

# Navigating Constitutional Issues Raised by State And Regional Efforts to Address “Leakage”

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# Supremacy Clause

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S.C.A. Const. Art. VI, cl. 2.

## Effects of the Supremacy Clause – Preemption of State Regulation

"The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."

*Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986).

# Express Preemption

- ◆ “A fundamental principle of the Constitution is that Congress has the power to preempt state law.”

*Crosby v National Foreign Trade Council*, 530 U.S. 363, 363 (2000).

# Field Preemption

- ◆ “When Congress intends federal law to ‘occupy the field,’ [all] state law in that area is preempted.”

*Crosby v National Foreign Trade Council*, 530 U.S. 363, 363 (2000).

# Conflict Preemption

- ◆ “ ... state law is naturally preempted to the extent of any conflict with a federal statute.”
- ◆ “We will find preemption where it is impossible for a private party to comply with both state and federal law, and where, ‘under the circumstances of [a] particular case, [state law] stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.’”

*Crosby v National Foreign Trade Council*, 530 U.S. 363, 363 (2000).

## Preemptive Effects of the Federal Power Act:

FERC sets the price but does  
not regulate the sale of electricity

1. Congressional regulation of wholesale transactions in electricity through the FPA and FERC preempts state regulation of wholesale power sales:

"A State must ... give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."

*Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

## Preemptive Effects of the Federal Power Act: (continued)

3. States have the authority to regulate retail sales

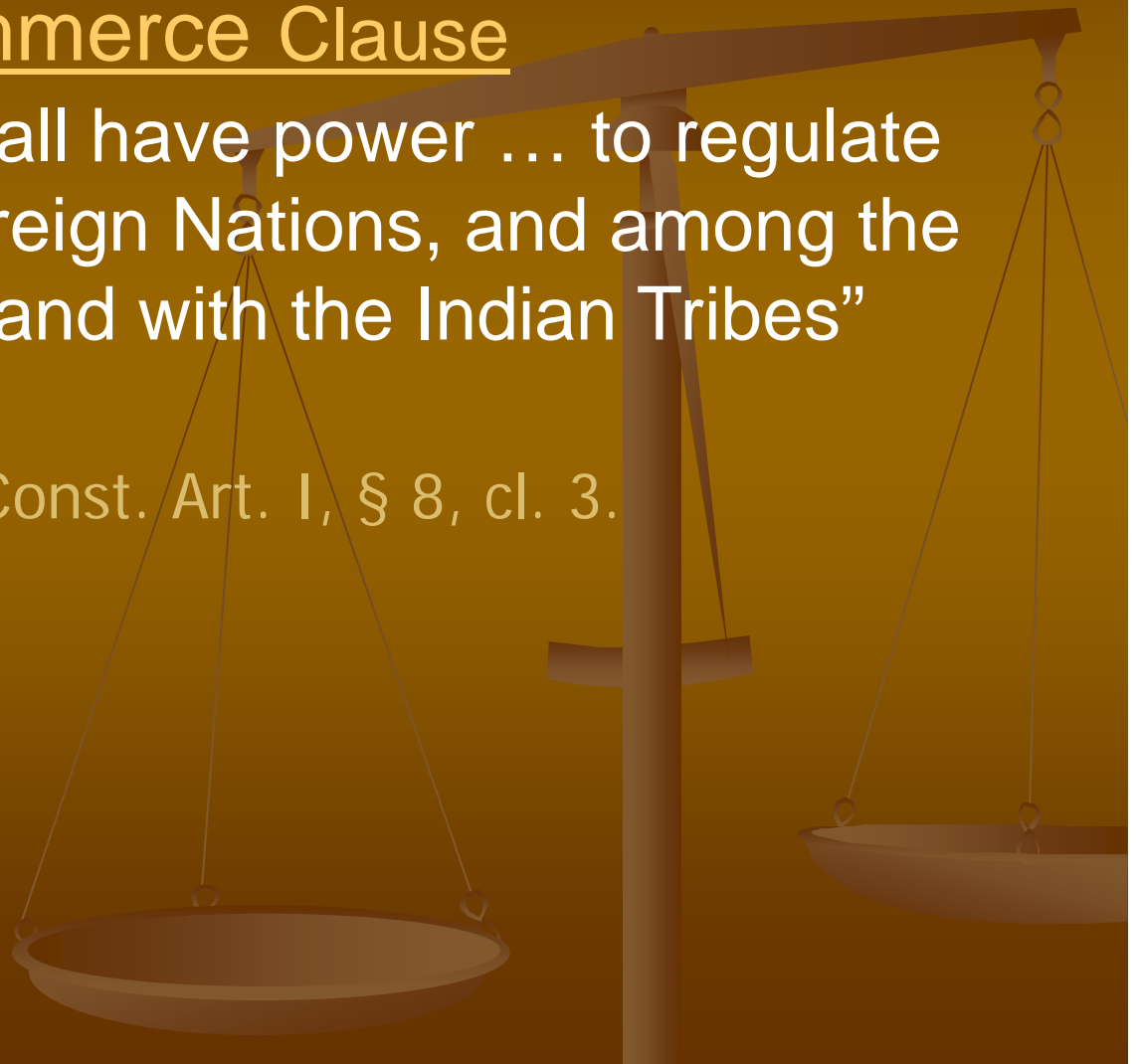
“the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States”

*Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375 (1983)

## Commerce Clause

“The Congress shall have power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”

U.S.C.A. Const. Art. I, § 8, cl. 3.



# States Cannot Purposely Discriminate against Interstate Commerce

## 1. Economic Protectionism is per se invalid

*Welton v Missouri*, 91 U.S. (1 Otto) 275 1876).

## 2. In general, states may not purposefully discriminate against Interstate Commerce

"When a state statute clearly discriminates against interstate commerce, it will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."

*Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992).

## States may enact Evenhanded Regulations which have an Incidental Impact on Interstate Commerce

### Pike balancing test

“Where a state 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.”

*Pike v Bruce Church*, 397 U.S. 137 (1970).



## States may enact regulations which discriminate against interstate commerce

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- Discriminatory Regulations are Strictly Scrutinized
- *Maine v Taylor*, 477 U.S. 131 (1986).

# Legitimate Local Purpose

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- a state has “broad authority to protect the health and safety of its citizens and the integrity of its natural resources” *Maine* at 151
- states have a “legitimate interest in guarding against imperfectly understood environmental risks” *Maine* at 148

*Maine v Taylor*, 477 U.S. 131 (1986).

# No less discriminatory alternative exists

- “the purpose must be one that cannot be served as well by available nondiscriminatory means.”

*Maine v Taylor*, 477 U.S. 131, 140 (1986).

States do not have  
extraterritorial jurisdiction

Healy v. Beer Institute, 491 U.S.  
324, 336 (1989)

Congress can grant the states  
power to regulate interstate  
commerce where they would  
otherwise be forbidden to do so

*Wilkerson v Rahrer*, 140 U.S. 545  
(1891).