**Theoretical Background**

- **Entrenched rules**: explicit in Constitution, difficult to alter; purpose: serve coordinating function in society, govern disputes among rulemakers. Also there is a "constitution"—non-entrenched non-textual rules, e.g. statutes passed by governing body; possibly natural law. Both together form a constitution.

- **Enforcement**: no super-govt to act as enforcer of Const. People obey it w/o coercion b/c its acts as coordinating device: where expectations are shared it is overwhelmingly in one's self-interest to comply w/ them (e.g. traffic lights).

**Articles of Confederation**: purpose—unification of states regarding common foreign/domestic problems but retain state sovereignty. **Features**: Cong. has power of peace, war, authority to resolve inter-state disputes, regulate/value coining struck by ind. states, deal w/ Indians, post offices, etc. **Problems**: 2 of modern nat'l govt's most important powers missing: tax power and regulate commerce; no executive or national judicial authority—inability of states to act in concert in matters of nat'l import, multiplicity of laws in several states (e.g. import duties), no enforcement mechanism to ensure state compliance; no Bill of Rights (though this not imperus for Constitution).

- **Republicanism**: (anti-Federalism) entire populace ought to participate in small-scale govt to prevent formation of governing elite— civic virtue is paramount.

- **Federalism**: (anti-Republicanism) direct democracy/small govt's encourages faction of interest groups/political parties. Representative govt prevents this.

- **Separation of Powers**: structural federalism protects liberty b/c divided powers check others' interests—only branch prevents expanding power in order to preserve own powers. **Criticism**: akin to fighting monkey problem w/ more monkeys—more possible sources of suppression of liberty.

- **Federalist 51**: Madison's defense of new Const. expansion fed. powers from AoC. Problems: executive no longer weakest branch, and is now biggest threat to ind. liberty, faction problems: govt efficacy hampered by emergence of Fed. and D-Republicans; Art. 2 provided for prez and veep contenders; slavery, women couldn't vote.

- **Constitutional adjudication**: a function of SC is discussion and clarification of constitutional order, e.g. whether political parties prohibited in Germany.

- **Legal Process School**: seeks to set forth how govt should adopt active role in policymaking consistent w/ democratic ideals. **Ideas**- Law is purposive—Congress trying to achieve goal, cts. should discern purpose and assist law in achieving it (criticism: same problem as authorial intent originalism); relative institutional competence (e.g. dormant CC)—acts adjudicate among actors who should do what re: law; cts should legitimate govt action by requiring procedures; re: SOP, should facilitate institutional coordination to effectuate government; rather than simply policing SOP mindlessly; re: dormant CC, care about effects of court enforcement and general economic effects of having it, rather than the precise nature of the language used.

**Judicial Power/Judicial Review** to determine constitutionality of statutes & executive action. **Arguments for judicial review**: (1) Const. meant to impose limits on govt powers of 3 branches, meaningless w/o judicial enforcement (counter: ct. cannot enforce (Worcester v. Georgia); any branch can interpret). Against: departmentalism: negative needs for the power (counter: situations like Civil War arise—but is this good or bad? Depends on desire for stability vs. principle). (2) Power to decide cases "arising under" Const. + supremacy clause judicial review. Against: could just interpret/apply fed. statutes to decide cases and evaluate const. of state statutes but not fed. ones. **Marbury v. Madison**: judges violate oath if enforced unconstitutional laws. (this begs question): supremacy cl. (could just mean Congress should conform to const.'s restrictions).

- **Stuart v. Laird**: Congress has power from Art. 3 to (a) establish/abolish inferior federal courts & (b) transfer power between them. **Judiciary Act of 1801** abolished circuit riding created new courts/judges. Incoming Republicans concerned with these new courts filled with federalist judges, so passed JA of 1802, eliminating these Art. III judgships, reinstating circuit riding (an SC justice too). **Court** Art. III apparently allows Congress to make whatever inferior tribunals it wants & can transfer power b'tween them; also, "protection of federal (legislative) system. Like Marbury est. judicial review but a marked SC acceptance of Republican hegemony.

- **Mandatory view of Art. 3**: the judicial power shall be vested in some fed. judiciary—if not poured out into other courts must remain in SC. Historically this view rejected by Congress (e.g. limits on fed. diversity jurisdiction—Congress in § 1332 gives less diversity jurisdiction than Art. 3 permits).

- **Marbury v. Madison**: Struck down part of JA of 1789—it authorized jurис. to hear Marbury, but Congress cannot expand court's original juris. beyond original const. boundaries—in this case to hear petition for writ of mandamus. If could then Art. III enumeration "mere surpursel, w/o meaning (criticism: could just be floor rather than ceiling, a la argument: enforcement powers—rights enumerated are floor, not ceiling, so Congress ought to be able to expand).

- **Lessons**: (1) Congress can add/remove from SC appellate juris. but not original. (2) SC can enforce const. limits against Congress, including Art.3 (3) SC can compel exec. officials to do certain tasks as long as those are due and not discretionary to executive (e.g. U.S. v. Nixon—comply w/ subpoena). (4) Judicial review—established power of judiciary to review constitutionality of legislative acts (5) Stuart and Marbury are united by SC's reluctance to enter serious confrontation w/ executive branch; instead gave Republican purge of Federalists blessing of law.

- **Cooper v. Aaron**: Arizona school failed to comply w/ ct. order to desegregate after **Brown v. Board** 2 Reasserted judicial review power against AK's contention that it was bound only by Const—not SC's interpretation of it. Ct's strong statement came after prez. sent in nat'l guard, in contrast to guarded statement of **Youngstown Sheet v. Sawyer**—thanks to departmentalism too).

- **Insular Cases**: solved by **Stuart v. Laird**. Instance where **INS v. Chadha** (1989): Congress implicitly denied consent to preemption here by rejecting putting power in contemplated legislation that would have granted it (vs. Cong. silence—if area of trad. prez authority then silence might imply tacit authorization).

- **Departmentalism**: view that Congress, prez, and Court each individually must evaluate constitutionality of e.g. punishing seditious speech—cannot pun to court after legislating or prosecuting. **Motivation**: judicial supremacy + rational basis scrutiny risk of under-enforcement of const. norms (only judiciary scrutinizes and doesn't do so harshly, even if gets through barrier of justifyability reqs.). Other branches can pick up slack e.g. Lincoln after **Dred Scott**.

**Executive Power**: 3 sources: (1) Art. 2 of Const. (vague). (2) What Congress determines/expresses by legislation. (3) inherent powers?

- **Is there inherent (i.e. not pursuant to express/implied const./statutory authority) presidential power?** 4 approaches (Youngstown):

  - (1) **No inherent prez power**: prez may act only if express/implied const./statutory authority (Black's majority opinion).
  - (2) **Interstitial executive power**: prez has inherent authority unless prez interferes w/ursupps powers of another gov't branch (Douglas's concurrence).
  - (3) **Legis. accountability**: prez may exercise inherent powers so long as he doesn't violate statute or Const. (Jackson's conc.). **Three zones of prez authority**: acts pursuant to Cong. authorization (generally legislation), against its will, or middle twilight zone; judicial review standard adj, accordingly. **Very influential**
  - (4) **Stewardship Theory of exec. power**: prez has inherent powers that cannot be restrained by Cong.; may act unless violates Const. (e.g. foreign policy—but see **Medina**.

- **Youngstown Sheet v. Sawyer**: Truman seized nation's steel mills during Korean War pursuant to Comm.-in-Chief power when strike threatened. Jackson (conc.) expresses executive as Cong. "implied" power (S) Congress implicitly denied consent to preemption here by rejecting putting power in contemplated legislation that would have granted it (vs. Cong. silence—too area of prez, cond. authority that might imply tacit authorization).

- **Dames & More v. Regan**: Practically, **Pres given more leeway by ct. on issues of nat'l security or foreign policy** (see view (4)—may be extra-const. inherent powers in those zones). Prez-freed military in Iran in agreement for release of **American hostages in Iran**. **Versus Yountown**: seizure is leg. action, transfer of claims isn't: no contemplated legislation to draw implied authority of Congress from.

- **Medallin v. Texas**: Vienna Convention must be implemented by domestic legislation—prez lacks executive power to give non-executing treaty effect. **Hamdi v. Rumsfeld**: plurality held prez has power to detain enemy combatants indefinitely b/c AUMF statute showed Cong. approval (Youngstown framework). Souter dissenting, interprets AUMF differently. Only after this executive power established does question of Hamdi's due process right (review of detention) enter. Court finds curtailed DP review by bin Laden's(tenuous)

- **Hamdan v. Rumsfeld**: held prez does NOT have power to try non-citizen via special military tribunal b/c Cong. disagreed via UCMJ (maj.) and (plurality) UCMJ through lens of **Geneva Convention**—law of nations, vs. American common law of war. These tribunals need to meet certain criteria to be fair (e.g. cannot be held in absence).

- **Boumediene**: Gr. protex that it was protecting Cong. from executive overreach; habeas restrictions (on territory of sovereign) unconstitutional under Suspension Clause. Using Congress as justification made it look as though ct. wasn't understanding nat'l security, acting humbly, and deciding on narrow statutory grounds.

- **US v. Nixon** created *domestic privilege subject to balancing test*; can encompass almost anything: strongest where exec. makes claim of exec. privilege in regard to particular disclosure (Nixon didn't). **Clinton v. Jones**: no immunity to civil proceedings re: prior conduct b/c interest less strong (no need to safeguard unofficial conduct).

**Legislative Power**: Art. I imposes 2 reqs. on legislative action: **bicamerality** (action by both chambers of Congress) and **presentment** (bill goes to prez to sign or veto).

- **INS v. Chadha**: (limits on legislative veto) immigration judge (executive) determines whether illegal imm. deported; AG then has total discretion to enforce/overturn judgment. If stayed Chadha's deportation, House introduced resolution vetoing (I) decision. Court found unconstitutional b/c no bicameralism (only one house) and no
prevention. Essential that Congress found that veto essentially legislative in purpose and effect—altered legal rights, duties, relations of persons (both Chadha and officials involved). White’s: Dissent: Legis veto enmeshed in politics; here no threat of tyranny.

-Chadha’s DP a major concern. Basic due process requirements (notice/hearing/neural DM) can possibly replace e.g. non-Art. 3 courts in Guam/Samoa.

---Appointment: Art. II § 2.2: Executive power to nominate Officers requires “advice and consent of the senate” but as w/ special prosecutor in Morrison can vest appointment of inferior officers (hired & supervised by Officer) or “mere employees” in Frez, courts, or dept heads.

---Removal: Art. 2 § 4: Impeachment of executive persons. 4 rejected approaches: (1) Symmetry: whoever appoints can remove; (2) Removal is inherently executive function (Myers veto “take care” clause) [Taft, Scalia, Thomas]; (3) Impeachment by Cong from Art. II only; (4) Congress specifies in provision for each position pursuant to N&p Cl. Myers v. US: removal of executive officers [here postmaster] is solely executive function & must be done by president, where exec. power is solely vested in “take care” cl. Congressional action providing that can be removed only "with advice & consent of Senate"—congressional limits on removal power—is unconst. interference w/ exec. power.

---Humphrey’s Executor v. US: only purely (vs. quasi, e.g. policymaking Fed. Trade Comm.) exec. Officers under Presidential power such that removal restrictions apply. Otherwise Congress can under Art. I create independent agencies/insulate members from presidential removal unless for good cause if quasi-legis. or quasi-judicial.

---Bowsher v. Synar: Comptroller-General is head of Gen. Accountability Office, watchdog of Congress. Removable by Cong. for cause. Though legis. tolled to exercise lots of discretion in duty by GRH Act, i.e. execute the Act. Court found congress having removal power here was impermissible delegation of executive power to legislative official (CG) (b/c insulated from presidential removal). Criticism: if mere implementation of GRH = execution, this is absurdly broad definition of “execute.”

---McBride v. US: Office of Special Counsel, established by efficacy of Executive Branch to determine whether & when it was necessary to bring charges against inferior officers (special counsel or inferior counsel) for violation of the civil rights of Chadha. Office of Special Counsel at AG’s instigation. Powerful ind. counsel, difficult to remove (impeachment by AG/good cause only). (1) Is AC an Officer or inferior Officer? If Officer, good cause restriction problem under Myers. Even though doesn’t report to anyone court considers inferior Officer limited by jurisdiction, tenure, and subordinate to AG’s ability to remove. (2) Even in an 10, is cross-branch appointment by courts okay? Incongruity standard for CBAs: no incongruity b/tin pros. and court appointing. (3) Does overall scheme violate sep. of powers by undermining exec. authority & (inconsistent with Myers) to make removal decisions for good cause? Ct. formalizes Myers and Humphrey’s for functionalist approach: does the restriction impede/impermissibly undermine Prez’s ability to faithfully execute the laws? No. Also no agrandizement issue b/c legis. not taking more power but curtail executive’s by getting to judiciary. Vs. Bowsher: no Congressional role in removal; independence of IC from prez desired → Cong. can limit removal. power.

---Modern Approach: no Congressional participation in removal of pure Officer, but what is Officer determined by functionalist approach: what power does President need to do his job? Prevention of aggrandizement expansion of one branch’s powers at expense of another branch.

---Nondelegation doctrine: Congress, because invested with sole legis. power, cannot delegate it to executive administrative agencies b/c would violate sep. of powers.

Delegation is implied only if Congress provides intelligible principle guiding executive administration—very weak standard!

Trends regarding removal power in regard to Separation of Powers:

- (1) Emphasis on nbusi b/c removal power & power of control over person to be removed: control requires removal (Myers); flipside is power to remove influences court to control you (Morrison [Scalia dissents], Bowsher—CG removable by Congress thus legislative officer).

- (2) For cause/good cause removal restrictions not significant impediment to executive having required control of an Officer (Morrison—didn’t impermissibly undermine; Bowsher—control over CG not very restrictive; Humphrey’s—restriction on removal of FGC commissioner.

- (3) Move away from broader view of separation of powers (Morrison—narrower view of what power prez needs to do job; Myers—quasi-categorizations)

- (4) “Inferior officer” very broadly defined (most officials are this) (Morrison—IC did not seem very inferior).

- (5) Congress can limit removal by prez to good cause (esp. indep. from prez is desirable), but cannot prohibit completely; nor can it give self sole power to remove

Const. adjudication approaches: Counter-majoritarian dilemma: judicial review is CM/anti-democratic b/c founders overrule statutes enacted by popular vote/representation. Yet Constitution also purports to grant sovereign authority to people. 2 major questions (Bickel): (1) Whether/when it’s approp. for judges to adjudicate; (2) How does one prevent judicial tyranny/keep court in proper place?

Rests on questionable assumptions: (1) equates democracy w/ majority rule. (2) Assumes laws enacted by elected representatives must reflect majority will (corporate hegemony, imperialism) mathematically impossible to translate majority will into coinciding policy outcomes b/c of confounding intermediaries). Against dilemma (Dahl): (1) Historically courts never resist majority will; sometimes lags (e.g. Lochner era) but substantive operations of formal legal apparatus updated by replacement of justices/political pressure. (2) Flipside that Court never stands up for rights in face of majority opposition—see e.g. Korematsu, Dred Scott. Advantage of constitutionalism vs. parliamentarianism: stability General argument that political considerations prefigure adjudication—e.g. Marbury, Stuart Lochner-era court (economic theory, popular opinion, or power of other branches).

**Interpretivism:** const. adjudication just is interpretation of text, regardless of particular interpretive approach. Approaches:

- (1) Textualism: uses grammatical rules, original understanding of Founders of words, dictionaries from time; overlap w/ originalism; purposivist criticism: does “no veliies on the grass” also cover wheelchairs?

- (2) Originalism: was purpose of legislature in using certain words/phrasings?

- (3) Originalism: 1st Authorial intent: relied by inability to impute single intention to 500 people; furthermore, literal theory allows meanings never intended by authors. IL Public understanding (supplanting AI): soft originalism = general sense of purposes/aspirations; hard originalism = particular questions regarding portions of Const.

Arguments for originalism: founding was standard event transcending normal democratic procedures and deliberative care, so should bind us; saves us from judicial tyranny of unelected, unaccountable judges (counter: this is all judicial review). Criticism: “law office history” reduces complex narratives to superficial representations through taking preferred narratives at face value to support preordained conclusion; no supermajority representing all parties (women, slaves, non-propertied). Dispute w/ A-O basically over whether amendment (cumbersome, safe) or interp. is proper means of Const. evolution! Did framers intend A-O (via nat. rights)?

- (4) Anti-originalism: Const. is living meaning meant to be interpreted in context of current times re: public good; also covers pragmatism

- (5) Structuralism: how do structures of text fit together in best, most coherent manner (against Scalia’s ignoring first clause of A.2).

-Dworkin: judges ought to provide best constructive account of existing legal materials by putting text/predictions in best possible light: (a) fit existing materials and b) justify them by making them sensible and good rather than senseless and bad.

- (6) Natural Law: unwritten const. composed of fundamental “natural law” principles enforceable against states even if not in text.

**Justiciability—Art. 3 Limits on Judicial Power:** advisory opinions, standing, ripeness/mootness, political question doctrine. Ways court can duck difficult cases.

- Arg. for: protect SoP, conserve judicial resources, improve decision making w/ concrete controversies suited for jud. resolution, fairness; prevent a., of rights of persons not present (see e.g. class actions); yet these considerations must be balanced against need for judicial review. Tension bw/tion flexibility and predictability in doctrines.

- Arg. against: originalism (conflicts with structuralism, etc.) ↔ interpretivism versus structuralism argument that political considerations prefigure judicial decisions on legislative, lack of standing/ripeness etc., and cannot review state ct. judgments having adequate/independent basis in state law such that decision will only affect federal law.

- Standing: cases: has reasonable expectation of redress; possesses adequate/independent basis in state law such that decision will only affect federal law.

- 1. Prudential: general rules against 3rd party standing (cannot assert rights of others); generalized grievances (no standing where same injury as everyone else in country—appropriate forum is legislature; preserves SoP); zone of interest test: must be w/ in class intended to benefit from statute (esp. review of agency decisions under APA).

- 2. Constitutional: — (A) Injury-in fact: injury must be concrete/actual/imminent, not merely abstract/hypothetical. Criticism: how can this be a factual inquiry when which subjective categories of injury ought to be recognized is a legal/judicial judgment at cl.’s arbitrary discretion.

- (B) Causation: injury must be “fairly traceable” to charging action. Allen v. Wright: fed courts opinion on admissibility of racial discrimination ([Medina]) that no standing must be concrete; denial of interference w/ right to desegregated education: affirmed in Brown but here no standing b/c schools might still discriminate w/o money (but whole reason gov’t subsidizes activities is to encourage them)! Bottom case: note: causation/reddressability analyses often identical. Criticism (too): can’t possibly be made on basis of pleadings, unprincipled b/c depends on how ch. characterizes injury (compare cases!), unprincipled b/c deals w/ probability continuum not equipped to engage with.

- (C) Redressability: remedy must be likely to follow from favorable decision. Regents of UC v. Bakke: no chance to compete for spots set aside for non-white applicants is injury redressable by having opportunity to compete. Linda R.S. v. Richard D: increased probability of getting child support not suf. to satisfy redress.; req.: ct. presumes threat of criminal prosecution will not influence behavior! Dumber case—reducio would prevent standing for anyone! Role of non-const. considerations, e.g. pet’s race?

- (D) Rationality: Defendants of Wildlife: (purely procedural injury) sued for application of Endangered Species Act overseas; act provides for any citizen to challenge violations of it. Scalia: no standing b/c procedural injury = no standing b/c procedural injury; no standing b/c procedural injury—aegis provides for universal procedural standing and b) also harm to concrete interests—would have been okay if e.g. petitioners gave evidence of plans to visit countries like a plane ticket! Criticism: isn’t this, like magic boilerplate, a superficial req.? Also, why
shouldn't know of death of species be enough? Scalia: requiring enforcement of procedures impinges on Exec. authority from Take Care cl. *Criticism:* Ct. taking power from Congress who writes laws in first place. *Blackman's dissent:* Congress' provision for purely procedural standing has substantive ends determined by it—removing disputes litigation against admin. agencies.

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**FEC v. Akins** *(generalized grievance)* *GG* okays/satisfies IIF req. *if* isn't too abstract; *if* (a) widely shared & (b) of abstract and indefinite nature, then no IIF. Disclosure of info by AIPAC pursuant to FEC regulations providing for such disclosure. *Distinguish* from *U.S. v. Richardson:* denial of access to CIA info gives no standing b/c no statute protecting to citizens from that info (e.g., in creating right of privacy for info that can provide for enforcement of that right in manner of choosing; did in *Akins* but not *Richardson*).

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**Lesson from *Akins***: Congress can't make something not subject to judicial review by saying it's not subject to judicial review—making otherwise available to public—concretizing otherwise procedural. *Massachusetts v. EPA:* affirms "ecological nexus" test to satisfy C/R rejected in *Lujan* (emissions -> global warming->oceanic rise). EPA's failure to regulate emissions need not be but-for (nec) cause to have nexus—reduction of risk is sufficient. *Distinguish:* federalism concern b/c MA has "quasi-sovereign" interest in protecting its sovereign territory. *Moore v. Regents of the U of Mn.* cause to have nexus—reduction of risk is sufficient. *Distinguish:* federalism concern b/c MA has "quasi-sovereign" interest in protecting its sovereign territory. *Moore v. Regents of the U of Mn.* cause to have nexus—reduction of risk is sufficient. *Distinguish:* federalism concern b/c MA has "quasi-sovereign" interest in protecting its sovereign territory.

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**Ripeness/Mootness:** facts supporting standing have yet to develop (ripeness); standing existed at prior point (mootness). Ripeness -> Standing -> Mootness.

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**Ripeness:** Factors: (1) Are there non-factual issues for judicial decision? (2) What is hardship in requiring parties to wait (does/does not require immediate & significant change in behavior); (3) Are there serious political questions for non-compliance? *City of LA v. Lyons:* speculation that might be put in LAPD chokehold in future not ripe. *Criticism:* no one can pursue injunction against LAPD then! Defunis v. Delegal* cannot decide questions that cannot affect rights of litigants in case before Ct. (here in final semester of law school; 2nd to denial of admission a non-justiciable question)

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**Mootness:** Ct. will consider moot case where (1) Voluntary cessation of allegedly illegal conduct (after injunctive relief obtained; e.g. suspension of an AA policy every time litigation portends) (2) Capable of repetition yet evading review (Roe v. Wade).

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**Political Questions:** case non-justiciable where (from *Baker*): (1) Textually demonstrable Const. commitment of issue to coordinate political dept.; (2) Lack of judicially manageable standards for resolving it; (3) Impossibility of deciding w/o initial policy determination not w/in judicial discretion; (4) Would court to direct non-probative coordinate bracnhes of govt. *Areas applied in:* foreign affairs, Guaran. cl. political process, Congress' internal processes, impeachment. *Arguments for:* fed. judiciary avoids controversial questions, limits courts imposition on democracy (CMD), relative institutional competence, danger of fed. court's self-interest in reviewing amendment process, separation of powers grounds; *Arguments against:* judicial role to enforce const./preserve matters from majoritarian interference, fed. courts robustly credible, equities deference with adjudication. 

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**Baker v. Carr:** meaning of Guarantee Cl. ("Republican form of govt") has no judicially-manageable standards b/c meaning too unclear (*Luther v. Borden*) (versus EP cl. which does). Malapportionment of state legislatures invokes EP cl., not Guarantee cl. *Frankfurter's dissent:* too abstract for judges; for electorate to decide. Also, EP clause just as vague as GC—why judicial standards developed for one but not the other?

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**Nixon v. U.S.** Question whether "try" in Impeachment cl. mandates jury by whole Senate non-justic. b/c impeachment is legs. sole check on judiciary and would be conflict of interest. *Souter:* cl. has some discretion re: impeachment, e.g. flipping a coin unacceptable ("sanity check"). *Committee* standard clearly okay.

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**Powell v. McCormack:** does "each House shall be Judge of Qualification of its Members" allow House to exclude rep. from taking seat? political question? no—textual commit. issue to House is to narrow scope of judicial qualifications. Imp't distinction: Nixon—no discretion; *Powell*—limited scope of discretion.

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**Bush v. Gore:** Any dollar counting means of valuation of EP cl. remedy is to halt recount. Political question b/c SCt. basically saying it doesn't think Florida could do a recount, so it can’t. Death of PQ doctrine! Was tool of *Bush v. Gore* (where non-justiciable fear of secession) as such here issue.

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**Federalism—Enumerated Powers:** Federalism: vertical division of power (v/s horizontal of SOP) and subject matter juris. between multiple govt’s.

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**Porcupine virtues:** (1) like SOP, splitting govt’s protects against tyranny by preventing use of power for individual purposes (mathematical Two State Markov model—less likely system will align); (2) market of govt’s among which citizens can shop; *Tiebout hypothesis*—jurisdictional competition will maximize choice-satisfaction through specialization; *criticisms:* where’s the empirical support? Aggregate welfare demands restraint but tragedy of commons re: taxes, environmental regulation, etc. Practical criticism: fed. govt’s far better at protecting civil rights!

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**Enumerated powers** split illegally coping powers in Const. text belong to fed. gov’t; all others belong to states/people. (*A.10, N&P cl. S cl.) *McCollough v. Maryland:* Marshall enforces emoluments clause against states' power, states against fed. power in context of whether fed. govt’s can make nat’l bank/states tax it?

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**10th Amendment:** powers not delegated to US by Const., nor prohibited by it States, are reserved to States respectively, or to people. *Marshall overcomes:* (a) textualism: expressly omitted though was ok in AOC to framers didn’t intend to deny states/const. powers state power against fed. in context of whether fed. govt’s can make nat’l bank/states tax it? (b) straitjacket: giving Congress powers must have ability to use them—need roads leading to the post office.

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**Necessary & Proper Clause:** Congress will have powers not explicit in constitution N&P for carrying out enumerated ones. However, "necessary" ought to mean strictly construed, not efficacious. *Marshall overcomes:* strict construction would strangle ability to thrive/react to crises or modern exigencies; would make court a humbly powerful b/c would have to evaluate every law to find out whether necessary. *Makes N&P. cl. of power rather than restraints.*

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**Supremacy Clause:** *Art VI cl.* Const./Treaties/Constitution are supreme. Marshall uses this rather than N&P. cl. to unjustly nat’l bank. Invokes S. cl. where relevant federal interests at stake that Congress has made no move to protect—here MD’s power to tax, which is power to destroy. Destroy what? Unclear here. S. cl. becomes protective barrier for fed. govt interests.

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**Commerce Clause:** Why do we need it? (1) Pure coordination problem: horrible logistical problems where each state e.g. has own trucking reg.; difficult to work out w/o overarching representative authority (fed. govt.). (2) Tragedy of commons: aggregate incentive to cooperate (e.g. we need environmental reg.) but individual incentive not to everyone cheats and everyone worse off. *Arguments for restricting:* federalism concerns (outdated).

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**Stage 1:** (formalism)—Schechter Poultry: codal of blue. for poultry ind. voluntarily adopted by supermajority. Chickens come from other states but go to butchers interstate. Not it. *NLRB v. Jones & Laughlin steel:* industrial ind. is not commerce. *McCulloch v. Maryland:* Marshall enforces emoluments clause against states' power, states against fed. power in context of whether fed. govt’s can make nat’l bank/states tax it?

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**Stage 1:** (neoclassical)—U.S. v. Lopez: *GSF Act*—fed. offense to possess firearm in school zone—unconstitutional. 4 doctrinal themes: (1) Return to commerce/non-commerce distinction as economic/non-economic. (2) Federalism in areas of trad. state sovereignty (here education, crime). (3) Limitation of aggregation principle—slippery slope leading to reg. of any behavior (why is this bad?) Aggregation okay if of economic units. (4) Undermines RB review from stage 3: "substantial effect" req. -> direct/indirect test from stage 1. Slippery-slope: if can regulate this can regulate anything of state’s—(that’s b/c states have control of ISC and ISC controls are essential/appropriate to protect ISC from obstructions. Labor unrest disrupts IS markets, everyone cheats and everyone worse off.)

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**Stage 2:** (transition)—NLRB v. Jones & Laughlin Steel: Robert’s SITTS9. NLRB established right to unionize via CC. Direct/indirect test becomes *Wickard v. Filburn*—direct/indirect test becomes *Vick’rd* v. Filburn. Arguments for restricting:aggregate incentive to cooperate (e.g. we need environmental reg.) but individual incentive not to everyone cheats and everyone worse off. *Arguments for restricting:* federalism concerns (outdated).

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**Stage 3:** (modern)—*Wickard v. Filburn:* Agr. Adj. Act reduce wheat supply b/c consumption reduced. Filburn exceeded quota for personal use. Effect on ISC? Exchange is not *substantially effect ISC*. Ct. ephemeral rule that b/c a regulation that incidentally affects ISC. *Cheyenne River Sioux Tribe v. U.S.* Ct. OKs regulation of ISC for Montana's transactional purposes (b/c trust of nat’l gov’t’s capacity for effective administration (this could just be rationalization).

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**Stage 4:** (categorical formalism)—*U.S. v. Richardson*: *NFIB Act*—feds. fail to regulate ISC in context of state law (e.g. sep. of powers) -> strict reading of Rec. Amendments.

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**U.S. v. Morrison:** Violence Against Women Act—civil remedy for gender-based violence not w/in CC power. *Criticism:* why isn’t this analogous to civil rights in stage 3? Maybe: no economic nexus, b/c no "demand" for violence against women; or, exercising political judgment traditionally reserved to legis. *Less deferential RB review:* rather than accepting legit. conclusions re: existence of substantial effect, *Ct.* asks itself if it agrees there is such effect.

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**Possible explanation for Stage 4:** more federalism-concerned conservative justices on court (note that rulings generally 5-4). *Ways to make VAWA constitutional:* (a) add "substantially effect ISC" to statute; (b) add jurisdictional predicate, e.g. "regulated in manner using public accommodations included in ISC," (c) instantiate finding of "substantial effect ISC" to statute. *Stage 57:* Gonzalez v. Raich: California legalized medicinal marijuana—challenged const. of fed. statute banning on ISC grounds; ct. found Cali statute unconstitutional. Is this a return to definition of stage 3? Result-driven judgment? Factual similarity to *Wickard*?
Dormant Commerce Clause: commerce clause limitation on power of states (original intent arg.: finders intended exclusive grant of power to Congress).

- Arguments for Court using: (1) Free trade is desirable and court enforcement facilitates it [[ja] states will race to bottom b/c necessity of protectionism]; (b) pure coordination problem: coordinating fed. to ensure functional-equal (e.g. Coa failed)!! (2) Congress needs help—too much legislative processing. (3) Congressional silence even though there has been no case that statute could have prevented (statute could have also authorized by statute, however). Also, one should not harmed by laws in states where one lacks political support.

- Arguments against having it: no textual provision for it, included iners/ Congressional authority/SoP.

- Meant to prevent state protectionism by discriminating against out of state actors. 3 types of discrimination: (1) Facial—all out-of-state actors d'd against—strict scrutiny (strong pres. of invalidity); (2) Effective Discrimination—even though never brought in cases of discrimination, the Court, apprehending apparent discriminatory intent, subject to scrutiny; (3) Mere Intent to Discriminate—b/c executive action always requires some policymaking.

- Framework: and on what basis can courts require people to eat outside of state? Must be in pursuit of general welfare.

- (A) If significantly discriminatory -> strict scrutiny: must be no less restrictive alternative available; strong presumption of invalidity.

- (B) IF NOT faciaaly discriminatory -> balancing test: uphold statute unless burden on ISC is clearly excessive in relation to local benefit.

- (C) Court sometimes employs strict scrutiny when it suspects a discriminatory purpose behind statute.

- (D) Does law generate negative externalities for other states (Philadelphia, Kassel)? This can weigh in balancing test or cause to fail SS.

- C.I. likely to find discrimination where: (1) Effectively excludes virtually all out-of-staters from particular state market, but not if just one group of OOS ( Exxon, Clover Leaf Creamery); (2) imposes costs on OOS; (3) Apparently motivated by protectionist purpose (Hunt, Healy).
Preemption
limitation on power of states. Sources: (1) Art. I § 10: restrictions on state power. (2) Art. VI: Supremacy clause. Note: absent preemption, can challenge state
laws via either dormant CC or P&L clause. Policy considerations: should court preserve federalism or show deference to state/local legislatures? See policy re: dormant CC! 3 types: (1) Direct: statute contains provision specifically indicating which state laws preempted. (2) Field: scheme of fed. regs. so pervasive as to reasonably invoke intent of Congress to leave no room for state to supplement (like dormant CC). (3) Conflict: Either (a) compliance w/ both state and fed. law impossible or (b) state law presents obstacle to accomplishment/execution of federal purposes/objectives.
-Gage v. NSMWA: invalidated Illinois reqrs. for workers in fed. OSHA. Majority: field preemption intended to subject employees to only one set of regs. Concurrence: express preemption even though no conflict between two regs. Note: ct. can avoid preemption by narrowly construing purpose of fed. law!
-Crowley v. Nat’l Foreign Trade Council: Cong. statute imposing mandatory/cond. sanctions on Burma 3 mos after similar Mass. statute. Ct. could have found field (“comprehensive”) but found conflict instead. State law is obstacle: (1) Impairs scope of prez power—less than full weight of nat’l economy at disposal; interferes w/ prez speaking as one voice in foreign affairs. (2) Mass. statute isn’t a waiver of sovereignty or expressly inconsistent w/ fed. law. (3) Complaints about Benighted States (dairy farmers taxed for health & safety inspection and proceeds pooled to be redistributed to in-state dairy producers. Health & safety inspections and dairy subsidies okay by themselves, but are protectionist in this combination by transferring funds from OOS to in-state. New vs. old FF test (4) Which is more protective of individual rights? While TI is more predictable and minimizes problem of judicial discretion, FF allows extension beyond BoR (e.g. can enforce trespass claims by racist states via either dormant CC or P&L clause.)

Problems
3 types
- Bringz Brothers v. Brooks: Bank’s agents repossessed house pursuant to law—no state action so no need for procedural DP. Deprivation must be (1) Caused by state AND (2) by “fairly said” to be state action—employed by OR acting w/ “significant aid” of state. Crucial: state embodied its decision to refrain from acting in statute. Argument against FBs actions efficacious only by back-up of threat of state force—so satisfies (A). ***Would balancing test be preferable?***
- Kassel v. Consolidated Freightways Corp.: IA statute prohibited use of larger trucks; ostensible safety reasons; court struck down even though transporters to accomplish/execution of federal purposes/objectives.
- Palko v. Connecticut: (1908, 1937) (1) Impairs scope of prez power—less than full weight of nat’l economy at disposal; interferes w/ prez speaking as one voice in foreign affairs. (2) Mass. statute isn’t a waiver of sovereignty or expressly inconsistent w/ fed. law. (3) Complaints about Benighted States (dairy farmers taxed for health & safety inspection and proceeds pooled to be redistributed to in-state dairy producers. Health & safety inspections and dairy subsidies okay by themselves, but are protectionist in this combination by transferring funds from OOS to in-state. New vs. old FF test (4) Which is more protective of individual rights? While TI is more predictable and minimizes problem of judicial discretion, FF allows extension beyond BoR (e.g. can enforce trespass claims by racist states via either dormant CC or P&L clause.)

State Actor Requirement
To what extent do Reconstruction Amendments empower fed. gov’t to regulate conduct of private individuals? A.13 always read as affecting private conduct (slavery prohibited anywhere in US, only private actors had slaves). Theory: Classic liberal conception—threats to freedom of indiv. comes from gov’t; but Marshall v. Alabama (co. owned town, arrested JWs) → private power just as dangerous; public function doctrine: private actors may be deemed state ones where many public functions delegated to them—limited (e.g. priv. schools not functions) Questionable distinctions: private/public, action/inaction. Analytically, can conceptualize any private infringement of const. values as result of gov’t inaction—e.g. gov’t denies equal protection if permits priv. racialdisc.
- Other justifications: (1) preserves zone of private autonomy, but sacrifices indiv. freedom via allowing violation of rights; (2) enhances federalism—preserves zone of state sovereignty (reg. of individuals vs. state police power); questionable view of federalism post-civil rights and doesn’t justify rights infringing.
- Requirements for cert. to implicate private conduct—must be either (A) sufficient degree of state involvement w/ that conduct or (B) failure by state to act in circ. where Const. affirms fed. power to act.
- The Civil Rights Cases: (1883) Cong. cannot prohibit disc. in public facilities via “badges & incidents” provision—special legal status to former slaves (stupid case)
- DeShaney v. W. Cnty. Dep’t of Social Services: DP cl. does not require state to protect life/propery against invasion by private actors. Abused child, state failed to stop dad from beating. Different outcome if e.g. state intervened for white but not black children (equal protection violation).
- Lugar v. Edmondson Oil Co.: DP violation where writ of attachment for property executed by county sheriff sufficient state involvement (this & Shelly v. FP) → sufficient state involvement (this & Shelly v. FP)
- Shelley v. Kraemer: No restrictive covenants b/c enforcement of them by courts constitutes state action susceptible to A.14. Is this just b/c it is enforcement of racial restrictions against background of prohibition of restraints on alienation (i.e. racist governmental purpose)? Implicitly limited, e.g. can enforce trespass claims by racist owner! Washington v. Davis: Do factually neutral statutes w/ discriminatory impact (vs. intentionally disc. ones) constitute state action?

Privileges & Immunities Clause: 2 clauses—A.14 is distinguished from Art. IV’s in Slaughterhouse Cases. Ct. found Louisiana slaughterhouse monopoly preventing other butcher’s from having own business (had to pay to have animals slaughtered there) constitutional, b/c P&L clause not incorporated (and doesn’t incorporate Bill of Rights). Art. IV § 2: “P&L of citizens in the several States”—sole purpose was to declare to several states that whatever rights are granted to own citizens must be rights of citizens of other states in your jurisdiction, the “Rights of Englishmen.” Protects fundamental rights e.g. to be free from torture; (14) Amend. effects of laws on citizens of the United States—construes as response to Dred Scott to undo law and its effects; applies only to fed. gov’t, not states. Protects rights uniquely federal in character from “Fed. gov’t, its national character, Const., or its laws”—right to come to seat of gov’t and assert claim, seek its protection, share offices, access seaports, courts, habeas corpus, peaceably assemble.
- Problems: (1) Practical nullity—guts A.14 P&L d/b/a only protects rights in fed. law not much use to former slaves trying to get equality (2) Inconsistent with intent of Reconstruction Congress in adopting A.14—change from “several states” to “US” to make clear that racial, fed. regulated, was abolished.
- Alternative Readings: (1) Intended to incorporate Bill of Rights against states; but this would mean inclusion of a DP cl. was redundant, and original P&L cl. was distinct from BoR. (2) Meant to enforce remedial provisions of 1866 Civil Rights Act to remedy racial inequality (3) Meant to incorporate P&L clause as limiting legis., DP against judiciary, and DP against executive—a natural reading rejected by court. Would infringe on federalism, but good arg. that this is exactly what RCong. had in mind—to prevent states from discriminating! Solution: Ct. employed substantive due process (Lochner overruled Slaughterhouse, commerce clause, & A.14 § 5 enforce powers for same result.

Incorporation
whether/what extent Bill of Rights applied against states via A.14 due process clause. Fundamental fairness vs. total incorporation.
- Barron v. Baltimore: (1833) A 5 “just compensation” provision applies only to fed. gov’t—states can take land whenever they want.
- Twining v. NJ & P&L & Connection: (1908, 1937) (fundamental fairness) due process clause incorporated only to the extent necessary to protect “fundamental principles of liberty and justice” which lie at base of all our civil/political institutions—i.e. that are essential to any concept of ordered liberty. These rights exist ind. of gov’ts and legislatures. Includes freedom of speech, press, assembly, religion, right to counsel; NOT A.5 right to freedom from self-incrimination or A.7 right to trial by jury. Problems: (1) Leaves too much to judicial discretion for enforcement purposes (2)forum shopping; court can enforce freedom to testify but generally does not have to. (3) Errors in determinations of right to testify especially common. (4) Conflict: (a) meaningful domestic resistance to statute, (b) prohibited sale on private property more costly, so less reason to suspect purpose. Vs. Carbene: will still be out-of-state pulpwood mong competition.
- DeShaney v. W.C. Dep’t of Social Services: IA statute prohibited use of larger trucks; ostensible safety reasons; court struck down even though transporters to accomplish/execution of federal purposes/objectives.
- Lugar v. Edmondson Oil Co.: DP violation where writ of attachment for property executed by county sheriff sufficient state involvement (this & Shelly v. FP) → sufficient state involvement (this & Shelly v. FP)
- Shelley v. Kraemer: No restrictive covenants b/c enforcement of them by courts constitutes state action susceptible to A.14. Is this just b/c it is enforcement of racial restrictions against background of prohibition of restraints on alienation (i.e. racist governmental purpose)? Implicitly limited, e.g. can enforce trespass claims by racist owner! Washington v. Davis: Do factually neutral statutes w/ discriminatory impact (vs. intentionally disc. ones) constitute state action?

- New vs. old FP test (Twining vs. Duncan): positive vs. negative framing, “unimaginable w/o” “fundamentality,” hypothetically vs. actual.

- Maine v. Taylor: even though facially disc., restriction on importation of live batfish survives strict scrutiny b/c environmental concern (preservation of ecosystem) and no less burdensome way to sift through species. Reference here b/c court recognized they are not marine biologist.
- Hunt v. WA State Apple Adv. Comm.: Court found effective d. in requiring out-of-state actors to use inferior grading system, and that less d. alternatives available (SS). Possibly court contemplated d. purpose in admission it was passed on behalf of NC apple industry. Inference: disc. effect → disc. purpose?
- Minnesota v. Clover Leaf Creamery: (particular industry) disposable pulpwood but not plastic containers allowed for milk; MN had pulpwood industry but not plastic.
- Environmentalism: is substantive protection but pulpwood worse for environment. Yet court upholds! Vs. Hunt: (a) meaningful domestic resistance to statute, (b) prohibited sale on private property more costly, so less reason to suspect purpose. Vs. Carbene: will still be out-of-state pulpwood mong competition.
- West Lynn Creamery v. Healy: OOS dairy farmers taxed for health & safety inspection and proceeds pooled to be redistributed to in-state dairy producers. Health & safety inspections and dairy subsidies okay by themselves, but are protectionist in this combination by transferring funds from OOS to in-state. New vs. old FF test (4) Which is more protective of individual rights? While TI is more predictable and minimizes problem of judicial discretion, FF allows extension beyond BoR (e.g. can enforce trespass claims by racist states via either dormant CC or P&L clause.)