandoned those formulas and adopted a four-part test that balances the practical consequences of a challenged tax on interstate commerce against the legitimate need for revenues to fund state government. A state tax is constitutional under the Commerce Clause if the tax is: (1) applied to an activity with a substantial nexus to the taxing state; (2) fairly apportioned to apply only to activities connected to the taxing state; (3) fair and equitable not to discriminate against out-of-staters or interstate commerce; and (4) fairly related to the governmental services provided by the taxing state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

The Supreme Court applies the basic four-part test with only minor variations to all the various types of state taxes. Different states rely on different kinds of taxes and combinations of taxes. The various types of state taxes include: sales tax; use tax; severance tax; property tax; income tax; gross receipts tax; and business or occupation tax. Their names generally imply what the tax applies to or how it is assessed. Relatedly, the Due Process Clause of the Fourteenth Amendment requires a "minimum connection" between the taxing state and the person or property or activity being taxed. *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982). A discriminatory state tax might also run afoul of that amendment's Equal Protection Clause or the Privileges and Immunities Clause in Article IV, Section 2. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985); *Toomer v. Witsell*, 334 U.S. 385 (1948). State taxes on foreign commerce must satisfy the same four-part test and cannot be discriminatory under either the Foreign Commerce Clause or the Import–Export Clause. U.S. Const. art. I, § 8, cl. 3 & § 10 cl. 2. The Export Clause prohibits the federal government from imposing any tax on exports. U.S. Const. art. I, § 9 cl. 5.

This brief summary oversimplifies a rather complex area of constitutional law. But for present purposes it is enough to note the similarities and the differences in the constitutional analysis under the dormant or negative Commerce Clause of state taxes

and state regulations. A discriminatory state tax on interstate commerce, like a discriminatory state regulation, is very likely to be struck down as a violation of the dormant or negative Commerce Clause. A state tax is analyzed under the four-part test summarized in this Section, not under the two level balancing analysis applicable to state regulations that was summarized earlier in this Chapter in the discussion of the Dormant or Negative Commerce Power. The doctrinal test for taxes is different from the doctrinal test for regulations, although there is something of a family resemblance. Finally, congressional approval will save a state tax that otherwise would be invalid under the dormant or negative Commerce Clause, just as congressional approval can save a state regulation. Consequently, our Williams diagram for state regulations in the previous Section of this Chapter provides a fairly accurate depiction of the constitutional analysis for exercises of the power of state taxation and need not be reproduced here.

10. Conclusion

This Chapter's discussion of government powers illustrates the essential difference between federal powers and state powers. The federal government is a government of limited and enumerated powers. But federal powers under the Commerce Clause and the Taxing and Spending Clause have been given broad interpretations, particularly when coupled with the sweeping authority of the Necessary and Proper Clause. Likewise, the other delegated powers in Article I, Section 8 have been given exceedingly broad interpretations. The state police power to regulate for the health, safety, morals, and general welfare of the people is an attribute of state sovereignty that is limited only by the prohibitions of the Constitution. For a federal law to be valid, it must be a proper exercise of a constitutional power. For a state law to be valid, it must not be an improper violation of a constitutional prohibition.