CONSTITUTIONAL LAW OUTLINE:

Constitutional Interpretation:
- Enumeration unius est exlusio alterius: the enumeration of one excludes the other
- Slippery Slope Argument:
  - 1.] examine causal claim
  - 2.] if the causal claim passes muster, move onto normative question (is the legislation desirable, or undesirable?)
- Constitutive v. Declaratory (to give expression to a pre-existing state of affairs)
  - Ex: Art. I, § 8, par. 18 – declaratory rather than constitutive; first 17 par.’s are constitutive

I. JUDICIAL POWER:
- Federal Legislative Power [Article I]:
  - Art. I, § 8: what the legislative power entails; para.’s 1-17 enumerate specific powers
    - para. 18: “necessary & proper” clause – “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
  - McCulloch v. Maryland (1819):
    - Facts: Maryland enacted law imposing annual tax on all banks or branches of banks in the state not chartered by the state legislature. Bank of U.S. cashier refused to pay tax
    - First issue - Does Congress have the authority to create the Bank of the United States:
      - 1.] Historical experience justified constitutionality of a practice – there was a first U.S. Bank (no court, however, ruled on constitutionality of bank)
      - 2.] The people ratified the Constitution & they retain the sovereignty, not the States.
      - 3.] Congress is not limited only to acts specified in Constitution as long as they are not prohibited.
      - 4.] Broad reading of necessary and proper clause: Congress may choose any means, not prohibited by the Constitution, to carry out its express authority
        - Different readings of the term necessary: “useful/desirable” vs. “indispensable/essential”
    - Second issue - Did Maryland have power to impose a tax on real property of U.S. Bank?:
      - 1.] Power to create also includes power to preserve its existence -> however, power to tax involves the power to destroy, which will render useless power to create
      - 2.] State tax on Bank of United States essentially is a state tax on those in other states. Those being taxed were not represented in the state imposing the tax. [Where Maryland is a “part,” it can only tax its “parts.”] Marshall, concedes though, that MD has the power to tax “real property.”
    - ***Note: Madison is inconsistent in reading of “necessary & proper” clause – He goes from construing it narrowly when selling it to the states, to construing it broadly in this case (conditions are merely sufficient).
  - Marbury v. Madison (1803):
• **First issue** – Does Marbury have a right to the commission?
  • Marbury has right to commission: when a commission has been signed by President, appointment is made & is complete when seal is affixed.
  • Delivery is a mere custom.
• **Second issue** – Do the laws afford Marbury a remedy?
  • Distinction b/w when there is a specific duty to a particular person & when it is a political matter left to executive discretion
  • Here, there is a specific duty assigned by law & individual rights depend on that duty
• **Third issue** – Can the Supreme Court issue this remedy? Is mandamus an appropriate remedy?
  • A.] **Does the law authorize mandamus on original jurisdiction?**
    o § 13 of Judiciary Act of 1789: statute conveys original jurisdiction
  • B.] **Does mandamus on original jurisdiction violate Article III?**
    o Art. III, § 2: “In all cases affecting Ambassadors, other public Ministers & Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction.”
      ▪ enumerated its original jurisdiction -> Congress cannot enlarge it (there is no constitutional cover)
      ▪ Federal Courts are courts of limited jurisdiction
      ▪ Gov’t. argument: court only has appellate jurisdiction
      ▪ Level argument: *lex superior derogate legi inferiori* – whenever new legislation isn’t consistent w/ Constitutional provision the new legislation would take precedent over the contrary Constitutional provision (iii – conceptual argument): *constitution is distinct from and superior to legislation & common law*
  • C.] **Can the Supreme Court declare laws unconstitutional?**
    o 1.] Constitution imposes limits on government powers & these limits are meaningless unless subject to judicial enforcement.
    o 2.] Inherent to judicial role to decide constitutionality of laws it applies.
    o 3.] Authority to decide “cases” arising under Constitution implied power to declare unconstitutional laws conflicting w/ basic legal charter (iv – text of Constitution)
      ▪ Art. III, § 2, par. 1: Constitutional review power already there
    o 4.] Judges take oath of office & they would violate this oath if they enforced unconstitutional laws.
    o 5.] Article VI makes Constitution the “supreme law of the land.”
    o **Slippery slope argument:** if review power sticks, it will lead to broader power (causal claim: correct; iii – Gibson’s POV)
    o **Marshall does not argue:** where there is conflict b/w constitutional & statutory provision, judiciary decides (iii)
• **Holding:** The judiciary has the authority to review the constitutionality of executive & legislative Acts.
• ***Notes:***
  • Substantive question decided before jurisdictional question -> included just to show that Jefferson administration improperly denied Marbury his commission
  o **Martin v. Hunter’s Lessee:** **Facts:** conflicting claims to land in VA. Martin claimed title to land based on inheritance from Lord Fairfax, British citizen who owned the property. U.S. & England entered into two treaties protecting rights of British citizens to own land in U.S.
Hunter claimed that VA had taken land before treaties came into effect. **Holding:** Federal treaty was controlling & it established Lord Fairfax’s ownership. **Rule:** The Supreme Court has the authority to review state court judgments.

- J. Story:
  - 1.] Constitution presumed that Supreme Court could review state court decisions -> Constitution creates a Supreme Ct. & gives Congress discretion whether to create lower federal courts
    - **Art. III, § II:** grant of appellate jurisdiction to the Supreme Ct.
    - **Supremacy Clause**
  - 2.] Bias in state courts: attachments, prejudices, jealousies, and interests
  - 3.] uniformity in the interpretation of federal law
  - 4.] sovereignty of nation
- **25th § of Judiciary Act of 1789:** provided Supreme Ct. review of highest court in state’s judgments; issue revolves around a treaty held under the United States

  o **Centralized Constitutional Review:**
    - Driving force behind it: Federalism – power to review state law somewhere in the Federal system
    - Differences in holding an act unconstitutional:
      - Germany: abrogates the offending statute completely
      - United States: set aside offending statutory provision for case at hand
        - Common law (stare decisis) in constitutional process
        - **Art. III, § II, par. I:** there will be no orders stemming from courts to legislatures – the court can only decide the case or controversy before it; court can just “set the statute aside”
    - **CONGRESSIONAL CONTROL OVER APPELLATE JURISDICTION:**
      - **Ex Parte McCordale:** **Holding:** Supreme Court cannot pronounce judgment b/c it has no jurisdiction. **Rule:** Congress has the authority to make exceptions to the Supreme Court’s jurisdiction, as well as to “regulate” that jurisdiction.
        - Congress still has not commented on § 14 of Judiciary Act: Congress authorizes Supreme Court to issue original writs of habeus corpus and to review habeus corpus in lower courts; brings into question how broadly this rule extends.
        - **Art. III, § II, par. II:** Appellate jurisdiction is conferred “with such exceptions and under such regulations as Congress shall make.” [allows for Repealer Act]
      - **Read in two ways:**
        - 1.] **Boilerplate** version: stands for virtually unlimited Congressional power where the question is Congressional power under the “exceptions” clause
        - 2.] McCardell doesn’t really stand for much of anything – does not effect jurisdiction conferred independently of the 1867 Habeus Corpus Act (still have Judiciary Act)
  - **U.S. v. Klein:** **Facts:** Government seized property of Wilson, who abetted Confederacy. Wilson took a full pardon before death. Congress created a statute providing that pardon was inadmissible as evidence in claim for return of seized property. **Holding:** Congress’ statute was unconstitutional. **Rule:** Congress may not restrict Supreme Court jurisdiction in an attempt to dictate substantive outcomes, where the case is pending and an individual’s right is at stake.  
      
      [narrower rule: This
is not a limitation of powers under the “exceptions clause,” rather Congress cannot limit the Supreme Court’s jurisdiction in a manner that violates other constitutional provisions (separation of powers) in a judicial proceeding when an individual’s right is at stake.

- Congress passed the limit which separated legislative from judicial power.
- 1.] Separation of powers: statute violates Executive power conveyed to President in Article II of the Constitution -> pardon power
- 2.] Deprivation of property w/o due process

**Robertson v. Seattle Audobon Society:** Facts: Congress passes new legislation w/ respect to requirements imposed on Forest Service. The requirements are now relaxed and are directed at pending cases. Holding: Statute was constitutional.
**Rule:** Where Congress adopts new law and does not direct the judiciary as to decision making under an existing law, it acts within its constitutional power.
- Congress is making new law which is prospective
- Another distinguishing point: individual’s rights are not being affected in this case.
- Factors: 1.] new law; 2.] individual’s rights

**POLITICAL QUESTION DOCTRINE:**

**Baker v. Carr:** Facts: Tennessee’s General Assembly failed to reapportion its legislative districts. Holding: Challenges to malapportionment are justiciable. Rule: A claim which arises under the Equal Protection Clause is justiciable, since the judicial standards are well-developed and familiar. [broader holding: A controversy is nonjusticiable where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”
- Claim is non-justiciable under the Guaranty clause.
- Three inquiries as to whether an issue is justiciable:
  - 1.] does the issue involve resolution of questions by the text of the Constitution to a coordinate branch of the government?
  - 2.] would resolution of the question demand that a court move beyond the areas of judicial expertise?
  - 3.] do prudential considerations counsel against judicial intervention?

**Goldwater v. Carter:** Facts: President unilaterally repealed treaty w/ Taiwan. Senator Goldwater believed it was unconstitutional for President to rescind a treaty w/o the Senate’s consent. Holding: This is a political question and therefore non-justiciable. Rule: Where there are no standards in the Constitution governing rescission of treaties and the matter is a dispute b/w coequal branches of our Government, issue is non-justiciable until each branch has taken action asserting its constitutional authority.
- Key point: Constitution is silent -> there is no “unquestionable” commitment of power to terminate treaties in the Constitution
- Branches of government have resources available to protect & assert their own interests.

**Powell v. McCormack:** Facts: Powell was elected to the House of Representatives & met the standing qualifications. However, he was excluded from his seat b/c he had deceived Congress by presenting false travel vouchers & making illegal payments to wife. Holding: Issue is justiciable. [Exclusion is unconstitutional] Rule: Where “textual commitment” to Congress in the Constitution does not convey judicially unreviewable power, a case which can be decided by an interpretation of the constitution is justiciable.
• Art. I, § V: “Each House shall be the Judge of the Elections, Returns, and Qualifications of its own members.” – represents a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution -> this was not a matter of determining qualifications though.

• Prudential criteria: stressed the importance of allowing people to select their own legislators

• Dictum: If there was a formally correct exercise of adjudicatory power in either House, there would be no review.

- Nixon v. United States: Facts: Nixon, Chief judge of District Court, convicted by jury of two counts of making false statements before a federal grand jury & sentenced to prison. Senate voted by more than 2/3rd majority to convict Nixon on first two articles & was subsequently removed from office. Holding: Supreme Court does not have the right to hear Impeachment claims. Rule: Baker rule – Impeachment claims are non-justiciable b/c there is a textually demonstrable commitment to Senate set forth in Art. I, § III, par. 6 & lack of judicial standards.

- Art I, § III, par. 6 [Impeachment Trial Clause]: Senate shall have the sole power to try all impeachments.

- Cannot say the Framers intended to use the word “try” as an implied limitation -> there are already limitations in the clause (those things that are not enumerated are not specific requirements)

- Legislative history: no evidence in Constitutional Convention to suggest possibility of judicial review

- Mora v. McNamara: Facts: Π’s drafted into U.S. Army & later ordered to replacement station for shipment to Vietnam. Π’s brought suit to prevent Secretary of Defense & Secretary of Army from carrying out orders. Holding: Constitutionality of war is a political question and thus nonjusticiable

  • Dissent: frames this in terms of individual rights.

II. COMMERCE CLAUSE: Art. I, § VIII, par. III – “Congress shall have power to regulate commerce w/ foreign nations, and among the several states, and with Indian tribes.”

  ➢ “Original Understanding” –

    o Gibbons v. Ogden: Facts: NY legislator enacted statute giving Livingston & Fulton exclusive right to operate steamboats in NY waters. They then assigned right to Ogden to operate ferry from NY to NJ. Under Act of Congress, Gibbons obtained license to navigate steamboats in the same waters. Holding: The NY statute violated the Commerce Clause. Rule: Congress has the power to regulate navigation between the waters of multiple states.

    ▪ “Among”: restricted to commerce which concerns more states than one (internal commerce reserved to states -> enumeration presupposes something not enumerated)

    ▪ Power of Congress may be exercised w/in a state if foreign voyage commences or terminates at a port w/in state.

    ▪ If the Federal law passes muster, then the supremacy clause says the Federal law prevails over the competing state law.

  ➢ Early Cases – moving back & forth b/w formalism & realism:

    o Paul v. Virginia: Facts: VA imposes tax on insurance policies sold in the state of VA that come from out of state. Rule: Issuing a policy of insurance is not a transaction of commerce so the commerce clause does not reach it.

    o Daniel Ball: Facts: Steamer traveled routes wholly w/in the State of MI, but carried merchandise being transported to, or from, other states. Rule: There is federal jurisdiction, under the Commerce Clause, when several agencies combine to transport commodities at the boundary line at one end of the State and leave it on the other end.

    o Champion v. Ames: Facts: ∆ indicted for conspiring to transport Paraguayan lottery tickets across state lines in violation of federal law. Holding: The prohibition of the trafficking of lottery tickets b/w states is constitutional. Rule: Congress has the power to prohibit the
carriage of lottery tickets from state to state – this is not inconsistent w/ any limitation or restriction imposed upon the exercise of powers by Congress.

- Invocation of Marshall’s “means-end” matrix in McCulloch: the commerce clause does not set forth all the means by which Congress’ powers may be carried into execution – it has a large discretion. [all means which lead to appropriate ends are constitutional]

- Logic: if a state can forbid the sale of lottery tickets w/in its own limits, why can’t Congress do the same from one State to another

- Plenary power doctrine
  - United States v. E.C. Knight Co.: Facts: Sugar refining company purchased four Philadelphia refineries & acquired near complete control of the manufacture of refined sugar w/in the U.S. Holding: Sherman Antitrust Act cannot be used to stop a monopoly in the sugar refining industry b/c the Constitution did not allow Congress to regulate manufacturing. Rule: Congress does not have the power to control contracts in manufacturing where restraint of trade is an indirect result.
    - Direct & primary: speaks to transport
    - Indirect & secondary: speaks to manufacture
    - Realism (one looks to actual economic impact of regulation – is the regulation discriminatory?) vs. Formalism (1.] fails to address problem that gave rise to litigation in the first place; 2.] hiding that failure in a cloak of forms)
    - Economic effects of cartel are never addressed
  - Houston, East & West Texas Railway Co. v. U.S. (Shreveport): Facts: Railroad maintained rates for hauls b/w points w/in Texas for substantially lower than for hauls b/w Texas and Shreveport. Rule: Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule.
    - “close & substantial relation”: Congress’ control of interstate commerce extends to carriers in all manners whose operations have a “close and substantial” relation to interstate commerce
    - Case of a “direct effect” on interstate commerce
    - Realist opinion
  - Hammer v. Dagenhart: Facts: Congress passed statute prohibiting transportation in interstate commerce of manufactured goods which w/in the past thirty days were produced in factory which utilized children under the age of 14, etc. Rule: Congress does not have the power to control the manufacture of goods even when they are afterwards used in interstate commerce.
    - Slippery slope argument: if Congress steps in this time, federal power will take over in more instances (intrastate, noncommercial activities); normative claim: is this undesirable – not in the related context

- Post-Depression New-Deal Era: Laissez-faire court resists Roosevelt’s legislation
  - Schecter Poultry Corp. v. U.S.: Facts: Δ’s violated Poultry Code, which set minimum wages, hours worked for workers in chicken factories. Rule: Congress does not have the authority to regulate hours and wages for indirect-intrastate commercial transactions.
    - Formalistic elements of opinion: direct vs. indirect
      - Little attention to problem that gave arise to Codes in New Deal in first place
      - Government argues that chickens find themselves in the “flow” of interstate commerce: flow in interstate commerce ceased when chickens became intermingled w/ mass of property w/in state
      - Slippery slope argument: control of wages & hours -> control of advertising, # of employees, etc.
  - Carter v. Coal Co: Facts: Statute imposed maximum hours and minimum wages for coal miners. Nearly all coal produced would be sold in interstate commerce. Rule: Congress does
not have the power to regulate activity that does not have a direct, logical, and linear link to interstate commerce. [See *Knight*]

- Congressional power is specific -> here Congress’ powers are general and exceed the power in Article I, § VIII
- Matter of degree has no bearing on issue: direct vs. indirect; this is case of manufacturing & production
- Slippery slope argument: If regulation encompassed all manufacturing intended to be the subject of commercial transactions in the future, it would also include all productive industries that contemplate the same thing (fisheries, mining, etc.)
- Dissent (Cardozo): realist opinion -> degree does matter

**Changing of the Commerce Clause Doctrine – Recognition of Congressional “Police” Power**

- Themes:
  - Court no longer distinguishes b/w 1.] commerce and other stages of business (i.e., mining, manufacturing, and production); 2.] direct & indirect
  - 10th Amendment is no longer a limit on Congressional power -> federal law upheld as long it was w/in scope of Congress’ power
- **NLRB v. Jones & Laughlin Steel Corp.**
  - **Facts:** ∆ violated National Labor Relations Act by refusing to allow employees the right to organize. Act applied when there was an effect on commerce – burdening the flow of commerce. ∆ engaged in gathering raw materials (MI, MN, WV), manufacturing/transforming them in Penn., and distributing the products to different states. Completely integrated process. **Holding:** The NLRA, which allows workers to bargain and organize collectively, is constitutional. **Rule:** Congress has the right to regulate labor practices where the manufacturer is involved in a national scale, and it is integrated to the point where the good is transformed and transferred across States.
    - Realist opinion:
      - look to the effect upon commerce, not the source of injury
      - The activities in this situation constitute a “stream” or “flow” of commerce which the manufacturing plant is the focal point
      - There is a “close & substantial” relation b/w manufacture & commerce
      - Look to degree -> this is an industry which is organized on a national scale
      - Fundamental right: collective bargaining & organizing
      - Congress is acquiring state police power.
  - **United States v. Darby.**
    - **Facts:** ∆ acquires raw materials which he manufactures into finished lumber w/ the intent when manufactured to ship it interstate commerce. ∆ violated Fair Labor Standards Act by paying less than minimum wage and prescribing more than maximum hours. **Holding:** FLSA Act is constitutional. **Rule:** While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of commerce.
      - Overrule *Dagenhart*: articles injurious to public’s health, morals, or welfare
      - Reasonable or rational relation b/w means and end (relaxed test of appropriate means)
      - 10th Amendment (“powers not delegated to the U.S. by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people) is a truisms: a law is constitutional so long as it is within Congress’ scope of power
      - Does not matter if Congress’ motive or purpose is regulatory
  - **Mulford v. Smith.**
    - **Facts:** marketing quotas on “flue-cured” tobacco. **Rule:** If goods can be both intrastate and interstate commerce, then interstate regulation may apply to both kinds.
  - **Wickard v. Filburn.** Π owned and operated small farm – sold portion of crop, some fed to livestock, the rest used for home consumption. Π violated Agricultural Adjustment Act since he has harvested excess acreage of the quota & has not paid penalty. **Rule:** So long as the cumulative effects of a class of activities regulated by Congress has a substantial effect on interstate commerce the law may be applied validly to a person whose individual activities have almost not impact on interstate commerce.
Purpose of the Act: control the volume moving in interstate & foreign commerce to avoid surpluses and shortages -> avoid abnormally high or low wheat prices & obstructions to commerce.

1. Justification – Aggregation: It’s contribution + others = substantial contribution
2. Homegrown wheat competes w/ the wheat in Congress.
3. Congress is in a far better position to pass on what counts as “reasonable means” – question of economic interests
Distinctions b/w commerce & production, and between “direct and indirect effects on commerce are no longer followed

Breadth of the post-1937 Congressional “police power”:

1. State Action Doctrine: requirements for equal protection extends only to the government and not to private conduct

Civil Rights Cases: Facts: Blacks denied the right to eat in public restaurants, stay in public inns, etc. Civil Rights Act of 1875 prohibited racial discrimination in public accommodations. Rule: Congress’ constitutional authority to prohibit racial discrimination extends only to state action/laws, and not that of individuals.

- § 5 of 14th Amendment: “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state deprive any person of life, liberty, or property w/o due process of law; nor deny to any person w/in its jurisdiction the equal protection of the laws.”
- § 2 of 13th Amendment: “power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the U.S.” – the refusal to serve a person was no more than “an ordinary civil injury” and not a “badge of slavery” [since been overruled]
- Individual invasion of individual rights is not the subject matter of the 14th Amendment -> Congress can only provide modes of redress against state laws & state officers
- Slippery slope argument -> Congress could enact legislation to enforce vindication of all rights of life, liberty, property, etc.

- Marsh v. Alabama: Facts: Corporation owns a town which is accessible and freely used by the public in general. It distributed religious literature and was told he was not allowed to distribute w/o a permit which would not be granted. This was in violation of Alabama Code. Rule: Where property which is privately owned benefits from public use and where the public has an interest in the functioning of the community, the freedom of press and religion outweigh the constitutional rights of the property owner. [Company town = Instrumentality of the State]

- Balance: rights of property owners vs. First Amendment rights -> First Amendment rights weigh more heavily
- Constitutional Rights trump Property Rights
- Constructive consent: corporation is opening up property to the public.

- Terry v. Adams (1953): Facts: Jaybird party is dominant political group and has endorsed every county wide official since 1889. Jaybird excludes Negroes from its primaries. Jaybirds are a voluntary, self-governing club, not regulated by the State. Rule: Where a primary is the sole influential force for both the Democratic Party and the general election, although that primary is not state-controlled, it must be treated as such. [Jaybird Ass’n = instrumentality of the State]

- 15th Amendment: blacks have the right to vote -> had it been operative in the ordinary primary it would be clearly unconstitutional
- Democratic primary & general election: only ratify the choice made in Jaybird elections (this is the election)
- Point to the end, rather than the means to the end.
Shelly v. Kraemer (1948): **Facts**: Owners signed restrictive covenant prohibiting blacks from owning property. Δ’s purchased warranty deed. **Rule**: State court decisions upholding restrictive covenants count as State action vis-à-vis 14th amendment guarantees.
- Purposes of agreements were secured only by judicial enforcement of state courts of restrictive terms of the agreements.
- 14th Amendment: Immunities Clause/Equal Protection Clause
- Court’s upholding of covenant had the effect of a state ordering that one “must obey the racially restrictive covenant.”

Civil Rights Cases of 1964:
- Effect on commerce per se: discrimination/segregation in four classes of business establishments which “serve the public” and “is a place of public accommodation.”
- Civil Rights Act of 1964 § 201(a): “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation as defined in this section, w/o discrimination or segregation on the ground of race, color, religion, or national origin.”
- Spheres for Act: [eventual tying of the first two spheres]
  - 1.] State
  - 2.] Privately owned enterprises serving public
  - 3.] Purely private sphere
- Heart of Atlanta Motel (1964): **Facts**: Δ owns motel readily accessible to interstate highways – advertises out of state & generates a lot of business from out-of-state residents. Motel refuses to rent to blacks. **Rule**: Congress can regulate local racial discrimination in public accommodations because of its substantial effect on interstate travel & commerce.
  - Quantitative effect of discrimination: discourages blacks from traveling; air commerce is adversely affected
  - Look at the ends here: 1.] morality -> to promote personal dignity; 2.] promoting commerce [Extraordinary deference to Congress in means]
- Katzenbach v. McClung (1964): **Facts**: Δ owns restaurant located on local highway. Restaurant only offers take-out services to Negroes. Restaurant purchases 46% of food from local supplier outside the State -> substantial portion of food had moved in interstate commerce. **Rule**: Congress validly exercises its power under the Commerce Clause when as long as it prohibits discrimination in restaurants where the particular restaurant either serves or offers to serve interstate traveler, or serves food, a substantial portion of which has moved in interstate commerce.
  - Discrimination effect on interstate travel, sale of goods: blacks cannot eat on the roads
  - Caused highly skilled people to become reluctant to move to certain areas -> restaurants sold less interstate goods.
  - New criteria: **promoting the volume** of commerce (this is really counterintuitive b/c there is no positive relation b/w means & ends -> enforcement of the means will undermine commerce in relation to Δ who will lose business)
  - Enforcement of morality (like Heart of Atlanta)
  - Aggregation principle (Wickard): look to contribution when added to others
- Perez v. U.S. (1971): **Facts**: Δ is a loan shark who uses threats to collect his money. Δ tries to collect from butcher. **Rule**: Congress can regulate a class of activities that substantially affects interstate commerce “without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.”
  - There is no direct evidence of out-of-state activity here; Δ’s operation was limited to Brooklyn
  - Congress is creating a monster -> can reach to anything [extraordinary deference to Congress]
  - Stewart (dissenting) -> Congress could not rationally have believed that the requisite connection b/w means and ends exists
Art. I, § 8 powers (Taxing & Spending clause):

- **Strategies in challenging tax measure:** argue that tax component is swallowed whole by regulatory component -> appropriate in such situation to examine Congressional motive
  
- **Strategies to uphold tax measure:** show that there is a revenue raising component (never mind how modest, it is there) -> it is not for the court to inquire into the legislative motive

  - Bailey v. Drexel Furniture Co. (1922): **Facts:** Child Labor Tax Law forced employer to pay 1/10th of entire net income in business for a full year if act was violated. **Rule:** Where a tax by Congress is such that its primary goal is regulation or punishment, rather than revenue production, it is not w/in the constitutional bounds of Congress.
    - Tax (primary motive is revenue production; incidental motive is discouraging employer) vs. penalty (primary motive is regulation and punishment)
      - Penalty b/c: 1.] only employers who knew they were employing children would be taxed; 2.] the amount of tax was not proportional to the ratio of children working the company; 3.] enforcement of the tax was enforced by the Labor Department and not the IRS
    - Slippery slope: if this law is validated, Congress could simply take over anything it desires in public interest by enacting a tax.
    - Primary vs. incidental motive: primary motive has to be directed to raising revenue; incidental motive can accompany a primary motive as an ancillary matter

  - Pre-text to the real motive

  - U.S. v. Kahrigher (1953): **Facts:** Revenue Act levied a tax on persons engaged in the business of accepting wagers and required such persons to register w/ the Collector of Internal Revenue. **Rule:** As long as the regulatory tax produces “some revenue” and is reasonably related to enforcement of the tax, then it is likely to be treated as a legitimate tax.
    - Court says there are no “penalties extraneous to the tax need.”
    - Congress gets involved b/c states have not done anything.

  - U.S. v. Butler (1936): **Facts:** Processing tax imposed by Agricultural Adjustment Act – authorized Secretary of Agriculture to make contracts w/ farmers to reduce their productive acreage in exchange for benefit payments. Payments made out of funds payable by processor – processing tax imposed on “first domestic processing” of particular commodity. **Rule:** Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions. [Court still held that since this tax measure was regulatory, it was unconstitutional]
    - General Welfare Clause (Art. I § 8, para. 1): “lay and collect taxes, duties, imposts, and excises, to pay the Debts and provide for the common defense and general welfare of the U.S.”
      - Madison: Congress was limited to taxing & spending to carry out other powers specifically enumerated in Art. I of the Constitution
      - Hamilton: Congress could tax & spend for any purpose that it believed served the general welfare, so long as Congress did not violate another constitutional provision
      - General welfare & taxing/spending clause are held together (middle reading: power to tax and spend is qualified by the general welfare clause.)
      - No voluntary co-operation on the part of the farmers: this is coercion by economic pressure
      - This is regulation of production and thus violates the 10th Amendment -> regulation is left for the states; not for the general welfare
      - Argument loses steam w/ comparison to education: Congress can make grants to State universities to promote study programs

  - Charles Steward Machine Co. v. Davis (1937): **Facts:** Social Security Act – Employer was entitled to credit of federal tax for any contributions to state unemployment fund certified by federal agency as meeting the requirements of the Act. **Rule:** Tax credits that are given upon the condition of compliance are not coercive devices that strip States of their autonomy.
- States were unable to give necessary relief -> there is no evidence of coercion in the Act, only temptation
- **J. Cardozo** (dissent): there is a distinction b/w coercing & compelling behavior. 1.] the law assumes the free will of individuals; 2.] free will is compatible w/ acting on motivation; therefore the distinction should be made b/w motivation and coercion. 3.] coerced behavior is also a matter of acting from the alternative. In coercion, there is no alternative.
  - **Coercion**: genuine coercion usually results b/c you have no choice; “coerced to do x” means compelled to do x
    - **Conditions**: A.] the directed course of behavior is decidedly unattractive; B.] there is no viable alternative.
    - Conditional grants don’t follow this -> states don’t have to follow the conditions; they don’t have to take the grants.

- **Art. I, § 8 powers** – War power clause:
  - **Woods v. Lloyd W. Miller Co.** (1948): **Facts**: Congress instituted Housing & Rent Act which regulated rents. This came after the President’s proclamation that hostilities were being terminated, although there was no explicit “termination of the war.” **Rule**: Where the particular negative externality of a war (economic condition) has not been eliminated, the necessary and proper clause supports congressional power to regulate it.
    - Here, there is a specific concrete problem which is readily identifiable (its cause is identifiable)
    - **Slippery slope** argument (dissent): “war powers” will be used during times of peace to treat all problems which war inflicted on society -> obliterate 9th and 10th Amendments
    - **Jackson**: worried that war power could be used forever -> does not last as long as the effects and consequences of war
  - **Missouri v. Holland** (1920): **Facts**: Treaty b/w U.S. & Great Britain – provided for specified closed seasons and protection of birds & agreed that two powers would take or propose to law making bodies necessary measures for carrying treaty out. Congress subsequently passed Migratory Bird Treaty Act. **Rule**: Congress may use any means necessary and proper to implement treaties even if they do not rely upon Congress’ enumerated powers. [treaties cannot be challenged as violating the 10th Amendment and infringing state sovereignty]
    - Acts of Congress (supreme law only made when in pursuance of Constitution) vs. Treaties (supreme law when made under authority of the U.S.; does not have restraints on content from necessary & proper clause) **the treaty power is broader**
    - Use of necessary & proper clause (Art. I, § 8) can be used generally: it is not limited to para’s. 1-17 [treaty in this case is not inconsistent w/ any specific provision]
    - Treaty making power: Art. II, § II (power to make treaties); Art. VI (treaties made under authority of U.S. are declared Supreme Law of the land)
    - Necessary & proper clause + Treaty making power is sufficient.
  - **Reid v. Covert** (1957): **Facts**: ∆ killed husband, sergeant in Air Force Base, in Great Britain. U.S. & Great Britain had an executive agreement at the time allowing U.S. military courts to exercise exclusive jurisdiction over offenses committed in G.B. by American servicemen or their dependents. ∆ was subject to subsequent Code enacted. **Rule**: Treaties and laws enacted in pursuant them must not infringe on an individual’s rights in the Constitution.
    - Assuages concerns over circumvention of constitutional safeguards via treaty-implementing legislation.
    - **Legislative history**: Reasons why treaties were not limited to those made in “pursuance” of Constitution was made so that agreements made by the U.S. under the Art. Of Confederation would remain in effect.
    - Court-martial: infringes on Art. III, § II & 5th/6th Amendments -> ∆ has constitutional right to jury trial (Constitutional rights trump over conflicting policies)

- **Commerce Clause**: undoing of post-1937 consensus/ “police power”?
United States v. Lopez (1995): **Facts:** Respondent was arrested and charged w/ violating Gun-Free School Zones Act – made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone. **Rule:** The Court will not hypothesize a rational basis for a statute when Congress has made no effort to find the activity’s substantial effect upon interstate commerce.
- 1.] Legislative history/language of statute -> neither contemplate effects upon interstate commerce; this is a non-economic activity
- 2.] even if the Court were willing to address the premises of the gov’t’s argument on “substantial effects,” the argument would prove too much (slippery slope -> government could regulate all activities which might lead to violent crime or related to economic productivity)
- **Formalism:** distinction b/w economic vs. non-economic merely shrouds the problem
- **Kennedy** (concurring): emphasizes “federal balance” -> statute intrudes upon an area of “traditional state concern.
- **Souter** (dissenting): defer to Congress who has heard the case
- **Breyer** (dissenting): “substantial economic effects” on the merits (Economic growth traced back to schooling)

Brzonkala v. Morrison (2000): **Facts:** College student sexually assaulted & sues under 42 USC § 13981, which provides remedy for victims of gender-motivated violence. **Rule:** In areas that the Court regards as traditionally regulated by the states, Congress cannot regulate noneconomic activity based on a cumulative substantial effect on interstate commerce.
- Holding despite the fact that Congress conducted “voluminous” hearings & found that violence against women had an enormous effect on American economy.
- 1.] emphasis on non-economic character of the activity being regulated and 2.] adduces slippery slope argument to meet government’s arguments re “substantial effects.” (cannot regulate violent criminal conduct based solely on that conduct’s aggregated effect on interstate commerce)

III. DORMANT COMMERCE CLAUSE:
- **Exclusivity:**
  - *Gibbons v. Ogden:* Doctrine of Exclusivity: the power of a sovereign state over commerce amounts to nothing more than a power to limit and restrain it at pleasure; this power must be exclusive; therefore, this grant carries w/ it the whole subject, leaving nothing for the state to act upon
  - **Concurrent powers:** Taxation -> Congress & state tax for different purposes; Congress cannot tax for purposes empowered by the state
    - Anything partially concurrent falls under Supremacy Clause (supremacy of a Congressional statute over a conflicting State’s statute)
  - **Exclusive powers:** Commerce; war power
  - **J. Marshall:** still allowed for state inspection laws which may have a “considerable influence on commerce.”
    - Problem w/ opinion: cannot group state laws into two distinct categories (1.] adopted under police power; 2.] regulate commerce among states) b/c they are not at all separate

plume v. Commonwealth of Massachusetts: **Facts:** A convicted of violating Massachusetts law prohibiting sale of oleomargine. **Holding:** Massachusetts law did not violate Congress’ commerce power. **Rule:** Where a statute is adopted under a state’s police power to protect fraud and deception in food products, it does not matter that the legislation indirectly or incidentally affects trade in such products.

Cooley v. Board of Wardens: **Facts:** II violated Pennsylvania law, requiring all ships to use local pilots when they navigated Delaware. Those who did not use local pilots were forced to
pay a penalty. 1789 Federal Law gave states the power to regulate local pilots. **Holding:** Law is valid. **Rule:** Where the nature of the subject matter requires diverse local regulation, Congress has the power to delegate regulatory authority to the state.

- End of exclusivity doctrine:
- Regulation of pilots is a local matter
- **Absurdity** results from the denial of concurrent State power -> similar to denying Congressional power to recognize continuing State regulation
- **Problems:** 1.] allows state regulations no matter how protectionist or how much they interfere w/ interstate commerce so long as subject matter is local; 2.] there is no clear distinction b/w what is national and what is local
  - **Prudential Ins. Co:**  **Facts:** Regulation and taxation by states of insurance business. **Holding:** Appropriate b/c it reflects Congressional policy. **Rule:** Where Congress declares that State regulation is in the public interest, it survives challenge even though the regulation might well fail in the absence of congressional “authorization.”

➤ **Transportation Cases:**
  - **South Carolina State Highway Dpt. v. Barnwell Bros:**  **Facts:** South Carolina passed an Act prohibiting use of state highways of motor trucks and semi-trailer motor trucks w/ specific measurements & weights. **Rule:** When analyzing the constitutionality of state actions under the Commerce Clause, the court must decide whether 1.] the state legislature acted w/in its province and 2.] whether the means of regulation chosen are reasonably adapted to the ends sought
    - State highways are a local concern (owned & maintained by state municipality divisions)
    - There is no Congressional action in this situation
    - **Prong #1:** state may impose non-discriminatory restrictions for safety & economical reasons
    - **Prong #2:** [deference to state legislation] question is whether there is rationale basis for legislature’s choice -> preferences are not arbitrary or unreasonable (reasonableness is deferred to the legislature)
    - **Question one should ask:** there is NO intended discrimination
  - **Southern Pacific Co. v. Arizona** (1945):  **Facts:** Π runs a substantial portion of long trains and has been forced to haul over 30% more trains due to statute. Arizona Train Limit Law makes it unlawful for any person or corporation to operate w/in the state a railroad train of more than fourteen passengers or seventy freight cars. **Rule:** When weighing the effect of state law regulating interstate commerce, the court must balance the burden on interstate commerce against the benefits of the state
    - **Burden:** imposes serious burden on interstate commerce conducted by Π; interposes a substantial obstruction to national policy proclaimed by Congress (efficient transportation service)
    - **Uniformity:** requires trains from other states to be broken up and reconstituted (effectively control train operations beyond boundaries of the state)
    - Means are not reasonably related to the end
  - **Bibb v. Navajo Freight Lines** (1959):  **Facts:** Illinois Mudguard statute: requires use of certain type of rear fender mudguard on trucks and trailers operated on highways of state -> Guard should contour the rear wheel. **Rule:** Where there is a dubious safety rationale coupled with a large burden on interstate commerce, the state law fails the balancing test invoked in Southern Pacific.
    - **Installation Costs** are steep
    - **Safety:** contour mudflap possesses no advantages over conventional mudflap
    - **Burden:** conflicts w/ Arkansas statute which requires conventional mudflaps -> causes the need for mudflaps to be inter-changed; disrupts interlining – those who operate in and through Illinois will lose substantial portion of their business
Kassel v. Consolidated Freightway Corp. (1981): **Facts**: Π is one of the largest common carriers & prefers to use doubles to ship certain types of commodities. Iowa Act limited truck combinations to 55 feet in length, but gave special exemptions. Also allowed certain cities abutting state line by local ordinance to adopt length limitations of adjoining state. **Rule**: Balancing test (*Southern Pacific*) -> safety rationale is dubious and there is an undue burden on interstate commerce.

- **Burden**: trucking companies wishing to use doubles must route them around Iowa or detach trailers of doubles and ship them through separately.
- **J. Brennan** (concurring): looks to actual discriminatory purpose -> protectionist purpose to discourage interstate traffic; (look at exemptions)
- **J. Rehnquist** (dissenting): deference to state legislature on safety grounds -> sufficient evidence at trial related to safety

Pike v. Bruce Church, Inc. (1970): **Facts**: Appellee had AZ cantaloupes packed at plant in CA. Building a plant in AZ would cost $200,000. The packaging bears the name of the CA packer. AZ Fruit & Vegetable Standardization Act requires AZ products to be packaged in AZ. **Rule**: Where the statute does not discriminate to effect a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

- If legitimate local interest is found, then the question becomes one of degree
- Court recognizes State’s legitimate local interest in maximizing financial return in industry w/in it
- **Proportionality criterion**: local benefit is not so great as to justify locally imposed burden
- Satisfies first three standard criteria:
  1. even-handed (free from discrimination)
  2. legitimate State purpose or interest
  3. incidental effects on interstate commerce, …
  4. then regulation passes muster unless
- **Incoming Commerce**:  
  Baldwin v. G.A.F. Seeling Co.: **Facts**: ∆ buys milk from VT creamery at prices lower than minimum payable to producers in NY. New York State regulation requires that the price of milk purchased out of State for processing and retail sale in NY be left to the minimum price paid, by law, in NY. **Rule**: Where the state regulation is discriminatory on its face (in this case police power establishes an economic barrier against competition w/ the products of another state and labor of its residents) it is unconstitutional.

- NY argues that supply is put in jeopardy when farmers in the state are unable to earn a living income. (health argument)
- **Slippery slope**: Economic welfare is always related to health
- **Discriminatory**: Legislative motive is irrelevant -> instead, look to discrimination; cannot eliminate competition b/w states, i.e., place your state in economic isolation.
- **Scalia** (dissent): Discriminatory effects might pass muster where state can show that it is legislating w/ respect to legitimate end and there is no less onerous alternative.

Welton v. Missouri: **Facts**: Missouri statute required license for peddlers doing business in MO, unless they sold MO produced goods. **Rule**: Where there is a less onerous alternative (licenses could have been required for everyone), statute is discriminatory and thus unconstitutional.

Hunt v. Washington State Apple (1977): **Holding**: North Carolina regulation that “closed containers of apples” shipping into NC bear no grade other than applicable U.S. grade or standard is discriminatory.

- **Less onerous alternative**: permitting out-of-state growers to utilize state grades only if they used also marked their shipments w/ applicable USDA label.
- **Statute burdens & discriminates** against interstate sales of WA apples:
- 1.] raises the cost of doing business in NC
- 2.] strips away competitive advantage earned through expensive inspection/grading system
- 3.] leveling effect which works in favor of NC producers

- **Edwards v. CA** (1941): **Facts:** CA law makes it illegal to bring, or assist in bringing, an indigent person into state w/ knowledge of the indigency. **Holding:** CA regulation is discriminatory b/c the state cannot isolate itself from problems common to all states.

- **Healy v. Beer Institute** (1989): **Holding:** Connecticut law requiring out-of-state shippers of beer into Conn to set prices no higher than prices in states neighboring Conn is discriminatory.
  - The State would in effect be deciding what out-of-state sources of beer are allowed to charge in Conn.

- **Dean Milk** (1951): **Facts:** Appellant engaged in distributing milk and milk products in ILL and WI. Appellant does not process or pasteurize any of it’s milk w/in 25 miles of WI. Madison City Ordinance makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant w/ radius of five (or 25) miles from central square of Madison. **Rule:** Even a regulation w/ a valid objective may be struck down if reasonable nondiscriminatory alternatives that adequately serve the state’s aim are available.
    - Possible less onerous alternatives: Madison could charge actual & reasonable cost of inspection to importing producers/processors; federal inspection; sending inspectors to importing producers

- **Breard v. City of Alexandria** (1951): **Holding:** court upholds municipality’s ordinance proscribing door-to-door salesman w/o prior consent.
  - **Social issue:** Homeowner’s right of privacy outweighed burden on interstate commerce

- **Philadelphia v. New Jersey** (1978): **Facts:** NJ law prohibits importation of most “solid or liquid waste” which originated or was collected outside the territorial limits of the State. **Rule:** Whatever a states ultimate purpose may be in imposing its statutory prohibition, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason , apart from their origin, to treat them differently.
    - First look at discriminatory effects, then look at less onerous alternatives.
    - Less onerous alternative: if you are concerned w/ environmental problem, then restrict the amount of garbage at the sites generally
    - **J. Brennan:** purpose of statute does not matter; statute gives NJ residents a preferred right of access
      - Distinguishes quarantine laws which prevented transit of noxious articles, whatever their origin -> movement of waste does not endanger health; waste must not be disposed of as soon as close to its point of origin as possible

- **Hughes v. Oklahoma** (1979): **Facts:** Hughes holds TX license to operate a commercial minnow business by transporting from OK to TX a load of natural minnows purchased from a minnow dealer licensed to do business in OK. OK statute proscribes transport out of State for sale there of minnows seine in OK waters. **Holding:** OK’s statute is discriminatory and there are less onerous alternatives. **Rule:** Where discrimination is evident, ask 1.] is there a legitimate state purpose? And 2.] if so, is there a less onerous alternative.
    - Adds to the **Pike** formula: 1.] only incidental effects on interstate commerce; 2.] whether statute serves a legitimate local purpose; 3.] whether alternative means could promote this local purpose as well w/o discriminating against interstate commerce.
    - OK can control yield w/o drawing in-State/out-of State lines -> limit number of minnows taken by licensed minnow dealers; state does not limit how minnows are disposed of w/in state
    - Economic discrimination (protectionism) can take two paths:
• 1.] Discriminatory on its face or 2.] discriminatory effects
  ▪ Four rubrics for state power: safety, health, environment, welfare
  o Maine v. Taylor (1986): Facts: ∆ arranged to have golden shiners delivered to him w/in Maine. Shipment was intercepted. Maine statute bans importation of live fish which are commonly used for bait-fishing in inland waters. Holding: Statute is upheld. Rule: State statute banning “incoming commerce” which is discriminatory is only constitutional if it 1.] serves a legitimate local purpose and 2.] the purpose must be one that cannot be served as well by available discriminatory means.
    ▪ Obvious discrimination
    ▪ Legitimate local purpose/interest: environmental interest -> Maine cannot wait until there is irreversible environmental damage
    ▪ Maine succeeds w/ argument that there is no less onerous alternative: “Abstract possibility” of developing acceptable testing procedures does not make them an available non-discriminatory alternative (State is not required to develop new and unproven means of protection at an uncertain cost)
    ▪ Appellate Ct: should not decide factual questions de novo as to whether there are adequate sampling & inspection procedures
    ▪ Dissent: presumption shifting -> if it has been shown that a state statute discriminates, the burden of proof rests on the discriminating state to show that there are no less onerous alternatives

➢ PREEMPTION:
  o Rice Criteria: Sets out preemption criteria
    ▪ A.] begin w/ presumption in favor of State regulation
    ▪ B.] Grounds for rebuttal
      • 1.] pervasive federal scheme
      • 2.] dominant federal interest
      • 3.] state law “stands as an obstacle to the accomplishment” of congressional purpose
  ▪ Preemption can be either express or implied
  o Hines v. Davidowitz (1941): Facts: Penn statute requires aliens to register annually, carry alien registration card, etc. There is also Congressional Act w/ more modest requirements of aliens. Holding: State statute preempted by Congressional Act. Rule: Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for registration of aliens, states cannot inconsistently w/ the purposes of Congress, conflict or interfere w/, curtail or complement, the federal law or enforce additional or auxiliary regulations.
    ▪ Pervasive federal scheme [KEY FACTOR]: Congress has enacted a “complete scheme of regulation;” “broad and comprehensive plan”
    ▪ Dominant federal interest: dealing w/ rights, liberties, and personal freedoms of human beings; this is an international relation field which demands broad national authority
    ▪ Dissent: Federal regulation may not be so pervasive given the amount of state legislation in the field on the books
    **In order to have uniformity in compliance and enforcement, there must only be one national system. This creates more freedom for resident aliens
    ▪ All three Rice criteria are met:
      • 1.] Congress has occupied field to exclusion of parallel state legislation
      • 2.] dominant interest of federal regulation precludes state legislation
      • 3.] administration of state Acts would conflict w/ operation of federal plan
o **Askew v. American Waterways Operators Inc.** (1973): FLA statute imposing strict liability for oil spills in the State’s territorial waters is upheld, despite Congressional Act imposing strict liability, for the latter is limited to cleanup costs incurred by the federal government. 
  - Differences b/w the two:
    1. Federal limitation of liability only runs to “vessels” and not “shore facilities”
    2. Congress only deals w/ “cleanup” costs, leaving States to impose liability in damages for losses suffered both by States & by private interests
    3. States need to deal w/ “cleanup” costs of its own.

o **City of Burbank** (1973): **Facts**: City ordinance proscribes night air departures from Hollywood. Federal Aviation Act and Noise Control Act have been enacted. **Holding**: Burbank ordinance preempted by congressional acts.
  - Burbank ordinance enacted to control single flight weekly due to noise.
  - Congressional Acts enforced w/ an eye towards safety.
  - Pervasive nature of scheme of federal regulation.

o **Pacific Gas & Electric** (1983): **Facts**: CA Act conditions construction of nuclear plants on findings by State Energy Resources Conservation & Development Commission that adequate storage facilities and means are available for nuclear waste. **Holding**: CA Act, which addresses both safety & economic issues, does not preempt Federal Atomic Energy Act which addresses safety issues. **Rule**: Historic police powers of state may not be superseded by a Federal Act.
  - Court distinguishes federal (radiological safety aspects) vs. state responsibilities (electrical utility – need, reliability, cost)
  - Court accepts CA’s economic purpose argument: nuclear waste problem could be critical leading to unpredictably high costs to contain problem
  - The court looks for and finds an economic rationale
  - Court makes a point not to find pre-emption: narrowly construes federal goal to encouraging nuclear power only where it was economically efficient

o **Ray v. Atlantic Richfield Co.** (1978): **Facts**: WA State law enforced pilot licenses, specific safety standards, tug requirements, and weight restrictions. Ports & Waterways Safety Act controlled navigation w/ special design & operating characteristics. **Holding**: WA enrolled pilot license requirement, safety features (by themselves), and weight restrictions all pre-empted by federal law. However, since WA statute presents the choice between tug escorts or greater safety standards, safety measures are not pre-empted.
  - Congressional intent of uniformity is infringed upon by safety features and weight restrictions.
  - **Dissent**: Safety regulations are invalid (Paulson agrees)
  - Presumption exists that state law is good law.

1976: Courts try to give States greater regulatory role in commercial field
  - 1.] Effort to provide a use for the 10th Amendment: court lends state immunity from Congressional regulation of the Commerce Clause
  - 2.] Market participant exception -> State participates in the market

**MARKET PARTICIPANT**:
  - **Hughes v. Alexandria Scrap** (1976): **Facts**: MD pays a “bounty” to in-State and out-of-State processors of auto hulks, requiring, however, the latter to provide more ample documentation of tile. **Holding**: Discriminatory actions against out-of-staters did not violate the dormant commerce clause. **Rule**: Where a state is a market participant and provides incentives [which favor its own citizens] for increasing the intrastate commerce, its action do not interfere w/ the Commerce Clause.

  - **Reeves, Inc. v. Stake** (1980): **Facts**: South Dakota cement plant supplied all SD customer first honoring all contract commitments, w/ the remaining volume allocated on a first come, first serve basis. TI, a ready mix distributor out-of-state, was engaged in long term contract w/ buyers when he was told he would not be supplied anymore. **Rule**: If a state is acting as a
market participant, rather than as a market regulator, the dormant commerce clause places no regulation on its activities.

- State is a private party w/ freedom to discriminate
- 1.] benefits limited to those who fund it
- 2.] this is not a natural resource like timber
- 3.] other states can create plants themselves; suppliers at fault for entering into long-term contracts
- 4.] free market forces never worked in the beginning

- South Central Timber Development, Inc. v. Wunnicke (1984): Facts: Alaska statute requires that timber taken from state lands be processed w/in the state prior to export. Rule: Where the state acts as a market participant in one area, it may not involve itself in an area further downstream where it has no direct interest at hand.
  - Alaska, seller of timber, is comparable to Maryland, the purchaser in Alexandria Scrap case
  - Alaska is imposing conditions that don’t turn up in the market in which Alaska is participating: state is using leverage in the timber market to exert a regulatory effect in the processing market, in which it is not a participant
  - Distinguished from Reeves: involves 1.] foreign commerce; 2.] natural resources; 3.] restrictions on sale

INTERSTATE “PRIVILEGES AND IMMUNITIES.” Art. IV, § II:

- Art. IV, § II: “The citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states.”
  - Sometimes seen as an alternative to the Commerce Clause in the employment context (discriminatory clause in employment context)
    - Does not apply to corporations
  - Problem w/ the clause: it does not enumerate anything

- Cornfield: Upheld statute limiting access to oyster bed determined to be owned by N.J. Rule: States may not interfere w/ right of citizen of one state to pass through, or to reside in any other state, for purposes of trade.
  - Gathering of oysters/clams is not a fundamental right
  - Art IV, § II & 14th Amendment speak to different things:
    - J. Washington interprets P & I clause wrong -> enumerates fundamental rights (protection by government, enjoyment of life & liberty w/ right to acquire property of every kind, pursue and obtain happiness and safety, etc.)
    - Instead, proper reading is the “command reading”: to bring the outsider up to the level of the insider (P&I clause is an equality provision)
    - Reconstruction Congressman drew on Washington’s reading in second P&I clause in 14th Amendment -> bring treatment of disfavored groups to level of favored groups

- Baldwin v. Montana (1978): Facts: Montana statute discriminates against out-of-state residents by charging Montana residents $9 for an elk license, while charging nonresidents $225 for a combination license. Montana’s problem is one of costs. Rule: Where an activity is not 1.] tied to a nonresident’s livelihood & 2.] does not facilitate the maintenance/well-being of the Union, it is not covered by the Privileges & Immunities clause.
  - Elk hunting: not a means to a non-resident’s livelihood (this is a recreation/sport)
  - State is not obliged to share the things it holds in trust for its own people.
  - Enumeration of what is guaranteed under clause:
    - 1.] imposing unreasonable burdens on citizens of other states in their pursuit of common callings w/in the state
    - 2.] ownership & disposition of privately held property w/in the state
    - 3.] access to courts in State
  - Dissent (Brennan) provides stronger criteria: Toomer rule
• 1.] presence or activities of non-residents is the source or cause of the problem or effect w/ which the State seeks to deal
• 2.] the discrimination practiced against non-residents bears a substantial relation to the problems they present.
  - Privileges & Immunities confined to employment issues
    o **Toomer v. Witsell** (1948): **Facts:** SC law regulated commercial shrimp fishing off coast by imposing huge fee on nonresident boats. **Rule:** Where non-residents are not the source of any problem (use the same boats/equipment) and there is no reasonable relationship between the danger represented by non-residents and the severe discrimination practiced upon them, the state law is unconstitutional under the P&I clause.
      - Discriminatory practice on the part of the state has to be in proportion to the problem addressed.
    o **Hicklin v. Orbeck** (1978): [Employment case] **Facts:** \( \Pi \)'s unable to secure residency cards in Alaska. ALS Act required employment of qualified Alaska residents in preference to non-residents for all oil and gas leases. **Rule:** Where non-residents are not the peculiar source of evil and there is no reasonable relationship b/w the danger represented by non-citizens and the discrimination practiced upon them, the Act violates the P&I clause. [Toomer]
      - Cause of Alaska's high unemployment: numerous residents were uneducated & lived in geographically remote areas; residents could not complete training in time
      - Act only aids skilled/employed, not unskilled/unemployed
    o **Supreme Ct. of New Hampshire v. Piper** (1985): New Hampshire rule limiting membership in the N.H. bar violates interstate "privileges and immunities" clause. No basis for distinction between residents & non-residents. [violation of prong #1 of Toomer]
      - Practice of law is important to national economy; out-of-state lawyers represent those w/ unpopular federal claims
      - **Frame case as law as a form of employment**
    o **Camden** (1984): **Facts:** Ordinance required that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. **Rule:** Where the ordinance alleviates the evil without unreasonably harming non-residents, it does not violate the P&I clause.
      - Gives states considerable leeway in analyzing local evils and in prescribing appropriate cures
      - This case is an anomaly
  ➢ **STATE IMMUNITY DOCTRINE:**
    o **National League of Cities** (1976): **Facts:** FLSA required employers to pay minimum wage and set maximum hours. Previously the act did not apply to the states, but 1974 amendments extended the provisions to almost all public employees employed by states & by their various political subdivisions. Cities argue protection under intergovernmental immunity. **Rule:** Where Congress has displaced the State’s freedom to structure integral operations in areas of traditional government functions, it has not acted within the authority granted by Commerce Clause (regulated by 10th Amendment). [Congress has power to reach to employment questions under federal law (Darby – minimum wage under FLSA applied to private manufacturer) but the states & their employees are immune to this exercise of Congressional power]
      - Amendment will result in reduction in safety & welfare due to lack of training (b/c of the need to save)
      - Limits the discretion of the state
      - **Affirmative limitation:** Congress has the power to regulate employees generally - power is limited though, in that it cannot be used in certain types of cases
      - Faulty analogy used b/w individual’s immunity from governmental interference to right to jury trial to state immunity from Congressional interference
        - State immunity is a matter of policy, not a trump right; questions of policy move left and right
• Individual’s rights do not change every day – the line is fixed
  ▪ Immunity applies when:
    • 1.] the federal statute at issue must regulate the States as States
    • 2.] statute must address attributes that are indisputably attributes of state sovereignty
    • 3.] compliance w/ federal obligation must directly impair the State’s ability to structure integral operations in areas of traditional government functions
    • 4.] relation of state & federal interests must not be such that “the nature of the federal interest justifies state submission.”
  o Garcia v. San Antonio Metropolitan Transit Authority (1985): **Facts:** ∆ received subsidies from federal Mass Transportation Act. FLSA wants to subject ∆ to minimum wage and overtime requirements. **Holding:** ∆ does not have immunity from federal wage and overtime requirements. [overrules National League] **Rule:** The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than result.
    ▪ 1.] State immunity standards are unworkable
    ▪ 2.] “role of federalism in a democratic society” assures the States of autonomy – protection of state prerogatives should be through the political process and not from the judiciary
      • Composition of Federal Government protects states from overreaching of Congress
      • States given a role in selecting Executive, Legislative branches
      • State sovereign interests protected by procedural safeguards
  o Printz v. United States (1997): **Facts:** Federal statute compelling State officers, in interim arrangement, to execute federal law. (background checks on would-be purchasers of handguns) **Rule:** The Federal Government may neither issue directives requiring the States to address particular problems, nor command the State’s officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.
    ▪ 1.] Historical practice: Lack of statutes imposing obligations on the State’s executive.
      • Better argument: in the early years of the Republic, given the underdeveloped state of federal courts/administration, the country had no real alternative but to turn to state courts for a whole wide range of activities, administrative in nature. Now, the federal government has many more resources.
    ▪ 2.] Structure of the Constitution:
      • There is a system of “dual sovereignty”
    ▪ 3.] Jurisprudence of the Court:
      • J. Scalia’s argument depends upon distinction b/w administrative and adjudicatory, but this is not a strong distinction.
  o Alden v. Maine (1999): **Facts:** Probation officers filed suit against employer (State of Maine), alleging violations of FLSA. **Rule:** Congress has no power to compel states to be subject to private suits for money damages in its courts.
    ▪ State’s immunity from suit is fundamental aspect of sovereignty which states enjoyed before ratification of Constitution
    ▪ Reciprocal privilege: federal government retains immunity from suit in state tribunals but own courts; states entitled to same privilege
    ▪ J. Kennedy: silence shows no one thought states would be stripped of this immunity. Structural argument: argument where the point if denied threatens to undermine the institutional structure in question

IV. Function of the Judiciary – Slavery & the Constitution:
Applicable §’s of the Constitution:
- **Art. 1, § 2, cl. 3**: slaves constitute “3/5ths of all other persons” -> question of representation for Southern States in Congress
- **Art. I, § 9, cl. 1**: talks about slaves; no restraining legislation until 1808
- **Art. IV, § 2, cl. 3**: fugitive slave clause -> most notorious of constitutional provisions that refer to black slaves. “No person held to service or labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”
- **13th Amendment**: abolishes slavery
- **15th Amendment**: right to vote on part of emancipated black males

**Groves v. Slaughter** (1841):
- **Facts**: Mississippi constitution prohibited the importation of slaves. Slaughter challenged validity of Constitution against the Commerce Clause. Congress has exclusive power of regulating commerce.
- **Rule**: Prohibition of importation of slaves must first be implemented through state legislation.
- **J. Baldwin**: slaves are subject to regulation by commerce clause (Thompson, who writes opinion, denies); references Art. IV, § II, cl. II (privileges & immunities clause) -> need for federal control since the clause assures that out-of-state property on these claims will be recognized in Mississippi as elsewhere

**Prigg v. Pennsylvania** (1842):
- **Facts**: II, agent of slave owner, applied to Penn. Magistrate for certificate of removal for an escaped slave. After certificate was refused, II forcibly removed slave from Penn and returned her to Maryland. Pennsylvania statute prevented self-help in return of fugitives. Fugitive Slave Act (gives slave-owner option to go to magistrate but self-help remains) which dictated rights of slaveowner to retrieve slave.
- **Rule**: Where Congress has enacted legislation in pursuance of the goals of the Constitution (through the use of the necessary and proper clause), the state may not provide additional regulations on top of that legislation.
- **Article IV, § II**: runway slaves delivered to slave-owner
  - Depicts means by which slaveowners can retrieve runaway slaves
  - States cannot provide additional regulation to Congress’ legislation
  - Language is self-executing
- **Congress had power to make this Act through necessary & proper clause**
  - Broad reading of the clause
  - Art. IV, § II implies federal enforcement
- **Legislative history**: Southern States would not have agreed to clause if all non-slave holding states could have declared all runaway slaves free.
  - **Self-executing**: where the right does not execute itself, there is the need for implementing legislation; b/c according to Story Art. IV, § II, para. III is self-executing, the statutory requirement to acquire a certificate of removal is a mere option.
  - **Support of implementing legislation**: if it’s consistent & facilitates goal
- **Federal Licensing Act prevails b/c of Supremacy Clause**
- **Slavery is a federal issue**

**Dred Scott v. Sandford**: **Fact**: Scott, a slave in St. Louis, moves with owner (Emerson) to free-state, Illinois. After Emerson dies, his estate was administered by ∆. Scott sued ∆ in federal court claiming residence in Illinois made him a free person. **Holding**: Slaves are not citizens and thus cannot invoke federal court diversity of citizenship. **Rule**: 1.] Missouri compromise was unconstitutional because the act prohibited a citizen from holding and owning property (slaves) – the right of which is affirmed in the Constitution - of this kind in the northern territory; 2.] Slaves are not citizens, because at the time the Constitution was ratified, slaves were “subordinate” and “inferior” and there was a distinct divide b/w black and white; 3.] Scott’s status is governed by Missouri law
- **Three types of views**:
  - 1.] Permanent slave status means what it is – status does not change
2.] Once free, always free: a slave taken by his master to a free state remains free -> doesn’t matter that he goes back to MO

3.] Slave who is taken into a free state becomes free there; once he leaves free state his status as a slave re-attaches

- States confer citizenship, but the issue in this case is national citizenship
- Court points to Art I, § 9, par. I (right to import slaves until 1808) & Art IV, § II, par. III (maintain right of property for slave-master) for lack of citizenship argument -> argues that slaves were not regarded as a portion of the people or citizens of the Government then formed
  - **Problem:** This is a poor argument since class of blacks referred to in Constitution are slaves. What is true of black slaves is NOT true of blacks generally.
- **Dissent** (Curtis): **At time of ratification of Articles of Confederation, there were blacks who were citizens; thus those who were state citizens became U.S. citizens after ratification of Constitution.** Art. II, § 1: assumes citizenship is acquired by birth; they are entitled to privileges & immunities through Art. IV, § II
  - Disputes Taney’s argument (if free blacks were citizens they would be entitled to all privileges under Art. IV, § II; since right is denied in some states, they are not citizens) -> absurd argument: women are not citizens b/c they cannot vote
  - 1789: nothing on national citizenship established
  - **4th Fundamental Article:** leaves out blacks but includes others (what is not enumerated is not there) who should not be entitled to privileges & immunities of all citizens; citizen in one state entitled to citizenship in another

- **Frederick Douglass:** textualism vs. intentionalism – only if the text does not make the clause clear do you then refer to the intention of the writers; textualism makes an anti-slavery position of the Constitution
  - 3/5th argument: this is a penalty to the slave states b/c it deprives 2/5ths of their representation in Congress
  - **Migration & Importation** Clause: this clause was only supposed to last for a limited time. That means that the slave trade was to come to an end.
  - **Insurrection Clause:** where insurrection is traceable to slavery, have a reason to bring slavery to an end
  - **Fugitive Slave Provision:** the slave cannot owe service to anyone b/c there is no contract; thus they were not part of the clause (indentured servants were)

- **RISE & FALL OF SUBSTANTIVE DUE PROCESS:**
  - **Slaughter-House Cases:** **Facts:** LA statute created monopoly for New Orleans, and conferred exclusive privileges upon a small number of people for handling livestock. **Rule:** The 14th Amendment transfers the security and protection of civil rights only of citizens of the Union to the Federal Government, and not those of the citizen of the States. [Attempt here was to use the P&I clause in the 14th Amendment to carry over rights found elsewhere in the Constitution. Ruled that the 14th Amendment does not carry over rights from the Bill of Rights]

  - How the 14th Amendment serves to carry over to the states certain constitutional rights set out in the Bill of Rights...
    - 1.] 14th Amendment carries over nothing from the first eight Amendments (9th and 10th Amendments are not at issue since they don’t specify anything in particular).
    - 2.] 14th Amendment carries over some – but not all – of the rights guaranteed by the first eight Amendments.
    - 3.] 14th Amendment carries over some – but not all – of the rights guaranteed by the first eight Amendments but recognizes some rights beyond the first eight Amendments.
    - 4.] 14th Amendment carries over exactly those rights covered in the first eight Amendments.
5. The 14th Amendment carries over exactly those rights covered in the first eight Amendments and in addition recognizes some rights going beyond.

- Privileges & Immunities trotted out by appellants in this case are tied to the citizens of the States -> these privileges and immunities are left to state governments.
- 13th and 14th Amendments were to provide for freedom of former slaves -> therefore, it cannot be said that the 14th Amendment “privileges and immunities” clause carries over to, and enforces against, the States those protections found in the Bill of Rights.

DUE PROCESS USED AS A CHECK ON LEGISLATIVE POWER:

- Two tests: 1.] rational basis; and 2.] economic liberty.
- Oddity of “substantive” due process b/c due process is normally associated w/ procedure. “So-called” economic rights are being constitutionalized as substantive rights in the name of the due process clause.


**Facts:**

Π violated labor law of State of New York, which prohibited employers from contracting w/ employees to work more than ten hours in a day.

**Holding:** statute not w/in the police power of the state.

**Rule:**

For social & economic regulation to survive substantive due process review, two requirements have to be satisfied: 1.] essential to establish that a state’s exercise of its police power responded to health and safety concerns; 2.] even if a legitimate health or safety concern was established, it was necessary to demonstrate that the regulation was reasonable – the legislative policy competed against judiciary’s sense of economic & social imperative.

- 1.] freedom of contract is a basic right protected as liberty and property rights under the due process clause of the Fourteenth Amendment [Paulson: economic freedom is not completely had here, since employee has less bargaining power]
- 2.] government can interfere w/ freedom of contract only to serve a valid police purpose (public safety, health, or morals)
- 3.] judicial role to carefully scrutinize legislation interfering w/ freedom of contract to make sure that it served a police purpose.
- Act must have a more direct relation b/w means to an end (this is not an appropriate health law)
- Harlan (dissent): Rational basis test should be applied; “ liberty of contract” is subject to state regulations -> validity of state statute enjoys presumption of validity.
- Holmes (dissent): issue is one of policy (not rights), and on policy questions the people are sovereign.

*Muller v. Oregon* (1908):

**Facts:** OR statute limits the amount of hours women work in mechanical establishment, factory, or laundry.

**Rule:** Where the statute protects the health and safety concerns of women, and the concerns are viable, the statute is w/in the police power of the state.

- Physical well being of women becomes an object of public interest.
- Women are not equal to men (physically) -> Legislation for women can be sustained even where like legislation is not necessary for men.
- **Exception to the substantive due process rule**

*Adkins v. Children’s Hospital* (1923):

**Facts:** D.C. set minimum wages for women and minors in D.C.

**Rule:** Where a congressional statute does not provide health and safety benefits, and furthermore only facilitates half the parties affected, it violates the 14th Amendment.

- Women have closed the gap since Muller was decided -> point to 19th Amendment that gave women the right to vote.
- Draws on distinction b/w an hour cap (leaves parties free to contract about wages & equalizes burden imposed upon employer as a result of restrictions).
vs. minimum wage statute (price fixing law based on opinion of members of the Board)

- J. Taft (dissent): Argument for economic policy. Just b/c the court disagrees w/ the policy on which the state decided does not justify invalidating the law.
- J. Holmes (dissent): Legal restrictions against people such that they cannot make contracts that are against public policy -> there are many limitations on an individual’s right to contract

**Nebbia v. NY** (1934): **Facts:** NY has state milk price controls. **Rule:** Where the law has a “reasonable relation to a proper legislative purpose” and is not discriminatory, it will be upheld. [rational relation test]

- Comparison to **Baldwin:** dormant commerce clause -> it is overturned
- End of the road for **Lochner**
  - Property/contract rights are not absolute -> state is free to adopt whatever economic policy may reasonably be deemed to **promote public welfare**, and to enforce that policy by legislation adapted to its purpose.

**West Coast Hotel Co. v. Parrish** (1937): **Facts:** WA state Act fixes minimum wages for women and minors. **Holding:** The court upheld the law saying that employees are not in an equal bargaining position, the restriction will help employees as a class, and will help prevent some of the works from becoming wards of the state. **Overrules Adkins.**

- 1.] Court would no longer protect freedom of contract as fundamental right; 2.] government could regulate to serve any legitimate purpose; 3.] judiciary would defer to the legislature’s choices so long as they were reasonable
- J. Sutherland (dissent): Less deference to legislative judgment -> offers a formalistic opinion by not addressing the exigencies that give rise to the litigation in the first place.
- Ending of laissez-faire jurisprudence

**U.S. v. Carolene Products** (1938): **Facts:** Filled Milk Act prohibited the shipment in interstate commerce of skimmed milk compounded w/ any fat or oil other than milk fat. Purpose was to prevent fraud & protect health. **Rule:** The court upholds the law on the basis of a connection b/w the means and the end – weak standard (rational basis) set out by court in which it is not concerned w/ the wisdom of the legislation.

- **Footnote:** forecasts occasion to defend narrower reading of presumption of constitutionality; strict scrutiny in post-war test
- Rational basis test, which the court uses, is not concerned with the means here. However, w/ the strict scrutiny test, you ask if there are less onerous means.

**Olsen v. Nebraska** (1941): **Facts:** Statute in question fixed the maximum compensation which a private employment agency might collect from an applicant for employment. **Rule:** As long as there is a rational basis made by the state legislature between the means and the end, the court will not interfere.

- Precepts of Lochner do not prevail anymore

**Whalen v. Roe** (1977): **Facts:** NY State statute where records are kept of those who have obtained w/ a doctor’s prescription, certain drugs. **Holding:** Even where the state is not able to demonstrate the necessity of the regulation, the court still upholds statute against appellee’s “Lochner-style” defense.

- Using the rational basis test, no one is asking the state to demonstrate the necessity

- **INCORPORATION:**
- **Barron v. Major & City Council of Baltimore** (1833): **Facts:** Action against Baltimore to recover damages for injuries to Barron’s wharf property arising from the acts of the city. Appellant invokes 5th Amendment “taking clause.” **Rule:** The 5th Amendment taking clause that the government cannot take property w/o just compensation does not apply to the states as the Constitution only applies to the federal government.
  - 5th Amendment: “no taking of private property w/o compensation”
  - This position changed w/ 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.
- **Palko v. Conn.** (1937): [Selective incorporation] **Facts:** CT statute in question permits appeals by state in criminal cases. Appellant argues that this is double jeopardy and this is violation of 14th Amendment. (incorporating the 5th Amendment) **Holding:** Conn statute does not trigger 5th Amendment immunity from double jeopardy, for incorporation is justified only if the precept in question is “implicit in the concept of ordered liberty.”
  - 14th only incorporates the most fundamental rights. (i.e., the First Amen.)
- **Adamson v. CA** (1947): **Facts:** Appellant argues that 5th Amendment right that no person shall be compelled to testify against himself is fundamental national privilege or immunity protected against state abridgment. **Rule:** “Not...all the rights of the federal Bill of Rights” are drawn into the rubric of the 14th Amendment due process clause; in particular, freedom from self-incrimination under the 5th Amendment does not carry over the 14th Amendment.
- **Malloy v. Hogan** (1964): The court incorporates 5th Amendment freedom from self-incrimination. Today the law reflects nearly complete incorporation.

**MODERN SUBSTANTIVE DUE PROCESS & THE PRIVACY DOCTRINE:**
- **Privacy rights:** Government must meet the heavy burden of strict scrutiny in order to justify an infringement of any of these rights.
- **Incorporation:** As of today, only the grand jury proceeding of the 5th Amendment and jury trials in civil proceedings in 7th Amendment are holdouts; otherwise there is full incorporation.
- **Standards of Review:** 1.] If a right is deemed fundamental, the government usually will be able to prevail only if it meets strict scrutiny; (gov’t must present a compelling interest to justify an infringement; law must also be necessary to achieve objective) 2.] but if the right is not fundamental, generally only the rational basis test is applied (only legitimate purpose is needed)
- **Meyer v. Nebraska** (1923): **Facts:** NE statute prohibited teaching in any language other than English in the elementary grades of public or private school. Δ was schoolteacher who taught German. **Rule:** The State does not have the power to enact statutes which prohibit private decisions reflected in personal/family autonomy.
  - Means adopted exceed limitations upon power of the state
  - This is not the rational relation test: legislation here is not going to have the last word
  - “Liberty:” stretches to “the right of the individual…to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children,” etc.
  - Constitutional rights trump over policy w/ legitimate purpose
- **Pierce v. Society of Sisters:** strengthened this doctrine by striking down OR statute that required parents to send their children to public school.
  - Extended the concept of liberty beyond economic due process to the area of personal & family autonomy, laying the foundation for the modern right of privacy decisions.
• **J. Holmes** (dissent): judicial deference to legislative judgments about social welfare (this is a policy issue; there are no constitutional rights)

  - **Poe v. Ullman** (1961): **Facts**: CT statute that proscribed the use of contraceptives. **Holding**: case dismissed for lack of standing.
  
  - **J. Harlan** (dissent): develops the theme of “liberty” in the 14th Amendment as “including a freedom from all substantial arbitrary impositions and purposeless restraints.”

  - **Griswold v. Conn.** (1965): **Facts**: CT statute which prohibited the use of contraceptives. **Rule**: The right to privacy of marriage is a penumbral Constitutional right which emanates from the 3rd, 4th, 5th, and 9th Amendments. [reconstitutes substantive due process in the name of privacy]

  - **J. Douglass**: 1st Amendment has a penumbra where privacy is protected from governmental intrusion (freedom of speech) -> penumbral right is freedom to associate (rights on the periphery/the edge)

  - **J. Goldberg**: There are Constitutional Rights which go beyond the expressly enumerated Bill of Rights.
    
    - **9th Amendment**: there is no criterion for applying it; history says that the Framers tacked it on b/c they believed there were additional fundamental rights which were protected from gov’t. infringement

  - **Slippery slope**: If government can be permitted to invade your privacy, they can control your family planning

  - **J. Black** (dissent): Literalism -> interprets document on its face – there is no explicit provision for family privacy right; court is worrying about moral concepts instead of concepts of law

  - **Roe v. Wade** (1973): **Facts**: TX made it a crime to “procure an abortion” except upon “medical advice for the purpose of saving the life of the mother.” **Holding**: The court struck down the law as a denial of the “personal liberty” protected by the 14th Amendment’s due process clause. J. Blackmun declared that the right to privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

    - Argues by analogy on past cases: Griswold, Pierce, Meyer [did not find privacy in the penumbra of the Bill of Rights]

    - Right to abortion was not absolute. However, it was found to be part of the fundamental right to privacy -> Court applied strict scrutiny test.
      
      - **Balancing test** between right of abortion and state’s interest in protecting prenatal life.
      
      - Legislation limiting these rights may be justified only be a compelling state interest and…legislative enactments must be narrowly drawn to express only legitimate state interests at stake.

    - Women’s right to terminate pregnancy is **not absolute** -> State has compelling interest after 1st trimester
      
      - 2nd trimester: gov’t could not outlaw abortions, but could, if it chose, regulate abortion procedure in ways that were reasonably related to maternal health.
      
      - 3rd trimester: gov’t could prohibit abortions except if necessary to preserve the life or health of the mother.

    - Opinion is non-interpretivist: Since it is a written Constitution, the court has no authority to import values and rights that have no fair textual connection to the Constitution.

  - **J. Rehnquist** (dissent): focuses on intentions of Reconstruction Congressman -> nothing in their intention suggests that they were concerned w/ abortion problem (14th Amendment)
• **J. White** (dissent): issue should be left to political processes people have devised to govern their affairs.

  - **Cruzan v. Director, MO Dep’t of Health** (1990): Facts: Cruzan suffered severe head injuries in automobile accident and was in persistent vegetative state. Her parents wished to terminate food and hydration and thus to end her life. State intervened to prevent this. **Holding:** 1.] Competent adults have a constitutional right to refuse medical care. [5 justices said that such a right existed to bring about death]; 2.] state may require clear and convincing evidence that a person wanted treatment terminated before it is cut off; 3.] state may prevent family members from terminating treatment of another

  - 2nd holding: Court acknowledges state’s important interest in protecting life and in ensuring that a person desired the end of treatment before it is suspended.
  - 3rd holding: family members are in position of conflict of interest

  - **Problems w/ decision:**
    - 1.] Did not impart a level of scrutiny to be used in evaluating government regulation of personal decisions
    - 2.] Did not resolve what is sufficient to constitute clear and convincing proof of a person’s desire to terminate treatment (Brennan)
    - 3.] Does not address the situation where a competent person designates a surrogate or guardian to make the decision concerning terminating life-saving treatment

• **J. Scalia** (dissent): State’s role to prevent suicide

• **J. Brennan:** Majority sets too high of an evidentiary burden to pull the plug

  - **Bowers v. Hardwick** (1986): Facts: Δ arrested for engaging in consensual oral sex w/ another man. Georgia statute charges person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another w/ sodomy. **Rule:** There is no fundamental right to engage in homosexual sex.

    - No connection b/w family/marriage/procreation & homosexual activity
    - 1.] Problem: J. White frames the issue as whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy – framed w/ such specificity that it is reduced to an absurdity.
    - 2.] History: activity was a criminal offense at common law & forbidden by laws of original 13 states when Bill of Rights was ratified [Problem: history does not address homosexuals]
    - 3.] Rationale basis test used since this was not a fundamental right.
    - J. Stanley: otherwise illegal conduct is not always immunized whenever it occurs at home
    - Prudential Concerns: prudence counseled caution in expanding the categories of fundamental rights and w/o more support in history & tradition the claimed right is better left in a minimally protected category.
    - Law is based on notions of morality
    - J. Blackmun (dissent): pitches guarantee of privacy at general level, and introduces elements of a justification of privacy in terms of autonomy.

  - **Lawrence v. Texas** (2003): Facts: Two Δ’s arrested for engaging in sexual contact & arrested by officers. TX statute made it a crime for two persons of the same sex to engage in certain intimate conduct **Rule:** Liberty, as defined under the Due Process Clause of the 14th Amendment, includes the right to engage in private human conduct in private places.

    - Doctrine of privacy lends itself to explication in terms of autonomy (takes from Blackmun’s dissent in **Bowers**) -> the need to be able to make fundamental decisions for oneself
appeal to rational basis test (even though we deal w/ a fundamental right): Texas statute furthers no legitimate state interest which can justify intrustion...

- Liberty: protects person from unwarranted government intrusions into a dwelling or other private places -> case of liberty in both spacial & transcendent dimensions

- Criticizes & overrules Bowers for framing the issue so narrowly -> the liberty involved is not for homosexuals to engage in sodomy but rather private human conduct in private places

- Attacks historical grounds of Bowers: Many states w/ same sex prohibitions have moved towards abolishing them

**SEPARATION OF POWERS:**

- **Youngstown Sheet & Tube Co. v. Sawyer** (1952): During North Korea conflict, employees at steel manufacturer gave notice of intention to strike when bargaining agreements ran out. President issued order, directing Secretary of Commerce to take possession of steel mills and keep them running. Additionally issued possessory orders calling presidents of various seized companies to serve as operating managers in U.S. Held President did not act w/in constitutional power. **Rule:** Where Congress has not enacted a statute or an Act conferring the President power and there are no Constitutional provisions which speak to the President’s power, he does not have the power to enact seizure legislation.
  - President’s power must stem from either:
    - 1.] Statute/Act of Congress [statutory cover]: a.] Congress has authorized two statutes which authorize president to take personal/real property -> conditions are not met; b.] Taft-Hartley Act: excluded authorization of governmental seizures during emergencies
    - 2.] Constitution
      - State legislative power vested in Congress -> Congress’ job is legislate and it is the Executive’s job to enforce it [formalistic approach]
  - Constitutional power: [none apply for this action]
    - 1.] Executive power vested in the President
    - 2.] Faithfully execute laws
    - 3.] Commander and chief of the army and navy
  - J. Black: this is a labor dispute, not a national emergency
    - “he shall be Commander-in-Chief of Army or Navy” – does not reach to current problem; that clause refers to the “theater of war” which is Korea, not halfway around the world here
  - J. Jackson:
    - 1.] presidential acts pursuant to authority delegated by Congress
    - 2.] presidential acts in the absence of a Congressional grant or denial of authority
    - 3.] presidential acts against Congressional will – Jackson puts President’s actions in this third category
  - Reductio ad absurdum: set out a development that reduces the supposition that it is a mere labor dispute to absurdity
    - Labor dispute goes unresolved for a long time -> shortage of steel & all that portends to war effort --> reduction to: not a labor dispute at all (yields untoward consequences)

- **U.S. v. Curtiss-Wright Corp.** (1936): **Facts:** Congress passed joint resolution – empowered President to prohibit sales of arms if he found that such a prohibition would contribute to establishment of peace in the region. Held President acted w/in Constitutional powers when he prohibited sale of guns to Bolivia. **Rule:** In regards to external relations (w/ foreign nations), the President has plenary and exclusive power and does not require as a basis for its exercise an Act of Congress.
  - Internal (Federal govt.’ can only exercise powers specifically enumerated in the Constitution & implied powers under “necessary & proper clause;” states bestowed power on national government after Constitution) vs. External (w/ the Declaration of Independence, foreign
powers vest in National Government whether they are trotted out in Constitution or not – necessary concomitant of nationality; delegated from Crown to U.S.

**Dames & Moore v. Regan** (1981): **Facts:** Americans seized in Iran; President subsequently negotiated their relief. President instituted International Emergency Economic Powers Act, which blocked the removal or transfer of all property and interests of the gov’t. of Iran under U.S. jurisdiction; Treasury Department implemented regulations which froze Iranian assets; suspended claims were to be handled by International Tribunal; International Claims Commission had body to arbitrate. Held President’s actions w/in constitutional powers. **Rule:** Where the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute b/w our country and another, and where we can conclude that Congress acquiesced in the President’s action, President does not lack power to settle claims. [everyone agrees this is a national emergency]

- There is not express Congressional acquiescence, only implied:
  - 1.] general tenor of Congress -> International Claims Settlement Act; Congress placed its stamp on settlement agreements
  - 2.] Legislative history of IEEPA: Congress has accepted authority of Executive to enter into settlement agreements
  - 3.] Congress has not disapproved of the action.
- Past practice plus and long continued practice known and acquiesced by Congress

**NON-DELEGATION DOCTRINE:**

- Separation of powers is in trouble when Congress delegates power to the executive branch w/ an eye to creating an administrative agency that makes law in place of Congress.
  - Non-delegation doctrine ensures that Congress is creating laws and not giving this power to someone not elected to do so -> Congress must direct agency to act w/in constraints set by the Congress. [Congress must lay down “intelligible principle” w/ which the agency must act.
- **A.L.A. Schecter Poultry Corp. v. U.S.** (1935): [questioning the broad delegation of authority]
  - **Facts:** National Industry Recovery Act authorized President to approve “codes of fair competition.” Industry and labor groups drafted the codes. Held federal law was unconstitutional delegation of power. **Rule:** Congress must delegate a specific principal or standard to constrain those working in the administrative agency in order to assure their accountability to the people.
    - Congress might not always know enough about field of regulation to come out w/ a standard so they came up w/ something general -> the court says this is too general. (principal or standard is nowhere to be seen in Schecter)
    - Dilemma w/ non-delegation doctrine:
      - **Reasons for keeping:** there must be some accountability to Congress & the people
      - Either the statement of the principle is so broad to be worthless, or the Congress is unable to specify the principle at all (not close enough to area to make regulations for agencies)
- **Yakus v. U.S.** (1944): **Facts:** Emergency Price Control Act – establishes Office of Price Administration under direction of Price Administrator appointed by President. Administration sets forth regulations/orders fixing maximum prices of commodities and rents as will effectuate purposes of Act and conform to standards. Standards to guide: “fair and equitable and will effectuate the purposes of the Act.” **Rule:** Congress has the Constitutional authority to prescribe commodity prices as a war emergency measure so long as the purposes and standards are clearly set out.
- **Whitman v. American Trucking Ass.**: **Facts:** Clean Air Act requires the administrator of EPA to promulgate standards for air pollutants and to review them every five years. **Rule:** The scope of the discretion the provision allows is well w/in the outer limits of the non delegation precedents.
  - Court did not feel qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.
Courts should just accept that agencies are legislative powers and move on to adequately limit these agencies by statute. This may throw out the non-delegation doctrine once for all.

### LEGISLATIVE VETO:

- **INS v. Chadha** (1983): **Facts:** Provision of the Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate the decision of the executive branch. (gains its power pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the U.S. AG found that Chadha met the statutory requirements to be permitted to stay but House reversed. Held legislative veto invalid. **Rule:** The action of a single house disfavoring suspension of deportation is a legislative act b/c it altered the legal rights, duties and persons outside of the legislative branch.

- Legislative veto does not meet **bicameralism** or **presentment** requirements
  - **Art. I, § VII,** par. 2 &3: **presentment** – “shall be presented to the President of the U.S.”; this “run-around” requirement can be avoided by calling something a proposal or resolution
  - **Bicameralism:** checks & balances; careful and full consideration of bill is more likely if it is required that both houses pass on it rather than one
  - No debate in House; vote was not recorded; resolution which was passed in House not passed in Senate; President did not sign bill

- Legislative veto: represents Congress’ effort to preserve accountability
- **Paulson:** criticizes what the court brands legislation -> everything becomes legislation b/c they alter the legal rights, duties, and person
  - Perhaps the court offers no criterion at all -> it is just presupposed in Art.
  - Court shrouds its failure to address first issue in cloak of forms
- After **Chadha:** little attention paid to the rule; legislative vetoes are not overruled in one fell swoop
- **White** (dissent): Legislative veto power secures accountability and is exercised pursuant to enacted law so it already so it already met the Art. I lawmaking requirements. This is an adjudicative function, not legislative.
  - Sets out Hobson’s choice: no administrative agencies at all or take the undesirable horse, accountability and legislative veto

### REMOVAL:

- **Art. II, § II:** Subject to Senate confirmation, the president has the power to appoint ambassadors, federal judges, and all other officers of the U.S. whose appointments aren’t provided for (principal officers). Congress can vest power of appointment of inferior officers in president, courts, or heads of departments. Nothing in Constitutional text about removal.
  - Congress may restrict the president’s power to remove inferior federal officers, but may neither restrict the president’s unilateral power to remove principal officers nor otherwise impose removal restrictions that impede the president’s ability to perform his constitutional duty.

### TWO-STEP ANALYSIS:

1. Is the office one in which independence from the president is desirable? If yes, Congress may limit removal power. [Weiner indicates Congress may limit removal power in absence of statutory restriction] Different tests used to decide:
   - **Humphrey’s Executor:** purely “executive” tasks vs. “quasi-legislative” or “quasi-judicial”
   - **Morrison v. Olson:** “removal restrictions are of such a nature that they impede President’s ability to perform constitutional duty”
   - Analysis is more functional/contextual than anything else
2. Are Congress’s limits on removal constitutional?
• Can limit removal where there is good cause; Congress cannot have sole power to remove an executive official.

  o **Buckley v. Valeo** (1976): **Facts**: Under Federal Election Campaign Act, a majority of members was appointed by president pro tempore of the Senate and Speaker of the House. FEC was given direct and wide-ranging enforcement power such as instituting civil actions against violations of the act as well as extensive rule-making and adjudicative powers. Held the appointment powers given to president pro tempore of Senate & Speaker of House could only be exercised by officers in the U.S. appointed in accordance w/ appointment clause and therefore cannot be exercised by FEC. **Rule**: Only officers appointed in the constitutionally prescribed manner (Art. II, § II) can undertake executive or quasi-judicial tasks.
    ▪ **Principal officers**: those who exercise significant authority pursuant to laws of the U.S.
    ▪ Appointment power could have been allocated to president, courts, or heads of departments – president pro tempore of Senate and Speaker of House are none of these

  o **Myers v. U.S.** (1926): **Facts**: Statute provided that Postmaster may be removed by President w/ consent of Senate. President tried to remove Postmaster prior to expiration of term w/o consent from Senate. **Rule**: The statute is unconstitutional b/c the president’s removal power is incident to the power of appointment and the president has the exclusive power to remove executive officers whom he has appointed.
    ▪ Requirement for president to file charges and submit them to Senate for consideration: disturbs unity and coordination in executive administration essential to effective action

  o **Humphrey’s Executor v. U.S.** (1935): **Facts**: Roosevelt removed Commissioner of Federal Trade Commission. FTC enforced anti-trust law provisions and “defined and eliminated” unfair methods of competition. Court narrowed the holding of Myers to executive officers, and held President did not have power to remove FTC Commissioner since he served a legislative/quasi-judicial function. **Rule**: Whether the power of the President to remove an officer should prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend on the character of the office -> for officers engaged in quasi-legislative/judicial activities, no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.
    ▪ Statute itself in the case limited removal power of the President

  o **Weiner v. United States** (1958): **Facts**: II removed from War Crimes Commission by President Eisenhower. Statute creating the War Claims Commission did not expressly limit president’s removal power. Furthermore, War Crime Commission’s duties included “to receive and adjudicate according to law.” Court held that the functional need for independence of the War Claims Commission limited president’s removal power. **Rule**: The president cannot remove executive officials where independence from the president is desirable.
    ▪ Intent for War Claims Commission was to award claims based on merit rather than political influence.
    ▪ Commission’s function, however, is clearly adjudicative in power

  ➢ **INDEPENDENT COUNSEL - Morrison v. Olson** (1998): **Facts**: Law which created independent counsel - to investigate and prosecute high ranking government officials for violations of federal criminal laws – provided that he or she could be removed by the A.G. only for cause. If independent counsel was removed, the A.G. would have to file a report w/ panel of judges who made appointment and w/ the House and Senate Judiciary Committees. Court upheld the constitutionality of limits on the president’s ability to remove the independent counsel. **Rule**: In determining whether the limitations on the President’s removal power violate the Constitution, the court must determine whether the removal restrictions are of such a nature that they impede the president’s ability to perform his constitutional duty.
Court decides that independent counsel, who exists to investigate and prosecute alleged wrongdoing in the executive branch of government, ideally should be independent of the president.

Statute does not prohibit all removal -> gives A.G. power

Independent counsel is an inferior officer, thus it falls properly w/in appointments clause -> vests appointment powers in heads of departments/courts (Special Division)

J. Scalia (dissent): There is a violation of the separation of powers when any executive power is transferred to another branch. At the time, this formalistic opinion was criticized, but now this appears to be realistic opinion.


[continued rejection to challenges of federal statutes on the ground that they impermissibly delegate legislative power]

**Facts:** Court approved broad delegation of power to U.S. Sentencing Commission to promulgate sentencing guidelines to determine the punishments for those convicted of federal crimes. Organizationally, commission is part of judicial branch of gov’t. Court upheld the law and rejected the claim that it was an impermissible delegation of legislative power to judicial branch of gov’t.

**Rule:** Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.

J. Scalia (dissent): power to make law cannot be exercised by anyone other than Congress, except w/ the lawful exercise of executive or judicial power -> commission’s authority to promulgate sentencing guidelines was unconstitutional delegation of legislative powers to a judicial agency.

Court frames this as “Congress obtaining assistance of a coordinate branch”

Judicial interpretation: ensures that judicial experience and expertise will inform promulgation of rules for exercise of Judicial Branch’s own business.

Judges forbidden to wear both hats at the same time, but does not forbid them to wear both hats (Art. III judges, sentencing judges)

Paulson rule: delegation of a legislative power to a judicial branch isn’t unconstitutional unless the task in question is more appropriately carried out elsewhere.

**Bush v. Gore (2000):**

Facts: Tally of election results – Gore leads in popular vote by narrow margin; electoral college votes too close to call. FLA supreme court later approves hand recounts in certain counties. U.S. Supreme Ct. reverses FLA Supreme Ct. ruling of a day earlier -> bars any further count of disputed ballots. Held counting uncounted ballots w/o standards denies equal protection and counting could not continue b/c FLA wished to choose its electors by Dec. 12 “safe harbor” date set by federal law.

**Rule:** Minimum procedures are necessary to protect fundamental right of each voter in special instance of statewide recount under the authority of a single state judicial officer.

3 U.S.C. § 5: Supreme Ct. of FLA has said that legislature intended State’s electors to participate fully in federal electoral process, which requires that any controversy/contest…be completed by December 12.

**Problems w/ Equal Protection Argument:**

1.] hard to see which individuals were prejudiced w/ errors and which were not (in contrast to reapportionment)

2.] where one needs help on reading the ballot and/or the machines reach the level of discrimination, there was an Equal Protection problem never mentioned by court

Stevens (dissent): state legislature is responsible for determining how electors are determined (Art. II, § I, par. II)

Equal protection claim could be justiciable in case of reapportionment. This case is dramatically different from case of mal-apportioned voting districts. The present issue is the “intent of the voters.”

Souter (dissent): no significant federal issues raised; case should have been left to FLA courts to resolve

Ginsberg (dissent): Art. IV, § IV – respecting a Republican form of government

No recalcitrance by state high court in this case.
Can’t imagine that re-count standard would yield a result any less fair than what had preceded it
Utopian to suppose that any standard is going to eliminate every bit of error in that process; have to live w/ circumstances where error can be held to a minimum

- **Breyer**: statutory mechanism in 1887 law (Electoral Count Act): points to Congress as “constitutional tribunal for this issue.”
- **Political explanation vs. legal justification**:
  - **Marbury**:
    - Marshall lies in **political** bind which he finds himself -> Marshall couldn’t decide the case as per Marbury’s argument
      - Court couldn’t issue to have order delivered b/c the decision would not have been followed
      - To have simply dismissed the case for lack of jurisdiction would have deprived Marshall of his opportunity to vindicate Marshall’s position
    - **Legal justification**: comes in arguments Marshall uses for Constitutional review
      - Reductio ad absurdum falls short of the mark
      - Marshall trots out a number of Constitutional provisions -> lack of clear legal justification
  - **Bush**:
    - **Political explanation**: future make-up of court; composition of court is at stake -> should Gore win, transformation of Court would take place given number of old-timers
    - **Legal justification**: really none whatsoever

- **WAR POWER**:
  - **War Powers Resolution**: President has the duty to defend the United States -> has the power to take appropriate measure when conflicts occur suddenly [express reassertion of Congress to declare war]
    - After action is taken, President must go to Congress w/in 48 hours
    - President is in power for 60 days; if there is no extension for 30 days or delaration of war, his power is terminated
    - **5 (c)**: exercising legislative veto power (two house legislative veto power -> concurrent resolution on part of Congress) [Congress can veto presidential exercise of power]
    - **Constraints on introduction of troops**: 1.] when Congress declares war; 2.] specific statutory authorization; 3.] national emergency
  - Constitutional change -> usurpation of power by President: development of customary international law
    - **1941**: Roosevelt takes US forces to defense of Greenland & Ireland -> developments expanded to undeclared naval war in Atlantic
    - **1954: Gulf of Tonkin Resolution** -> Congress really had no power except to endorse Presidential action
  - **Prize Cases**: **Facts**: Blockade of Confederate ships w/ no war declared. **Rule**: Executive has the power to put down the insurrection and this includes the power to institute a blockade of ports.
    - Congress did not declare war b/c it did not want to vindicate the status of the Confederacy as an independent nation state. There is nothing to do in the Constitution about what do in the case of Civil War.
  - **Ex Parte Milligan**: **Facts**: Army official is arrested and charged w/ conspiracy to seize munitions of federal arsenals. **Rule**: Where the civil courts in which the ∆ is brought are still running, there is no basis for marshal law and thus ∆ should not be brought in front of a Military Commission.
This case would have come out differently if marshal law had been declared

Laws of war: international agreements regarding the conduct of countries during war. In Civil War, there is no need for such agreements since there is not a recognized country.

Army private had no colorable claim unless court was willing to declare war unconstitutional

Mora v. McNamara: traditional stance of larger questions of war & peace -> invoke the political question doctrine
  - Constitutionality of war is a political question -> supported by textual commitment of Congress; question of who declares war has been clear from beginning

Why is there no employment of political question doctrine? – question of individual’s rights can be answered independently from any judicial decision on the larger constitutional question of war and peace

- Ex Part Quirin: Facts: Δ’s, German spies, wanted to blow up munitions. Military commission to try them for their offenses – presidential proclamation said they were subject to law of war. They argue that they are being denied 5th and 6th Amendment safeguards and that the president has no power to try them by military commission. Rule: President has the power under Article 15 of the Articles of War to convene a military tribunal for the prosecution of enemy aliens in a time of war w/ a formal declaration of war by Congress. [Constitutional rights, under these circumstances, do not restrict president]
  - Power derived from Executive proclamation: this is about the law of war, which is a range of provisions in 1. customary international law; and 2. treaty law
  - Distinction from Milligan: Haupt was not a part of the “Armed Forces of the Enemy”
    - Take into account that Haupt was a citizen and civil courts were up and running

  - Authorization for Use of Military Force: Authorized President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided terrorist attacks. [broad delegation of power – Court says this alone authorizes detention]
    - Citizen does not stand in the way of right of detention where one is characterized as an enemy combatant.
    - Case of indefinite detention -> ceasefire could never occur
  - Paulson does not agree w/ straightforward balancing test (private interest that will be affected by the official action against the Government’s asserted interest) b/c Constitutional rights are at stake
  - Souter & Ginsberg (dissent): AUMF does not authorize detention
    - Suspension Clause: does aiding enemy in wartime make a difference to citizen’s rights
  - Thomas: National Security argument -> detention falls w/in war power (look to balancing test; require gov’t to rebut presumption)
  - Scalia & Stevens: gov’t. has no right to suspend the writ of habeas corpus unless there is an invasion -> either writ of habeas corpus has been suspended or Hamdi is charged w/ treason

- Rasul v. Bush: Facts: no charges filed against detainees in Cuba. The U.S. gov’t. has no sovereignty in G.B. Cubs, according to the District Court and Court of Appeals. Supreme Court reverses. U.S. gov’t. exercises exclusive jurisdiction and control over those ares. There must be a habeas corpus proceeding.
CONSTITUTIONAL INTERPRETATION: [useful to dissect in terms of fundamental rights]

- **Originalism/Interprevism/Intentionalism**: constitutional decisions are justified as long as one can point to Framer’s intentions
  - Judges are not checking people, constitution does
  - b/c the people gave the consent, they are essentially checking themselves

- **Non-originalism**: view that it is permissible for the Court to protect fundamental rights that are not enumerated in the Constitution or intended by its drafters

- **Moderate originalism**: view that the judiciary should implement the framers’ general intent, but not necessarily their specific views

- What type of consent is there to the Constitution: Express (applies only to those who were there in 1787 – consent to the instrument that binds them to the contract) vs. Tacit (doesn’t fill the gap; later generations tacitly consent)