

## Judicial Power and its limits

### Judicial Power

*Marbury* – cited as establishing judicial review; at least lays the logical framework for it, whether it establishes it is a different matter

- Article III grant of jurisdiction has been read in accord with *Marbury*, so that jurisdiction is meant to only be original in one category, and only appellate in the other
- It is emphatically the process of the judiciary to say what the law is. *Marbury*.  
But open question under *Marbury* whether courts have special competence
  - o Could read this broadly: the judiciary and no one else gets to decide what the law is, and once the judiciary so decides, then everyone else has to respect that. *Cooper v. Aaron*
    - Courts are uniquely positioned to say what the law means
    - Federal judiciary is supreme in exposition of the Constitution, claims that *Marbury* established this, SC interpretations of Constitution are “supreme law of land” which officers are bound to support by the oaths they take. *Cooper*.
    - Might have been product of a unique historical situation: Governor Faubus claimed that, since Arkansas wasn’t a party to *Brown*, Arkansas wasn’t bound by desegregation ruling
  - o Or, more narrowly: judges are also under a duty to uphold the constitution, and the constitution may apply to the cases and controversies before them; are they to disregard it and just follow statute? – tail of *Marbury*
    - Also, one of the things that courts routinely do is look to the law in front of them and decide what law applies
    - So, judges are better at adjudicating cases, and their decisions are final as to those cases; don’t interfere w/ court order. Doesn’t mean that we need to accept their decisions as a political rule. *Lincoln view*
    - Allows the members of other branches to be constitutional judges or their own powers
- Judicial review might be undemocratic, in that it’s anti-majoritarian
- Also, might contribute to the decay of other branches; allows legislatures, citizens, and voters to exempt selves from task of constitutional deliberation
- Constitutional decisions of the court may not be overruled by acts of congress; “When SC lays down a constitutional rule, Congress may not legislatively supercede SC decisions interpreting and applying the Constitution”, *Dickerson v. US*; Congressional attempt to overrule *Miranda*
  - o Scalia’s dissent, by contrast: *Marbury* held that an act of Congress won’t be enforced if it violates the Constitution, not that statutes can be disregarded if they contradict a decision that announces a “constitutional rule.” This holding is undemocratic, arrogates prerogatives reserved to the people’s representatives

**Scope of Congress’ powers, post-*Marbury*, and State power over the National Gov’t**

### *McCulloch v. Maryland*

- Congress need not act only in strict accordance with express powers; rather, Congress has powers implied from those expressly granted to it by Constitution
- Structural argument: “it is a constitution that we’re expanding.” Presupposes a view of constitutionalism that will only convince those who already agree w/ him
- Implied grant: Necessary and Proper clause; allows wide discretion as to choice of means. “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.”
  - o Bank is means to accommodate ends such as regulation of interstate commerce, maintenance of army and navy, etc.
  - o Congress can’t use powers prohibited by the constitution, or use its enumerated powers as a pretext for passing laws “for the accomplishment of objects not entrusted to the government.”
- Jefferson’s fear of “House that Jack Built” arguments: anything can be deemed “necessary” (read useful) if you follow the chain of causation back far enough.
- Structural part of the opinion
  - o Power to tax is the power to destroy; federal government is supreme, states can’t exercise control over federal instrumentalities like this
  - o Democratic theory: taxes are illegitimate imposed by people not representing the constituency subject to taxation
  - o Federal government could tax state bank, though; difference is the whole acts on a part, rather than vice versa – different under constituency theory

### *Term Limits*

- States didn’t have the power to limit the qualifications of federal representatives before the federal government was established; can’t be among reserved 10th amendment powers
  - o States only enjoy powers over the federal government that the Constitution expressly grants, “Big Bang” theory
- Framers envisioned a federal government directly responsible to the people and chosen by the people; allowing “patchwork” regulations of qualifications would “undermine the uniformity and the national character that the Framers envisioned and sought to ensure.”
  - o Imposes a negative externality, harms Congress as a whole
  - o Another example of the part (states) acting against the whole (nation)
- Kennedy concurrence: All sorts of ridiculous language about splitting the atom of sovereignty, leading up to the idea that:
  - o “the National Government is and must be controlled by the people without collateral interference by the states,” and “the states have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere.”
  - o Federal right of citizenship is a relation btw people and their national government; states can’t interfere
- Thomas dissent: unit of analysis is “people of the states,” not the undifferentiated people as a whole; people retain their identity as state citizens

- If it's not prohibited to the states or granted to the federal government, states retain the power – states have all powers, incl. over federal government, except those withheld directly (ex: AI S9) or indirectly (by allowing Congress to pass legislation pre-empting state laws)
- But, does accept that there can be implicit delegations or prohibitions
- Leaves open the question: what is reserved?
  - Test itself doesn't resolve; have to look @ constitution & reasons behind adoption of different provisions
  - Different view of the process of adoption, places more emphasis on state identity, and more freedom for states to act

*Cook v. Gralike*, 2001 – follow-up to above, a label of “disregarded voters’ instructions on term limits” next to candidate name on ballot is unconstitutional

- This is like a binding instruction from state to candidate; such instructions were rejected early on in nation's history b/c they undermine the deliberative nature of Congress, which is essential
- Kennedy: The idea of federalism is that people hold legislatures to account; if states could control their actions, accountability is blurred

*Bush v. Gore*, 2000

- Rehnquist concurrence: constitution gives power to state legislatures over elector certification; state courts must respect that role and not depart from the legislative scheme
- Ginsburg's dissent: yes, but this doesn't authorize “federal superintendence over the relationship between state courts and state legislature” – give state courts deference in interpreting state law

## **Limits on Judicial Power**

### Political Question

- Have to ask: are courts really deciding not to decide?
  - Saying “how can we possibly know?” is similar to saying “the constitution permits many things, and this is one legitimate reading” – can sound like a decision on the merits
- *Colgrove v. Green* – apportionment is a political question
  - Constitution gives states the power to regulate time/place/manner of fed. elections, subject to fed. pre-emption
  - Frankfurter writes op, reads this as giving Congress the exclusive authority to act, and that this is too much of a “political thicket” for courts to be involved in
- Since then, the “one person, one vote” standard was laid down
- *Baker v. Carr* – unlike in *Colgrove*, where there was possible redress (congressional action), here there is no possible redress – does that make it a more appropriate avenue for judicial decision? More necessary?
- *Baker v. Carr* lays out general test; is there:
  - “A textually demonstrable constitutional commitment of the issue to a coordinate political department”
    - Guaranty clause typically thought of as this sort of case
  - “Lack of judicially discoverable and manageable standards for resolving an issue”

- Rather, the “standards” are those of policy that are clearly for “nonjudicial discretion”
    - Can involve constitutional interpretation, or prudential considerations
  - Is this likely to entangle the court in a controversial issue that it should not be involved in, pose enforcement problems or other institutional difficulties? Can court render the judgment while according the respect due to “coordinate branches of government?”
  - These factors don’t change, but they can be read more or less broadly
    - Brennan inclined to read them narrowly to allow judicial resolution of lots of grand questions of political theory
- Frankfurter (who dissented) reads them broadly; thinks there is a political question here
  - “Political question” is conclusory label”
  - But, what’s ultimately being asked of the court here is to conclude between different theories of representation, different political theories
  - The partisan, compromise, complex nature of apportionment disputes make these disputes the sort of things that judges aren’t equipped to resolve, and the partisan politics will also add “friction” and “tension”
- *Powell v. McCormick*, 1969, Warren
  - Seems like this is a clear textual commitment, that each house is the judge of its own members’ qualifications – But, Court says this just means they get to judge whether the 3 qualifications are met, don’t get to add more
  - Warren thinks that constitutional interpretation can proceed here
  - Reasons for stepping in similar to baker – majority of house can disenfranchise districts in the minority, want to ensure that the political branches are open to political change & dissenting political voices
- *Goldwater v. Carter*, 1979, Rehnquist
  - President has power to conduct foreign relations; constitution is silent on the matter of Senate’s participation in abrogating a treaty. Shouldn’t get involved in the political dispute; both branches have the tools to protect their own rights
  - Powell concurrence: constitutional silence doesn’t make something nonjusticiable – we interpret silence all the time! (see *Chadha*, Line Item Veto cases). But, the dispute isn’t ripe – shouldn’t adjudicate it unless both parties really want to fight
  - Brennan dissent: would reach the merits, but president has unilateral power to recognize & withdraw recognition from foreign nations
  - No real bottom-line difference btw Brennan and Rehnquist – leads to same result; just maybe Rehnquist’s position doesn’t foreclose Carters’ opponents’ arguments in the political arena

### Impeachment

- Ideological disagreement hasn’t been viewed as sufficient grounds to impeach
- *Nixon v. US*, 1993, Rehnquist

- Senate given the “sole” power to “try” impeachments – this is a textual commitment of power to another branch, and the senate can determine its trial procedures
- Also, (not in opinion), it might be inappropriate for judiciary to get involved in impeachment, when impeachment is a check on the judiciary!
- 2 other reasons:
  - Purpose of separating prosecutorial and adjudicative function is to ensure deliberation, independent judgments; judicial interference would undermine that
  - Also, allowing judicial review of impeachments could potentially embroil the country in years of chaos, in the case of a review of a presidential impeachment
- Stevens concurrence
  - Constitutional confinement of this power to the legislature is more important than definitions of “sole” and “try”
  - Senate is conscious of importance of its decisions; respect for coordinate branch forecloses consideration of hypotheticals that White brings up
- White concurrence
  - There are plenty other grants of power to 1 branch only in the constitution, but whether Constitution grants another branch final responsibility to interpret. Here, “sole power to try” is meant as a contrast to the legislative power to impeach, not to the courts
  - Trial must be fair, not arbitrary; but Senate has wide discretion to determine fair procedures, and here, that’s satisfied
- Souter concurrence: same as White’s 2nd point – coin toss example
  - Also, stresses that “political question” judgment is to be made case-by-case

### Standing, Mootness, Ripeness

- No advisory opinions (J. Rutledge fleshes this out in *Rescue Army v. Municipal Court of LA*, p. 50)
  - FDR court reacted (as above) against excessive SC involvement, allow political processes to go on; read judicial power narrowly to prevent courts from stepping in
  - Warren court was about expanding rights
  - Burger and Rehnquist court can use standing expansively to move back, even when they’re not directly overruling precedent
- Standing itself
  - Congress has power to change court’s prudential limitations under standing, but no power to change the Art. III “case or controversy” req
- Why have a requirement of standing?
  - Bad appearances on the court to just decide blanket constitutional issues: courts exist to determine people’s rights in actual cases
  - Avoid backdooring advisory opinions through feigned cases
  - Might be redress through other avenues (legislature)
  - Infusion of suits by people who don’t actually have a case

- *Warth v. Seldin*, 1975, Powell
  - o 3 part test to constitutional limit of standing: Art. III power “exists only to redress or otherwise to protect against injury,” so can only be invoked “when P himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action.’”
    - Injury must also be traceable to D’s action and redressable
    - So, if you can’t show D’s action harmed (depended on actions of 3rd party developers) or that court’s remedy will help (depends on actions of 3rd party developers, or, if you’re the developers, need a plan you’ll implement if the court acts)
  - o Prudential limits: don’t hear generalized grievances or 3rd party claims
    - Sometimes 3rd parties can assert the interests of others, when there is an identity of interests. *Craig v. Boren*
- Brennan dissent: this requires P to prove their case to even make it into court, harks back to the antiquated days of pleading, and as to developers, the refusal to grant permits may be prohibitive to developing plan, so the blanket refusal to permit any plan should be enough to grant standing
- *Lujan v. Defenders of Wildlife*, Scalia, 1992
  - o It can’t be that someone has suffered an injury; these Ps must suffer an injury, and “I might like to see the animals, someday, but I might not get to” doesn’t count
  - o Also, there is no citizen right to have the government follow proper procedures, and Congress can’t create such a generic right without violating the Art. III requirements
    - This suggests that the “generalized grievance” limitation is constitutional, not prudential; conflicts with *Warth*
  - o Kennedy concurrence – qualifies majority. Congress can create a rights, injuries, chains of causation where none existed prior, but Congress didn’t properly do so here. Need to identify the injury it seeks to vindicate & relate that to a class entitled to bring suit – can’t confer a right on “anyone”
  - o Stevens’ concurrence – doesn’t add anything.
  - o Blackmun dissent – no, procedural injuries are cognizable, and to say otherwise gives the executive too much power.
- There would have been cognizable injuries if developer had a plan to build, contingent on rezoning, or if the environmentalists were actually going to observe the animals
- *Allen v. Wright*, 1984, O’Connor – injury not fairly traceable to gov’t (D) conduct b/c whether integration will happen depends on a ton of things, other than withdrawal of tax-exempt status from segregated private schools
- *FEC v. Akins*, 1998, Breyer – To the extent that there’s a constitutional limitation on “generalized grievance” claims, it’s “concreteness.” If everyone suffers a concrete injury, anyone can bring suit, and the fact that it’s widely shared doesn’t prevent Congress from creating a right to information in every American.
- *Martin v. Hunter’s Lessee*, 1816, \*Story – SCOTUS has final review even over federal questions that arise in state court – 1) The constitution does act on the

- states, 2) This doesn't undermine the independence of state judges; to ensure consistency and uniform applications of federal laws, must have such a provision
- *Cohen v. Virginia*, 1821, Marshall – SC has final review of the validity of state criminal proceedings involving federal law – Marshall goes farther in attacking capacity of state judges to interpret & enforce federal law

### Jurisdiction-Stripping

- Size of court, selection process: tools to influence direction of SC

*Ex Parte McCardle*, 1869, Chase – arises during fear that SC would strike down

Reconstruction as unconstitutional.

- Constitution allows Congress to make exceptions and regulations to appellate jurisdiction
- This is allowable even though appellate jurisdiction is granted by constitution, not congress
- Congress, in its initial act granting jurisdiction, negated all the jurisdiction it didn't grant (and then later granted it back, if it did at all)
- Not at liberty to inquire into legislative motives

Any limits on jurisdiction-stripping?

- Non-retrogression principle: can't take away jurisdiction over a case in which a final judgment has been rendered, and thus "undo" the case
- Can't have jurisdiction-stripping statutes that are unconstitutional for other reasons (racial discrimination)
- May be other limits, but it's all in the realm of theory & speculative; hard to make out any principles that courts would follow:
  - o Is there an "essential" judicial function or role that cannot be taken away?
  - o Perhaps jurisdiction over cases with the "all" modifier before it can't be taken away
  - o Maybe it's not an "exception or regulation" if you take away an entire category of jurisdiction, negate it entirely
  - o Look to framers' intent – can't take away jurisdiction when we're getting to core constitutional issues or inconsistent application of federal law is a concern (might affect taking away appellate jurisdiction over federal v. state courts)

### Congressional Powers

4 Eras of Commerce Clause adjudication:

1. Pre-1887: Political checks on Congress are working; almost no national regulation of the national economy, at least nothing that seems like a significant intrusion into state prerogatives
2. 1887-1937: Struggling for a judicial check, trying to decide which entity (Court or Congress) should decide – in this period, the answer is "the Court," but they're not sure how
3. 1937-1995: No judicial check? – All of the cases uphold congressional action
4. 1995-Present: Unclear, a new search for judicial checks? Or maybe they're reasserting a judicial check at the outer limits?

Pre-New Deal, 3 theories:

- “Affecting commerce” -> Shreveport rate case, but see *Knight*
- “Stream of commerce” -> *Swift/Stafford*
  - o Can at least deal with some of commerce, the “throats of commerce,” even if it can’t regulate the very beginning (manufacture)
- Prohibiting Commerce -> Lotteries, adulterated food & drugs, prostitution
  - o Power was upheld based on a moral concern with the item itself
  - o But Congress can’t prohibit goods that are not harmful in themselves, but are produced by intrastate means that Congress doesn’t like – that would be a mere pretext

*Gibbons v. Ogden*, 1824, Marshall

- Commerce to be read broadly – doesn’t just include “traffic” (exchange of goods & services), but all commercial intercourse, and comprehends transportation
- “Among the states” means “intermingled with,” – doesn’t include completely internal commerce, but does to things that affect more than one state, or the states generally

*US v. E.C. Knight Co.*, 1895, Fuller – Commerce does not include manufacture, even though manufacture might include commerce; Commerce is buying, selling, transportation, Manufacture is transformation of raw materials into finished form. Nexus is one of logical relations, not an empirical one of economic impacts

- But, *Addyston Pipe & Steel Co. v. US*, 1899 – Court did allow antitrust enforcement against manufacture, when that manufacturing agreement aimed to affect prices, things are more directly commercial
- Holmes’ dissent in *Northern Securities Co. v. US*, 1904: shouldn’t read “commerce” to allow Congress to regulate everything, touch all parts of life (how very prescient)

*Houston E. & W. Ry. Co. v. US* (Shreveport Rate Case) 1914, Hughes – Congress can reach intrastate rail rates that discriminate against interstate traffic

- Railroads are “instrumentalities of interstate commerce” which have such a “close and substantial relation” to everything about interstate commerce that Congress can regulate even the pure in-state lines – “the government of one involves the control of the other.”

“Stream of Commerce theory”

- *Swift v. US*, 1905 (Holmes) – When goods are sent to a place w/in state w/ expectation they’ll be purchased and then taken to another, and this happens over and over, the goods are in a “current of commerce”
  - o Uses practical rather than technical definition of commerce
- *Stafford v. Wallace*, 1922 (Taft) – Even business w/in the stopping point (stockyards) can be regulated, b/c stockyards are “throats of commerce” – stuff goes in, and leaves to go to another state

*Champion v. Ames*, 1903, Harlan (The Lottery Case) – Lottery tickets are subjects of traffic, plus:

- They’re immoral, and the states have the power to prohibit immoral things in commerce

- If Congress has the power to exclude them from commerce, it may do so whatever it's motive – “the possible abuse of power is not an argument against its existence”
- Fuller's dissent: The purpose of Congress' action was moral disapproval of the lottery. Congress doesn't have a general police power; this is a mere pretext, extension of this principle would wipe out state power and aggregate federal power too much.

*Hipolite Egg co. v. US*, 1911, McKenna – no defense to seizure of goods that they had “passed out of interstate commerce” before seizure

*Hoke v. United States*, 1913, McKenna – applies *Champion's* principles to the Mann Act, which prohibits the transportation of women in interstate commerce

*Hammer v. Dagenart*, 1918, Day (The Child Labor Case).

- Prior 3 cases dealt with using the commerce power to prohibit something that was itself immoral; that situation doesn't exist here, the goods are harmless.
- Rather, the effect of this provision on interstate commerce is the complete standardization of child labor law
- Congress cannot use Commerce Clause to affect purely internal regulation of state
- Not really a pretext case; says you can't look at Congress' intent, just the effects
- Holmes' dissent: if an act is within Congress' power, its indirect effects don't make it any less constitutional
- This statute prohibits the transportation of certain goods in interstate commerce; that's what Congress can regulate! Doesn't make any difference whether the things transported are evil, but if we want to talk about evil, child labor is
- Thinks this is similar to *Champion*

#### The Court vs. the New Deal

*Railroad Retirement Board v. Alton RR*, 1935, Roberts – a retirement & pension plan act was not a regulation on interstate commerce – it's not related to efficiency at all, but a social welfare measure

*Schechter Poultry v. US*, 1935, Hughes – these aren't transactions in interstate commerce; the goods affected have already left interstate commerce when delivered to the slaughterhouse. The government's arguments about hours and wages affecting price proved too much (also unconstitutional delegation)

- Cardozo concurrence (notable b/c he often supported New Deal): this is “delegation running riot,” also this view would obliterate the national and local distinction; if Congress can regulate this, they can regulate everything

*Carter v. Carter Coal Co*, 1936, Sutherland – no power to legislate generally in the national interest; production is purely local activity; whether an activity is direct or indirectly affecting commerce depends on a proximate cause analysis; increase in the effect of things such as labor/management dispute doesn't change the character of the things themselves

- Cardozo dissent: Regulation of prices is within commerce power; mining and agriculture and manufacture are related to commerce, and the “directness of the relationship” must necessarily be viewed as one of degree to both respect Congress' power and prevent it from getting too wide
- Hughes concurrence: reasserted that Congress can use the commerce power widely to protect commerce from injury, but not as a pretext

The Change – now, relying on the effects on commerce

*NLRB v. Jones & Laughlin Steel Corp.*, 1937, Hughes

- Proper inquiry is not the nature of the thing regulated, but its effects or burdens on commerce
- Industry is organized on a national scale, controls and composes a lot of the “arteries” of commerce
- Adopts Cardozo’s statement that this is a matter of degree; can’t allow Congress so much power so there’s no longer a national & local distinction, but you have to look at the regulated activities at a high level of generality. Not “does 10 people on strike affect interstate commerce,” but “does this whole activity have a ‘close and substantial relation to interstate commerce’ that their control is ‘essential or appropriate’”
- McReynolds dissent: Effect of discharge of these employees would have a very remote effect; anything (like marriage) is regulable under this logic

*US v. Darby*, 1941, Stone

- Congress may set minimum wages & maximum hours for workers producing goods for sale in interstate commerce
- Prohibition of transportation of goods is a regulation of commerce
  - o Congressional power can’t be enlarged or diminished by exercise or non-exercise of state power; congress gets to prohibit for any reason it wants; motive and purpose don’t matter
  - o Congress can choose means reasonably adapted to the attainment of a permitted end, whether or not they involve control of intrastate activities; the act is directed at regulating poor labor conditions in interstate commerce
- Decision unaffected by 10th amendment, which states but a truism...
- Explicitly abandoning *Hammer*, following *J&L* where it conflicts with *Carter*
- Taken for the proposition that Congress has the power to regulate industry that has an affect over the national economy

*Wickard v. Filburn*, 1942, Jackson – the high water mark – homegrown wheat competes with the wheat in commerce

- Rests on aggregation principle, which is implicit in *J&L* and *Darby*
- Not possible, in national economy, to parse out effects of individual action – individual action may be regulated if it has a “substantial economic effect on interstate commerce,” whether local and themselves not commerce

*Maryland v. Wirtz*, 1968, Harlan – applying labor standards to more employees

- Now, can regulate all employees who work for an enterprise engaged in commerce or in the production of goods for commerce
- There are still limits on the congressional power, can’t use “trivial impact” as a pretext for “broad general regulation,” but if the regulation itself bears a substantial relation to commerce, “the de minimis character of individual instances is of no consequence”

*Hodel v. VA Surface Mining*, 1981, Marshall – commerce power broad enough to cover environmental hazards that might have effects in more than one state

- Rehnquist’s concurrence: You could get the idea from our opinions that there are no limits to Congress’ power, but you’d be wrong

- Congress' conclusions that an activity substantially affects interstate commerce needs a rational basis and is reviewable
- Some activities may be so private/local that they're not *in* commerce
- *Some* nexus is insufficient, need *substantial* effect on commerce

*Heart of Atlanta Motel v. US* and *Katzenbach v. McClung*, 1964, Clark

- Extend Commerce power even further – seems like there's nothing Congress can't touch after these
- Intrastate conduct affects interstate travel, which is regulable under the commerce clause – *HoA Motel* – doesn't matter that Congress is also righting a moral wrong, not a pretext
- Restaurants that buy food interstate can be regulated, b/c racial discrimination in restaurants affects interstate commerce – the restaurants were selling interstate goods (imported food), and they could serve less of it b/c they discriminate. *Katzenbach*. Don't need case-by-case decision that discrimination in a given restaurant affects commerce
- Black's concurrence in *Katzenbach* – not every remote, possible, speculative effect should be accepted – can think of a local place that only buys and serves locally; but this is acceptable under aggregation principle.
- Douglas concurrence – would have rather rested on 14th amendment
- Goldberg – congress had authority under 14th amendment and commerce clause

*Perez v. United States*, U.S. 1971, Douglas – Loan sharking and extortion is a national problem and tied to organized crime; Congress doesn't need particular fact-findings to justify act

- Stewart Dissent: Sure loan sharking is a national problem and affects business, but prosecution of local, intrastate crime is reserved to the states

### The Rehnquist Court's limits on Commerce power

*United States v. Lopez*, 1995, Rehnquist – firearm in schools as commerce

- Goes through history recap, and then 3 broad categories that Cong can regulate
  - The use of the channels of interstate commerce
  - Regulate & protect the instrumentalities of interstate commerce, or persons & things in interstate commerce, even if threat is wholly intrastate
  - Activities having a “substantial relation” (not just relation) to interstate commerce
    - Where economic activity substantially affects IC, then it's sustained – even *Wickard* involved economic activity
- Not coming up with standard, but to follow Congress' logic here would destroy the national/local distinction; not expanding the doctrine further
- There has to be a limit somewhere
- **Kennedy** concurrence: realizes it's important to take the Commerce Clause into account as it pertains to a national economy, but the framers did create a system of dual sovereignty to check each other, and the federal balance is too important to securing our liberty to sacrifice it
- **Thomas** concurrence – the “substantial effects” test is wrong and too broad (a “blank check”); need a case in which that can be reconsidered while still being true to newer cases; doesn't agree with an interpretation of Commerce clause that

makes the rest of A.1, S.8 superfluous. Like Rehnquist's opinion, notes that the dissent says "there are limits" but curiously can't point any out

- **Breyer** dissent: court is supposed to look at cumulative effect, not a single occurrence; test is not whether this is substantially related to IC, but whether congress could believe it was; this can't be reconciled with prior holdings; creates legal uncertainty in an area of law that seemed well settled.
- **Souter** dissent: this is a return to the laissez-faire pitfalls which were the underlying philosophical source of the pre-1937 holdings; the "chastening experience" showed the court it should move away from that.
- **Stevens** dissent: Congress' power to regulate commerce in firearms includes its ability to prohibit possession in a location or particular market
- Added jurisdictional nexus (firearm must have moved in or otherwise have effected interstate commerce); law has been upheld since then. Is that all that's needed? Prosecutors now have to prove this for convictions

*Eldred v. Ashcroft*, 2003, Ginsburg – upheld broad copyright-clause power

- Stevens dissent: retroactive compensation doesn't encourage new inventions or add knowledge to the public domain
- Breyer dissent: economic effect is perpetual grant of rights to heirs, which is unconstitutional by degree
- Example of the *Lopez* majority being very deferential to congressional power, and some of the dissenters being more strict

*United States v. Morrison*, 2000, Rehnquist – gender-motivated violence statute

- 3 significant considerations:
  - o *Lopez* law had nothing to do with economic enterprise; was criminal law
  - o Statute (originally) contained no jurisdictional statement
  - o Also lacked formal findings
- Here, 1 and 2 are missing; 3 is present but not enough. Says that they're not adopting a categorical rule against "aggregation" for noneconomic activity, but won't aggregate noneconomic conduct just based on the conduct's aggregate effect – this would allow too much interference w/ local things like criminal, family law
- **Thomas** concurrence: pretty much says the same thing; "substantial effects" test doesn't accord w/ original understanding and Congress will continue to appropriate state police powers
- **Souter** dissent: determination of substantial effect is for congress, court is just to review rationality; there is a far more voluminous record here; this act would have been OK at any time before *Lopez*, categorical exclusions are unworkable and are just a means to serve a federalism end today (as they were to serve a laissez-faire end in the past); politics, not judicial review, should mediate between the states & federal government here
- **Breyer** dissent: virtually every kind of activity, aggregated, can today affect commerce & subject matter categories make no sense

Courts have pretty much upheld jurisdictional nexuses since *Lopez*, and that might be no real limit

How far will the court go? *Raich* – medical marijuana injunction case. Parties recognize that political preferences don't line up with federalism support, and they're trying to use that

- To the conservatives: There has to be a limit, but surely the regulation of the drug market is within the limit
- To the liberals: Don't give up on the Congressional power doctrine
- Also, professors are making a play for 2 distinct sets of votes

#### Other Powers in the “unamended” constitution

- Other federal powers besides commerce power, potentially allow Congress to get around limitations on federal power, and admit of interpretations (though the courts haven't necessarily followed them) that provide for unrestricted power; thus, needs to be internal limits

#### **Tax power:**

*Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 1922, Taft

- Court can tax and penalize, or use a tax as a penalty, where it has the power to do both
- But where it doesn't have the power to regulate, can't do that through a tax – if a tax goes too far, it loses its “tax” characteristic and becomes a punishment
- Test: in part the effect, in part whether this was enacted out of a motive to regulate or get money – primary motive must be raising revenue, but there can be an incidental motive to regulate

*United States v. Kahriger*, 1953, Reed (the Darby to Bailey's Hammer)

- A federal tax doesn't cease to be valid because it curtails & hinders, or because it doesn't raise much money – courts can't limit taxing power this way
  - o This tax raises some revenue – more than other taxes. As long as there's some revenue, it's ok
- **Jackson** concurrence: Difficult to regard this as a good faith measure, thinks it's a pretty clear regulation. But dissent goes too far in impairing the taxing power
- **Frankfurter** dissent: Courts can't shut its eyes to attempted regulation disguised as a tax
- Surprising b/c you see 3 New Deal justices not in the majority: Jackson, FF, and Douglas (joins FF). So they probably didn't think federal power was unlimited

State of the law today on taxation power: Has to be legitimate tax, but it's good enough that it produces some revenue. Very deferential to Congress as to what's a legitimate tax, and if it's legit, not inquiring into motives. Also, very deferential even if (as in *Kahriger*) if the purpose of the tax scheme isn't really to make money. Court has not revisited this in the post 1995 era.

Spending power – Court has revisited spending power, people say this is the next area in which the federalism revolution will take place.

- Restrictive doctrines often bar suit in this are

*United States v. Butler*, 1936, Roberts – the Agricultural Adjustment Act

- Roberts is feeling the heat from New Deal supporters, writes at the beginning about how the role of the court isn't to condemn legislative policy, but to apply the law, which "drips with arrogance."
- Spending power is not limited to the other powers in the constitution (otherwise it would be surplusage b/c of "necessary and proper" clause), but rather gov't can spend "in the general welfare." Agrees with Hamilton, Story; this applies to tax power too
- But, ability to grant benefits can be coercive when those grants are conditioned on compliance "that congress is powerless to command." "The power to grant unlimited benefits is the power to destroy." Indirect, backdoor ability to do something that Congress couldn't do directly not ok, seems pretextual. Does it matter at all whether the farmers have to contract in or not?
  - o Differentiates between conditional appropriation of money & contractual obligation to submit to regulation
- Bagenstos thinks this is a lot more about pretext than coercion, despite the language
- **Stone** dissent: Courts are concerned w/ power to enact statutes, not their wisdom. Purpose must truly be national, but this was for the general welfare of the economy. Power to spend inseparable from persuasion to action, condition & promise – it's contradictory to say "you can spend, but you can't impose conditions adapted to attaining that end".
  - o **"Courts are not the only agency of government that must be assumed to have the capacity to govern."** Courts can abuse their powers just as the legislature can, and the only check on their abuse is self-control. Don't interpret the constitution based on a belief that the other branches will fuck up.
- Spending clause becomes less relevant in post-New Deal world, b/c of broader congressional powers under other clauses.

Couple of cases upholding social security:

- *Charles Stewart Machine Co. v. Davis*, 1937, Cardozo – Dealing w/ problem w/ national need; No coercion: taxpayer pays at state demand, and the statutes were state-enacted
- *Helvering v. Davis*, 1937, Cardozo – Congress has broad discretion to determine spending for general, vs. particular, welfare; problem is a national one

Now, *South Dakota v. Dole* is the basic spending-clause law

*South Dakota v. Dole*, 1987, Rehnquist – Highway funds & drinking age

- Congress can, through spending power, encourage states to act in a particular way even if the Constitution explicitly reserves the power over legislation on the subject (i.e. drinking) to states; the only "independent constitutional bar" is to prevent federal government to induce the states to act in unconstitutional ways (race discrimination, etc.)
- Conditions on the receipt of federal funds ok when:
  - o The exercise of spending is w/in "general welfare"

- Must grant \$\$, enabling states to exercise choice knowingly & cognizant of consequences
- Conditions may be illegitimate if they're unrelated to the fed interest
- **O'Connor** dissent: disagreement about application of principle: the error in Butler was Court's wrong view of Commerce clause, not of spending clause; spending power has limits, this is a regulation, and the regulation is beyond Congress' authority, so it's not justified by the spending power (and it can't be justified otherwise, b/c of 21st amendment)

### War, Foreign Affairs, and Federalism

*Woods v. Cloyd W. Miller Co.*, 1948, Douglas – Housing & Rent Act after WWII

- Even though this act took place after the end of hostilities, it's ok. Congress has the authority to “remedy the evils which have arisen from its rise & progress’ and continues for the duration of the emergency.” Recognize the issue that the effects of war can continue for years, and this power could threaten to swallow up all other powers of Congress + 9th and 10th amendment, but that's not a big issue in this case
- **Jackson** concurrence: This war power is dangerous, and can't accept the argument that war powers last as long as effects and consequences of war, or to things done that only indirectly affect the conduct of war, b/c war is a time where deliberation is at its lowest and passion highest. But here, still in a state of war, so it's OK.
- Jackson very worried about this, since he just came back from Nuremberg.

### Treaties, Foreign Affairs, and Federalism

*Missouri v. Holland*, 1920, Holmes – Migratory Bird Act – US can regulate sth by entering into a treaty that it cannot regulate by Congressional statute. 2 different requirements: acts of congress are supreme law only when made in pursuance of constitution, but treaties are so when made under authority of US

*Reid v. Covert*, 1957, Black – nothing in the Supremacy Clause's history or language “which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.” Alien to the framers, constitutional history & tradition, to let US exercise that power on an international scale w/o constitutional provisions.

### 10th Amendment Limitations on Congressional Powers in the “Unamended” Constitution

- Argument: states, as states, have autonomy and thus immunity from regulation in situations that Congress otherwise has the power to regulate

*United States v. California*, 1936, Stone – sovereign power of states is necessarily diminished to the extent that powers are granted to the government

*New York v. United States*, 1946, Frankfurter – power of Congress to lay taxes includes its power to tax states; only limitation is that Congress must not tax a source of revenue that's “uniquely capable of being earned by a state”

- **Stone** concurrence: A federal tax that discriminates against state is unconstitutional, but if it's not discriminatory & merely affects a state, it's fine

- **Douglas** dissent: There's a lot that states might do that are essential to the state enterprise, and it doesn't have to pay the federal government to do that; taxes on such things are unconstitutional

*National League of Cities v. Usery*, 1976, Rehnquist – application of federal law (Fair Labor Standards Act)

- Federal law cannot “displace the states’ freedom to structure integral operations in areas of traditional government functions.” Labor laws would interfere with integral government functions; if Congress can make those employment decisions for states, there’s not much left of state sovereignty.
- **Blackmun** concurrence: troubled by implications of the opinion – reads it as a balancing approach, depending on strength of federal interest
- **Brennan** dissent: restraints upon plenary commerce power are in political process, not judicial. Political branches are structured to protect state & nation, states can look out for themselves.

*Garcia v. San Antonio Metropolitan Transit Authority*, 1985, Blackmun

- Impossible to determine what are “traditional,” “integral,” or “necessary” nature of state government functions – involves judicial decisions about which policies they favor & which they dislike. Principle protection of states is political process and structure of federal system itself (state representation in Congress)
- **Powell** dissent: state’s role in our system isn’t a matter of legislative grace, but of ConLaw; structure of government in administrative state & with modern lobbying no longer suffices to protect states in the same way. Inconsistent with *Marbury* to make Congress judge of the limits of its power
- **O’Connor** dissent: Essence of federalism is that states *as states* have legitimate interests; Court can’t abdicate constitutional duty; Weigh state autonomy as a factor in assessing regulation, Congress doesn’t get to regulate states as much as private parties
- **Rehnquist** dissent: not necessary to spell out further the fine points of a principle that will get a majority again in the future (it didn’t).

*South Carolina v. Baker*, 1988, Brennan – *Garcia* suggested that judicial intervention might protect states from “possible failings in national political process,” 10th amendment doesn’t give states the right to second-guess the substantive basis for congressional legislation (only procedural basis)

State courts have to enforce national laws (*Testa v. Katt*, accepted proposition by both of the majorities in the 2 cases below)

*New York v. United States*, 1992, O’Connor – take title to radioactive waste

- Congress can regulate by giving states incentives, so that state chooses to accept regulation & get federal benefit, or not. OK so long as choice exists
- But, Congress cannot tell states to regulate, nor can it tell states to take title to something, so it can’t give them the “choice” between two unconstitutional means. Can’t force states to enact or administer programs. To do otherwise is commandeering
- 10th amendment is a truism, but doesn’t make it meaningless; confirms the background understanding that federal government can’t displace state role

- **White** dissent: This was something that states actively sought as a resolution to a collective action problem; majority's "civics lesson" assertion of federalism as protecting freedom rings hollow when compared to this crisis of figuring out how to dispose of nuclear waste; Congress could attain the same goals through other powers (condition grants under the spending clause on taking title, for ex.)
- Majority response: it doesn't matter if the states wanted this. Individual political actors might prefer to do away with balance (shift responsibility), but federalism doesn't exist at sufferance of states; it's for the preservation of individual liberty
- **Stevens** concurrence/dissent: Why can't federal government tell states what to do here? They can and do direct state officers all the time

*Printz v. United States*, 1997, Scalia – the Brady bill

- Offered distinction from *New York* (above): this is a temporary measure, and calls for state executive branch action, doesn't force state legislatures to enact anything
- Federal government can't issue directives requiring states to address problems, nor may it command the state's officers to administer or enforce them; such commands are incompatible with dual sovereignty
  - o History and practice has judges applying federal law, but that may just be a part and parcel of allowing state courts to hear federal questions
  - o Federalist papers are unclear, though they might indicate that there couldn't be any command to a state to enforce federal law without the state agreeing to it
  - o Rely on prior case law, which prohibits commandeering; the fact that these are executive officers doesn't mean there's no policymaking, and even if it's temporary, a "balancing" test is inappropriate to protect against such violations
- **Stevens** dissent: Congress can enlist state agents in enforcing laws; the historical materials strongly support that they can; the failure to exercise this power in the early days (and conscript only judges) doesn't negate its existence; the primary safeguard is the structure of the federal government to include a state voice, not of such rules; the majority's rule is perverse because it leads to the creation of exactly the sort of vast bureaucracy that the founders feared
- **Souter** dissent: The federalist papers really support having state executive officers enforce federal laws, and this is consistent with *New York v. US* because there's a difference between having executive officers enforce the law and requiring legislators to make a particular law
- **Breyer** dissent: although we're interpreting our own constitution, other nations with a two-tier structure have local gov't implement national mandates, and that doesn't destroy liberty. Just sayin'

*Reno v. Condon*, 2000, Rehnquist – DMV can't sell your info

- The two above cases said that Congress can't require the states, in their sovereign capacities, to regulate their own citizens
- But, Congress can regulate the states as owners of their own databases; this doesn't require SC legislature to enact anything or officials to enforce anything
- Decline to address the issue of whether only "generally applicable laws" can be applied to states (whether Congress can target and regulate states as states) b/c this law is generally applicable to all who sell car info

- Bagby says: This case was taken to overrule *Garcia* and to reintroduce *National League of Cities* without saying so – how???
- This case shows how you have a lot of room to characterize laws as a “broad scheme” or narrowly targeted at states
- Forcing state to do things in its own operations, is OK
- If state being regulated, OK – if state being forced to regulate, not OK
- This distinction difficult to sustain analytically and apply consistently across cases, since it’s always going to be open to the state / feds to claim either
- Best way is to think of 2 poles: *NY* and *Printz* force states to regulate, *Condon* just regulates the states

### The Civil Rights Powers – Private Action

2 questions here:

- 1) What’s the degree to which Congress can protect civil liberties & rights from private action?
- 2) What’s the scope of Congress’ power to reach action that is by states but that is not unconstitutional, when enforcing the provisions of the 14<sup>th</sup> amendment? Going beyond what’s prohibited and drawing a prophylactic circle

14<sup>th</sup> and 15<sup>th</sup> amendments, by their terms, regulate all state actions, while the 13<sup>th</sup> amendment does regulate private parties (by prohibiting slavery, a private practice).

- Under these amendments, there are ways that Congress can reach private actions
  - o Joint venture theory *Guest* – if a state actor is working in league w/ a private actor, a private actor becomes a state actor for constitutional
  - o Can enforce rights against private interference, like right to travel – *Jones, Griffen*
    - *Jones* – Congress has the power to ban practices that it determines to be a “badge and incident” of slavery; An individual act of housing discrimination (race discrimination) can be a badge and incidence of slavery
  - o Congress can enforce a right that is a corollary of a right against public interference; so, if the state can’t prevent you from using public parks, Congress can stop private actors from doing likewise; “The right wouldn’t mean anything if private actors could interfere.”
- **Very hard for Congress to prohibit wholly private action under the 14th amendment, other than by these theories? - Review session**

*United States v. Guest*, 1966, Stewart – can the federal government prohibit acts of private discrimination? Can it reach private action? Deals with criminal law punishing conspiracy to deprive of rights

- Doesn’t fully answer that question, b/c he finds that the government can regulate private citizens (punish for conspiracy to deprive rights) when state officials are somehow involved
  - o People acting in league with state actors effectively become state actors for the purposes of the statute

- Right to travel is an individual right; conspiracy to deprive this right is punishable, even if it's only private actors conspiring
  - o Congress can reach private individuals for deprivation of rights under the Constitution, for rights that are protected against private violation
  - o Inclusion of right to travel is what makes this controversial
- **Clark** concurrence: Congress has the power to punish private conspiracies under 14th amendment, section 5 – can punish conspiracies “with or without state action”
- **Harlan** concurrence/dissent – agrees with the first part, but cannot agree that the law reaches conspiracies that involve only private action; although a right to travel exists, this is the first case that finds such right protected against private (in addition to state) action
- **Brennan** concurrence/dissent – 14th amendment doesn't of its own force prohibit conspiracy, but Congressional power under S.5 can prohibit all conspiracies to interfere w/ the exercise of rights secured by the constitution; S.5 empowers congress to punish all conspiracies, state or private, to interfere w/ 14th amendment rights; without this, the legislative power is reduced to that of the judiciary (judging when a violation has already occurred & then acting), but this is a positive grant of legislative power

Brennan's take is the most controversial and expansive. Gets 2 justices to join his op, & another 3 more say “I agree with Brennan.”

*United States v. Price*, 1966, Fortas – companion case to *Guest*; killing of civil rights workers – private persons can be reached under the statute when they jointly engage in the prohibited action, along w/ state officials – their action becomes state action

Brennan's opinion in *Guest* assumes a relationship btw citizens and states, that states can regulate private action to preserve that relationship. What about states regulating private conduct to affect the private relationships between citizens?

*Griffin v. Breckenridge*, 1971, Stewart – a provision for civil actions (now 1983), similar to the criminal provision in *Guest*

- Didn't touch the 14th amendment question; there is power to reach private conduct under the 13th amendment & in protection of right to interstate travel
- Reading the law to cover private action doesn't mean it covers all tortious action; rather, there needs to be some invidiously discriminatory motivation; reaches private conspiracies to deprive others of rights

*Jones v. Alfred H. Mayer Co.*, 1968, Stewart – challenge to refusal to sell home to blacks

- An act from back in 1866 bans all discrimination against blacks in sale or rental of property
- Congress has the power to do this under 13th amendment; enabling clause allows Congress to “determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation” – the rights would mean nothing if private actors could interfere

- **Harlan** dissent: cert improvidently granted b/c of new housing laws; history of the law shows that it was meant to operate only against state-sanctioned discrimination, discrimination in property ownership “under the law”

### The Civil Rights Powers – Voting Rights

*Lassiter v. Northampton County Election Bd*, 1959, Douglas – literacy tests OK

- States have broad power to determine conditions for the right of suffrage; literacy may be desirable for the voting population; literacy is itself neutral on race, creed, color, sex; It’s an OK criterion, though we acknowledge such tests may be employed to discriminate in violation of the 15th amendment, but “no such influence is charged here.”

*South Carolina v. Katzenbach*, 1966, Warren – ruling on voting rights act

- Addresses 2 provisions in voting rights act
  - o Prohibits literacy tests in certain jurisdictions identified by formula set forth in the statute (Basically southern states, though as the statute applies today they’re banned outside the south)
  - o Establishing “preclearance”: Whenever the state changes voting practices, has to go to Washington and ask Atty Gen or Dist Court for a declaration that the change doesn’t have discriminatory purpose or effect; Until that declaration, state can’t enforce the changed laws
- Review of long history of discriminatory enforcement of voting qualifications
- Reject the argument that Congress can do no more than forbid violations of 15th Amend in general terms, & that task of adjudicating is left entirely to the courts; Congress can use any rational means to effectuate the constitutional prohibition, and Congress had found that case-by-case voting was an inadequate solution
- Reconciling w/ *Lassiter*: *Lassiter* recognized that literacy tests could be used to discriminate; record here shows that they were used thus

Works out to a prophylactic power, based on two ideas:

- Burden of case-by-case litigation is huge, and effectively prevents enforcement of rights
- Know ahead of time that these tests will be used to discriminate; can strike at them ahead of time

Key question next: how much prophylactic power does Congress have?

*Katzenbach v. Morgan*, 1966, Brennan – PR non-English speakers can vote in NY

- Congress under A.14, S.5 is not limited to prohibiting things that are otherwise unconstitutional (judicially determined to be so); Rather, S.5 is a positive grant of legislative power, allows Congress to determine what is necessary to secure guarantees of 14th amendment
- This legislation can be seen as furthering the aims of equal protection; it’s for congress to determine the pervasiveness of discrimination
- This will also be helpful in reducing discrimination in provision of public service (access to the franchise makes officeholders accountable)
- Enough to perceive a basis for Congress to have acted as it did

- Ratchet footnote: rights can only be expanded by congress, not abridged; hard to understand what this means exactly, if Congress has co-equal power of interpretation why can't it restrict as well as expand?
- **Harlan** dissent: NY was acting rationally, so then the question becomes: was Congress acting rationally saying that NY was not? It's a judicial question when constitution is infringed. This isn't remedial legislation to cure an established violation of the constitution, but here the court reads S.4 of A.14 to give Congress to define the substantive scope of the amendment, say what the amendment means
  - o That logic applies to reducing powers, as well as expanding – doesn't buy the "ratchet" idea
  - o Also, legislature can find discrimination in fact, but no such findings here.

*Oregon v. Mitchell*, 1970, **Black** – Voting age change and uniform literacy test ban

- **Black**: literacy test ban OK to remedy racial discrimination under enforcement powers; Congress has power to override state regulations as to federal elections, but state power to determine own voter qualifications is important to independent existence of state, and the change to voting age wasn't based on voter discrimination
- **Brennan** C/D: Only question is whether Congress could rationally have concluded that the denial of vote to citizens btw 18-21 was unnecessary to promote legitimate interests; if so, it's unconstitutional under equal protection & Congress can forbid it under S.5
- **Stewart** C/D: Congress has no power for any elections to set voting age; 14th amendment doesn't limit state power to regulate that

*Rome v. United States*, 1980, **Marshall** – OK to require changes in voting laws to be precleared w/ Atty Gen

- Congress can prohibit voting practices that are discriminatory in effect, even if not in intent, under authority of A.15 S.2 – even if S.1 only prohibits intentional discrimination; Congress could rationally have concluded that the effect, in places w/ history of discrimination, creates risk of purposeful discrimination
- **Powell** dissent: Congress can only act if it is doing so to remedy violations of Constitutional rights
- **Rehnquist** dissent: This is abdication of court's authority in the field (to adjudicate disputes), not deference to executive; also not remedial, b/c holding can only be sustained on theory that structural changes which deprive racial groups of their ability to elect a minority candidate violate 14th and 15th Amends.

Not much case law on section 5 for a while, then 2 things happen: commerce clause restrictions (*Lopez*) and 11th amendment jurisprudence (see below)

### The Civil Rights Powers – Congruence and Proportionality

*Seminole Tribe of Florida v. Florida*, 1996, **Rehnquist** – Congress cannot abrogate a state's sovereign immunity by use of Commerce power; suits against states in fed court

- State sovereign immunity: 11th amendment immunity from suit; this limits the judicial power under Art. III and so it can't be gotten around by Art. I power of Congress

- But, sovereign immunity can still be abrogated by Congress' exercise of it's A.14, S.5 power
- **Stevens** dissent: the 14th amendment exception is illogical; prevents states from providing a "federal forum for a broad range of actions against states."
- **Souter** dissent: All we've required in the past was a "plain statement" that Congress intends to abrogate sovereign immunity

*Alden v. Maine*, 1999, **Kennedy** – sovereign immunity argument above also applies to suits against states in their own courts

- This is about consent and sovereignty, that state can't be sued without consent, as a necessary incident to its sovereignty, sees 11th amendment as "restoring the balance"; 10th amendment confirms state sovereignty
- The justices who are most often textualists are pushing for the broadest, most "purpose-driven" argument here.
- **Souter** dissent: disputes history of sovereign immunity; that Colonies were never thought to enjoy it, "sovereign dignity" doesn't make much sense in the case of a republic, rather than a king, and at any rate, Congress is the relevant "sovereign" here

*City of Boerne v. Flores*, 1997, **Kennedy** – Religious Freedom Restoration Act

- Prophylaxis argument doesn't work b/c hearings didn't reveal any evidence of discriminatory intent; Congress can only use its power remedially
- A piece of legislation that Congress introduces pursuant to it's A.14 S.5 power must be "congruent" and "proportional" to a remedial end, otherwise Congress' legislation changes substantive constitutional rights, which it may not do
- S.5 gives Congress the power to enforce, not to change, the constitutional amendment. It's only "changing" if you view the SC's interpretation as the only legitimate one and a contrary interpretation from Congress is "changing" the constitution (rather than constitutional law).
  - o Gets rid of any notion from *Katzenbach v. Morgan* that Congress can interpret 14th amendment in any way in conflict to Court's interpretation.
- Opens up the question of Congress' power to impose substantive restrictions on the states, beyond prohibiting constitutional violations; also opens question as to whether Congress is limited in setting damages for constitutional violations
  - o Congress must be acting in situations of real threat

*United States v. Morrison*, 2000, **Rehnquist** – Same VAWA as above

- This law isn't congruent or proportional, because it's not corrective or aimed at fixing problems in state law (though that is it's goal) – rather, it attempts to punish individuals who have committed criminal acts; so it doesn't matter if state officials are involved (despite that this act was intended to fix disparate state treatment in law enforcement); Congress' findings indicate that these discrimination problems don't exist in all states
- **Breyer** dissent: this is remedial legislation, intrudes little on states, and punishes people for acts already criminal, what's the problem? Also, Congress had evidence of problems in 21 states, and no evidence of "no problems" in any states – why can't it take that as sufficient?

*Tennessee v. Lane*, 2004, **Stevens** – 11th amendment permits suits against states for money damages under Title II of the ADA, and S.5 authority is OK with that

- This is about access to courts, people have a right to that, states must provide it
- Legislative findings made this an appropriate subject for prophylactic legislation
- Question in this case isn't Title II's wide application, but whether Congress can enforce a right of access to the courts under S.5
  - o Refusal to accommodate is often the same as exclusion; required states to take efforts to remove barriers to accessibility
- **Rehnquist** dissent: Not enough evidence to support discrimination; requirement to provide special accommodation & elimination of programs w/ disparate impact on disabled prohibits far more than irrational discrimination, provisions are too broad; abrogates state sovereign immunity
- **Scalia** dissent: Doesn't like the "congruence and proportionality" test, thinks it would be better to limit Congress' power to "enforce" to the literal meaning of the word, except for race discrimination cases, "proportionality" turns too easily into vehicles for judicial policy preference
  - o One doesn't enforce a prohibition by issuing a broader one – prophylactic legislation is "reinforcement"

### Executive Powers

#### Executive Powers Generally

- Difference in language suggests some kind of inherent executive power ("all powers herein granted" to the legislature vs. "the executive power")
- Possibility of congressional inertia if President acts by himself – now takes 2/3 rather than 1/2+1 to make policy
- Formalism seems attractive b/c then you don't deal with imponderables, but then you have problem of classification

*Youngstown Sheet & Tube v. Sawyer*, 1952, Black – Steel Seizure case

- President's power must stem from either an act of congress or from Constitution
- No congressional permission
- Very formalist constitutional analysis: war powers don't give power president to do everything; executive power is the power to execute the laws, not make them; he's not "taking care" that the law be faithfully executed because he's executing his own policy, not Congress'
- Doesn't matter that Congress is sitting on its rights; president must follow Const
- **Frankfurter** concurrence: separation of powers is more complicated and flexible than all that; Congress essentially withheld power from the president to do this by refusing to pass a bill allowing him to, traditions give meaning to the words and "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ..." are constitutional (but this wasn't such a practice)
- **Jackson** concurrence:
  - o Impossible to divine what our forefathers would have wanted had they been privy to modern conditions; speculation and support on both sides
  - o 3 categories of a test for this:

- President + Congress: here, President acting w/ all power of federal government, if he can't act, the Fed Gov't lacks that power
- President w/o Congress: there might be a zone of twilight where there's concurrent authority; actual test of power is likely to depend on imperatives of situation
- President – Congress: powers are at their lowest ebb; can only rely on own powers minus those of Congress
- This case falls into 3rd category; it would be really sinister (almost dictatorial) for president to be able to enhance his power by claiming war powers or military necessity; Congress may give up their rights by sitting on them, but it's not the court's job to help them get there. "The tools belong to the man who can use them"
- **Vinson** dissent: Presidents have acted "promptly and resolutely" in times of national emergencies, this is such a time; if the President has any inherent powers, this is clearly among them

Jackson's categories have been the most influential

*Dames & Moore v. Regan*, 1981, Rehnquist – asset seizure during Iran-Contra, subsequent settlement of claims

- 3 pronged framework of Jackson is good, but it shouldn't pigeonhole; should be continuum
- There is a historical gloss here: presidents have long had the power to unilaterally recognize governments, pull ambassadors, freeze assets
- Congressional silence on the matter, but unlike *Youngstown*, it's not read to be congressional disapproval; rather, legislation has granted President broad responsibility to solve the problem, which can be read as an invitation to independent presidential responsibility & action; presidential power/action can be a "necessary incident" to resolution of foreign policy dispute

This all calls into question the degree of responsibility that's appropriate for Congress:

- Whether Congress acts in a responsible fashion when they lay down broad rules or acquiesce to presidential action, or if they're just passing the buck / accountability.
- Whatever happens, is Congress doing the right thing? Koh thinks they should be held accountable, this is more important than quick resolution.

War Powers Act:

- Everyone acknowledges that President has power to protect nation from attack, in default of Congressional action. But what other powers?
- Two (possibly) conflicting provisions: president as "commander in chief," Congress has the power to declare war
- Act is effort by Congress to preserve some institutional control
- Pres can only commit troops pursuant to a declaration of war, specific statutory authorization, or an "emergency" created by attack on US

- For #3, President must give notice of any commitment of US armed forces to Congress w/in 48 hours, can only commit troops for 60 days unless Congress authorizes more
- Pretty much ignored / blatantly not followed by every president

US has no emergency provisions in const. Two opposing views, as to war-time and emergency:

- There is no law in war, or in war laws are silent
- The constitution is the constitution and it is meant to protect us in the darkest of times; Constrains the government when the government is most in need of constraint
  - But in times of emergency, there will be more infringement of liberties; to have a formalist position that ratifies wartime practices might allow spillovers into non-wartime infringement of civil liberties
- And a middle argument, that we apply the constitution in wartime but while recognizing the exigencies of the situation

*Ex Parte Milligan*, 1866, Davis – Confederate sympathizer in Indiana

- Lincoln's unilateral suspension of habeas corpus during Civil War OK
- But, a citizen cannot be deprived of his right to a jury trial; should have indicted Milligan under crim code & tried him in Art. III court; person is guaranteed certain rights, and martial law to the degree that the government argues for it is one of the reasons we struck against King George
- A civilian can be tried in military court, if it's necessary – but not when the courts of states are still open; doesn't apply to people in armed service

*Ex Parte Quirin*, 1942, Stone – German attack on US in WWII

- President was acting here w/ congressional approval, since Articles of War established the jurisdiction of military tribunals (and Pres. said that military tribunals would try all those who came into USA to attack us)
- Doesn't matter if you're a citizen or not, if you're an enemy belligerent; any member of armed forces submits themselves to a different form of justice; paradoxical for us to give more protection to foreign belligerent US citizens than we do to US Armed Forces (who are triable in military court)
- Most important differences btw cases might be political, not legal; in *Milligan* the war was over, in *Quirin* the guy admitted to being an enemy belligerent

*Johnson v. Eisentrager*, 1950 – WWII case on detention, trial of enemy aliens

- Aliens don't get privilege of litigation in US courts when they're "at no relevant time within any territory over which US is sovereign, and their offense, punishment, capture, trial is outside US."

*Rasul v. Bush*, 2004, Stevens – Guantanamo detention in war on terror

- Courts have jurisdiction to hear habeas corpus challenges to Gitmo detainment, b/c
  - o The prisoners are held in territory that's w/in exclusive jurisdiction & control of US (though US doesn't have ultimate sovereignty)
  - o These people are not nationals of countries at war w/ US and claim they haven't plotted acts of aggression vs. US

- **Kennedy** concurrence: *Eisenrager* indicates a realm of political authority of military affairs which judiciary can't enter, but b/c Gitmo is practically a US territory & these people are being held indefinitely w/o legal proceedings, federal-court jurisdiction is OK
- **Scalia** dissent: this overrules *Eisenrager*, extends scope of habeas statute to "4 corners of the earth," Congress could have changed jurisdiction if it wanted

*Hamdi v. Rumsfeld*, 2004, **O'Connor (plurality)** – Detaining a US citizen b/c of alleged support to enemy in post-9/11 conflict

- AUMF did authorize detention; if Hamdi is enemy combatant, can be detained
- Hamdi is entitled to due process, which includes notice + an opportunity to be heard to rebut the gov't's claims (opportunity to dispute factual basis for detention b/f neutral decisionmaker). But, to determine the right level of process in this situation, have to weigh the private interests (Hamdi's) with the public interests in prosecuting the war
  - o Some abridgement of Hamdi's rights might be OK, such as admission of inadmissible evidence, presumption against accused, military tribunals
- Position that the courts forgo examination of individual cases & only focus on the legitimacy of the broader detention scheme just condenses power in 1 branch of gov't
- **Scalia** dissent: Since Hamdi is a citizen, it's not OK to hold him. Gov't has 2 options: suspend writ of habeas corpus, or bring criminal proceedings against Hamdi (when a person is accused of making war vs. USA, try him for treason)
  - o Deals w/ *Quirin* by narrowing it; Haupt admitted in he was in 3rd Reich army, Hamdi made no such admission
- **Souter** c/d/con in judge: Another law (non-detention act) forbids detention where not authorized by Congress, and AUMF doesn't authorize it
  - o Need express statement of congress to get around NDA b/c it's not appropriate for president to decide the right amount of liberties for people to have – his job is to protect security
  - o Might be able to detain on showing of genuine emergency / imminent threat
- **Thomas** dissent: The national government exists to for national security; Congress has power, but judicial review destroys the energy of a unitary executive; Since Congress has authorized detainment, this is in Jackson's category 1; Due Process only requires a good-faith executive determination
  - o Sees this as a situation where Congress "invited members of independent responsibility," like in *Dames & Moore*
- As a practical matter, O'Connor's 4 votes are the law.
  - o In any case that the O'Connor 4 agree that sufficient process has been provided, their 4 plus Thomas' 1 keeps the person detained
  - o In any case in which any 1 of them thinks that insufficient process has been provided, their 1 plus the other 4 mean Hamdi goes free
- "Rules" (Scalia, formalism) vs. "standards" (O'Connor, functionalism)

### Nondelegation doctrine

- Basic idea: Congress cannot constitutionally delegate its legislative power to another branch of government

*Whitman v. American Trucking*, 2001, **Scalia** – EPA setting pollutant levels

- Congress can give administrative agencies the authority to make laws, and it's not "delegation" so long as Congress lays down an "intelligible principle" to guide the agency (so that it's still Congress' will)
- Intelligible principles can be very broad & general; only ones that haven't worked are those that provide no guidance and/or allowed regulation of whole economy (*Schechter*)
- Inconsistent w/ rule-oriented formalism b/c he loves admin agencies
- **Thomas** concurrence: doesn't like the doctrine
- **Stevens** concurrence: thinks that of course Congress can delegate, but only can delegate when they are providing an intelligible principle (distinction without a difference?)
  - o Essence of legislating is making rules (Stevens) vs. Essence of legislating is laying down policy principles (Scalia)

*INS v. Chadha*, 1983, **Burger** – deportation of an alien, legislative veto

- Delegation of power over deportation was OK, but once the power was delegated, deportation can't be changed w/o following Constitution
- All bills must meet presentment and bicameralism requirements; this one does not; A legislative veto violates bicameralism because the decision is made by 1 house; powers are not "hermetically sealed" but are "functionally identifiable; Constitution explicitly says where houses are allowed to act on their own, this isn't such a time
- Constitution may impose delay, inefficiency, but that's part of the cost of a system that prevents arbitrary government
- **Powell** concurrence: this is a usurpation of judicial function, not legislative – trial (by legislature) to say that person didn't meet statutory criteria
- **White** dissent: w/o legislative veto, Congress is faced w/ worse alternatives: Atty Gen gets power w/o Congressional control, or Congress gives up no power (extremely inefficient)
  - o Legislative Veto isn't a sword against executive, but a means to preserve role amidst the regulatory state
  - o Don't want to delegate unfettered power b/c they don't want to give complete control, as non-delegation tells them they shouldn't
  - o The same thing has to happen for alien to stay in country (both houses & executive agree), but the order is different. What's the big deal?

Another formalist argument in favor of Chadha outcome – this is a case of the legislature giving itself a hand in execution of laws

Formalism in favor of Chadha result – this bill (Immigration & Nationalization Act) was passed by 2 houses (bicameralism) and signed by president (presentment); this is just a matter of applying the scheme to one particular person

Functionalism against Chadha result – one-house veto lacks the ordinary deliberative and policy checks that we want on bills becoming law; poorly thought out legislation, one very narrow interest group being served (and others probably can't lobby effectively)

A tweak in the law that would satisfy formalists: automatic deportment, if AG finds extreme hardship he notifies Congress, who then fast-track a private bill for relief  
*Clinton v. New York*, 1988, **Stevens** – line-item veto

- President has amended 2 acts by repealing portions of each; Repeal must conform w/ Article I as per *Chadha*; constitutional return is of the whole bill & happens before passage, unlike here; power over appropriations doesn't give power to cancel parts of duly-enacted bill or change the texts
  - o Probable response to Scalia: historic discretion as to spending goes to implementation (execution) of law, but here, discretion is over what the law will be
- **Kennedy** concurrence: restraining spending might be a good thing, but “failure of the political will doesn't justify unconstitutional remedies.” Also, unlike what Breyer says, individual liberties are implicated here; they always are in separation of powers cases
- **Scalia** dissent: the original enactment of the Balanced Budget complied with presentment & bicameralism, Clinton only struck parts of the budget after the proper procedure; prior case law has held that the president can cancel a law that Congress has authorized him to cancel; this is no different than the president declining to spend some amount of discretionary spending, and Congress “may confer discretion ... to withhold appropriated funds, even funds appropriated for a specific purpose.” Technical difference between “cancel” and “decline to spend” doesn't relate to Presentment Clause requirements
- **Breyer** dissent: at the founding it was possible to divide the budget up by individual appropriations – now, no longer; “canceling,” or preventing bill from having force isn't the same as repeal or amendment and it would be OK if the bill gave him the authority to cancel appropriations, so it's OK if that authority comes from another law; no separation of powers violation: 1) power is executive, 2) Congress retains power to disapprove, 3) and no violation of non-delegation
- Both Scalia and Breyer talk about situations in which the executive can prevent a law from having legal force if some condition is met (“cancel tariff deal if other side doesn't comply, for ex.”)

Could support this or oppose this on formalist or functionalist grounds

- Formalism: depends on which box you put it in, repeal or nonrepeal
- Functionalism: whether this is good for our government

Functionalist thoughts (not considered by majority):

- System might encourage Congressional irresponsibility.
  - o Incentive to load up pork, logroll a lot
- Big-picture question: who should be doing the budgeting?
- If legislation is a conglomeration of competing interests settled by negotiation, it might be a problem to upend logrolling like this
  - o Example: If Pres vetoes, he may cancel benefit to a group that only supported the bill for that rider

- Might end up getting a different bill entirely that never would have been passed, but, knowledge that the bill will be subject to the line item veto act might change voting, too
  - Concern with protecting political minorities – it's their spending that will be affected
  - Does this create any shift in balance of power?
- Also, Court fails to grapple with how this authority given to the President is any different than the authority granted in *American Trucking*

Formalism can obscure the amount to which concerns over the effects of the congressional innovation play into analysis

- But, Functionalism often won't persuade those who don't already agree, as with early Rehnquist court – "this is not too much" (see below)

### **Bagenstos thinks it's most persuasive to add in functionalist elements to formalism**

#### Congressional Control over Executive Officers

- Only President can appoint Officers of US (w/ advice & consent), but Congress may vest appointment of inferior officers in courts or department heads
- In individual separation of powers cases you have moves that are very technical & textual, but in reality seem to be more about the appropriate roles of the branches

#### *Buckley v. Valeo*, 1976, **Per Curiam**

- Congress cannot appoint inferior officers (those exercising executive or quasi-judicial functions); An agency w/ a majority of congressionally named personnel can only exercise powers that Congress could delegate to its committees (investigatory & informative powers)

#### *Bowsher v. Synar*, 1986, **Burger** – Comptroller General removal, Balanced Budget & Emergency Deficit Control Act

- Executive power may not be exercised by a person removable by Congress
- Very formalist view, ask: in which branch is this person acting? What kind of function is this person performing? If there's a mismatch, it's unconstitutional
- Congress has the power to remove CG, so then CG will have to do what Congress wants; plus the only standard for Congressional removal of officer is impeachment; once Congress legislates, its job is done, it has no share in exec
- Twist on *Chadha* – reinterpreting *Chadha* to mean that the law was unconstitutional because Congress was reserving a piece of the execution of the laws; threatening to fire an officer is like a congressional veto
  - But, law wouldn't prohibit completely cutting an agency's funding
- **Stevens** concurrence: this is impermissible, but not for Burger's reasons b/c the CG is an agent of Congress, but the powers vested in him are too great – Congress can't exercise its power to make national policy by delegating them to CG.
- **White** dissent: cites Jackson in *Youngstown*, art of governing can't be based on judicial definitions of power from isolated clauses; constitution contemplates that government will be workable
  - Executive officers always have legislature hanging over their heads, b/c they have to execute whatever laws are passed

- This isn't analogous to impermissible execution by Congress, or to *Chadha*, b/c to remove this guy you need a joint resolution signed by the president! (bicameralism and presentment)
- The actual effect of this is to make CG one of the most independent people in Washington, not a tool of Congress

*Myers v. United States*, 1926, **Taft** – Postmaster General, patronage

- President can unilaterally fire executive officers without advice and consent of the senate (or any restrictions, really).
- Senate tried to reserve power of advice & consent for firings too

*Humphrey's Executor v. United States*, 1935, **Sutherland** – president cannot unilaterally fire FTC guy

- Congress can limit removal when officer doesn't exercise "purely executive power"; the FTC members exercise quasi-legislative, quasi-judicial functions
- Also (not a lot of analytic play in court's opinion, but important later), this case doesn't involve Congress playing a part, just laying down guidelines that establish cause for firing

*Weiner v. United States*, 1953, **No Justice Listed**

- Congress can limit executive power to remove officers in the executive branch who exercise judicial-type functions; follows *Humphrey* rather than *Myers*

*Morrison v. Olson*, 1988, **Rehnquist** – Independent Counsel Law

- Interbranch appointments ok; the IC is an "inferior officer" because of limited jurisdiction, limited time in office, & can be removed for "good cause"
- This is a purely executive officer (criminal prosecutor), but OK to limit Pres' removal – test is no longer whether officers exercise "quasi-judicial" or "quasi-legislative" functions, but whether Congress attempts to gain a role in the removal process and interferes w/ President's duty to execute laws
  - No interference here, b/c Pres doesn't need to terminate IC at will to exercise that control, and Pres' power isn't completely stripped – can fire for "good cause"
  - Limit on removal power was necessary for independence of office
- Also the reduction in Pres' control over IC doesn't violate Separation of Powers. No Congressional / Judicial usurpation or power increase, these powers aren't required to be performed by executive, act's "good cause" provision gives AG "sufficient control"
- **Scalia** dissent: "this wolf comes a wolf"
  - Only matters that the statute reduces presidential control, not "how much" – that's irrelevant
  - ALL exec power vested in Pres – very formalist reading
  - Any system of separation of powers w/ exclusive power accepts the possibility that power might be abused – even in Cong or the Court
  - Court's opinion doesn't give any hint of how to resolve balancing test
  - IC is not "inferior" b/c not subordinate; in past, all superior officers were terminable at presidential will
  - Old categories of "quasi-legislative" didn't make much sense, but at least they allowed you to tell who was under complete Pres control
    - Rules vs. standards debate

- Court essentially says to Pres, “trust us, we’ll see that you keep enough power.”
- Purpose of separation of powers isn’t effective government, but freedom; check on abuse of prosecutorial discretion is political, but now that check is removed

*Mistretta v. United States*, 1989, **Blackmun** – Sentencing Commission; separation of powers and nondelegation

- No excessive delegation b/c this act laid down an “intelligible principle”
- Separation of powers: have struck down laws where too much power was gathered in one branch where it should be in several, or where law undermined a branch; but when functions are commingled w/ no danger of aggrandizement or encroachment, that’s OK
- Congress’ decision OK so long as it gives powers appropriate to the branch of government; here, giving the judiciary powers over sentencing, what could be more appropriate?
- Doesn’t undermine impartiality – powers judges wield is administrative, not pursuant to their status as judges, would be problematic if they wielded both at once; won’t politicize the judiciary, undermine institutional integrity
- This won’t have an impact on public view of judicial disinterestedness, President’s power to appoint won’t sway the judges, they won’t try to pander to get seats
- **Scalia** dissent:
  - Although delegation is OK, there is “no place within constitutional system for an agency created by Congress to exercise *no governmental power* other than the making of laws.” – pure delegation of legislative power; doesn’t matter whether standards are intelligible, b/c they’re not standards for execution or judging, but further legislation
  - Constitution sets a prescribed structure, doesn’t just generally say “don’t mix the powers of government *too much*.”

*United States v. Nixon*, 1974, **Burger** – subpoena of Watergate materials

- Nixon claims that executive gets to decide when things are privileged, scope of that power; but the power of interpretation exists in the judiciary & Nixon can’t fully claim it for the President
- President can be subject to judicial process & subpoena, but pres has “presumptive privilege” – have to balance the interest in protecting Presidential communication vs. the interest in criminal prosecutions
  - Actually recognizes some executive privilege; President can be compelled to turn over materials, but judge must review it and can only turn over what’s relevant
- Presumptive Nixon critique on all of this: judges aren’t in the best position to decide matters of national security. Everyone acknowledges some executive privilege, but the executive is in best position to decide what’s privileged

*Nixon v. Fitzgerald*, 1982, **Powell** – Whistleblower suing President

- President has absolute immunity from civil damage liability for his official acts, at least in absence of explicit affirmative action by Congress; protecting

president necessary so he's not "cautious in the discharge of his official duties." Plus makes an easy target & so is vulnerable

- Doesn't leave nation w/o remedy: Pres can be impeached, other checks on presidential action and incentives to avoid misconduct; Pres not above law
- **White** dissent: this makes the president above the law, goes back to "the King can do no wrong," a policy choice & a bad one
  - o Scope of immunity should be determined by function, not office; ask "would private action for damages substantially impair a constitutionally-assigned executive function?"
- Court later refused to extend this absolute immunity to senior aids, though they get qualified immunity.

*Clinton v. Jones*, 1997, **Stevens** – Paula Jones case, Clinton just asking for postponement

- The *Fitzgerald* rationale doesn't apply here, because the president wasn't acting in his official capacity here; primary motivation for *Fitzgerald* was not to render president unduly cautious in his discharge of "official duties"
- President has been subpoenaed before; historical facts are in conflict; no doubt that the president is busy, but it doesn't violate separation of powers to allow suits against him – no other branch is encroaching; burden on the president not sufficient to establish a violation; risk of frivolous litigation can be reduced through firm application of the Rules, and history shows there's not much risk
- **Breyer** concurrence (reads like a dissent): agrees with majority that President doesn't have absolute immunity, but courts need to schedule lawsuits with a view towards not impairing presidential function; probably a showing by the president or a claim of interference would be enough; not so confident that the civil law machinery wouldn't be used against president, now that it's clear he can be a target

### Impeachment

- House has sole power to try, Senate has sole power to convict
- Impeachment removes an officer, but doesn't lead to a criminal conviction, nor does it trigger double jeopardy
- Real debate: what is an impeachable offense?
  - o Treason, bribery, other high crimes and misdemeanors
  - o Ustem Generis – maybe "high crimes and misdemeanors" is like "treason and bribery"
  - o This is thought not to reach "maladministration"
- Interpreting what it means:
  - o If it includes things not involving official conduct, it would be broader than "maladministration," and this seems wrong
  - o Oh the other hand, those things suggest an abuse of power
  - o May not be a rule that can be laid down in advance
- Congress can't pass code defining "high crimes and misdemeanors" (haven't the power) and even if they could, they couldn't be stopped from changing definition

- Probably not intended to be a common law process – constitution might not contemplate setting down rules in advance
- Might be impeachable for something you did before office, if it was concealed – otherwise the fact that you got elected might make impeachment illegit
- Black believes impeachment must be exercised in the spirit of the bill of attainder, which Mason compared to maladministration – to protect against officeholders who don't discharge duties properly
  - Bill of attainder allows person to be taken and punished for something that wasn't a crime? Like ex post facto?
  - Then, when Madison didn't like this, and proposed "high crimes and misdemeanors," Mason was all for it
- Legal norms are embedded in Congress, though they argue about it differently. Also, prudentialism and pragmatism play a greater role there

Need to get *Acorn*, impeachment materials