I.  **Introduction: Symmetry Among First 3 Articles of Constitution**

A.  **Federalism:** is a form of government in which power is divided between central government and several formerly independent regional governments.

1.  In the United States, the individual states surrender partial sovereignty but retain all rights and prerogatives not specifically assigned to the federal government under the Constitution.

B.  **Conferrals of Power: Articles 1-3:**

1.  **Symmetry Among First 3 Articles of Constitution**
   a.  Article 1: Conferral of Power on Legislative Body
   b.  Article 2: Conferral of Power on the Executive
   c.  Article 3: Conferral of Power to the Judiciary

2.  The instrument (constitution) is constitutive of the branches of the government

3.  Article 1, Section 8: Model of Limited Government:
   a.  “enumeratio unius est exclusio alterius”: The enumeration of one excludes the other
   b.  Enumerate the powers to ensure the branches of government are limited (Section 8: 17 paragraphs that confer specific powers)

4.  Whether provisions in Bill of Rights to be understood different from Conferral of powers (i.e. denials of certain powers)
   a.  Ex: 1st Amendment: A duty not to establish a state church or is this an express denial of a power to establish a state church?
      i.  What looked like a conferred power was cut off
      ii.  Paulson: denial of certain powers in Bill of Rights
   b.  Citizen’s Immunity – Government Disability
      (not subject to (govt. has no power X) exercise of govt. power X).
      i.  Governmental disability: relationship of correlativity

5.  **The Amendments are typically express denial of powers while the Articles are the conferral of powers**

C.  **Slippery-Slope Arguments**

1.  1st way to examine slippery-slope arguments: **causal criteria**
2.  2nd way to examine slippery-slope arguments: **normative criteria**
3.  **Ex:**
   a.  Matrix 1:
      i.  End: fair treatment to workers
      ii.  Means: Taft and Hartley Act
   b.  Matrix 2:
      i.  End: the object of the Taft/Hartley Act
      ii.  Means: federal legislation solving child labor
   c.  Causal Claim: federally imposed minimum wage
   d.  Causal Claim is tenable so move on to criteria #2: is the result desirable?
      i.  Many people would argue the result is desirable

4.  Slippery-Slope Arguments Attacked by:
   a.  Causal claim
   b.  If causal claim passes muster then move to normative judgment: desirable or undesirable?

II.  **Judicial Power**
A. **Marbury v. Madison** (1803): **Judicial Review**

1. **Facts:** Marbury petitions for writ of mandamus (court order to Secretary of State to deliver the commission)
2. Which branch of the federal government shall have the final say in interpreting the Constitution?
3. Power to review Congressional legislation on constitutional grounds
   a. Marshall: constitutional review is important (but easy to justify)
   b. Power aggregated: took later Courts recognizing this power and then using it
4. Distinguish Four Parts of the Opinion:
   a. (i) The substantive question
   b. (ii) The jurisdictional question
      i. Interpretation of § 13, and or Article III, § 2
      ii. The political dimension of the case
   c. (iii) Arguments, philosophical and legal, on constitutional review and Judge Gibson, *Eakin v. Raab*
   d. (iv) Arguments, philosophical and legal, on constitutional review and Judge Gibson, *Eakin v. Raab*
5. Substantive Question: has the commission been consummated?
   a. Yes: the appointment has been carried out (president signed the commission, seal of the union affixed)
   b. Leaves jurisdictional question to be able to pass on substantive question
6. **Jurisdictional Question:**

<table>
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<tr>
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<th>Readings of statutory power under Section 13</th>
<th>Readings of Constitutional power under Art. III, Sec. 2</th>
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<td>Orig. Juris. X</td>
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   a. Govt.: argues case should be dismissed b/c statutory authorization under section 13 only for appellate jurisdiction
   b. Marbury: argues original jurisdiction from statute or Const.
      i. Const. gives original jurisdiction under Art. III, Sec. 2, Para. 2 (general grant of original jurisdiction)
   c. Held: (J. Marshall): Supreme Court has appellate jurisdiction
      i. Not a general grant: only the specific cases listed have original jurisdiction in the Supreme Court
      ii. No Constitutional cover in this context but Congress *purported* to grant original jurisdiction and therefore the statutory provision is unconstitutional

7. **Held:** The provision in the Congressional statute purporting to grant original jurisdiction is unconstitutional
   a. This holding was aggregated: constitutional review reaching to legislation
   b. Hard to say whether framers intended this: the holding was built upon as law
8. Justice Holmes, Justice Jackson (Sup. #2, p. 75): no inevitability (contra the rule in Martin)
9. Consider competing readings of the holding/rule: Why did Marshall not grant the government’s motion to dismiss (on the second, jurisdictional question)?
   a. Marshall wants to reach issue of congressional review
      i. Federalist issue: agenda in background
   b. Would have rendered Marshall’s vindication of Marbury meaningless
      i. Attempt to give Marbury a bona fide legal claim
10. Explanation v. Justification of steps leading Marshall to establish constitutional review power
   a. Explanation (facts): Federalist party was losing power
   b. Different from justification (normative): reason why it ought to be the case
   c. Explanation distinct from whatever justification Marshall may offer for constitutional review power
11. No institutional design required the Marbury rule
12. Compare review powers of the German centralized Constitutional Court
   a. Our model: de-centralized constitutional review has not had much influence
   b. German model: centralized constitutional review
      i. More influential: Only one court can pass on constitutional questions
      ii. Important in globalized world (Ex: Eastern Europe, South Africa, South Korea)

B. #1: Constitution is Paramount
   Constitution different from and superior to ordinary legislation (distinction of levels)
   1. Const. would be just ordinary piece of legislation: new legislation will take priority over the contrary const. provision
      a. “lex posterior derrogat legi priori”
   2. Marshall: reductio ad absurdum argument- must have distinction of levels instead of above absurd argument

C. #2: Judiciary interprets:
   Whether the courts are going to pass on these questions (conflicts between legislation and the Constitution)
   1. Note: questions surrounding the justificiation issue here:
      a. Political scientists: concerned w/ the explanation
      b. Constitutional lawyers: concerned w/ the justification
   2. Gibson: against judicial review:
      a. Gibson: against Marshall by arguing the people are supposed to be sovereign and not judges
         i. Not issues for Court to decide but for people to decide
      b. Gibson: slippery-slope argument (How far will review power go?)
         i. Causal critique: review power will increase in scope
         ii. Normative critique: is this increase in judicial review power a good or bad thing?
         iii. Conclusion: arguments can be made on both sides
   3. Marshall Argues: Judicial Review power was always there
      a. Marshall argues from the Const. text
      b. Art. III, Sec. 2, Para. 1: Both sides can take from the “arising under” clause what is needed for their arguments
         i. Judiciary hears all cases arising under the laws of the U.S.
c. If Congress has potential to ride over states’ rights: is Court the proper place to sort out these conflicts?

d. Ex: Bills of attainder (individual rights): If Congress runs over provisions of Art. I, Sec. 9, Para. 3, is the Court the proper place to sort out the conflicts?

D. Other Arguments for Judicial Review

1. Countermajoritarian Role – Congress represents the majority and therefore might create laws that infringe the minority’s constitutionally guaranteed rights. Federal judges are appointed for life and therefore less susceptible to political pressure.
   a. Argument that Judiciary best to decide: where rights granted to citizens are understood it is right for Courts to pass on these questions
   b. Ex: Civil Rights Movement (majority walked all over minority rights)

2. Stability – If each branch were free to interpret the Constitution there would be no final answer because:
   a. The branches would probably interpret the Const. in its favor leading to conflicting powers
   b. A Court’s decision would have limited effect. It could then be overruled by another branch.

3. Practicing self-limitations:
   a. Court typically decide for the only issue presented by the facts (narrow holding)
   b. Court will not decide the Const. issue if the case can be decided on some other grounds.
   c. Courts can attempt to construe statutes as to not conflict w/ the Const.

4. Common Law: (see below)

E. Other Arguments against Judicial Review:

1. Antidemocratic – Federal judges are not elected officials and therefore not politically accountable. To vest final authority over the Constitution’s meaning is a repudiation of the principle of democratic self-governance. For example:
   a. Substantive due process declaring “liberty to contract”
   b. Bush v. Gore

2. Entrenched Error – it is very difficult to correct mistaken judicial interpretations. The only avenues for correction are:
   a. Court changes its mind
   b. Appoint new Justices
   c. Impeachment
   d. Const. Amendment

F. Precedents for Judicial Review

1. Lord Coke found in Common Law: ability to overturn legislation (Sup. #2, p. 75, footnote #15)

2. John Locke: 2nd Treatise on Govt.: the “people” have power to take back some of the delegated authority
   a. Limits on what Congress can do

3. Hamilton Federalist #78

4. Colonial period: privy council
   a. Colonists set aside British law

5. Pre-1789 (pre-“Constitution”): state courts appealing to state law and setting aside legislation

G. Martin v. Hunter’s Lessee (1816): Judicial Review
1. See Justice Holmes, etc… (above), and ask: why is review power inevitable here?
   a. Judicial review of state decisions is easier to justify than judicial review of Congress
   b. Without such power: more like confederacy
      i. Fed. System would spin out of control
      ii. States could spin themselves out of the union
   c. Distinction:
      i. Confederacy as loose alliance v. federal level having last word
   d. In Federal System: Constitutional review of state law may be more justified than of Congress
      i. Especially when unity of fed. System in question

2. Why is judicial review inevitable here?
   a. Const. review of state court decisions is the glue that holds the union together during times of instability
   b. Provides uniformity when there is stability
   c. Easier to establish judicial review power here than in Marbury b/c there was no similar issue dealing/ w the design of the system in Marbury

3. Facts: Claim for title of land in Virginia. Authorized by Virginia statute, land of Britain’s loyalists was confiscated. VA statute possibly conflicted with 1783 peace treaty with Britain. Martin argued that SC was authorized by the Judiciary Act. Hunter argued that it was unconstitutional for the Supreme Court to overrule a decision of a State’s highest court

4. Issue: does a particular Virginia statute conflict w/ a federal treaty?
   a. Virginia Court of Appeals refused to recognize the Supreme Court’s decision in Martin I

5. Held: The Supreme Court could review the constitutionality of a decision by a state’s highest court

6. J. Story’s Reasons for Decision:
   a. Art. III of Const. grants general appellate jurisdiction
      i. Supreme Court’s original jurisdiction is enumerated
      ii. The appellate jurisdiction is general
   b. J. Story responds to Virginia’s argument that the state is not bound by federal law:
      i. Supremacy Clause (Art. 6, Para. 2): binds Virginia to federal law

7. State Supreme Court review of highest Supreme Court decisions adverse to federal law, see 1789 Judicial Act, § 25
   a. Emphasis: federalism (review power of state law included in concept)
   b. Federalism set in place in Judiciary Act of 1789

8. Need for uniformity: have standard law
   a. Each state w/ own laws: questions survival of federal union
   b. If no way to get from state court to federal court then laws contrary to Constitution could be upheld and enforced in states

9. Removal Power: as Virginia argues is not sufficient
   a. J. Story: not adequate b/c lawyers may not remove or statute may not provide for removal
      i. Doesn’t exhaust possibilities of Supreme Court to review
   b. Need federal review: because case may not be removed

H. German Centralized Constitutional Review
   1. Motivation: building in restraints in constitution so fascism would not rise again
German Constitution Article I: Human dignity inviolable

German constitutional review is broader: a general rule that everyone must follow
a. In U.S.: just cases at hand decided and does not abrogate statute

Holding of unconstitutionality: abrogates the statute or rule
a. Germany: sends directive to Parliament to write new legislation and sets deadline to have it done
b. Our system: only set aside the offending provision, reflection of common law in our constitutional process
   i. Art. III, Sec. 2, Para. 1 (“Case and Controversy Clause”): all Court can do is set statute aside for case at hand (no ability to direct Congress)
   ii. “stare decisis”: stand by what’s been decided
   iii. Up to legislature to change b/c doesn’t remove statute
   iv. Follow precedent: common law learning
   v. Offending state provisions die as a victim of neglect

Abstract Constitutional Review (w/o concrete case)

Our system: Courts don’t have such power to decide abstract disputes

German Courts can hear political questions
a. Our courts cannot hear political questions

III. Congressional Power vis-à-vis the Judiciary

A. Ex parte McCordle (1869) Cong. Power to curb/limit jurisdiction (pending case)

1. Question of Congressional control over appellate court jurisdiction
2. Facts: McCordle was imprisoned by military governor of Mississippi, argued the Reconstruction Acts were unconstitutional, sought writ of habeus corpus under 1867 Repealer Act that granted the Supreme Court appellate jurisdiction of the case. After the argument in the Court, Congress stripped the SC of the power to rule on the case (through Repealer Act) because it feared the court would rule the Acts unconstitutional.
   a. “habeaus corpus”: for defendant to produce the body
   b. Judiciary Act of 1789 (§ 14): authorizes Supreme Court to issue original writs of habeaus corpus and to review habeaus corpus actions in lower court (Given by Const. in Art. I, Sec. 9, Para. 2)
3. Held: Supreme Court did not have jurisdiction of appeal
4. Rule: Even if a case is pending, the power of Congress to curb/limit jurisdiction is permitted
   a. The appellate jurisdiction of the Supreme Court is conferred “with such exceptions and under such regulations as Congress shall make” (Art. III, Sec. 2, Para. 2) thus Congress can remove its jurisdiction even when a case is pending in the federal courts.
5. Compare holding w/ received opinion on “McCordle rule”
   a. McCordle doesn’t establish the proposition that the Congress’ power under the exceptions clause is unlimited as compared to the boilerplate version of McCordle we have today
   b. Generally: McCordle is seen as an anomaly
   a. Facts: claim for compensation for property destroyed by Union Army. Klein Arg: Presidential pardon = loyal, therefore deserving of his
compensation. Cong. legislation = Presidential pardons of such nature heretofore declared a person disloyal, and directed courts to dismiss for want of jurisdiction for any such person.

b. **Held:** Supreme Court held the Congressional Act unconstitutional
   i. Congress does not have unlimited power to tamper w/ the Supreme Court’s appellate jurisdiction

c. **Rule: Congressional legislation restricting the jurisdiction of the Supreme Court for specific cases invades its judicial functions and violates the separation of powers.**
   i. Congress involved in judicial proceeding: essentially directing judges how to decide

d. **Rationale:**
   i. Court relied upon separation of powers. Here, Congress attempted to command the courts how to interpret evidence before them without changing the governing substantive and procedural law. Therefore, Congress ultimately decided the case.
   ii. If Congress wants to change the rules it must do so by changing substantive or procedural law that has neutral application upon all litigants.

e. **Exceptions Clause:** dealing w/ limits on constitutional power: a dynamic at play (Art. III, Sec. 2, Para. 2)

f. **Klein** could be read as not addressing the Exceptions Clause at all: separation of powers issue (?)
   i. Ind means of reaching same end = different route from *McCordle*

7. **Compare Robertson v. Seattle Audubon Society:** Congress can change the law applying to cases not yet decided
   a. **Facts:** “Spotted Owl” case. Environmentalists brought suit challenging the legality of logging in old growth forests. Congress altered the laws governing the case, specifically listed this case saying it was now legal.
   b. Audubon’s Argument (Klein strategy brought up to date): imperative tone of new provision showed Congress was dictating results in a pending case.
      i. the legislation is simply directing the result (The legislation even identifies the cases and the docket number)

   c. **Held:** The Congressional statute altering Forest Service provisions was upheld.
      i. Directed at both the Forest Service and the courts

d. **Rule:** A regulatory statute that binds both the administer and the interpreter of the law does not interfere with the judiciary’s power.

e. Statutory claims: Congress can micromanage the court’s application of the law provided it does not directly manage the courts

f. Different decision reached from *Klein*
   i. Policy case rather than a rights case (environmental policy rather than individual rights at stake)
   ii. In a sense: making new policy, a law to be applied prospectively

B. Distinguish “internal” constraints on Congress built in by framers, viz. Article III, § 2, Para. 2 (any constraints at all?)
   1. With “external” constraints of two sorts:
      a. Those stemming from elsewhere in the Constitution (Bill of Rights, 14th Amendment)
      b. Turning on “essential functions” hypothetical
2. External constraints override what were thought to be internal constraints
3. Are there any constraints when Congress is implementing a treaty or is carte-blanche given to Congress?
   a. Reid v. Covert: held there are constraints
C. Klein should be the classic case b/c it actually has relevance instead of McCardle.
   1. Separation of powers doctrine: tells us no interference of Congress with:
      a. Judicial decision in a pending case
      b. Individual rights at stake
D. Exceptions Clause: Art. III § 2: Supreme Court has appellate review of all cases within the federal judicial power (except those in which the Court has original jurisdiction) “with such Exceptions, and under such Regulations as the Congress shall make.”
   1. Most commentary agrees that Congress does have carte blanche constitutional power to make legislation.
   2. However, good constitutional policy dictates that there should be limits to Congress or we might have jurisdictional stripping.
      a. Paulson’s Argument: Any Act of Congress under the “exceptions” clause can only create policy, but the Constitution guarantees rights. Therefore, constitutional rights may not be restricted by Congressional policy.
      b. Could use a reductio ad absurdum argument here. To prove Supreme Court may not have all of its jurisdiction, say that may not. But if it could this would lead to liberties stripped, imbalance of government, majoritarian control

IV. Political Question Doctrine
A. Political Question: question of constitutional policy
   1. Is it good for the court to forbear hearing certain questions?
      a. This is not explicit in Const.: Judicial invention (judges formulated it)
   2. Criteria that work towards eliminating justiciability
   3. Distinction: justiciability v. outcome as substantive issue
      a. Often: complete agreement on substantive matter but not on justiciability
         i. Ex: Nixon
B. Political Question Doctrine: six criteria which have been employed in case law (rubric on bottom of CB 44 from Baker v. Carr):
   1. Commitment to Another Branch: textually demonstrable constitutional commitment of the issue to a coordinate political department
      a. Argue that the Constitution gives the problem to the executive or the legislative branch to resolve rather than the judiciary
   2. Lack of Standards: lack of judicially discoverable and manageable standards for resolving it
   3. Unsuitable Policy Determination: impossibility of deciding w/o an initial policy determination of a kind clearly for nonjudicial discretion
   4. Lack of Respect for Other Branches: the impossibility of a court’s undertaking independent resolution w/o expressing lack of the respect due coordinate branches of government
   5. Political Decision Already Made: an unusual need for unquestioning adherence to a political decision already made
   6. Multiple Pronouncements: the potentiality of embarrassment from multifarious pronouncements by various departments on one question
C. Brennan’s application of 6 criteria from Baker v. Carr:
   1. #1: textually demonstrable
2. #2: judicially manageable standards
3. #3-6: prudential considerations
   a. Prudence: in our interest to let the decision stand
      i. Let other branch decide the issue

D. Baker v. Carr (1962)
   1. Facts: TN legislature did not reappoint itself for 60 years. Plaintiffs argued that this was a violation of the equal protection clause of the 14th Amendment.
   2. Held: Reapportionment not a political question
      a. Reapportionment in cases of malapportioned voting districts is required by the equal protection clause; none of the criteria for the application of the political question doctrine is met (strong opinion by J. Brennan).
      a. District Court said this was a political question
   4. Dissent (J. Frankfurter): Courts poorly equipped to handle reapportionment
      a. No judicially manageable standards at all

E. Reasons for nonjusticiability of political questions:
   1. Need for finality of a government branch’s decision
      a. Ex: war power: another branch should exercise this w/o the possibility of a judicial check
   2. Prudential Argument: when it is wise to let the other branch of government’s decision stand

F. Distinguish: Political Question Doctrine - Separation of Powers Doctrine
   1. Separation of Powers: 3 branches serve to check one another
   2. Political Question Doctrine seems to fly in face of Separation of Powers
      a. Insulates against checks in one sense
   3. Political Question Doctrine doesn’t explain Separation of Powers

G. Luther v. Borden (CB 45: mentioned in Baker decision) Political Question and Guaranty Clause
   1. Facts: 2 groups w/ governments in Rhode Island competing for power
   2. Issue: which of 2 groups entitled to recognition? Who hears the question?
   3. Held: J. Taney (p. 45): political question
   4. Brennan’s test (6 criteria) if applied:
      a. No manageable judicial standards: state election process (state is sovereign) and not in federal law
   5. Here: no clear federalism issue:
      a. No delegation to fed. govt. to decide
      b. State militia involved and enforced old charter
   6. Best known Guaranty Clause case (Art. IV, Sec. 4)
      a. The Court has consistently held that claims based on Guarantee of Republican form of govt. are non-justiciable political questions
      b. Lack of judicially manageable standards

H. Goldwater v. Carter (1979) Ripeness and Political Question
   1. Facts: Complaint brought by Senator Goldwater, contending that abrogation of treaty required Senate approval is dismissed.
   2. Issue: Whether the president can terminate a treaty w/ Taiwan w/o congressional approval?
   3. Held: non-justiciable political question
   4. J. Powell (concurring): argues issue is not ripe
      a. Case not ripe until Senate makes decision in conflict w/ president’s decision
5. J. Rehnquist (concurring) relies on Coleman v. Miller (Notes 1/25): Could look to Art. 2 and argue this issue is delegated to the president by the Const.
   a. Coleman v. Miller: only Congress could determine whether a particular state had ratified a constitutional amendment
      i. Process by which constitutional amendments are adopted is probably committed to Congress for final determination
      ii. Non-justiciable political question
   b. Just as Const. is silent on operative question in Coleman, so likewise, it is silent on question of the Senate’s role in abrogating a treaty.

6. J. Brennan (Paulson’s favorite position): decide who has power in antecedent question
   a. Easy premise: president recognizes treaties, w/ other countries
   b. Easy matter: recognizing China then abrogates the treaty w/ Taiwan
   c. J. Brennan’s resolution of the problem: most tidy

7. “Ripeness” is the issue not political question

I. Powell v. McCormack (1969) Justiciable b/c textual commitment limited to standing qualifications
   1. Facts: Adam Powell elected to House but was not seated. Powell was accused of diverting House funds to his own use.
   2. Was Powell expelled or excluded?
      a. Excluded: b/c he was never permitted to take his seat
   3. Standing requirements: Art. I, Sec. 2, Para. 2
      a. Problem: House not formally correct in exercise of this power attempting expulsion for Powell
   5. Held: Powell’s exclusion was unconstitutional (illegal so unconstitutional)
   6. There is a “textually demonstrable commitment” to the Congress to judge standing qualifications and to exclude, should they not be met
      a. Ex: 20 year old elected to House: warrants exclusion, won’t be seated
         i. If issue is person’s age: question would be nonjusticiable
         ii. Clear case of criterion #1: textually demonstrable
         iii. House would be clearly exercising power to adjudicate (within Art. I, Sec. 5)
   7. Where, however, the Congress excludes Powell although the standing qualifications have been met, this falls outside the power of Congress and is therefore justiciable.

   1. Facts: Nixon, judge fed. dist. court allegedly convicted making false statements, impeached, removed from office. Senate Rule XI: committee hear evidence, then report given to full Senate. N Arg: doesn’t comply with Article I, §3, Para. 6 which requires the Senate to “try all impeachments” (Sp. 7, p. 55)
   2. Nixon’s Arg.: “try” means full judicial meaning and applies to evidentiary hearings as well (narrow reading of “try”)
   3. Held: question of whether Senate Rule XI violates the impeachment trial clause is nonjusticiable: there is a “textually demonstrable commitment” of impeachment to the Senate.
   4. J. Rehnquist: mentions judicial standards as hanging together w/ textual commitment to other branch
      a. Lack of judicial standards points to textual commitment to coordinate branch (Sup. 7, p. 55)
5. Constitution: enumeration of 3 requirements imposed on Senate members for impeachment (Sup. 7, p. 56, 2nd Para.)
   a. Those things not enumerated: not specifically required

K. Mora v. McNamara (1967) **Foreign Affairs: Prudential Criteria**
   1. **Facts:** No declaration of war from Congress for Vietnam, 3 privates drafted, argue the govt. has no power to order them to fight in an illegal war.
   2. Katzenbach argues for Govt.: Gulf of Tonkin resolution was not a declaration of war (Sup. 7, p. 465) and U.S. objectives in Vietnam are limited
   3. **Held:** clear political question
      a. Political question doctrine precludes hearing challenge to the constitutionality of the Vietnam War. “Foreign affairs” trigger J. Brennan’s prudential criteria

L. Reason to limit the Political Question Doctrine?
   1. Good reasons in Marbury context for Political Question doctrine
      a. Keep the Court’s autonomy
      b. At the time: needed to strengthen the Court
   2. But by mid-1960s: Court may have had sufficient power to challenge the issue presented in Mora (end war earlier: LBJ would have agreed)

M. Courts can change their mind as to what is a political question
   1. the Malapportioned voting districts case

V. **Congressional Power under the “Necessary and Proper” clause (Part II of Course)**
   A. Necessary and Proper Clause (CB 1410)
      1. Article I, section 8, paragraph 18 (necessary and proper clause): is declaratory b/c it gives expression to pre-existing state of affairs
         a. Paragraphs 1-17: constitutive paragraphs
            i. Thus is paragraph 18 declaratory of a certain power that already existed regarding paragraphs 1-17 (making paragraph 18 not necessary)? (issue with national bank in 1791)
         b. Madison (1791): only those powers absolutely necessary to reach an end
            i. Narrow position (Sup. #2, p. 12): regarding ability to form U.S. bank
   B. **Broad Reading of Necessary and Proper Clause (Hamilton):** Since it is impossible to determine what is truly “necessary,” it would always lead to problems. A better understanding is found in the means/end matrix. The ends are the enumerated powers granted to Congress. The means are the legislation made by Congress to reach those ends or powers.
      1. **Ex.:** Means-End Matrix (ERA Amendment)
         a. Matrix 1:
            i. End: human equality
            ii. Means: Equal Rights Amendment
         b. Matrix 2:
            i. End: the object of the ERA
            ii. Means: legislation to equalize salary scales
      2. Broad Reading of Necessary and Proper Clause (Paragraph 18)
         a. Declaratory of what we already have: means to give effect to the ends of the expressly conferred powers of paragraphs 1-17
         b. Broad Congressional power: implied powers doctrine
         c. Broad reading of Necessary and Proper Clause given by Hamilton (Sup. 2, p. 17, Para. 2)
            i. Hamilton’s classic statement adopted by Marshall in McCulloch
C. **Narrow Reading (Madison and Jefferson):** To allow a broad reading would destroy the central character of the government: a limited government. It must be truly necessary, and not merely convenient. If we were to allow a means to get to an end, then we must allow a means, to a means, *ad infinitum*, to get to the end. This would allow the government to at times create a monopoly. (e.g., bank makes money and borrows money for government). This is a *slippery slope argument*.

1. Narrow reading of Necessary and Proper Clause:
   a. Narrow reading of paragraph 18 would not be declaratory and instead constitutive
   b. Narrow reading puts constraints on what would be the means
   c. Interpretation of Necessary and Proper Clause: issue in McCulloch

D. Why is Madison against a national bank?
1. Leads to Congress being omnipotent (unlimited powers)
   a. Goal: govt. w/ limited powers
   b. If we allow this: no basis for arguing against other issues
2. Madison afraid of the implications of establishing a bank
   a. Slippery-slope argument (sup. #2, p. 12)

E. J. Marshall’s interpretation of the “original understanding”
1. **McCulloch v. Maryland** (1819)
   a. Illustrates de-centralized constitutional review (institutional practice)
      i. Started w/ Marbury: power had to be aggregated to become entrenched (McCulloch)
   b. **Facts:** Maryland tax all banks in the state not chartered by the state, only applied to the Bank of the United States. Bank refused to pay tax.
   c. 2 Major Issues:
      i. Question of constitutionality of U.S. bank
      ii. Power of the state to impose a tax on the U.S. bank (Baltimore was trying to tax)
   d. **Held:**
      i. U.S. Bank is constitutional
      ii. State doesn’t have power to impose tax on US bank
   e. **Art. I § 8** enumerates specific powers granted to Congress including the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
   f. **Rule:** The “necessary and proper” clause gives Congress the power to select the *means* by which to accomplish *legitimate ends* of the national government.
      i. **End:** “legitimate” (Sup. #2, p. 30)
         a. On ends, note “pretext” argument
         b. He qualified Congress’s discretion: “Should Congress, under the *pretext* of executing its powers, pass laws for the accomplishments of objects not entrusted to the government,” then it is the duty of the courts to overrule such an act.
      ii. **Means:** “appropriate”
         a. On means, compare modern means (competing strategies): deference to Congress relaxed (“rational basis” standard)
G. First Question: May Congress incorporate a national bank? – Marshall’s exercise in judicial interpretation

i. **Past Practice:** Marshall - past practice is not dispositive, but a strong presumption in favor of the bank’s constitutionality.

ii. **Delegation Doctrine:** MD: powers of gov’t delegated to the states. Marshall - powers of the general government were not delegated to the states, but the people of the states. States are an organizational device for allowing expression of popular sovereignty.

iii. **Supremacy Clause:** Marshall - If a federal law is valid, and a state law conflicts w/ the federal law, then the federal law must prevail.

iv. **Structure of the Constitution:** Marshall - the generality of the instrument warrants inferences to later specifics. Where they are not inferred, then they must be stated in the Constitution.

v. **Necessary and Proper Clause:** Marshall (broad reading) - in the Constitution, it is impossible to detail every means to solve future problems. Therefore, any means calculated to reach that end is allowed. “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.”

vi. Marshall then applied this interpretation and stated that a national bank could be of service to the legitimate ends of taxation, spending, borrowing, and maintaining a national defense.

H. Second Question: May Maryland tax the national bank?

vii. **Model of “Parts and Wholes”** to describe representation. Where whole represented by parts: whole can tax the parts

Ex: Congress = whole (has ability to tax its parts)

Ex: Where Maryland is the whole: it can tax its parts Here: the whole falls outside the state of Maryland (taxing branch of U.S. bank): so not allowed

**Doctrine of Virtual Representation:** Maryland may tax the real property of the bank: taxed in same way as tax on real property of Maryland’s citizens

VI. **Congressional Power under the Commerce Clause (Part II of Course)**

A. Commerce Clause: Illustrates how Constitution has changed over time

1. **Art. 1 § 8** provides that “Congress shall have Power … to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

2. History: Pre-1789 of Balkanization of states (trade barriers, tariffs), commercial warfare

3. Convention of 1787: revise Articles of Confederation and new Const. drafted

   a. Uniform commercial regulation may be necessary

4. Commerce Clause: concurrent power (commercial regulatory power)

5. **H.P. Hood v. Du Mond** (CB 557)

   a. States: not separable economic units

B. Original Understanding used in different ways:

1. **Paul** and **Kidd** sanction economic discrimination

2. But Commerce Clause meant to not have economic discrimination (uniform natl. commercial market)

C. **Gibbons v. Ogden** (1824): ISC and transportation
1. **Facts:** New York granted monopoly on steamboat between NY and NJ. Ogden had license from states. Gibbons received a license from U.S. to navigate the steamboat in “coastal trade.” Ogden received injunction from New York courts to stop Gibbons.

2. What prevails: state v. federal law?
   a. When fed. law passes muster, it prevails b/c of Supremacy Clause the state power must yield

3. Difficult question: Does federal law pass muster? (Yes)

4. **Held:** Injunction against Gibbons invalid b/c based on monopoly that conflicted w/ a valid fed. statute (violate Supremacy Clause)

5. Commerce interpreted to include transportation initially by water, then railroads
   a. Marshall foreseeing need to regulate transportation: affects commerce in other states (i.e. Shreveport)

6. Doctrine that checks on congressional exercise of commercial regulatory power stem from political process
   a. Marshall responds to concerns of power central govt.: Congressional representatives will be voted out if not acting as people want

7. “Enumeration” Argument (CB 480)
   a. Congress can regulate commerce among the several states
   b. Contrast: what is completely internal to the state

8. Broad interpretation of “commerce”
   a. Meaning of commerce (CB 480, four middle para.)
   b. Also See Hood (CB 558): framers’ intent

D. Early Cases: Oscillation between formalism, realism (see Sup. 8, CB 474)

1. **Paul v. Virginia** (1868) **Insurance Contracts not commerce**
   a. **Facts:** Virginia imposed tax on insurance policies sold in Virginia but from other states
   b. Narrow reading of “commerce”: ins. policies are not “commodities”
   c. **Held:** Court could not regulate
      i. Not commerce until policy signed in Virginia (local transactions b/c executed locally)
   d. **Rule:** Insurance contracts are not part of interstate commerce and may not be protected by the commerce clause from state discrimination.

2. **Kidd v. Pearson** (1888) **Narrow reading of commerce**
   a. **Facts:** Iowa company manufactured liquor but sold all out of state.
   b. **Held:** internal matter, Congress can’t regulate here
   c. Narrow reading of “commerce”
   d. Buttressed by formalist defense of “manufacturing” as local (CB 493): Commerce clause does not apply to manufacturing even if the manufacturer sells exclusively out of state

3. **The Daniel Bell** (1870)
   a. Broad, realist reading of “commerce” within field of navigation
   b. Good slippery slope argument (!) on effects of denying congressional control

4. **The Lottery Case** (Champion v. Ames) (1903)
   a. Congressional control over transport of lottery tickets
   b. **Held:** Congress’s regulatory power of interstate commerce allows the prohibition of articles deemed harmful to the public morals.
   c. A state can protect its people from lotteries under police power but there is no comparable warrant for Congress looking to Art. I, Sec. 8
d. Criticize from standpoint of Marshall’s “pretext” argument (consider legitimacy of end): J. Harlan here wants to enforce morals  
   i. J. Harlan’s analogy is ridiculous: state has police power but it is different in Constitutional context  
   ii. Paulson: the end here is not legitimate  
   iii. Case should have been argued on grounds of regulating transportation instead of grounds of a legitimate end  
   iv. Better reading: plenary power of Cong. for commerce regulation  

e. In any event, Lottery Act, Mann Act, etc… represent a dramatic expansion of congressional commercial regulatory power  

f. Hoke v. U.S. (The Mann Act) (Sup. 9, last page)  
   i. Facts: transporting women  
   ii. Court argues as transportation case: ducks issue of Congress regulating b/c of public morals  

5. U.S. v. E.C. Knight (1895)  
   a. Facts: American Sugar Refining Company, 90% of market  
   i. U.S. sued under the Sherman Act  
   b. Issue: police power v. commerce regulation  
   i. Police power: aggregation of powers retained by states  
   c. Formalist Approach: rely on formal/conceptual/categorical distinctions  
   i. Knight case: invokes indirect/direct effects to distinguish manufacturing from commerce  
   d. Realist approach: look at the effect  
   i. Actual economic impact of the regulation  
   e. Formalist Reasoning (Commerce Clause reaches to what is primary or direct regulation):  
      i. Primary/direct: transport  
      ii. Regulation is secondary/indirect: manufacture  
      iii. Original problem in Knight, effects of sugar cartel never addressed  

6. Houston, East & West Texas Railway (or Shreverport Case, Sup. 9) (1914): model opinion in Paulson’s view: close and substantial relation to ISC  
   a. Facts: the Texas intrastate rates are interfering w/ interstate transportation  
   b. Held: Protective Principle: In order to protect interstate commerce, Congress may regulate the intrastate activities of “instruments of commerce” so long as those activities had a “close and substantial relation to interstate traffic.”  
   c. Broad reading of “commerce” within field of transport, including standard and readings of the end associated with the Commerce Clause  
      i. See the case as early example of “realist” or “functional” approach, in sharp contrast to “formalist” or “definitional” approach  
      ii. Standard of “close and substantial relation” is in principle an empirical test  
      iii. Intrastate matters may have an interstate component  
   d. “Close and substantial relation” between intrastate and interstate applies where the following are sought as an end (criteria for evaluating):  
      a. Safety
b. Efficiency  
c. Uniformity (i.e. “fair” market)  
e. “Close and substantial relation” criteria are manageable (helpful) and used subsequently many times  
f. Modern case: realist opinion  
   i. Looks at economic effects of regulation  
   ii. Considers econ. discrimination  

7. **Stafford v. Wallace** (1922) (**stream of commerce**)  
   a. **Facts:** Packers and Stockyards Act regulated the practices of brokers and dealers at stockyards  
   b. **Held:** Congress may regulate activity that is found to be “essential,” “necessary,” and “indispensable” to the flow of interstate commerce  
   c. Broad reading of “commerce” regarding trade practices:  
      i. “current” (also “flow”/ “stream”) metaphor: transactions “occurring therein are incidents…”  

8. **Child Labor Case** (**Hammer v. Dagenhart**) (1918)  
   a. **Facts:** Reacting to public outrage toward the practice of child labor, Congress prohibited the interstate shipment of goods made by children  
   b. States not regulating child labor (more competitive in the market)  
   c. Government’s brief: uniform (i.e. national) control of child labor is necessary, lest differing state policies, laws, give rise to inequities (thus lack of uniformity) in the market (looks like the reason for C.C.)  
   d. **Held:** Narrow reading of “commerce” arguing that manufacture is “local” and its goods, shipped in interstate commerce are “harmless”  
   e. **Rule:** Congress cannot prohibit articles of commerce that are themselves “useful or valuable” because of the way they are manufactured  
   f. The *locus classicus* of formalism: Government’s brief reflects “original understanding” of Commerce Clause, and the problem at hand is critical: still the Court holds against the Child Labor Act  
   g. Compare: Holmes’s dissent looks to Lottery Case  
      i. **Holmes’ dissent:** Congressional motive is irrelevant. So long as the regulatory technique employed by Congress involved interstate commerce, it does not matter what indirect effects it may have  

E. **Laissez faire** Court resists Roosevelt’s legislative program  
   a. **Facts:** Through the National Industrial Recovery Act, Congress imposed minimum wages and prices upon the poultry industry. Schechter, poultry wholesaler sold only to NYC retailers, and bought from NYC market, but nearly all poultry came from out of state, selling sick chickens  
   b. **Held:** Local activities that are at the end of the “stream of commerce” do not have a direct effect upon interstate commerce  
   c. Court takes up but denies application of realist standards (formalistic decision on the balance)  
      i. “current” or “flow” and substantial effects retreating to slippery slope argument  
      ii. J. Hughes uses formalistic elements (Sup. 10, p. 170, Para. 3)  
      iii. J. Hughes wants to duck this case (decides to not trigger revolution by resorting to formalistic argument): knew the poultry code was weak basis for expansive legislation under CC  
2. **Carter v. Carter Coal Co.** (1936)
a. **Facts:** Butuminous Coal Code: imposed maximum hours and minimum wages for coal miners. Nearly all the coal produced would be sold in interstate commerce

b. **Held:** Unconstitutional
   i. Congress may not regulate activity that does not have a *direct, logical, and linear link* to interstate commerce
   ii. Endorsement of formalist’s definitional standard

c. This counts as last gasping breath of the *laissez faire* Court
   i. J. Sutherland: not concerned about magnitude of effect

3. Roosevelt wants to “pack Court”: b/c he sees the Court as old and needs new blood to understand contemporary issues
   a. Arguments against Roosevelt:
      i. Supreme Court never meant to have 2 different parts
      ii. Case load was not too much

**F. The Revolution of 1937: in effect a congressional “police power” is recognized**

1. The 3rd American Revolution
   a. 1st Revolution: War for Independence
   b. 2nd Revolution: Constitution of 1787
   c. 3rd Revolution: Context of Great Depression: Set stage for the New Deal
      i. Court: 3rd revolution in Constitutional Law in 1937 with *NLRB v. Jones & Laughlin*

2. Why call this a revolution?
   a. Constitutional policy and individual rights
   b. Working class acquires rights w/ 1937 Revolution
   c. What should the Constitution do for us?
      i. Upholding the law in *NLRB*: preserved rights
      ii. Preserving rights: a good thing (way to support the revolution)
   d. Revolutions fought to create rights

3. Congress attains power like a police power
   a. Allows regulation in a variety of areas: agriculture, aviation, drugs, etc…
   b. Implications: power brought about like an Amendment
   c. Constitutional policy poses normative question: How ought the Constitution function?
      i. 1787 written for agrarian society and now the nation is wealthy, large, industrial (Const. needs to change to address the present society)
   d. Crisis brings about change:
      i. Developments: rights created: NLRA and right of worker for collective bargaining, Fair Labor Standards Act upheld in *Darby*
      ii. Creation of rights: good thing
      iii. The possible horrible consequences have not followed
         a. Fed. power has not moved to control everything
         b. Real intrusions on rights have come from states and not Congress (*Ex:* Georgia sodomy statute)

4. The Court expanded the reach of the Commerce power by recognizing three theories upon which a commerce-based regulation may be premised:
   a. Substantial economic effect (*Jones & Laughlin*)
   b. Cumulative effect (*Wickard*)
   c. Commerce-prohibiting protective (*Darby*)

5. *NLRB v. Jones & Laughlin* (1937) **Substantial Econ. Effects**
a. **Facts:** National Labor Relations Act (NLRA) prohibited certain "unfair labor practices." J & L produced only in PA but had many employees in other states and its corporation extended nationwide. NLRB sought injunction to stop J&L from firing workers

b. J. Hughes use this as the test case instead of the poultry case, *Schechter*

   i. Size of industry involved: 523,000 employed
   ii. Effect on commerce and not source of injury is criterion (good contrast w/ formalistic opinions)

c. **Held:** Congress may regulate any intrastate activity that exerted a *substantial effect on interstate commerce*

   i. the whole enterprise falls within the Commerce Clause b/c of the close and substantial relation to interstate commerce

d. Realist standards prevail, with Court recognizing their application as per the statutory language

   i. Lack of collective bargaining: burdens/obstructs commerce
   ii. Effects taken as "per se" relation: Irrebuttable presumption that the Burden on commerce follows automatically


a. **Facts:** Fair Labor Standards Act barred interstate shipment of goods not in accord w/ maximum hours and minimum wages, AND prohibited the employment of people to make interstate goods not at these standards

   i. This case involved a lumber producer in Georgia

b. **Held:** Congress’s plenary power may regulate or close the channels of interstate commerce no matter what its motive or purpose might be so long as the means are reasonably adapted to the end

   i. Fair Labor Standards Act provisions upheld

c. Formal overruling of *Hammer v. Dagenhart* (Child Labor case)

d. Extraordinary deference to Congress (in 3 parts of Opinion)

e. #1: *Eliminate any Standard of Congressional Motive:* Court will not examine motive/purpose as long as there is Congressional power

   i. unless the motive is clear violation of Art. I, Sec. 9 (??)

f. #2: *Reasonable Relation:* Courts defer, Congress can choose means

   i. Reasonable/rational relation between the means and the ends: Trust that Congress will find reasonable means

g. #3: Congress given discretion on how to regulate commerce

   i. Note the role of the Commerce Clause *qua* plenary power

h. Rational relation test: toothless and means deference to Congress

   i. Anything goes post-revolution

7. **Kentucky Whip v. Illinois Railroad**

a. **Facts:** convict produced goods

b. Commerce Clause used to enforce state law provision

8. **Mulford v. Smith**

a. **Facts:** flue-cured tobacco

b. **Held:** Congress still has power to regulate here b/c some of the tobacco does leave Georgia (Doesn’t matter if some of tobacco stays in Georgia)

c. **Rule:** If goods can be both intrastate and interstate commerce, then interstate regulation may apply to both kinds

9. **Wickard v. Filburn** (1942) *Cumulative Effect Theory*
a. **Facts:** Farmer planted more bushels of wheat than was permitted by federal regulation. He attacked the validity of the penalty imposed upon him because he contended the wheat was not sold, but used by his farm.

b. **Held:** So long as the cumulative effects of a class of activities regulated by Congress has a substantial effect on interstate commerce the law may be applied validly to a person whose individual activities have almost no impact on interstate commerce
   i. Justified via *aggregation principle:* Filburn as individual (minimal effect); but the cumulative effect is great

### VII. Breadth of the post-1937 congressional “police power”

A. **Mini-Unit:** How Court in 1960s solved Civil Rights cases by way of Commerce Clause
   1. Why not using the Equal Protection Clause of the 14th Amendment?
   2. History: 13, 14, 15 Amendments were constitutional counterpart to what was won on the battlefield during the Civil War
      a. 13th Amendment (1865): proscribed slavery
      b. 14th Amendment (1868): equal protection of laws to blacks
      c. 15th Amendment (1870): gave black men voting rights
   3. Issue: Means of enforcing the Amendments’ terms
      a. Amendments allowed Congress to use the means necessary leading to adoption of Civil Rights Act of 1875

B. **State Action Problem** (as background to Civil Rights cases)
   1. **Civil Rights Cases** (1883)
      a. Very narrow interpretation of 1875 Civil rights Act
      b. **Facts:** Civil Rights Act of 1875 prohibited private acts of racial discrimination in the operation of public accommodations. Section 5 of the 14th Amendment granted Cong. power to enforce substantive provisions of the Amendment, but was limited to government conduct only
      c. **Issue:** Is protection from discrimination limited to state instrumentalities or does it reach private enterprises?
         i. Senator Butler (Fisher p. 78): informal criteria for distinguishing purely private sphere and enterprise: social
      d. 3 categories for application of 14th Amend. (Sen. Butler, Fisher p. 78):
         i. State
         ii. Private enterprises
         iii. “Purely social” engagement
      e. Attorney General Devens: treat categories #1 and 2 as under statute
         i. Attempt to tie #2 to #1 through mechanism of state action doctrine (licenses from state used by private enterprises)
      f. **Held:** The enforcement provision of the 14th Amendment does not permit Congress to regulate private conduct that the States could not prohibit
      g. J. Bradley: category #2 is not the subject matter of the Amendment
         i. J. Bradley destroys state action doctrine: the link is broken between #1 and #2, kills off idea of state licensing involves state
   2. **Marsh v. Alabama** (1946)
      a. **Facts:** Corporation had constructed entire Chickasaw w/ “all the characteristics of any American town.” Jehovah’s Witness was arrested for distributing religious material
      b. **Held:** There was state action
      c. **Rule:** Private parties exercising governmental powers should be regarded as state actors
d. “Company town” counts as instrumentality of the State where it undermines 1st and 14th Amendment guarantees
   i. State of Alabama allowed the corporation to operate the town
   ii. Enforced the will of Chickasaw authorities in the state courts
e. Constitutional rights trump over property rights
   i. The more open property becomes to public use, the more the property rights decrease

3. **Logan Valley Plaza** (CB 1353)
   a. **Facts**: Picketing working conditions inside shopping center
   b. Private ownership factor similar to *Marsh*
c. *Marsh* precedent allows 1st Amendment rights to win over property rights

4. **Lloyd Corporation Ltd. v. Tanner** (CB 1353)
   a. **Facts**: huge mall, privately owned, flyers against Vietnam War
   b. *Logan Valley* reasoning not followed (distinguished): b/c the demonstration in *Logan Valley* was related to conditions w/ shopping center
c. Criticism here: municipality was involved in running the shopping center

5. **Hudgens v. NLRB** (CB 1354)
   a. *Logan Valley* overruled
   b. State action doctrine is left in weak condition
      i. Irony: 1970s during Civil Rights movement but this doctrine is going the other way

6. **Terry v. Adams** (1953) (CB 1356)
   a. Previous Cases: *Nixon v. Herndon* (CB 1355): Texas statute prohibiting Negroes from voting in Democratic primaries struck down on state action grounds and *Smith v. Allwright*: Democratic party was deciding for the state who could vote (**Held**: Action taken for state = state action b/c controlling party membership falls under state action)
b. **Facts**: Reacting to previous SC decision, Jaybird Democratic Assoc. formed. Purpose: exclude blacks, decided who the democrats’ candidate would be and this candidate always ran unopposed
c. Jaybird Argument: different from political party b/c voluntary club
d. **Held**: “Jaybird Association” counts as instrumentality of the State where it undermines 15th Amendment guarantees
   i. Violation b/c this “voluntary club” was only a guise
e. Four Justices thought the association was the Texas Democrats by another name and therefore the same holding in *Smith* applied. Three thought the state action was in the state inaction.

7. **Shelley v. Kraemer** (1948)
   a. **Facts**: Black owner Shelley purchased home in Missouri, covenant made by the neighbors that prohibited the sale of a home to “people of the Negro race.” Kraemer sued to enforce the covenant
   b. **Held**: A State’s enforcement of a racially restrictive covenant is considered state action subject to the 14th Amendment
      i. **State action comes from judicial enforcement (CB 1370)**
      ii. Restrictive covenants only viable if there is possibility of enforcement in the courts
      iii. Although the restrictive covenant as such is not in violation of the 14th Amendment

C. Civil Rights Cases of 1964
1. Title II of Civil Rights Act of 1964, “places of public accommodation”
   (Operations affect commerce and also Supported by state action)
   a. State Action doctrine mentioned: trying to give life to the doctrine
      i. However: the Commerce Clause carries this legislation
   b. “Per Se” Rule (Sup. 13): Irrebuttable presumption presented that commerce is thereby affected

   a. Facts: Title II of the 1964 Civil Rights Act prohibits racial discrimination by private businesses w/ public accommodations to interstate travelers or to restaurants if much food had come from interstate commerce. Heart of Atlanta Motel catered to interstate guests, attacked the validity of the act
   b. Burdens on Interstate Commerce (2 kinds):
      i. Qualitative: impairment of pleasure, convenience
      ii. Quantitative: reduces travel of blacks
   c. Competing ends
      i. Promoting commerce
      ii. Correcting a moral wrong (“pretext” argument does not count here as argument against an illegitimate end)
   d. Held: Congress can regulate local racial discrimination in public accommodations because of its substantial effect on interstate travel and commerce. (extraordinary deference to Congress on means)
   e. Legal fiction: was Commerce Clause intended to operate this way?
   f. Does promoting the volume of commerce fall under Shreveport critiera?
      i. Is volume an additional criterion?
      ii. Qualitative effect: end or purpose
      iii. Quantitative effect: is Cong. now concerned w/ volume of commerce?

   a. Facts: Ollie’s Barbecue, restaurant in Alabama, served a local crowd but received 46% of its food from interstate commerce
   b. Testimony from federal district court to the effect that the means are counterproductive (Business will decrease if blacks are served)
   c. Recognize promotion of volume of commerce as a goal of regulations under Commerce Clause (CB 507)
   d. Held: Congress has determined this is still appropriate means b/c the aggregate effect is the focus (even if one party is affected adversely)
   e. Promoting Commerce (has it always been a realist criteria?):
      i. Remove trade barriers
      ii. Promote volume where possible

4. Need to make these holdings stick (Here the moral goal is calling the shots):
   i. No surprise that the traditional criteria don’t work here (“fiction” using commerce for this legislation)
   ii. Commerce clause only used b/c state action doctrine is so weak
   iii. If promoting volume of commerce is a legitimate criterion: these cases are well settled (If not: problem to justify these cases)

D. Another illustration of breadth
   a. Facts: Consumer Credit Protection Act prohibited loan sharking (lines of credit through extortion). U.S. Arg.: big part of organized crime which had an effect upon interstate commerce
b. **Held:** Congress can regulate a class of activities that substantially affects interstate commerce “without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.”

c. Court never bothers itself w/ the question of how petty loan shark Perez finds himself in the class of those (in organized crime) affecting interstate commerce
   i. Is Perez involved in organized crime affecting interstate commerce?

d. Reach of Commerce Clause to the greater class
   i. Don’t worry about Perez here or Ollie’s BBQ in *Katzenbach*

e. At this point: appears Congress has been given a general police power
f. Compare J. Stewart’s dissent: denies such power to Congress
   i. J. Stewart not willing to defer to Congress here: Argues that rational basis standard isn’t met
   ii. In effect: as applied in *Perez*, Congress could not rationally have believed that the requisite connection between means and end exists

E. At Issue: Balance of Power between states and national govt. (comment on CB 511)
   1. Have we created a monster: Congress can reach anything?
      a. Concern for states: ability to regulate w/ state criminal code
   2. Editors’ reply:
      a. the political process will check the reach of Congress (as to Commerce Clause and reach of Art. 1, Sec. 8 powers generally)
      b. Marshall (Const. prophet): recognized: political process would provide check on legislature (Marshall’s from *Gibbons v. Ogden*)

VIII. **Other Article 1, Section 8 Powers (Taxing, War Power, Military Jurisdiction, etc…)**

A. These powers reflect similar pre-1937 and post-1937 divide
   1. Will examine Marshall’s idea of “pretext”

B. Taxing Clause (Power to Tax) (Art. I, Sec. 8, para. 1??)
   1. **Child Labor Tax Case (Bailey v. Drexel Furniture Co.)** (1922) **Penalty**
      a. **Facts:** Statute imposed 10% tax on any companies who had children as employees (Terms of tax like Child Labor Act: *Hammer v. Dagenhart*)
      b. **Held:** Congress may not use taxes as penalties
         i. measure is truly regulatory (a penalty)
      c. Court rejects taxing and spending clause as basis for Child labor tax law of 1919 (See Marshall’s “pretext” argument in *McCulloch*)
         i. Regulation introduced on pretext of revenue-raising measure
   d. Difference between a tax and a penalty:
      i. Tax: raise revenue
      ii. Penalty: direct/channel/guide behavior
   e. Reasons for holding this to be penalty
      i. Provisions regulate behavior
      ii. Concept of “scienter” refers to knowledge on part of would-be accused for liability (written into Act): penalty context
      iii. Primary motive: should be raising revenue and only incidental motive of penalty to ensure the tax is paid is allowable
   2. Other Cases
      a. **Veazie** precedent: separate Constitutional conferred power (national currency from Art. I, Sec. 8, Para. 5) which Necessary and proper clause allows
b. **McCray case**
   i. ¼¢ tax on white margarine and 10¢ tax on yellow margarine
   ii. Clearly regulation on pretext of being revenue-raising measure

c. **U.S. v. Doremus**: Narcotic Drug Act
   i. Clearly regulatory: did not raise hardly any revenue

d. Taft seems to say: if Congress hides its motive: the Court won’t question it (Taft would have gone along w/ the tax in Veazie, McCray, Doremus)

3. **U.S. v. Kahriger** (1953) (Sup. 14)
   a. Illustrates the Court’s dramatic shift in this area too
   b. **Facts**: Revenue Act of 1951 – had pretext of raising revenue, but really regulated intrastate gambling. Argued: tax punished pro gamblers
   c. **Held**: (J. Reed) the Act upheld b/c it is enough that the “wagering” tax raised revenue (So much for the “pretext” argument)
   d. Overtly regulatory measures (prohibiting the “taking of wagers”) in 1951 Revenue Act pass muster if “the wagering tax produces revenue”
   e. J. Frankfurter (dissent): Where motive can’t be squared w/ statute, the motive should be examined

4. Classical Understanding
   a. Regulation = illegitimate motive
      i. Act as a regulation: not upheld
      ii. Against: tax being swallowed whole by regulatory motive
   b. If regulation is primary motive then won’t be upheld
   c. Favor: at least some revenue raising
   d. Rational-relation test: deference to Congress (see Arg against Tax below)
      i. Presupposes means reasonably related to end
      ii. Now: talking about end (be careful in analyzing w/ this test)
   e. Not always same result with Classical ideas: see McCray

5. How to Argue Taxing Measures:
   a. Against Tax: where the regulatory effect outweighs the revenue-raising then examine motive
      i. Classical view (from J. Frankfurter)
   b. Uphold Tax: if revenue is raised then don’t question the motive

C. Spending Clause

1. **U.S. v. Butler** (1936) (Sup. 14)
   a. **Facts**: Through Agricultural Adjustment Act, Congress sought to raise farm prices. Tax on processors and revenues used to pay farmers (subsidy) who entered into contracts to limit production. Cotton processor brought the case.
   b. **Held**: While Congress may spend for the general welfare, it may not regulate for the general welfare (here: regulation and not spending)
      i. Seems flatly inconsistent w/ the Court’s own interpretation of the “general welfare” clause: as though spending to stabilize farm prices were not “providing for the general welfare”
   c. Perhaps J. Roberts’ other arg.: coercion, is doing most of the work here
   d. J. Stone (dissents): Court confuses: acting w/ an attractive motive v. being coerced to act (Ex: Congress can give grants to land-grant universities on condition of teaching agriculture (Morril Act))

2. Madison narrow interpretation: taxing/spending power is not independent power (Only a power as regarding the other enumerated powers)
   a. J. Roberts rejects Madison’s position: this taxing power would be mere reiteration of nec. and prop. clause which turns up later in the section
b. Opposite extreme: general welfare idea = “carte blanche” (do whatever you want)

   power to tax and spend is qualified by the general welfare clause
   i. Power w/ independent standing
   ii. Tax and spend hangs together w/ welfare clause

3. Taxing and Spending Power
   a. There is a conferred power to tax/spend
   b. Qualified by the general welfare clause
   c. Perhaps a 3rd point added by Butler: doesn’t conflict w/ the 10th Amendment

   a. Here again: the 1937 constitutional revolution
   b. Facts: Social Security Act a credit against federal payroll taxes so long as employers contributed to state unemployment compensation schemes.
   c. Held: Court upheld the statute reasoning that it was not a “weapon of coercion, destroying or impairing the autonomy of the states.”
   d. Rule: Credits that are given upon the condition of compliance are not coercive devices that strip States of their autonomy
   e. J. Cardozo distinguishes motive behavior from coercive behavior:
      i. Free will: assign responsibility for acts
      ii. Choosing freely: compatible w/ acting w/ a motive (Even more: presupposes a motive b/c most behavior: end-directed)
      iii. Coercive Behavior: also is acting toward an end
      iv. General Difference: coercion means to have no choice
         a. Ex: “coerced to do X” means being compelled to do X
   f. Conditions for Coercion:
      i. Directed course of behavior is decidedly unattractive
      ii. There is no viable alternative
   g. In this case the conditional grant does not fit into the “coercion model”

D. War Power
   1. Hamilton (Fed. 21?) argues the war power was an aggregate of various powers.
      a. Facts: Title II Housing and Rent Act froze rents at their wartime levels
      b. Held: Court upholds federal Housing and Rent Act of 1947 under the war power, although the measure is enacted after the War
         i. Housing shortage caused by a war so the war power applies
         ii. Means supplied by necessary and proper clause
         iii. Allows congressional power to regulate an economic condition partly produced by an intense national war effort
      c. Causal connection between War conditions and the post-War exploitation of rental housing market justifies this exercise of the war power in peacetime
      d. J. Douglas in majority opinion: no general concern about being invoked in haste/excitement b/c the problem here is defined and limited
         i. Majority: this develops a right to housing w/ little down side
      a. Facts: federal legislation implementing migratory bird treaty between Canada and U.S., federal law preempted MO’s regulation of gamebirds
      b. MO’s Argument: what Congress can’t do under Art. I, Sec. 8, it can’t do under a treaty either
c. **Held:** Implementing legislation, following treaty agreement, is constitutional quite apart from whether the legislation reflects the Article I, Section 8 powers.

d. **Rule:** Congress may use any means necessary and proper to implement treaties even if they do not rely upon Congress’s enumerated powers.

e. “Necessary and Proper” Clause, coupled w/ presidential treaty-making power (Art. II, Sec. 2, Para. 2) suffices

   i. This combination must suffice, lest the president w/ approval of the Senate, have no treaty-making power in those instances in which the treaty requires implementing legislation.

f. “Nec. and Prop.” Clause not limited to paragraphs 1-17 of Art. 1, Sec. 8 (J. Holmes: would lead to absurdity: president having not treaty power)

g. Made (1) “pursuant to the Constitution” v. made (2) “under the authority of the U.S.”

   i. (2) picks up no restraints from Art. 1, Sec. 8
   
   ii. Content restraints don’t apply: Like contracts where parties to treaty allowed to determine the content.

4. **Reid v. Covert** (1957) **Treaty Implementation v. Individual Rights**

   a. **Facts:** U.S. treaties w/ other nations gave American military courts juris. over any service members/dependents on foreign soil. Civilian dependent, Mrs. Covert, was convicted of murder by a military court.

   b. **Held:** Where implementing legislation undermines individual rights as guaranteed by the Constitution it will not be allowed.

   c. **Rule:** Congress is free to implement treaties w/o regard to federalism restraints but may not do so in violation of constitutionally guaranteed individual rights.

   d. Const. rights trump over any policy affecting that right (i.e. over a treaty).

IX. **The Undoing of the post-1937 consensus? Back to the Commerce Clause**

A. Court has ruled that the 1937 Revolution did not abolish dual govt.

   1. Argue for dual govt.: exercise of CC is limited to economic activities

      a. What if economic effects of a non-economic activity are severe?
      
      b. These issues best left to be addressed by Congress

   2. Other side: distinction of economic v. non-economic activity is really formalism


   1. **Facts:** (1995) Gun Free School Zone Act: possession of gun on/near school grounds a crime. It never considered the impact this activity had on ISC

      a. Criminal Law: normally local concern (state police power) but CC had reached to criminal law (intrastate matter) in Perez (loan sharks)

   2. **Held:** 1990 Gun-Free School Zone Act is unconstitutional, Court argues:

      a. The activity, as non-economic in nature, does not fall within the scope of the Commerce Clause

      b. Even if the Court were willing to address the premises of the govt.’s arguments on “substantial effects”, the argument would prove too much (slippery slope)

   3. **Rule:** The Court will not hypothesize a rational basis for a statute when Congress has made no effort to find the activity’s substantial effect upon interstate commerce

   4. The Court asserts that the **activity must have an economic dimension.**

   5. Kennedy and O’Connor found three factors.
a. #1: “neither the actors nor their conduct have a commercial character”
b. #2: “neither the purposes nor the design of the statute have an evident commercial nexus”
c. #3: the law “seeks to intrude upon an area of traditional state concern.”
6. 3 categories given for applying Commerce Clause (p. 514)
   a. Govt. argues category #3
   b. Court will follow Shreveport and “substantial effects” if the activity is economic by nature
   c. Fundamental distinction between economic v. non-economic activity
7. Ask: does the sealing off of “non-economic activities” not mark a return to formalism (definitional categories, which take the place of a focus on effects)?
   a. Distinction: shrouds from view what is really going on
8. J. Rehnquist (Court’s opinion): refers to Federalist #45 and the conferral of power in Art. I, Sec. 8: we retain a govt. of limited powers
   a. States’ rights can’t be swallowed whole by Congress
9. Compare J. Kennedy (concurring): emphasizes the “federal balance” and argues that statute intrudes upon an area of “traditional state concern” (i.e. education)
   a. More liberty from 2 govts. instead of one (Madison’s arg.) b/c of 2 lines of accountability to people (Paulson: better argument than J. Rehnquist):
      i. States
      ii. Congress
10. Compare J. Souter (dissenting): emphasizes the importance of deferring to Congress as a means of undergirding the democratic process
    a. Back to Marshall’s point in Gibbons
    b. Argue: the Court has no role in Commerce Clause questions except if economic discrimination (Defer to Congressional opinion whether the means are appropriate and here Cong. had rational basis for means)
    c. J. Kennedy counter-argues: can’t leave to politicians b/c they will usurp the proper balance (Ex: this Gun Free School Zones Act)
   2. Held: Despite aexplicit findings that gender-motivated violence had a substantial effect upon interstate commerce, the Court ruled it unconstitutional
      a. Non-economic activity so no occasion to examine economic effects
   3. Rule (??):Because the Constitution requires a distinction between what is truly national and truly local, Congress may not “regulate any crime as long as the nationwide, aggregated impact of that crime” has substantial effects upon interstate commerce.
   4. In upholding challenge to provisions of 1994 Violence Against Women Act, Court again:
      a. Emphasizes non-economic character of the activity being regulated
      b. Adduces slippery-slope argument to meet govt.’s arguments regarding “substantial economic effects”
   5. Questions posed above w/ respect to Lopez are germane here too
   6. J. Souter (dissenting):
      a. Statistics are staggering: should be basis for regulating
      b. Only check on Commerce regulation: political in nature
         i. Quoting Gibbons (p. 55, 3rd para.): Relying on representation in democratic order (Pol. representation = political accountability)
c. Raises the question of formalism

7. Can Argue: this Act is rights enhancing (no clear downside)
   a. Court recognizes the rights enhancing but sees the downside in the slippery-slope argument
   b. If no clear downside, skeptics see no slippery-slope problems

**PART III: Court regulates in absence of congressional regulation: “the dormant commerce clause”**

**Competing Interests between state regulation and the Federal Commerce Clause**

**State acting in absence of Congressional legislation**

**Theme in dormant C.C. cases: discretion of leaving matter to state**

- comes up again in Part IV: what role does the judiciary play?

**X. Question of “Exclusivity”: bases of State regulation and congressional “authorization”**

A. Exclusivity (Dormant Commerce Clause context):
   1. no code in this area (like UCC)
   2. issue: regulation of Congress on one hand and regulation of state on the other

B. Options for Exclusivity
   1. Exclusive Congressional Power
      a. Cooley: shows this option doesn’t make sense
   2. Fully concurrent state/congressional power
      a. Also doesn’t make sense
   3. Partially concurrent state power
      a. Status quo: “selective exclusivity”
      b. Anything said here can be said under the supremacy clause (turns to #4)
   4. Supremacy of Congressional statute
      a. Option #3 passes muster
      b. Everything under #3 falls within the rubric of #4
         i. Exclusivity doctrine then drops out
   5. Exclusive v. Concurrent Power
      a. Ex: of exclusivity doctrine = war power
         i. No one would ever suggest the states have war power
         ii. Articles of Confederation plainly stated that Congress has exclusive war power
      b. Ex: of concurrent power = power to tax (Supp. #18, p.1)
         i. Power of taxation indispensable to states’ existence
         ii. Capable of residing in and being exercised by different authorities at the same time
      c. Disanalogy between taxation and commerce regulation as concurrent powers
         i. Taxation: different powers b/c purposes are different
         ii. Commerce: the power is the same argument for fed. exclusivity
   6. Exclusivity: adequately stated by appeal to supremacy clause
   7. Cooley: ended discussion by deciding that the field is regulated by both Congress and the states (concurrent regulation)

C. Defer to States?
   1. some justices bend over backward to defer to states
      a. view that this is what democratic process requires
   2. Other justices say democratic process has limits
      a. If discrimination is depriving rights
b. Or when deferring to states maintains a status quo problem

D. **Gibbons v. Ogden Exclusivity**
   1. **Facts:** steamboats passing between states
   2. This is not a dormant commerce clause case, but an issue of whether a state and federal law can coexist: **The state law must yield to the federal law.**
   3. **Doctrine of exclusivity would prohibit the state regulation of anything that affects interstate commerce at all and is not purely local.**
   4. Exclusivity: conceptually appealing b/c clear-cut and pristine
      a. Washed out b/c it was a conceptual abstraction: law concerned most often w/ practical matters
   5. Other Argument (J. Johnson??: Supp. #18, p. 190, P 4): Congress determines what remains unrestrained but this Argument is a non-sequitur b/c the conclusion of exclusivity doesn’t follow
      a. Instead: until power exercised by Congress: nothing to prevent state regulation (Where Congress hasn’t exercised its power: then states can go on regulating)

E. **Plumley v. Commonwealth of Massachusetts** (CB 527) **Can divide regulatory field**
   1. **Facts:** selling “adulterated” oleomargarine
   2. Held: State retains “plenary control” over those aspects of sale fraught w/ “fraud and deception” (exclusivity doesn’t reach this far)
      a. Falls under state concern (state power to regulate health and safety)
   3. state does not have power to regulate conditions of sale (here of oleomargarine) but not a problem b/c the state not involved in commerce regulation here

F. **Paul v. Virginia and Kidd v. Pearson** (from Part II of course): ask if employing today’s standards these dormant commerce clause cases were decided correctly?
   1. Paul: scheme would be seen as discriminatory w/ VA regulating
   2. Kidd: no exclusively intrastate regulation of manufacture for interstate market

G. **Cooley v. Board of Wardens** (CB 528) **Break from Exclusivity**
   1. **Facts:** ships in Delaware river must engage a local pilot (Penn. Law)
   2. **Issue:** Federal law said states will continue to regulate in this area
   3. Held: rejection of exclusivity doctrine
   4. **Congressional affirmation of concurrent state regulatory power** follows from fed. law (1789) that recognizes continued state reg. of local pilotage issues
      a. Illustrates problem w/ exclusivity doctrine: the denial of concurrent state power (in the name “exclusivity”) would be tantamount to denying Congressional power to recognize continuing state regulation – an absurdity (reductio ad absurdum argument)
      b. **Congress can authorize regulatory function to the states**
   5. J. Curtis gives 4 arguments:
      a. ??
      b. Normative: states best able to regulate here
      c. Conceptual: exclusivity doesn’t work
      d. Past practice role
   6. J. McLean dissented: argued exclusivity to its end
      a. No power in Congress to delegate its power
         i. Problem: exclusivity doctrine would govern this too?
   7. **Rights:** Commerce Clause involves economic discrimination and thus economic rights: Courts will strike down discrimination of economic rights

H. **Prudential Ins. Co.**
   1. **Facts:** 3% tax levied in S.C. on premiums paid to out-of-state insurance companies
2. Held: where Congress declares the State regulation is in the public interest, it survives a challenge, even though the regulation might well fail in the absence of congressional “authorization”

XI. Transportation Cases

A. Brennan’s Scheme (from Kassel): employed in all 4 cases
   1. deference to the state legislature [A]
   2. balancing [B] (except –Brennan- in “safety” cases)
   3. actual purpose [C]: discriminatory purpose is established by imputing the bad purpose to the legislature
      a. not be confused w/ “facial discrimination” or discriminatory effect
      b. tough argument to make

B. South Carolina State Hwy. Dept. v. Barnwell Safety Grounds based on [A]
   1. weight and width restrictions on SC highways
   2. Burden on interstate commerce by the SC regulation:
      a. Many trucks had to avoid state
      b. Out-of-state operations have harder time competing
   3. SC’s concern w/ truck weight:
      a. Condition of roadways: damage caused by heavy trucks
   4. Held: Constitutional b/c SC’s concern is safety
      a. The end in this intrastate context in context of police power
   5. Result: deferring to state legislature to determine weight of trucks on SC highways
   6. Two-part standard for state regulations:
      a. Acting w/in the scope of the state police power (legitimate end)
      b. Rational Relation test: whether the means of regulation are reasonably adapted to the end sought
   7. The only court review power is to determine if there is a rational basis.
      a. Rational Basis Standard Prevails means of deferring to legislative judgment (letting the people decide)
   8. J. Stone mentions: will not be allowed if state intends to discriminate under guise of regulation (Court concerned w/ intended discrimination only)
      a. Weak position that changes w/ Post-War Court which will look at discriminatory effects

C. Southern Pacific Co. v. Arizona (CB 533) Balancing [B]
   1. Facts: statutory limits on railroads (number of cars)
   2. The “safety” provision calling for shorter trains to eliminate slack effect was deemed to cause more accidents (b/c more trains)
   3. Held: means not reasonably related to the ends so this case can’t be deferred to the state legislature
   4. Balance: State safety interest v. burden on Interstate Commerce (ISC)
      a. No countervailing state safety interest here b/c the “cure is worse than the disease” (less safe)
      b. Burdens on ISC:
         i. Break up trains through Arizona (effects from LA to El Paso)
         ii. Increases railroad costs to consumer
      c. The state goes too far and impedes on the uniformity required by the Commerce Clause.
   5. J. Stone abandons direction of Barnwell and discretion to state legislature
      a. The court here involved in examining the factual record independently of what legislature would have the court believe
b. The court is to determine the reach of the Commerce Clause, not the state legislature. [Complete opposite of his opinion in Barnwell.]

6. The rational basis test is replaced with a balancing formula [b/t state interests and national uniformity]

D. Bibb v. Navajo Freight Lines, Inc. (Supp. #20) Balancing [B]
   1. Facts: Ill. requirement for contour mudguards
   2. Held: unconstitutional b/c of massive burden on ISC
   3. Balance:
      a. Unusually harsh burden on ISC: “contour” mudguard in direct conflict w/ Arkansas (Requires modification to operate between the 2 states)
      b. Weak state safety rationale: mudguard collects heat causing break problems (In reality a safety hazard - undermines State safety rationale)
   4. Ill. safety rationale does not allow deferral to the state

E. Kassel v. Consolidated Freightways Corp. Balancing [B]
   1. Facts: IA stat. prevents CF from running 65 foot “doubles” through IA
   2. Held: Iowa statute overturned using balancing test
   3. Balancing test:
      a. Begin w/ presumption that deference to state legislature is appropriate
      b. Here: presumption crumbles b/c Iowa’s claim of safety is not sig.
   4. Apply Balancing Test:
      a. State safety interest not significant: No evidence that shorter trucks are safer and many exceptions to the law (livestock, mobile homes: Winnebago)
      b. Burden on ISC is significant: Burden on CF, natl. trucking company, to go through IA
   5. J. Brennan (concurs by looking to [C]): illegitimate motive of state
      a. Gov. Ray vetoed bill allowing longer trucks b/c the competition would hurt IA citizens
         i. No legitimate end triggers Marshall’s old pretext Arg.
         ii. In federalist system, all parties must share the burden
      b. Other justices don’t go along b/c balancing less problematic than trying to determine good v. bad motives
   6. J. Rehnquist (dissents by looking to [A]): deference to state legislature
      a. Safety grounds: reasonable relation between these means and the end of safety

XII. The Pike Formula:
A. The Pike Formula:
   a. if (1) statute regulates even-handedly (free from discrimination)
   b. and (2) legitimate State interest (means to legitimate state end: police power)
   c. and (3) only incidental effects on ISC (balancing test applied: substantial)
   d. then state regulation passes muster unless (4) proportionality condition is violated
      i. burden on ISC is clearly excessive in relation to the putative local benefits
   2. Pike Formula re-stated:
      a. Not merely incidental effects on ISC
      b. Thus: passes muster unless (invoke strict scrutiny test)
      c. Allow burden in proportion to claimed local benefit
B. Cases of Discrimination:

**Economic Discrimination**

<table>
<thead>
<tr>
<th>Imputation of Bad purpose</th>
<th>[“facial discrim.”]</th>
<th>[point to discrim. effects]</th>
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<tbody>
<tr>
<td>1. case is settled</td>
<td>1. involves strict scrutiny test</td>
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<tr>
<td>2. if can support this claim</td>
<td>2. Ask: if less onerous alternatives</td>
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C. No bright-line rule: what is required to rebut the presumption of deference to the states

D. Policy Basis
   1. For J. Douglas and J. Black: Except for most extreme cases defer to state legislature
      a. informed by democratic theory: minimal interference from judiciary in decisions taken by the people
   2. For J. Brennan: protection of minority rights is not to be deferred to states
      a. Viewed not as democratic issue but instead issue where a right is being violated

E. Pike v. Bruce Church (CB 560)
   1. Facts: pack cantaloupes in certain way to protect against fraud, concern: quality
   2. Held: This statute was legitimate: promoting state’s interest (employment, taxes, etc…)
      a. Where state regulates even-handedly and does not discriminate (effects on interstate commerce incidental): then will be upheld
   3. Adds a fourth criterion: proportionality
      a. If a burden is locally somewhere: must be proportional
      b. Here: benefit to local growers in Arizona not so great to justify burden on packing plant in California here

XIII. Incoming Commerce

A. Analysis:
   1. Incidental effects and no economic discrimination
      a. Then statute is okay
   2. If discriminatory effect:
      a. Then talk about question of purpose
   3. If answer to #2 is positive then look for less onerous alternatives
      a. If no less onerous alternative then the discriminatory measure/statute can be upheld: Maine v. Taylor

Commerce Clause Analysis [Hughes Test – Strict Scrutiny Test] ➔

a. whether the challenged statute regulates evenhandedly w/ only “incidental” effects on interstate commerce either on its face or in practical effect; [two paths]:
   i. even-handedness (no discriminatory purpose)
   ii. extent of the burden on interstate commerce [third Pike condition]
b. whether the statute serves a legitimate local purpose; and if so,
   i. To ascertain the state’s purpose independently of the state’s own account [balancing]
   ii. Bad motive or bad purpose.
c. whether alternative means could promote this local purpose as well w/o discriminating against interstate commerce
B. **Strict Scrutiny:**
   1. compelling reason to solve problem
   2. no less onerous alternative

C. **Baldwin v. G.A.F. Seelig, Inc. (CB 539)** *Economic Protectionism*
   1. Milk Control Act: price for milk purchased out of state for processing and retail sale in NY must be held to the minimum price paid by law in NY
   2. Held: the act is discriminatory on its face (clear case of “protectionism” or economic discrimination)
   3. J. Cardozo: refers to framers’ concern of prohibiting barriers to trade between states
      a. Such trade barriers problem during time of framing of Constitution and proscribed by Art. I, Sec. 10
      b. Commerce Clause purpose: eliminate economic barriers between the states such as here: imposing of customs’ duties on out-of-state products coming into a state
   4. **One state in its dealings with another may not place itself in a position of economic isolation**
   5. Criterion:
      a. Bad Motive: “avowed purpose” = obstruction (Hiding from view the statute’s purpose)
      b. Discriminatory Effects: Necessary tendency toward decreasing competition
   6. Leads to modern formula: invoke strict scrutiny and ask if less onerous alternatives

D. Legally recognized exception to Economic Discrimination:
   1. **Discrimination may be allowed if:**
      a. legitimate end (compelling state interest)
      b. no less onerous alternative exists (“strict scrutiny”)
   2. Apply this solution to Baldwin:
      a. Legitimate end: believe NY’s reason
      b. Is discriminatory but no less onerous alternatives available

E. **Welton v. Missouri** (CB 541)
   1. Held: license required for peddlers doing business in MO (Unless they sold MO produced goods) is discriminatory
   2. Ask: what is the less onerous alternative here?
      a. Could license all peddlers

   1. Facts: NC regulation that apple containers shipped into NC bear no grade other than the applicable U.S. grade or standard
   2. Held: discriminatory
      a. Discriminatory effects of statute: hurts Washington and its apple industry (Don’t have to examine legislative motive)
   3. Ask: what is the less onerous alternative here?
      a. Put USDA grade alongside the Washington label on the container

G. **Edwards v. California** *State Can’t isolate itself from common problems*
   1. Held: CA regulation that forbids one to transport indigents into the state w/ knowledge of indigency is discriminatory
   2. State cannot isolate itself from problems common to all states

H. **Healy v. Beer Institute**
   1. Held: Conn. Law requiring out-of-state beer shippers to set prices no higher than prices in states neighboring Conn. is unconstitutional
a. Regulating state prices but effect on national prices
b. State regulating beyond its borders: in effect deciding what out-of-state sources of beer are allowed to do

I. Dean Milk Co. v. Madison (CB 545) Discriminatory Effects and Clearly Less Onerous Alternative

1. Facts: Madison milk ordinance requiring milk sold in the city to be pasteurized at plant within 5 miles of Madison
2. Held: unconstitutional b/c less onerous alternative available
3. Analysis:
   a. Regulation has legitimate purpose as health regulation
   b. But regulation erects economic barrier (economic discrimination)
   c. Court held: Madison can’t discriminate where there are reasonable, less onerous alternatives at hand
4. Even with legitimate safety interests and no conflict with federal laws, if there is still a less onerous alternative, a statute will be invalidated.
   a. Here: Pass inspection cost off to Dean Milk, Model Milk Ordinance available

J. Breard v. City of Alexandria (CB 549)

1. municipality’s ordinance prohibited door-to-door salesmen w/o prior consent
2. Held: no discrimination (use of police power)
3. Homeowner’s right of privacy outweighed burden on ISC


1. Facts: N.J. statute: prohibited importation of solid waste into the state
2. N.J. Arg.: statute’s “avowed purpose” = police power to protect environment
3. Appellants’ Arg.: Environmental protection talk shrouds from view the economic protectionism (economic discrimination)
4. Held: N.J. effort to control flow of out-of-state waste in N.J.’s landfill sites is discriminatory
5. Less onerous alternative: control flow of all waste into state’s remaining landfills (Statute categorically drew distinction between in-state/out-of-state waste)
6. Court found: discriminatory effects: need not be clear from language of the statute
7. Test: Economic Protectionism (3 routes)
   a. (1) discriminatory effects
   b. (2) “on its face”: Warrants the inference: discriminatory effects
   c. (3) bad (actual) purpose or “bad motive” (Ex: Kassel)
      i. Even if so: talk about discriminatory effects
8. Here: statute has discriminatory effects b/c:
   a. Isolation from all other states: N.J. doesn’t carry fair share of the load
   b. N.J. locals preferred right of access

L. Hughes v. Oklahoma (Supp. #21)

1. Facts: statute forbid transportation out of Oklahoma of minnows seined or procured in Oklahoma
2. Where discrimination is evident ask:
   a. Legitimate state purpose?
   b. If so, is there a less onerous alternative?
3. Held: there is a less onerous alternative: Oklahoma can control the yield w/o drawing this in-state/out-of-state lines distinction
4. Decision here reflects strict scrutiny doctrine after WWII: less onerous alternatives
   a. Different from Pike which didn’t mention less onerous alternatives
5. Both Philadelphia and Hughes: appears economic discrimination shrouded from view b/c of stated economic concerns

M. Maine v. Taylor (Supp. #22) No less onerous alternative
   1. Facts: Maine law banning out-of-state baitfish to protect against non-native species (parasites will disrupt Maine’s ecological balance)
   2. Held: statute upheld despite obvious discrimination
      a. Maine’s state environmental interest is legitimate
      b. Maine prevailed on its argument that there was no less onerous alt.
   3. Here: prima facie case of no less onerous alternatives:
      a. Maine needs to take stronger measure for concerns about wild fish than other states
      b. No sampling and inspection techniques available for baitfish (that are available for other types of freshwater fish)
   4. What about parasites/baitfish swimming into Maine from N.H.?
      a. But: just b/c a 100% success rate is not possible does not justify the importation of baitfish
   5. Protection of Environment today is comparable to safety (aggregate of state police power)

XIV. Preemption
   A. Preemption
      1. Problems Involve:
         a. Federal statute is on the books
         b. Not right on target
      2. Rice criteria used in cases w/ preemption (drawn from Hines case)
      3. Back to context where there is a federal statute: but the arguments here are in the dormant Commerce Clause context
         a. Does the statute apply?
         b. Not clear if federal law preempts the field
      4. If federal law is on target it prevails: defeats competing state law
         a. Where case for preemption is successful: rules out competing state measure
      5. Application of Rice criteria (recall political question doctrine)
         a. Which criteria applies most clearly?
         b. Can draw on other criteria to make the conclusion stronger (related criteria), although not necessary to rely on all 3 criteria
         c. Get beyond one criterion if possible: stronger argument
      6. If actual conflict: Skeptic’s view: not case of preemption and instead falls under Part II of the Course (Federal prevails)
      7. Intangibles in Preemption Context:
         a. Is the concern such that a cooperative regulatory scheme is desirable?
         b. Accommodation of state regulatory scheme:
            i. When overriding purpose shows that this is possible
            ii. See Pacific Gas: nuclear power regulation, quite removed from Rice criteria
   B. Rice (Supp. #22)
      1. Analysis:
         a. Presumption is to allow continuance of state’s ability to regulate
         b. Burden of proof is on party trying to rebut this presumption
      2. Grounds for rebuttal: the Rice criteria:
         a. (1) Pervasive federal scheme (uniformity)
i. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

b. (2) Dominant federal interest
   i. Fed. interest is so dominant that the fed. system will be assumed to preclude enforcement of state laws on the same subject.

c. (3) Conflicting federal and state purpose
   i. Conflicting purposes: ends, goals, objectives
   ii. State law stands as an obstacle to the accomplishment of congressional purposes
   iii. Subject sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose or the state policy may produce a result inconsistent with the objective of the federal statute.

3. #1 and #3 are often used together: go to the purpose question

C. Hines v. Davidowitz (Supp. #22) Added a criterion
   1. Facts: Penn. Statute required annual alien registration, carry regis. card, etc…
   2. Held: Penn. Statute preempted by congressional act w/ more modest requirements of aliens
   3. Ask: which of the Rice criteria applies best and why?
      a. Criteria #1: Pervasiveness (dominant federal scheme)
         i. Complete scheme (Supp. #22, p. 348, P 1), Comprehensive scheme (P 2), Uniform natl. system (p. 349, P 2)
      b. Criteria #3: State law conflicts w/ Congressional purpose
         i. Not to put extraordinary burdens on aliens (p. 348 penul. P)
         ii. Cong. Purpose = protect an alien’s rights/liberties (p. 349)
         iii. Criterion #3 Dominant federal purpose = more interesting here than criterion #1

D. Pennsylvania v. Nelson
   1. Facts: PA statute prohibiting sedition against PA and the U.S.
   2. Held: preempted by the Smith Act
   3. Analysis: arguably all 3 of the Rice criteria apply

E. Askew No Preemption
   1. FL statute imposing strict liability for oil spills in state’s territorial waters
   2. Held: statute upheld despite congressional act imposing strict liability
      a. The Cong. Statute is limited to cleanup costs incurred by the fed. govt.

F. City of Burbank
   1. Facts: city ordinance prohibiting night air departures from Hollywood
   2. Held: preempted by “pervasive control” of air traffic by congressional acts
   3. J. Rehnquist (dissent): state purpose looms large here, this is persuasive b/c nothing much here gets in the way of federal aviation regulation

G. Pacific Gas and Electric Co. v. State Energy Resources Conservation Commission
   1. CA statute prohibits construction of new nuclear energy plants in the state unless means of disposal of nuclear waste are at hand
   2. Held: statute upheld
   3. Court: read CA statute so that the state is taking decisions on economic grounds which are not preempted by fed. law (uses economic rationale) and agreed w/ CA that meltdown of nuclear power plan would hurt CA economy
   4. Federal govt. has exclusive power to regulate safety in this area
a. Found that CA not regulating on safety grounds despite the fact that safety, preempted by federal law, played a role in the CA statute and the basis of this decision

5. Appears overwhelming case of preemption but Crt. doesn’t reach that result
   a. Rice #1: Cong. regulation pervasive (Uniform regulations desired)
   b. Rice #2: Dominant federal interest

6. Court’s interpretation of Rice criterion #3 “conflicting purposes”:
   a. State’s purpose here is different: in line w/ economic constraints that are viable

H. Ray v. Atlantic Richfield Co. (Supp. #23) Accommodation
   1. Facts: standard safety features of Washington’s Tanker Law
   2. Held: “standard safety and design features” preempted by fed. law speaking to the same issues
   3. Appears: overwhelming case of preemption
      a. Rice criteria #1: uniformity
         i. Cong. Interest in uniformity (uniform fed. regulation)
         ii. Cong. Anticipated fed. standards to preempt state standards
         iii. State standards would frustrate Congressional desire for uniform standards (p. 400)
   4. Court in effect does not overturn Washington’s safety/design features at all:
      a. Court later in opinion brings the safety provisions back in: Disjoins the state safety features to a tug escort provision and sets out the disjunction as a set of live options
      b. Court says there is a choice:
         i. negative alternative: if you don’t do 1st thing then must do the 2nd thing (“Either comply w/ tug escort provisions or meet ‘design’ provisions” (Supp. #23, p. 400))

5. Accommodation of state regulatory scheme in environmental context where state regulation plays a key role

XV. Two Developments: Courts trying to give states a greater role in the commercial regulatory context
   A. 10th Amendment: increased role and use
      1. immunity doctrine: lending states immunity from Congressional commercial regulation under the commerce clause
   B. Market Participant Exception
      1. state participates in market → distinct from regulating the market
      2. doctrine is more interesting than its supporting arguments

XVI. State as Market Participant
   A. State as Market Participant:
      1. When the states do not try to regulate commerce, but instead intervene in commercial markets and become “market participants.”
      2. Market Participation Exception → states as players in a market; state is immune from regulation under the dormant commerce clause [remains a problematic area]
      3. Question: can the state really cloak itself enough to be a market participant?
         a. No: a state favors in-state customers instead of out-of-state customers
      4. Role of subsidies: resource at hand to resolve these problems w/o resorting to the market participant fiction
         a. Market participant fiction is problem b/c hard to justify the doctrine
5. Problem: making economic discrimination possible here when classical learning said it was not possible
6. Other side Arg: free up states from economic restraints
   a. Let state enter through exceptions that have been recognized

B. Hughes v. Alexandria Scrap (Supp. #24): Market Participant Doctrine
   1. MD pays “bounty” to in-state and out-of-state processors of auto hulks but out-of-state processors required to provide more ample documentation of title
   2. Court upheld this statute: Did not follow classical dormant C.C. framework
   3. Market Participant Doctrine: the state as a market participant is no more subject to the constraints stemming from the dormant C.C. than are private market participants
   4. Critique of the doctrine:
      a. Okay if this is subsidy: state can subsidize in-state businesses (in-state processors): Subsidy won’t reach to out-of-state processors
      b. Not endorsing state subsidy here:
         i. If giving a subsidy, MD is not participating in the market
         ii. Private business would not offer bounty to remove auto hulks

C. Reeves v. Stake (CB 573) Market Participant
   1. SD statute gave in-state purchasers of cement preference at time of shortage
   2. Held: statute upheld under market participant doctrine
   3. When state acts as “proprietor” then constraints understood under “evenhandedness” have no application
   4. DISSENT: This is an example of Protectionism. This is precisely what the dormant commerce clause is supposed to prohibit.

D. New Energy Co. of Indiana v. Limbach (CB 576) Not Market Participant so Econ. Discrimination
   1. Tax rebate for Ohio ethanol, tax = quintessential govt. purpose
   2. Held: not a market participant here
   3. Statute thrown out on grounds of economic discrimination

E. South-Central Timber Development, Inc. v. Wunnicke (CB 577) No Market Participant Exception if affecting a different market
   1. Statute required purchasers of Alaska timber to have timber processed in state before being shipped out of state for sale
   2. Here: Alaska = market participant regarding the sale
      a. But Alaska is not a market participant regarding the processing of the timber which takes place “downstream”
   3. The market-participation exception cannot extend beyond the transaction to which the state is a participant. After that, the state is acting in a regulatory capacity.
   4. Held: Exception to the Market Participant Doctrine
      a. Alaska can’t effect beyond the transaction in which it is participating
   5. Alaska is imposing conditions on a market in which it is not participating
      a. Processing of timber is different market from the selling of timber
   6. Problem illustrated: buyer has no choice under this statute which is exactly what a private participant has in the open market

F. White v. Massachusetts Council of Construction Employers (CB 577)
   1. Facts: hiring 50% of construction workers from Boston
   2. Result may be desirable: Employment for people of Boston (Like desirable result in Alexandria Scrap)
   3. Doctrine: at best a legal fiction: Maybe the analogy of the state as a market participant can’t be made
XVII. Interstate “Privileges and Immunities” (Art. IV, § 2)

A. Privileges and Immunities Clause
1. Article IV, §2: clause was designed to ensure that states would not discriminate against the citizens of other states b/c of their citizenship in those states
2. Second P and I clause: 14th Amendment = “entitlements” as specific enumerated rights, follows command interpretation
   a. Introduced along w/ equality provision
3. not well understood and may always be that way
4. sometimes seen as an alternative to the Commerce Clause in the employment context
5. Doctrine: no application to corporations
   a. Only out-of-state citizens → must be a person

B. Privileges and Immunities Clause has not been followed
1. Problem: P and I clause does not enumerate anything
2. None of this has been followed by the courts: everything still a fog
3. Brennan’s analysis like strict scrutiny: compare
4. Employment context = paradigm (Piper) and everything else goes off the track

C. State discrimination permissible if: (Brennan’s analysis)
1. Problem traceable to activity of non-residents
   a. Non-residents = source
2. Discriminatory measure (set down by state) responds to the problem the non-residents present

D. Corfield v. Corvell (CB 181)
1. NJ statute: nonresidents can’t take clams from NJ waters
2. Held: statute upheld b/c gathering clams is not a fundamental right
3. J. Bushrod Washington’s reading of Art. IV, § 2 was wrong:
   a. Framers meant it as an equality provision: prevent state from treating non-citizens less favorably than its own citizens
   a. To bring the outsider up to the level of treatment enjoyed by the insider

E. Baldwin v. Fish & Game Commission of Montana Brennan’s standards (dissent)
1. MT statute calls for higher fees for non-resident hunting licenses
2. MT Arg.: modest fee and only for wealthy out-of-state hunters
3. Held: statute upheld
4. Court draws on Corfield and characterizes P and I as basic rights and concludes elk hunting is not a basic right
5. J. Blackmun offers criterion of vitality of the nation as a single entity (CB 580)
   a. Not a good criterion: not specific/workable/detailed (goes nowhere)
6. J. Brennan (dissent):
   a. State discrimination permissible if:
      i. Problem traceable to activity of non-residents
         a. Non-residents = source
      ii. Discriminatory measure (set down by state) responds to the problem the non-residents present
   b. Brennan’s criteria for P and I cases used for employment issues
7. How J. Brennan’s scheme would not apply:
   a. If non-residents are not the problem and problem instead = high cost of managing wildlife then Problem not traced to non-resident hunters
   b. Or if Brennan’s scheme is limited to the employment context

F. Camden Application of Brennan Analysis
1. Facts: city ordinance, hiring preference for those residing in the city as an effort to address “middle class flight”

2. Apply Brennan’s 2 criteria:
   a. What is problem?: Middle class flight (city losing tax base)
      i. Problem caused by non-residents by definition
      ii. Measure here addresses the problem
   b. Discriminatory measure → responds to the problem
      i. The measure addresses problem that is a legitimate state purpose

3. clear application of Brennan’s analysis

G. Toomer Analyze: If Proportionate to the problem
   1. SC law imposing $2500 fee on non-residents’ shrimp boats
   2. Held: unconstitutional under P and I clause
   3. Fee is not proportional to whatever legitimate concern SC may have had as to concerns of maintaining its shrimp industry (Meant to eliminate non-residents)

H. Hicklin v. Orbeck J. Brennan’s scheme used helpfully (employment context)
   1. Facts: Alaska “local hire” law
   2. State’s purpose is to address unemployment problems
   3. Held: law is unconstitutional b/c the state’s purpose is not reflected in the means adopted
   4. Brennan’s standards:
      a. Problem not traceable to the activity of non-residents and instead traceable to lack of educ./job training and remoteness of the residents

I. Supreme Court of New Hampshire v. Piper Paradigm for P and I Clause
   1. Facts: NH rule: NH residents alone qualify for NH bar
   2. In this employment context: P and I Clause can be used w/ confidence
   3. Held: NH rule violates interstate P and I Clause
   4. No basis for distinction between residents and non-residents
   5. State’s Concern: non-residents may not always be available
      a. Simply require a local attorney when non-resident can’t come

XVIII. State Immunity Doctrine
A. State Immunity Doctrine
   1. Argument: Congress can regulate private industry but states themselves are immune from such regulation
   2. The state immunity doctrine has survived (here to stay) but Problems arise w/ the arguments to support the doctrine (not persuasive)
   3. Best Arg. for State Immunity Doctrine: need to redress the balance between the 2 systems of govt. from time to time (Kennedy in Alden): This is job of the court but still no criteria for identifying proper balance are specified
   4. J. Renquist’s analogy: immunity in rights context (see table below)

<table>
<thead>
<tr>
<th>Individual’s constitutionally protected immunities</th>
<th>Federal regulation</th>
<th>State regulation</th>
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<tbody>
<tr>
<td><strong>the line between federal and state regulation is a moving line (left or right) as to questions of policy</strong></td>
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B. When does this immunity apply? (CB 591, 592)
   1. Application of State Immunity Doctrine From Garcia (CB 595):
      a. (1) states as states
b. (2) attributes of state sovereignty
   c. (3) federal obligation impairs states’ traditional governmental functions

2. #2 seems to fall under #3 (integral governmental functions)
3. CB 595 list activities that have and have not been attributable to states
   a. Demonstrates problem: the criterion are meaningless (later caselaw has not improved what J. Rhenquist gave us in National League)

C. Overall Trend
1. National League like Lopez: limits Congressional power
2. National League introduces new doctrine
   a. Doesn’t challenge Congressional power as such but in Natl. League argues that states and their employees immune from this Cong. Power
      i. Not within scope of this power
3. Arg in favor: Strategies to reign in federal courts
4. Counter-Arg.: the only check on Congressional policy should come from the people
   a. Question for political process: courts have nothing to say here
   b. Rhetorical questions: who are people being protected from? What is this entity – the state?
   c. See: Marshall’s lines from Gibbons, Dissenting opinions (J. Brennan…)

D. National League of Cities v. Usery (CB 587) States decide these issues for themselves
1. 1974 Fair Labor Standards Act: minimum wage applied to state employees
2. Held: States immune from regulation under the C.C. where “functions essential to the separate and independent existence” of the State are concerned
3. Affirmative Limitation (CB 588, last P): Congress has power but it is limited (can’t be used in certain cases)
   a. Ex: self-defense in homicide context is limitation on state’s power to prosecute
4. Criterion #3 from above given reference to at CB 591 (last P)

E. Garcia v. San Antonio Metro Transit Authority (CB 593)
1. Facts: transit services were private until after WWII
2. Held: National League doctrine overruled: The standards given for state immunity are unworkable

F. Printz v. U.S. (CB 608) Question Begging
1. Facts: Fed. statute (Brady bill?) compels state officers in interim arrangement to execute fed. law (background checks on would-be purchasers of handguns)
2. Held: statute unconstitutional b/c incompatible w/ our system of dual sovereignty
3. Rubrics for decision:
   a. Historical practice/understanding
      i. Anything required by state courts of early Congress was adjudicative in nature
      ii. But: state courts were involved in administrative functions
         a. Record applications for citizenship
         b. Ordering deportation of illegal aliens during war
   b. Structure of the Constitution
   c. Early decisions of the Supreme Court
4. Critique: Question Begging
   a. Govt. alleged to defend Cong. Power where it doesn’t have any power but must determine what is Cong. Power before 10th Amend. is applicable (same for Necessary and Proper clause)
b. Court says State sovereignty violated but that is precisely the issue: does the state immunity doctrine apply here?
c. Doctrine asserted at every juncture but that is precisely what at issue

G. **Alden v. Maine** (CB 619) **Better Argument for State Immunity Doctrine**
   1. Facts: Probation officers employed by Maine allege state violated overtime provisions
   2. Held: Congress has no power to compel states to hear private suits for money damages in its courts
   3. J. Kennedy uses care to describe place of the states in “constitutional plan” (when suits against a state are involved: 11th Amend., 14th Amend., Sec. IV)
   4. **Better Arg here for state immunity doctrine.: strike balance between 2 systems of government**
   5. J. Kennedy’s structural Arg. here is overdrawn
      a. From Martin v. Hunter’s Lessee: need to sustain federal system (glue holding the union together)
      b. Overdrawn here: mentioning financial integrity

**PART IV: The Persisting controversy over the function of the judiciary**
**Slavery, substantive due process, incorporation, “modern substantive due process” or privacy**
**Issue of constitutional rights v. decisions taken democratically**
**Fundamental questions: role of judiciary?**
   - begins in slavery context: does slave-catcher have a choice in **Prigg**?

**XIX. Slavery and the Constitution**
A. Slavery:
   1. references in Constitution:
      a. Article 1, Section 2, Para. 3: “3/5 Compromise”
         i. Slaves: for representation and considered chattel/property
      b. Article 1, Section 9, Para. 1: Importation of slaves prohibited after 1808
      c. Article 4, Section 2, Para. 3: Fugitive Slave Clause
   2. Derrick Bell article: property is not principal purpose of government
   3. Issues of Slavery come up in three contexts in the mid-1800s
      a. 1st context: commerce and slaves
      b. 2nd context: returning fugitive slaves (**Prigg** case)
      c. 3rd context: status of slaves in interstate transit (after spending time in free state)
B. **Groves v. Slaughter: ISC and Slavery**
   1. Mississippi Const. proscribed importation of slaves into state
   2. Arg.: Congress has exclusive regulatory power
      a. If slavery part of commerce: Cong. Has power to regulate commerce
   3. Held: provision has no application until implemented by the legislature
   4. power over slavery = local (local regulation of slaves)
   5. J. McLean (dissent): Congress has exclusive commercial regulatory power but slaves not an article of commerce
C. **Prigg v. Pennsylvania:**
   1. Fugitive Slave Act (1793): required proper identification of the slave as a fugitive slave, Pennsylvania law curbed “self-help”
   2. Issue: returning fugitive slaves
   3. Held: Penn. Law was unconstitutional b/c of conflict w/ Fugitive Slave Act and lying behind that Article 4, Section 2, Para. 3
4. Result: the PA statutory requirement to acquire a certificate of removal is a mere option (dubious ruling)

5. J. Story Arg.: Article 4, Sec. 2, Para. 3 is self-executing (self-IMPLEMENTING)
   a. Problem w/ Story’s Arg: what was self-executing is now defined by federal statute (terms of the 1793 Act outline how to go about this)
      i. 1793 Act = constraints and does not mention self-help (but J. Story says that self-help remains)

D. Dred Scott Non-fugitive slave in free state
   1. Dred Scott was slave in MO, went w/ dr. to Ill. and Wisconsin (free state and free territory) and then returns to MO
   2. Issue: status of non-fugitive slaves in free states
   3. 3 possible answers as to Scott’s status upon return to MO:
      a. Permanent slave status
      b. “once free always free”
      c. Reversion (middle position): Taken to free state become free there, Return to slave state: then status of slave returns again
   4. Held: blacks cannot be U.S. citizens and therefore are not U.S. citizens
      a. Scott still a slave due to permanent slave status
      b. Citizenship in state has no bearing on citizenship in federal union
   5. J. Curtis (dissent): points to actual cases of black U.S. citizens in 1789
      a. If these blacks were citizens of states before the ratification of the Constitution, they would then be US citizens afterwards.

E. Interpretive Strategy: Frederick Douglas and Textualism
   1. Spectrum: Moral theory ------------------------x----- intentionalism/originalism
      a. Textualism = on side of intentionalism
   2. moral theory:
      a. Ex: privacy is presupposed for autonomy
         i. argued for abortion
         ii. Kant: human beings are ends in themselves
   3. Intentionalism: look at legislative history
      a. Ex: reconstruction – legislators didn’t intend de-segregation
   4. Textualism: look only at text: Don’t try to figure out the framers’ intention
      a. Progressive document: no more importation after 1808
      b. Fugitive Slave provision recognized slavery and possibility of insurrection (Thus: safer to abolish slavery)

XX. Rise and Fall of so-called Substantive Due Process
A. Substantive Due Process: Court protection of rights not specifically mentioned by the Constitution as “fundamental rights” (CB 195)
   1. D.P. by definition = procedure therefore is substantive D.P. an oxymoron?
   2. Due Process came to be used as check on state power:
   3. Odd set of developments at end of 19th century
      a. When economic rights of employers involved, Freedom from economic regulation constitutionalized in the name of substantive Due Process
B. Recent privacy cases (abortion and sex cases) go off track from doctrinal standpoint in same way as old substantive D.P. cases
   1. If interested in maintaining the privacy cases: learn from old D.P. cases and modify arguments to actually support the doctrine
   2. If no improvement in arguments: the present privacy cases will wash out
   3. See CB 212 (last P): CB editors set out problem of distinguishing old style substantive D.P. from its “modern” counterpart of privacy
a. Part of motif of Part IV of the course
b. See also: comments by DER and DEL at CB 280-283

4. Since the right of privacy cannot be found in the Constitution, a more radical approach must be taken and this must be interpreted as a right of privacy/autonomy based upon a political/moral principle.

C. Issue: How the 14th Amendment serves to carry-over to the states certain rights guaranteed in the Bill of Rights

1. Amendments 9 and 10 guarantee nothing in particular (both generalize)
   a. 10th Amendment: truism of powers left over to state

2. 5 possibilities regarding carry-over:
   a. 14th Amendment carries over nothing from first 8 Amendments
   b. 14th Amendment carries over some but not all
   c. 14th Amendment carries over some but not all and some goes beyond
   d. 14th Amendment carries over exactly those rights of the first 8 Amendments
   e. 14th Amendment carries over exactly those rights of the first 8 Amendments and recognizes some additional rights

3. Vehicle for carry-over: Due Process Clause of the 14th Amendment
   a. Although in beginning appeared that P and I clause would do this: But P and I possibilities did not go anywhere
      i. Arg. of J. Washington in Corfield went nowhere

D. Slaugher House Cases (1873, CB 183): No incorporation through P and I Clause

1. Facts: monopoly conferred by New Orleans to Slaughterhouses, other butchers wanted to work
2. Held: the one pervading purpose of 13th and 14th Amendments is the freedom of the black slave (guarantee rights to former slaves)
   a. Therefore: cannot be said that 14th Amendment “P and I” clause carries over to and enforces against the States those protections found in the Bill of Rights
3. Part of Dred Scott overturned: citizen of U.S. means born or naturalized in U.S.
   a. No longer piggy backed from citizenship in a state
4. P and I alluded to by the appellant are tied to citizens of the states
   a. Left to states to enforce, vindicate these rights
   b. No carry-over of rights from Bill of Rights
5. J. Field (dissent): some P and I exist as rights as such
   a. States can’t interfere w/ these
   b. Connection between 1866 Act and 14th Amendment (constitutionalizing what is set out in the 1866 Act)

E. Mugler v. Kansas (CB 196) Economic Liberty

1. Fundamental law mentioned
2. Liberty of employer to do what he/she would like
   a. Laissez-faire → status quo → rights to economic liberty

F. Lochner v. New York (1905, CB 198) Economic Liberty from substantive D.P.

1. NY statute limited the work week
2. start w/ D.P. as an idea to ensure fair procedure
   a. process/procedure owed to a person/Defendant
   b. contrast: substantive D.P. yields substantive right not to be confused w/ procedural safeguards enjoyed by a person
3. Held: statute unconstitutional b/c of economic liberty from the D.P. clause of the 14th Amendment
4. Statute interferes w/ the “right of contract” between employer and employee
a. “Right of contract” = absurd Arg. b/c it presupposes roughly equal bargaining power (compare to Parrish)
b. Substantive right: economic liberty but doesn’t mention econ. liberty of employee (one-sided rationalization)

5. 14th Amendment D.P. clause used as a check on state legislative power
6. Result: Court doing bidding of industry and Rationalized: economic liberty
   a. Constitutionalized: appeal to 14th Amendment in hearing these cases
7. Both dissents treat this issue as a matter of policy rather than view it as constitutionally protected rights
   a. J. Harlan (dissent): “liberty of contract” is subject to state regulations
   b. J. Holmes (dissent): issue is one of policy and not rights
      i. substituting one policy for another is for legislature to decide, not judiciary

G. Baldwin v. Missouri (CB 205)
   1. J. Holmes (dissent): deplores use of 14th Amendment to rob states of the use of their police power

H. Muller v. Oregon (1908)
   1. Oregon statute limiting work week for women
   2. Held: constitutional: exception to substantive D.P. rule
      a. Physical structure and maternal functions place women at disadvantage in struggle for subsistence

I. Adkins v. Children’s Hospital (1923)
   1. Minimum wage in Washington D.C. for women and minors
   2. Held: unconstitutional using Lochner reasoning that “right to contract” is part of liberty protected by the 14th Amendment D.P. clause
   3. J. Taft, Holmes (dissenting opinions): power of legislature to set working conditions

J. Nebbia v. N.Y. (CB 205) Rational Basis Test
   1. Facts: State price controls on milk
   2. Held: law upheld b/c has reasonable relation to a proper legislative purpose and is not discriminatory
      a. Rational basis test: here the legislation is not arbitrary so passes test
   3. Opinion suggests that Lochner decision was coming to the end of the road
      a. If rational relation test sufficient to uphold legislation: substantive D.P. (econ. rts of employer) will vanish b/c sub. D.P. claim can’t prevail

K. West Coast Hotel v. Parrish (1937, CB 208)
   1. Facts: Washington state act fixes minimum wages for women and minors
   2. Court undermines Lochner: shows the absurdity of the lie that workers enjoy equal bargaining power with their employers (Defends the rights of the worker)
      a. Court formally overrules Adkins
   3. J. Sutherland (dissent): formalistic opinion representing the old reasoning
      a. Argues that constitutional meaning does not change w/ the ebb and flow of the economy (CB 209, P 2)
      b. Critique: Appears: the meaning does change w/ change in economy
         i. Problem: Sutherland and co. created problem here by not recognizing rights from the outset of the 14th Amendment (1868)
         ii. Formalistic: not addressing exigencies that gave rise to the problem in the first place (plight of Elsie, the worker)

L. U.S. v. Carolene Products Co. (1938, CB 210) Anticipate: Discrimination of rights falling under strict scrutiny test
   1. Facts: Filled Milk Act, health measure, protect against fraud
2. Held: act upheld  
   a. Deference to Congress in Commerce Clause case: facts for legis.
      judgment are to be presumed (Standard of weak review from Darby)
3. Rational relation: not concerned w/ means (defer question of means to legis.)
4. Significance of case from footnote #4: Court anticipates the higher standard of 
   “strict scrutiny” in post-War period  
   a. Strict scrutiny when “prejudice against discrete and insular minorities” is the concern  
   b. Means become the focus: are there less onerous means?  
5. Anticipates the distinction b/t claims of rights (strict scrutiny standards) and 
   claims of mere policy (relaxed standard). Anticipating a stricter standard as 
   applying the rational basis test to discrimination.
M. Olsen v. Nebraska (1941, CB 211) **Substantive D.P. overturned**  
   1. Neb. Statute fixed maximum fee that private employment agency may charge 
   2. State Supreme Court overturned statute b/c of substantive D.P. 
   3. Held: Neb. Supreme Court decision overturned b/c the precepts of the Lochner 
      era no longer have merit  
   4. Court overturns substantive D.P.
N. Whalen v. Roe (1977)  
   1. Facts: NY statute, records kept of those who have obtained w/ a doctor’s 
      prescription certain drugs 
   2. Held: upheld against appellee’s Lochner-style defense 
   3. Using rational basis test: no one is asking the state to demonstrate necessity 
   4. The court is rejecting all traces of Lochner. There is nothing unreasonable 
      about the connection b/t the means and the end.

XXI. **Incorporation**
A. Incorporation: summarized at CB 253  
   1. Not incorporated today (only hold-outs):  
      a. Grand jury proceeding of 5th Amendment  
      b. Jury trials of 7th Amendment in civil context 
   2. Result has been virtually complete incorporation  
      a. Departure from J. Cardozo and selective incorporation 
B. Barron v. Mayor & City Council of Baltimore (1833, CB 245)  
   1. Appellant invokes the 5th Amendment “taking” clause against municipality 
   2. Held: 5th Amendment had no application to the states 
   3. Result: Bill of Rights does not apply to the states 
   4. The argument draws on the text of the instrument (not the intentions of the 
      legislature). *The federal govt. was what was created by the Constitution; therefore, this is the entity to be regulated by the document.* 
   5. Limitations of power that are specific  
      a. Article I, Section 9: specific limitations 
C. Palko v. Connecticut (1937, CB 247) **Selective Incorporation**  
   1. Conn. statute provided for prosecutorial appeal 
   2. Held: statute did not trigger 5th Amendment immunity from double jeopardy  
      a. Incorporation is justified only if the precept in question is “implicit in the 
         concept of ordered liberty”  
      b. Selective incorporation: 14th Amendment incorporates only the most 
         fundamental rights  
      c. Liberty is a fundamental right, but not if we are merely talking about 
         double jeopardy
3. Cardozo illustrates idea of incorporating precepts implicit in the concept of ordered liberty by underscoring the role of the 1st Amendment freedoms therein 
   a. Recalls Marsh v. Alabama and J. Black showing how fundamental the freedom of speech is to liberal democracy
D. Adamson v. California (1947, CB 249) Selective Incorporation
   1. Held: freedom from self-incrimination under the 5th Amendment does not carry over to the 14th Amendment 
      a. D.P. clause does not incorporate all fed. rights associated w/ a fair trial 
      b. Applying Palko: not all the rights of the federal Bill of Rights are drawn into the rubric of the 14th Amendment D.P. clause 
   2. J. Black: argues for full incorporation 
      a. Court is making distinctions between rights of first 8 amendments: reduced to using “natural law” which is not in the Const. and involves no standards (therefore the court is arbitrarily choosing what is fundamental based on their own intuition)
E. Malloy v. Hogan (1964)
   1. Here the Court incorporates the 5th Amendment freedom from self-incrimination 
   2. Today: the law reflects nearly complete incorporation (see CB 253)

XXII. Modern Substantive Due Process and the Privacy Doctrine
A. Substantive Due Process: shift from economic liberty to personal liberty 
   1. Griswold reconstitutes substantive D.P. field in name of privacy 
B. Context for Privacy: 
   1. education 
   2. personal liberty (Griswold) 
   3. right to die (Cruzan) 
   4. sex context (Bower v. Hardwick and Lawrence v. Texas) 
   5. Constitutional Interpretation in Equality Context 
C. Privacy and issue of Constitutional interpretation 
   1. issues of concern that are contentious but most people agree on the sex issue 
   2. Doctrine from Meyer carried over in privacy cases in post-War period 
   3. Holdings crying out for theoretical support 
      a. Problem: cases like Bower possible b/c there is no doctrine here 
   4. Have we improved on doctrine since Roe/Griswold? 
      a. See J. Blackmun (dissent in Bowers): principle of autonomy 
      b. Autonomy picked up in Lawrence but problem is that the decision could be argued as simply rejecting an illegitimate state purpose 
         i. Rational relation test: means rationally related to ends 
         ii. But reason Court gives for being illegitimate goes back to individual right (personal and private life) 
      c. Touchstones being developed in autonomy context so probably not relying solely on rational relation test in Lawrence 
         i. Reason not legitimate state interest goes back to the individual’s right: autonomy (subtle reference) 
D. Meyer v. Nebraska (1923, CB 256) Const. right of child in education context 
   1. Neb. Statute: prohibited instruction in schools in any language besides English 
   2. Poses substantive D.P. problem in new way: to extend constitutional immunity to a school child (not an economic right) 
   3. Held: statute overturned as violation of 14th Amendment D.P. clause 
   4. Liberty in the 14th Amendment leads to a specific constitutional right
a. Specific/substantive right drawn from outside the realm of procedure of the D.P. clause (D.P. not restricted to procedure)
b. Right of child/parent for child to be taught in a foreign language
c. If constitutional right (immunity): courts will review and even if legislation has reasonable relation it will be thrown out

5. Court emphasizes: liberty as reaching to “the right of the individual to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children.” (broad interpretation of liberty)

6. If the right at issue is a constitutional immunity then the means here are beyond the scope of a state: Constitutional immunity prevails and statute washes out
   a. Constitutional rights trump over a policy w/ a legitimate purpose

7. J. Holmes (dissent): arguing that there was no right at issue here, but a matter of policy best left to the state legislature.

E. Poe v. Ullman (1961)
   1. Conn. statute proscribed the use of contraceptives
   2. Held: the action challenging the statute dismissed for lack of standing
   3. J. Harlan (dissent): develops the theme of “liberty” in the 14th Amendment as “including a freed from all substantial arbitrary impositions and purposeless restraints.”

F. Griswold v. Connecticut (1965, CB 261) Big Issue: doctrinal support for privacy doctrine
   1. Conn. statute banning use of contraceptives
   2. Held: the Conn. statute is unconstitutional b/c it violates the right of marital privacy (decision based on constitutional right)
   3. Conn. statute especially troubling b/c it prohibited the use of contraceptives: how could it be enforced?
   4. Machinery that J. Douglas used to develop a right of privacy (zones of privacy)
      a. Draws from the Bill of Rights “penumbral rights” where privacy is protected from governmental intrusion (periphery rights at the edge)
      b. On the edge of the “core rights” contained in the Bill of Rights (CB 262):
         i. References to 1, 3, 4, 5 Amendments
         ii. 3rd Amendment: prohibition against quartering soldiers
         iii. 4th Amendment: prohibits unreasonable searches and seizures
   5. J. Goldberg (CB 264): reductio ad absurdum Arg:
      a. Does govt. have power to sterilize after birth of 2nd child?
      b. No const. provision given to protect from such a measure but clear that Const. protects from this kind of measure although it is not express
      c. Conclusion: rights that are not expressly guaranteed in the Constitution are still clearly there (i.e. right to privacy)
   6. J. Goldberg defends incorporation (CB 263): 14th Amendment provides additional guarantees beyond those of the first 8 Amendments (with above Ex: sterilization not enumerated)
   7. J. Goldberg also Arg: argues the 9th Amendment indicates the view of the framers that the first 8 rights were not exhaustive of our rights
   8. Problem with the 9th Amendment Argument:
      a. No criterion for applying the 9th Amendment (nothing specific enumerated there) so if rights decided by only reference to the 9th Amendment the scope is too broad
      b. Enumeration: what is not enumerated is excluded
         i. Madison added 9th Amendment as response to the above canon of construction

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G. **Roe v. Wade** (1973, CB 272) **Personal Privacy Right from 14th Amendment?**
   1. Facts: Texas abortion statute: proscribed abortion
   2. Held: statute overturned
   3. Rationale: J. Blackmun attempts to draw a right of personal privacy from the 14th Amendment arguing by analogy from past cases on related matters (including **Meyer**)
   4. Is it the Texas legislature speaking here or a constitutional immunity so Texas legislature has nothing to say on the matter?
   5. These rights are penumbra from the core (Preamble) in the “blessings of liberty.” (??): Autonomy, Family, Health
   6. **Promising doctrine: “autonomy” as undergirding privacy**
      a. This decision points to the autonomy argument: Treat men and women as ends themselves and Not as means to an end
         i. Doesn’t matter if the end may be a good one
         ii. Ex: end set down by state (concern about reproduction) and women = means for reaching that end
   7. Held: no absolute/unqualified right to abortion
      a. State’s interests here (CB 273): Health of mother, Protect unborn child, Maintain medical standards
      b. State has compelling interest at the point of viability (point when state can regulate and proscribe abortion)
   8. Issue of personhood: if fetus = a person
      a. This is philosophical question and not a legal decision (no caselaw here)

H. **Cruzan v. Missouri Dept. of Health** (CB 338) **Right to Die**
   1. MO requirement: clear and convincing evidence to discontinue treatment
   2. Issue: privacy right to discontinue treatment?
      a. If person is competent: no problem w/ person’s constitutionally protected immunity of right to refuse medical care
      b. This issue is a problem if a person is incompetent and unable to make this choice to discontinue treatment
   3. Held: MO has power to set down procedural safeguards
      a. As to who and under what circumstances this right can be exercised
   4. J. Scalia: federal courts have nothing to say in this area at all
      a. Theme for Unit V of the course: what is the judicial role?
   5. J. Brennan (dissent):
      a. asymmetry in evidence standard: problem if not reflecting the patient’s wishes
         i. High evidentiary standard to pull plug
         ii. No evidentiary standard to stay alive
      b. Right is a const. immunity and no govt. power can take her right away
         i. Balancing has no place here (balancing state’s interest v. person’s interest)

I. **Bowers v. Hardwick** (1986, CB 327) **Sodomy, Specificity Problem**
   1. Facts: Hardwick and friend arrested for sodomy after policeman entered house pursuant to open container charge
   2. J. White contends the issue presented is whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy
      a. illustration of “specificity problem”: framing the issue w/ such specificity that it is reduced to an absurdity: Makes the language too specific and Must be broader to be a constitutional issue.
3. J. White: terrible reading of history: So-called sodomy statutes of 19th century did not address homosexuals in speaking to the particular activity at issue here
4. J. Blackmun (dissent): pitches the guarantee of privacy at an appropriately general level
5. J. Blackmun (dissent): also introduces elements of a justification of privacy in terms of autonomy
   a. Autonomy based on (CB 330):
      i. Decisions: whom to love, marry, have children with….
      ii. Places: in home an individual is secure and free from intrusion
   b. “place/home” = most textual basis for right to privacy
      i. 4th Amendment (CB 331): protecting the home
      ii. Home = private place
J. Lawrence v. Texas (Supp. #27) Autonomy being developed?
1. J. Kennedy: suggests the doctrine of privacy lends itself to explication in terms of autonomy (picking up from J. Blackmun dissent in Bowers)
   a. Need to be able to take fundamental decisions for oneself
   b. Autonomy underlies moral value that underlies right to privacy
   c. Dignity as a dimension of autonomy (closely related to autonomy)
      i. Effects of arrest under sodomy statute to a person’s dignity
      ii. Underlying notion of autonomy at work here
2. J. Kennedy also points backward to substantive D.P.: precept of liberty and privacy
3. Still it is arguable that the case is decided by appeal to the rational basis test:
   a. “The TX statute furthers no legit. state interest to justify its intrusion in the personal and private life of the individual.” (Supp. #27, p. 35)
4. J. Scalia: insists on framing issue as in Bowers
   a. Insulting: J. Scalia expresses surprise that the Court here leaves untouched the conclusion of Bowers as he and J. White have framed it

PART V: SEPARATION OF POWERS: Congress and the Executive

XXIII. Allocation of Powers
A. Part V focus Separation of Powers:
   1. We have examined where a constitutionally protected right prevails over any policy (federal or state): vertical perspective
   2. Now shift gears to focus on horizontal axis: Exec. ------ Cong. ------- Courts
   3. Usually: conflicts between the Executive and Congress
      a. Not much hard law here
      b. Very little organization in course materials
   4. Separation of powers is not an express doctrine of the Constitution
      a. No separation of powers clause in the Constitution
      b. Appeal to enumeration of powers that are present in Articles I, II, and III
B. Constitutional Provisions and the Executive: (found in Article II)
   a. Vesting clause (generic term): Executive power vested in the president (Art. II, Sec. 1, Para. 1)
      i. Establishes that certain powers are allocated to the Executive
   b. Executive applies the law (faithfully execute)
   c. Commander-in-Chief (of army and navy)
C. **Youngstown v. Sawyer** (CB 374) **Executive Power, Statutory Authorization not found**

1. **Facts:** wage negotiations between steelworkers and industry manufacturers during Korean conflict
2. **Issue:** sources of executive power
3. Pres. Truman authorized the Secretary of Commerce to seize steel mills in the face of threat of national catastrophe from the Korean conflict (war situation)
   a. Arg.: Congressional acquiescence (lack of response) = approval
4. **Nature of the crisis is fundamental:** what is at issue here a labor problem or a national emergency (war-time problem)?
   a. How do you adjudicate between these perceptions?
   b. Challenge: characterize the dispute in the proper way
5. Held: Truman’s action was unconstitutional
6. Labor context dictates opinion (perception = labor problem)
   a. Taft-Hartley Act: Congress had considered seizure but refused to adopt such a provision b/c it would not facilitate collective bargaining
   b. If labor dispute → statute provides what to do → not much room for Executive power
7. If national emergency: then plenty of power in the Executive Branch
8. J. Black’s opinion is formalistic but formalistic distinction of labor dispute suffices here
9. J. Frankfurter: seizures w/ only Congressional acquiescence can’t be justified
   a. There have been many provisions for presidential seizure. But, these seizures by other presidents had Congressional cover.
   b. Here there is a) no declaration of war or b) a statutory cover which would grant Congressional cover.
10. J. Jackson: **Whether president’s action authorized by Congress (3 rubrics)**
    a. (1) Express/implied authorization
       i. What president is looking for and if has it then smooth sailing
    b. (2) Questions arise if there is authority, concurrent authority
    c. (3) President acts against will of Congress
       i. Must rely on his constitutional powers
       ii. President does not comport w/ policy statements of Congress
11. Here: president Truman under category #3
12. The court reads the facts very narrowly as to stay away from a grant of executive power when it does not seem absolutely necessary.
13. C.J. Vinson (dissent): natl. emergency b/c strike would jeopardize war effort (reductio ad absurdum argument)
    a. Labor dispute, Goes unresolved for months, Leads to shortages of steel and undermines war effort
    b. Reduces initial premise (a labor dispute) to absurdity
    c. Conclusion: not a labor dispute at all
14. **Drafting of emergency powers into a statute is a bad idea:**
    a. Temptation: to declare an emergency when there is not one
    b. Ex: Weimar Constitution provided for emergency powers
       i. Those powers used for everything imaginable
       ii. 1930: use emergency powers to get a budget
       iii. 1933: Hitler arrived
D. **U.S. v. Curtiss-Wright** (Supp. #30) **Congressional authorization to president of law-making power (domestic v. foreign context)**
1. **Issue:** Can Congress authorize to president its law-making power?
2. J. Sutherland: internal/domestic areas may not be able to
3. Domestic Powers are limited
   a. Context: Article I, Section 8
   b. Powers possessed by states pre-1789 (state police powers)
   c. States delegated some of these police powers to fed. govt. in 1789
      i. Some delegated and some retained by the states
4. Foreign powers are not limited
   a. States can’t transfer/delegate powers in foreign arena b/c states didn’t
      have these powers in first place
      i. Foreign powers passed from British crown to Continental
         Congress to Articles of Confederation
   b. Foreign powers only limited by doctrine of necessity
      i. No delegation/basis from states to talk about limitations
      ii. Doctrine of necessity: response must be appropriate to perceived
          threat
5. Limitations on power might be lost if delegated in domestic context
   a. Powers of Congress: very real reason for limited power in domestic
      context
   b. No comparable limitations need to be observed after delegation in
      foreign context

E. *Dames and Moore v. Regan* (CB 389) **Category #1: Express Authorization**
   1. Facts: hostage crisis in Iran, private claims to be handled by the Foreign Claims
      Commission
   2. Here: falls under category #1 from *Youngstown*: Express/implied authorization
      a. Congress has delegated a power here:
         i. 1949 Act recognized future settlements
         ii. IEEPA: at least implicitly recognized pres. power to freeze assets
   3. Analogy here to *Carter v. Goldwater*:
      a. If president withdraws recognition then the treaty collapses (depends on
         recognition)
      b. Another reason not to bring this issue to the Senate: when recognition is
         calling the shots
   4. Distinguished from *Youngstown*: national emergency was not questioned here

XXIV. Delegation Problems and Legislative Veto
   A. Basis of non-delegation doctrine
      1. (J. Black in *Youngstown*):
         a. Congress makes law
         b. President (Chief Executive) carries out/enforces the law
   2. Non-delegation doctrine → the units of government are sealed, and thereby, insulated from the others.
      a. This separation of powers makes for trouble when you consider when Congress delegates power to the executive branch w/ an eye to creating an administrative agency that makes law in place of Congress.
   3. J. Black’s distinction formalistic: because it doesn’t reflect what really happens
   B. Above view problematic in context of modern industrial state: Administrative State
      1. industrial countries require regulatory agencies
         a. part of Executive Branch
         b. from authorization of Congress
         c. these agencies make a lot of law
2. Reason for regulatory agencies in industrial countries:
   a. Expertise required (Ex: nuclear areas)
   b. Field changes rapidly (technology changes rapidly)
   c. Regulatory work/burden overwhelming: Congress doesn’t have time
3. Congress can duck political costs by delegating to an agency
   a. “passing the buck”: Exec. branch stuck w/ the buck and Congress off the hook
C. Non-Delegation Doctrine (from 1930s: beginning of justification of Congressional delegation of power)
   1. Congress can delegate the mechanics/details of law-making to Exec. Branch
   2. Congress cannot delegate the principle/standard in accordance with which the agency makes law
   3. The non-delegation doctrine ensures that Congress is creating laws and not giving this power to someone not elected to do so. What is retained by the Congress is to direct the agency to act w/in constraints set by the Congress.
   4. Since the Congress is representative of the people, they cannot just delegate authority of law w/out retaining part of the law-making decisions.
D. Reason for Non-delegation Doctrine: Congress must remain accountable to the people
   1. those in Admin. Agencies were not elected
   2. holding Congress accountable for fundamental policy decisions
   3. Congress has to delegate some things that they do not have expertise in, but there must be some accountability to the Congress.
      a. Leads to problem: either the statement of the principle is so broad as to be worthless, or Congress is unable to specify any principle at all (they are not close enough to the area to make regulations for the agencies).
E. Non-delegation Doctrine proved to be unworkable:
   1. always looking for standard or principle or policy
   2. Congress would not know enough in field to create a standard
   1. Facts: poultry code with standard of “fair competition”
   2. Held: non-delegation doctrine violated
      a. No principle here by which the Agency was to do its work
   3. “Fair Competition” is too broad/too vague to be a standard
      a. Doesn’t constrain the agency in any way
      b. No principle/standard → no constraint → no accountability
   1. Held: emergency price control is constitutional
   2. The principle/standard: “fair and equitable standards”
      a. Does not appear to be a basis for distinguishing from Schechter
   3. An agency rule could only be overturned if there were an absence of standards for guidance of the Administrator’s action, so that it would be impossible for a proper proceeding to ascertain whether the will of Congress has been obeyed
      a. Only then would the Court be justified in overriding its choice of means for affecting its declared purpose.
   4. Different treatment likely explained b/c price control during context of WWII
H. Legislative Veto introduced after Non-Delegation doctrine proved unworkable
   1. Legislative Veto: over what happens in the Agency that Congress now disapproves of
   2. Distinction between Legislation and Legislative Veto
      a. Legislation: general in character, looking forward (policy)
      b. Legislative veto: responding to set of facts, what has happened in past
i. Appears to be adjudication

3. J. White’s dilemma (from dissent in Chadha): Either abandon Executive Agencies or leave law-making task in hands of Exec. Agencies w/o any check on their work (no accountability)
   a. Undesirable choices
   b. Court has ignored Chadha rule b/c it is anomaly

I. **Immigration and Naturalization Service v. Chadha Legislative Veto**

1. Facts: decision in Exec. Branch to suspend deportation so can remain in U.S.
   a. House can overrule this decision by the president: one-House veto
   i. Congressional attempt to maintain accountability

2. Because part of legislative veto this resolution had no debate, no publication of resolution, no recorded vote, resolution not passed on to Senate, president did not sign the resolution
   a. Exercising legislative veto = Article I legislation??
   b. Legislative veto = congressional monitoring

3. Issue: Can Congress constitutionally do this?

4. Held: No, this resolution does not satisfy Article I provisions
   a. **House by exercising legislative veto failed to satisfy Article I conditions**

5. Court’s decision: resolution was subject to presentment and bicameralism requirements
   a. Presentment Clause (Art. I, Sec. 7, P 2-3):
      i. 4 exceptions that are not subject to presentment to president
      ii. “that which is not enumerated is therefore excluded” (i.e. this resolution)
      iii. Leads to court’s conclusion: resolution subject to presentment and bicameralism
   b. Bicameral Requirements (Art. I, Sec. 7, P 2-3)
      i. Requirement = part of checks and balances

6. **Fundamental to Crt.’s decision: characterize what the House did as legislation**

7. J. White (dissent): disagrees w/ requirements of presentment/bicameralism here
   a. Comes from canon of construction combined w/ 1787 Const. language
   b. Admin. Agencies however are development of modern industrial state
      i. Not contemplated in 1787

8. J. Powell concurs but says character of the veto is not legislative
   a. The resolution = judicial decision and clear violation of separation of powers (better view than majority opinion)
   b. This is a judicial function b/c it is addressed to named individuals with respect to events in the past (retrospective).
      i. Looks like a judicial holding: determinant rather than specific.
   c. The legislative veto is an important power that is needed. There are appropriate safeguards in place so that this power is not abused.
      i. **Makes Separation of powers a better rationale for this decision:** more narrow and tailored to fit the situation at hand.

9. Reasons that support the legislative veto (??):
   a. The reasons for giving the president a veto power → Concern over ill-advised legislation that is hastily drafted. This follows the checks and balances.
   b. Bicameralism → All of the provisions in the constitutional authority of the laws refer to this. The rationale is that the legislature will otherwise exceed their powers

10. After this decision: little attention give to the **Chadha** rule (an anomaly):
a. 200+ legislative vetoes have not disappeared
b. Practice is well-entrenched

11. Criticism of Chadha besides J. White’s dissent:
   a. Court’s definition of legislation:
      i. Criterion = “legislative purpose and effect”
      ii. Criterion only asks if act affects rights, relations, etc… of those outside the legislative branch
      iii. Not useful: because doesn’t leave anything out: Admin. Regulations, Admin. Judicial decisions, etc… all appear to be legislation (everything would become legislation)
   b. No reason for Article I argument unless Court makes the case that the veto = legislation (Court didn’t make this argument)
   c. Decision as formalistic:
      i. Opinion fails to address the issue that gave rise to the litigation in the first place
      ii. Shrouded in forms of bicameralism and presentment from Art. I
      iii. Doesn’t address issue of accountability (delegation of power to Executive Branch w/ establishing agency)
   d. Without the legislative veto, Congress is faced with a Hobson’s choice (horse owner):
      i. either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws w/ the requisite specificity to cover endless special circumstances across the entire policy landscape,
      ii. or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies.

XXV. Removal Power

A. Removal Power
   1. only explicit provision in Constitution → impeachment (House impeaches)
   2. Removal power as to officers of the U.S. is not in the Constitution
   3. Appointment Power: Congress may vest power to appoint inferior officers in the president alone (Art. II, Sec. 2)
   4. Presumption as to where president has removal power:
      a. Executive power vested in Executive
         i. Inferior officers in an agency (typically under Exec. Branch)
   5. J. Scalia’s Arg.: once appointed an official must be answerable to the executive
      a. Requires an exclusive deferral to the executive
      b. This view foresaw problems of the president having hands tied as to a special prosecutor
         i. Ex: 10 yrs later Clinton’s time consumed w/ Starr’s investigation

B. Formalism vs. Functionalism
   1. Formalism emphasizes maintaining the structure of the Constitution by reading the “letter of the law” [STRICT READING]
   2. Functionalism reads the constitutional framework as fluid; Tend to defer to legislative judgment; [BALANCING OF INTERESTS]

   1. Postmaster removed by the President w/ the advice and consent of the senate
   2. Issue: whether the president alone has the power to remove the postmaster before the term ends?
3. Held: The court determined that this was an unconstitutional restriction on the executive’s removal power.
   a. In order to execute the laws, the president has the power to select those who help him.
   b. Having the powers to select those who work for him, he should intuitively have the power to terminate them.
4. Comparison to cabinet members (from Marshall, Supp. #2, p. 80, P13)
   a. Cabinet officers = extension of persona of the president
   b. Once consummated the president has the sole word whether to stay or go
5. But postmaster is not a cabinet member: normal duties distinct from political duties
   a. Cabinet member = political duties (speak for president)
   b. Postmaster = normal duties (general administrative control of pres.)
      i. Nothing in Constitution says otherwise
6. J. Holmes (dissent): Congress can end the office of the Portland postmaster
   a. Not problem for Congress to pass on question whether person should hold office b/c Congress created the office
7. Was Myers decided correctly?

   1. FDR wanted to remove Humphrey, the head of the FTC, removal provision only allowed removal for cause
   2. Held: restriction on presidential removal power is constitutional
      a. functions of the commission may not be executive in nature but instead administrative
   3. Court distinguishes Myers:
      a. Myers: solely executive functions (postmaster)
      b. Here: FTC = quasi-legislative and quasi-judicial functions
         i. FTC makes regulations and adjudicates
         ii. Not exclusively within the Executive Branch
         iii. Agency’s work is not solely executive or administrative
   4. Even if the branches are sealed, their functions are not.
      a. Strauss Arg: the Executive Branch may be coupled w/ legislative and judicial functions

E. Weiner
   1. Here agency’s function is only judicial
   2. Held: no presidential removal power here

F. Buckley v. Valeo (Supp. #32, p. 244) Classic Study of the Appointment Clause
   1. Congress appointing members to the Federal Election Campaign Commission
      a. 4 of 6 voting members appointed by Congress
      b. All 6 must be affirmed by House and Senate
   2. Held: Congress itself could not appoint these officers
   3. Absent a statute: officers of U.S. appointed by president w/ advice and consent of Senate (Appointment Clause: Art. II, Sec. 2, P 2)
   4. With inferior officers, Congress can get involved (as to delegating the appointment power: 3 exceptions (p. 244)): do not need consent of Senate
      a. The 3 paths Congress can follow
         i. President alone
         ii. Heads of departments
         iii. Courts alone
      b. No language at all that Congress falls under this exception
5. Here: the Election Commission did not follow any of the 3 paths
6. Must follow the Appointments Clause here or else the power would be given to Congress

G. Morrison v. Olson (CB 443) **Independent Counsel: interfere w/ Executive?**

   a. Attorney General applies to Special Division if believes further investigation is warranted which in turn can appoint the ind. Counsel
   b. Here: **inferior officer** (not subject to Appointment Clause restraints)b/c:  
      i. Tenure in office is limited (also limited jurisdiction)
      ii. Can be removed by someone other than the president

2. Issue: does this fit the constraints of Art. II? (here: quintessential executive function of enforcing the law)

3. Held: the independent counsel is constitutional (fits Art. II constraints)

4. Inter-branch appointment (Crt. of Appeals appointing someone who resides/functions in the Executive Branch)
   a. Allowed b/c following one of 3 paths for inferior officers: court appoints

5. Other Arg.: Article III limits courts to things judicial (decision in case/controversy before the court)
   a. Court responded:
      i. Delegation of appointment power to judges does not encroach on legislative power
      ii. Special Division acting passively here: receive reports and no supervisory role (functions not inherently executory)
   b. The Case/Controversy Clause of Art. III is not the precise limit of judicial power
      i. Would conflict with Art. II, Sec. 2, P 2: so can’t be the precise limit

6. Here: an official with a quintessential executive function but this is not dispositive of the matter
   a. Must be examined in light of: if impedes the Executive (CB 449)
      i. President’s inability to control would be a violation of separation of powers
   b. Ex: as long as independent counsel does not interfere in presidential sphere no problem (anticipates 10 years later: Bill and Monica)

7. Humphrey’s Executor distinguished: the end question is whether the function is something that interferes w/ the President’s ability to carry out his functions.

8. J. Scalia (dissent): violation of Art. II powers is egregious
   a. Investigation beyond the control of the president
   b. Attorney General w/o real power to remove for good cause
   c. Perspective: ALL executive power vested in the president (not just some but all) thus any compromise that reduces this power is unconstitutional
      i. Appeared formalistic at the time (but 10 yrs. later….)

9. Perhaps Constitutional design affirmed by these events:
   a. Dilemma:
      i. Either: true independence of independent counsel violates Art. II
      ii. Or: no effective prosecution b/c not independent if it follows Art. II restrictions
   b. Only impeachment as investigative/discipline of high ranking officials
      i. Because independent counsel can’t be squared w/ Art. II constraints
c. Problems w/ independent counsel are most acute when president is the object of investigation
   i. With a less monumental figure: the trade-offs offered by the Court in Morrison are more applicable

1. Facts: Federal sentencing guidelines, Commission of 7 voting members (3+ are federal judges)
2. Issue: Is the delegation of power to the commission unconstitutional b/c it gives too much discretion (no standard available)?
3. Held: No, the delegation here is sufficiently specific
4. Separation of Powers Issue:
   a. Judges involved in commission
   b. Commission under Executive branch
   c. Commission involved in legislative function
5. Held: rule-making power by judges is not unconstitutional
6. Criteria: rule-making by judges is constitutional unless:
   a. (1) The work is better done elsewhere
   b. (2) or it undermines the integrity of the judiciary
7. Here: no problems with these criteria

I. Bush v. Gore (Supp. #33): Terrible Decision
1. Florida Supreme Court allowed for further recount
2. Held: the U.S. Supreme Court overturned the Florida Supreme Court ruling and barred further recounts
3. J. Stevens (dissent): 
   a. The majority is looking for standards that do not exist. Applying one standard over another will not benefit the situation. Therefore, the “intent of the voter” standard is just as good as the “reapportionment” standard.
   b. state legislatures determine how electors selected (Art. II, Sec. 1, P 2)
      i. Deference to state courts to interpret elections laws (state rules regarding elections, including federal elections)
      ii. Supreme Court cannot intervene w/o a federal question
4. 3 possible sources of a federal question according to J. Stevens
   a. (1) Art. II, Sec. 1, P 2
   b. (2) 3 USC § 5: on presidential elections and vacancies (prompted by Election of 1876)
      i. If this statute followed → no basis for Supreme Court intervention → no federal question
   c. (3) Equal Protection Problems
      i. But malapportioned voting districts are distinguished from this issue
      ii. No way to avoid subjectiveness here: thus can’t improve on the “intent of voter” standard
5. J. Souter (dissent):
   a. 3 USC § 5 → covers this problem and is precisely for this case (could handle every detail of this case)
      i. Irony: Bush would have prevailed under this manner as well and would have preserved the rule of law
   b. Still time for a recount: the 12/18 deadline has never been enforced (many states’ electors file late)
6. J. Ginsberg (dissent): promote system of dual sovereignty
   a. Should not take this matter out of the hands of Florida’s Supreme Court
7. J. Breyer (dissent): where there is a statutory mechanism to resolve the dispute then the U.S. Supreme Court cannot intervene (3 USC § 5 and specifically 3 USC § 15)

8. Critique:
   a. the Court said decision only applies to this case
      i. But the Court can’t pass on the precedential value of its decision
   b. If there is an Equal Protection Issue (problem in voting machines, etc…): must look at the whole panoply of this issue:
      i. Look at discrimination in fact:
         a. Blacks being discouraged to vote
         b. Ballots only in English (in a county w/ 21% Hispanic population)
         c. Minority ballots 10 times more likely to be read incorrectly

XXVI. Separation of Powers in International Context (War Powers: Executive v. Congress)
A. President has duty to defend the U.S.
   1. Ex: Mexican troops about to invade Texas (pres. does not need to wait for Congress)
B. War Powers Resolution Context
   1. Classical Learning: president only goes to Congress after the fact if the situation requires fast action
   2. War Powers Resolution: if emergency goes on and no declaration of war is forthcoming: 60 day limit, if no declaration of war then must remove troops
   3. War Powers Resolution (end of Vietnam War)
      a. Belated response to aggregated war power of the president which supplanted Congressional power to declare war
      b. Ex: FDR and undeclared naval war in Atlantic (wisdom proven here)
      c. Vietnam = different light after WWII (Supp. #34, p. 419, Part 4, P 1)
         i. Congressional power: endorse presidential action in name of national unity
   4. Resolution: Congress expressly attempting to re-assert its power here
      a. Instead of acquiescing, is now protesting
C. War Powers Resolution:
   1. Three contexts for presidential use of armed forces:
      a. (1)
      b. (2)
      c. (3) national emergency
   2. National Emergency: most touchy area and receives most attention from Congress
      a. Section 5(c) from Supp. #34, p. 413:
         i. Two House legislative veto
         ii. Overturn decision of president
      b. Delegation of certain Congressional powers to president in name of Congressional power to declare war
         i. Congress can veto presidential exercise of this power (will take action if limits exceeded)
      c. Section 8: response to Gulf of Tonkin Resolution
         i. Congress will resist a view that such a resolution is tantamount to a declaration of war
   3. Effect: War Powers Resolution has had essentially no effect
a. The Senate Committee Report has not been taken all that seriously by the executive branches. This underscores the intractability of the conflict.
b. Ex: Iraq and Bosnia, War Powers Resolution not succumbed to
4. War Powers Resolution should be read together w/ Sen. Fulbright’s Commission Report
   a. Resolution = response to commission report
   b. Presidential aggregation of war power in place of Cong. war power
      i. Note the date: 1967

D. Prize Case President responds to hostility (Civil War) w/ blockade
   1. Union blockade in southern ports, seized some ships
   2. Issue: Did president here have power to impose blockade w/o Congressional authorization? (Can Civil War be treated like other wars?)
   3. Reluctance to having Congress declare War: would give certain recognition to Confederacy
   4. Held: constitutional, (?) Cong. Acts: respond to insurrection w/ hostility
      a. This follows Public International Law (authorized by laws of war, p. 414)

E. Ex parte Milligan No laws of war: civil courts functioning
   1. Milligan accused of trying to help South (liberate Southern prisoners), brought before military tribunal
   2. Held: laws of war don’t apply to Milligan: Should receive benefits of civil trial
   3. Reasons for decision:
      a. Civil courts still functioning: no obstructions to processes in civil courts
      b. No martial law: threat of martial law does not suffice
   4. Case illustrates the importance of the writ of habeas corpus

F. Ex parte Quirin Citizen, military tribunal b/c enemy belligerent
   1. German spies, Haupt a disputed U.S. citizen, plan to blow up munitions factories, FDR’s proclamation authorized their trial before a military tribunal
   2. Held: articles of war: Congressional certification of certain aspects of Laws of War
   3. Held: not entitled to criminal proceedings in a civil court (war criminals)
   4. Reasons for decision:
      a. Enemy belligerents (they are spies not soldiers)
         i. Landed and then buried uniforms
   5. Once you have congressionally declared war, then the exercise of these powers is under the Executive.
      a. The Constitutional Rights do not restrict the president in conferring a military tribunal as long as the requirements have been met. ……
   6. Although Haupt a citizen: not to be rendered immune from the consequences
      a. But what about his right to be tried in a civil court?
         i. Milligan distinguished b/c Milligan was not associated w/ enemy forces like Haupt
         ii. Paulson: that distinction does not appear to be enough (last page of Quirin opinion: Court’s reasoning is not good)

G. Back to political question doctrine (Mora v. McNamara)
   1. Court’s traditional stance on broad matters of war: invoke political question doctrine
   2. Court dismissed in McNamara the question of constitutionality of the war b/c it was a political question
      a. Issue was textually committed to another branch (Congress): Art. I, §8, cl. 11 (War Power) → power to declare war is a congressional power.
      b. But that was precisely petitioner’s Arg. in McNamara: Congress declares war and that did not happen in Vietnam
3. **McNamara**: turn to prudential criteria:
   a. Textually committed to another branch
   b. If Standards available
   c. Remaining criteria: grouped as prudential criteria
4. The dissenting arguments in McNamara
   a. Stewart → These are justiciable questions.
   b. Douglas → Quote from Thomas Jefferson. Not only should Congress check what the executive does, but a special sort of check in determining how the war should be financed.
5. **Why no political question doctrine in Ex parte Milligan or Hamdi**: 
   a. b/c question of individual right can be decided apart from broader political question of issue of war and peace
      i. apart from any judicial decision on broad question of war/peace
   b. Compare to McNamara: the army privates’ claim depended on the war being unconstitutional

**H. Hamdi v. Rumsfeld**

**Citizen detainee right to petition for writ of habeas corpus**

1. **Facts**: Yasser Hamdi, born in Louisiana (U.S. citizen), captured in Afghanistan
2. **Issue**: whether Congressional authorization suffices to deny petitioner’s attempt to receive a writ of habeas corpus?
3. **Held**: citizen detainee has right to petition for writ of habeas corpus
4. Mobb’s Declaration: govt.’s only evidence for claim that Hamdi = an enemy combatant (Alleged Hamdi was fighting w/ Taliban, had received training)
5. Supreme Court takes middle road: there is Congressional authorization (AUMF from 1 week after 9/11) for detention
   a. Dist. Crt.: held Mobb’s Declaration was totally inadequate (ordered in camera review)
   b. Crt. of Appeals: reversed based on Quiron precedent (how Haupt was classified notwithstanding citizenship)
6. 1971 Congressional Act forbids detention except when expressly authorized by Congress
   a. Court agreed w/ govt. that Congressional authorization through AUMF satisfied the 1971 Act
   b. Hamdi’s detention according to AUMF can only last as long as forces used according this AUMF resolution
      i. Addresses the problem that this unconventional conflict could go on for Hamdi’s lifetime (no formal cease-fire will mark end of conflict)
7. Issue then narrowed: Does this detention according to Congressional authorization deny Hamdi’s right to petition for a writ of habeas corpus?
8. **Held**: No, the problem is that the circumstances surrounding Hamdi’s capture remain unclear
   a. Balancing test may not be appropriate here where a constitutional right is involved (writ of habeas corpus)
      i. Balancing social/natl. security benefits (statutory right) against constitutional right (writ of habeas corpus)
   b. Safer route: presumption in favor of the constitutional immunity
      i. Strict scrutiny which sets out the burden of persuasion
   c. Problem for Court: for 25 years using “fudging talk” of an individual’s interest to employ a balancing test
      i. Not a good approach in the context of a constitutional immunity
ii. Reflects that a balancing test is easier than presumption in favor of constitutional immunity

9. Suspension Clause (Art. I, Sec. 9, P 2): prohibitions/disabilities
   a. Govt. not empowered to suspend writ of habeas corpus unless open warfare
   b. No basis for detention w/o habeas corpus review unless the writ is suspended
   c. Only alternatives: charge Hamdi w/ treason (bring charges) or release him

10. J. Scalia: champion of an individual’s right if it was in place in 1787
    a. Lone champion of Hamdi’s right

I. Rasul v. Bush
   1. Citizens of countries not at war w/ the U.S., no planned acts of aggression against the U.S.
   2. Held: territory where the U.S. has exclusive jurisdiction

**Great Opinions:**
Marbury v. Madison
Martin v. Hunter’s Lessee
McCulloch v. Maryland

**Disastrous Cases:**
Civil Rights Cases
Slaughter House Cases
Bush v. Gore