I. Judicial Power, Congressional Power vis-avis the judiciary, political question doctrine

A. Introduction: Structure of Constitution

1. Art.1: Confers power to Congress (House and Senate)
   - Conferral of power is constitutive
2. Art 2: President (Executive)
3. Art 3: Judiciary – Supreme Court and Inferior Courts
   - Supreme Court constituted by document
   - Legislature given power to create inferior courts
4. Comparing Article 1 with First Amendment
   - Art 1, Sec 8: enumerates powers of Congress
   - “enumeration unius, est exclusion alterius” – enumeration of the one, is exclusion of the other. – not interpreted literally in every context, even considering historical surroundings.
   - First Amendment: an express denial of such powers. Congress does not have the power to create a church in the first place, so any such law created is therefore invalid. Holding of invalidity means: there is no power to do this.

B. Necessary and Proper Clause: art. I, sec. 8, para. 18

1. “Doctrine of Implied Means” is absolutely necessary as to provide Congress means to achieve ends previously listed. It is a conferral of power, since not all means can be enumerated.
2. Broad Reading (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.
3. 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. (eg., bank makes money and borrows money for government). This is a slippery slope argument.
4. How To Combat Slippery Slope Argument:
   - Two criteria for attacking/assessing them-
     - Assess the worth of the causal claim
     - Normative judgment – given the effects are going to ensue, are they desirable?
   - ** see means/ends matrix class notes 011105**
   - Madison – against creation of bank – narrow interpretation that only such means are allowed that without which, there would be no way to the end.
   - Hamilton:
     - Question is whether the mean to be employed has a natural relation to any of the acknowledged objects or lawful ends of the gov’t.
     - Congress has right to employ all means not precluded by Constitution (Art1, Section 9)

C. *McCulloch v. Maryland* (1819) (est. broad reading of necessary & proper clause)

**Facts:**
1818 Maryland enacted a law imposing an annual tax of $15,000 on all banks in state not chartered by state (the federal bank). Local cashier of the federal bank, McCulloch, refused to pay tax, and the bank sued.

**Issues / Questions:**
- Whether the Constitution granted Congress the power to incorporate a bank?
- If so, did states have power to tax the bank? (or was it immune)

**Court's Decision:**
- The court held that the Constitution gave Congress the implied right to incorporate a bank, if it was the means to achieving other rights/responsibilities itemized in the Constitution; and, the government of the Union (and actions thereof) is supreme within its sphere of action (p22).
- Law passed by the legislature of Maryland, imposing a tax on the Bank of the U.S. is unconstitutional and void.

**Rule:** The "necessary and proper" clause gives Congress the power to select the means by which to accomplish legitimate ends of the national government.

**Marshall's Key Arguments for Bank:**
- Broad interpretation of necessary and proper clause – not "absolutely necessary"; rather, as long as an end was legitimate, within scope of constitution, any means not prohibited, and rationally related to that end would be okay.
- Supported this conclusion: power to punish violation of fed. laws not specifically granted, but inferred.
- Dismissed ME’s argument that federal powers were delegated by states, and therefore subordinate to state. Marshall: powers directly from the people.
- Separation of Powers: Judicial branch should not examine the degree of necessity justifying a statute by Congress – unless it was obvious no constitutional end was being pursued.

**Marshall's Key Arguments Against MD Tax:**
- a) The constitution made the federal branch of government supreme over the states, and the very essence of supremacy is to…"exempt its own operations from [subordinate] governments influences” implies can’t tax
- b) State power of taxation is already limited in Constitution. It is not boundless.

**D. Marbury v. Madison: Establishing Power of Judicial Review**

**Facts:** Marbury was assigned as justice of the peace by outgoing President Adams. The Secretary of State (Madison) refused to deliver the commission. Marbury sued for a writ of mandamus directly to the S. Ct. Congress had granted S. Ct. authority to issue writ of mandamus and hear cases originally in Judiciary Act.

**Issue:** 1) does Marbury have right to the commission he demands? 2) if he has a right that has been violated, do the laws of the U.S. afford him a remedy? 3) is a mandamus from the Supreme Court that remedy?

**Holding:** 1) Marbury is entitled to commission 2) a judicial remedy will not interfere improperly with the executive’s constitutional discretion; and 3) a mandamus is the appropriate remedy, to which Madison cannot assert sovereign
immunity, and while the Judiciary Act of 1789 authorizes the issuance of
mandamus, it is unconstitutional.

4 Part Breakdown of Opinion

1. When a commission has been signed by the president, the appointment is
made, and the person to whom the commission is made then has the right to
accept or decline it.

- The legal right has to be protected, and there has to be a remedy if it is denied
him – that power is within the court

2. Constitution defined Supreme Court’s appellate and original jurisdictional
powers, and this case does not fall w/in the enumerated instances where court
should be original. (if not listed, have to assume it is not) and if you were to
suppose that the grant in Art. III, Sec 2 WAS general – all other comments in that
section would be superfluous. This would make no sense, and therefore further
supports the statement that anything not listed, is not intended to be category of
original jurisdiction.

3. Philosophical Arguments to decide two issues:

Is the Constitution superior to legislation?

a. that Constitution be seen as different from and superior to other
legislation:

- If later legislation always takes precedence over earlier legislation, and
original constitution is seen as just “legislation” there becomes nothing to
appeal to. Law is always superceding itself. Allowing this dictum to
apply would allow Congress to change the law at its whim. Reductio
absurdi argument

b. When a statute and a law conflict the Constitution must prevail and it is
the duty of the Supreme Court to make this decision.

- Gibson disagrees, says court can only pass on question of form, not
substance

Marshall: while Congress purports to extend Sup. Ct. jurisdiction to
original jurisdiction in this context – they never had that power to begin
with, and therefore that extension is unconstitutional

4. Marshall’s Arguments from Text of Constitution:

- Marshall infers power of the courts to check the legislature’s adherence to
Constitutional mandates “no tax or duty shall be laid on articles exported
from any state…” infers that courts are to check on this to ensure it. It is not
clearly specified, though.

- Since one specific point of constitution directs courts as to the process of
convicting one for treason – uses this as evidence that framers were also
intending the courts as an audience of the document.

- Art. III § 2 – judicial power extends to all cases arising under the
Constitution. Necessary aspect to the judicial role of interpreting law.
Judge Gibson argues that this begs the question. Does that mean they
interpret the Constitution?

5. 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.

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

(3) Practicing self-limitations:
   i. Court typically decide for the only issue presented by the facts (narrow holding)
   ii. Court will not decided the Constitutional issue if the case can be decided on some other grounds.
   iii. Courts can attempt to construe statutes as to not conflict with the Constitution

**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:
   iv. Substantive due process declaring “liberty to contract”
   v. Bush v. Gore

(2) Entrenched Error – it is very difficult to correct mistaken judicial interpretations. The only avenues for correction are:
   1. Court changes its mind
   2. appoint new Justices
   3. impeachment
   4. constitutional amendment

Gibson in Eakin v. Raub – against Judicial Review
- judiciary review of legislation that would otherwise stand as will of the people, is usurpation of legislative power.
- Judiciary should only inquire into the form of enactment; to go beyond creates slippery slope. Where does judicial review end?
- Responsibility for ensuring constitutionality of act rests w/ Congress

E. Precedents for Constitutional Review
- no provision of constitution explicitly authorizes the federal judiciary to review acts of Congress
- no precedent in England
- John Locke: sovereignty did not reside in any agency (Congress) but in “the people” themselves – who delegated their authority to the agencies through the Constitution
- After legislature began to abuse power, states used judicial review to remedy them – justification for overturning legislature was that if people were sovereign and legislature only their agent, than any acts passed by legislature contrary to the “people’s will” as expressed in Constitution – should be struck.
- Judicial review was not everywhere, but was very common when Constitution was framed and ratified…framers did not expressly forbid federal judiciary…

1. Martin v. Hunter’s Lessee (1816) U.S. Supreme Court
   Facts: land was owned by Lord Fairfax. He devised it to Denny Martin (who took name Fairfax. Martin was resident of Great Britain. 8 years later, VA issued land to David Hunter and heirs. Fairfax died and left the land to his heir, Thomas Martin, who was a citizen of VA)
**Issue:** whether Supreme Court has jurisdiction and appellate authority to review decisions of states, under the Constitution

**Holding:** the Constitution does give the Supreme Court the authority of appellate review over state cases

**Rationale:**
- Constitution vests whole judicial power – full authority, to the extent envisioned by Congress
- Third Article does not limit appellate power of courts… “judicial power shall extend to all cases…and in all other cases before mentioned the supreme court shall have appellate jurisdiction.” – use case of “between a state, or the Citizens thereof, and foreign States, Citizens or Subjects”
- Constitution presumes state prejudices, state interests, might sometimes obstruct justice – mitigated by federal court review
- U.S. Supreme Court review can help provide uniformity of decisions interpreting Constitution – not different interpretations in different states

**Notes:**  
*Martin:* rule upholds constitutionality of courts to review decisions of high state courts. Nature of federal system is if there were no check, the system would collapse. Upholds §25 of the 1789 judiciary act.

2. Centralized system of Constitutional Review in Europe: Germany
   - One court assumes all power of Constitutional Review
   - Art 93 (1)(1): Disputes the branches of the federal government (for ex. a dispute re the constitutionality of a certain war) – Centralized court can hear such cases; Supreme Court or any other U.S. court cannot hear it.
   - Art 93 (1)(2): Abstract Constitutional review does not exist here in U.S. but does in this article for Germany. U.S. courts are limited to cases
   - U.S. court has no power to aggregate the position taken in a certain case (Art 3 limits power to case in controversy). Rather, offending provision is set aside, and stare decisis upholds court decision, leading to neglect of the statutory provision. De facto invalid in U.S. Completely struck in centralized country like Germany.

F. Congressional Control over Appellate Jurisdiction
   1. *Ex parte McCordle* (1868) U.S. Supreme Court

**Facts:**
- McCordle was charged w/ libel and other offenses for publishing newspaper articles in Mississippi that incited riots
- After he appealed the U.S. Supreme Court, and while opening arguments were being heard, Congress passed an act repealing the Court’s jurisdiction over the case (repealed an act from a year before that had granted Sup Court jurisdiction over habeas corpus cases)

**Holding:** The court held that Congress’s removal of jurisdiction, by repeal of the Act of 1867, was Constitutional.

**Boilerplate RULE of this case:** Since Congress has right to grant jurisdiction, it also has the right to remove jurisdiction, even affecting current cases. Vindicates exception clause in Article III, which allows Congress (virtually unlimited power of Congress…) to limit court power.

**Comment [L.R.7]:** More subtle reading – no right is denied that hadn’t been granted in 1789 Act. (Congress just repealed a substantive law act…)
Rule: The appellate jurisdiction of the Supreme Court is conferred “with such exceptions and under such regulations as Congress shall make,” thus Congress can remove its jurisdiction even when a case is pending in the federal courts.

2. United States v. Klein:
   Facts: U.S. had passed a law authorizing gov’t to seize abandoned or captured property from those who had aided the Confederacy during the Civil War. Under this law, U.S. treasury seized V.F. Wilson’s cotton, sold it, and took proceeds. Before he had died, however, Wilson took advantage of “full pardon” offered by president if he took oath to support Constitution and union. While litigation over this issue was pending, Congress passed a statute altering the effect of the pardon, and directing that the Supreme Court would have no jurisdiction over a case appealed if it was proved that a pardon did exist for a former Confederate supporter.
   Holding: the Supreme Court held that the act passed by Congress was unconstitutional, as it specifically intended to change effect of Presidential pardons, as executed through the courts
   Rule: Legislature could not assume judicial role by enacting legislation to effect the specific outcome of a case, while the case was being tried. Violated separation of powers.

3. Roberson v. Seattle Audubon Society:
   Facts: Audubon sued the U.S. Forest service, alleging it was not management the old-growth forests in the Pac. NWt in accordance with the Migratory Bird Treaty Act. While lawsuit was pending, Congress enacted law imposing requirements that were more lenient than those of previous statutes. It stipulated that compliance with the new law was adequate for meeting statutory rqmts in pending lawsuits (and then identified the particular suit)
   Holding: The court held that because the statute revised substantive law, and gave instruction to courts on how to rule under the new law, rather than mandating certain findings under pre-existing law – it was constitutional.
   Notes: Distinguishing this case from Klein: Klein is about rights of individuals. Audobon is a policy question. The court will demand a higher level of scrutiny when we’re talking about rights when compared to policy

G. The Political Question Doctrine
      Facts: TN legislature did not reapportion itself for 60 years. Plaintiffs argued that this was a violation of the equal protection clause of the 14th Amendment.
      Rule: The question of reapportionment is not a political question and is justiciable
      TEST: Factors identifying political question follow. If any one of the factors is present in a case, it is a nonjusticiable political question.
         o Textually demonstrable commitment of the issue to a coordinate political department.
         o Lack of standards: Lack of judicially discoverable and manageable standards for resolving the issue.
         o Prudential considerations:
impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.
o impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government.
o unusual need for unquestioning adherence to a political decision already made.

2. **Goldwater v. Carter**

*Facts:* Senator Goldwater challenged the validity of President Carter’s unilateral abrogation of a defense treaty with Taiwan.

*Rule:* 4-justice plurality thought the case was a political question because of the desirability of speaking with one voice on foreign affairs.

(Powell Concurrence) He agrees that the claim should be dismissed but not because of political question. He says the issue is not ripe because Congress has not yet acted – there must be a “constitutional impasse.”

**Brennan’s Dissent:** not a political question at all. Constitution expressly gives president authority to recognize and withdraw recognition from foreign governments. Treaty says “withdraw” will be triggered by recognition of People’s Republic of China.

3. **Powell v. McCormack (1969) U.S. Supreme Court**

*Facts:* House of Representatives passed a resolution not allowing Petitioner, Powell, to be sworn in…did so to purposely avoid S. Ct’s review, and claimed S. Ct. had no review over their actions. b/c it was a “political question,” and thus nonjusticiable…Supreme Ct. reversed and said it could hear the case; further that act was illegal

*Holding:* The court held that it did have the power of judicial review over the House’s decision to deny an elected representative his seat, and further classified the House’s actions as unconstitutional (House does not have power to exclude a duly elected person who meets requirements for membership).

*Rationale:*

- Art I, §5 only gives Congress power to judge whether person meets the qualifications expressly set forth in the Constitution
- (Answer to point 3 below – this is a Constitutional interpretation question, and does not involve a ‘lack of respect to another branch’ or ‘multifarious pronouncements,’ b/c – S. CT. IS ULTIMATE INTERPRETER of Constitution.

4. **Nixon v. United States (1993) U.S. Supreme Court**

*Facts:* Nixon was MS judge convicted for false statements and accepting bribes. House adopted 3 articles of impeachment for high crimes and misdemeanors; Senate voted to invoke its own Impeachment Rule XI under which presiding officer appoints a committee of Senators to "receive evidence and take testimony."

*Holding:* Whether Senate’s use of committee for evidentiary hearings violated Senate’s constitutional authority to “try” the impeachment is a nonjusticiable Issue under pol. question doctrine.

**Stevens Concurrence:** most important thing is that framers of Constitution assigned impeachment power to the legislature and the court should restraint itself from reviewing it.
White Concurrence: Constitution does not forbid court to review this claim, and if it did review it, would find that Senate fulfilled its obligation to “try” the petitioner
- Not reviewing gives Senate opportunity to abuse power
- “sole” not proof of no review…just emphasizes the power of Senate vs. power of House, in division of impeachment roles

Souter Concurrence: “political question” doctrine is a separation of powers issue, asking courts to restrain from inappropriate interference in other branches…not all interference is inappropriate – depends on situation. This situation does not demand review.

Notes: two ways to resolve issue. If nonjusticiable – he’s out, on Senate’s decision; if justiciable, out, on court’s approval of Senate’s handling of issue.

   Procedural history: supreme court denied writ of certiorari
   Petitioner’s argument: shouldn’t be sent to Vietnam b/c the war was illegal/unconstitutional, b/c there was never a declaration of war
   Rule: Constitutionality of war is a political question and is nonjusticiable.

II. Congressional Regulation Under the Commerce Clause and Pursuant to other Art 1, § 8 Powers.
   A. Congressional Regulation of Commerce – Early Experience
      Facts: NY statute gave Livingston and Fulton the exclusive right to operate steamboats in NY waters. Under act of congress, Thomas Gibbons obtained a license to navigate steamboats in same waters between NY and NJ. NY courts gave injunction prohibiting Gibbons from operating
      Holding: The court held that Congress’ power to regulate “commerce” included navigation, even within the limits of states, so far as that navigation may be connected with “commerce” with foreign nations or among several states or Indian tribes.
      Rationale: Supremacy clause of Constitution says that competing state laws lose to federal laws on same subject. Harder question is generally, is the federal law valid?

   2. Paul v. Virginia: (formalism to uphold state regulation against interstate commerce) court upheld VA statute that discriminated against insurance companies incorporated in other states…did not see issuing a policy of insurance as a transaction of commerce. – local transaction
      Formalism. (not realism b/c they’re not focusing on the economic impact on consumers).

   3. Kidd v. Pearson: Iowa statute that prohibited the manufacture of liquor upheld and held to apply to an Iowa company who exported all of its product, but made it in Iowa. Object of statute was to prevent mfr. WITHIN the state.
      Upheld by formalism – state regulation of mfr ok police power, despite affect this statute had on out-of-state consumers.
Paulson Note:
“original understanding” as it relates to commerce clause:
- w/ Kidd v Pearson and Paul v Virginia is that they created economic discrimination, and the original understanding in the commerce clause is that it’s purpose was to prevent economic discrimination

4. The Daniel Ball: (interstate regulation w/in the state) steamer that traveled routes wholly within state of MI, but carried merchandise to/from other states. Ship transported goods that were a part of interstate commerce but only transported them within state. Court held that federal authority applied to the steamer.

   **Rule:** Congress has the power to regulate local activities of instrumentalities of interstate commerce in order to protect interstate commerce itself.

5. U. S. v. E.C. Knight (1895) U. S. S. Ct. (formalism: primary vs. secondary power)
   **Holding:** The court held that while Congress had the power to regulate interstate commerce, it did not have the power to regulate the purchase of companies residing solely in one state.

6. Champion v. Ames (The Lottery Case) 1903
   **(5-4 decision)** (articles harmful to public morals)
   **Facts:** Congress prohibited the interstate shipment of lottery tickets.
   **Rule:** Congress’s regulatory power of interstate commerce allows the prohibition of articles deemed harmful to the public morals.
   - Harlan quotes McCulloch that if it is a legitimate end then the means should be allowed. Here, the driving force is public morals. But is this a legitimate end per the Constitution?
     - There are 9 references in 2 paragraphs to “public morals”
     - Compare “public morals” with “philosophical or critical morality” – point is that former is picking up various views that are prevalent in the community at that time, has nothing to do with philosophical morality
     - Paulson criticizes case on ground that congress was acting with an illegitimate end in mind
     - But it could be upheld by appealing to the plenary power doctrine (Gibbons #4) – as long as you can reach some aspect of the phenomenon w/ CC, then you can reach whole

7. Houston, East & West Texas R.R. v. United States (The Shreveport Rate Case) 1914 (close and substantial relationship) - REALISM
   **Facts:**
   - E&W Texas RY and other railways were charging higher freight rate for trips going out of TX, than trips staying within TX
   - Effect was to encourage businesses to only ship w/in TX
• In 1912, ICC issued order to TX to raise the intrastate rates

**Issue:** Whether commerce has the authority to regulate the intrastate activities of the railroad industry, under its charter to regulate the interstate activities of that same industry

**Holding:** The court held that where the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, Congress has power to regulate whole.

8. **Hoke v. United States**

**Issue:** whether congress could prohibit the transportation of women in interstate commerce for immoral purposes (Mann Act)

**Holding:** powers given to congress are to promote general welfare and morals…by doing so, Congress may remove the facility of interstate transportation from immoral activities

**Notes:** How does rationale avoid problem Harlan encountered w/ using morals as justification under CC? They emphasize that power regulates transportation is plenary, and reaches every aspect of transportation.

**Caminetti v. United States**

**Issue:** whether the Mann Act is applicable to activities not constituting “commercialized vice” (pretty much followed Hoke)

9. **Hammer v. Dagenhart** *(1918) (child labor case)*

**Procedural History/Facts:** Congress passed an Act prohibiting the transportation of goods manufactured in a factor in which, w/in 30 days prior to shipment, children under 14 had been employed, or children between 14-16 worked too much

**Issue:** whether Congress can prohibit the interstate transfer of a good, if it feels the manufacture of that good was accomplished through immoral means (employment of child labor)

**Holding:** The court held that regulation of the production of articles was a state police power, and thus, since Congress intended to regulate specific production activities through its act, the act was unconstitutional

**Rationale:**
• Commerce is intercourse and traffic – transportation; making of goods, mining of coal is not commerce
• Since the Constitution did not specifically enumerate to Congress the authority to make state labor laws uniform, it doesn’t have that power.
• Slippery Slope: freedom of commerce will end, and power of states over local matters may be eliminated, destroying system of government

**Dissent:**
• Power to regulate has already been established to include power to prohibit, and is therefore w/in Constitutional power granted to Congress
• When product is sent across state line, no longer w/in state’s right to regulate
• National welfare over state rights

**NOTES:**
• Excise tax is general tax to raise revenue.
• Difference between tax and a penalty: tax is used to raise general revenue; penalty would be payment if violated certain type of conduct. Purpose – to stop you from doing something.
• Considering that – is the Child Labor Tax a regulatory type penalty, or a tax?
• Goal of act is to curb child labor.
B. Constitutional Crisis – Judicial Resolution: 3rd revolution – New Deal

1. Schechter Poultry Corp v. United States

FACTS: Schechte's were convicted of violating wage and hour provisions of code. and other trade practices (sold sick chicken)

National Industrial Recovery Act authorized president to approve codes of fair competition. Live Poultry Code (drafted by boards from various industries) approved by Pres. Roosevelt established hour and wage regulations, prohibited child labor, and est. collective bargaining.

Issue: whether poultry code, as passed by Congress, was within its constitutional powers (under the commerce clause)

Holding: unconstitutional; commerce clause did not permit Congress to

Gov't's arguments: - extraordinary circumstances of the Depression required extraordinary measures – emergency powers

Court’s Rationale: - Distinguishes Stafford case: which held that re “current” or “flow” of interstate commerce…if product moves through interstate travel to other locations, regulation accompanies the product. Here, claims that regulations only apply during transport, but once goods are permanently situated in state, federal regulations end.

- If intrastate transactions only have indirect effect on interstate commerce, transactions remain w/in domain of state power

- Not province of court to consider economic advantages or not, of centralized system

- P170 Formalistic approach again:: indirect vs. direct effects.

- Hughes doesn’t want to trigger revolution – ducks issues; Cardozo, in Carter dissent, takes it head on.


Procedural History: Carter brought a stockholder’s suit to enjoin the company from paying the tax of the US (in order to challenge the constitutionality of the code)

Facts: legislation passed to regulate prices, wages, hours… assessed tax on violators

Holding: act struck b/c court finds congress has no power to regulate internal affairs of states

Rationale: - distinction between direct and indirect effect …never turns upon magnitude, but manner….this is a definition - formalism p494

- incidents leading to and culminating in mining of coal are not ‘intercourse’ for interstate regulation purposes

Dissent: - Cordozo cites Schecter – (Paulson: preparing for the revolution)

- b/c regulation of prices for interstate sales is w/in commerce power, regulation of intrastate sales for mining and agriculture makes sense b/c they are directly related to interstate commerce

Notes: Roosevelt’s Court packing plan-
- Roosevelt sought plan that would allow president to appoint a new member to court whenever old member reached age of 70 w/o retiring. Membership would have swelled to 15 – majority in favor of Roosevelt
- Plan died in congress b/c it was thought to upset balance of powers

3. NLRB v. Jones and Laughlin (1937) supp. 11

Facts:
- NLRA est. right of employees to organize and bargain collectively, and prohibited unfair labor practices like discrimination against union members. Created board to police unfair practices
- J&L was 4th largest steel producer in US; owned mines in Midwest, steamships on Great Lakes, mines and factories in Pennsylvania and West Virginia…shipped all over the country and other warehousing in other states…

Holding: the activities regulated could directly burden interstate commerce, and therefore fell with in Commerce’s regulatory power

Rationale:
- The Act limits itself only to those labor relationships which may directly burden or obstruct interstate or foreign commerce – and the EFFECT upon commerce, not the source of injury, is what qualifies a certain activity for regulation.
- Right to organize and collectively bargain is a fundamental right, worthy of attention by legislature
- Re: second steel argument: congressional authority is not limited to transactions that can be deemed essential part of the flow…although activities may be intrastate in character when considered separately, if they have a close and substantial relation to interstate commerce and can cause obstructions to it – Congress has to have power
- Can’t say the effect of any problems with this activity would be “indirect”
- Schechter and Carter are not controlling here. Carter affected due process; and Schechter there was no immediate or directness in the activity’s impact on commerce.

Q: What is effect, according to NLRA, of employers refusal to allow workers to unionize? A: Strikes and “industrial strife” which could obstruct commerce

Statutory language takes form of a per se rule, if conditions at outset occur, it follows that…commerce is burdened and obstructed. Per se rule is a rule that establishes an irrevocable presumption on behalf of claim

4. United States v. Darby 1941, p 496

United States v. Darby (1941)

Facts:
- Congress passed act requiring minimum wages and overtime pay for industries engaged in interstate commerce
- Darby owned operated lumber mill, which shipped product into interstate commerce

Holding: The Supreme Court held that Congress could prohibit the shipment of interstate goods produced under the forbidden substandard labor conditions – motive did not matter as long as the powers exercised did not exceed the constitutional authority – which they did not.

Rationale:
• Congress can regulate areas of law that may also be regulated by the state. Where powers overlap, Congress trumps
• Courts have no control over Congressional motive as long as exercise of power is constitutional
• The prohibition of goods is a means to an end of equality in commerce (even though means are not granted powers, they are appropriate aids to accomplishment of the granted power)

Notes:
**Darby** – clear example of post-revolutionary case
3 parts:
P497 – presents the first big issue: question of congressional motive or purpose
P498-499 – question of means; what means are necessary and proper, relaxed standard
P498, 3rd point – question of whether statute, constitutionally speaking, can reach to all of Darby’s employees
 Constitutional policy behind “revolution”
- where a statute provides rights for a class of people that didn’t exist earlier,
  then other things equal, courts are in favor of the development
NLRA created rights – the right of collective bargaining. Rights preserved in *Jones* decision.
Fair Labor Standards Act – creates more rights, upheld in *Darby*.

5. *Wickard v. Filburn* (1942)
**Facts:** individual farmer grew excess wheat in amount of 239 bushels beyond what he was allotted by the government. He sold some wheat, used some for feed, some for personal consumption, keeps rest for following year’s seeding. He was charged $117.11 in penalties or delivering excess to department of agriculture.
**Issue:** Whether wheat that never left the farm should be subject to the regulation of the Agricultural Act of 1938
**Holding:** since even the individual farmer’s act, when aggregated, could affect interstate commerce, his actions should be subject to the regulation of Congress

C. The State Action Problem
1. Civil Rights Background:
   **State Action “problem”** (Doctrine)
   13th Amendment 1865 – proscribes slavery
   14th Amendment – expands equal protection of the law
   15th Amendment – extends voting rights to black men
   Civil Rights cases of 1960’s passed on Commerce Clause grounds

   1875:
   - attempted to reach public accommodations (range of private industry establishments serving the public)
   - question is “is protection limited to protection from states, or is it inclusive of actions of private individuals?”
   - struck as unconstitutional in Civil Rights Cases, b/c actions by parties who operated inns, hotels, etc seen as private, not state action.

2. **The Civil Rights Cases (1883)** p1347
   - what constitutional provisions underwrite and warrant the legislation here:
- second section of 13th amendment (enforcement provision): Congress shall have power to enforce provisions in first section of 13th amendment.
- 14th amendment: “no state shall make or enforce any law…” (privileges and immunities clause in federal constitution; Due Process clause; and Section 5 – the enforcement section
- Bradley’s response to 14th amendment argument: individual invasion of individual rights are not the subject matter of the amendment (this applies to the “privately owned facilities listed above)
- Makes slippery slope argument (1348). Parade of horribles he proclaims are actually specifically included in the statute.
- 1349: para 5 and 6 – attacking 13th amendment argument. Refusal to invite blacks into inn, pub, etc…doesn’t count as servitude or slavery. (yet no one had argued that this was the case – rather, that there was a link between 13th and 14th amendment, and problem that had led to 13th amendment had led to discrimination...

3. Senate Committee Hearings, 1963:
- Kennedy: Civil Rights Acts constitutional under either commerce clause or 14th amendment. Notes the problem of private facilities in civil rights cases of 1800’s
- Cumulative effect of establishments on interstate commerce (in response to Thurmond on effect of one individual)
- Marshall – discrimination bad b/c it effects interstate commerce; not b/c establishments are part of interstate commerce

**Procedural History:**
- Marsh charged in state court for staying on a property after being warned not to do so (was distributing religious materials)
- She contended that the state statute as construed took away her right of freedom of press and religion (contrary to 1st and 14th amendments)

**Holding:** Under 14th amendment (guaranteeing B of Rights through states) company-owned town may not restrict the first amendment rights of its citizens, just because it is privately held. Specifically, a person distributing religious literature cannot be criminally charged.

**Rationale:**
- The more an owner opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it
- The state statute enforcing the restriction of rights by criminally punishing people attempting to distribute religious literature is also a violation of the 1st and 14th amendments

**Court’s answer:** ownership doesn’t mean absolute dominion; more an owner opens property….more property rights yield to constitutional rights of those on property, etc.

ALSO – in a balance between constitutional rights and property rights, constitutional rights have priority.

5. Shopping Centers:
*Logan Valley:* union members picketed a business located in private shopping center, Court held that the shopping center could not restrict their right to strike,
b/c the shopping center was essentially the same as a business district in a small town – where they would have the same rights.

Lloyd Corp: mega shopping center (50 acres), with private police. People came distributing handbills against Vietnam War, were ejected by guards. Sought injunctive relief on First Amendment grounds, and Supreme Court said the center’s conduct was private action – distinguished Logan to only hold to the type of picketing involved in that case (related to the use of the property).

Hudgens v. NLRB: Supreme Court overrules Logan Valley completely. Union members could not picket in mall.

Notice state action doctrine shrinks in this era. (trend through cases above) (insert TX statutory history re: voting here (there was a Texas law that gave the Executive committee power to decide who could vote in primary. Committee said no blacks. Struck down on state action basis – committee operated as representative of state))

Smith v. Allwright – TX Democratic party internally passes resolution to only admit whites as members (only members can vote in primaries). Smith overrules Grovey on state actions grounds…the ACT in question, is the Democratic Party’s determination – for the state – of who shall be allowed to vote in primaries.

Procedural history: district court held that Jaybird election process deprived petitioners of right to vote and Supreme Court affirmed the decision
Holding: The court held that Texas violated the 15th Amendment by permitting the Jaybird primary election processes that denied blacks the right to vote.
Rationale:
• Jaybird primary had essentially replaced state primary. State primary was essentially meaningless
Dissent: private club; no state action

7. Shelley v. Kraemer (1948)
Procedural History:
• Property owners surrounding Shelley brought Suit in Circuit Court of St. Louis to restrain Shelley from taking possession of property (against restrictive covenant barring black residents) and reverting title back to immediate grantor or other person
Holding: the Supreme Court found that to enforce the covenant restricting ownership and residence of a property solely on race, would be a state action by the court in violation of the 14th amendment. Therefore, court enforcement of the covenant could not be upheld.

D. Civil Rights Cases (commerce or moral goal as ‘end’ justifying means?)
1. Heart of Atlanta (1964)
Facts:
• Hotel has 216 rooms, solicits out of state patronage through national advertising; 50 billboards on highways, close proximity to highway, 75% of guests are from out of state.
• Refused to rent rooms to Negroes and vowed to continue
**Holding:** Though there may have been moral motivations behind the 1964 CRA, the commerce clause gives Congress ample power to regulate the aforementioned industry due to its impact on interstate commerce.

**Rationale:**
- Discrimination of blacks reduced their travel and impacted air and highway commerce
- Means justify ends – the end being the regulation of commerce, the means being the exercise of power over the places of public accommodations
- Precedent: *United States v. Darby* – power extends into intrastate activities that affect interstate commerce
- Quantitative discussion hinges on fact that volume of travelers decreases when blacks decide not to travel for discrimination reasons. Question: is this a new criteria? That the VOLUME of interstate travel is not as high as it would be is an argument for the CRA. But note, in Ollie’s BBQ, argument that his volumes will drop if he serves Blacks, is contrary to this point.
- Note from Shreveport: criteria driving commerce regulation: uniformity, efficiency, safety… which of these would be used in this case? Is volume derived from these criteria? My opinion – yes. Each criteria in Shreveport inhibits volume; the imposition of optimization of each naturally assists volume.

2. *Katzenbach v. McClung* (1964)

**Procedural History:** district court held that Title 2 of CRA , in applying to a restaurant of this size, was unconstitutional; Supreme Court reversed.

**Facts:**
- Ollie’s is family owned restaurant in AL; 46% of food served was from out of state; 2/3 of employees are black, but no blacks allowed in dining room – take out only.

**Issue:** Whether Title II of CRA, as applied to a family restaurant earning only $70K of food that has moved in commerce, is a valid exercise of the power of Congress

**Holding:** The Supreme Court held that the act, since it only applies to those restaurants offering to serve interstate travelers of interstate food, is within the power of congress to regulate under the Commerce Clause.

**Precedent:** *Wickard v. Filburn* (one farmer’s wheat)


**Procedural History:** petitioner arrested for violating federal Consumer Credit Protection Act

**Facts:** Petitioner was loan shark who threatened borrower with violence, and used unfair practices to raise interest rates/payback to powerless borrower.

**Holding:** The supreme court held that the regulation of loan sharks was a constitutional use of power by Congress, under the Commerce Clause

**Rationale:**
- Loan sharks, when aggregated, pull in millions nationally- impacting legitimate businesses and consumers
- Activity falls within Act even if it’s not commerce, as long as it exerts some effect on interstate commerce - How do you tie this to Perez, specifically? Court answers that he’s a member of a “class” that impacts commerce.

**Dissent:**
• lots of other criminal activity, regulated by states, impacts interstate commerce.
• Local criminal activities/intrastate crime, reserved to state regulation under 9th and 10th amendments.

Notes: for those concerned about balance between federal and state powers by the time of Perez? DER: the congressional political process ensures ample state representation, and therefore protects against federal arrogation of state authority. – points to Gibbons. Marshall argues that b/c the men and women of congress stem from the states, and have an interest in the autonomy of state power – self check.

E. Congressional Regulation Pursuant to other Art 1, Sec 8 Powers (Taxation)

1. *Child labor Tax Case (Bailey v. Drexel Furniture)* 1922
*Facts:* Child Labor Tax law imposed excise tax in 1919, 10% on annual net profits of every employer of child labor in covered businesses. One violation meant same tax as 500.
*Holding:* The decision of the lower court was affirmed on appeal. The Child Labor Tax Law was an impermissible attempt by Congress to interfere with regulation of child labor, an exclusive state function, through imposition of a penalty and was not an allowable excise tax. Unconstitutional. (exceeding tax power)
*Notes:* significance of *Scienter* – to point out that you have to knowingly violate the act. Associate it with criminal motive
- primary motive vs. secondary motive:
- the goal of either raising revenue / general welfare has to be the primary motive.
- Incidental motive of putting a penalty on failing to pay the tax – with eye to promoting the end marked by the primary motive (raising revenue) would be okay.
- But in this case, the primary motive is to regulate behavior, but the incidental motive is tax/revenue raising.
*Holmes switches sides from *Hammer v. Dagenhart* to this case. In Hammer, he argued that court shouldn’t look into purposes and obvious collateral effects. Commerce power is *plenary power*, so as long as you can point to an activity that is covered, Congress can go ahead.*

2. *United States v. Kahriger* (1953) (motive or tax not important if revenue raising)
*Issue:* whether congress could constitutionally tax people who accepted intrastate wagers.
*Holding:* the court upheld the tax on businesses accepting wagers.
*Argument of challenger:* tax is more of a penalty for illegal intrastate gambling/regulatory
*Rationale:
• Indirect effects of tax NOT important…tax not invalid b/c it discourages or deters activities (essentially, motive not important)*
Dissent:

- Congress was concerned w/ an activity beyond the authority of Congress – it’s for criminal enforcement / help states prosecute in state courts
- Congressional motive is not subject to judicial scrutiny UNLESS the motive cannot be squared with a straight-forward of the text of the act.

Note: this is post 1937 material, there is a greater police power in the congress. Revenue raising activity is enough for majority.

Summary on Tax cases:

Strategy for defeating the tax measure:
If regulatory aspect swallows revenue raising aspect – urge court to look at motive

Strategy for upholding the tax measure:
Argue *Kahriger* it’s enough to be able to point to revenue producing dimension, regardless how modest that dimension is
It is not for the court to delve into motives of Congress…deference to congress in its choice of reasonable means. “rational/reasonable” basis.

Facts: Agricultural Adjustment Act sought to stabilize farm prices by curtailing agricultural production. Farmers were paid to reduce their productive acreage. Payments made by funds from a processing tax on certain commodities. Processing tax on cotton was imposed on Hoosac Mills (Butler).

Holding: the court held that the act was not a valid exercise of the power to spend for the general welfare (said it was coercion)

Court’s Argument:
- gov’t argument is too broad…power to tax and spend must be confined to the clause (Art 1, Sect. 8) that created it…power to tax is only to create funds for the nation’s debts and provision for the general welfare.
- Act invades rights of the states…actually a regulation on subject reserved to states. Not voluntary b/c lose benefits if you don’t comply
- Emergency conditions not justification for congress to ignore constitutional limitations

Dissent:
- condition and promise are valid in furtherance of national purpose…if govt has power to spend for national welfare, needs power to impose conditions to justify expenditure
- abuse of court power (ends of general welfare here were legitimate; these means were acceptable)

Notes: 2 parts –
1. framers conferred, in para 1, power to tax and power to spend money
2. qualified by general language in para 1.

4. Steward Machine v. Davis
Holding: Court upheld the unemployment compensation provision of the SS act, which encouraged state taxation for unemployment by giving the taxed entities credits for paying state taxes

RULE: Credits that are given upon the condition of compliance are not coercive devices that strip States of their autonomy.

Notes: even though Cardozo tries to distinguish Butler, but essentially this case takes away Butler’s punch.
- law assumes freedom of the will \( \Rightarrow \) has to, b/c law assigns responsibility to people for their acts. This makes sense only if we assume free will.
- Free will is not only compatible with the idea of acting from a motive. Free will presupposes a motive
- Difference between coercion and free will (accepting an incentive as motivation to act) is that in a case of GENUINE coercion is that you have no choice
- Conditions of coercion:
  - The directed course of behavior is decidedly unattractive
  - There is no viable alternative

F. The War Power and Foreign Affairs

1. Woods v. Cloyd W. Miller Co. (1948)
   
   **Issue:** whether the Congress’ invocation of war power to remedy housing situations in the U.S. caused by our involvement with war, was constitutional, given that direct hostilities had ended
   
   **Holding:** The court held that the war power did not terminate with the cessation of hostilities, and that action taken by Congress to cope with direct effects of war, under that power, would be constitutional.
   
   **Rationale:**
   - This was a concrete, specific act directed at effects directly and immediately from current conditions. It was not open-ended
   - Measure expands individual rights. Not reduce them.
   
   **Concurring Opinion:**
   - When war power is used to limit liberties or their property, etc…constitutional basis should be scrutinized w/ care
   - In this case, war power is valid for rent control, and since armies still abroad and there are no peace terms – reasonable exercise of war power

2. Missouri v. Holland (1920)
   
   - State of MO sued to prevent game warden of US from enforcing Migratory Bird Treaty Act on grounds that it violated 10th amendment
   - Treaty had been signed by Congress and UK
   
   **Holding:** The court held that treaties made under authority of US are supreme law of the land, and those national interests trump state interests in the same area. Congress may use any means necessary and proper to implement treaties - not limited to Art 1, Sec 8.
   
   - Missouri v. Holland leaves open the question of whether there are any constraints, on Congressional power to implement treaties.
   
   (Constraint is Constitution. – see Reid v. Covert)

* Bricker Amendment – failed; concerns about Congress’ Treaty Making power usurping Constitutional Rights*

3. Reid v. Covert (1957)

**Facts:**
While living w/ him in airbase in England, Covert killed husband, sergeant in Air Force
At time of offense, executive agreement was in place between US and Great Britain permitting US to use military courts to exercise jurisdiction over offenses committed in GB by Americans and their dependents
Tried my military court martial; sentenced to life in prison
**Holding:** no treaty provision will be recognized as undermining constitutionally guaranteed rights. Constitutional rights prevail over any countervailing policies.

**Rationale:**
- she’s outside the territorial limits of the USA – their right to a jury trial is established in Article 3 of constitution.

NOTES: No conflict between Missouri v. Holland and Reid v. Covert. Reid addresses rights, and Missouri does not.

G. **Return to Commerce Cl: major decisions of ’95 and ’00 - Δ in direction?**

1. **U.S. v. Lopez** p514

**Facts:** senior in high school, Lopez, was arrested at school for carrying a concealed, loaded handgun. Was arrested and charged with violating the “Gun-Free School Zones Act” of 1990.

**Holding:** Court held that the activity of carrying a handgun on school did not substantially affect interstate commerce, and therefore was outside the constitutional authority of Congress

**Majority Rationale:**
- reference to federalist papers – federal government of limited powers. (return to classical learning, prior to revolution of 1937)
- three criteria for upholding legislation under commerce clause:
  - use of channels
  - protection of instrumentality of interstate commerce
  - regulation of an activity that substantially affects interstate commerce

  p515: the court categorizes this case as “non-economic” activity. **Criminal statute.** If case was to be considered in terms of substantial effects, slippery slope argument…nothing would be excluded if activity was treated as economic activity.

  P516…b/c activity is non-economic, court says it has no occasion to consider effects.

**Souter Dissent:**
- Championing Marshall approach in *Gibbons* – this whole aggregate of problems ought to be left to the political process. Congress members come from states – therefore have interest in preserving state power. Only exception to this argument, is economic discrimination cases.

**Notes:**
- best to have local (state) authority to regulate and enforce criminal areas of law however Lopez goes in different direction than Perez case…where U.S. did get involved in racketeering.
- So fundamental distinction is between an economic activity, and a noneconomic activity. If the latter – there is no occasion to look at economic effects, regardless of whether they may exist.


**Facts of this case:**
- Brzonkala raped by two football players
- She filed charges, one was convicted (2 semesters off)
- Provost set aside judgment as excessive

**Comment [L.R.32]:** Limitation on congressional power to implement treaties

**Comment [L.R.33]:** This is at issue in this case. Government tries to argue this point. Court agrees that only this point could be argued here.

**Comment [L.R.34]:** Note that this statement could be argued by opposition to be FORMALISTIC. Argument that its formalism…distinction amounts to set of definitions/categories…noneconomic vs. economic activities. Category, when applied, succeeds in enshrouding the issue that gave rise to the litigation in the first place….the person arguing that this is the correct opinion, though, sees it as a wise exercise of discretion in maintaining balance of powers.
She then dropped out of school, and then brought action against school and football player in federal court.

**Government:** seeks to justify 42 USC 13981 under 3rd rubric

**Court rationale:**
- reiterates *Lopez* doctrine. Categorical distinction between non-economic and economic activity.
- Slippery slope - b/c noneconomic, court has no occasion to look at economic effects of activity.

**Souter dissents:**
- page 55, *Gibbons* doctrine. Unlimited deference to Congress in respect to the means
- if you have atty. General in 38 states willing to sign onto federal legislation, suggests that balance of power is outweighed by resolution of concern.

### III. Court Regulates in Absence of Congressional Regulation ‘Dormant Commerce Clause’

#### A. Question of Exclusivity:

Exclusivity doctrine / distinction between exclusive powers and concurrent
- Art 3, Sec 8: paradigm example of an exclusive power was power to create an army
- Tax power is paradigmatic example of concurrent powers of state and federal government
- Criteria for concurrent powers: that the purposes for tax are distinct; both can exercise the power at same time without exercising powers of the other.

1. **Review of Gibbons v. Ogden**
   - Marshall, in his opinion, recognized dormant power of congress to regulate any area of interstate commerce. Essentially stated no area of interstate commerce left for state
   - Johnson, in concurrence, said any state legislation in area null and void
   - Webster lists following options for interpreting Congressional vs. state power over commercial regulation:
     1. exclusive congressional power
     2. fully concurrent state and congressional power
     3. partially concurrent state power
     4. supremacy of a congressional statute over conflicting state statute
   - non exclusivity doctrine survives. Only idea (3) on syllabus – partial concurrent powers and (4) supremacy clause – prevail

2. **Cooley v. Board of Wardens** *(1851)*
   **Facts:** PA law required all ships to use local pilots when navigating the DE river, or else pay penalty. Π paid penalty, then sued for restitution
   **Holding:** the court held that the states maintained the power to regulate pilots when congress was granted power to regulate commerce, and that therefore this specific state law could coexist with federal regulation of commerce
   **Rationale:**
   - States had acted for over 60 years upon the 1789 statute – to make all of this law null and void would be absurd. Further, if congress were to take up the state statutes as their own, it’d again be absurd, b/c according to exclusivity doctrine, the state statutes would cease to exist or be recognized.

Comment [L.R.35]: *Reductio absurdum*
• Since Congress had not acted otherwise, state statutes should remain valid
• Regulation of commerce not exclusive

Notes:
Court rejects the criterion of “the nature of the power” when determining exclusivity. Instead, looks to “nature of the subject”
- marks shift: end of exclusivity doctrine, end of abstract discussion of nature of the power. Emphasis on local control, depending on subject.

Curtis Opinion has arguments along 4 different lines:
1. statutory interpretation (1789 statute)
2. normative argument (desirability of local control…what ought the court do…)
3. reductio absurdum argument regarding exclusivity doctrine
4. force of past practice in the area

3. Prudential Ins. Co. v Benjamin:
Carolina tax of foreign insurance companies upheld. Why was this different from VA v. Paul? B/c Congress had indicated that its intent was to allow the state to regulate in a federal law regarding the subject matter. This was not a dormant commerce clause case.

4. Plumley v. Commonwealth of Mass
Justice Harlan decision: state regulation was specific to prevent its citizens from being defrauded – state police power to protect health, safety - state has control over matter like protection of its people against fraud and deception in food products
How would Johnson rationalize this decision? Would say this was not a commerce matter at all.

B. Deference to the State vs. Balancing of Competing Interests

1. South Carolina State Hwy Dept. v. Barnwell Bros. (1938)
Issue: whether So. Carolina’s regulation of width and weight, for trucks traveling on its state highways, exceeded its constitutional (14th amendment?) power by infringing on interstate commerce
Holding: The Court held that the regulatory measures taken by South Carolina were w/in its legislative power and did not infringe on the 14th amendment. The burden on interstate commerce they caused, therefore, was not forbidden by the constitution or congressional legislation.
Rationale:
• So. Car has reasonable rationale for limiting width and weight for safety concern
• Since Congress has not acted to regulate the trucks, states may act, even if it impacts interstate commerce, as long as there is no economic discrimination
• The truck regulation did not discrimination against interstate commerce

Notes:
• Stone sets out 2 criteria which lead to his resolution of the problem:
  o Whether the state has acted w/in its province (and)
  o Whether the means are reasonably adapted to the end sought
• Deference to reasonableness of congressional wisdom. Showing that legislature had set up commission, had tried numerous other things…deference to their wisdom.

**Procedural History / Facts:** AZ train limit law made it unlawful for any trains with more than 14 passenger cars or seventy freight cars to pass through state.

**Holding:** Because AZ’s regulation on train lengths had a serious impact on interstate transportation efficiency and economy, without greatly increasing safety w/in the state, its merits are outweighed by national concerns, and is therefore unconstitutional (relating to dormant commerce clause)

**Book notes:** note that court clearly exceeded its normal scope of review if Congress has wisdom to decide where to act and when, should there even be a dormant commerce clause?

**Notes:** this was a challenge to previous ways of dealing w/ state regulatory action, b/c benefits (safety) here were unclear. Could no longer defer. Instead had to balance benefits vs. burdens (here, safety decreased)


**Procedural History/Facts:** guy growing Cantaloupes in AZ had them packed in CA, and marked package saying they were from CA. AZ law had required that cantaloupes grown in AZ must be packed a certain way, marked with AZ

**Holding:** Criteria for determining validity of state statutes affecting interstate commerce: where (1) state statute regulates even-handedly, and (2) its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Here, the AZ regulation would impose to great burden on Pike(one person, out of state) to be constitutionally justified. (still needs to also meet Barnwell criteria)


- Appellees challenged constitutionality of the IL act, and district court concluded that it unduly and unreasonably burdened interstate commerce by making a mud flap that is legal in at least 45 states, illegal in IL.
- Use of IL mudflaps actually could increase safety hazards by decreasing effectiveness of breaks.
- Could be dangerous to change flaps before entering states b/c they’re welded on.
- Conflicts with AR state rqmt. trucks could not drive between these two states.

**Holding:** The Supreme Court held that due to the marginal, if any, safety benefits achieved versus the great expense and impact on interstate commerce, IL’s law was unconstitutional.

**Note** that here court is using facts not established by state legislature. Departure from deference. Movement towards balancing


**Issue:** whether state – in compliance with commerce clause - could pass regulation on truck length that would avert greater commercial traffic to its neighboring states, or cause greater number of smaller trucks to be on highways, as a result
Holding: The court held that the Iowa statute was unconstitutional because it created too great a burden for little or no safety increase in the state, and legislative history suggested it was discriminatory in nature.

Rationale:
- plurality used Balancing Test

Brennan’s Concurrence:
- Court should not even ask whether the safety result was satisfactory – only whether it was protectionist or whether legislators could have rationally believed the regulation would foster safety, etc.
  - Courts are not empowered to second-guess empirical judgments of lawmakers = deference to state legislature
  - Burdens imposed on commerce must be balanced by local benefits actually sought by the lawmakers, and not those suggested after the fact by the state’s lawyer
  - Protectionist legislation is unconstitutional under the commerce clause, even if the burdens and benefits are related to safety rather than economics
- State’s argument pretextual

Rehnquist’s Dissent:
- States should not have to give up their regulation power because it affects other states…if uniformity is necessary should be Congress’ action
- 17 other states had similar regulations

C. Incoming Commerce

   Facts: NY law made it illegal to buy milk from out of state for less than the in-state minimum price, and to then resell it.
   Issue: whether NY’s prohibition of lower cost milk of wholesome quality, into its territories, violated the dormant commerce clause
   Holding: Because the statute was protectionist in nature, the NY milk statute did violate the commerce clause
   Rationale:
   - Purpose of the commerce clause was to remove economic barriers between states – NY’s law increases rivalries and barriers
   - Economic welfare is always related to health – NY’s argument is weak
   Constitution did not allow one state to protect its people at expense of other
   Book: discriminating statute may pass muster when (1) a legitimate end (compelling state interest) is established, and (2) no less onerous alternatives are available. This is the strict scrutiny test.
   other note: motive becomes less important to dormant commerce clause analysis. If it discriminates, and there is a less discriminatory option avail – it will be struck.

2. Weldon v. Missouri: requiring peddlers to have license unless they sold MO goods - unconstitutional

Hunt v. Washington State Apple: court struck N.C. statute that would have deprived WA industry of its competitive advantage (high grading system). Could have chosen a less discriminatory alternative. Even though it appears N.C. is purposely discriminating – (markings on crates don’t affect consumers) court
doesn’t have to follow that route. Shows that there are discriminatory effects, and then suggests that less discriminatory means are available.

*Edwards v. California:* CA law making it illegal to bring indigent people across the border was struck down. Court said it couldn’t isolate itself from difficulties common to all states

*Healy v. Beer Institute:* Connecticut law requiring out-of-state beer makers to give pricing no higher than prices given to other states was struck down.
- regional and national regulation of pricing could only be accomplished by Federal Government
- this statute discriminated against brewers engaged in interstate commerce.

3. *Dean Milk Co. v. Madison* (1951)
   **Facts:**
   - Madison regulation made it unlawful to sell any milk in county unless it was pasteurized at an approved plant within 5 miles of the city
   - Also made it unlawful to sell milk that didn’t have a source of supply permit from Madison officials – officials had no duty to inspect farms beyond 25 miles from the city
   **Issue:** whether a Madison regulation regarding milk certification, even if created to ensure safety, should be struck under the commerce clause for the economic discrimination it causes
   **Holding:** the court held that despite its valid objective, the statute was discriminatory, and thus violated the commerce clause
   **Rationale:** Less discriminatory means were available to protect health of citizens (suggestion is that if Madison could show that there were no less onerous alternatives – they’d be accepted)

D. Environmental Issues

1. *Philadelphia v. New Jersey*
   **Facts:** NJ law prohibits the importation of waste from outside NJ. Ostensible purpose of NJ is to extend life of landfills, prevent threat to environment from waste from outside the state.
   **HOLDING:** What the legislature’s ultimate purpose was does not matter—what is important is if there are discriminatory effects. Here, the state is isolating itself—a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within the state. Also a less onerous alternative—regulate ALL waste, even in-state.

2. *Hughes v. Oklahoma* (Strict Scrutiny – burden shift)
   **Facts:** OK statute provides that no person may transport or ship minnows for sale outside the state which were seined or procured within the waters of OK. H, of TX, transported natural minnows from OK dealer.
   **Rule:** Where (1) discrimination is evident, ask (2) legitimate state purpose? And, if so, (3) is there a less onerous alternative?
   - In applying this rule, look at evenhandedness of regulation to determine if discrimination (if evenhanded, don’t have
to go on); usually will be a legitimate state purpose (don’t look at motive, but rather at effects).

ii. **Wild animals = natural resources.**

iii. If statute is discriminatory on its face, the burden shifts to the defendant to prove that there is a (1) legitimate purpose, and (2) no less onerous alternative.

**Holding:** The statute is discriminatory on its face and even though there may be a legitimate purpose there is a less onerous alternative (treat in-state and out-of-state the same). This is classic statement on strict scrutiny.

3. **Maine v. Taylor:** court agrees w/ state of Maine that there were no less onerous alternatives, and upholds their statute prohibiting importation of live golden shiners (bait fish)
   - Though it was discriminatory, protection of environment seen as legitimate purpose
   - Court accepted argument that there was no less onerous alternative

E. Preemption

   All preemption cases use the Rice Criteria. (comes out of Hines case law)
   - where there is a Federal Statute
   - the preemption problem: what is it?
     - (1)There is a federal statute but
     - (2)It is not right on target
   - So there is reason to believe that congress has taken over the entire field, but the matter isn’t clear
   - Question of interpretation…does the federal statute preempt the state statute

1. **RICE CRITERIA:**
   start w/ presumption of maintaining state regulation – he or she who would strike down state statute bears burden of proof – looking at the following criteria of the federal statute
   1. pervasiveness of federal regulation in area
   2. dominant federal interest or purpose in area being regulated
   3. conflicting state and federal purposes (objective)

2. **Hines:** illustrates use of the Rice Criteria p571
   - 1939 PA statute requiring that aliens over 17 register annually
   - 1941 fed. Statute – aliens register only once
     - Holding: Court struck PA statute in favor of Federal statute.
     - Rationale:
       - Pervasiveness is easily shown by majority
       - Dominant interest – reciprocity when our citizens go abroad. (federal purpose)
       - Rights, liberties and personal freedoms (bill of rights)
       - To use 3rd criteria: show that state purpose doesn’t comport w/ federal purpose; and moreover, state regulations don’t comport w/ the dominant federal interest.

3. **Pennsylvania v. Nelson**
   S. Ct. struck PA law against Sedition against PA and U.S. Found that Congress occupied the field to exclusion of state legislation, dominant interest of Fed.
precludes state intervention, and administration of state acts would conflict with operation of fed. plan
Dissent: nothing in congress’ statutes specifically barred exercise of state power

FLA law for insurance for oil spills upheld, in fact of Federal Act on same thing. Court said Fed was only concerned about its own costs, and Fla was only concerned about its costs. No collision.

5. *City of Burbank v. Lockheed Air Terminal Inc.*
S. Ct struck city’s ordinance prohibiting air travel between 11pm and 7am, said federal regulation was pervasive in that area as to conclude state act was pre-empted.

**Issue:** whether CA’s 1976 amendments to an act, which conditioned construction of nuclear plants on findings by State Energy Resource Commission, that adequate storage facilities and means of disposal are available for nuclear waste, are preempted by the federal Government’s Atomic Energy Act of 1954.
**Holding:** The court held that CA’s amendment was not preempted by the Federal Government’s Act, b/c CA’s was focused on economic feasibility and the Fed. Government’s was focused on safety. CA could not regulate construction or operation of nuclear powerplant, but could regulate waste disposal requirements (and thus the forestalling of building until rqmts were met) in so far as it had an economic impact on state.
WHY did court rule this way? – nuclear energy possesses great safety problem potentials – therefore important to enhance cooperation between federal and state governments.
- two “touchstones” for court to consider: safety goal of fed. Govt; economic feasibility goal of state govt.
- court actually throws out state’s argument concerning safety directly.
- Court claims that state’s “avowed” purpose of legislation is economic – but none really exists. Ascribes the purpose to the state. Legal fiction that saves state statute and enhances cooperation between fed and state.

**Issue:** Whether a WA statute regulating oil tanker safety, design, weight, pilotage and tug requirements in Puget Sound, was preempted by federal law.
**Holding:** The court upheld the tug and pilotage provisions, and struck the safety and weight restriction measures.
**Rationale:**
- Statutory pattern showed that Congress had entrusted Secretary w/ duty of determining which oil tankers could safely be allowed to proceed in navigable waters…uniform national standards. Title II. Aims at same ends as the WA law - WA cannot impose higher/stricter safety standards… Supremacy Clause.
- Tanker design has international impact…
- House report makes clear that state regulation of vessels is not contemplated. State has no power to ban large vessels. AND

Comment [L.R.46]: Strong case for preemption, but court upholds it on principle – wants cooperation
Comment [L.R.47]: Which gave exclusive power over safety to federal regulation and which left economic regulation to State.
Comment [L.R.48]: Another seemingly strong case for preemption, but court wants cooperation
Secretary’s failure to ban large vessels should be read to mean that no one else can ban it either. (p401)

- Tug requirement okay. **Doesn’t hinder interstate or foreign commerce.** Doesn’t need to be nationally uniform.

**Dissent and concurrence (Marshall, Brennan and Rehnquist):**

- Disagrees on state’s size requirements’ validity. **Navigational conditions vary from port to port, so local regulation of tanker access is appropriate and maybe even necessary.** Size limit could fall into this category, and since there was no clear showing of undue burden on interstate or foreign commerce – should be upheld.

**Dissent and concurrence (Stevens, Powell):**

- Disagrees on allowing tug requirements of the state to stand as valid.
- Tug escort is $277,500 per year. If all other states follow suit, it would be an enormous burden on interstate commerce
- Court spends quite a bit of language in opinion emphasizing uniformity; that differing state regulations may frustrate the congressional intent to have uniform federal controls.
- So the court’s opinion in para. V – determines a ‘choice’ design of the statute ➔ ship can either meet weight reqmts OR have a tug escort
- WHY does court do this?
  - Court is trying to accommodate state regulation again. – with eye to greater cooperation between the governments.

**F. State as Market Participant**

1. **Hughes v. Alexandria Scrap Corp** (1976)
   - **Issue:** whether Maryland could essentially subsidize in-state scrap car processing businesses by requiring less documentation for the payout than they required for out-of state
   - **Holding:** The supreme court held that because ME had entered into the market itself to bid up pricing in ME, the law did not violate the commerce clause.
   - **Stevens Concurrence:** MD created the commerce that is supposedly burdened. State should have power to encourage certain local industry

   **Notes:**
   - how would case have come out if it was considered under classical dormant commerce clause notions? Can state, under exercise of police power, pay a bounty to all scrap auto processors to achieve environmental objectives? Yes. Can state artificially inflate pricing as incentive? Yes. Can state make restrictions higher on out-of-state processors? Not under commerce clause. It’s discriminatory. Less onerous alternative? Treat out of state same as in-state. whole point here by court is to create exception that would allow MD plan to stand.
   - court says state may participate in market and then may choose customers/suppliers etc. as they wish.
   - result may be desirable here; but court also notes that subsidies to in-state processors would also address the problem – would have stronger constitutional ground

Facts: South Dakota cement plant built for state purposes went on to sell to whole region for 50 years. Supplier became dependent on it, and when shortage occurred, plant restricted sales to contracts and in-state needs, hurting supplier

Holding: The court held that the state (S.D.) could restrict the sale of its cement product to its residents only, in a time of shortage.

Notes:
- court says constitutional plan does not prohibit market participant exception
- second para. On p 574 – states should enjoy same discretion as private companies once they participate in market.. yet court gives little support for an analogy between private participant and state. Just conclusion. He actually lays out a dis-analogy (state as guardian and trustee for people)
- Paulson: market participant doctrine in this case is a stretch / weak.

Facts: OH gave tax credit for ethanol sold in gas, only if ethanol was produced in OH or state that reciprocated tax credits for OH supplied ethanol

Holding: state granted tax credits do not constitute state participation in market, and are actually regulatory – violating commerce clause

Notes: rebate of tax – quintessential gov’t. activity. Again – disanalogy between private co. and state.

Issue: Whether Alaska could claim that its requirement that timber taken from its lands be processed w/in the state prior to export, fell w/in the market-participant doctrine – and thus was protected from constitutionality challenges

Holding: The court held that Alaska could not require buyers of its timber to use in-state processors. Violated commerce clause.

Rationale:
- Reeves does not apply. Alaska is not subsidizing, but rather placing constraints on down-stream market.
- Just b/c state could achieve the same objectives by being a market participant, does not mean its regulations should be upheld under the commerce clause

Notes: - just talking about Alaska as a seller of timber is fine for market participant argument
- but, court will not endorse Alaska’s imposition of conditions on the processing downstream. Processing of Timber is a different market, in which the state does not participate. In that market, Alaska is just a regulator.
- RULE: Role of a state as a market participant has to be limited to the market in which state participates.

G. Interstate Privileges and Immunities
A. Corfield v. Coryell (1823) p 181
Lists example rights, belonging to “citizens of all free govs, and which have been enjoyed the by the citizens of the several states…”

Ex: life, liberty, right to acquire property, travel interstate, maintain action in court of any state… (no right to collect clams)

- other scholars have also suggested that his interpretation of Art 4 (list of entitlements) was wrong.
- Framers used it as “command” doctrine – that outsider be treated as well as the insider. No specific concrete substantive rights/entitlements laid out. Just general. If that’s so, then long list from Washington is wrong.
- However, reconstruction congress drew on his theory for the 14th amendment. ‘command’ doctrine – that minorities be brought up to same level of treatment as majority. no specifics. So to distinguish amendment from constitution- need to adopt ‘entitlement’ theory

B. Baldwin v. Fish & Game Comm. MT p579
Facts: Montana charged out of state hunters 7.5 times the cost to residents for big game/elk hunting license
Issue: whether this licensing system violated the P & I Clause of the Const. Art 4, §2; and Equal Protection Clause.
Holding: Right to hunt is not a fundamental right protected from discrimination by states in Constitution
Test: privilege in question must bear upon the vitality of the Nation as a single entity, to force state to treat non-residents and residents equally. (Also can’t impede interstate commerce or nonresident’s right to pursue livelihood)
Notes: Constitutional claims made are: Equal protection clause and P&I Clause.
  o comment on test: too vague / general to be useful
  o in end, Blackmun doesn’t even use his “test” or criterian.
  o uses the Corfield case – looking at the entitlements quoted there.
  o Finds that Elk Hunting is not a basic right – unless it is basis for nonresidents’ livelihood (which oddly doesn’t agree w/ Corfield)
Dissent: doesn’t matter if right is fundamental. Discrimination is only permissible where 1) activity of nonresidents is source of problem addressed by state or 2) discrimination against nonresidents bears substantial relation to that problem they present.
- Plug in the facts of Camden:
  1a. problem = middle-class flight
  1b. problem is traceable to nonresidents, by definition! 😊
  2. discriminatory practice speaks to problem
  (note that if solution is proportional to problem – meets test. If it’s out of proportion, doesn’t. – Toomer)

C. Toomer v. Witsell p583 Supreme Court struck S.C. law charging nonresidents 100 times amount for shrimp boating. State could find other ways to restrict type of use, or charge nonresidents appropriate amount to cover increased costs.

Holding: Court held that for a discriminatory act by state to pass muster, must bear relationship to the evil presented by nonresidents.
- Court tends to hold violative of the protection clause state discrimination against nonresidents seeking to ply their trade (work)
Brennan uses the scheme he developed in Baldwin. Applying scheme:
  1a: problem = high unemployment
  1b: do nonresidents exacerbate problem in constitutionally required way? NO. Problem is workers don’t live near jobs and aren’t trained. Statute doesn’t address that.
E. *Sup. Ct. of NH v. Piper:*
Rule: state must show a “substantial reason” for its discrimination against nonresidents…or demonstrate the discrimination practice bears a close rel. to its proffered objectives (refusal to let nonresident into BAR didn’t fly).
- practice of law is privilege under P&I clause b/c it’s employment
- Constitutional Policy reason for having non-resident lawyers practice: might be only means available for some unpopular clients

F. *United Bldg and Construction Trades of Camden v. City of Camden p586*
- privileges and immunities clause applies to cities – but Camden’s law ok
- states should have considerable leeway in analyzing local evils and prescribing appropriate cures. Law addressed problem caused by out-of staters

H. INTERGOVERNMENTAL IMMUNITY
- federal government’s ability to regulate state government activity

A. *Nat’l League of Cities v. Usery p587*
**Facts:** Nat’ League, and several cities and states sued challenging validity of 1974 amendments to FLSA – in which Congress extended min. wage and overtime to states and public employers.
**Holding:** Congress could not regulate integral operations/ traditional governmental functions of states. (labor constraints would effect functions like police, fire prevention, etc)
**Dissent:** congress has power to regulate commerce, even if state is involved. If state is engaging in economic activities that are validly regulated by the Fed., then it can be regulated. – No threat to state sovereignty/interests, b/c Congress is made up of state representatives.
 Criteria for a state activity to be deemed immune from a federal regulation under commerce clause – According to Natl League was:
1. federal statute must regulate “the states as states”
2. the statute must address matters that are indisputably ‘attributes of state sovereignty
3. state compliance with the fed. Must ‘directly impair the states’ ability to structure integral operations in areas of traditional govt functions
4. finally: relations of the state and federal interests must not be such that the nature of the federal interests justifies the state submission.

B. *Garcia v. San Antonio MTA. P593*
**Facts:** FLSA challenged again, this time in its application to SAMTA, mass-transit system which gets federal financial assistance.
**Holding:** *National League* is overruled and FLSA applies to SAMTA. *NL* overruled because standards were *unworkable* (what is traditional or integral government function?)
**Support:** state interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power
Oconnor Dissent: on basis of federalism
Powell Dissent: judicial review necessary; legislatures are beholden to fed, not state governments

**Comment [L.R.51]:** New references in this case: affirmative limitation: affirmed in fact that congress has the power, but that it’s limited in those cases respecting state employment.

**Comment [L.R.52]:** Rehquist suggests that state’s rights are somehow similar to individual’s constitutionally protected rights. But state regulation vs. federal regulation is a policy question. Constitutionally protected rights (individual’s immunities) are quite separate. Policy fluctuates depending on who’s in office. Rights about employment are similar policy rights. They are determined by statute.

**Comment [L.R.53]:** Note: judicial protection, rather than this representative decision-making: takes decision from the people. Who are judges protecting the states from, if the popular sovereignty – people’s ability to show decision by voting – is not allowed

**Comment [L.R.54]:** Too VAGUE!
- Brennan’s dissent and Blackmun’s opinion in Garcia argue against judicial protection

**brady handgun act**

**Facts:** Brady Act called for local law enforcement to do background check, report to Fed. Govt. (basically enforce the act) (doesn’t have to do anything, but must provide report w/in 5 days if does deny purchase)

**Holding:** the Fed may neither issue directives requiring states to address certain issues, nor command the State’s officers to administer or enforce a fed. regulatory program (can’t use state’s machinery to enforce Fed. program)

**Dissent:**
- State officials should not be immunized from fed. regulation just b/c they’re state employees
- Under commerce clause, congress can regulate guns and can use any means “necessary and proper” under N&P clause.

**Notes:** class discussion in response to Scalia argument focused on how historically, courts assumed many administrative responsibilities for fed, not just adjudicative (state courts originally heard all federal issues)


**Facts:** probation off. in ME tried to sue state for violations of overtime provisions in FLSA

**Holding:** Congress cannot force a non-consenting state to be sued in a state court.

**Rationale:** b/c state is a sovereign, and part of being a sovereign is immunity to suit in federal courts (or its own)
- don’t want to sacrifice public interest for private monetary interest
- State officials can still be sued.

**Notes:** *Martin v. Hunter* vindicates judicial review. Presents structural argument – “that position, the lack of which, would lead to collapse of institutional structure in question.”

**IV. PERSISTING CONTROVERSY OVER THE FUNCTION OF THE JUDICIARY**

A. Slavery and the Constitution

1. Derrick A. Bell: p647

- Pierce Butler, S.C., - government was instituted principally for protection of property
- In Locke’s treatise: “Property” includes life, liberty, property…counterpart in Declaration of Independence – life, liberty, pursuit of happiness
- Considering Locke’s point – Butler’s statement then becomes contradictory, if it suggests sacrificing one (liberty) at expense of other (property)

2. *Groves v. Slaughter* (1841) supp. 17

**Facts:** suit brought attacking part of Mississippi Const. that forbade importation of slaves into the state…attacked as restriction of interstate commerce

**Issue:** whether the regulation of the interstate slave trade was a power delegated to Congress by the constitution

**Holding:** The Supreme Court held that the Miss. Constitutional provision was invalid because it needed activating legislation (not self implementing) (supreme court did not directly address issue – struck provision on technicality)
Baldwin Concurrence:
- Slaves were an element of commerce, and if a state was going to allow slaves, would have to allow regulation of commerce by Congress. (but state had power to prohibit slavery too…)
- Since slaves are property (as defined by a state law) they are then protected from any violations of rights or property under 5th amendment – Congress.
- To consider slaves as persons rather than property would be “fatal to whole system” – compared them to bales of goods that might otherwise be traded

McLean Concurrence:
- Gibbons as precedent casts doubt on validity of state laws regulating slave trade – if slaves were item of commerce. Therefore, he denied that they were part of commerce, and said that each state had power over slavery (didn’t want abolitionist states to lose their power to restrict against it either)

Taney (wrote Dred Scott Case): agreed that states had power over slave trade

- Facts: Prigg forcibly removed slave from PA brought to MD. PA statute forbid it. Congress had passed a law stating to remove slave needed to bring claim before federal magistrate. Prigg had been denied claim in PA.
- Issue: whether the federal government (Congress) has power to regulate action taken within states against fugitive slaves, and if so, whether state laws may be sustained in support of those laws.
- Story’s Holding: Under the Constitution, slave master has right to go retrieve fugitive slave; state however, has no right to pass law regarding this Constitutional right, and PA law is therefore unconstitutional and void. The congressional right is exclusive.
- Rationale:
  - Clause was approved unanimously by the framers – proof that it was necessary to ensure safety and security of southern states
  - During framing of Constitution, slave-holding states would never have acquiesced to the non-slave states demands for the power to regulate fugitive slaves w/in their borders
  - Right given to owners over their fugitive slaves is an absolute right
  - b/c clause is in constitution, national government must have power to enforce it.
  - States can use police power to arrest and detain runaway slaves as long as they do not interfere with rights of slave owners

Note that the constitutional law is enforced by the congressional statute. If the state statute works in cooperation to enforce it, how then is it unconstitutional? Holding suggests that Prigg has a choice, either acting directly under Art 4, sec2 – self-help; or he has the option of going to a federal or state magistrate and getting the certificate of removal. If going to the magistrate is only an option, than any state law that mandates it – conflicts and has to go.

4. *Frederick Douglass Speech*
- approaches to interpretation of constitution:
  - one end spectrum, *intentionalism* / originalism
  - other end: *moral* / philosophy (men and women are ends in themselves – not means to an end. Autonomy lies behind legal doctrine of privacy…)
  - “textualism” somewhere in between
Douglas wants to make least of intentionalism and make most of textualism. Insisted upon textualism as the approach and then he exploits it:

1. 3/5 deprives the South of 2/5 of the vote. Hence, it is antislavery.
2. End of slavery clause basically said that the price you have to pay is to end slavery by the 1808. (Criticize by saying it only said “importation” from Africa).
3. Insurrection Clause: Bring insurrection to an end by ending slavery.
4. Fugitive Slave Clause: “slaves” not meant but indentured apprentices who had the right to enter into a contract.


**Facts:**
- Dred Scott was a slave owned by a MO man, Emerson, and had sojourned with Emerson in IL (and free WI territory) and MO territory north of the compromise line before returning to MO.
- John Sanford assumed Emerson’s estate after her death. He was citizen of NY – didn’t want to pay Scott’s wages which had been held in Escrow. Scott had previously been declared free, but when he sued for his wages, court held that after he re-entered MO, his slave status re-attached.

**Issue:**
1) whether Scott had obtained his freedom while traveling in free states and 2) whether federal court had jurisdiction over a slave’s claim (due to his citizenship status)

**Holding:**
- The court held that MO law should govern his request and that the MO compromise was unconstitutional b/c federal gov’t did not have power to legislate for territories and that 2) an act depriving a citizen of his property b/c he came into a territory would violate due process and 3) federal court lacked jurisdiction over Scott’s claim b/c blacks were not citizens

**Rationale:**
- States do not have power to confer citizenship to the U.S…only state citiz.
- To determine citizenship of U.S. – have to look at class of citizens in existence when constitution was adopted. Blacks were not citizens at time constitution was created and therefore couldn’t have been considered to be so by framers
- Only reason slaves weren’t prevalent in northern states was b/c labor there was less profitable. At time of constitution, most regarded African race as property
- Though constitution only says words like “people,” “citizens” taking it in the context of the time, one can figure out that it did not include Africans
- There are 2 clauses in Constitution which point directly to slavery
- Legislation of states prohibiting marriage, etc, reinforces that they are not an equal class
- Framers knew that if they were to give slaves equality, that would cause instability between northern states, and southern, therefore constitution should be interpreted in way that protects peace and safety of the state.
- A change of public opinion should not lend the court to interpret the constitution differently than Framer’s intended…

**Dissent:**
- There were free African-american descendents/citizens! at the time of the ratification of Articles of Confederation
Various states restricted the right to vote of blacks in early 1800’s – would not have done so if they were not citizens
There is no power in constitution to disenfranchise persons born into freedom in a state, and entitled to citizenship of such state
Article 4 of articles of confederation excepts an enumeration of types of people from the clause “free inhabitants” who should be entitled to privileges and immunities…the enumeration does not include slaves. Not enumerated; not there. Therefore, it doesn’t say that slaves wouldn’t get rights
Also, in writing to amend the article did not insert the word “white” even though it came upon their consideration.
While they might have been stripped of various rights, they were still citizens
Notes:
- Taney: since blacks didn’t vote, they couldn’t be citizens.
- Defeated by argument: women were citizens, and couldn’t vote. Obviously Taney’s argument was weak.
- Note in Taney’s opinion, he proceeds as though what is true of a black slave, is true of blacks in general.

B. The rise of Substantial Due Process
1. Slaughter-House Cases 1873
   Facts: LA legislature had granted monopoly in handling livestock to Crescent City Livestock Co. Several butchers brought action challenging power of the state to grant such a monopoly arguing that it is not allowed under the privileges and immunities clause of the 14th Amendment.
   Holding: The P&I clause of the 14th Amendment speaks only of privileges and immunities of the citizens of the US, not citizens of the states—the privileges and immunities clause does not extend protection of rights from state intrusion through 14th amendment.
   - Court said the overriding purpose of the 13th and 14th Amendments was to guarantee the freedom of the slaves.
   - Court recognized privileges and immunities belonging to US citizens—claim against government, protection, participation in government, etc.
   - Dissents want the rights to carry over to the states.
   - Although the first attempt at carry-over was with the P&I clause, due process clause is ultimate vehicle for carry-over.
2. Book Notes on Evolution of Substantive Due Process
   - Due process was originally only applicable to process and proceedings of courts of justice – per Hamilton – not intended to refer to act of legislature.
   - But later, courts used due process violations to strike legislature that violated rights inherent in the Constitution (but not explicitly spelled out).
     - Typifying due process analysis is independent inquiry by the judiciary into whether regulation is reasonable or justified.
     - Included regulation affecting individual economic interests. (supposedly excluded review of legislation which concerned regulation of a public interest)
     - Late 19th century to first 1/3 of 20th, concepts of economic liberty in contractual freedom and property rights were central to court’s understanding of due process.
ex. people successfully challenged laws regulating max hours person could work; minimum wages, etc.

Court shifted emphasis on 14th amendment as vehicle for freeing slaves and insuring blacks’ rights – to using it to focus on economic rights theory first and foremost. – 197

3. **Lochner v. New York** (1905) p 198 Example of labor regulation struck using substantive due process

**Facts:** NY labor law that no employee shall be required or permitted to work more than 10 hours/day.

**Holding:** The law is invalid because it interferes with the right of contract between the employer and the employees, which the court says is protected by the 14th Amendment.

- Paulson says this is an absurd contention because it presupposes equality of bargaining power. Also, there is not a constitutional right to liberty of contract.

- Finally, he says that before labor legislation was exercise of state power, but this decision suspended that.

(Harlan Dissent) Liberty of contract is subject to state regulations and validity of state statute enjoys presumption of validity—rational basis test.

(Holmes Dissent) The issue is one of policy, not rights, and on policy questions the people are sovereign. There is no reason why the legislature should not employ economic theory on which they have settled.

4. **Muller v. Oregon** (court allows limitations to right to contract)

**Facts:** OR statute that provided that no female employed in any mechanical establishment, or factory, or laundry shall work more than 10 hours/day.

**Holding:** The law is valid because while the general right to contract in relation to one’s business is part of individual liberty protected by the 14th Amendment, it can still be restricted.

**Rationale:** incredibly sexist and paternalistic view of court allows them to determine that women need to be protected by legislature because of their inherent frailties, etc. Horrible.

**this was exception to due process rulings of the day**

5. **Adkins v. Children’s Hospital** (return to Lochner)

**Facts:** Congress created board to set minimum wages for women and children in D.C.

**Holding:** The law is invalid because it forbids the freedom of contract by fixing wages for adult women who are capable of contracting for themselves. Further, the price fixed has no relation to the job or ability of the employee.

- Court distinguishes between maximum hours worked and minimum wage. min. wage is more invasive; max hours related directly to health

**Taft Dissent:** Just because the court disagrees with the policy on which the state decided does not justify invalidating the law. Also felt Lochner was effectively overruled by Muller.

**Holmes Dissent:** does not see difference in regulating wage vs. max hours. Both affect health.

6. **Baldwin v. Missouri** (1930) p 205
Holmes' Dissent: again expressing dismay at court’s expansive application of 14th amendment in striking down state laws as unconstitutional. Says court is just reacting to own moral or economic beliefs. Concerns about infringement on states rights, which were guaranteed by Constitution - his opinion is echoed in later cases after the depression, when greater gov’t regulation in economic sphere was necessary.

7. Nebbia v. NY (1934) p205
- Court upheld NY state milk price controls against due process challenge
Appellant argument: 1) create a disanalogy between business that are affected w/ public interest, vs. private industry. Milk production is private industry, therefore, no basis for price regulation.

Holding/ Rule: Laws comply with substantive due process so long as they are not “unreasonable, arbitrary or capricious” AND “the means selected must have a real and substantial relation to the object sought to be obtained, (this is the rational basis test)

Rationale:
- state may reasonably adopt whatever economic policy may reasonably be deemed to promote public welfare and enforce that policy by legislation
- price control is only unconstitutional if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature has adopted.
- Relaxed standard of review; moved away from Lochner. Moved away from distinction between industries supposedly affected or not affected w/ a public interest.

8. West Coast Hotel Co. v Parrish 1937 – p207
Facts: appellee was chambermaid in local hotel, paid below min. wage for 48 hour work week. Minimum wage law had been enacted by the state of WA.

Appellant argument: the law violated substantive due process. Substantive due process counts as a guarantee to hotel of economic freedom from regulation; constitutionally protected immunity - state has no power to undermine.

Holding: Court rejects substantive due process argument

Rationale: unequal bargaining power of a class of workers, workers are defenseless, and thus state is appropriately exercising its police power; likewise, underpaid people b/c wards of the community if they can’t make ends meet.

Sutherland's Dissent: *formalistic?*
1. says the ‘meaning of the constitution does not change w/ the ebb and flow of economic events’ - in opposition to this- Commerce Clause experience. It has evolved. Paulson- of course rights clauses are not subject to change; just policy.

9. Carolene Products co. (1938) p210
Facts: skimmed milk filled w/ fat or oil other than milk fat is prohibited by congress under interstate commerce notions

Holding: the existence of facts supporting the legislative judgment is to be presumed…regulatory legislation is not to be pronounced unconstitutional unless in light of the facts, it can be shown that it does not rest upon some rational basis. (footnote – leads to strict scrutiny test: ‘may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution.)
- strict scrutiny test will look for less onerous means.

**Facts:** employment agency sued to have maximum limits on pay contributions set by state legislature, declared unconstitutional. The court held that the statute WAS constitutional

**Douglas Holding:** we are not concerned w/ the wisdom need or appropriateness of the legislation…for public policy. Constitution doesn’t provide standards for judging the constitutionality of the economic and social programs of the states. (left to political process)


**Facts:** NY state law required identify of all people obtaining certain prescription drug be transmitted by pharmacists.

**Holding:** individual states have broad latitude in creating solutions to problems of vital local concern.

- Attempt to control illegal use of certain drug seen as reasonable by court. Forcing patient-identification to do so seen as reasonable.
- Leaned on rejection of *Lochner* “state legislation which as some effect on individual liberty or privacy may not be held unconstitutional simply b/c court finds it unnecessary, in whole or part.

**Book Notes:** court has still selectively used substantive due process to undo social legislation, despite its declamation of Lochnerism. Wholesale abandonment of substantive due process has been confined to economic legislation.

C. Substantive Due Process and the Incorporation Doctrine

1. *Barron v. Mayer /Baltimore* (1833 – 35 yrs before 14th amend) p245

**Facts:** Barron sues b/c divergence of streams into bay allegedly ruined his wharf. Looks to 5th amendment taking clause – no taking of his property w/o just compensation.

**Marshall:** limits the application of the 5th amendment taking clause to the federal govt (does not apply to state actions)

(compare Art 1, Sec 9 to 5th Amend) specific vs. general

- This position changed with the rise of substantive due process—many aspects of the Bill of Rights were accounted for against the states by an expanded understanding of liberty under the 14th Amendment.


**Facts:** state appeals the jury verdict that Δ was only guilty of 2nd degree murder to court of errors (saying he should have been guilt of 1st degree).
\[ \text{argument: } \] \Delta \text{ appeals and said that this would basically subject him to double jeopardy.}

- Says whatever is forbidden by the 5th amendment is forbidden by the 14th also. (immunity from double jeopardy was guaranteed for federal cases in earlier amendment)

\text{Cardozo Holding:} There are some rights that are so fundamental that they would be included as rights guaranteed under 14th amendment. For \( \text{ex} \) – 1st amendment.

Only those rights which are “implicit in the concept of ordered liberty” are carried over by the 14th Amendment. Immunity from double jeopardy is not carried over.

3. \text{Adamson v. CA (1947): p249}

\text{Issue: } 5\text{th amendment immunity from self incrimination. Whether that immunity transfers under 14\text{th amendment to states (via doctrine of incorporation)?}}

\text{Appellant argument: } \text{right to trial carried over, so as a component of that, immunity from self incrimination should carry over as well.}

\text{Holding:} \text{court upholds Palko – selective incorporation doesn’t reach to various procedural rights. Not all rights from Bill of Rights carried over under 14th.}

\text{Book Notes:} \text{selective incorporation has been used to achieve almost total incorporation, excepting only the 7th amendment guarantee of jury trial and grand jury clause of 5th amendment.}

4. \text{Malloy v. Hogan p253}

\text{Holding:} \text{Here the court incorporates 5\text{th Amendment freedom from self-incrimination. Today the law reflects nearly complete incorporation.}}

\text{Harlan dissents against approach of piece-meal absorption by states of all Bill of Rights. Brennan: court has rejected notion that the 14th amendment applies to the states only watered-down, subjective version of BoR.}

\text{D. Modern Substantive Due Process (and Doctrine of Privacy / Autonomy) }

1. \text{Meyer v. Nebraska (1923) p 256}

\text{Facts:} \text{teacher fired for teaching German, b/c state wanted to promote civic development by inhibiting training of children in foreign languages before they knew English.}

\text{Holding/Rule:} \text{court struck down legislation for interfering with liberty w/o adequate reason}

\text{Rationale:} \text{court felt that state exceeded policy power by infringing on liberty ‘guaranteed’ by 14th amendment}

\text{Class notes:}

- won’t defer to legislature when the legislation is arbitrary or w/o rational relation to purpose of state (p 256)
- \text{Paulson: does this rational-relation test make any difference if we’re talking about a constitutional immunity?}
- - no, when it’s a constitutional immunity, we evaluate it under a strict scrutiny test. “trump right kills any legislation”- \text{Paulson}
- There was no strict scrutiny test at this point in history. Court is basically just balancing rights vs. legislation.
- b/c balancing test doesn’t really protect the rights; strict scrutiny test was developed w/a presumption of unconstitutionality. State wanting to interfere w/ right had to show important justification.

2. **Pierce v. Society of Sisters**: court struck down OR statute that rqd parents to send kids to public school. “Fundamental theory of liberty…excludes any general power of state to standardize its children by forcing them to accept instruction from public teachers only. Child is not the mere creature of the state.”
- Meyer and Pierce extended concept of liberty beyond economic due process to area of personal and family autonomy. Foundation to modern right to privacy.
- other interpretation – just extended right to contract and protect property to parents’ freedom to control children from regulation

3. **Poe v. Ullman** 1960 p259
**Facts**: Supreme Court upheld CT birth control regulation (absolute ban on contraceptives; physicians clinics who aided and counseled use of birth control could be charged) b/c lawsuit raised no controversy b/c statute was supposedly no longer enforced even though it was.
**Harlan’s dissent**:
- Liberty is rational continuum which … includes a freedom from all substantial arbitrary impositions and purposeless restraints
- due process is general guaranty of liberty and fairness

4. **Griswold v. CT (1965) p 261**
**Facts**: Planned parenthood challenged CT anti-contraceptive law by opening clinic
**Holding**: law struck as unconstitutional for invading right to privacy in marriage
**Rationale**: 1st, 4th, 5th and 9th amendments guarantee rights which contain an implicit right to privacy (zones of privacy)
**Goldberg Concurrence**:
- concept of liberty not confined to specific terms of Bill of Rights
- 9th amendment signifies that there are additional rights not enumerated, which are left to the people
**Harlan’s Concurrence**:
CT statute violates due process clause of 14th amendment b/c it violates basic values ‘implicit in the concept of ordered liberty.’
**White Concurrence**:
due process, 14th amendment deprivation of liberty – realm of family life where state shouldn’t go.

**Notes on Douglas’ Holding**:
- the right of privacy is guaranteed by implication. Why? (when we’re using Douglas’ penumbral doctrine)
- there are core rights, and there are penumbral rights

Ex. of his logic:
- **NAACP**: freedom of association is the peripheral (penumbral) right. The core right from which its derived is the right of 1st amendment freedom of speech (through freedom of expression)
- Then he appeals to other amendments: peripheral rights taken together (from all amendment core rights) serve to constitute right to privacy.


P269: Blackmun's background in *Roe v. Wade*
- restrictions on abortion not as present in statutes until second half 19th cent.
- common law used to base criminal penalties on whether fetus had 'quickened'
- at time of constitution, woman had broader right to terminate pregnancy than in most states today
- division over whether the first laws were enacted to protect the health of the mother or the fetus

**Facts:** suit against TX abortion law (w/ GA companion suit). II said state had no interest in regulating abortion

**Three** categories of constitutional rights used by II's lawyers:
- 14th amend. substantive due process
- Penumbral rights
- 9th amendment rights reserved

**Holding:** 1st trimester state couldn't regulate. Second, state could regulate licensing, etc. But otherwise right to personal privacy includes abortion, just not unqualified.

**Rationale/Rules:**
- right to privacy is a fund. right, found either in 14th Amend. liberty and restrictions on state action, or 9th amend. reservation of rights to people
- state may infringe on fundamental right only by presenting a ‘compelling state interest’ and narrowly drawing legislation to meet that interest
- state interest in protecting life to be weighed w/ mother’s privacy interest

**Stewart Concurrence:** Griswald decision used substantive due process and violation of 14th amendment – this case can also be decided that way. Right to bear child – personal liberty

**Dissent:**
R: Liberty is not guaranteed absolutely against deprivation
Court should not be reviewing wisdom of legislation. Abortion legislation goes back 100+ years. Congress did not intend to legislate w/ regard to abortion using 14th amendment.
W: no constitutional right – overrides 50 state statutes

**Notes:**
- **Court:** 14 amend. concept of liberty provides substantive due process protection against states
- court distinguished 2 aspects of substantive due process – one economic and other personal
- equality approach; privacy for women; unequal social power not addressed

- state issue: state can define laws for proof of incompetent’s right to die.
- balance state interest in preserving life w/right to die w/dignity, survivors’

**Facts:** parents wanted to disconnect daughter who was in persistent vegetative state –but MO said ‘no’ b/c no proof of her wish to be disconnected

**Rules:**
- Competent person has right to decline medical treatment.
- Under constitution, state can regulate this as a medical procedure. Can put burden of proof on person wanting to remove life support.

**O’Connor Concurrence:** this decision does not preclude a future determination that the Constitution requires the states to implement the decisions of a patient’s duly appointed surrogate.

**Scalia:** Federal court shouldn’t hear decision at all. There is no fundamental right to suicide, so no reason to show compelling state interest.

**Dissent:** B: right to be free from medical attention w/o consent ‘firmly entrenched in American tort law’ State has no interest which could outweigh person’s right to decline medical treatment

**NOTES:**
- Quinlan: NJ supreme court decides in favor of incompetent woman – that she did have a privacy right to die
- note that in opinion, court talks about a ‘liberty interest’ should be a liberty right! Discussing it as a ‘liberty interest’ invites the court to use “BALANCING” those interests against the state interests.
- State has power to decree that family members’ views are not necessarily dispositive.
- Brennan recognizes it’s a right, rather than an interest – thus necessitating strict scrutiny. (remember strict scrutiny begins w/ presumption that right is there – burden of proof on party wanting to infringe upon it)

8. **Bowers v. Hardwick 1986**

**Facts:** police arrived at Hardwick’s home for other offense, caught him in act w/ boyfriend and arrested him under GA sodomy statute.

- county had dropped charges, but ACLU picked up cause to challenge statute

**Holding:** court upholds the statute on basis that there is no fundamental right to homosexual sodomy

- White’s framing of the issue sets the question up to fail – not explicitly addressed in Constitution. But of course – many other things aren’t mentioned explicitly in constitution but are still seen as rights.

**Berger’s Concurrence:** long tradition of such laws

**Poss. Opposing argument:** sodomy in general was addressed by old statutes – wasn’t specific to homosexuals. Proscription against homosexuals specifically modern.

Court’s response: but there’s a long history against homosexuals generally

**Response:** but there’s also a long history of discrimination against blacks.

**Blackmun’s dissent:** (allusion to autonomy) – p331 the ‘ability independently to define one’s identity.’ Again 332 ‘ touches the heart of what makes individuals what they are.’ Identity and more importantly Autonomy – rights of privacy in question.

Two touchstones of autonomy:
1. privacy interest with reference to decisions
2. privacy interest with reference to certain places (right to be secure in home)

Blackmun’s discussion presupposes autonomy in right

**Class Q:** does equal protection clause play a role in case?

- no reason to believe that statute would be enforced against heterosexuals.

Charges against heteros dropped, previously

- Note “enforcement of morals” vs. philosophical morality

- Morals: reflection of a belief system
- Kennedy begins by presuming an 'autonomy of self'

**Issue: 3 questions**
1. whether TX statutes which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the 14th amendment guarantee equal protection of laws. (YES, but not used.)
2. whether criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by due process clause – 14th amend. (YES)
3. Whether Bowers v. Hardwick should be overruled

**Note:** use of phrase ‘vital interests in liberty’ flags substantive due process issue in second question.

**Note also reference to international position:** Wolfenden committee: 1957, Hart appeared before House of Lords; Britain repealed criminal laws against homosexuals in 1957. European court of human rights said similar laws invalid.

**Rationale:** cites Roe v. Wade, Griswald and Eisenstadt as examples where court found law impaired exercise of peoples fundamental personal rights. references in past half century show emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

**Scalia’s Dissent:** points back to ‘fundamental right to homosexual sodomy’ and says that court didn’t address this. (but see earlier comments on White’s framing of issue in Bowers.) similarly casted issue so specifically in Michael H.

- p37. also finds legitimate state purpose for legislation – proscribing certain sexual behavior on grounds that those forms are ‘immoral and unacceptable’
- Paulson: strict scrutiny test must be applied b/c we’re talking about an individual’s right – yet Scalia doesn’t apply strict scrutiny.
- Scalia also says that here court violates democratic rules of engagement

But if we’re dealing w/ a fundamental right, democratic engagement is not appropriate. That’s only appropriate if there isn’t a fundamental constitutional right being questioned

**V. SEPARATION OF POWERS: CONGRESS, EXECUTIVE AND COURTS**

(note political question doctrine cases fit here as well: Baker, Goldwater, Powell…)

**A. Executive Power – executive vis-à-vis foreign affairs**

1. **Youngstown Sheet & Tube v. Sawyer**: 1952; p374

- perception of what is going on in country/world impacts decisions (labor dispute vs. national emergency)

**Facts:**
- armed services were in Korea, but Congress never declared ‘war’
- steel industry was about to strike, which would have impacted supply of steel for war
- Truman therefore issued executive order putting steel mills under power of Secretary of Commerce – told Congress, but Congress never responded

**Justified it by saying it was necessary to avoid ‘national catastrophe’**

**Holding:** Black states that President was clearly acting outside powers designated by Constitution, therefore invalid. Focused on labor dispute – perception that this was a labor dispute, not an emergency at war time.
Looks to 3 proposed places where President would find power: 1) vesting Clause; 2) execution clause and 3) Commander in Chief Clause and defeats them.

Commander in Chief presupposes ‘theatre’ of war. Executive power cannot expand to seize property ½ around world from the location of war.

Power to see laws executed refutes idea that he is lawmaker. Constitution says legislature has power to make law. President has no power to make law, only to enforce law.

Vesting clause(look to Jackson) is a generic reference to powers that are conferred elsewhere in Article 2.

Jackson Concurrence: uses more flexible approach – three ways of looking at presidential actions:

- When president acts pursuant to an express or implied authorization of congress – authority is at maximum (possesses his own rights and those delegated by Congress)
- When acts w/o denial or grant of authority, he only has his own powers at his disposal
- When president takes measures incompatible w/ expressed or implied will of Congress, he only has his own power, minus an constitutional powers of Congress over the matter on which he’s acted. – That describes this situation.

Note on Dissent’s desire to give ‘emergency’ powers to president – recall Weimer Republic (Germany) – granting emergency power led to abuse

- to prove that supposition that it’s not a mere labor dispute: suppose that it is using reduction ad absurdum. Several months later, severe shortage of steel, hurts war effort. Then, in that case, you can prove that it’s not merely a labor dispute.
- Majority resolves the case by saying it’s just a labor dispute – therefore everything can be resolved by statute – no role for executive to play
- Can find justification for greater executive power in case of emergency, - doctrine of necessity - but concern is abuse
- -Sutherland’s concern about delegation is that the limitations on congressional power might be lost in the delegation.

2. United States v. Curtiss-Wright Corp. p387 ok b/c foreign affairs

Issue: can congress delegate to the president, its lawmaking power in the international sphere

Facts: here congress has allowed president to prohibit sale of arms to Bolivia

Holding: federal government enjoys entire power to resolve foreign affairs, and therefore congress’ delegation of its power, plus president’s power in foreign relations- justifies the act. Statement that the federal government can exercise only the enumerated powers and necessary implied powers is categorically true only with respect to internal affairs.

Notes:
- domestic powers are limited b/c the represent powers that were delegated to the federal govt by the states
- nothing comparable w/ regard to foreign powers. They are not limited. States never had them. Foreign and war powers are limited only by the doctrine of necessity.
- Difference between internal and external powers stems from the fact that internal powers were delegated from pre-constitutional states, but external powers were not.

B. Executive power vis-à-vis foreign affairs: the non-delegation doctrine

1. Dames & Moore v. Regan  p389
Facts: president nullified attachments and liens (claims) against Iranian assets in US and transferred them to international claims tribunal in order to comply w/ executive agreement between US and Iran.
Holding: court held that president was acting w/in powers delegated to him by Congress – and therefore supported per Youngstown test.
Rationale:
- Congress had delegated this sort of power in previous situations w/ other nations
- Congress was remaining silent (though silence in Youngstown meant Congress did NOT approve!)
- Justified by necessity of the times (hostage crisis)
Class notes:
- international claims tribunal was arbitrator. Had power to reach binding decisions. (different from mediators, who only negotiate.)
- found congressional delegation of power in Int’l claims settlement act of 1949
- cites U.S. v Pink – soviet union assigned debts to U.S. debtors to U.S. for payment. Note difference between treaty and executive agreement. Pink – pres was negotiating number of things w/ eye to recognizing the soviet union. That’s a presidential power. (tie this back to carter v. goldwater, where president canceled treaty w/ Taiwan to get something from China. Was allowed to do that b/c it was in course of him removing recognition.)

2. Notes on Nondelegation Doctrine:
- What is the non-delegation doctrine?:
  Executive enforces law; legislature makes law.
- delegation to administrative agencies unavoidable in industrialized societies b/c areas needed regulation are too complex – expertise needed that cannot all be found or put in Congress
Are there any constraints limiting Congressional delegation? Currently – not many.
- Non-delegation doctrine – 2 points:
  1. congress can delegate mechanics of lawmaking, but it cannot delegate the principal or standard in accordance of which agency makes law
  Why must congress retain principle or standard? b/c that way congress can be held accountable

Holding: act did not provide clear enough standards to be constitutional delegation of power. Did not define ‘fair competition.’
Rule: congress cannot delegate legislative power to preside to exercise unfettered discretion to make whatever laws he may think are necessary
Notes: Hughes Quote on page 420: “whether there is any adequate definition of the subject to which the codes are to be addressed.” – points to nondelegation doctrine
- ‘fair competition’ as standard too broad

Unworking of nondelegation doctrine – dilemma: congress is asked to set down standards for agency, but if congress does not have expertise, and that is why they’re delegating – how can they set out the standards?

- approach that replaced nondelegation doctrine was legislative veto of administrative rules.

4. **Yakus v. United States (1944) p423**

**Facts:** Emergency Price Control Act delegated power to administrator (executive branch) to create comprehensive scheme for maximum prices of things like rent as a temporary wartime measure. Std: fair and equitable per judgment of administrator; considering prices for October, 1941.

**Holding:** The court upheld the legislation of Congress b/c:
1. Congress had stated a legislative objective
2. had prescribed method of achieving that objective
3. had laid down standards as guide
4. and had the Constitutional power to prescribe prices as war emergency measure

**Rationale:**
- Distinguishes Schechter b/c NIRA had broad purpose and no standard, and power was delegated to private individuals, not exec.
- Congress can give flexible standards to administrator w/o violating separation of powers (he can have proper latitude if congress thinks that’s appropriate. Deference) p 425
- Rule: court says only if it could say that there is a absence of standards for guidance of exec office, such that it would be impossible to ascertain whether the will of Congress had been obeyed, would it be justified in overriding ‘its choice of means for effecting its declared purpose.’

**Book Notes:**
- basically abandoned principle that Congress could not Constitutionally delegate; congress now just needs meaningful standards to delegate. Complex conditions require.

**Paulson Notes:**

Non-delegation doctrine: executive agency has to do work w/ standard or principle congress retains, device proved unworkable. Replaced by legislative veto

Legislative veto maintained despite Chadha case
- ignoring Chadha speaks to fact that it is workable, and that Congress can be held accountable to the people

C. **The Legislative Veto**

1. **Chadha Case, p 428**

**Facts:** Provision of the Immigration and Nationality Act authorizing one house of Congress, by resolution, to invalidate the decision of the executive branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the US. AG found that Chadha met the statutory requirements to be permitted to stay but House reversed.

- §244(c)(2) authorized house of congress to invalidate decision of executive branch re: immigration judge suspended deportation on recommendation of Attorney General; immigration judges not Article III judges – work for executive branch
**Holding:** The action of a single house disfavoring suspension of deportation is a legislative act because it altered the legal rights, duties and relations of persons outside the legislative branch. The legislative veto does not meet either the bicameralism or presentment requirements. The legislative veto is invalidated.

**Rationale:** Majority discusses importance of bicameralism reqmt on legislation:
- check on lawmakers
- careful consideration
- one legislative body would lead to tyranny (Hamilton)

Majority proving that veto is legislative in purpose and effect:
Criteria listed –
“act of house had purpose and effect of altering the legal rights, duties and relations of persons, outside the legislative branch.”
- too broad. Almost any decision/action in legal arena would affect this.

**Dissent:** (White – functionalism)
- majority decision was too broad.
- Left legislature w/ Hobson’s choice – either don’t delegate at all and try to write all laws w/ requisite specificity or completely abdicate law-making function to executive branch

Notes:
- majority opinion is more formalist – looks at constitution specific language. Does not address issue at hand; instead, sets up categories. What’s legislative; Art. 1 uses Presentment and bicameralism as its forms.
- Madison lists multiple names for bill to ensure that requirements cannot be circumvented by calling it something else not enumerated in constitution
- There are only 4 exceptions to the rqd. Process for vote approval – enumerated in Constitution (p434)
- White’s Dissent (in response to the above): says legislature already went through the necessary procedure in creating §244(c).
- Powell’s Concurrence: House’s veto is judiciary in character. It’s retrospective, and looks back at one individual’s set of facts. Legislative actions are general, and prospective in nature. So Powell’s stance has him deciding it on separation of powers notion.
- All courts since have ignored the Chadha decision. Legislative veto common.

**D. Removal Power Questions**

Removal Power:
- only explicit comment on removal power in Constitution is Art. 1 impeachment power in the house
- appointment power Art II, sec 2 presumption is where president has removal power, he/she will have unfettered removal power; presumption is rebuttable.

1. *Myers v. United States – supplement 32, case 2*

**Facts:** statute had postmaster appointed and removed by president, w/advice and consent of senate; but President Wilson removed the postmaster in Portland w/o advice and consent of senate. Meyers then sued for backpay

**Majority Opinion:** power to remove subordinates is part of executive power in Article 2, §1. President has power to appoint officers to help him in executive
administration – they are virtually extensions of his persona, so he must have power to remove the person
- yet postmaster is inferior position; Taft extends his discussion re: cabinet members’ duties over to postmaster w/ phrase of “normal” duties and says there’s nothing in the Constitution that stands in the way of extending president’s discretion to fire cabinet members over to case of inferior officers like post master.
- note – Taft refers to Marbury (supp.2) para 13
- Taft’s second argument is by means of the vesting power in Art II, § 2 – appointment symmetry w/ removal. But appointment is not the best argument, b/c appointment requires Senate confirmation.

Dissent (Holmes):
- Congress created the office in the first place, and therefore could write a statute bringing office to an end.

Brandeis’ Dissent:
- distinguishes Marbury v. Madison, b/c in that case the discussion concerned an appointment for a judiciary; no one can remove judge from position w/o cause; therefore what may be true there may not be true in this case.

Issue: president ability to remove limited by enumerated causes - is this constitutional?
Govt: argues that this clause is unconstitutional, per Myers.
Majority Holding:
- distinguishes Myers as only pertaining to Postmaster, and says that in that case, office in question was purely executive.
- FTC was not purely executive in function – was quasi-judicial; quasi-legislative. Commission set out regulations, and was determining what would count as unfair competition (adjudicative)
Rule: The functional character of the office determines whether the president can remove—if executory, can remove, but Congress can attach conditions to presidential removal of quasi-legislative or quasi-judicial officers.

3. Weiner v. United States supp. 32
Facts: another suit for backpay from former member of War Claims Commission. Petitioner nominated by Truman, removed by Eisenhower
Rule: most reliable factor for drawing an inference regarding the president’s power of removal in our case is the nature of the function that Congress vested in the War Claims Commission.
- b/c the commission’s functions were primarily adjudicative, president’s removal power restricted. Further supported b/c statute did not confer that power upon him.

4. Buckley v. Valeo Case 1, supp. 32
Facts: 8 member federal election commission; 6 w/ voting rights: 2 appointed by Senate; 2 House; 2 Pres
Holding: structure of commission struck by court b/c it effectively united executive power in the legislature by allowing it to execute its own legislation through its own commission
Art 2, Sec 2: presidential nomination of officers, or if statute has been enacted, appointment of inferior officers.

Notes:
- framer’s language for appointment is very specific (specifics for inferior officers as well) (on other end of spectrum, equal protection clause is not nearly specific. Variable)
- since Art 2 language is so specific, if statute departs from constitution, it is easily struck by court.

E. The Independent Council Question (and sentencing guidelines)
1. Morrison v. Olson p443 (functionalism in court allowing infringement on executive power for sake of efficiency…)

Facts: Congress passed ethics in govt. Act to allow for appt of independent counsel. Atty general to investigate and report to Special Division (court) who then appts. Ind. Counsel. Ind. Counsel can only be removed for good cause by Atty gen, has to submit report to Congress saying why; and an appellate court can review the decision

Holdings:
1. Ind. Counsel is ‘inferior’ officer b/c position is limited and can be removed by higher exec. Branch official and is temporary.
2. Appts Clause – no limitations on interbranch appointments.
3. addresses art III by saying that since court is not actually supervising, it’s not encroaching on exec. authority
4. case is analogous to Wiener and Humphrey – Congress can “condition president’s power of removal by fixing definite term and precluding removal except for cause – depends on character of office.” Since these removal restrictions do not impede presidential Ability to perform constitutional duty, they’re okay. (this is the big question for deciding case) See page 449

Arg for govt: (first argue that she’s a principal officer) even if its an inferior office, Appts clause of Art II does not give congress power to appt. outside of executive branch.
- powers vested in Special Division (court) conflict w/ Art. III. Article 3 limits judicial power to decisions in cases
- separation of powers – act impermissibly restricts atty general’s ability to remove guy from office.

Note: dilemma is either there is real independence of independent prosecutor violate Article 2; or put it in hands of executive branch, defeating the purpose.
- In 1988, Scalia’s dissent was dismissed as formalistic.
- Ten years later, need was to figure out how to get ride of special prosecutor. Scalia’s opinion was then interpreted in a different way.

Dissent: (Scalia)
- statute deprives Pres. of exclusive control over an executive activity.
- Court has no right to determine how much of purely executive powers of govt must be w/in control of pres- all are.
- court uses balancing test but does not define standards for balancing
2. **Mistretta v. United States** p457

**Issue:** whether a sentencing commission comprised of judiciary members may enforce sentencing guidelines from Congress

**Argument against:**
a) commission has legislative discretion by promoting guidelines – so violates nondelegation doctrine.

**Argument for:**
a) nondelegation doctrine does not prevent Congress from getting assistance of coordinate branches – as long as it gives standards
b) act doesn’t violate separation of powers: Madison stated that it doesn’t mean they can’t have partial agency or control over acts of each other – just can’t take ‘whole’ power of one dept. and exercise by another.
c) just b/c commission is comprised of judicial members doesn’t threaten impartiality of branch b/c may not be acting member and judge simultaneously

Paulson: all separation of powers cases are so ‘mushy’ that despite decision in cases like Morrison – next round of cases will also be driven by political factors.
- if political pressure mounts for independent counsel in future, we’ll get another one.
- Problem is when president himself is being investigated – executive branch is investigating itself

**F. Federal Election Procedures: role of States and Supreme Court**

1. **Bush v Gore** Supp. 33

**Facts:** FL supreme ct. ordered manual recount of thousands of ballots in various counties – included that ‘intent of voter’ should be ascertained in ballots where chad was not completely punched, etc.

**Holding:** specifically counting types of ballots for some counties, that would be discarded in others, would be arbitrary, violating equal protection. Problem is lack of standard preventing arbitrary recount.

**Rationale:** court also suggested that the recount couldn’t have been finished by date in FL statute. (standards suggested by court would require vote and procedures to implement them, etc)

**Concurrence:** while this would normally be a case to defer to state courts, b/c the constitution specifically addresses state obligation for election law (Art 2) - it’s an exception.

**Stevens’ Dissent:** b/c constitution puts this responsibility in hands of state courts, should leave it there. FL statute shows intent to have FL supreme ct decide disputes – constituent w/ Art 2
- sup. Ct. has never before questioned substantive std. used by state to determine votes – FL guidelines are just as vague as ‘beyond a reasonable doubt’ and the magistrate in FL could have adjudicated any objections.
- state courts are in position to provide final answers in election disputes
- supreme court cannot intervene in case (under Article 3) unless there’s a federal question.
- Stevens identifies possible grounds for federal questions (and rejects them).
  #1. §5 of U.S.C. Electoral Count Law of 1887 addresses issue. 1876 election between Tildon and Hayes. No constitutional provision to govern; no precedent. 20 disputed electoral votes, Tildon had popular vote. ECL clearly sets out procedure for resolving disputed vote.

**Comment [L.R.87]:** ODD. This court has no power to decide whether a later court will see this decision as precedential. Case in controversy doctrine rules out this action, b/c it goes beyond deciding the case at hand.

**Comment [L.R.88]:** Section1,para 2 – says state legislatures select
Congress. If there should be a tie, it goes to the governor of the state in question.

#2 – Article 1, another poss. source of federal question.

#3 – equal protection question. *Baker v. Carr* – equal protection used to re-apportion voting districts. But Stevens says: (see underlined text) nothing can be done to make it perfect; element of error built in. Thus, there’s no equal protection based on federal question grounds either.

**Souter:** court shouldn’t have reviewed the case. Political tension would have worked it out through Congress, which is what is called for by statute 3 USC 15 S.Ct should have just remanded and asked FL to determine standards.

**Ginsberg:** b/c FL court was not recalcitrant or acting in other gross manner, it’s decision shouldn’t be disturbed.

- Art 2 does not hold that fed. may review state’s construction of laws that Simply provide for organization.
- voting process is imperfect. No equal protection claim.
- court’s judgment about viability of timely recount should not replace that of those closer to facts
- also uses Article 4, Sec 4 language re: Republican form of government should protect from federal judicial intervention under federal question doctrine. How state organizes itself is a non-justiciable issue.
- Dual sovereignty. Intergovernmental immunity (nat’l league case) why act in opposition to these doctrine’s now.

**Breyer:** court shouldn’t have taken case. Constitution and statutes have a procedure for handling disputed elections – Congress. Congress is political body, better able to express people’s will than court.

**Notes:** despite majority’s use of equal protection to decide case, court does not look at entire circumstances surrounding voting in FL – where minorities are definitely discriminated against (no Spanish ballots, etc)

**G. Executive and Congress on the war Power**

1. **War Powers Resolution of 1973**
   - War Powers Resolution of 1973 is not a late authorization, but rather a protest to president’s actions.
   - Express reassertion of Congressional power to declare war.
   - 5(c) p 413, legislative veto provision – giving congress power to counteract the president’s actions if necessary. (remember – Chadha case. Legislative vetos used anyway)
   - Constraints on president on introduction of troops: (1) when Congress declares war; (2) specific statutory authorization; (3) national emergency.
   - Imposes many other conditions. There is a delegation of congressional power to the president but it is limited and defined.
   - Has not been followed by the executive branch at all—Bush’s statement on the Iraq Resolution demonstrated this.
   - president Nixon vetoed it. It was then passed over his veto.

**Historical Notes and viewpoints (Paulson):**
- Such a pattern had become a problem – presidential exercise of a quasi-war power w/ no express authorization from Congress: Roosevelt in 1941 committing U.S. forces to Greenland and Iceland, all ahead of declaration of war following Japanese bombing
Para 4, p 419 of supp: by late 1940’s there was ambivalence as to war power in people of all parts of government and country at large - widely accepted that president as commander in chief had authority to use armed forces in any way he saw fit…

Was this a change in constitutional interpretation? Those in support of Vietnam actions could justify it by saying Congress has acquiesced so many times to executive assertion of power – that the power no longer belonged to them. Had shifted.

Others would argue that this was an outrageous usurpation of power by the exec. branch.

2. **Prize Cases – 1863**

**Facts:** ships delivering goods to Confederate States seized by Union ships, pursuant to Lincoln’s orders. Court upheld most of the seizures, even though there had been no declaration of war.

**Court’s Rationale:**
- if foreign invader attacks, president is authorized and bound to resist by force.
- If the hostile party are states organized in rebellion, it is none the less war situation where president needs to act
- Congress authorized it after the fact

**Notes:**
Why might Congress not want to declare war in Civil War?
- b/c declaration of war would recognize the belligerent state as a foreign state – giving them what they wanted.

3. **Ex Parte Milligan: 1866, supp 34**

**Facts:** army officials arrested Milligan w/ conspiracy and effort to liberate confederate prisoners in camps in the North. Milligan was a civilian; brought before a military commission b/c problem was perceived as a military problem and military authorities just took matters into their own hands. He was charged w/ aiding and abetting enemy and was sentenced to be hanged.

- His claims: military had no jurisdiction over his case; he deserved a jury trial – as a civilian, constitutional guarantee.
- In answer to Military’s argument re: martial law (p1052) – martial law cannot be declared just b/c there’s a threat of an invasion to state of IN. there must actually be an invasion or hostilities.
- References to ‘laws of war’ – international agreements and international custom w/ regard to established laws of war

4. **Ex Parte Quirin**

- mostly German citizens; one, Haupe, U.S. Citizen. Trained in Germany to destroy munitions factories in U.S.
- presidential proclamation authorized trial of German saboteurs before military tribunal. (petitioners brought case on writs of habeas corpus)
- Congress certified provisions from ‘laws of war’ and provided that military tribunals shall have jurisdiction to try offenders against the law of war in appropriate cases

**Rule:** detention of petitioners or order by President exercising his power as Commander in Chief at time of war – are not to be set aside by the courts w/o the clear conviction that they are in conflict w/ the Constitution of laws Congress constitutionally enacted
- Difference between this case and Milligan is that these people were military spies – were not in uniforms; distinguished them from military soldier (unlawful from lawful combatants) unlawful combatants subject to capture and trial by military tribunals.
- Haupe gave up privileges of citizenship when became belligerent
- Enemy Aliens not entitled to protection of 5th and 6th amendments in military tribunal

NOTE: Mora v. McNamara – Court wouldn’t even hear complainant’s claim b/c president’s decision to send troops was political question – despite fact he didn’t have authorization from Congress.
- textually committed to a branch of government? Yes, to Congress to declare war. But this doesn’t explain Mora v. McNamara - b/c Congress hadn’t declared war here.
- more telling are the prudential criteria – 3,4,5 (Powell refers to this group in Goldwater v. Carter) having already taken a decision here, justices of the high court cannot after-the-fact intervene

Why no employment of the political party /political question doctrine in Ex Parte Milligan or Hamdi vs. Rumsfeld?
A: in these cases, questions posed, of an individual’s RIGHTS, can be answered apart from any answer on the larger constitutional question of war and peace (constitutionality of undertaking itself)

Note: in Mora v. McNamara – situation was different. Distinguishable b/c army privates had no colorable claim at all, apart from the constitutionality of the war.

5. Hamdi v. Rumsfeld

Court holds: Hamdi has a right to petition for writ of habeas corpus, has right to have his claim heard by neutral decision-maker.
(citizen held in the U.S. as an enemy combatant must be given meaningful opportunity to contest the factual basis for that detention, before a neutral decisionmaker.) However, detention is authorized as part of war power.

Facts: govt had just put forth a declaration asserting that Hamdi was captured w/ a Taliban unit and had surrendered to Northern Alliance, and surrendered his assault rifle.

Gov’ts arguments (in order)
1. No congressional authorization needed to obtain authority to detain him. Executive power suffices under Art. 2. “Commander in Chief”
2. OR, there is Congressional Authorization in AUMF:
- court agrees that AUMF authorizes detention in narrow circumstances
- citizenship doesn’t stand in way of detention, however, question of right to petition for writ of habeas corpus remains open.
3. Govt further argues that it is undisputed that his seizure took place in combat zone. Court rejects argument and says it is disputed.
4. Govt also says that any additional process would be constitutionally intolerable.

Court says need to balance the individual’s liberty interests and gov’t interest on other.

Notes: Paulson: Court balances and comes out strongly in favor of petitioner’s constitutional rights, but A presumption in favor of constitutional immunity from
any curbing or narrowing of petitioner’s habeas corpus rights would have been safer ground than a balance. This would have set the burden of persuasion
- of course, if you’re arguing against the right, use the balancing test.
Either to defeat using the balancing test.
- when you’re arguing FOR the right, the high road is to establish a presumption in favor of right.
- note also the tendency of court to discuss the right as a “liberty interest” that fudges things. Makes a balancing test appropriate, where it should not be. *(Matthews on p49)* (look back to So. Pacific RR)

**Scalia’s Dissent:**
- suspension clause: writ of habeas corpus must be available unless Congress suspends it, which can only be done in time of natl emergency (Art 1, para 9, §2)
- no charges in civil court for treason (violating Due Process) nor a suspension of the writ of habeas corpus have been made, thus Hamdi should be released.
Thomas’s Dissent:
- detention falls within Exec. Powers during war – no neutral decision-maker needed


**Facts:** family of foreign nationals kept in Guantanamo sued for habeas corpus. district ct had dismissed for lack of jurisdiction b/c Guantanamo is not w/in sovereign territory.

**Supreme Court reversed:** says U.S., under treaty w/ Cuba, has sole control / jurisdiction in Guantanamo, so people detained in U.S. territory are entitled to have U.S. court hear their habeas corpus challenges.

<Compare to Eisentrager decision>

**Holdings:** The Supreme Court, Justice Stevens, held that:

(1) federal habeas statute conferred on district court jurisdiction to hear challenges of aliens held at Guantanamo Bay, and
(2) district court was not barred from exercising jurisdiction over claims asserted under federal question statute and Alien Tort Statute.