The Structure of the Constitution:

1. The Three Branches.
   a. Article 1 § 1. This is a conferral of power to the legislative body, the Congress.
   b. Article 2 § 1. This is a conferral of power on the executive branch. Note: The words of this Article contain the word “he,” but we should not rule out having a female president.
   c. Article 3 § 1. This creates only the Supreme Court. There is no explicit creation of lower federal courts, but states that they can be created.
   d. The notion is that this document is constitutive of the branches; without this conferral of power, there would be no such branches.

2. Article 1 § 8.
   a. The power to create lower courts. If a strict interpretation of the document were given, the creation of inferior courts by Congress should be in Article 1 § 8: “To constitute tribunals inferior to the Supreme Court.” However, this power is picked up in Article 3 § 2 in a different context, but the conferral itself stems from Art. 1.
   b. Enumerated powers. You could say that Article 1 § 1 creates the legislature and Article 1 § 8 enumerates its specific powers – it mentions “all powers herein granted.” In § 8, there are 18 paragraphs, and the first 17 confer specific powers to Congress (i.e., taxing).
   c. Tribunals. Does the language “tribunals” in Article 1 § 8 reach to military tribunals? In the past, the President has established military tribunals, claiming that power under Article 2.

   a. The specifically enumerated powers represent a model of limited government. The only powers that can be exercised are those specifically mentioned.
   b. Is the doctrine of enumerated powers, back in 1787, to be interpreted literally? Suppose in 1787 that the power to raise an army hadn’t been enumerated. Would it follow then that the Congress had no such power? Could you argue that they still had such a power? They would likely claim that a country has the right to defend itself, so that power would be implied. This view is opposed to a strictly literal reading of the document.
   c. The Bill of Rights. For example, Amendment 1 states that “Congress shall make no law respecting an establishment of religion.” Is this necessary since it is a document of limited enumerated powers? Yes, if Congress attempted to create a state religion it would be immediately invalidated. No arguing would be needed. Without these amendments, there could be a lot of debate. The Congress would argue that it might fit into another power directly or indirectly.

   a. That clause states that Congress has the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”
   b. James Madison, the Federalist Papers no. 44. He makes two points on this clause: First, an enumeration of every single “means” would be hopelessly complex without this clause; and second, this doctrine is so necessary as to be understood even if not expressly set out in this provision. NOTE: But later, Madison would argue that it was only those means which were “absolutely” necessary that should be allowed.

A Brief History of the Drafting of the Constitution and McCulloch v Maryland:

1. Generally. Government under the Articles of Confederation proved unsatisfactory. The powers of the federal government were severely limited. The country was undergoing a severe economic depression, and as early as 1783, Alexander Hamilton called for a meeting to amend the federal government. A convention met in Philadelphia in 1787 and ended up, not just amending the Articles, but drafting a new constitution – something the delegates knew was beyond their congressional authorization.

2. IMPLIED POWERS. One of the first constitutional questions confronted by the new federal government
was whether chartering a national bank was within the enumerated powers conferred to Congress by Article 1 § 8. In December of 1790, Secretary of the Treasury Alexander Hamilton submitted a plan for a national bank. The Senate unanimously adopted Hamilton’s proposal. In the House, however, James Madison opened the debate by denouncing the proposed bank as being beyond Congress’ authority.

3. **McCulloch v Maryland’s FIRST QUESTION**, Supreme Court, 1819.

- **Facts**: In 1818, the Maryland Assembly enacted a law imposing an annual tax of $15,000 on all banks or branches of banks in the state not chartered by the state legislature. The only bank that fit this description was the Second Bank of the United States, whose local cashier, McCulloch, refused to pay the tax. Maryland successfully sued him in its own courts to recover the penalty for failure to comply with the statute.

- **Question 1**: Does Congress have the power to incorporate a bank?

  - **Holding and Rationale**: Yes. Maryland’s lawyer considers the Constitution not as emanating from the people, but as the act of sovereign and independent states. According to him, the powers of the federal government are delegated by the states, who alone possess supreme dominion. The Supreme Court rejected this argument: The measures adopted were adopted by the people who could accept or reject it, and therefore this act was final. The federal government, though limited in its powers, is supreme within its sphere of action. There is no language in the Constitution which excludes the incidental or implied powers. Though among those powers enumerated there is no mention of “bank,” there are powers to lay and collect taxes, to borrow money, and to regulate commerce. The government, entrusted with these powers, must be entrusted with the means to carry them out. **How far may such means be employed?** A government which has a right to do an act must be allowed to select the means. The power here, the power to create a corporation, is never used for its own sake, but only for the purpose of affecting something else. In addition to its enumerated powers, the Congress is given the power to make “all laws which shall be necessary and proper, for carrying into execution the foregoing powers.” If the framers had wanted to use the words “absolutely necessary,” they could have. **For example**: The Congress is given the power to establish the post offices. This power could be executed by the single act of establishing the office. But it has been inferred from this power those means necessary to carry mail from one office to another. It has also been implied to right to punish those who steal mail.

  - **Rule**: Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. To undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.

- **Madison’s Fear**: Madison sees this extension of power as unending. He is afraid of the implications of allowing the Congress this power (a slippery slope/parade of horribles situation).

- **Marshall’s Opinion**: He relied on at least 5 sources of judicial interpretation: (1) The text; (2) The theory and structure of the government established by the Constitution; (3) The consequences of decision; the argument reductio ad absurdum (if p is true, c will follow, c is ridiculous, then p can’t be true); (4) The history surrounding the adoption of the text; and (5) Precedent (the First Bank had already been created).

4. **McCulloch v Maryland’s SECOND QUESTION**.

- **Question 2**: May the State of Maryland without violating the constitution tax the Bank?

- **Holding and Rationale**: Taxation is an important power that the states have. However, the overriding principle is that the Constitution and the laws made in pursuance thereof are supreme; they control the states, and cannot be controlled by them. The power to create implies a power to preserve; a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. **Where there is a conflict, the authority which is supreme must control**. The power of the states to tax the Bank would grant a power to destroy it. It is the very essence of supremacy to remove all obstacles within its own sphere. It is conceded that all subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are exempt from taxation. But the people of all the states have created
the general government, and have conferred upon it the general power of taxation. The states have no power, by taxation or otherwise, to burden the operations of the laws enacted by Congress to carry into execution its vested powers.

- **Notes.** Marshall proceeds with a theory of representation. Where the whole is represented by the parts, the whole can tax those parts. But the parts cannot tax the whole. Where the state is the whole – that is, within its own borders – it may tax according to this theory of representation. However, the real property of the U.S. Bank can be taxed in the same way as that which is owned by Maryland citizens, due to “virtual representation.” From Marshall’s Opinion: This opinion does not extend to a tax paid by the real property of the Bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and consequently is a tax on the operation of the government of the Union to carry its powers into execution.

### The Creation of Judicial Review.

1. **Background of Marbury v Madison.** On February 13, 1803, the Federalist Congress enacted the Circuit Court Act, which created 16 new circuit judgeships and eliminated the circuit-riding responsibilities of the Supreme Court. The purpose and effect of the Circuit Court Act was to cement Federalist control of the judiciary. A provision of the Act decreased the size of the Supreme Court from 6 to 5 in order to deny the incoming Republican president (Jefferson) the opportunity to appoint a successor to Justice Cushing. In addition, the Organic Act was also passed, creating 42 new positions for justices of the peace in the District of Columbia. Outgoing Federalist President John Adams quickly nominated party members to fill the positions under both Acts, and the Senate hastily confirmed the nominations – Jefferson was to become President on March 4. In these last moments, the commissions of several justices, including Marbury, were not delivered. When Jefferson took office, he ordered James Madison, his Secretary of State, to withhold their delivery. Marbury instituted an action directly in the Supreme Court to compel delivery of the commission.

2. **Marbury v Madison.** Supreme Court, 1803.
   - **Marshall’s Opinion, Part One.** Paragraphs 1-9. Is Marbury entitled to the commission he demands? Marbury’s commission was signed by John Adams, after which the seal of the United States was affixed to it (by Marshall himself, acting as Adams’ Secretary of State), but the commission never reached the person it was intended for. The commission being signed, the subsequent duty of the Secretary of State (Madison) is prescribed by law, and not to be guided by Jefferson’s will. Paragraphs 10-15. The transmission of the commission is not necessary to constitute the appointment. When a commission is signed, the appointment is made, and it is complete when the seal of the U.S. is affixed to it. Withholding the commission violates a vested legal right.
   - **Marshall’s Opinion, Part Two.** Paragraphs 16-28. If Marbury had a right that was violated, does the law afford him a remedy? The person who considers oneself to be injured has a right to resort to the laws of the country for a remedy. Marshall had a legal right to the office, he has a right to the commission, and a violation affords him a remedy. This case is for mandamus, either to deliver the commission or a copy of it.
   - **Marshall’s Opinion, Part Three.** Paragraphs 28-33. Section 13 of the Judiciary Act of 1789 authorizes the Supreme Court to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the U.S. Madison is a person holding an office under the authority of the U.S., so he is precisely within the letter of the description. If this Court is not authorized to issue a writ, it must be because the law is unconstitutional. Paragraphs 34-end. To enable this Court to issue a writ or mandamus, it must be to be an exercise of appellate jurisdiction. The authority given to the Supreme Court by the Judicial Act, is not warranted by the Constitution, as it attempts to expand the original jurisdiction of the Court.
   - **Marshall’s Holding.** If the Supreme Court identifies a conflict between a constitutional provision and a congressional statute, the Court has the authority and the duty to declare the statute
unconstitutional and to refuse to enforce it. First, he found that the Constitution is paramount. Secondly, “it is emphatically the province and duty of the judicial department to say what the law is.”

   a. Marshall’s reductio ad absurdum. Marshall uses the reductio ad absurdum form of argument on the question of whether an act, repugnant to the Constitution, can become the law of the land: The Constitution is either a superior and paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, it is alterable when the legislature shall please to alter it. If the Constitution is paramount, then a legislative act contrary to the Constitution is not law; if the Constitution is not paramount, then written Constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature not limitable.
   b. Judge Gibson’s two cents. It is conceded that the Constitution is a law of superior obligations, and if there is a collision with an act of the legislature, that act would have to give way, but it is a fallacy to suppose that they can come into collision before the judiciary. It may be the case that declaring a law void which was enacted according to the forms prescribed in the constitution is a usurpation of the legislative power.
   c. Paulson’s two cents: Without Constitutional review the courts would always have to go along with legislation, and this would necessarily usurp the judicial power.

   a. He says that Article III § 2 gives the judiciary’s appellate power over all cases arising under the Constitution, and that a necessary aspect to the judicial role is interpreting law. Judge Gibson would say that this begs the question of whether they are supposed to interpret the Constitution. The Founders could have meant that they were able to hear challenges to the validity of state laws and practices.
   b. Second, Marshall observed that certain provisions of the Constitution are addressed especially to the courts. This is a rather limited and narrow view of review. To the extent that § 13 of the Judiciary Act directed the Court to ignore Article III § 2, the Court was justified in declaring the act unconstitutional. Judicial review under these circumstances would be okay with Judge Gibson, but not Marshall’s broad view.
   c. Third, Marshall contends that review is supported by the oath that judges have to take to “support the constitution.” Judges would violate this oath if they were to honor an unconstitutional law. This is perhaps the strongest argument against judicial review, however. The same oath is imposed on Congress and the executive, so the Oath Clause seems to indicate a system in which each branch assesses the constitutionality of its own actions.
   d. Finally, Marshall relied on the Supremacy Clause, allegedly addressed to state judges, instructing them that the Constitution and the laws of the U.S. which shall be made in pursuance thereof shall be the supreme law of the land. This reading suggests that state judges may decide whether of not a federal statute comports with the Constitution. Since the Founders could not have intended to give state judges the last say on the validity of federal laws, they must have expected the Supreme Court to review a state court’s ruling in its appellate capacity. But, this may have instead simply meant that a federal law is valid so long as it was adopted pursuant to the procedural formalities of Article I.

5. Other Arguments for Judicial Review.
   a. Counter-majoritarian Role. Congress represents the majority and therefore might create laws that infringe the minority’s constitutionally guaranteed rights. Federal judges are appointed for life and are therefore less susceptible to political pressure.
   b. Stability. It each branch is free to interpret the constitution there would be no final, uniform answers because the branches would probably interpret the Constitution in its favor leading to conflicting powers, and a Court’s decision would have a limited effect if it could then be overruled by another branch.

6. Other Arguments Against Judicial Review.
   a. Antidemocratic. Federal judges are not elected officials and therefore are not politically
accountable. To vest final authority over the Constitution’s meaning is a repudiation of the principle of democratic self-governance.

b. **Entrenched Error.** It is very difficult to correct mistaken judicial interpretations. The only avenues for correction are: (1) the Court changing its mind (although a continuing pattern of litigation may cause Justices to reconsider a matter and change their minds); (2) appointing new Justices (although the appointment process can be used to bring new Justices in line with popular thinking); (3) impeachment (it’s never been used successfully to remove a judge, but it could cripple the independence of the judiciary); and (4) constitutional amendment (it’s difficult, but it has happened four times).

7. **The Precedent for Judicial Review.** No provision of the Constitution explicitly authorizes the federal judiciary to review the constitutionality of the acts of Congress. England provided no direct precedent for judicial review. The common law courts never assumed the authority to review acts of Congress. The premise of John Locke’s social compact was that sovereignty did not reside in any agency of government but in the people themselves, who delegated limited authority to those agencies. In the years following the Revolutionary War, the possibility of legislative abuse became increasingly apparent. Judicial review emerged as one remedy. By 1787, several states had asserted the authority to nullify legislative enactments. The intent of the framers is still the subject of dispute. Though Marbury met with some criticism, it took no one by surprise.

8. **Alexander Hamilton Defends Judicial Review (Federalist No. 78).**

   a. The judiciary may be said to have neither force nor will, but only judgment. Opposition to judicial review has arisen due to the belief that giving this power would somehow make the judiciary superior to the legislative power. The interpretation of laws is the proper province of the courts. The constitution is fundamental law. The power of the people is superior to both; and where the will of the legislature stands in opposition to that of the people, the judges ought to be governed by the latter rather than the former.

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**The Review of State Court Decisions.**

1. **Generally.** Although the Court’s assertion of the power to review state legislation was not controversial, its assertion of the power to review and revise the judgments of state courts encountered some resistance. At issue was the constitutionality of section 25 of the Judicial Act of 1789, which provided for the Supreme Court of final judgments of the highest court of a State in which a decision in the suit could be had in three classes of cases: (1) where is drawn the validity of a treaty or statute of the United States, (2) where is drawn the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, or (3) Where is drawn the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States.

2. **Martin v Hunter's Lessee.** Supreme Court, 1816.
   
   • **Facts:** Lord Fairfax, a citizen of Virginia, held title to the so-called Northern Neck of the state, and devised it in 1781 to Denny Martin, a citizen and resident of Great Britain. In 1789, the Commonwealth of Virginia, acting pursuant to a state forfeiture law of 1785, issued a patent covering the land to David Hunter and his heirs. Denny died between 1796 and 1803, leaving as his heir his nephew Thomas Martin, a citizen of Virginia. David Hunter’s lessee brought an action of ejectment in the state court. The Fairfax heirs asserted rights under treaties of 1783 and 1794 with Great Britain. The Virginia Court of Appeals decided in favor of the P. On writ of error, the Supreme Court reversed, holding that Virginia had not perfected the title remaining in Fairfax.
   
   • **Story’s Opinion:** The Court of Appeals of Virginia issued this statement: “The court is of the opinion that the power of the Supreme Court does not extend to this court, under a sound construction of the Constitution.”

   **Holding:** It is a duty to vest the whole judicial power. It is manifest that a supreme judicial court must be established. It would seem that the appellate power of the United States must extend to state tribunals. This right cannot be seen as to impair the independence of the state courts. (1) The constitution has presumed that state prejudices might sometimes obstruct the regular administration of justice. (2) There is also a need for uniformity of decisions throughout the United States. “If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treatises and the
Constitution would be different in different states.” The Appellate Jurisdiction is a General Grant of Power. There is no enumeration for appellate jurisdiction. The states are not completely sovereign; the Constitution cuts back upon state sovereignty in numerous respects (the limitations and duties set forth in Article I § 8, 10). There is no reason to presume that state judiciaries are immune from the set of limitations.

**NOTES:** Story points to Article III’s grant of appellate jurisdiction to the Supreme Court, and the Supremacy Clause. The Supremacy Clause is helpful here because in a conflict in a conflict between the laws of a state with federal law, the supremacy clause says the federal law is superior. There is some talk about the removal power and uniformity. The general point that Story is making is that this power is not adequate as a review power. Some cases don’t trigger the removal to federal court, or the statute doesn’t provide for the removal. So we need both, we need to removal power to give the D an equal chance of that front, but we also need a federal reviewing power because the case may not be removed to federal court.

Arguments in favor of state court review: (1) it keeps the federal union in tact, (2) there is a need for uniformity across the state in the interpretations of the Constitution, (3) if there is no way to get from state to federal court, then laws contrary to the Constitution would stand.

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**Germany’s Centralized Judiciary.**

1. **Generally.** There are two general types of systems with constitutional review: the decentralized and the centralized system. A decentralized system means that ordinary courts rule on constitutional questions in ordinary proceedings. A centralized system reserves constitutional issues to a special constitutional court – in this case the German Federal Constitutional Court. When Germany drafted a new constitution, they made it clear that judicial review was implicit in their understanding of an independent judiciary. The Germans established a constitutional court and vested it with authority to nullify laws contrary to the Constitution. The plan envisioned a tribunal vested with both constitutional review power and the authority to hear the complaint of any person alleging that any public agency had violated his or her constitutional rights. The framers agreed to create a court independent of other public law courts.

2. **Versus the United States.** The U.S. Constitution contains no express reference to any judicial power to pass upon the validity of legislative or executive decisions. Germany’s Basic Law, by contrast, leaves nothing to inference, as it creates the Constitutional Court’s entire jurisdiction. The U.S. Supreme Court requires a real controversy and adverse parties before it can decide a constitutional question. Marbury made it clear that the Supreme Court could refuse to enforce an unconstitutional law, and it put forth an elaborate rationale in support of judicial review. No such rationale was necessary in Germany, for the Basic Law explicitly gives the Court this power.

3. **Procedure.** The German Constitutional Court would hear constitutional issues right away by pausing proceedings in the lower court until the constitutional issue is decided. German courts are not compelled to justify constitutional review – it is explicitly stated in the constitution. The German court has more power – it has the power of **Abstract Review:** It can examine a statute and abrogate at the request of the government, or erase it from the books afterwards. For abstract review, the Court may consider different facts and situations to look at the statute objectively in its entirety – there doesn’t have to be a case. In the U.S., the courts can only hear and decide individual cases and set aside its application for the case at hand. Here, stare decisis becomes important.

4. **Why did Constitutional Courts Develop?** Following WWII, there was a concern over fascism. Many countries have recently picked up centralized constitutional review. In these courts, the holding of unconstitutionality abrogates the offending provision altogether. This isn’t the case in our system; all the court can do in our system is set aside the offending provision for the case at hand. However, according to stare decisis, subsequent cases and courts will stand by what has been decided. Any reason why our courts cannot abrogate statutes? It means, among other things, that the court doesn’t have the power to do that. The only thing they can do is decide the case before it.

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**Limitations on the Judicial Power.**
1. **Congressional Control of the Judicial Power.** Article III of the Constitution establishes the judiciary, and imposes limitations on the scope of judicial authority. Article III § 2 gives the Supreme Court original jurisdiction over cases involving “Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a Party,” and also gives the Court appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.” Given that most cases arrive at the Court by appeal, Congress’ control over the Court’s appellate jurisdiction creates the potential for abuse.

2. **Ex Parte McCardle.** Supreme Court, 1868.
   - **Facts:** McCardle was charged with libel, and various other offenses, for publishing newspaper articles about the post-Civil War military government in Mississippi. McCardle sought a writ of habeas corpus from a federal court, but the writ was denied. McCardle appealed to the U.S. Supreme Court. While the case was pending, Congress passed an act repealing the Court’s jurisdiction over the case.
   - **Issue:** (1) The first question is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.
   - **Holding and Rationale:** (1) It is quite true that the appellate jurisdiction of this court is not derived from acts of Congress. It is conferred by the Constitution. But it is conferred with such exceptions and under such regulations as Congress shall make. It isn’t necessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. Among the earliest acts of the first Congress, at its first session, was the act of September 24, 1789, to establish the judicial courts of the United States. While the appellate powers of this court are not given by the judicial act, but are given by the Constitution, they are nevertheless limited and regulated by that act, and by such other acts as have been passed on the subject. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception. We are not at liberty to inquire into the motives of the legislature. The power to make exceptions to the appellate jurisdiction of this court is given by express words. It is quite clear that this court cannot proceed to judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.
   - **NOTES:** This seems to give Congress plenary authority over the Supreme Court’s appellate jurisdiction. During the 1970’s and 1980’s, some congressmen tried to remove the Court’s authority over controversial issues like school prayer, abortion and school busing. Whether these bills would have been constitutional is debatable. One commentator argued that, even though Congress has the authority to make exceptions to the Supreme Court’s jurisdiction, as well as to regulate that jurisdiction, Congress cannot destroy the essential role of the Supreme Court in the constitutional plan. A second commentator agrees: It is not reasonable to conclude that the Constitution gave Congress the power to destroy that role. Reasonably interpreted the clause means “With such exceptions and under such regulations as Congress may make”, not inconsistent with the essential functions of the Supreme Court under this Constitution.
   - **NOTES:** Congress was not completely withdrawing the Supreme Court’s right to hear habeas corpus cases. It was withdrawing that right only where the Supreme Court got the case by appeal from the lower courts. Even if the lower courts had jurisdiction only, this would still have not left the litigant without the possibility of habeas corpus relief. The statute also operated in a neutral manner. That is, appeal to the Supreme Court was not allowed either to the government of to a private party; thus in a future case, it might be the government which suffered because of the statute. The fact that it would not always favor the same side makes it somewhat less objectionable.

3. **U.S. v Klein.** Supreme Court, 1871.
   - **Facts:** Three years after McCardle, the Court decided United States v. Klein. The case involved a law
authorizing the government to seize abandoned or captured property from those who had aided, countenanced and abetted the Confederacy during the war. Pursuant to this law, the U.S. Treasury Department took possession of the late V.F. Wilson’s cotton, sold it, and placed the proceeds in the U.S. Treasury. Prior to his death, Wilson had taken advantage of a presidential proclamation offering a full pardon with restoration of all rights to those who agreed to take and keep inviolate a prescribed oath to support the Constitution of the United States and the union of the States there under. After Wilson’s death, Klein, the administrator of his estate, sued to recover the proceeds claiming that the pardon had restored Wilson’s rights and property. Klein won in the Court of Claims, and the government appealed to the Supreme Court. While the appeal was pending, Congress passed a statute altering the effect of a pardon. The statute declared a presidential pardon shall not be admissible in the Court of Claims to support a claim for recovery. The statute also provided that: ‘The Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. That whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of rebellion, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and on proof of such pardon, or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall forthwith dismissed.’

**Holding:**

The Supreme Court ruled the act unconstitutional, and refused to apply it: “Its purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time establish. The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor?

**NOTES:** In light of Klein, many question whether McCardle retains vitality. Another limitation on the judiciary’s power is contained in Article III § 1, which authorizes creation of lower federal courts. Since Congress has the power to ordain and establish inferior federal courts, it also has the power to abolish them as well as to limit their jurisdiction. When the political branches have perceived the Court as too far ahead or behind the general culture, as with the New Deal in the 1930s or desegregation in the 1970s, the Court eventually receives the message as a function of new personnel or realization that its role otherwise will be marginalized. The Court holds that the Congress is prescribing the decision of a given case. Is this an Article 3 case, or is it a separation of powers case? The separation of powers doctrine is one kind of restraint on the exceptions clause. Is there a basis for distinguishing McCardle and Klein? You might argue that the designation of classes in each is more suspect in Klein. You could also say that McCcardle is an odd case.

**NOTES:** The Court argued that this was not a valid and bona fide denial of appellate jurisdiction in a whole class of cases; instead, it was merely a means to an end; a way to deny pardons granted by the President. Any jurisdictional limitation must be neutral; Congress may not decide the merits of a case under the guise of limiting jurisdiction.

4. **Robertson v Seattle Audubon Society.**

**Facts:** An environmental group sued the U.S. Forest Service, alleging that its management of old-growth forests in the Pacific Northwest violated provisions of five federal environmental laws, including the Migratory Bird Treaty Act. While the lawsuit was pending, Congress enacted a law imposing requirements on the Forest Service more lenient than those imposed by the pre-existing statutes. The new statute determined and directed that compliance with those new requirements was adequate consideration for the purpose of meeting the statutory requirements that are the basis of the pending lawsuits.

**Holding:** The Court upheld the statute against a Klein challenge, holding it to be simply a run-of-the-mill statutory amendment. This case makes it clear that, at least for statutory claims (where Congress...
can rewrite the substantive law), Congress can in fact micromanage courts’ application of law. The Equal Protection Clause might conceivably provide some limit on power, but given the normal deferential review accorded legislative classifications, such limits may be more theoretical than real. Congress need not strip federal courts of jurisdiction over particular claims in order to limit the power of federal courts. Instead, Congress may require that certain claims be adjudicated, at least at the trial level, by an administrative agency whose judges do not enjoy the institutional independence of life tenure of Article 3 judges.

- NOTES: Can the Congress make any exceptions it wishes to, to appellate jurisdiction? McCardle seems to say it can. Klein: seems to establish one sort of exception – namely when you have a case being heard and an individual’s rights is at issue. Seattle: You could reach this result without Klein. The academics have distinguished internal and external constraints. The internal constraint (the exceptions clause) is set by the framers. External constraints stem from elsewhere is the Constitution (Bill of Rights, 14th Amendment, etc.). It’s hard to see that the doctrine of internal constraints will carry the day. You have to look to the doctrine of external constraints. Are there any constraints?

5. Arguments for Limits on Supreme Court Jurisdiction.
   a. Article III § 2 restrictions are an important check on the federal judiciary power and the language is unambiguous, and nothing in the Constitution requires the Supreme Court review certain claims.

6. Arguments against Limits on Supreme Court Jurisdiction.
   a. Limiting review in particular controversial areas would unconstitutionally infringe constitutional rights and that in effect would allow Congress to disregard the Constitution and permit state courts to ignore federal law.
   b. Separation of Powers.
   c. Results in an uneven allocation of power among branches.
   d. Congress may not limit jurisdiction in an effort to dictate substantive outcomes.
   e. Limiting power to hear cases in a given area would freeze the case law in that area.
   f. It might also lead to states adopting laws that are repugnant to the already interpreted laws of which now the Supreme Court can’t hear, which undermines democracy.
   g. Protection of minority rights.
   h. Congressional authority is limited by other parts of the Constitution – they would undermine the court’s essential function in the system of government such as assuring the supremacy of federal law, checking the legislature, and they would infringe on specific constitutional rights.

7. Things to Look For.
   a. A statute operating in a neutral manner (McCardle v. Klein)
   b. Congress acting in a way incompatible with the Constitution (Klein)
   c. Congress managing law, but not directly managing the courts (Seattle)
   d. Making new law which indirectly affects the judiciary vs. directing the judiciary to make decisions.
   e. New law created (Klein) vs. Modifying an existing law (Seattle).
   f. The McCardle case is an oddity; it gives us two views: the boilerplate view – unlimited Congressional power under the exceptions clause, the second view is that the McCardle case doesn’t stand for anything. Klein is more reliable – where the case is pending and an individual’s rights are on the line – it is a separation of powers case, and that doctrine tells us that there will be no inference by Congress in a power of the judiciary – “one cannot violate the separation of powers doctrine under the guise of the exceptions clause.” Explain which view is more persuasive with respect to Klein. Robertson is interesting by contrast with Klein. Individual’s rights are not at issue. It is a policy case rather than a rights case. Although there is interference with pending cases, there are no individual’s rights at issue.

The Political Question Doctrine.
1. **Generally.** Even though a case fits ostensibly with the Court’s original or appellate jurisdiction, the Court might refuse to hear the case if it presents a “political question.” The Court has had difficulty determining what constitutes a political question.

   - **Facts:** Tennessee’s General Assembly failed to reapportion its legislative districts between 1901 and 1961 even though the population of some districts changed dramatically during this period. Because of this failure, the state’s electoral districts became so badly malapportioned that a single vote in Moore County was worth 19 votes in Hamilton County, and one vote in Stewart or Chester County was worth nearly eight votes in Shelby or Knox County. Although reapportionment measures were introduced in the legislature during the intervening years, they were always defeated.
   - **Issue:** Was the subject matter of this dispute not justiciable?
   - **The case does not present a political question:** This court holds that this challenge to an apportionment presents no nonjusticiable political question. How does the court determine whether a question falls within this category? The Court has said that “in determining whether a question falls within this category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.” It is primarily a function of the separation of powers. **Foreign relations:** A court will not ordinarily inquire whether a treaty has been terminated, since on that question “governmental action…must be regarded as of controlling importance,” but if there has been no conclusive “governmental action” then a court can construe a treaty and may find it provides the answer. **Dates of duration of hostilities:** This deals with the Court’s refusal to review the political department’s determination of when or whether a war has ended. **Validity of Enactments:** This Court has held that the questions of how long a proposed amendment to the Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. **The status of Indian tribes (though this is no longer a PQ):** Prominent of the surface of any case held to involve a political question is found 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; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
   - **Factors to use in identifying a political question (at least one of which must be present – each relating to separation of powers):** (1) Commitment to another branch: A “textually demonstrable constitutional commitment of the issue to a coordinate political department” (Congress or the President); (2) Lack of standards: A “lack of judicially discoverable and manageable standards” for resolving the issue – would resolution of the question demand that a court move beyond areas of judicial expertise; and (3) Prudential considerations including (a) the impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion, (b) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government, (c) an unusual need for unquestioning adherence to a political decision already made, (d) the potential for embarrassment from multifarious pronouncements by various departments on one question.
   - **NOTES:** One of these criteria, textual commitment to another branch, demands independent constitutional analysis for the very question of whether an issue has been textually committed requires judicial interpretations. Other criteria are pragmatic concerns of varying degrees: unusual need for unquestioning adherence to a political decision already made, the potentiality of embarrassment from multifarious pronouncements, etc.
   - **NOTES:** The Court has consistently held that claims based upon Article IV § 4 (Republican form

   - **Facts:** A few members of Congress claim that the President’s action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land.
   - The need for a unified voice (especially in foreign affairs) has occasionally been a factor in the conclusion that an issue presents a political question. For instance, here the Court refused to decide whether the President can terminate a treaty with Taiwan without congressional approval. There was no majority in agreement on why the case was non-justiciable; the four member plurality may have had the single voice rationale in mind when it remarked that the case posed a political question because it involves the authority of the President in the conduct of our country’s foreign relations.
   - As far as the criteria, no textual commitment to President, standards are normal principles of interpretation, and prudential concerns wouldn’t be a problem (although Paulson says you could argue both ways on all of these).

4. **Excluding Congressional Members - Powell v McCormack.** Supreme Court, 1969.

   - **Facts:** In November 1966, P was elected from New York to serve in the House of Representatives. He was not permitted to take his seat, according to a House resolution. P was asked to step aside when the oath of office was given to other members. A Committee was appointed which reported that P met the standing qualifications but that he had asserted an unwarranted privilege and immunity from the processes of the courts of New York; that he had wrongfully diverted House funds for the use of others and himself; and that he had made false reports on expenditures of foreign currency to a House committee. After a ruling by the Speaker that a majority vote would be needed to exclude P, the House adopted such a resolution of the exclusion. By the time the case got to the Supreme Court P had been re-elected and was seated in the next Congress.
   - **Procedural History:** P filed suit in Federal Court claiming that the House could not exclude him unless it found he failed to meet the standing requirements of age, citizenship, and residence – requirements he met – and P thus argued that he had been excluded unconstitutionally. The District Court dismissed P’s complaint for lack of jurisdiction on the subject matter. The Court of Appeals affirmed the dismissal. This Court determined that it was error to dismiss the complaint and that P is entitled to declaratory judgment that he was unlawfully excluded.
   - **Holding:** The Court held that the case was not moot because P asked for damages. The Court also held that the vote by the House could not be treated as a vote to expel even though the vote exceeded a two-thirds majority.
   - **D’s argument:** The House has the sole power to determine qualification; D argues that this case presents only a political question. D argues that pursuant to Article 1 s. 5, there has been a textually demonstrable constitutional commitment to the House of the adjudicatory power to determine P’s qualifications. D therefore argues that the House alone has the power to determine P’s qualification. To determine this, we must look at the Constitution. P, however, contends that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution.
   - **What is the Scope of Article 5?** We must determine the meaning of the phrase “be the judge of the qualifications of its own members.” The Court agrees with P; that the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution. Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. The Constitution does not vest in Congress a discretionary power to deny membership by a majority vote.
   - **Not barred by the Political Question Doctrine:** Article 1, s. 5 is at most a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the textual commitment formulation of the political question doctrine does not bar
federal courts from adjudicating P’s claims.

- **D’s other argument:** D also claims the case is a political question because judicial resolution would produce a “potentially embarrassing confrontation between coordinate branches of government.” But this case requires no more than an interpretation of the Constitution. This case requires such, so clearly there are judicially manageable standards.” A judicial resolution of P’s claim will not result in multifarious pronouncements by various departments on one question.

- **NOTES:** It is arguable that the “right to select the qualifications of its members” IS a textually demonstrable commitment to the House. The Constitution doesn’t give the power to exclude; just to expel, in which case you need to be seated first.


- **Facts:** P, a former chief judge of the US district Court for Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentence to prison. The investigation came from reports that P had accepted a bribe in exchange for asking a local attorney to stop prosecution of the man’s son. In May of 1989, the House adopted 3 articles of impeachment for crimes and misdemeanors. The Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to receive evidence and take testimony. The committee held four days of hearings. The committee provided the full Senate with a transcript of the proceeding and a report stating the uncontested facts and evidence. The Senate voted by more than the constitutionally required two-thirds to convict P on the first two articles. They then entered judgment removing P from his office.

- **Procedural History:** P then commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to try all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. The District Court held that his claim was nonjusticiable, and the Court of Appeals agreed.

- **Issue:** We must decide whether it is justiciable, that is, whether it is a claim that may be resolved by the courts.

- **Rationale:** Something is nonjusticiable – involves a political question – 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. The courts must interpret the text in question and find whether and to what extent the issue is textually committed.

- **P argues “try” means a judicial hearing:** We must examine Art. I s. 3 cl. 6 to find the scope of the authority conferred upon the Senate regarding impeachment. P argues that the word try in the first sentence imposes by implication a requirement that the proceedings must be in the nature of a judicial trial. P then argues that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses.

- **Court rejects for several reasons:** The word try has broader meanings than those which P limits it to. Other provisions are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word try in the first sentence. This Court thinks the word “sole” is of considerable significance. P’s interpretation would be inconsistent with the construction of the Clause as a whole. The parties do not offer evidence of a single word in the history of the Constitutional Convention or elsewhere that even alludes to the possibility of judicial review in the context of the impeachment powers. The Framers ultimately decided that the Senate would have the sole Power to Try all Impeachments. The Constitution explicitly provides for two separate proceedings for Impeachment, the impeachment trial and the criminal trial. Judicial review of the Senate’s trial would introduce the same risk of bias as would participation in the trial itself. Impeachment was designed to be the only check on the Judicial Branch by the Legislature. There is a built in check to this; both the House and the Senate have to collaborate, and a two-thirds majority is needed.

- **In addition to the textual commitment argument, the Court thinks the lack of finality and the difficulty of fashioning relief counsel against justiciability:** The lack of finality would manifest itself if the President were impeached. A successor would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction was invalidated. It is also uncertain what relief a court could give. This case is different than Powell because the word “try” does not
provide any textual limit on the authority which is committed to the Senate.

6. **War – Mora v McNamara.** Supreme Court, 1967.
   - **Facts:** A soldier claims that his orders to serve in Vietnam were illegal because the war was unconstitutional. No declaration of war from Congress, but the President continued to send troops.
   - **Rule:** The constitutionality of war is a political question and in nonjusticiable.
   - **NOTES:** Clearly a political question based upon the traditional learning. But, by the 1960’s, things have changed. Keep in mind that the courts can change their minds with respect to the political question doctrine (apportionment of voting districts – the courts could handle that and made the states make the changes).

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**THE FEDERAL COMMERCE POWER – cases prior to 1933.**

1. **Generally.** The Constitution explicitly gives Congress the power to regulate commerce among the several states. The Constitution did not define the phrase among the several states. That task was left to the courts.

2. Article I § 8 gives Congress the power “to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.” Congress’ power to regulate commerce among the states is of paramount importance, it is upon the commerce power that many, perhaps most, congressional activities are based.

3. **Gibbons v Ogden.** Supreme Court, 1824.
   - **Facts:** The NY legislature enacted a statute giving Livingston and Fulton the exclusive right to operate steamboats in NY waters. L and F thereafter granted Ogden a license to operate a ferry between NYC and New Jersey. Under an act of Congress, Gibbons obtained a license to navigate steamboats in the same waters. With G operating competing boats, O sought and obtained an injunction prohibiting the boats from operating in the State of New York. When affirmed, G appealed to the US Supreme Court.
   - **Issue:** Gibbons contends that the laws which give the exclusive privilege are repugnant to the clause in the Constitution which authorizes Congress to regulate commerce.
   - **Discussion:** All America understands the word commerce to comprehend navigation. A power to regulate navigation is as expressly granted as if that term had been added to the word “commerce.” It is not intended to say that these words comprehend that commerce which is completely internal, which is carried out between man and man in a State, which does not affect the other States. The government’s actions is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State may be considered as reserved for the State itself. What is this power? It is the power to regulate. This power is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. The power of Congress comprehends navigation in any manner connected with commerce with foreign nations, or among the several states, or with the Indian tribes. It may pass the jurisdictional lines of NY, and act upon the very waters to which the prohibition now under consideration applies.
   - **Notes:** Marshall found the injunction against Gibbons invalid, on the ground that it was based upon a monopoly that conflicted with a valid federal statute, and thus violated the Supremacy Clause. Marshall said the congressional power to regulate interstate commerce included the ability to affect matters occurring within a state, so long as the activity had some commercial connection with another state. Marshall stated that no area of interstate commerce is reserved for state control, and that the power given to Congress is a plenary power, the power “is complete in itself, and may be exercised to its utmost extent.”

4. **Early Cases: Oscillation between formalism and realism.**
a. **Formalism v Realism:** Under the formal approach, the Court examines the statute and the regulated activity to determine whether certain objective criteria are satisfied. For example, upholding regulation triggered by the fact that goods cross state lines is a formal approach that ignores actual economic effects and actual legislative motivation. In contrast, the realist approach attempts to determine the actual economic impact of the regulation or the actual motivation of Congress.

b. **Formalist – Paul v Virginia,** Supreme Court, 1868.
   - **Facts:** This involved a challenge to a Virginia statute which discriminated against insurance companies who incorporated in other states. The statute was challenged as repugnant to the commerce power.
   - **Holding:** The statute is not repugnant to the commerce power.
   - **Rationale:** Contracts are not commodities to be shipped or forwarded; they are executed locally (narrow reading of commerce).

c. **Realist - The Daniel Bell,** Supreme Court, 1870.
   - **Facts:** This involved a steamer that traveled intrastate routes, but with merchandise from other states. The question was whether a federal safety regulation applied to the steamer.
   - **Holding:** The Court held that a federal statute applied as such action could be used to out federal control over commerce.

d. **Formalist – Kidd v Pearson,** Supreme Court, 1888.
   - **Facts:** This involved an Iowa statute that prohibited the manufacture of liquor which was applied to an Iowa company that sold all of its products in other states.
   - **Holding:** The states retain control over their internal commerce. While the statute effects may be felt outside the state, the products of domestic manufacture are not the products of interstate commerce. This is a narrow definition of commerce.

e. **Formalist - United States v Knight,** Supreme Court, 1895.
   - **Facts:** Through a series of stock purchases the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that these purchases constituted combinations in restraint of trade, and that in entering into them the Ds combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations contrary to the Sherman Act of 1890.
   - **Issue:** Conceding that the existence of a monopoly in the manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.
   - **Discussion:** The power of congress to regulate commerce among the several states is also exclusive. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. If the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control. The contracts and acts of the Ds related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations.
   - **NOTES:** We can describe formalism very well with the Knight case. Formalism used in this field refers to a decision first that fails to address the problem that gave rise to litigation in the first place, shrouding that failure in a cloak of forms. The Knight case is a lovely example of formalism: the problem at hand (the sugar cartel) is ignored, and attempts to shroud this posture in a cloak of forms. Here the conceptual definitions take the form of these pairs (primary/secondary). The commerce clause applies only if we have primary regulation of transport. There’s no shred of argument that addresses the problem at hand.
This is a laissez faire market place and they are proponents of free enterprise; there is no interest in breaking up the cartel.

5. Police Power regulations and the commerce prohibiting technique. Congress developed a technique of prohibiting interstate transport of certain items or persons. This “commerce prohibiting” technique was used not only for pure economic regulatory matters, but also for police power or moral regulation. During the first two decades of the twentieth century, the Court was substantially more sympathetic to this commerce prohibiting/police power technique that to direct regulation of intrastate affairs.

      - **Facts:** C was indicted for conspiring to transport Paraguayan lottery tickets across state lines in violation of federal law. After his arrest, C sought a writ of habeas corpus on the basis that the law prohibiting the transportation of lottery tickets was unconstitutional.
      - **Issue:** C insists that the carrying of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, commerce among the states within the meaning of the Constitution; and as such, Congress cannot make it an offense to cause such tickets to be carried from one state to the other.
      - **Discussion:** We are of the opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states. It is argued that the authority given to Congress was not to prohibit, but only to regulate. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state.
      - **NOTES:** The majority began with the assumption that lotteries were clearly an “evil” which it was desirable for Congress to regulate; since Congress regulated only the interstate shipment of these evil articles, it could not be said to be interfering with intrastate matters reserved for state control.
      - **NOTES:** This is under the guise of the commerce clause. If we were just talking about the intrastate phenomenon, it would fall under the state’s police power. This opinion takes the posture that the Congress needs to protect the people from the ills of the lottery. What’s the problem with the analogy of this judge? Part of the opinion sounds like McCulloch; let the end be legitimate, etc. Why not reply to Paulson by saying: No, this is a question of transportation, and of course the Congress has power vis a vis transportation to regulate. The reply is that this should be argued in those terms, and not in terms of an illegitimate end (the lottery). They could have argued this matter very differently.

   b. Hoke v United States. Supreme Court, 1913.
      - The Mann Act was upheld. The powers of the state and the Nation are to be exercised to promote the general welfare, material and moral. If the facility of interstate transportation can be taken away from lotteries, etc, it can be extended to the debauchery of women. Congress has power over transportation. The power is plenary and Congress, incident to it, may adopt not only means necessary, but convenient to its exercise and the means may have the quality of police regulations.
      - **NOTES:** Here you have to court upholding the Mann Act; a matter of transporting women. If this case had been argued as the Lottery case had we would have a problem of an illegitimate purpose. Here, the court argues the case in terms of Congressional power over transportation and avoids the issue of whether Congress has the power to regulate public morals. If the Court sticks to transportation, then the plenary power doctrine is used – if the Congress can regulate transport, it can control all aspects of it.

   c. The Child Labor Case: But the Supreme Court was more hostile to congressional interference
with the employer-employee relationship. The Justices were particularly unwilling to allow congressional legislation which was pro-labor, and which the Justices saw as being an unwarranted interference with the free market system. **Hammer v Dagenhart.** Supreme Court, 1918.

- **Facts:** In this case, the Court voted to strike down a federal statute which prohibited the interstate transport of articles produced by companies which employed children younger than certain ages or under certain condition.

- **Issue:** Is it within the authority of Congress in regulating commerce among the state to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal there from, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7pm, or before the hour of 6am?

- **Discussion:** Referencing prior cases, the Court noted that in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. Commerce consists of intercourse and traffic and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities. The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. The production of articles intended for interstate commerce, is a matter of local regulation. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution. There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. In our view the effect of this act is a two-fold sense of repugnancy to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend.

- **Dissent:** The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them. The statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. When states attempt to send their products across state lines they are no longer within their rights.

- **NOTES:** The court argued that the production and manufacture of goods are not commerce and may not be controlled by Congress. The statute attempted to give the national government control over questions of the police power that are reserved to the states. Within a matter of days, members of Congress confronted the Court by introducing new measure to regulate child labor. One of the ideas that took hold was to rely on the taxing power. An excise tax would be levied on the net profits of persons employing child labor within prohibited ages.

- **NOTES:** The law in question prohibits goods from being shipped that are made by child labor. The court makes an argument that tracks this concern of the commerce clause – the commerce clause gives Congress the right to regulate that which goes through state lines. If
one state was to regulate child labor, and another didn’t, seemingly the state with less strict guidelines would have an economic advantage. Day’s response to the question of whether Congress has the power to equalize conditions in the labor market: he makes a slippery slope argument.

6. **Economic Regulation:** The Court’s review of economic regulatory laws from about 1880 to 1937 was characterized by what has been called a “duel federalism” approach. The Court felt that there were areas of economic life which, under the Tenth Amendment, were to be left to state regulation, and other areas of activity which were properly the preserve of the federal government. These two areas were viewed as being essentially nonoverlapping – either an area was proper for state regulation, or for congressional regulation, but not for both. During this period from 1880 to 1937, Congressional regulation was found to fall within the Commerce power so long as the activities being regulated had a substantial economic effect upon interstate commerce.

a. **Houston, E & W RR v US (The Shreveport Rate Case)** Supreme Court, 1914.

- **Facts:** The ICC, after setting rates for transport of goods between Shreveport and various points in Texas, sought to prevent railroads from setting rates for hauls totally within Texas which were less per mile than the Texas-Shreveport rates. The ICC’s theory was that Shreveport competed with certain Texas cities for shipments from other parts of Texas, and that the lower Texas intrastate rates were unfairly discriminating against the Texas to Shreveport interstate traffic. The railroads contended that it was beyond Congress’ power to control intrastate rates of an interstate carrier.

- **Discussion:** Congress has a complete and paramount power to regulate commerce among the several states. Where this power exists, it dominates. Its authority necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means on injury to that which has been confided to Federal care. 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, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. Congress does not possess the power to regulate the internal commerce of a state, but it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

- **NOTES:** This case demonstrates realism; one looks to the actual economic effect of the regulation, and is the regulation discriminatory. The intrastate rate is affecting interstate commerce, so it is discriminatory, and it invites attention to the criteria you want to look at when evaluating these claims dealing with the actual economic impact of this action. This case also makes reference to the plenary power. Shreveport was a decidedly modern case – a realist opinion, and you have a very careful statement in Shreveport offering realist criteria.

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**COURT BARRIERS TO THE NEW DEAL**

1. In 1929, the stock market crashed. In 1932, FDR was elected on the promise of the New Deal. During his first 100 days, FDR managed to push through Congress a host of bills. These acts were hostilely received by the federal courts.

2. **The New Deal Threatened.** When Congress and Roosevelt began implementing the New Deal in 1933, the Supreme Court’s view of congressional power under the Commerce Clause stood in an ambiguous state. The commerce prohibiting technique was of doubtful validity, in view of *Hammer v Dagenhart*. The validity of the effect upon commerce rationale was unclear: The Shreveport Case indicated that intrastate activity having a substantial practical effect on interstate commerce.
commerce could be regulated; but other cases suggested that there must be a direct and logical relationship between the intrastate activity being regulated and interstate commerce. Within a few years, it became apparent that the direct and logical requirement would carry the Court, and that a majority of the Court would strike down congressional regulation of any area which the majority felt was reserved by the 10th amendment to state control.

3. **ALA Schechter Poultry v US.** Supreme Court 1935.

- **Facts:** The National Industrial Recovery Act authorized the President to approve codes of fair competition developed by boards from various industries. FDR approved a Live Poultry Code applicable in metropolitan New York. The code established a 40 hour work week and a minimum wage of 50 cents per hour; it prohibited child labor and established the right of employees to organize and bargain collectively. Most of the poultry sold in New York was shipped by railroad from other states. The Schechters were convicted on violating the wage and hour provisions of the code, as well as a trade practice requirement that purchasers buy an entire run of a coop, including sick poultry. Schechter itself bought within NYC, and resold its stock exclusively to local dealers.

- **Not in “current of commerce”:** Were these transactions in interstate commerce? The code provisions do not concern the transportation of the poultry from other States to New York. When the Ds made their purchases, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. Ds held the poultry at their markets for slaughter and local sale to retail dealers. The facts afford no warrant for the argument that the poultry was in a flow of interstate commerce. The poultry had come to permanent rest within the state.

- **Not “affecting commerce”:** Did the Ds’ transactions directly affect interstate commerce so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. In determining the power of Congress to regulate that which affects interstate commerce, there is a well defined distinction between direct and indirect effects. Direct effects are illustrated by the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce. But where the effect of intrastate commerce upon interstate commerce is merely indirect, such transactions remain within the power of the states. Although Schecter’s wage and price policies might have forced interstate competitors to lower their own prices, this impact was much too indirect to allow for Congressional control – if wage policies of an intrastate enterprise were deemed to have a sufficiently direct impact upon interstate competitors, so would all other cost components of the intrastate enterprise, so that no facet of intrastate enterprises would be beyond congressional control.

- **NOTES:** On balance, Schechter is formalistic. The earlier case law on the commerce clause question would have sufficed to bring the poultry code within the commerce clause. Hughes, however, resorts to formalistic arguments. Hughes knew exactly what he was doing, and he had decided that the poultry code was a weak basis for this dramatic expansion of the federal regulatory power that soon followed. Hughes ducks the issue (quite reasonably) and uses formalist reasoning. His patience paid off 2 years later in Jones & Laughlin; he wins the support of other Justices and “changed the world.”

4. **Carter v Carter Coal Co.** Supreme Court, 1936.

- **Facts:** The Act confers the power to fix the minimum and maximum price of coal at each and every coal mine in the US. The labor provisions of the code require that in order to effectuate the purposes of the act the district boards and code members shall accept specified conditions contained in the code.

- **Discussion:** The validity of the act depends upon whether it is a regulation on interstate commerce, and the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question. Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. The distinction between commerce and manufacture: Manufacture is transformation. We have seen the word commerce as equivalent to the phrase intercourse for the purposes of trade. Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse.
The Court returned to the distinction (espoused in Knight) between production and commerce. Production, which was what was being regulated here, was a “purely local activity,” even though the materials produced would nearly all ultimately be sold in interstate commerce. Nor did the production “directly affect” interstate commerce; the issue was not the extent of the effect produced on interstate commerce, but the existence or nonexistence of a direct logical relation between the production and the interstate commerce.

- **Cardozo dissenting**: He believes the Act is within the power of the government is so far as it provides for minimum and maximum prices. The majority viewed these price rules and wage hour rules as being inescapably intertwined, so that the invalidity of the latter made the entire Act invalid. Cardozo contended that at least the price rules were valid, even as applied to intrastate sales. He argued that the prices for intrastate coal sales had such a direct impact on those for interstate sales that regulation of the latter could not be successfully carried out without regulation of the former.

5. **FDR’s Court packing plan.** This decision dealt a blow to the New Deal. FDR waited until after the 1937 election to launch a counterattack. When he did so, it was principally in the form of the court packing plan.
   a. **How the plan was to work.** FDR’s proposal sought congressional authority for him to appoint an additional federal judge for each judge who was over 70 years old and had served on the court for at least 10 years. The plan was to apply to all levels of the federal judiciary, and provided for a maximum of 15 members on the Supreme Court.
   b. **Plan defeated.** The plan stirred enormous political controversy. Those opposed to it contended that its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is – an interpretation to be changed with each change of administration. The plan was ultimately defeated in 1937.
   c. **Practical effect.** However, by that time the Supreme Court had materially reformed itself. A new majority was formed, and the Court decided the important NLRB v Jones case in favor of the validity of the NLRA. FDR lost the battle but won the war.

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**THE MODERN TREND**

1. **Generally.** The modern trend in Supreme Court commerce clause analysis began in the Court’s 1937 decision, NLRB v Jones. Beginning with that case, the Court showed a vastly greater willingness to defer to legislative decisions. Under present doctrines, the Court will uphold commerce based laws if the Court is convinced that the activity being regulated “substantially affects” interstate commerce. In fact, in only one case since 1937 has the Court found that Congress went beyond its commerce clause powers.
2. **Three theories.** The court expanded the reach of the commerce power by recognizing three theories upon which a commerce based regulation may be premised: (1) an expanded substantial economic effect theory; (2) a cumulative effect theory; and (3) an expanded commerce prohibiting protective technique.
3. **Expanded “substantial economic effect”:** Recall that in pre-1937 cases, the Court had insisted upon a direct and logical relationship between the intrastate activity being regulated and interstate commerce. But with NLRB v Jones, the Court substantially loosened the nexus required between the intrastate activity being regulated and interstate commerce.
4. **NLRB v Jones & Laughlin Steel Corp.** Supreme Court, 1937.
   - **Facts:** What is the NLRA? The National Labor Relations Act established a system for regulating labor/management relations. It established the right of employees to organize and bargain collectively, and created a board to supervise elections and to enforce the act’s prohibition of such unfair labor practices as discrimination against union members. The act contained findings that employers who denied employees the right to organize caused strikes which impair commerce, materially affecting goods in the flow of commerce, or causing diminution of employment and wages in such volume as substantially to impair or disrupt the market.
   - **What is the basis of the suit?** The Board charged Jones & Laughlin with the unfair labor practice
of firing employees because they sought to organize a union. The Court of Appeals held the act unconstitutional.

- **Who are Jones & Laughlin?** They are engaged in the business of manufacturing iron and steel in plants in Pennsylvania. It is the fourth largest manufacturer of steel in the United States. It is a completely integrated enterprise. It owns mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes. Towns railroad companies. Approximately 75 percent of its product is shipped out of Pennsylvania.

- **The Scope of the Act.** The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. The Act defines the term “affecting commerce”: in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise.

- **The Unfair Labor Practices in Question.** The statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. This is a fundamental right. Respondent says that the industrial relations and activities in the manufacturing department or his enterprise are not subject to federal regulation. The argument rests upon the idea that manufacturing in itself is not commerce. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a flow of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement to adopt measures to promote its growth and insure its safety to foster, protect, control and restrain. That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it. If activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. The question remains as to the effect upon interstate commerce of the labor practice involved. In Schechter, we found that the effect there was so remote as to be beyond the federal power. The fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. It is obvious that the effect would be immediate and might be catastrophic. Experience has demonstrated that the recognition of the right of employees to self-organize and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.

- **Because of the multi-state network of operations, the Court held that a labor stoppage on the Pennsylvania intrastate manufacturing operations would have a substantial effect on interstate commerce.**

- **NOTES:** The abandonment of the “current of commerce” rationale, begun here, now makes it irrelevant whether the activity being regulated occurs before, during, or after the interstate commerce movement, or even long after the interstate commerce.

5. **The commerce-prohibiting technique (police power regulations):** Recall that apart from the “affecting commerce” line of cases, another pre-1933 line of cases dealt (ambiguously) with Congress’ right to use prohibitions on the interstate transportation of items or people in furtherance of police power or general welfare regulations. This commerce prohibiting technique, like the affecting commerce principle, was substantially broadened shortly after 1937.

6. **United States v Darby.** Supreme Court, 1941. This cases reverses Hammer. In Hammer v Dagenheart, the Court held that Congress could not prohibit the interstate sale of the products of child labor. Hammer was flatly overruled in U.S. v Darby.
**Facts:** Here, the Court unanimously upheld the Fair Labor Standards Act of 1938, which set minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The Act not only prohibited the shipment in interstate commerce of goods made by employees employed for more than the maximum hours or not paid the prevailing rates, but it also made it a federal crime to employ workmen in the production of goods for interstate commerce at other than the prescribed rates and hours.

**Issues:**
1. Whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum.
2. Whether it has power to prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours.
3. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged in the production and manufacture of goods to wit, lumber, for interstate commerce.

**Holding:** The shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. It is said that the present prohibition falls within the scope of none of these categories; that its motive is the regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states. They argue that the effect of the present statute is not to exclude the prescribed articles from interstate commerce, but instead, to regulate wages and hours within the state contrary to the policy of the state. Congress is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. The motive of the present regulation are to make effective the conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions. Regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. We conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress. The court overturns Hammer v Dagenhart. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. Congress may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.

The Court first upheld the direct ban on interstate shipments; it disposed of the argument that manufacturing conditions are left for exclusive state control, by stating that “the power of Congress over interstate commerce can neither be enlarged nor diminished by the exercise or non-exercise of state power. The 10th amendment states but a truism that all is retained which has not been surrendered.” **What this indicates:** This shows that the 10th amendment will no longer act as an independent limitation on congressional authority over interstate commerce. Congress is completely free to impose whatever conditions it wishes upon the privilege of engaging in an activity that substantially affects interstate commerce, so long as the conditions themselves don’t violate an independent constitutional prohibition.

The Court also disavowed any interest in Congress’ motive: “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.” The irrelevance of motive remains a feature of commerce clause analysis. (But motive may be relevant where a preferred right, such as the right of free expression or freedom from racial discrimination, is concerned.

The Court upheld the portion of the Act making it a crime to employ workers engaged in interstate commerce in violation of the wage/hour provisions. Given Congress’ right to impose direct prohibitions or conditions on interstate commerce, Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.” Thus the outright criminalization of employer conduct was a reasonable means of implementing the prohibition on interstate shipments. **NOTE:** If this is taken seriously, it means that
Congress may attack any problem (even one of overwhelming local concern) by prohibiting all interstate activity associated in any way with it; then, the local activity itself could be prohibited as a means of implementing the ban on interstate transactions.

7. **Deference to legislative motive.** Kentucky Whip v Illinois Central Railroad.
   - This case involves a federal law which made it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor in violation of state law. The Court concluded that Congress had the power to exclude such goods from interstate commerce. The evil may proceed from something inherent in the subject of transportation. Or the evil may lie in the purpose of the transportation. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce.

8. **Motive Irrelevant.**
   - Mulford v Smith. If a good can be both intrastate and interstate commerce, then interstate regulation may apply to both kinds.
   - Maryland v Wirtz. When it is found that the legislators have a rationale basis for finding a chosen regulatory scheme necessary for the protection of commerce, our investigation is at an end.
   - The two doctrinal points in Darby: (1) a relaxed test of what counts as an appropriate means (reasonable relation test) – and the courts by and large deferred to the Congress as what counts as “reasonable,” and (2) the elimination of any standard where Congressional purpose or motive (it does not bear on the issue of Constitutionality) – unless that motive shows a violation of Article 1 section 9. They will not kill a statute on constitutional grounds because of a motive.

9. **The cumulative effect theory:** A major expansion of Commerce Clause power might be termed the cumulative effect theory. That theory provides that Congress may regulate not only acts which taken alone would have a substantial economic effect on interstate commerce, but also an entire class of acts, if the class has a substantial economic effect (even though one act within it might have virtually no interstate impact at all). As a result of this principle, it is not only the type of regulation sustained in Jones (where that producer’s problems would by themselves have a substantial effect on interstate commerce) which may be regulated.

10. **Wickard v Filburn.** Supreme Court, 1942. This case is probably the furthest the Court has ever gone in sustaining commerce clause powers, at least in the economic, as opposed to police power area.
    - **Facts:** This case involved the Agricultural Adjustment Act of 1938, which permitted the Secretary of Agriculture to set quotas for the raising of wheat on every farm in the country. The Act allowed not only the setting of quotas on wheat that would be sold interstate and intrastate, but also quotas on wheat which would be consumed on the very farm where it was raised. Wheat raised in excess of the quota was subject to a per-bushel penalty. Filburn owned a small farm in Ohio. He challenged the government’s right to set a quota on the wheat which he raised and consumed on his own farm, on the grounds that this was purely local activity beyond the scope of federal control.
    - **Holding:** A unanimous Court upheld the Act, even as it applied to home-consumed wheat. The Court reasoned that the consumption of home-grown wheat is a large and variable factor in the economics of the wheat market. The more wheat that is consumed on the farm where it is grown, the less wheat that is bought in commerce, whether interstate or not. Filburn’s own effect on the market might be trivial. But this decision, taken together with that of many others similarly situated, is far from trivial. That is, homegrown wheat supplies a need of the men who grew it which would otherwise be reflected by purchases in the open market, and the homegrown wheat thus competes with wheat in the market. Protection of the interstate commercial trade in wheat clearly falls within the commerce power, and the regulation of homegrown wheat is reasonably related to protecting that commerce.
    - **NOTES:** Wickard’s holding was striking because if Congress could reach a small wheat farmer because of the aggregate effect of all small farmers on interstate commerce, Congress could reach virtually anything. In this context, few economic transactions can be characterized as purely private or local.

11. **Generally.** The “revolution” is triggered by Jones & Laughlin, and suddenly the Congress acquires powers not unlike the state police power (an expansion beyond the framers’ wildest dreams) – making possible
now regulation in a variety of areas. How ought our Constitution to function? If a small, agrarian society has become a large and wealthy state, you can imagine the constitution is not going to address all the issues of legal conflict in the large state. Paulson wants to suggest that the “revolution” created rights (the National Labor Relations Act, etc.), and a year after Jones, the Fair Labor Standards Act creates more rights. The creation of rights is a good thing. The parade of horribles that was supposed to follow the revolution of 1937 has not transpired. Where the revolution serves to create rights, unless there’s a downside you can point to, then the revolution is a good thing.


1. **Only state conduct covered.** Nearly all the rights and liberties which the Constitution guarantees to individuals are protected only against interference by governmental entities. Therefore, in nearly every suit where an individual argues that his constitutional rights have been violated, the court can grant relief only if it finds that there has been state action.

2. **State action.** Although blacks were citizens as a result of Civil War Amendments, in many states they were denied access to theaters, restaurants, inns, and other public facilities. The first statute, grounded principally on the 14th Amendment, was declared unconstitutional by the Court. In 1964, a similar Act was upheld on both the 14th Amendment and the Commerce Clause. **Legislation in 1875:** Congress passed a bill in 1875 to protect all citizens in their civil and legal rights. The 14th Amendment prohibited states from abridging the privileges or immunities of citizens, from depriving persons of life, liberty, or property without due process of law, or denying any person the equal protection of the laws. The statute of 1875 was declared unconstitutional by the Court. The Court held that the 14th Amendment gave Congress the authority to enforce only **state action,** not actions by the private parties who operated inns and hotels, etc.

3. **The Civil Rights Cases.** Supreme Court, 1883.
   - **Facts:** The Civil Rights Cases involved the Civil Rights Act of 1875, in which Congress prohibited all persons from denying, on the basis of race, any individual’s equal access to inns, public transportation, theaters, and other places of public accommodation. The statute was clearly applicable to private conduct. The question before the Court was whether Congress had the power to enact such a statute.
   - **Holding:** In deciding the case, the Court made three main holdings, which have varying degrees of acceptance today. First, the Court held that the guarantee of equal protection and due process, given by § 1 of the 14th amendment, apply by their own terms solely to state action. This holding remains valid today, at least in the sense that, in the absence of congressional legislation, the courts will not find conduct that is exclusively private to be violative of these 14th amendment guarantees. Secondly, the Court held that the grant to Congress in § 5 of the 14th amendment of the power to enforce these guarantees did not authorize Congress to regulate solely private conduct. § 5 “does not authorize Congress to create a code of municipal law for the regulation of private rights.” The only lawmaking power given to Congress under § 5 of the amendment, the Court held, was the ability to pass laws to prevent the states, by their own action, from interfering with these rights. **NOTE:** It is not clear whether this aspect of the Civil Rights Cases remains good law, but it probably does not. There is no case in which a majority of the Court has held, in a single opinion, that § 5 of the 14th amendment allows Congress to reach purely private conduct. Lastly, the Court held that the statute could not be justified as an exercise of the 13th amendment. The court conceded that that amendment is applicable to private as well as state conduct, since it prevents private individuals from holding others in slavery. But the amendment by its terms bars only slavery and involuntary servitude, and the Court took a narrow view of this phrase. Refusal to allow blacks to use public accommodations was simply not a badge of slavery. **NOTE:** This narrow view of what constitutes a badge of slavery prohibited under the 13th amendment has clearly been overruled, at least with respect to Congress’ power to enact legislation to enforce that amendment. Since there was, in the majority’s view, no satisfactory constitutional basis for the 1875 Civil Rights Act, the Act was invalidated.
   - **Dissent:** Justice Harlan, in dissent, objected to the majority’s view of both the 13th and 14th amendments. As to the 13th, he believed that freedom form slavery necessarily entailed not
only the liberation from physical bondage, but also the eradication of all "burdens and disabilities" suffered by blacks because of their race. He believed Congress could prevent blacks from being denied, on grounds of race, those civil rights which white people have. With respect to the 14th amendment, Harlan pointed to part of § 1 that the majority ignored, the provision that "all persons born or naturalized in the U.S. and subject to the jurisdiction thereof, are citizens of the U.S. and of the State wherein they reside." He believed that this section gave blacks state citizenship, and that this grant of state citizenship in turn entitled them to exemption from race discrimination in respect to any civil right belonging to citizens of the white race in the same state.

4. **The public function approach.** The public function doctrine holds that when a private individual (or group) is entrusted by the state with the performance of functions that are governmental in nature, he becomes an agent of the state and his acts constitute state action. This public function analysis at one time appeared to be potentially extremely broad sweeping. But the Burger/Rehnquist Court has cut back the doctrine substantially, principally by insisting that the function be one that is normally exclusively reserved to the state.

5. **The White Primary Cases.** The public function analysis seems to have had its start in the so-called White Primary Cases. In a series of decisions, the Court held that despite state attempts to delegate more and more of the nominating process to private political parties, the entire electoral process is a public function and the political parties are acting as agents of the state. Therefore, they may not practice racial discrimination. The Court was confronted by claims that the Texas Democratic Party was precluding blacks from participating in party primaries.

   a. **Nixon v Herndon.** A state statute explicitly prohibited blacks from voting in the Democratic primary. The Court struck down the Texas law concluding that its mandated discrimination constituted a state action. Following this case, the Texas Legislature passed a new law giving the Democratic Party the power to decide who could vote in the primaries. The Court again struck down the law. The Court found State Action on the basis that the Committee operated as representative of the State.

   b. **Smith v Allwright.** The Texas Democratic Party passed a ruling limiting membership to white citizens of the State of Texas. The Court held that state action existed. When the privilege is the essential qualification for voting in a primary to select nominees or a general election, the state makes the action of the party the action of the state. **NOTES:** The Court identifies as the "act" the Democratic Party’s determination for the state of who should vote in primaries. They said that act is taken for the state, and this effectively ends their attempt to control black participation in party membership.

   c. **Terry v Adams.** Supreme Court, 1953. The Jaybird organization was organized in 1889. Its membership has always been limited to white people. While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so. The party has been a dominant political group. **Discussion:** For a state to permit such a duplication of its election process is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. Not every private club, association or league organized to influence public candidacies must conform to the Constitution’s restrictions on political parties. But the Jaybirds operate as an auxiliary of the local Democratic Party. **NOTES:** Duplication of the election procedures in the guise of a voluntary club is, the Court says, a violation of the Fifteenth Amendment.

6. **State involvement or encouragement.**

   a. **Shelley v Kramer.** Supreme Court, 1948. **Facts:** 30 out of a total of 39 owners of property in the city of St. Louis signed an agreement: The land is restricted for use by Caucasians. At the time of the agreement, five of the parcels in the district were owned by blacks. At the time this action was brought, four of the premises were occupied by blacks, and had been so occupied for 23-63 years. On
August 11, 1945, petitioners Shelley, who are black, received from Fitzgerald a warranty deed to the parcel in question. The trial court found that the petitioners had no actual knowledge of the restrictive agreement at the time of the purchase. On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit asking that Shelley be restrained from taking possession of the property. **Issue:** These cases present questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color. **Discussion:** (1) Does the equal protection clause of the Fourteenth Amendment inhibit judicial enforcement by state courts of restrictive covenants based on race or color? The restrictions of these agreements are directed toward a class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. The restrictive covenants standing alone cannot be regarded as a violation of any rights guaranteed by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State. Here there is more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State is a proposition which has long been established by decisions of this Court. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. **NOTES:** If judicial enforcement of private rights constitutes state action, is any distinction left between private action and state action? All private rights come from the state in the sense that state law grants the right, or fails to forbid it. How far can Shelley’s reasoning be pushed? But for judicial enforcement, racially restrictive covenants would be essentially precatory. **NOTES:** State action takes the form of judicial enforcement. The courts are the instrumentalities of the state. If we follow the holding to the letter, could we find that whenever there is judicial enforcement, the state action doctrine applies?

b. **Peterson v City of Greenville.** Petitioners were convicted of trespass for their refusal to leave a lunch counter when asked to do so because integrated service was contrary to local customs of segregation at lunch counters, as well as in violation of a Greenville ordinance requiring separation of the races in restaurants. The Court found that the restaurant’s actions constituted state action.

7. **Company towns and shopping centers.** Another major area in which public function analysis developed concerned actions taken by the owners of company towns and shopping centers. The issue is these cases was whether the owner of the property had the right to use state trespass laws to keep out people who wished to speak or distribute literature on the property. Where operation of the property was held to be a public function, 1st amendment guarantees became applicable, barring the use of state trespass laws. By contrast, when there was no public function, there were no First Amendment rights and the owner therefore had the ability to keep the outsiders off his property.

a. **Company Town. Marsh v Alabama.** Supreme Court, 1946. **Facts:** The town, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. It has all the characteristics of any other American town. The town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation. Appellate, a Jehovah’s Witness, came onto the sidewalk, stood near the post-office, and distributed religious literature. There were signs posted that solicitation was not allowed. She was told she needed a permit. She was arrested and charged in state court. She contended that the state statute abridged her right to freedom of press and religion contrary to the First and Fourteenth Amendments. **Issue:** Whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town’s management. **Discussion:** Neither a state nor a municipality can
completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. The court does not agree that the corporation’s property interests settle the question. The State argues that the right of the corporation to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. The circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.

b. NOTES: Then the issue could be phrased: Is Chickasaw enough like a town to subject it to the same Constitutional restraints. Alabama argues that the corporation’s right to control those within its borders is comparable of the right of a homeowner to control the conduct of his guests. The court says that unlike a home, the corporation here has opened up the property to public use; and the more it is opened up, the more its property rights will yield to the Constitutional rights. Why would the Justices defend the proposition that the First Amendment right is greater than property rights? Constitutional rights will trump property rights (rights will also trump policies). Was there state action here? The state of Alabama allows the corporation to operate the town, and enforces the will of the Chickasaw authorities in its state courts. How do you criticize Justice Reed’s opinion? He says that there has been no assent on the part of the property owner. You could say that by opening up the property to the public, he impliedly consented.

c. Shopping Centers. The Court struggled with this issue or whether shopping centers are the modern equivalent to company towns.

- **Amalgamated Food Employees Union v Logan Valley Plaza.** Union members peacefully picketed a business located in a private shopping center. When the owners of the center sought to enjoin the picketing as a trespass, the picketers defended on First Amendment grounds. The Court held that the shopping center’s actions constituted state action so that the First Amendment applied. The general public had unrestricted access to the mall property. The shopping center here is clearly the functional equivalent to the business district of Chickasaw in Marsh.

- **Lloyd v Tanner.** A shopping center covered nearly 50 acres of ground. All stores in the center were located within a single large, multi level building complex that contained interior promenades with large sidewalks. The center was generally open to the public. Litigation arose when the center’s security guards told several people, who were distributing handbills in the center, to leave or be arrested. The handbills opposed the Vietnam War. The billers sought relief on First Amendment grounds. The Supreme Court held that the center’s conduct constituted private action distinguishing Marsh and Logan: Marsh was decided on the basis that the property involved encompassed an area that was basically a town.

- **Hudgens v NLRB.** The Court overruled Logan Valley completely. Union members engaged in peaceful protests inside a privately owned shopping center. They were threatened with arrest, and sought declaratory relief. The Court held: If the respondents in Lloyd did not have a First Amendment right to enter the shopping center, then the pickets in the present case do not have a First Amendment right to enter this shopping center.

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**POST 1964 CIVIL RIGHTS CASES.**
1. **Generally.** A key use of the federal commerce power has been in civil rights legislation. Thus Title II of the 1964 Civil Rights Act bans discrimination in places of public accommodation. This ban applies against all but the very most localized, small hotels or restaurants. It does this by covering any establishment which serves interstate travelers, or which buys food, a substantial portion of which has moved in commerce. Any doubts about the constitutionality of the 1964 Act were put to rest by two 1964 Supreme Court decisions upholding it. Both involved what might be called local enterprises.

2. **Heart of Atlanta Motel v United States.** Supreme Court, 1964. **Facts:** Appellant owns and operates the Heart of Atlanta Motel. The motel is readily accessible to interstate highways. Appellant solicits patronage from outside the State of Georgia through various national advertising media. It accepts convention trade from outside Georgia and 75% of its registered guests are from out of State. The motel had followed a practice of refusing to rent rooms to blacks. The appellant contends that Congress in passing this Act exceeded its power to regulate commerce. **Discussion:** Title II is divided into seven sections which provide that...“full and equal enjoyment...” and four classes of business establishment, each of which serves the public and is a place of public accommodation within the meaning of 201 if its operations affect commerce, or if discrimination or segregation by it is supported by State action. Any inn, hotel, motel, or other establishment which provides lodging to transient guests affects commerce per se.” **Issue:** The Constitutionality of Civil Rights Act 201 as applied to these facts. The Act was based on the commerce clause. There is much evidence that discrimination by race places upon interstate commerce a burden. The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. The power of Congress extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end. Thus, Congress can regulate local incident which might have a substantial and harmful effect upon that commerce. “If interstate commerce feels the pinch, it does not matter how local the operation that applies the squeeze.” Nor was the Court troubled by the fact that Congress’ motive for this legislation was not purely economic, but rather moral and social. **NOTES:** Even without a 75% out-of-state occupancy rate, are there bases for assuming the motel falls within the terms of the statute? National advertising, billboards and highway signs, easy access to state highways, etc. What moral issue was in fact addressed by Justice Clark? Personal dignity is talked about both in the 1963 hearings and by Justice Clark in the opinion; depriving one of his/her stature as a citizen. In our commerce clause parlance, what do the “objects” refer to? The ends. One reading of the opinion is that the “end” is to preserve human dignity. What about the burdens on interstate commerce owing to discrimination? The general distinction is between qualitative and quantitative. Qualitative refers to the impairment of pleasure and convenience. Quantitative refers to discouraging travel and decreasing the volume of interstate travel. The qualitative effect gives rise to the purpose, and the quantitative effect gives rise to the question: Is Congress now concerned with the volume of interstate commerce?

3. **Katzenbach v McClung.** Supreme Court, 1964. **Facts:** This involved a Birmingham restaurant called Ollie’s BBQ. The restaurant was relatively far from any interstate highway or train or bus station, and there was no evidence that an appreciable part of its business was in serving out of state travelers. However, 46% of the food purchased by the restaurant during the previous year had been bought from a supplier who had bought it from out of state. (Recall that the Civil Rights Act applies to any restaurant a substantial portion of whose food has moved in commerce). **Holding:** The Court upheld the Act as applied to Ollie’s. The Court observed that unavailability of accommodations dissuaded blacks from traveling in interstate commerce. The Court returned to the Wickard rationale: even though Ollie’s itself was small, and the value of food it purchased from out of state had only an insignificant effect on commerce, the restaurant’s discriminatory conduct was representative of a great deal of similar conduct throughout the country, and this conduct in the aggregate clearly had an effect on interstate commerce. Therefore, Congress was entitled to regulate the individual case. Nor did the fact that the bill contained no congressional findings about the impact of restaurant discrimination on commerce render the Act unconstitutional. The Court would not scrutinize the facts to make a de novo determination of whether restaurant discrimination affected commerce. Rather, where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. **NOTES:** Is promoting the volume of interstate commerce a new criterion added to the Shreveport test or is it a new reading of something that has been
there from the beginning? One reading of the commerce clause is to say that to “promote” commerce is to promote the volume of interstate commerce. We introduce, by the back door, the criteria promoting the volume of interstate commerce. If that is a legitimate criterion, then we have a basis for deciding these cases under the commerce clause. If that is not legitimate, while we are undeniably behind the result, we have some trouble with the arguments.

4. Other Illustrations of Breadth – Federal Criminal laws. Historically, the states have passed virtually all basic criminal legislation including murder, robbery, rape, and assault statutes. Congress has passed some criminal statutes, but most federal statutes have concerned crimes against the federal government or criminal activity that crossed state lines. A broad reading of Congress’ commerce power has been applied in a number of decisions involving federal criminal statutes. **Loansharking.** The cumulative effect rationale was applied in a decision sustaining the anti-loansharking provisions of the Consumer Credit Protection Act. **Perez v US.** Supreme Court, 1971. The Act forbade extortionate extension of credit even in entirely local activities. The Court found constitutional an application of the Act to a loan sharking transaction which occurred entirely within one state. The Court noted first that in Congress’ judgment, loan sharking as a whole had an effect on interstate commerce, because organized crime was heavily dependent on loan sharking revenues, and siphoned these revenues from numerous localities to finance its national operations. Then the Court applied a Wickard rationale: “Petitioner is clearly a member of a class which engages in extortionate credit transactions as defined by Congress. Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise as trivial individual instances of the class. NOTE: Federal criminal statutes have also frequently made use of the commerce prohibiting technique by banning the interstate transportation of persons or items in a matter incident to some criminal activity. As Perez illustrates, the Court will uphold the constitutionality of criminal statutes affecting even seemingly local activities, if Congress has shown a clear intent to encompass such activities. But as a matter of statutory interpretation, the more local the activity of the D, the more likely the Court is to conclude that Congress did not intend to reach those activities. NOTES: The Court goes on to say that, even if the activity of Perez is local, it counts if it has a substantial effect on interstate commerce. The problem with this argument is that they are saying that you do not even need to be in commerce, and he belongs to this class which is presumed to affect interstate commerce. This begs the question of whether Perez belongs to this class defined as that class of individuals who affect interstate commerce (organized crime, etc.). In the dissent, he is not willing to defer to the Congress – they have gone too far. It is ludicrous to say Perez is a part of organized crime. Marshall anticipates the problems relating to the reach of the commerce clause – saying that it won’t get out of hand because the representatives in Congress themselves come from the states.

THE FEDERAL COMMERCE POWER – MODERN LIMITATIONS

1. **Some limits still exist.** But some limits still exist on Congress’ commerce powers, as a result of the landmark 1995 case of U.S. v. Lopez. Here, the Court for the first time in 60 years invalidated a federal statute on the grounds that it was beyond Congress’ commerce powers.

2. **United States v Lopez.** Supreme Court, 1995. **Gun Free Schools:** In the Gun Free School Zones Act of 1990, Congress 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. The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. The statute did not include explicit findings by Congress that the activity being regulated affected commerce. Perhaps more important, the statute did not include a jurisdictional nexus. For instance, Congress could have made it a crime only to possess a gun that had moved in (or otherwise affected) interstate commerce. Instead, Congress banned even possession of a gun that had never traveled in, or even affected, interstate commerce. On March 10, 1992, respondent, who was then a 12th grade student, arrived at Edison High School in Texas carrying a concealed gun. School authorities confronted him, who admitted to carrying the gun. He was arrested and charged with violating the Act. **Holding:** By a 5-4 vote, the Court held that the Act exceeds the authority of Congress to regulate commerce among the several states. **Discussion:** The federal government’s powers are few and defined. Those which are to remain in the state governments are numerous and indefinite. Jones, Darby, and Wickard ushered in an era of
Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. This was recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. The doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce. But the power is subject to outer limits. The scope of the commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Since then, the Court had heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. Three broad categories of activity that Congress may regulate under the Commerce Clause: Congress may regulate the use of the channels of interstate commerce. Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Congress’ authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce. The Court concludes that the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce. Did the Congress have the power to enact the Act? If the Act is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. The Act is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise. The Act contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. The Congress is normally not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. The Government’s main argument is that possession of a gun in school does substantially affect interstate commerce. The costs of crime are high, and a high incidence of crime discourages people from traveling to an area. Also, a handicapped educational process will result in less productive citizenry. Under these theories, it is difficult to perceive any limitation of federal power. Not commercial: The majority seemed to think that it was important that the particular activity being regulated – possession of guns in schools – was not itself a commercial activity. The majority distinguished Wickard from the activity at issue here, saying that Wickard “involved economic activity in a way that possession of a gun in a school zone does not.” Also, unlike the wheat growing regulation, the regulation here was not part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. Argument rejected: The majority rejected the government’s argument that gun violence affects commerce, essentially because it proved too much. The Court proceeded with a parade of horribles, if the government’s argument was accepted: Congress would be able to create a federal curriculum for schools, or be able to regulate child rearing, etc.

- **Concurrences:** More than Rehnquist, Kennedy seemed eager to leave untouched prior cases holding that Congress has full power to regulate what are truly commercial transactions, even if the transaction being regulated in a truly local one. But the activity being regulated here was not commercial.

- **Dissent (4 Justices – Breyer):** For Breyer, the test was whether Congress could have had a rational basis for finding a significant connection between gun related school violence and interstate commerce. Breyer accepted the government’s position that there was ample evidence that gun related violence in the schools interfered with the quality of education. And there was evidence that education was tied to the economic viability of whole areas. He thought Katzenbach had no greater connection to interstate commerce than the instance of gun possession here. He also thought the line between commercial and noncommercial transactions would be too hard to draw.

- **NOTES:** The court concludes that the regulated activity must substantially affect
interstate commerce. Commerce clause is used when 1) regulation of interstate channels 2) protecting the instrumentality of interstate commerce, people, things even though the threat may be only from intrastate activities 3) regulation of activities which have substantial relation to interstate commerce and adversely affect it. 922 doesn't regulate channels of interstate commerce or attempt to prohibit the transportation of an activity through commerce channels. 922 does not protect any instrumentality of interstate commerce or a thing in interstate commerce. This act is a criminal statute that has nothing to do with commerce or any kind of economic activity no matter how broadly it is interpreted. The govt argues: 1) cost of crime is substantial 2) violent crime reduces people's desires to travel to certain places 3) presence of guns in schools poses a substantial threat to the educational process which means less learning which equates into less productive citizens which in turn adversely affects the nation's well being. If this reasoning were followed congress could regulate everything from marriage to divorce and child custody. Kennedy and O'Connor, concurring: This statute stops the states from exercising and experimenting with their own judgment on this matter. Stevens, dissenting: Guns are articles of commerce that can constrain commerce. Their possession leads to criminal activity directly and indirectly. Congress can prohibit the possession of guns in certain markets. The market for guns for school children is substantial and should be regulated. Stevens, Ginsburg, Breyer, Souter, dissenting: There is an obvious link between the economic well being and social well being of our country and gun violence. Stating that 922 falls inside of the commerce clause would not in fact, extend the clause. The majority's opinion is opposite of those which have been decided in modern cases. What is the difference between finding that regulation of the environment is under congress' control (adverse effect on economy) and that of education?

- Criminal law falls within police power of the states. Perez gives authority to congress, if it chooses, to get involved in criminal matters as they relate to the commerce clause. Is this a formalist opinion: critics - yes and there is a fundamental distinction, fans – no. 3 categories of interstate commerce - an application of the first two categories, consideration of the 3rd. Court: is the activity in question economic or non economic. They decided to consider substantial effects (via Shreveport) only if the activity is economic in character. Distinction between economic activity and non economic activity is formalistic because it fails to address the problem says Paulson. The distinction serves to shroud from view what is really going on: the unwillingness to address the problem at hand. That there is a problem, everyone agrees, but the court leaves this problem to the states. Court says if it were prepared to follow govt's argument, slippery slope would follow. But they don't follow the argument because the problem is non economic and consideration of economic effects will only follow economic activity. Kennedy's argument: Emphasizes that the activity is non commercial/ non economic in character. Balance between federal government and states. Education is a concern of the states and it should stay that way. Madisonian statement: things work properly if the balance is maintained. 922q upsets the balance. Souter: we should leave the whole business to the political process (allusion to Marshall in Gibbons - congress is elected from people of the states so they aren't about to do themselves in), Kennedy: that's not a defensible condition. We don't have a political system in Washington that has a reliable check. Look at the 1990 act in question. Thomas: does not have the original understanding of the framers in mind at all but is endorsing FORMALIST stance of the pre 1937 court. This has "precious little" to do with the initial understanding if we are looking to Hamilton rather than Madison. Souter: Congress has heard the case and deference to congress is appropriate. Breyer: tries hard to make most of govt's brief by using stats.

3. Violence against women. An important 2000 case suggests that Lopez will be a major
obstacle whenever Congress relies on its commerce power to regulate conduct that is essentially non-commercial. Just as Lopez held that Congress couldn’t ban gun possession in school zones, this case says that Congress can’t broadly regulate violence against women.

4. **US v Morrison.** Supreme Court, 2000. **Facts:** P enrolled at Virginia Tech in the fall of 1994. In September, P met Ds who were both student at VT and members of the football team. P alleges that Ds assaulted and raped her. D made offensive remarks following this. In early 1995, P filed a complaint against Ds under VT’s Sexual Assault Policy. VT’s Judicial Committee found insufficient evidence to punish D2, but found D1 guilty of sexual assault and suspended him for 2 semesters. D2 appealed his conviction through the university’s administrative system. The sentence was set aside as excessive. P found out about this, and dropped out of school. In December 1995, P sued D1, D2, and VT in US District Court. She alleged that D’s attack violated § 13981 and that VT’s handling of her complaint violated Title IX of the Education Amendments of 1972. **Rule:** § 13981 was part of the Violence against Women Act of 1994. It provides, in part, that any person who commits a crime of violence motivated by gender shall be liable to the party injured for damages. **Procedural History:** In these cases we consider the constitutionality of 42 U.S.C. §. 13981, which provides a federal civil remedy for the victims of gender-motivated violence. The US Court of Appeals for the Fourth Circuit struck it down because it concluded that Congress lacked constitutional authority to enact the section’s civil remedy. We affirm. **Discussion:** As we saw in Lopez, modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Lopez’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation on intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. Thus far in our nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. Congress found that gender-motivated violence affects interstate commerce…”by deterring potential victims from traveling interstate, increasing medical costs…” The concern we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded. If accepted, P’s reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. P’s reasoning would not limit Congress to regulating violence but may be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is significant. The Constitution requires a distinction between what is truly national and what is truly local. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states. **Concurring:** The very notion of a substantial effects test under the Commerce Clause is inconsistent with the original understanding of Congress’s powers and with the Court’s early Commerce Clause cases. Until this court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce. **Dissent:** Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. One difference from US v Lopez is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. The Act would have passed muster at any time between Wickard in 1942 and Lopez in 1995, a
period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise: The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often solely rely, in all representative governments. **Dissent:** The economic/noneconomic distinction is not easy to apply. Congress must remain primarily responsible for striking the appropriate state/federal balance. Its members represent state and local district interests.

5. **Summary of Modern View.** In light of Lopez, there seem to be four broad categories of activities which Congress can constitutionally regulate:

a. **Channels:** First, Congress can regulate the use of the channels of interstate commerce. Thus Congress can regulate in a way that is reasonably related to highways, waterways, and air traffic. Presumably Congress can do so even though the activity in question in the particular case is quite intrastate.

b. **Instrumentalities:** Second, Congress can regulate the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. This category refers to people, machines, and other things used in carrying out commerce. So, for instance, presumably Congress could say that every truck must have a specific safety device, even if the particular truck in question was made and used exclusively within a single state.

c. **Article moving in interstate commerce:** Third, Congress can regulate articles moving in interstate commerce. For instance, the Court has said that computerized information about motorists was an article of commerce whose release into the interstate stream of business made the information an appropriate subject for Congressional regulation.

d. **Substantially affecting commerce:** Finally, the biggest category is that Congress may regulate those activities having a substantial effect on interstate commerce. The following rules now seem to apply:

- **Real bite:** The requirement of a substantial effect has real bite.
- **Activity is commercial:** If the activity itself is arguably commercial, then it doesn’t seem to matter whether the particular instance of the activity directly affects interstate commerce, as long as the instance is part of a general class of activities that, collectively, substantially affect interstate commerce. Thus is a Wickard type of fact pattern, D’s own activities are in a sense “commercial,” but they’re entirely intrastate; however, when taken together with all others they have a substantial effect on interstate commerce, and Congress can regulate even the solely-intrastate events.
- **Activity is not commercial:** But if the activity itself is not commercial, then there will apparently have to be a pretty obvious connection between the activity and interstate commerce. (It must be more obvious than the link between guns in schools and commerce; and more obvious than between gender-based violence and commerce).
- **Little Deference to Congress:** The Court won’t give much deference (as it used to) to the fact that Congress believed that the activity has the requisite substantial effect on interstate commerce. The Court will basically decide the issue for itself, from scratch. It certainly will no longer be enough that Congress has a rational basis for believing that the requisite effect existed.
- **Traditional domain of states:** If what’s being regulated is an activity the regulation of which has traditionally been the domain of the states, and as to which the states have expertise, the Court is less likely to find that Congress is acting within its commerce power. Thus education, family law, and general criminal law are areas where the Court is likely to be especially suspicious of congressional interference.
THE TAXING POWER

1. **Several Provisions of Tax:** Several constitutional clauses relate to the power of the federal government to tax. The basic power is given in Article I § 8: “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excise.”

2. To what extent may the congressional taxing power be used as a means of national regulation of arguably local affairs? Congress may regulate via taxation. Even if the principle motive is to regulate rather than to tax, so long as the tax produces meaningful revenue and any regulatory provisions accompanying the tax are reasonably related to the tax’s enforcement, the tax will probably hold.

3. **To argue against the tax measure:** Argue that the regulatory dimension swallows whole the revenue producing dimension. Therefore, we ought to look to the congressional motive. NOTE: One type of tax which might be held to be a regulatory tax (invalid if not authorized under some other power) is a tax enacted together with specified conditions, and written in such a way that the tax does not apply at all unless the taxpayer has violated the conditions.

4. **To argue for the tax despite a regulatory component:** Point to a revenue producing dimension, no matter how modest. Do not inquire into the motive as to why it is so modest, surely the Congress must know what it is doing.

5. **Child Labor Tax Case (Bailey v Drexel Furniture Co).** Supreme Court, 1922. HOW FAR CAN CONGRESS USE THE TAXING POWER TO REGULATE?

- **Facts:** Congress enacted the Child Labor Tax Law of 1919. That law imposed a federal excise tax of 10% of annual net profits on every employer of child labor in the covered businesses. The coverage provisions were similar to those in the law invalidated in Hammer v Dagenhart. After paying a tax of over $6,000, the Company successfully brought a refund suit in the District Court.

- **Argument:** The law is attacked on the ground that it is a regulation of the employment of child labor in the States – an exclusively state function under the Federal Constitution and within the reservation of the Tenth Amendment. The law is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation.

- **Issue:** Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?

- **Arguments for the tax as a penalty:** The provisions do not assign different penalties for employing differing numbers of children. And it is only used when the employer knowingly departs from the prescribed course. Scienter is associated with penalties, not with taxes. The employer’s factory is subjected to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers.

- **If enforced, creates a slippery slope:** If the law is deemed valid, all that Congress would need to do in seeking to take over its control any one of the great number of subject reserved to the states would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.

- **NOTES:** Justice Holmes was in the majority in the Child Labor Tax Case, just four years after his dissent in Hammer. In the Child Case, he joined in looking beyond the congressional label to invalidate because of forbidden purpose; in his dissent in Hammer, he had insisted that the Court could not look to purposes and obvious collateral effects and must sustain a law using the commerce-prohibiting technique. In short, Holmes was opposing judicial invalidation because of improper purpose in tax as well as commerce. By the time of the Child Labor Tax case, he seems to have
abandoned that position.

• NOTES: In United States v Constantine, D was convicted of conducting the business of retail dealer in malt liquor contrary to the laws of Alabama without having paid a special excise tax of $1000 imposed by congress. The question was presented whether the exaction of $1000 in addition, by reason solely of his violation of state law, is a tax or penalty. The Court concluded that the statute was a clear invasion of the police power, inherent to the states. But Sonzinsky v US sustained the National Firearms Act of 1934 which imposed a $200 annual license tax on dealers in firearms. Noting that the tax is productive of some revenue, the Court said they were not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed.

• NOTES: The Act provided for a 10% tax on profits for those who employed child labor. The terms of the Act are similar to a previous Child Labor Act that had been ruled unconstitutional. What is the general distinction between a tax and a penalty? The general purpose of a tax is to raise money. A penalty is generally to direct or guide behavior. To avoid the penalty, you forbear from doing the prohibited act. The Act provided for a penalty only where they knowingly depart from its terms (scienter is normally associated with penalties). We are talking about an illegitimate motive. The pretext argument (primary and secondary motive) deals with the primary purpose (to punish) under the pretext of being a revenue raising measure.

• Doremus Case: This tax is more of a regulatory measure and doesn’t amount to anything near a revenue raising measure, but the Court upholds it. A motive other than taxation “not shown on the face of the act” might have contributed to its enacted. Is he saying that if Congress is clever enough to conceal its motive, it might be upheld?

• US v Kahringer. This case sustained the constitutionality of an occupational tax imposed by the 1951 Revenue Act, which levied a tax on persons engaged in the business of accepting wagers and required such persons to register with the Collector of Internal Revenue. The Court reasoned that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Unless there are penalty provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. In the dissent: when use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to orders obviously an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure. In addition, the enforcing provision is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law.

• NOTES: This provides for a tax on persons accepting wagers. The D makes a pretext argument (the Congress is pretending to have introduced a tax measure, but it is really attempting to regulate. There is evidence in the legislative record to support his argument). The Court upholds it on the fact that the tax produces revenue, no matter how little. In the dissent, he points out that the Act provides for prosecution under state law. Here, he says, it is legitimate to consider the motive. Strategy for upholding the measure: enough to point to a revenue producing dimension, and it is not for the courts to look into the motive. The congress decides the best means, etc.

THE SPENDING POWER

1. Generally. Article I § 8 gives Congress the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. The power to spend is thus linked to the power to tax – money may be raised by taxation, and then spent for the common defense and general welfare.

2. Not limited to enumerated powers. In U.S. v Butler, the Court held that the spending power is itself an enumerated power, so Congress may spend to achieve the general welfare, even though no other enumerated power is being furthered.

3. United States v Butler. Supreme Court, 1936. Facts: The decision invalidated one of the major New Deal measures, the Agricultural Adjustment Act of 1933. The Act sought to stabilize farm prices by curtailing agricultural production. A processing tax was imposed upon the first domestic processing of the particular commodity. A processing tax on cotton was imposed upon the Hoosac Mills Corporation. Butler and his co-receivers for the company successfully attacked the tax, claiming that it was an integral
part of an unconstitutional program to control agricultural production. The Court held that the Act was not a valid exercise of the power to spend for the general welfare. **Arguments:** By the Government: even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article 1 section 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. The clause thought to authorize the Act confers upon the Congress power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare. The Government argues that Congress may appropriate and authorize the spending of moneys for the general welfare. **Differences in opinion on what the phrase means:** Madison said it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section. Hamilton maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and that Congress has a power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare. The Court concludes that the view of Hamilton is the correct one. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Another principle embedded in our Constitution prohibits the enforcement of the act. The act invades the reserved rights of the states. The tax is the means to an unconstitutional end. **Alternate Issue:** If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The regulation is not in fact voluntary. This is coercion by economic pressure. Contracts for the reduction of acreage and the control of production are outside the range of federal power. If the Act is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the US may be accomplished by similar exercises of the same power. **Dissent:** In declaring a statute unconstitutional, courts should remember two things: 1) courts are concerned only with the power to enact statutes, not with their wisdom; and 2) the only check on the court is its own sense of self restraint. 4. **Distinction abandoned.** The distinction between conditional appropriations and appropriations requiring binding promises by the recipient, has been abandoned by the Court since Butler. This abandonment began with Steward Machine v Davis, upholding a provision of the Social Security Act which allowed employers to receive a credit against federal tax for any contribution to a state-enacted unemployment plan. Even though the credit was given only where the state passed meeting congressionally-defined requirements, the plan was held valid, in view of the need to combat unemployment, a federal problem. 5. **Can’t regulate for the general welfare.** The most important principle for which Butler stands today is that Congress has no power to regulate for the purpose of providing for the general welfare. Congress may spend for the general welfare, it may tax for the general welfare, but it may not regulate for the general welfare.

### THE WAR POWER AND FOREIGN AFFAIRS POWERS

1. **The War Power.** Congress is given the power to declare war, and to tax and spend for the national defense. Also, it is explicitly given the right to raise and support Armies and to provide and maintain a navy. All of these powers are given by Article I § 8. The President, by contrast, is made the Commander in Chief of the Armed Forces (Article II § 2). Thus Congress and the President in effect split the war powers.

2. **Federalism.** The war’s impact on federalism has principally arisen in a context of economic regulations promulgated during wartime. The right to promulgate such regulations as an adjunct to the war power was broadly construed by the Court in Woods.

3. **Woods v Cloyd W Miller Co.** Supreme Court, 1948. **Procedural Posture:** The case is here on a direct appeal from a judgment of the District Court holding unconstitutional Title II of the Housing and Rent Act of 1947. The District Court was of the view that the authority of Congress to regulate rents by virtue of the war power ended with the Presidential Proclamation terminating hostilities on December 31, 1946, since that proclamation inaugurated “peace-in-fact” though it did not mark termination of the war. It also concluded that, even if the war power continues, Congress did not act under it because it did not say so. **Holding:** The war power sustains the legislation. **Discussion:** The war power includes the power to remedy the evils which have arisen from its rise and progress and continues for the duration of that emergency. The war power does not necessarily end with the cessation of hostilities. The legislative history of the present Act makes abundantly clear that there has not yet been eliminated the deficit in
housing which in considerable measure was caused by the heavy demobilization of veterans and by the
cessation or reduction in residential construction during the period of hostilities due to the allocation of
building materials to military projects. Since the war effort contributed heavily to that deficit, Congress has
the power even after the cessation of hostilities to act to control the forces that a short supply of the needed
article created. They recognize the argument that the effects of war can be felt for years, and that if the war
power can be used in days of peace, it may not only swallow up all other powers of Congress but largely
obliterate the 9th and 10th Amendments as well. Here it is plain from the legislative history that Congress
was invoking its war power to cope with a current condition of which the war was a direct and immediate
cause. (Invoking the Necessary and Proper Clause).

4. **The treaty power.** Like the war power, the treaty power is divided between two branches of the federal
government. The President may make a treaty, but it must be ratified by two-thirds of the Senate. A
validly-ratified treaty is roughly equivalent to a federal statute. The power to ratify treaties is in effect an
enumerated legislative power, just like the specific power listed in Article I § 8. Thus even though a
subject area might not otherwise be within congressional control, if it falls within the scope of an otherwise
valid treaty, it will be valid as a necessary and proper means of exercising the treaty power. It will also be
binding on the states, under the Supremacy Clause.

5. **Missouri v Holland.** Supreme Court, 1920. **Facts:** This case is brought by the State of Missouri to
prevent a game warden of the United States from attempting to enforce the 1918 Migratory Bird Treaty Act
on the ground that the statute is an unconstitutional interference with the rights reserved to the States by the
Tenth Amendment. On December 8, 1916, a treaty between the United States and Great Britain was
proclaimed by the President. It recited that many species of birds in their annual migrations traversed
certain parts of the US and Canada, that they were of great value as a source of food and in destroying
insects, but were in danger of extinction due to lack of adequate protection. It therefore provided for
specified closed seasons and protection in other forms, and agreed that the two powers would take or
propose to their law making bodies the necessary measures for carrying the treaty out. The 1918 Act
specified closed seasons and protection in other forms, and agreed that the two powers would take or
propose to their law making bodies the necessary measures for carrying the treaty out. The 1918 Act
prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty
except as permitted by federal regulations. **Issue:** IS THE TREATY VALID? It is not enough to refer to
the 10th Amendment because by Article II, section 2, the power to make treaties is delegated expressly, and
by Article VI treaties made under the authority of the United States are declared the supreme law of the
land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, section 8
as a necessary and proper means to execute the powers of the Government. **Discussion:** It is said that a
treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making
power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the
powers reserved to the states, a treaty cannot do. The treaty in question does not contravene any
prohibitory words to be found in the Constitution; the only question is whether it is forbidden by some
invisible radiation from the general terms of the Tenth Amendment. We see nothing in the Constitution
that compels the Government to sit by while a food supply is cut off and the protectors of our forests and
our crops are destroyed. It is not sufficient to rely upon the States. Here a national interest is involved; and
it can be protected only by national action in concert with that of another power.

6. **But the treaty may not violate constitutional guarantees.** A treaty may not violate any distinct
constitutional prohibitions or guarantees.

7. Reid v Covert. Supreme Court, 1957. **Facts:** Mrs. Covert killed her husband, a sergeant in the US Air
Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing
on the base with her husband at the time. She was tried by a court-martial for murder under the Uniform
Code of Military Justice. The court-martial asserted jurisdiction over Mrs. Covert under Article 2(11) of
the UCMJ which provides that “all persons serving with, employed by, or accompanying the armed
forces…” Covert contended that she was insane at the time, but the military tribunal found her guilty of
murder and sentenced her to life. When Covert was being held, her counsel petitioned for habeas corpus on
the ground that the Constitution forbade her trial by military authorities. At the time of Covert’s offense,
an executive agreement was in effect between the US and Britain which permitted US’ military courts to
exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their
dependents. Though a court-martial does not give an accused trial by jury, the Government contends that it
provides for a military trial of dependents, and can be sustained as legislation which is necessary and
proper to carry out the US’ obligation under the international agreements made with those countries.
Discussion: The obvious and decisive answer to this is that no agreement with a foreign nation can confer power on the Congress, or on any branch of Government, which is free from the restraints of the Constitution. There is nothing within Article VI that indicates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. It would be contrary to those who created the Constitution to construe Article VI as permitting the US to exercise power under an international agreement without observing constitutional prohibitions. There is nothing in Missouri v Holand which is contrary to the position taken here. We conclude that the Constitution in its entirety applied to the trial of Covert. Since her court martial did not meet the requirements of Article III section 2 or the 5th and 6th Amendments we are compelled to determine if there is anything within the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas. The Court held that the Constitution did not authorize such military trial of dependents.

THE DORMANT COMMERCE CLAUSE

1. We turn now to limitations on state power embodied in the Constitution. Express limits. Some limitations on state action are explicitly set forth in the Constitution; for instance, Article I § 9 flatly prohibits any state from imposing an export duty. Implicated limits. With respect to most areas in which the Constitution gives the federal government authority, however, that document does not say anything about whether the states may exercise similar power in the area.

2. Negative implications of the Commerce Clause. The issue which has been posed over and over again in the so-called dormant commerce clause cases is: does the mere fact that the Constitution gives Congress the power to regulate interstate commerce prevent a state from taking a particular action which affects interstate commerce, assuming that Congress has not actually exercised its power in the subject area in question? In other words, the controversy in the dormant commerce clause cases focuses not on what Congress has done, but on what it might have done.

3. During the first third of this century, the Supreme Court construed the Tenth Amendment as giving the states a reserved power over “purely local” commerce. Although Congress controlled commerce among the states, it was precluded from violating the states’ reserved power. Following the switch of ’37, the distinction between local commerce and commerce among the states began to disappear. Under decisions like Wickard and Perez, the federal government assumed much broader authority over both interstate and local commerce. The Court began to treat the Tenth Amendment as a truism thereby depriving states of their reserved power over commerce. In the post-Switch era, the federal courts have faced quite different questions regarding the scope of state power. Most post-Switch cases involve “dormant” power situations – situations in which the federal government has the power to regulate a subject, but has not done so (or has done so incompletely). In these dormant power situations, is the federal commerce power exclusive so that the states are precluded from regulating an area within federal authority even in the absence of federal regulation? Or do the states have concurrent jurisdiction so that they are also free to regulate? The Constitution provides little guidance on these issues. Article I, section 8 explicitly gives Congress the power to regulate commerce among the several states, but does not say whether the states can also regulate commerce.

4. Early interpretations. From its earliest days, the Supreme Court has given great weight to the purposes behind the commerce clause: the creation and nurturing of a common market among the states, and the abolition of trade barriers. Therefore, under the Constitution, the power of the federal judiciary, interpreting the commerce clause, had to be used to prevent economic balkanization.

5. Congress’ silence. Also, the Supreme Court has always well recognized that the fact that Congress has not chosen to speak out in a particular area does not mean that it tacitly approves of state regulation of that area. Congress is simply too busy, with too many pressing matters on its legislative docket, for there to be any assurance that state regulations which burden or discriminate against interstate commerce will be overturned by congressional action. There, the Supreme Court has always been intensely conscious of its own obligation to keep the channels of interstate commerce free of state originated impediments.

6. Gibbons v Ogden 1824. The first Supreme Court case interpreting the meaning of congressional silence in a commerce clause context was Gibbons v Ogden. New York had granted an exclusive steamboat operating license which was ultimately owned by Ogden. Gibbons obtained a federal license to operate his vessel between NY and New Jersey, but was enjoined by the NY courts from sailing it in NY waters because of Ogden’s monopoly. Gibbons argued that the NY monopoly violated the federal commerce power. Holding: After giving a broad definition of commerce, Marshall went on to hold that the NY
monopoly was invalid because it conflicted with the federal commerce power. First, Gibbons’ counsel had argued that the federal commerce power was exclusive; that is, that the states had no right to take any action which affected interstate commerce. Marshall conceded that there was great force in this argument, and that he was not satisfied that it has been refuted. However, he avoided an explicit ruling on the argument, and assumed, without deciding, that the states could regulate commerce in a particular way if there was no actual conflict between the state regulation and an act of Congress. But then, Marshall found that there was indeed an actual conflict between NY’s action and a law of Congress; the federal licensing law, in Marshall’s view, conflicted with the NY monopoly, and the NY monopoly had to fall under the Supremacy Clause. Thus Marshall never made any dispositive holding in Gibbons about the effect of congressional silence on the States’ regulatory powers.

7. Plumley v Commonwealth 1894: This case reinforced the notion that states retained control over certain internal matters. Here, Plumley was convicted of violating Massachusetts’ law prohibiting the sale of adulterated oleomargarine. The Court held that Massachusetts law did not violate Congress’ commerce power: the statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. If there is any subject over which the states ought to have control, it is the protection of the people against fraud and deception in the sale of food products.

8. Rise of the local vs. national distinction: The regulation of commerce and police power labels were more conclusory than analytical; if the Court wished to uphold the regulation, it termed it a police power one. But in 1851, the Court embarked on a new way of looking at the dormant commerce clause problem, a view which continues to have great significance at present. Instead of focusing on whether the state was regulating commerce or using its police powers, the Court focused on whether the subject matter being regulated was local or national. In Cooley, the Court affirmed a Pennsylvania law which required ships entering or leaving the power of Philadelphia to hire a local pilot. The Court refused to hold either that Congress had an exclusive right regulate interstate commerce in areas where Congress had remained silent. Instead, some but not all state regulation affecting interstate commerce was permissible. The states were free, the Cooley Court held, to regulate those aspects of interstate commerce that were of such a local nature as to require different treatment from state to state. But the state could not regulate aspects of interstate commerce which, because of their nature, required a uniform national treatment. On the facts of the case, the Court found Pennsylvania’s regulation was permissible, because piloting in local harbors was a subject appropriate for local control (at least if that control did not conflict with an explicit congressional action). Aftermath of Cooley: There were at least two major shortcomings to the Cooley doctrine. First, it was not at all easy to distinguish between those subjects that required uniform national regulation, and those that needed diverse local regulation. Secondly, the Cooley test looked solely to the subject being regulated, and did not consider how extensively the states’ regulation impacted interstate commerce. Legacy of Cooley: But the basic policy behind Cooley has remained in effect; the dormant commerce clause blocks some but not all state regulations which affect interstate commerce, and the resolution of particular cases turns on, roughly speaking, a balancing between the state interest in regulating local affairs and the national interest in uniformity.

9. The modern approach. In recent years, the Court has shifted to a more complex series of tests. A state regulation which affects interstate commerce must meet each of the following requirements to be upheld: (1) the regulation must pursue a legitimate state end; (2) the regulation must be rationally related to that legitimate end; and (3) the regulatory burden imposed by the state on interstate commerce, and any discrimination against interstate commerce, must be outweighed by the state’s interest in enforcing the regulation.

   a. Meaning of legitimate state end. The Court has sharply distinguished between measures that are designed for promotion of health, safety, and welfare objectives, on the one hand, and those that are designed to further economic benefits, on the other. If the state is acting to further health, safety, or general welfare, the Court will likely hold that these objectives constitute legitimate ends. The Court is much more skeptical of a state regulatory scheme where the state’s objective is to promote the economic interests of its own residents.

   b. Rational means to an end. The Court has been fairly careful not to substitute its judgment for that of the legislature in determining whether the regulation is a good way of attaining the end. A mere rational relation between means and end is all that is required.

   c. Balancing Test. Once the first two tests have been met, the Court generally performs a rough
balancing test. Thus in the case of legislation that is non-discriminatory, the state regulation achieves a presumption of constitutionality. But this presumption can be overcome by a clear showing that the national interest in uniformity or in free commerce outweighs the state benefit. **Less restrictive alternatives.** The Court has sometimes considered the necessity of the means which the state has used to achieve this objective; if the objective could have been achieved by mean less burdensome to interstate commerce, the Court is likely to find that the national interest outweighs the state’s interest.

10. **Pike v Bruce Church.** Supreme Court, 1970. **Facts:** The Arizona Fruit and Vegetable Act requires that all cantaloupe grown in Arizona and offered for sale must be packed in regular compact arrangement in closed standard containers approved by the supervisor. P, who grew cantaloupes in both Arizona and California, had its Arizona cantaloupes packed at its plant in California. **Rule:** Where the statute regulates (1) even-handedly to (2) effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be (3) upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Sometimes, the court has use a balancing approach, but more frequently it has spoken in terms of direct and indirect effects and burdens. **Discussion:** The impetus for the Act at issue was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return reduced. Its purpose is simply to protect and enhance the reputation of growers within the State. These are legitimate state interests. The State’s tenuous interest in having the company’s cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and maintain an unneeded $200,000 packing plant in the State. The nature of that burden is more significant than its extent. **NOTES:** The state is concerned about the quality of fruits, and that there is no misrepresentation – and this leads to the statute. Is this a case where the good name of Arizona used by an inferior product? No, it is a case where the name of Arizona is not being used by a superior product. This case deals with proportionality criteria. The benefit to Arizona is not as great as the burden imposed. The Pike criteria have been well known since.

11. **Regulation of transportation.** When states have regulated the instrumentalities (generally railroads and highways), they have usually done so in the name of public safety objectives, rather than to benefit local economic interests. Therefore, the existence of a legitimate state objective is generally not in doubt, and the Court’s scrutiny of such measures has usually focused on rational relation between the means and the safety objective, and balancing to the state against burden on commerce.

   a. **Absence of discrimination as a factor.** The Court has been much more likely to find that a transportation regulation does not violate the dormant commerce clause where the evidence is that it is not discriminatory against interstate commerce, either in intent or in effect. That is, even though the measure may create burdens on interstate commerce, if similar burdens are created on intrastate activities, the Court is likely to take the position that in-state political processes supply a sufficient check against abuse.

   b. **South Carolina State Highway Dept. v Barnwell Bros.** Supreme Court, 1938.
   - **Facts:** Act No. 259 (STATE ACT) of the General Assembly of South Carolina, of April 28, 1933, prohibits use on the state highways of motor trucks and semi-trailer motor trucks whose width exceeds 90 inches, and whose weight exceeds 20,000 pounds. Ps include truckers and interstate shippers; the Interstate Commerce Commission; and certain others. The suit was brought in the district court against various state officials, to enjoin them from enforcing the Act, on the ground that they have been superceded by the **Federal Motor Carrier Act of 1935** (FEDERAL ACT), and that they impose an unconstitutional burden on interstate commerce. **Procedural History:** The district court ruled that the challenged provisions of the statute have not been superceded by the Federal Motor Carrier Act. It held that the weight and width prohibitions place an unlawful burden on interstate motor traffic passing over specified highways of the state. The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings that there is a large amount of motor truck
traffic passing interstate in the southeastern part of the US, which would normally pass over the highways of S.C., but which will be barred from the state by the challenged restrictions if enforced, and that these restrictions were unreasonable. It found that compliance with the weight and width limitations demanded by the S.C. Act would seriously impede motor truck traffic passing to and through the state, and that the highways constitute a connected system of highways which have been improved with the aid of federal money grants, as a part of a national system of highways; and that they constitute one of the best highway systems in the southeastern part of the US.

**Issue:** The question for decision is whether these prohibitions impose an unconstitutional burden upon interstate commerce?  

**Discussion:** While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. It has been recognized that there are matters of local concern (See Cooley), the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints. The present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The present regulations must be applied alike to interstate and intrastate traffic, and this serves as a safeguard against their abuse. A state may not, under the guise of regulation, discriminate against interstate commerce. So long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority. Congress may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state’s regulatory power. **In the absence of such legislation the judicial function, under the commerce clause, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.**

Here the first aspect has been met in the determination that a state may impose restrictions that are non-discriminatory as a safety measure and as a means of securing the economical use of the highways. Courts are not called upon to determine what the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. Being a legislative judgment it is presumed to be supported by facts known to the legislature. The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature.

**NOTES:** They say there’s no reason to second guess the state’s legislature and the general interest in safety in the state – they say you might have done that different, but that the court shouldn’t get involved in those decisions. It is enough that it’s not irrational. It is assumed here that there is no issue of discrimination – so this two pronged test applies. (1) Whether the state has acted within its province (safety is a state concern), and (2) and whether the means are reasonably related to the end sought. As to the second, deference is given to the state – and there is talk about the length the legislature went to in arriving at these standards. **NOTES:** But there are discriminatory effects (instate moving companies, for example). In the opinion, it says that the commerce clause prohibits discrimination, whatever form or method. If they are, under the guise of regulation, discriminating against interstate commerce, that is
not allowed. Here, there is no reason to think the state is covering up a discriminatory purpose with what looks like a regulatory scheme. (The post-war courts won’t care whether the states intended the discriminatory affect or not).

c. **Look for discrimination before doing balancing test.** A P attacking a transportation regulation on commerce clause grounds has a far greater chance of prevailing by showing discrimination against out-of-staters than by showing merely that the scheme’s burdens outweigh its benefits. The Court remains very quick to strike down any transportation regulation that seems to the Court to be motivated by discriminatory or protectionist impulses.

d. **Kassel v Consolidated Freightways Corp.** Supreme Court, 1981. **Issue:** Whether an Iowa statute that prohibits the use of certain large trucks within the state unconstitutionally burdens interstate commerce. **Facts:** D is one of the largest common carriers in the country. They mainly use two kinds of trucks. One is a three-axle tractor pulling a 40 feet two-axle trailer. This unit is 55 feet in length. These trucks have long been used on the nation’s highways. They also use a two-axle tractor pulling a single-axle trailer which pulls a single-axle dolly and a second single-axle trailer. This is 65 feet long. Many companies prefer to use doubles as they have larger capacities, and can be detached and routed separately. **Iowa’s Statute:** They restrict length of vehicles that may use its highways. Unlike all other West and Midwest states, Iowa prohibits use of the 65 foot doubles. Most are restricted to 55 feet. Some things are permitted to be 60 feet. Cities on the state line are allowed to adopt the ordinance of the adjoining state. **The Problem:** D cannot use its 65 foot doubles to move goods throughout the state. Instead, it must 1) use 55 foot trucks, 2) use 60 foot trucks, 3) detach the 65 footers and shuttle each separately, or 4) divert the 65 footers around Iowa. **Iowa’s Claim:** They claim this is a reasonable safety measure because the 65 footers are more dangerous than the 55 footers, and the law promotes safety and reduces road wear. **This Court:** A state’s power to regulate commerce is great in matters of local concern. **Regulations that deal with safety** are those that the Court is reluctant to invalidate. We conclude that the **Iowa law unconstitutionally** burdened interstate commerce. **Reasons:** The state failed to present any evidence that 65 footers are less safe than 55 footers. The law is not in synch with all other Midwestern and western states. Where the State’s safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, **the law cannot be upheld under the Commerce Clause.** Iowa did not prove the 65 footers were less safe, but D proved the law burdened interstate commerce. The law added $12.6 million each year to the costs of trucking companies. D suffered $2 million a year in increased costs. The Iowa law may actually increase danger as more trucks will be required. **Less deference to the** legislature is due where the local regulation bears disproportionately on out-of-state residents. May not have been motivated by safety: The exception to allow 60 foot farm vehicles was helpful to local interests. The border cities exception suggests that the statute was intended to discourage interstate truck traffic. **Concurrence:** Analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) the courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation, (2) the burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved, and (3) **protectionist legislation is unconstitutional even if the burdens and benefits are related to safety rather than economics.** The judicial task is to balance imposed on commerce against the local benefits sought, and must confine its analysis to the purposes of the lawmakers. It is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes. Iowa sought to discourage interstate truck traffic on Iowa’s highways, thus the safety advantages and disadvantages of the types and lengths of trucks involved in this case are irrelevant to the decision. **Dissent:** The analysis oversteps our limited authority to review state legislation under the commerce clause and intrudes upon the fundamental right of the states to pass laws. Many states regulate the length of the trucks. A consideration of the safety purpose in relation to the burden on commerce is required. The purpose of this consideration is to determine if the asserted safety justification, although rational, in merely a pretext for discrimination against interstate commerce. The question is whether Iowa acted rationally in regulating vehicle lengths and whether the safety benefits are more than slight. Striking down this statute would essentially be compelling Iowa to
yield to the policy choices of neighboring states. Only Congress can preempt the rational policy
determination of Iowa. NOTES: Powell’s balancing act finds no compelling state interest. How
do you rebut the presumption that the legislature knows best? There is no significant difference
between the two – and the statute significantly affects commerce. Brennan’s Opinion: He looks
to a previous statute that would have let 65 trucks go through the state. The Governor vetoes the
bill on the grounds that it would impede Iowa commerce. Note that in these dormant commerce
clause cases, justices are willing to talk about the legitimacy of the end. Which of the Pike
standards is not met according to Brennan? No legitimate end. If you are stuck with a case like
this, where do you want to go? Should you defer to the state or point to the bad motive? Bibb is
an extreme case in the sense that the cure is worse than the disease. Those aside, consider the
policy basis of Douglas and Black: minimal interference on the part of the judiciary on decisions
taken by the people. Why is Brennan deciding Kassell differently? He sees the bad motive.
Brennan believes a right was violated, and that as soon as you discriminate, that triggers a claim of
the right to freedom from discrimination – and then you are no longer talking about democratic
theory because today we hold that the issue of minority rights is not a decision to be made by the
majority.

e. **Cumulative and contradictory burdens.** A particular regulation, even though it may seem to be
non-discriminatory and non-burdensome when viewed in isolation, may be part of a
discriminatory or burdensome mass of regulations imposed by many states. This may occur either
because many states impose regulations that contradict each other, or even because many states
impose regulations that are not contradictory, but that become burdensome if compliance with all
is required. Such a set of multiple regulations is by nature discriminatory in effect against
interstate commerce, since only those enterprises that do business in many states will suffer from
this problem. The problem is especially likely to occur in the case of regulation of interstate
transport. **Actual conflict.** When an actual conflict between the regulations of two or more states
is shown, the Court is likely to strike down at least one of the conflicting rules, on the grounds that
the need for national uniformity outweighs the individual state’s interest in regulating its own
highways, railroads, etc.

f. **Southern Pacific Co v Arizona.** Supreme Court, 1945. **Facts:** The Arizona Train Limit Law of
1912 makes it unlawful for any person or corporation to operate within the state a railroad train of
more than fourteen passenger or seventy freight cars (STATE LAW). **Discussion:** It has been
accepted that the commerce clause, without the aid of Congressional legislation, thus affords some
protection from state legislation unfavorable to the national commerce, and that in such cases,
where Congress has not acted, this Court, and not the state legislature, is under the commerce
clause the final arbiter of the competing demands of state and national interests. There has been
left to the states wide scope for the regulation of matters of lack state concern, even though it in
some measure affects the commerce, provided it does not materially restrict the free flow of
commerce across state lines, or interfere with it in matters with respect to which uniformity
of regulation is of predominant national concern. **Rule:** The matters for ultimate
determination here are the nature and extent of the burden which the state regulation of interstate
trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative
weights of the state and national interests involved are such as to make inapplicable the rule,
generally observed, that the free flow of interstate commerce and its freedom from local restraints
in matters requiring uniformity or regulation are interests safeguarded by the commerce clause
from interstate interference. The evidence indicates that long trains (in violation of the Law) are
standard in the US, and that if the length of trains is to be regulated at all, national uniformity in
the regulation is practically indispensable to the operation of an efficient and economical national
railway system. The evidence leaves no doubt that the Arizona Train Limit Law imposes a serious
burden on the interstate commerce. The practical effect of such regulation is to control train
operations beyond the boundaries of the state exacting it because of the necessity of breaking up
and reassembling long trains. The practical necessity of such regulation must be prescribed by a
single body having a nationwide authority. The decisive question is whether in the circumstances
the total effect of the law as a safety measure in reducing accidents and casualties is so slight or
problematical as not to outweigh the national interest in keeping interstate commerce free from
interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey. As a whole, the Train Limit Law affords at most slight and dubious safety advantage over unregulated train lengths. Its undoubted effect on the commerce is itself a primary cause of preventing the free flow of commerce by delaying it and substantially increasing its cost and impairing its efficiency. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. **Dissent:** The determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. **Dissent:** My view is that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with law which Congress had enacted. NOTES: **Southern Pacific:** This statute limits the length of trains within state borders. The state brings an action against D to recover penalties for the operation of trains that exceed this limit. The state argues that the limits are imposed for safety reasons – to limit “slack action,” and the way to reduce this effect was to reduce the length limit. They countervailing consideration is that this limit would increase the number of trains which would lead to a greater quantity of traffic and a higher risk of accidents. We are told that the cure is worse than the disease by the expert witnesses. That leads Stone to abandon the Barnwell case (which gives virtually unlimited discretion to state legislatures). Note that here, we really are talking about the facts as presented in court, and no longer the legislature’s take on the facts. What this means is that you would need a record of facts for the trial court to draw on. Stone’s predicament was that it does not make sense to defer to the State in this case, because the evidence is overwhelmingly against them. He adopts a new tact and balances the competing interest. The balancing takes the form of listing the burdens on interstate commerce on one side (trains must be broken up, etc), and then on the other side, the cure appears worse than the disease. You wouldn’t get this using the Barnwell formula – you draw on the factual record as established at trial court. This is a classic example of balancing – burdens v. gains to the state. If there had been even a modest gain in safety accruing to the state – he probably would have favored the state. The policy that the Barnwell case uses is well entrenched. But here, where the cure is worse than the disease, that doesn’t make sense. Why don’t they follow Barnwell? The means are not reasonably related to the end. However, shouldn’t the court defer to the legislature? Here things get a bit sticky. Sometimes you must appeal to facts independent of what the legislature believed.

g. **Bibb v Navajo Freight Lines,** Supreme Court, 1959. **Issue:** Does an Illinois statute requiring the use of a certain type of rear fender mudguard on trucks and trailers operated on the highways of the state conflict with the Commerce Clause? **The Statute:** The specification for this type of mudguard provides that the guard shall contour the rear wheel, with the inside surface being relatively parallel to the top 90 degrees of the rear 180 degrees of the whole surface. The surface of the guard must extend downward to within 10 inches from the ground when the truck is loaded to its maximum legal capacity. The guards must be wide enough to cover the width of the protected tire, must be not more than 6 inches from the tire surface, and must have a lip on its outer edge of not less than 2 inches. **Procedural History:** Appellees, interstate motor carriers with certificates from the Interstate Commerce Commission, challenged the constitutionality of the Statute. The District Court found that the Statute unduly burdened Commerce, because it made the conventional mud flap, which is legal in 45 states, illegal in Illinois. Also, taken together with an Arkansas law requiring straight mud flaps, the use of the same motor vehicle in both states was impossible. State’s power to regulate highways: This is a broad and pervasive power. The Court has recognized the peculiarly local nature of this subject, and has upheld statutes despite their impact on interstate commerce. Therefore, these safety measures carry a strong presumption of validity. Judges cannot determine if there is a better way to solve the problem; this is left to the legislature. **RULE:** Unless the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it we must uphold the statute. **(Southern Pacific):** District Court’s findings: The mud flaps required under other state’s laws would not meet those required by Illinois. The cost of installing them is $30 per vehicle, and would cost appellees between $4,500 and $45,840 with substantial cost to maintain. **Illinois’ Argument:** They claim that contoured mudguards have a decided safety advantage in preventing
debris from being thrown into the faces of drivers or passing cars. The District Court found that the contoured mudguards had no advantage and even created additional hazards- the accumulation of heat in the brake drum, decreasing the effectiveness of the brakes, and increasing the chance of being hit. This Court: We are faced with the problem of whether one state could prescribe standards that would conflict with the standards of other states, making it necessary for an interstate carrier to shirt its cargo to differently designed vehicles. This is similar to Southern Pacific. It is also similar to Morgan v Virginia – where a law required reseating of bus passengers to comply with local segregation law. Vehicles equipped to meet the Arkansas standards would not meet the Illinois standards. From two to four hours of labor are required to install or remove a contoured mudguard. The mudguard requires welding so if the truck was carrying explosives, it would be dangerous. It also interferes with interline operations of motor carriers – which is particularly vital in the shipment of perishables. Over 60 percent of the business of the Ps is interline. Ps argument: They concluded that since the statute is a reasonable exercise of police power, a court is precluded from weighing the merits of the contour mudguard against any other kind. They rely mainly on Barnwell. However: Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow. This is a case where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce. A state which insists on a design out of line with the requirements of almost all the other states may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device – out of line with the requirements of the other States – may be so compelling that the innovating State need not be the one to give way. But the present showing – balanced against the clear burden on commerce – is too inconclusive to meet that test.

12. State barriers to incoming trade. Many cases have involved state regulations which, either intentionally or otherwise, place barriers upon the importing of goods into the state. As a general rule, the test to which these regulations will be subjected depends on the nature of the state interest being served.
   a. Protection of the economy: If the purpose of the regulation is to protect in-state producers from competing out-of-state commodities, or otherwise to strengthen the local economy, the Court will generally strike the measure, without even inquiring whether the benefit to the state outweighs the national interest in free commerce. This is viewed as an illegitimate aim.
   b. Health and Safety: If the state is in good faith pursuing health or safety objectives, then the Court will generally balance the benefit to the state against the burdens to interstate commerce. In conducting the test, the degree to which the regulation burdens, and the extent to which less burdensome alternatives are available will be considered.
   c. Baldwin v GAF Seelig, Inc. Supreme Court, 1935. (INCOMING COMMERCE)(CARDozo WRITING FOR THE COURT). The New York Milk Control Act: This act, with the aid of regulations made there under, has set up a system of minimum prices to be paid by dealers to producers. Residents of the Metropolitan milk district, comprising NYC, derive about 70% of their milk from NY farms. To keep competition down, the Act has a provision whereby the protective prices are applied to the 30% of the milk that comes from other states. There shall be no sale of milk bought outside the state made unless the price paid to the producers was one that would be lawful upon a like transaction within the state. Facts: Seelig buys its milk from the Creamery in Vermont at lower prices than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to conform to the NY statute and regulations in the sale of the imported product. The applicant declines to do this. What NY cannot do: NY cannot project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. NY asserts her power to outlaw milk so introduced by prohibiting its sale if the price that has been paid for it to the farmers of Vermont is less than would owe in like circumstances to farmers in New York. What the Court says: Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the milk. The distinctions between indirect and direct burdens are irrelevant when the avowed purpose of the obstruction is to suppress or mitigate competition between the states. Such an obstruction is direct by its very terms. If NY is able to guard against competition from other
states, then the door has been opened to rivalries that were meant to be averted by subjecting commerce between the states to the power of the nation. It is further argued: It is argued that the end served by the Act is more than the economic welfare of the farmers or of any other class. The end to be served is the maintenance of a regular supply of milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income – the economic motive is secondary. On that, the court is asked to uphold the Act as a valid use of its police power – though there is an incidental effect on commerce. But the Court says: This exception would eat up the rule. Economic welfare is always related to health. RULE: Neither the power to tax nor the police power may be used by the state with the aim of establishing an economic barrier against competition with the products of another state. NOTES: This analysis supplements Southern Pacific’s balancing test. When a state seeks to promote a valid health and safety interest, on a non-discriminatory basis, the Southern Pacific balancing test applies. But when a state discriminates against interstate commerce, its actions are presumptively invalid. The court’s decisions leave open the possibility that a state may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. Thus the Court imposes an obligation of showing that economic protectionism is not the objective. Cardozo says they want to prevent economic competition. They say this has the effect of imposing a customs duty. The state claims that the purpose of the statute is to make sure there is an adequate supply of milk. Was there a bad motive? Discrimination may pass muster when they obtain a legitimate end, and no less onerous alternatives exist. Apply this to Baldwin: legitimate end? Sure. No less onerous position? Maybe.

d. Welton v Missouri: This case involved a Missouri statute which required peddlers to have licenses except for peddlers who sold goods which were grown, produced, or manufactured in Missouri. The Court struck down the law as a discrimination against interstate commerce. The general power of a state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Constitution. RLW: Usually a state will articulate health and safety concerns. In cases like Baldwin, the Court can determine that those concerns only mask intent to discriminate. DEL: Inquiry into discriminatory purpose is treacherous. Legislators often support political policies for diverse reasons. DER: Legislative motive is irrelevant to dormant commerce clause cases. The question it whether the state regulation gives local businesses an unfair advantage over out of state competitors – regardless of the justifications of the legislators. Even regulations that are facially neutral may have this discriminatory effect. NOTES: This illustrates the less onerous requirement. They could have licensed all the goods.

e. Hunt v Washington State Apple Advertising Commission: This involved a NC statute which required apples sold, offered, or shipped into the state bear no grade other than the applicable US grade. The law was passed to eliminate confusion and deception caused by the fact that seven states had their own grading systems, and it was hard for consumers to know all the systems. The Commission challenged the law, and the court struck down the law. Effects of the law: The Court said that the law had the effect of discriminating against other apples. This raises the costs for D’s apples. It also removes the advantages Washington had in developing its own grading system. The statute has an effect which operates to give local producers an advantage. Alternative solution: The states do have an interest in decreasing deception but the current statute does little to further that goal. NC could achieve the same goal by permitting out-of-state growers to use state grades only if they also marked their shipments with the applicable USDA label. NOTES: we are told this was enacted to eliminate confusion to NC consumers. There is discrimination: are there less onerous alternatives? They say they could include both kinds of grades. It’s pretty clear they smelled a bad purpose but didn’t try to decide the case on those grounds. For one thing, the crates are not even in view of the consumer.

f. Edwards v California: This involved a California law which made it illegal to bring, or assist in bringing, an indigent person into the state with knowledge of indigency. The Court struck down the law. It is settled that the transportation of persons is commerce within the meaning of the
commerce clause. California asserts that it has had a huge problem with an influx of migrants. This does not mean that there are no boundaries to the permissible area of state legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.

g. **Healy v Beer Institute:** This involved a Connecticut law which required out-of-state shippers of beer to affirm that their posted prices for beer sold to Connecticut wholesalers were, at the moment of posting, no higher than the prices at which those products are sold in the bordering states of Massachusetts, NY, and RI. The Court struck down the law. If Connecticut is allowed to pass this law, then so is every other state. The short circuiting of normal pricing decisions based on local conditions would be carried to a national scale if a significant group of States enacted contemporaneous affirmation statutes. This kind of potential regional regulation of pricing is reserved to the Federal Government and cannot be achieved piecemeal by the individual states. Secondly, the statute discriminates against brewers and shippers of beer engaged in interstate commerce. **Dissent:** Connecticut has no local brewers. Its motive is to obtain prices for Connecticut retailers as low as those charged by the brewers in neighboring states. No evidence suggests this law would have an effect on the beer prices of the other states.

h. **Valid Health objective not sufficient.** The NY regulation in Baldwin was clearly designed to foster the purely economic interests on NY residents. The Court is at least somewhat more sympathetic where the state regulation of incoming goods, while it burdens interstate commerce, is in good faith designed to protect the safety or health of the residents. But even in the case of such safety or health regulations, the Court will either implicitly or explicitly perform a balancing test, weighing the state’s interest in its regulatory scheme against the national interest in unburdened free commerce. A crucial part of this balancing test is often whether there are less burdensome alternatives which the state might have adopted.

i. **Dean Milk v Madison.** Supreme Court, 1951. **The ordinance:** Two sections of a Madison, Wisconsin ordinance regulate the sale of milk and milk products within the city’s jurisdiction. One section makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Another section prohibits the sale of milk, importation, or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials. This section is attacked because it expressly relieves authorities from any duty to inspect farms beyond 25 miles from the center of the city. **Facts:** Appellant is an Illinois company that distributes milk in Illinois and Wisconsin. He contends that both the 5 mile limit and 25 mile limit violate the Commerce Clause. Madison has about 5,600 dairy farms with milk production in excess of 600,000,000 pounds a year and more than 10 times the needs of Madison. Milk from the county moves also to Chicago and other areas. At the time of the trial, the Madison milk shed was not of Grade A quality by the standards recommended by the US Public Health Service, and no milk labeled Grade A was distributed in Madison. **Discussion:** The area included in the ordinance encompasses nearly all of Dane County and includes nearly 500 farms that supply milk for Madison. Within the 5 mile area for pasteurization, are plants of 5 processors, only 3 of which are engaged in the general wholesale and retail trade in Madison. The farms and plants are inspected once every month. Appellant: He buys and gathers milk from about 950 farms in northern Illinois and southern Wisconsin, none being within 25 miles of Madison. Its pasteurization plants are about 65-85 miles away from Madison. Appellant was denied a license to sell its products within Madison solely because its pasteurization plants are located more than 5 miles away. Appellant’s milk is Grade A. **Discussion:** Congress has recognized the need for local regulation of milk. The avowed purpose of this enactment cannot be objected to. But this enactment, like that in Baldwin, in effect excludes from distribution in Madison milk produced in Illinois. Madison plainly discriminates against interstate commerce. It can’t do this, even in its power to protect health, if reasonable nondiscriminatory alternatives are available. **Did Madison meet this?** It appears that alternatives exist. Madison could the cost of inspection to the importing producers. The model provision, based on the Model Milk Ordinance, imposes no geographical
limitation on location of milk sources and plants but the milk must conform to standards as high as those enforced by the receiving city. In doing, the importing city obtains milk ratings based on uniform standards and established by health authorities. The Commissioner testified that Madison consumers would be adequately protected under the model provision. **Dissent:** Both state courts below found that the Act represented a good-faith attempt to safeguard public health. The fact that it imposes some burden of trade, does not mean that it discriminates against interstate commerce. The Court's proposal of charging inspection costs will likely lead to litigation over what is a proper charge. There is no evidence that the model provision is any better. This provision would require Madison to rely on spot checks.

**j. Breard v City of Alexandria:** a regional representative of Keystone Readers Service, a Pennsylvania corporation, was arrested while engaged in door-to-door solicitation for nationally known magazines in Alexandria, Louisiana. The arrest was based on his failure to obtain the prior consent of residence owners as required by statute. The Court upheld the law. When there is a reasonable basis for a legislature to protect the social welfare of a community, it is not for the Court to deny the exercise locally of the power of Louisiana. Their judgment of local needs is made from a more intimate knowledge of local concerns. We cannot say that the ordinance so burdens interstate commerce as to exceed to powers of that city. **Dissent:** I think it plain that a blanket prohibition discriminates against and unduly burdens interstate commerce in favoring local merchants. NOTES: Not discriminatory because it applied to all door-to-door salesmen. Paulson thinks the dissent is a bad argument. Breard might come out the other way today due to commercial speech under the First Amendment.

13. **Embargo of natural resources.** The most significant, and troublesome, of the barrier-to-outgoing trade cases are those in which a state attempts to prevent exportation of scarce natural resources, either to keep them from being used at all right now, or to restrict their use to in-state residents.

a. Courts give relatively strict scrutiny to measures which, whether by design or by accident, keep such scarce resources from moving interstate. This strict review is often imposed even where the state's interest is a valid conservation or ecological one, rather than a crude desire to keep economic benefits in-state.

b. **Less discriminatory alternatives.** A key feature of this stricter scrutiny is that the regulation will generally be upheld only if less discriminatory alternatives for achieving the state’s interest are unavailable.

c. **Hughes v Oklahoma.** Supreme Court, 1979. **Oklahoma Statute:** The statute provides that “no person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state.** **Facts:** P holds a Texas license to operate a commercial minnow business near Wichita Falls, Texas. He was convicted of violating the statute by transporting from Oklahoma to Wichita Falls a load of natural minnows purchased from a minnow dealer licensed to do business in Oklahoma. **THE STATUTE CANNOT SURVIVE THE COMMERCE CLAUSE ATTACK** **Reasons for the Commerce Clause:** One reason was to avoid the tendencies toward economic Balkanization. Geer v. Connecticut is overturned. **Geer v Connecticut:** This case sustained a CC action against a statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state. The conclusion rested from the view that the state had the power to control not only the taking of game but the ownership of game that had been lawfully reduced to possession. **This Case:** This case is on all fours with Greer. We now conclude that challenges under the CC to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule Geer. **And Now:** Was the burden imposed on interstate commerce in wild game permissible under the general rule articulated in our precedents governing other types of commerce. Under that general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect, (2) whether the statute serves a legitimate local purpose, and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden falls upon the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives. The act on its face discriminates against interstate commerce –
such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives. Oklahoma argues: They argue that the act serves the interest of conservation. The fiction of state ownership may no longer be used to force those outside the state to bear the full costs of conserving the wild animals within its borders when equally effective nondiscriminatory conservation measures are available. But: Oklahoma has chosen the most overtly discriminatory way. Dissent: States have an interest in preserving and regulating the exploitation of the fish and game within its borders for the benefits of its citizens. This power is not absolute – but they do not think that the act discriminates against out-of-state interests in favor of local interests. No person is allowed to export natural minnows for sale.

d. **Maine v Taylor.** Supreme Court, 1986. **Facts:** Appellee Taylor operates a bait business in Maine. **Maine Statute:** Despite a Maine statute prohibiting the importation of live baitfish, he had 158,000 live golden shiners delivered to him from outside the state. The shipment was intercepted, and he was found guilty of violating the statute. **Appellee’s claim:** Taylor claims the statute unconstitutionally burdens interstate commerce. **Since it discriminates:** Since it discriminates on its face against interstate trade, it should be subject to the strict requirements of **Hughes v Oklahoma.** Maine argues that those requirements were waived by the **Lacey Act.** It is well established that Congress may authorize the states to engage in regulation that the commerce clause would otherwise forbid (**Southern Pacific**). The court will exempt state statutes from the implied limitations of the Clause only when the Congressional direction to do so has been unmistakably clear. This does not apply. Only constitutional if: Only if it satisfies the requirements as applied under Hughes. The statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means. **This Court agrees with the District Court:** Three experts testified for the Ps and one for the D. The Ps’ experts testified that live baitfish imported into the state posed to threats: 1) Maine’s population of wild fish would be placed risk by three types of parasites common to out-of-state baitfish, 2) non-native species could disturb Maine’s aquatic ecology. They further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species. The D’s expert denied that any scientific justification supported Maine’s total ban on the importation of baitfish. He said the parasites posed no significant threat and that sampling techniques had not been developed because there was no need for them. **What the District Court determined:** First, that Maine had a legitimate purpose. Second, the court found that alternative means of achieving this end were unavailable. **Court of Appeals:** They found several factors that cast doubt on the legitimate purpose. Maine was the only state to ban this. Maine allowed importation of other types of fish. An aura of protectionism surrounded the statute. The parasites could be transported in by other fish. Aside from this, the court rested its invalidation on the fact that Maine had not demonstrated that any legitimate local purpose served could not be so served by other means. Here: The question of whether scientifically accepted techniques exist for the sampling in one of fact, and the District Court’s finding that such techniques have no been devised cannot be characterized as clearly erroneous. The possibility of developing acceptable testing methods does not make those procedures available nondiscriminatory alternatives. The states are not required to develop new and unproven means of protection at an uncertain cost. We agree that Maine has a legitimate interesting guarding against imperfectly understood environment risks. The principles underlying the commerce clause cannot be read as requiring the state to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts. The protectionist arguments don’t hold up: the legislative history does not indicate discriminatory intent. The fact that they allow importation of salmon means nothing. The fact that no other state does this means nothing. The findings indicate that this ban serves a legitimate local interest that could not be served by alternative means. **Dissent:** This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating state. Since the state engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure. If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. **NOTES:** Here, the waiver argument was not successful (Prudential Life, pg. 530). Maine argues that this
law has a legitimate local purpose. The opposition argues that Maine is the only state with such a ban. The court rejects this by saying that Maine has unique concerns. And although there are sampling techniques for other types of fish, Maine argues that the baitfish problem is unique because there are not comparable techniques yet. Also, there is no evidence of protectionist legislative intent in the legislative history. The Court of Appeals follows Hughes (that there are alternatives and they should be used). The Supreme Court opinion says that only the District Court is able to take the testimony and evidence; and that suggests that we should take all attempts to believe the District Court’s version. According to the dissent, once it’s been shown that the state statute is shown to be discriminatory, the burden is on the state to show that there are no less onerous alternatives. Why do we have such a unanimous court in a case where economic discrimination is so clear? Maine made out a prima facia case that there were no less onerous alternatives here; so that we have to live with this decision (at least until other methods are developed).

14. Environmental regulations. States’ attempts to control their environment have sometimes been attacked as violative of the commerce clause. As the result of a case on garbage disposal, it appears that the Court will now strictly scrutinize any discriminatory or protectionist state action, even if it was enacted in furtherance of environmental or other non-economic motives. Only if no less onerous alternatives are available will the Court uphold such a statute. In other words, a state may no longer maintain or improve its environment at the expense of its neighbors’ environmental or economic interests, unless no reasonable alternative is available.

15. Philadelphia v New Jersey. Supreme Court, 1978. New Jersey Statute: It prohibits the importation of most solid or liquid waste which originated or was collected outside the limits of the state. Issue: Does the statutory prohibition violate the Commerce Clause? Facts: The operators of private landfills in New Jersey and several cities in other states that had agreements with these operators for waste disposal were affected. For starters: States are not free from constitutional scrutiny when they restrict the movement of waste. Is the law protectionist, or is it a law directed to legitimate concerns? The stated purpose of the law is to the effect of environmental protection of New Jersey. At state court: The New Jersey Supreme Court accepted this statement as the legislature’s purpose, and the state courts found that the state’s existing landfills will be exhausted within a few years. Based on these facts, the state courts found that the law was designed to protect the state’s environment, and that its substantial benefits outweigh its slight burden on interstate commerce. Appellant’s argue: This is a bill cloaked in environmental protection garb, but is actually a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents. Appellee argue: They deny that finances motivated the bill. This Court thinks: The issue of legislative purpose need not be resolved. The evil of protectionism can reside in legislative means as well as legislative ends. It does not matter what the ultimate aim of the bill was. NJ has every right to protect its resident’s pocketbooks as well as their environment. And it may be assumed that NJ may pursue those ends by slowing the flow of all waste into the state’s landfills, even though commerce may incidentally be affected. But whatever NJ’s purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason to treat them differently. This law both on its face and in its plain effect violates this principle of nondiscrimination. These cases stand for the basic principle that a state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state. What is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. Quarantine laws: Certain quarantine laws have not been considered forbidden protectionist measures. This statute is not such a quarantine law. There has been no claim here that the movement of waste into or through NJ endangers health. Dissent: The Court recognizes that states can prohibit the importation of certain items. The fact that NJ must dispose of its own waste does not mean that it must serve as a depository for those of every other state. I see no way to distinguish solid waste from germ infested rags. NOTES: The legislature specifically points to out-of-state garbage as the problem. This statute, should it fly, suppresses competition, stabilizes the cost of garbage disposal, etc. Justice Stewart says that the legislative purpose is not relevant. Instead, we look to the discriminatory effects. What is Justice Stewart’s less onerous alternative? He suggests that if they really wanted to help the environment, they would slow the flow of all garbage. The court distinguishes this law from quarantine laws. But, there are very real discriminatory effects, and that fact is going to weigh very heavily in the equation.
16. **State as market participant.** All of the cases considered so far involved state action that was purely regulatory. But suppose the state acts as a market participant, spending money to run a proprietary enterprise, or to subsidize private businesses. Is the state barred from discriminating against interstate commerce, or unduly burdening it, as it would be if its actions were solely regulatory? Where the state acts as a market participant, dormant commerce clause analysis will not be applied, and the state may favor local citizens over out-of-state economic interests. NOTES: The doctrine is at best a legal fiction. The court proceeds as though the state were a private party; but maybe the courts have never made this analogy because it can’t be made. This may encourage the state to issue subsidies (which is not a problem constitutionally) – the way Brennan would resolve the Alaska case. So, there are alternatives to resolving the problems with out resorting to this legal fiction.

17. **Hughes v Alexandria Scrap Corp.** Supreme Court, 1976. **Issue:** Whether the commerce clause forecloses state purchases and subsidies that favor local products or industries over those from out-of-state. **Facts:** To rid Maryland of wrecked and abandoned cars, for each Maryland-title car reduced to scrap Maryland paid a $16 bounty to in-state and out-of-state processors, most of which they bought from unlicensed suppliers, for whose hulks the processors actively competed. For inoperable hulks at least eight years old, the law required no proof of ownership, but in 1974 Maryland amended its law to require out-of-state processors to secure from unlicensed suppliers more elaborate title documentation. This caused substantial reduction in the hulks from out-of-state processors. **Supreme Court:** They reversed, holding that the common thread in cases which the District Court relied on was the state interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because, since the 1974 amendment, Maryland effectively has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the state. **Issue of first impression:** The Court has never been asked to hold that the entry of the state itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the state restricts its trade to its own citizens or businesses within the state. Maryland entered the market for the purpose of protecting the state’s environment, commendable and legitimate. The effect is that hulks resting within the state will tend to be processed inside the state rather than flowing to foreign processors. But no trade barrier of the type forbidden by the commerce clause impedes their movement out of state. They remain within Maryland due to market forces. Nothing in the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others. **Justice Stevens added:** It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. The cases finding state regulation impermissible deal with adverse effects on the free market. This case is unique because the commerce which Maryland has burdened would not exist if Maryland had not decided to subsidize a portion of the scrap business. The Clause does not inhibit a state’s power to experiment with different methods of encouraging local industry. Whether that takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a burden on commerce. **Brennan Dissent:** A state’s refusal for purposes of economic protectionism to purchase for end use items produced elsewhere is a facial and obvious discrimination against interstate commerce.” The aim and effect of such act is establishing an economic barrier against competition with the products of another state. The Court’s decision stands in stark contrast to the repeated emphasis on the fact that a state may not promote its own economic advantages by curtailment or burdening of interstate commerce. The particular type of discrimination in this case is particularly suspect under precedent. He would hold that these statutes are invalid unless justified by asserted state interests in regulating matters of local concern for which reasonable nondiscriminatory alternatives are not available.

NOTES: **Alexandria Case:** In the 1974, an amendment required title documentation in order to get the bounty. The requirements differ with regards to in-state and out-of-state processors. If we just look at this case from a dormant commerce clause case, can the state exercising its police power, pay a bounty of scrap cars in the state, in order to achieve environmental objectives? Yes. Can the state, in achieving this objective, artificially enhance the prices, with an eye toward getting rid of the cars within the state? Yes. You could argue that this is necessary to solve the problem. Can the state restrict the payout of its bounties to in-state processors? No, that would be a form of economic discrimination with a less onerous alternative.
(paying in and out-of-state the same rate). Can the state relax the title requirements for in-state processors? No, that would be a form of economic discrimination. However, this isn’t a dormant commerce clause case. The District Court (which followed the dormant commerce clause) was overruled. The Court is saying that the state, as a market participant, can choose its customers as it wishes. There is no reason to think the state can’t subsidize in-state businesses, and, this subsidy isn’t going to reach out-of-state processors. The upshot is fine if we’re talking about a subsidy. Maryland is the body that provides the subsidy – would a private party have distributed scrap processors to rid the state of old cars? Probably not, so that is not in its capacity as a market participant.

18. Reeves, Inc. v Stake. Supreme Court, 1980. Issue: Whether, consistent with the Commerce Clause, the state of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents. Facts: In 1919, SD built a cement plant in response to recent regional cement shortages that interfered with and delayed both public and private enterprises. The plant soon produced more cement that SD could use. Between 1970 and 1977, some 40% of the plant’s output went outside the state. P is a concrete distributor in Wyoming. He purchased 95% of his cement from SD. In 1978, there was a cement shortage and SD reaffirmed its policy of supplying all SD customers first. P was hit hard by this development. He was forced to cut production by 76% in mid-July. Commerce Clause: There is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market. States have a role to protect its people. Evenhandedness suggests that, when acting as proprietors, states should similarly share existing freedoms from federal constraints. SD, as a seller of cement, fits the market participant label. Protectionism: SD’s refusal to sell to buyers other than SD’s is protectionist only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve. Moreover, cement is not a natural resource like coal, timber, wild game, or minerals. It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. SD has not limited access to the state’s limestone, nor has it limits the ability of private firms to set up plants within its borders. It is argued that this policy places SD suppliers at a competitive advantage. The competitive plight of out-of-state producers cannot be laid on the feet of SD. The very reason SD built the plant was because the free market had failed to supply the region its cement. Dissent: SD’s policy is economic protectionism of the kind the Commerce Clause sought to prevent. He cannot agree that the state can withhold its cement from interstate commerce in order to benefit private citizens and businesses within the state. By enforcing the Commerce Clause, SD could still reserve cement for public projects and share in whatever return the plant generated. NOTES: Reeves Case: SD is restricting sales of cement to its own residents during a shortage. Is SD a market participant such that it has discretion to do that? Though SD built the plant to serve in-state public works, eventually 40% of business was from out-of-state. Compare SD’s actions with the stance of a private cement supplier. What would they do in the same situation? They would probably honor contract commitments, and then first serve their best customers (This is not what SD did). Reeves did not have a long-term contract with SD. Blackman says that there is nothing in the Constitutional plan that would stand in the way of a state participating in the market. Private participants in the market have discretion to decide whom they are going to deal with. Therefore, if the state is a market participant, it has the same discretion. We don’t get the kind of help for the doctrine here that we would like. How does the court respond to the charge of protectionism? The court employs a reductio ad absurdum argument; but much characterizes the state as a state and not as a market participant.

19. New Energy of Indiana v. Limbach: An Ohio statute awarded a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a state that grants a similar tax advantage to ethanol produced in Ohio. Might the law have been upheld on a market participation theory? The Court refused that theory: The Ohio action is neither its purchase nor sale of ethanol, but its assessment and computation of taxes. That does not transform it into a form of state participation in the free market. Alexandria does not establish such a proposition. We think it is clear that Ohio’s assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser. NOTES: Scalia distinguishes Ohio’s activity. Here the act was primarily a tax issue, and that is a quintessential governmental activity. What if you argue that this is a subsidy? Scalia says no, this represents a governmental action.
20. **Natural resources and regulatory effects.** However, the fact that the state is in some senses a market participant will not immunize every sort of discriminatory rule the state has economic power to impose. For instance, where the state attempts to affect parties beyond those with whom it is contracting, the Court may conclude that the regulatory consequences of the state’s action outweigh its market participatory consequences, thus making the state conduct susceptible to traditional dormant commerce clause analysis. Similarly, if the state’s participation in the market concerns raw natural resources that the state has not already processed, the market participant doctrine is less likely to be applied than where the state has invested labor and capital in manufacturing a product (cement in Reeves).

21. **South Central Timber v Wunnicke.** Supreme Court, 1984. Alaska: They had a requirement that timber taken from state lands be processed within the state prior to export. Precedent: If a state is acting as a market participant, rather than as a market regulator, the dormant commerce clause places no limitation on its activities. In White v Mass Council, the Court sustained against a CC challenge an executive order of the Mayor of Boston that required all construction projects funded in whole or in part by city funds to be performed by a work force of at least 50% residents. The fact that the employees were working for the city was crucial to the market-participant analysis. Alaska contends that its requirement fits within the market-participant doctrine. Alaska participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing. If the state directly subsidized the timber-processing industry by such an amount, the purchaser would have the option of taking advantage of the subsidy by processing in the state or forgoing the benefits of the subsidy and exporting unprocessed timber. No such choice exists. Although the Reeves court did strongly endorse the right of a state to deal with whomever it chooses when it participates in the market, it did not purport to sanction the imposition of any terms that the state might desire. The Court expressly noted that CC scrutiny may well be more rigorous when a restraint on foreign commerce is alleged; that a natural resource like coal, timber, etc was not involved, but instead the cement was the end product; and that SD did not bar resale of SD cement to out-of-state purchasers. In this case, all three of these elements are present. The market participant doctrine allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. Alaska contends that it is participating in the processed timber market. P argues that although the state may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. The court agrees with this. Instead of merely choosing its own trading partners, the state is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. The state may not use the market participation doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant. Dissent: Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. The state court accomplishes that in any number of ways. It seems unduly formalistic to conclude that the one path chosen by the state as best suited to promote its concerns is the path forbidden by the CC. NOTES: Alaska is arguing that it is a market participant as a seller of timber, thus it is comparable to Maryland. The Court agrees that Alaska can participate as a seller of timber, but the Court objects. They say that are not just participating in the market, but are leveraging their influence to affect other markets (that Alaska is not participating in – or downstream) in the form of processing the timber. This marks a limit on the market participation – the effect cannot extend beyond the market in which the state is participating – if so, it is merely acting as a state and is subject to the limitations of the Commerce Clause.

22. **Congressional Action. Preemption and Consent.** The aspect of the commerce clause which we have been examining thus far in this chapter is its dormant aspect – its force as a negative implication where Congress has not acted. A different, but similar, set of problems is presented when Congress does exercise its power. To what extent does this exercise of valid congressional power restrict what the states may do?
   a. **Supremacy Clause.** In the case of a direct, obvious conflict between a federal and state statute, the resolution is clear: the state statute is simply invalid. The Supremacy Clause of Article IV provides that in case of a conflict, state law must yield to federal law. Federal law is said to have preempted state law.
   b. **Unclear cases.** But much more likely to arise is the situation where the federal and state actions involve similar or identical subject matter, but there is no clear cut conflict. In this situation, no
23. **Federal occupation of the field.** A federal state conflict (whether is statutory provisions or in purposes) is only one of two ways in which congressional action may render state action invalid. One way is for Congress to “occupy the field” for the federal government. If Congress has made such a decision to occupy the field (if is has preempted the entire subject area), state action in that area must fail no matter how well it agrees with the federal action and policies.

24. **Hines v Davidowitz.** Supreme Court, 1941. **Facts:** A Pennsylvania statute required aliens over 17 to register yearly; to provide specific information; to carry an alien identification card and to exhibit it in order to register a motor vehicle or obtain a driver’s license, and on demand of a police officer or agent of the state Department of Labor and Industry. Congress passed the 1940 Alien Registration Act, which required aliens over 13 to register only once, but did not require them to carry an identification card. The Act mandated secrecy of alien’s records. On appeal, the Supreme Court held that the 1940 Act precluded enforcement of the Pennsylvania statute. **Importance of protecting aliens:** Legal impositions of distinct, unusual and extraordinary burdens and obligations upon aliens – such as subjecting them alone, though perfectly law abiding, to indiscriminate and repeated interception and interrogation by public officials – bears an inseparable relationship to the welfare and tranquility of all the states. Laws imposing such burdens provoke questions in the field of international affairs. This is a matter which Congress must consider in discharging its constitutional duty “to establish a Uniform Rule of Naturalization. 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 the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with the federal laws. **Formula for constitutional exclusivity of federal government:** (1) Does Pennsylvania’s stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is of importance that this legislation is in a field which affects international relations – something of federal authority. Any concurrent state power that may exist is restricted to the narrowest of limits. **Congress has provided such laws before:** Congress has provided a comprehensive plan describing when aliens may enter the country, etc. The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering whether federal law precludes enforcement of state laws on the same subject. Opposition to federal bills (like the Pennsylvania one) was based on the fact that their requirements were contrary to the fundamental principles of our free government. Having the constitutional authority to do so, Congress has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. Under these circumstances, the Pennsylvania Act cannot be enforced. **Dissent:** Does not think Congress has set up an exclusive registration for aliens. Every act of Congress has occupied some field, but we must know the boundaries of that field before we can say that it has precluded a state from an exercise of any power reserved to it by the constitution. No words indicate that Congress intended to withdraw from the states any part of their constitutional power over aliens within their borders. NOTES: The Rice criteria are used in preemption cases. **The Rice criteria address this issue. There is a presumption is favor of continuing state regulation. The burden of proof is carried by those that would rebut that presumption. There are 3 situations:** (1) pervasiveness, (2) federal interest is dominant, (3) same purpose may be protected (then supremacy clause takes over). **As with the political question doctrine, it is a question of which criterion applies most conspicuously, most clearly, etc. There is no suggestion that you have to use all of them. The question arises: Is there language that underscores the first criteria (pervasiveness)? Yes, Congress has enacted a “complete” scheme. Stone says pervasiveness by itself does not decide this case (19 states have other rules). What was the deciding factor? They also talk about the federal interest in protecting this interest. We could also go to the 3rd Rice criteria as well. Rice criteria: uniformity, dominant federal purpose, and conflicting federal and state purposes. These are related criteria. You can use more than one.

25. **Pennsylvania v Nelson:** This involved the Pennsylvania Sedition Act which prohibited sedition against both Pennsylvania and the US government. D was charged with uttering sedition against the US. D challenged the act as contravening the Smith Act, a federal law which prohibited the knowing advocacy of the overthrow of Government by force and violence. The court struck down the law: Since Congress has
occupied the field, that the dominant interest of the federal government precludes state intervention, and that administration of state acts would conflict with the operation of the federal plan, we strike down the law. Dissent: Congress has not specifically barred the exercise of state power to punish the same acts under state law. The Smith Act is an exercise of federal police power, and carries no dominance over similar state powers as might be attributed to continuing federal regulations concerning foreign affairs or coinage.

26. **Askew v American Waterways Operators:** This involved Florida’s Oil Spill Prevention and Pollution Control Act, which imposed strict liability for any damage incurred by the state or private person as a result of an oil spill in the state’s territorial waters. Each owner or operator of a terminal facility or ship subject to the Act was required to establish evidence of financial responsibility by insurance or a surety bond. The act required the state’s department of natural resources to regulate containment gear which must be maintained for prevention. Prior to this act, Congress passed the Water Quality Improvement Act, which subject ship owners to liability without fault for cleanup costs incurred by the Federal Government as a result of oils spills. The court upheld the Florida law. The federal law is concerned only with actual cleanup costs incurred by the Federal Government; the state of Florida is concerned with its own cleanup costs. There need be no collision between the Federal Act and the Florida Act, because the federal act presupposes a coordinated effort with the states. Congress left the states free to impose liability damages.

27. **City of Burbank v Lockheed Air Terminal:** This involved a Burbank ordinance which made it unlawful for a so-called pure jet aircraft to take off from the Hollywood Burbank Airport between 11 pm of one day and 7 am the next day. The court concluded that the ordinance was preempted by the federal aviation act of 1958 and the noise control act of 1972. There is no express preemption in the 1972 act. It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption. Control of noise is deep seated within the police power of the states. Yet the pervasive control vested in EPA and in FAA under the 1972 act seems to us to leave no room for local curfews or other local controls. This area requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the FAA are to be fulfilled. **Dissent:** the legislative history demonstrates intent to allow local regulation. Even if not, that history surely does not reflect the clear and manifest purpose of Congress to prohibit the exercise of the historic police powers of the states.

28. **Actual conflict.** It may be impossible to obey the state and federal regulations simultaneously. Even if the federal and state regulations do not conflict upon their face, it may be that the objectives behind the two regulations are inconsistent. In this case too, the state regulation must fall.

29. **Pacific Gas and Electric v State Energy Resources.** Supreme Court, 1983. **Facts:** Atomic power has become a source of energy in American society. The federal government has relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the risks of the new technology. The federal regulatory structure has frequently been amended to optimize the partnership between federal and state authority. This case arises from the intersection of the federal governments’ efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity. California in 1974 established a moratorium on nuclear power plant certification until it was demonstrated that the technology existed for safe and effective disposal of high-level nuclear waste. This moratorium reflected a belief that viable disposal methodologies were essential to avoid potential plant shutdowns and consequent economic harm. **Issue:** Are provisions in the 1976 amendments to California’s Warren-Alquist Act, which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal of available for nuclear waste, preempted by the Atomic Energy Act of 1954? **Discussion:** It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Congress’ intent to supersede state law may be found from a “scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it,” because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Even where Congress has not entirely displaced state regulation in an area,
state law is preempted to the extent that it actually conflicts with federal law. Such conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Atomic Energy Act, despite its comprehensiveness, does not expressly require that states to construct or authorize nuclear power plants or prohibit the states from deciding not to permit the construction of any further reactors. As the court views the issue, Congress in passing the Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, costs, etc. Need for new power facilities are areas that have been normally governed by the states. When Congress legislates in a field which the states have traditionally occupied, we start with an assumption that the historic police power of the states was not to be superseded unless it was the clear and manifest purpose of Congress. The Atomic Energy Commission was not given authority over the generation of electricity itself or over the economic question whether a particular plant should be built. The Congress has preserved the dual regulation of nuclear-powered electricity generation: the federal government maintains complete control of the safety and nuclear aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity. The federal government has occupied the entire field of nuclear safety concerns, except the limited power expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. A state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC. A state prohibition on nuclear construction for safety reasons would also be within the Atomic Energy Act’s objective to ensure that nuclear technology is safe enough for widespread use – and would be preempted for that reason. The Court determined that without a permanent means of disposal, the nuclear waste problem could become critical leading to unpredictably high costs to contain the problem, or even shutdowns of reactors. We accept California’s avowed economic purpose as the rationale for enacting sec. 25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation. It is contended that sec. 25524.2 conflicts with federal regulation of nuclear waste disposal, with the NRC’s decision that it is permissible to continue to license reactors, notwithstanding uncertainty surrounding the waste disposal problem, and with Congress’ recent passage of legislation directed at the problem. NRC indicates only that it is safe to proceed with such plants, not that it is economically wise to do so. Compliance with the NRC order and 25524.2 are possible. It is strongly contended that 25524.2 frustrates the Atomic Energy Act’s purpose to develop the commercial use of nuclear power. It is well established that state law is preempted if it stands as an obstacle to the accomplishment of the full purpose and objectives of Congress. However, the promotion of nuclear power is not to be accomplished at all costs. NOTES: In the California case, isn’t the State pretty clearly regulating with an eye to safety in sec. 25524.2 of the 1976 law? Yet the Court looks for, and finds, a non-safety rationale. Informal collaboration, here, between the Court and the State of California at Pacific Gas and Electric’s expense? NOTES: Is there a general presumption in favor of federal law or continuing state regulation until the contrary is shown? Start with a presumption in favor of state law: we don’t have a lengthy codified federal law, etc., so it is reasonable to presume that the state regulation is good law. In this case, California has a moratorium on the certification of new power plants until the technology is developed for safe and effective disposal. If there is an exclusive federal power vis a vis safety issues, what is the state’s responsibility? The case indicates that the states retain the power over economic concerns. The court seems to be saying that safety concerns on the part of the state have economic effects, and if we look to the economic effects, then the state retains this power. There is a bit of haggling that nevertheless upholds the state’s statute. The court is almost “bending over backwards” for California. In the end the court looks for, and finds, an economic rationale. The court may be exaggerating when it talks about California’s “avowed economic” purpose. What about the argument that the state regulation is ruled out by Rice criterion 3?

30. Ray v Atlantic Richfield Co. Supreme Court, 1978. Conflicting Laws: The PWSA Act of 1972 controls navigation in Puget Sound. The PWSA also subjects to federal rule the design and operating characteristics of oil tankers. The Tanker Law of Washington of 1975 was adopted with the aim of regulating the design, size, and movement of oil tankers in Puget Sound. The District Court held that under the Supremacy
Clause, the Tanker Law could not coexist with the PWSA and was totally invalid. **Facts:** ARCO operates an oil refinery in the northern part of the Sound. There were 105 tanker deliveries of crude oil to that refinery from 1972 to 1975, 95 of which were in excess of 40,000 deadweight tons, and 15 were in excess of 125,000 deadweight tons. Seatrain owns or charters 12 tankers, of which four exceed 125,000 deadweight tons. It has also recently constructed four tankers of 225,000 ton capacity. On the day the Tanker law became effective, ARCO brought suit in District Court, Seatrain later joined as a P. The complaint alleged that the statute was pre-empted by federal law. **Discussion:** Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. The Tanker Law requires both enrolled and registered oil tankers of at least 50,000 tons to take on a pilot licensed by the State of Washington while navigating Puget Sound. The Court agrees that this is in direct conflict with 46 USC 215, 364. Section 364 provides that every vessel should be under control of a pilot licensed by the Coast Guard. Section 215 adds that no state shall impose upon pilots any obligation to procure a state license. The Court has held that these tow statutes read together give the federal government exclusive authority to regulate pilots on enrolled vessels and that they preclude a state from imposing its own pilotage requirements. Thus, to the extent that the Tanker Law requires enrolled tankers to take on state-licensed pilots, this is in direct conflict with federal law and therefore invalid. Just as it is clear that state may not regulate the pilots of enrolled vessels, it is also clear that they are free to impose pilotage requirements on registered vessels entering and leaving their ports. Accordingly, the state was free to require registered tankers in excess of 50,000 tons to take on state-licensed pilots upon entering Puget Sound. **Next aspect:** Section 88.16 of the Tanker Law requires enrolled and registered oil tankers of 40,000 to 125,000 tons to possess a series of required standard safety features. The section has a proviso stating that if the tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, the design requirements is not applicable. We hold that the foregoing design requirements, standing alone, are invalid in the light of the PWSA and its regulatory implementation. The statutory pattern of PWSA’s Title II shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe. This indicates that Congress intended uniform national standards for design and construction of tankers. The mere fact that a vessel has been inspected and found to comply with the Secretary’s vessel safety regulations does not prevent a state from enforcing local laws having other purposes, such as a local smoke abatement law. Title II aims at insuring vessel safety and protecting the marine environment. The federal scheme thus aims directly at the same ends as does the Washington Law. The supremacy clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. **Frustration:** Enforcement of the state requirements would frustrate what seems to be the congressional intention to establish a uniform federal regime controlling the design of oil tankers. Title II leaves no room for the states to impose different or stricter design requirements than those which Congress has enacted. A state law in this area would frustrate the congressional desire of achieving uniform, international standards. **Other state laws:** That a tanker is certified under federal law as safe insofar as its design and construction are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications. Registered vessels, as we have noted, must observe Washington’s pilotage requirement. Both enrolled and registered vessels must also comply with the provision of the Tanker Law that requires tug escorts for tankers over 40,000 tons that do not satisfy that design specifications of 88.16.190. The other provision of the Tanker Law: The other section excludes from Puget Sound any tanker in excess of 125,000 tons. This provision is invalid in light of Title I and the Secretary’s actions taken thereunder. The Secretary has the authority to establish vessel size and speed limitations. **Challenge to the state’s tug requirement:** Appellees contend that this provision, even if not preempted by the PWSA, violates the Commerce Clause because it is an indirect attempt to regulate the design and equipment of tankers. This is not the type of regulation that demands a uniform national rule. Nor does it appear that the requirement impedes the free and efficient flow of interstate commerce. **Concurrence in part/Dissent in part:** I agree that the pilotage requirement is preempted only with respect to enrolled vessels. I also agree that the tug escort requirement is fully valid. However, I see no need to speculate on the validity of the safety features alternative to the tug requirement. I also cannot agree that the size limitation contained in the Tanker Law is invalid under the Supremacy Clause. Title I does not by its own force preempt all state regulation of vessel size, since it merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title. I would hold that Washington’s size regulation does not violate the commerce clause. **Concurrence in part/Dissent in part:** The standard
safety features requirement of the Washington Law is invalid. The Court inconsistently allows the state to impose a costly tug escort requirement on these vessels. The imposition of any special restriction impairs the congressional determination to provide uniform standards for vessel design and construction. The tug escort requirement is an inseparable appendage to the invalid design requirements; the invalidity of one necessarily infects the other. NOTES: The Court held invalid the state safety features required by sec. 88.16.190(2) of the Tanker Law when they stand alone (Supp. 23, 398), but the Court then went on, so to speak, to disjoin these requirements to a tug escort requirement (i.e. set out the respective requirements as alternatives). Doesn’t this mean that the Washington State provisions stand after all (since expensive tug escort is required when they’re not met)?

1. **The Privileges and Immunities Clause.** Note: In any case in which out-of-state citizens are discriminated against by the state acting as a market participant, the statute may be vulnerable to an attack based on the Privileges and Immunities Clause of Article IV. The Court has held that there is no market participant exception to the Privileges and Immunities Clause. It provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” This clause prevents states from discriminating against out-of-staters.

2. **Test for P&I violation.** Even where a state does discriminate against out-of-staters, it is relatively hard for the out-of-staters to establish a violation. **Only fundamental rights covered.** First, only rights that are fundamental to national unity are covered. The rights that meet this fundamental to national unity standard are all related to commerce. Example: The right to be employed, the right to practice one’s profession, and the right to engage in business are all fundamental, and are therefore protected.

   a. **Corfield v Coryell.** This case shows the old statement on the meaning of privileges and immunities. Washington sets out fundamental rights protected under the clause. Paulson says that was not what the Framers meant; rather, they meant to introduce an equality provision to keep the state from treating nonresidents worse than residents. But Reconstruction congressmen drew on this for understanding of second privileges and immunities clause in the 14th amendment. Now look for an interest sufficiently fundamental to the promotion of interstate harmony: discrimination of constitutional rights, or discrimination of important economic activities. NOTED: Corfield: Can the out-of-state resident as a constitutional matter gather clams from NJ waters? The Justice offers a mini-treatise on Article IV. You might ask: what are the privileges and immunities? He lists several, but also sustains the NJ statute on the ground that gathering oysters and clams does not count as a fundamental right. This is a peculiar result because the out-of-state citizen was trying to earn a living. There is a lot of authority that this Justice was almost certainly wrong in his reading of the Privileges and Immunities Clause: The Framers named this Clause as an immunities provision – to keep states from treating outsiders differently. A command reading of this clause: this clause was to bring the outsider up to the level of treatment of the insider. There’s nothing substantive there – it’s just that whatever treatment the insider enjoys, is to be enjoyed by the outsider. That is what the Framers had in mind. The Reconstruction Congressmen drew on Corfield in drafting the Fourteenth Amendment. There, this Justice’s explanation makes more sense. A command reading of the Fourteenth Amendment’s Equal Protection Clause is intended to bring the minority up to the level of the majority. It makes good sense to instead read the Fourteenth Amendment as guaranteeing specific rights (as in Corfield), to avoid repetition. So we have in short, an entitlement interpretation of the Fourteenth Amendment, distinguishing it from the command reading of Article IV. HOWEVER, nothing like this has been followed by the courts. The only thing you can really rely on is that Article IV relates to employment.

   b. **Hicklin v Orbeck.** Supreme Court, 1978. **Facts:** In 1972, supposedly for the purpose of reducing unemployment in the state, the Alaska legislature passed an act under which it is required that all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party contain a provision requiring the employment of qualified Alaska residents in preference to nonresidents. This is administered by issuing certificates of residence to be presented to employers covered by the act. Ps wanted these jobs but could not get the certificates. **Issue:** Does this act fail under the privileges and immunities clause? **Discussion:** Even where the presence of activity of nonresidents causes or exacerbates the problem the state seeks to remedy,
there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the discrimination placed upon them. Alaska’s act cannot withstand scrutiny. No showing was made on this record that nonresidents were a peculiar source of the evil. The record shows that instead it was the lack of education, remoteness of location, or no job training by residents that kept them from getting jobs. Nonresidents only threatened Alaska with respect to those jobs for which untrained residents were being prepared. Even if nonresidents were a source of evil, the act still fails. The discrimination does not bear a substantial relationship to the particular evil they are said to present. It grants all Alaskans a flat employment preference. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska’s act with it across-the-board grant of job preference to all residents is not. The only restriction on the act is that the employment that generates the employment must take place inside the state. This merely prevents the act from requiring out-of-state employers to discriminate against residents of their own state. Alaska’s ownership of the oil and gas that is the subject matter of the act constitutes insufficient justification for the pervasive discrimination against nonresidents.

c. Recreational use. Conversely, non-economic rights are generally not fundamental rights to national unity, and thus not protected by the P&I clause. Baldwin v Fish and Game Commission of Montana. Supreme Court, 1978. Issue: This case presents issues under the Privileges and Immunities Clause of the Constitution’s Article IV section 2 and the Equal Protection Clause of the Fourteenth Amendment, as to the constitutional validity of disparities, as between residents and non-residents, in a State’s hunting license system. Facts: Baldwin (P) is a Montana resident. He also holds a license as a state hunting guide. Most of his customers are non-residents who come to the state to hunt big game. Ps Carlson, Huseby, Lee and Moris are residents of Minnesota. They hunt big game in Montana. For the 1975 hunting season, a resident could purchase a license for $4. The nonresident, however, in order to hunt elk, was required to purchase a combination license at a cost of $151; this entitled him to take two deer and one elk. For 1976, a resident could buy the license for elk for $9. The combination license for nonresidents was $225; this gave him one elk, one deer, one black beer, and game birds, and to fish with hook and line. A resident did not have to, but could, but the combination license for $30. Montana has large amounts of big game. It has one of the largest amounts of elk in the US. From 1960-1970 licenses issued by Montana increased by about 67% for residents and 530% for nonresidents. Due to a successful management program for elk, the state has not been compelled to limit the number of hunters. Elk are not hunted commercially in Montana. Nonresidents seek the animal for its trophy value; whereas residents may more often be interested in the meat. Elk management is expensive. Privileges and Immunities Clause: Ps urge that the licensing scheme violates the privileges and immunities clause. Usually, the clause has been interpreted to prevent a state from imposing unreasonable burdens on citizens of other states in their pursuit of common callings within the state. Is has not been suggested that citizenship may never be used to distinguish among persons (voting). Only with respect to those privileges and immunities bearing upon the vitality of the nation as a single entity must the state treat all citizens equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting. A state’s interest in wildlife: Many early cases embrace the concept that the states had complete ownership over wildlife within their boundaries, and, as well, the power to preserve this bounty for their citizens alone. In Corfield, the Court said that in regulating the use of the common property of the citizens of a state, the legislature in not bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. Though, in most respects, they had to treat all those on their land the same, they were not obligated to share those things they held in trust for their own people. Recently, the Court has recognized the states’ interest in regulating and controlling those things they claim to “own,” including wildlife, is by no means absolute. States may not hoard their resources when doing so impedes interstate commerce. Nor does a state’s control over its resources preclude the proper exercise of federal power. And a state’s interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident’s right to pursue a livelihood in a state other than their own. Does the licensing violate a right that offends the privileges and immunities clause: Elk hunting by nonresidents is a recreation. The elk supply, which has been entrusted to the care of the state by the people of Montana, is finite and must be carefully tended in order to be preserved. Ps’ interest
does not fall within the Privileges and Immunities clause. Equality here is not basic to the
maintenance or well-being of the Union. Ps are not deprived of a means of a livelihood by the
system or of access to any part of the state to which they seek to travel. Dissent: An inquiry into
whether a given right is fundamental has no place in our analysis of whether a state’s
discrimination against nonresidents violates the clause. Our primary concern is the state’s
justification of the discrimination. A state’s discrimination against nonresidents is permissible
when (1) the presence or activity of nonresidents is the source or cause of the problem with
which the state seeks to deal, and (2) the discrimination practiced bears a substantial relation to
the problem they present. Under this analysis, the licensing plan must fall. There is nothing in
the record to indicate that the influx of nonresident hunters created a special danger to
Montana’s elk. Secondly, Montana makes no effort to inhibit its own residents from hunting.
Another possible justification is cost justification. They claim the pricing is an attempt to shift
the cost of their conservation efforts onto nonresidents. This fails under the second prong of
the analysis. NOTES: Brennan’s analysis is close to the strict scrutiny standard. Can you
reconcile this analysis with the holding in Baldwin? Brennan’s analysis: there’s a problem out
there, and the nonresident is the source; the economically discriminatory measure bears on the
problem (Toomer – must be proportionate to the problem). How does the strict scrutiny test
relate? There’s an interest in a problem; and there is a no less onerous alternative available. Can
you endorse the holding and Brennan’s analysis? Yes. Limit Brennan’s analysis to the
employment context. Then it doesn’t apply.

3. Two-part test. Once the Court concludes that a fundamental right is at stake, then the Court applies a two-
part test to determine whether the discrimination against non-residents is acceptable. The P (who is
attacking the discrimination) will win if either of the following is shown:
   a. Peculiar source of evil: First, the discrimination will violate the P&I clause unless non-residents
   are a peculiar source of evil which the law was enacted to remedy. Example: In Hicklin, Alaska
   argued that it employment preference for residents was a reasonable response to high
   unemployment rates. But the Court held that the state did not show that the non-residents were a
   peculiar source of evil, because much of the problem came from the fact that too many residents
   were untrained.
   b. Substantial relationship test. Second, the P will win if the discrimination against non-residents
   does not bear a substantial relationship to the problem it is attempting to solve. Example: In
   Hicklin, this prong was not satisfied either – a blanket preference for all qualified residents over
   non-residents was not sufficiently closely tailored to the unemployment problem.
   c. Toomer v Witsell: This involved a SC law which regulated commercial shrimp fishing in the
   three-mile maritime belt off the coast of that state. The law imposed a $2,500 per boat fee on non-
   residents while imposing a $25 fee on residents. Georgia shrimpers challenged the law as a
   violation of the privileges and immunities clause. The Court struck down the law. The Ds
   mentioned the techniques, size of their boats, and greater cost of enforcing laws against
   nonresidents. The state’s shrimp conservation requires funds beyond the licenses, to which
   residents contributed. Nothing in the record indicates that non-residents use larger boats or
different methods than residents, that the cost is greater, or that any amount of state funds in
   contributed to shrimp conservation. Even so, they would not justify a remedy so drastic as to be
equivalent to exclusion. The state could restrict the type of equipment used in its fisheries, to
   graduate license fees according to the size of the boat, or merely charge a differential that would
   only make up for any added enforcement burden or conservation costs. There is no reasonable
   relationship between the danger represented by non-citizens and the severe discrimination placed
   upon them.
   d. Supreme Court of New Hampshire v. Piper: This involved a NH Supreme Court rule which
   limited membership in the NH bar to state residents. P, who lived in Vermont, about 400 yards
   from the NH border, applied for the NH bar exam. She was told she would have to establish a
   home address in NH before she could become a member. The Court struck down the rule. There
   is nothing that suggests the practice of law should not be a privilege under Article IV. In addition
to being good for the national economy, out-of-state lawyers may sometimes provide the only
means available for the vindication of federal rights. There is no reason for NH to bar
nonresidents. No evidence suggests nonresidents are less likely to keep abreast of current rules.
There is no reason to believe a nonresident lawyer will conduct his practice in a dishonest manner. There is some merit that a nonresident lawyer would sometimes be unavailable for court proceedings. One may assume those who take the NH bar would live in places close to NH. Even so, less restrictive means of protection exist. A lawyer far away can use a local attorney for unscheduled meetings and hearings. Finally, it is fair to assume that any non-resident member of the bar will partake in their share of pro bono activities. D does not advance a substantial reason for its discrimination against nonresidents, not shows that their practice bears a close relationship to their objectives.

e. **United Building v City of Camden:** This involved a Camden ordinance which required at least 40% of the employees of contractors and subcontractors working on city construction projects to be Camden residents. The Court held that the clause applied to cities but did not prohibit the law. D claims that this ordinance is necessary to counteract grave economic and social ills. Unemployment, a decline in population, and a reduction in the number of businesses in the city have eroded property values. This ordinance is designed to increase the number of employed persons in the city. Nonresident workers, they claim, represent a source of evil. They claim the ordinance is tailored to not place unreasonable discrimination upon nonresidents, as they still have access to 60% of the available jobs. **Dissent:** Clause is not meant to apply to cities.

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**INTERGOVERNMENTAL IMMUNITY**

1. **The 10th amendment as a limit on Congress’ power.** For nearly 40 years following the Carter Coal decision, the Court did not invalidate a single statute on the grounds that it violated state or local governmental sovereignty. This sustained stretch led most observers to conclude that the 10th amendment was completely dead as an independent check upon the federal power under the commerce clause.

2. **Once again relevant.** It does indeed seem to be the case that the 10th amendment places relatively few practical limitations upon the exercise of federal power under the commerce clause. However, from 1976-1985, the Court treated the 10th amendment as imposing an important limit on federal power – this amendment was held to bar the federal government from doing anything that would impair the state’s ability to perform their “traditional functions.” Then, in 1985, the line of cases establishing this limit was flatly overruled by the Court. Some understanding of the prior line of cases in needed.

3. **National League of Cities v Usery.** Supreme Court, 1976. **The Fair Labor Standards Act:** 40 years ago Congress passed the Fair Labor Standards Act, requiring employers to pay workers a minimum wage and pay them time and a half. They were also required to keep certain records, and comply with child labor rules. The Court has upheld this Act as a valid exercise of Congressional authority under the commerce power. The original Act excluded States from coverage. In 1974, Congress extended the coverage to almost all public employees. **Appellants:** They include various cities and states, the National League of cities. They challenged the validity of the 1974 amendments asserting that Congress, by applying this Act across the board, infringed a constitutional prohibition running in favor of the states as states. They argued that the established constitutional doctrine of *intergovernmental immunity* prevented the exercise of this authority in the manner which Congress chose in 1974. **The 1961, 1966, and 1971 Amendments:** In 1961, Congress started expanding the Act to cover some public employees. In 1966, the Act was extended to employees of state hospitals, institutions, and schools. The Court sustained the validity of these two amendments in Maryland v. Wirtz. In 1974, Congress extended the Act to include a “public agency.” This included the government of a state of political subdivision. Congress has therefore entirely removed the exemption previously afforded states and their political subdivisions – giving the exemption only to persons holding public elective office. **Commerce Clause:** This grants Congress a plenary authority. When considering the validity of “asserted” applications of the Commerce Clause to wholly private activity, the Court has clearly stated “even activity that is purely intrastate may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states.” Congressional power is limited only by the requirement that the means chosen must be reasonably adapted to the end permitted by the Constitution. **Appellant’s Contention:** They argue that it seeks to regulate directly the activities of states as public employers, and that this transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations in the Constitution. For example, Congressional enactments that may be fully within the authority under the commerce clause may be nonetheless invalid if found to offend against the right to trial by jury contained...
in the 6th Amendment, or the Due Process Clause of the 5th Amendment (Paulson thinks this sucks). The claim that the 1974 amendment, while within the scope of the commerce power, are barred because they are to be applied directly to the states and subdivisions of the states as employers. This Court recognizes limits: This Court recognizes the limits on the power of Congress to override state sovereignty; even when they are otherwise valid under its plenary powers (tax, commerce). The Tenth Amendment expressly states that Congress may not exercise power in a fashion that impairs that states’ integrity or ability to function effectively. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the states. The Court has repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by congress. In Coyle v Oklahoma, the Court gave an example: The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. One undoubted attribute of state sovereignty is the state’s power to set the wages for its employees, as well as their hours. The Issue: Are these determinations functions essential to separate and independent existence, so that Congress may not abrogate the state’s otherwise plenary power to make them? These allegations show a significant impact on the functioning of the governmental bodies involved. Increased Costs: One P estimated that the increase in costs for just police and fire would be nearly $1,000,000 a year. Others had higher figures. California claimed to have to cut down police training so as to avoid paying them overtime. One city had to discontinue a classroom police program. Displaces state policies: The Act would forbid such choices by the states (to hire college kids for less, for example). They are forced to either increase revenue, or decrease available positions. The overtime requirements: Congress intended this to limit hours, and to spread work over more people. This directly penalizes the state for hiring employees on terms different from those which Congress has sought to impose. It would have the effect of requiring overtime to be paid in cash, as opposed to a practice of compensating with time off. They may also have the effect of reducing volunteer firemen. Overall: Both the minimum wage and hour provisions will impermissibly interfere with the integral governmental function of these bodies. The act will significantly alter or displace the states’ abilities to structure employer-employee relationships in such areas as fire, police, sanitation, public health, and parks. If Congress could impede these state areas, there would be little left of the states’ separate and independent existence. The dispositive factor is that Congress has tried to exercise Commerce Clause authority to prescribe wages by the states in their capacities as sovereign governments. Insofar as the amendments operate to directly displace the states’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress. Congress may not exercise power under the commerce clause so as to force directly upon the states its choices as to how essential decisions about conduct of government operations are to be made. Dissent: The power over commerce is vested in Congress. If a state is engaging in economic activities that are validly regulated when engaged in by private persons, the state may too be forced to conform. NOTES: Criteria for determining whether states are immune from federal regulation: (1) must be regulating the states as states; (2) must address matters that are indisputable attributes of state sovereignty; (3) state compliance with the federal obligation must directly impair the state’s ability to structure integral operations in areas of traditional government function; (4) relation of state and federal interests must not be such that the nature of the federal interest justifies state submission. These criteria proved too abstract to apply. NOTES: National League, like Lopez, has the effect of limiting Congressional power; but unlike Lopez, National League introduces a new doctrine; that is, Lopez simply challenges the post 1937 learning on the commerce clause – that they have gone too far. National League doesn’t challenge Congressional power as such. That is, it grants that the Congress has the power to reach to employment questions (Darby Case). National League says that the states and their employees are immune to this exercise of Congressional power. Brennan dissenting in National League and Blackmun in Lopez suggests that the only check on Congressional power is a check coming from the people – the Congress speaking for the people will provide that check. They are saying that judicial protection here is wrong. Who are they protecting the states from?

4. Overruling of Usury. This case was on tenuous ground from the day it was decided. All it took was for Justice Blackmun to abandon his never passionate attachment to the principle of that case. In Garcia v. San Antonio Metro, the Court overruled Usury.

5. Garcia v San Antonio Metro Transit Authority. Supreme Court, 1985. This case is a revisitation on
National League. That case did not provide a general explanation of how a traditional function is to be distinguished from a nontraditional function. Facts: The District Court found that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under National League, is exempt from the FLSA (three other Federal Appeals courts and one state appeals court reached the opposite opinion). The function standard of National League is unworkable, and is therefore overruled. In 1913, the Texas Legislature authorized the state’s municipalities to regulate vehicles providing carriage for hire. The city relied on publicly regulated private mass transit until 1959, when it purchased the privately owned SATS, operated until 1978, when they became the SAMTA. San Antonio eventually looked to the federal government for money to maintain public mass transit. By 1970, federal subsidies were vital for its operation. SAMTA looked for relief under the Urban Mass Transportation Act of 1964, which provides this type of assistance. This money accounts for about 75% of SAMTA’s operating expenses. Is SAMTA subject to the FLSA? SATS complied with the Act until 1976 when National League was decided. Congress’ authority over intrastate activities extends to those that affect interstate commerce. The requisites for governmental immunity under National League are: The federal statute must regulate the states as states; it must address matters that are indisputably attributes of state sovereignty; state compliance must directly impair the state’s ability to structure integral operations in areas of traditional governmental functions; and the relation of state and federal interests must not be such that the nature of the federal interest justifies state submission. Traditional government function? This case centers on the third factor. The Court has made little headway in defining functions protected under National League. The Court rejects a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is integral or traditional. A new rule: We have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the commerce clause. State sovereign interests are more properly protected by procedural safeguards in the structure of the federal system than by judicially created limitations on federal power. We are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the states is one of process rather than one of result. Nothing in the FLSA is destructive of state sovereignty or violative of any constitutional provision. Dissent: Today’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts under the Commerce Clause. The Court does not show how the procedural safeguards are effective. The result of the holding is troubling: that federal officials, invoking the commerce clause, are the sole judges of the limits of their own power. It also upsets the constitutionally mandated balance of power between the states and federal governments. It is at the state and local level that democratic self government is best exemplified. Dissent: The Framers intended the sphere of state activity to be significant. The Framers perceived the commerce power to be important but limited. The 10th amendment urges that the states will retain their integrity in a system in which the federal laws are supreme. State autonomy is a relevant factor in assessing the means by which the Congress exercises its powers. With the abandonment of National League, all that stands between the remaining essentials of state sovereignty and congress is the latter’s capacity for self-restraint. The resolution lies in weighing state autonomy as a factor in the balancing when interpreting the means by which Congress can exercise its authority on the states as states. It is not enough to say the provision would be valid if applied to a private citizen.

6. Significance. Garcia appears to mean that once Congress, acting pursuant to its commerce power, regulates the states, the fact that it is a state being regulated has virtually no practical significance – if valid as applied to a private party, it is valid as applied to the states. Several later cases seem to be cutting back the broad scope of Garcia.

7. Use of state’s lawmaking mechanisms. One aspect of state sovereignty is a state’s ability to make and apply law, through legislative, judicial, and administrative functions. Even after Garcia, there are limits to Congress’ right to interfere with these state legislative or executive processes, and Congress with violate the 10th amendment if it exceeds those limits. The Court has held that the federal government may not compel state/local officials to perform federally specified administrative tasks. This is true even if the functions are fairly ministerial and easy-to-perform, and even if the compulsion is only temporary.

8. Printz v United States. Supreme Court, 1997. Issue: The question presented is whether provisions of the Brady Handgun Violence Prevention Act, which requires state and local law enforcement officers to conduct background checks on prospective handgun purchasers, violate the Constitution. The Brady Bill: In 1993, Congress amended the Gun Control Act of 1968 by enacting the Brady Bill. The Act required a background check system: under interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement containing the name, address and date of birth of the
proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers; (2) verify the identity of the transferee by examining identification; and (3) provide the chief law enforcement officer of the transferee’s residence with notice of the contents of the Brady Form. The dealer must then wait 5 days before consuming the sale. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, or if state law provides for an instant background check. In lieu of these two exceptions, a CLEO must try to ascertain within 5 days whether possession of the gun would be illegal. If found to be illegal, he must, upon request, provide the purchaser with a written statement of the reasons for the denial. **Petitioners**: Printz and Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona filed separate actions challenging the constitutionality of the Brady Act’s interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that the provision was severable from the remainder of the Act, leaving a voluntary background-check system in place. *Ps argue that compelled enlistment of state officers by the federal government is unprecedented.* The Government observes that statutes enacted by the first Congress required state courts to perform a variety of enforcement functions. These early laws established, at most, that the constitution was originally understood to permit imposition of an obligation on state judges to enforce federal proscriptions. We do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executives into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States’ executive, suggests an assumed absence of power. **The Federalist Papers** as proof that the Constitution permitted this activity: None of these statements necessarily implies that Congress could impose these responsibilities without the consent of the states. They appear to rest upon the assumption that the states would consent to allowing their officials to assist the federal government. **Absence of executive commandeering statutes:** There is an absence of executive commandeering statutes in the early Congress, as well as an absence of them until very recently. **The Structure of the Constitution:** The constitutional practice examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. The separation of the state and federal government is one of the constitution’s structural protections of liberty. The dissent resorts to the Necessary and Proper Clause. It reasons that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers conclusively establishes the Brady Act’s constitutional validity; because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers not delegated to the United States. When a law for carrying into execution the commerce clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a law proper for carrying into execution the commerce clause. **The Precedent of the Court:** In New York *v* United States, the “take title” provisions of the Radioactive Waste Policy required states either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to the waste. The Court concluded that Congress could constitutionally require the states to do neither. The Government argues that this case is distinguishable because unlike the take title provisions, the background check here does not require state legislative officials to make policy, but instead issues a final directive to state CLEOs. The Court is doubtful whether the new line the Government proposes would be helpful. Executive action that has utterly no policymaking component is rare. It is an essential attribute of the states’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority. **The argument that the Brady Bill serves an important purpose:** Where, as here, it is the whole object of the law to direct the functioning of state executives, and hence to compromise the structural framework of dual sovereignty, such a balancing analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends. The Court holds that Congress cannot compel state to enact of enforce a federal regulatory program and cannot circumvent that prohibition by conscripting the state’s officers directly. **Dissent:** First, Congress has the commerce power. Second, Congress has the necessary and proper power. The Tenth Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens. The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the federal government itself. In the name of state’s right, the majority would have the federal government create vast national bureaucracies to implement its policies. Neither explicitly nor implicitly did the framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials. New York *v* United States does not apply here. The take title provision was beyond Congress’ authority to enact because it was in principle no
different that a congressional compelled subsidy from state governments to radioactive waste producers. NOTES: A distinction should be drawn between cases like National League and Garcia, and cases like Printz. The former address regulation of states as economic actors while the latter concerns use of the state’s governmental machinery for federal purposes. Even if you think Lopez was wrong, and Garcia was right, it is still possible to believe that the machinery of state government should be protected from federal intrusion. Under such a theory, state governments would remain independent from the federal government and able to exist as politically accountable entities able to effectively regulate when Congress decides not to step in. At the extreme this model breaks down: if the commerce power allows Congress to regulate every single area previously overseen by the states, protection for state government machinery as such doesn’t mean much. But in the real world, where Congress does not federalize every regulatory area in existence (and, at any rate, where Lopez would impose at least some limit on such an attempt), preserving state governments as such has value, not just as small scale laboratories for social experimentation, but as alternate power centers that could in the future provide the electorate with an alternative to more centralized power from Washington. NOTES: They are arguing that Congress cannot commandeer state officials to carry out federal law. The District Court tried to save this by saying the unconstitutional provision was severable. The first rubric, historical practice, is interesting and problematic. What did early Congressional legislation require of state courts? The opinion gives us some examples. Scalia is claiming that, since all of these matters were carried out by courts (registration of aliens, etc), they speak to adjudication and not administrative matters = administrative. The courts duty to resolve controversies concerning the seaworthiness of vessels would be adjudicative. Claims against slaveholders = adjudicative. Claims of Canadian refugees that had assisted the US in the Revolutionary War = adjudicative. Deportation orders regarding enemy aliens = administrative. The important point is that we have counter examples against Scalia’s claim that nothing in the historical practice counts against the position of the court that early legislation required administrative action by courts. Paulson thinks a better argument for Scalia would have been that in the early years of the Republic, given the extraordinarily underdeveloped state of federal courts, there was no alternative but turning to state courts for these functions; but things have drastically changed in the interim. The use of the consent doctrine raises questions because did the courts really consent? He then turns to the structure of the constitution. The government’s argument is that the Brady Act passes muster under the commerce clause and the necessary and proper clause.

9. **States’ sovereign immunity from state-court suits based on federal rights.** Sovereign immunity generally prevents Congress from subjecting the states to private suits in their own courts, even where the right sued on is federal.

10. **Alden v Maine.** Supreme Court, 1999. **Facts:** In 1992, Ps, a group of probation officers, filed suit against their employer, the state of Maine, in the United States District Court for the District of Maine. The officers alleged the state had violated the overtime provisions of the Fair Labor Standards Act of 1938, and sought compensations and damages. While the suit was pending, the Court decided Seminole Tribe of Florida v Florida which made it clear the Congress lacks the power under Article I to abrogate the state’s sovereign immunity from suits commenced or prosecuted in the federal courts. Upon consideration of Seminole Tribe, the District Court dismissed, and the Court of Appeals affirmed. Ps then filed the same action in state court. The state trial court dismissed the suit on the basis of sovereign immunity, and the Maine Supreme Court affirmed. **Holding:** We hold that the powers delegated to Congress under Article I of the Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts. We decide as well that the state of Maine has not consented to suits for overtime pay and damages under the FLSA. The Eleventh Amendment: The 11th amendment makes explicit reference to the state’s immunity from suits commenced or prosecuted against one of the states by citizens of another state, or by citizens or subjects of any foreign state. The state’s immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the constitution, and which they retain today except as altered by the plan of the convention of certain constitutional amendments. **Sovereignty of states:** Our federal system preserves the sovereign status of the states in two ways: 1) it reserves to them a substantial portion of the nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. 2) Even as to matters within the competence of the national government, the constitutional design secures the founding generation’s rejection of the concept of a central government that would act upon and through the states in favor of a system in which the state and federal governments would exercise concurrent authority over the people. The Court held, just five years after the constitution
was adopted, that Article III authorized a private citizen of another state to sue the state of Georgia without its consent. The Court has been consistent in interpreting the adoption of the 11th amendment as conclusive evidence that the decision in Chisholm v Georgia was contrary to the well-understood meaning of the constitution. The Court has upheld states’ assertions of sovereign immunity in various contexts falling outside the literal text of the 11th amendment. In Hans v Louisiana, the Court held that sovereign immunity barred a citizen from suing his own state under the federal question head of jurisdiction. In this case: The Court must determine whether Congress has the power, under Article I, to subject nonconsenting states to private suits in their own courts. The fact that the 11th amendment by its terms limits only the judicial power of the United States does not resolve the question. While sovereign immunity does bar federal jurisdiction over suits against nonconsenting states, this is not the only basis of sovereign immunity. Congress may subject the states to private suits in their own courts only if there is compelling evidence that the states were required to surrender this power to Congress pursuant to constitutional design. Ps contend the text of the constitution and our recent sovereign immunity decisions establish that the states were required to relinquish this portion of their sovereignty. Article I: This grants Congress broad power to enact legislation in several enumerated areas of national concern. The Supremacy Clause provides that the laws of the US are supreme. It is contended that where Congress enacts legislation subjecting the states to suit, the legislation by necessity overrides the sovereign immunity of the states. However, the supremacy clause only applies to those laws which are themselves constitutional. The supremacy clause does not foreclose a state from asserting immunity to claims arising under federal law merely because that law derives not from the state itself but from the national power. When a state asserts immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the states. The Court cannot conclude that any of the Article I powers include the incidental authority to subject the states to private suits as a means of achieving objectives otherwise the scope of enumerated powers. Does Congress have authority under Article I to abrogate a state’s immunity from suit in its own courts? This is a question of first impression. In determining whether there is compelling evidence that this derogation of the state’s sovereignty is inherent in the constitutional compact, we look to history, practice, precedent, and the constitution. The Court believes the no one suggested the constitution might strip the states of their immunity. It suggests the sovereign’s right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new constitution. Early practice: Although early Congresses enacted various statutes authorizing federal suits in state courts, we have discovered no instance in which they purported to authorize suits against nonconsenting states. It thus appears early congresses did not believe they had the power to authorize private suits against the states in their own courts. Constitution: Is a congressional power to subject nonconsenting states to private suits in their own courts consistent with the structure of the constitution? Our federalism requires that Congress treat the states in a manner consistent with their status as residuary sovereigns. The founding generation thought it neither becoming nor convenient that the several states of the union, invested with that large residuum of sovereignty which had not been delegated to the US, should be summoned as Ds to answer the complaints of private persons. The principle of sovereign immunity preserved by constitutional design thus accords the states the respect owed them. Private suits against nonconsenting states present the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum. In some ways, a congressional power to authorize private suits against nonconsenting states in their own courts would be even more offensive. This has always been understood to be within the sole control of the sovereign itself. A congressional power to strip the states of their immunity from private suits in their own courts would pose more subtle risks, in addition to threatening the financial integrity of the states. The course of their public policy may become subject to and controlled by the mandates of judicial tribunals without their consent. Congress cannot abrogate the states’ sovereign immunity in federal court. It would be unprecedented to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress’ authority to pursue federal objectives through the state judiciaries exceeds not only its power to press other branches of the state into service but even its control over the federal courts themselves. Holding: The states retain immunity from private suit in their own courts, immunity beyond the congressional power to abrogate by Article I legislation. Sovereign immunity bars suits only in the absence of consent. The states have consented to some suits pursuant to the constitution – including suits brought by other states or by the federal government. It bars suits against states but not lesser entities. Nor does it bar all suits against state officers. NOTES: As a doctrine, it is here to stay. The problem lies in the argument: what are you going to say if you’re asked to defend the
state immunity doctrine? Neither Rehnquist in National League nor Scalia in Printz is sound. In National League, the analogy is mistaken between immunity and individual rights. Scalia’s defense is questionable. A better argument is Justice Kennedy’s argument in Alden; the emphasis is in striking the right balance between the two systems of government. His point is that there is a need to redress that balance from time to time, and that is a job for the courts. To be sure, no criteria for identifying what might count as a proper balance are specified. That’s difficult. On the downside, Kennedy adduces a structural argument that is overdrawn. The structural argument is where the point of the argument, if denied, threatens to undermine the institutional structure in question (example in Martin v Hunter’s Lessee). Kennedy adduces a structural argument that is pitched to the financial integrity of the state of Maine (may be an overdrawn argument).

PART IV OF THE COURSE – THE PERSISTING CONTROVERSY OVER THE ROLE OF THE JUDICIARY

1. **Slavery and the Constitution.** During the Constitutional Convention the most divisive controversy among the Framers concerned slavery. Despite significant anti-slavery sentiment, the overarching imperative of forming a viable union drove a compromise. The result was a Constitution that neither endorsed nor prohibited but accommodated slavery. Representation is the House was based upon a population count that recognized slaves as three-fifths of a person. Slavery first became a prominent national political issue in 1819 with the debate over the admission of Missouri as a state. The conflict resulted in the Missouri Compromise, which, among other things, admitted Missouri as a slave state but prohibited slavery in the territories north of latitude 36 30.

2. **Groves v Slaughter:** A provision of the Mississippi Constitution of 1832, which arguably forbade importing slaves into the state for sale there, was attacked as an impermissible restriction of interstate commerce. The majority opinion avoided the issue entirely. Three concurring justices carried on a vigorous side debate over the issues that the majority avoided. **McLean concurring:** The case presented a dilemma for McLean. If slaves were an item of commerce, Congress could, if it so chose, prohibit the interstate slave trade by ordinary legislation under the commerce power. McLean denied that slaves were an item of commerce. He then went on to argue that the states were free to deal with slavery as they wished. **Taney concurring:** the power over the subject is exclusively with the several states. **Baldwin concurring:** He argued that although a state could abolish slavery entirely, it could not allow slavery and prohibit the slave trade, for slaves were items of commerce and the regulation of interstate commerce lay within the control of Congress.

3. **Prigg v Pennsylvania:** The Fugitive Slave Act of 1793, enacted pursuant to Article IV of the Constitution, authorized the owner to seize a fugitive slave and bring him or her before a federal judge, who upon satisfactory proof that the person so seized or arrested does owe service or labor to the person claiming him or her. P, the agent of a Maryland slave owner, applied to a Pennsylvania magistrate for a certificate of removal for an escaped slave. When refused, P forcibly removed the slave from Pennsylvania and returned her to Maryland. P was convicted under an 1826 Pennsylvania statute expressly designed to prevent self-help in the return of fugitive slaves. The Supreme Court reversed and found the state law unconstitutional. There are two clauses in the constitution upon the subject of fugitives, which stand in juxtaposition to each other. “A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.” “No person held to service or labor 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 labor; but shall be delivered up, on claim of the party to whom such service or labor may be due.” The clause was of the last importance to the safety and security of the southern states, and could not have been surrendered by them, without endangering their whole property in slaves. The clause from the Constitution gives the owner of a slave the right to seize and recapture his slave. Furthermore, the natural inference is that the national government is clothed with the authority to enforce it. The government has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also. These are some of the reasons upon which we hold the power of legislation on this subject to be exclusive in congress. Upon these grounds, we are of opinion, that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. **Taney concurring:** The opinion maintains that
the power over this subject is exclusively vested in Congress, so that no state can pass any law in relation to it. I think that, on the contrary, it is enjoined upon the states as a duty, to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective borders.

**McCLean dissenting.** NOTES: Prigg held that Article IV, section 2, clause 3 was self-executing (operated of its own force without the need for implementing congressional legislation) and that it authorized a slave owner to use self-help in capturing a fugitive slave. The Court intimated that the statute, if not the Constitution, precluded state courts from playing any role whatsoever in returning fugitive slaves. One result of the case was to take the Northern states out of the business of returning slaves, but the result was also to carry forward the involvement of the federal government in the protection of slavery. Story, one would ask, was not aware of all the repercussions of the Prigg case. The opinion has been criticized as formalistic.

4. **Dred Scott:** A new Fugitive Slave Act of 1850 was the focus of controversy. Dred Scott grew out of other major legal problems of slavery in a federal nation – the status of non-fugitive slaves in free states. Some northern states had forbidden slave-owners from bringing slaves with them, and several state courts had freed slaves brought into their jurisdiction. Scott alleged that his earlier residence in the free state liberated him from slavery. The opposition contested the court’s jurisdiction on the ground that a black was not a citizen of Missouri or the United States. Taney, writing for the majority, decided three things: Scott’s status was governed by the law of the forum state, Missouri, the Missouri Compromise was unconstitutional on the grounds that Article I did not authorize congress to legislate for the territories once the settlers were able to legislate for themselves and an act of Congress which deprives a citizen of his property is not due process of law, and the federal court lacked jurisdiction over Scott’s claim because blacks were not citizens within the meaning of the diversity jurisdiction clause of Article III. Are blacks entitled to the rights under the Constitution? The Court holds no. At the time of the drafting of the Constitution, they were an inferior and subjugated race. One may have all the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of one of another state. The rights he would acquire would be restricted to the State which gave them. Therefore, no State can, by any act or law of its own, introduce a new member into the political community created by the Constitution. It cannot introduce any person who was not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it. NOTES: The ideology of Dred Scott, if not its result, is as relevant in the modern era as it was prior to the Civil War. The status of non-fugitive slaves in free states. There were three answers: Permanent slave status applies; the slave that is taken to the free state becomes free there but as soon as they return to a slave state, the status of slave attaches again; and one more (see notes above). The opinion held that Scott was a slave because blacks were not citizens of the US and could not sue in federal court (no jurisdiction). Tawney’s position is that citizen in a state has no bearing on citizenship in the union. Citizenship, according to the Articles of Confederation, hails from the states. The dissent points out that blacks are not there as an exception and that citizens of the several states are entitled to all the privileges and immunities of the other states. The general conclusion of all this: there were free blacks at the time of the creation of the republic, and since that is the case, the majority cannot argue that that cannot be the case (which is what he does argue).

5. **Enactment of the Civil War Amendments.** Although the Emancipation Proclamation had been predicated upon the president’s war power, that basis was inadequate for purposes of supporting a general and enduring proscription against slavery. The Thirteenth Amendment not only prohibited slavery but empowered Congress to enforce its terms by appropriate legislation. The notion that civil rights flowed incidentally from the 13th Amendment was tested almost immediately. This identified the need for further legal reform if civil rights and equality were to be accounted for meaningfully at the national level. Missing from the Civil Rights Act of 1866 was the right to vote. To secure the federal interest in civil rights the 14th Amendment was ratified. The 15th Amendment followed shortly thereafter.

a. **Substantive Due Process Before 1934.** The Due Process Clause of the 14th amendment reads as follows: “Nor shall any State deprive any person of life, liberty, or property, without due process of law.” This doctrine can be traced (1) the rise of substantive due process from the late 19th century until the 1930’s; (2) the doctrine’s abandonment (at least with respect to economic regulation) in the late 1930’s; and (3) is fairly dramatic rebirth as a means for vindicating a broad range of non-economic rights. When the 14th amendment was first enacted, it was not clear whether it would be found to limit states’ substantive powers.

b. **Slaughter House Cases.** Supreme Court, 1873. **Facts:** This case concerned a challenge to a state-granted monopoly on slaughter houses in New Orleans. **Referring, I believe to the 14th**
The 14th amendment: “these amendments” have one pervading purpose in them all; the freedom of the slave race, the security and firm establishment of that freedom. We do not say that no one else but the Negro can share in this protection. It is, however, necessary to look to the purpose of them, the evil which they were designed to remedy. Definition of citizenship: The 14th amendment begins with a definition of citizenship – it declares that citizens may be citizens of the United States without regard to their citizenship of a particular state, and it overturns Dred Scott by making all persons born within the United States citizens of the United States. There can be no doubt of the main purpose to give citizenship to the Negro. A person must reside with a state to be a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is clear that there is a citizenship of the United States, and one of a state, which are distinct from one another. Privileges and Immunities: The next section speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument in favor of the P rests wholly on the assumption that the citizenship is the same. The language is “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Only the privileges and immunities of the citizen of the United States are placed by this clause under the protection of the federal constitution. In Corfield v Coryell, a court found the privileges and immunities of the citizens of the several states to include protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole. Was it the purpose of the 14th amendment to transfer the security and protection of all the civil rights mentioned from the states to the federal government? We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them. We may excuse ourselves from defining the privileges and immunities of citizens of the United States which no state can abridge. Dissent: The question presented is whether the recent amendments to the constitution protect citizens of the United States against the deprivation of their common rights by state legislation. In his judgment, yes, the 14th amendment does afford such protection. The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If, as the majority holds, the amendment refers only to such privileges and immunities as were specially designated as belonging to citizens of the United States, it was a useless attachment which accomplished nothing. No state could have ever interfered by its laws. What then are the privileges and immunities which are secured against abridgement by state legislation? The Civil Rights Act has stated some of these terms: the right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property. Dissent: There are certain fundamental rights which the state’s right of regulation cannot infringe upon. The constitution specifies only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. But even if the constitution were silent, the fundamental privileges and immunities of citizens, would be no less real and no less inviolable than they now are. Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. NOTES: We are talking about the Civil Rights Act of 1866 – reenacted after the ratification of the 14th amendment in May of 1870 – now with the support of the 14th amendment (14th amendment is understood as a constitutionalization of the Civil Rights Act). Our first general theoretical problem in this part of the course is to consider how the 14th amendment serves to carry over to the states certain constitutional rights set out in the Bill of Rights. What from the Bill of Rights (addressed to the Federal government) carries over to the states, by way of the 14th amendment (addressed to the states)? About five possibilities respecting the carryover: (1) the 14th amendment carries over nothing from the first 8 amendments (the Bill of Rights); (2) the 14th amendment carries over some, but not all, rights guaranteed in the first 8 amendments; (3) it carries over some but not all, and recognizes some rights beyond the first 8 amendments; (4) the 14th amendment carries over exactly those rights from the first 8 amendments; (5) it carries over exactly those rights, and in addition, some rights beyond the first 8 amendments. The vehicle for the carryover (incorporation) has been the due process clause of the 14th amendment, but in the beginning it looked as though the privileges and immunities clause of the 14th amendment would be doing
this carryover. The Slaughter House cases put this interpretation of the privileges and immunities clause to the test, and find that it is not the vehicle. In the case, the Louisiana legislature grants a monopoly to the Crescent City Slaughterhouse Company in New Orleans. Butchers who had worked in other slaughterhouses then bring the action. They argue that this act deprives them of their right to pursue a livelihood – in other words, the monopoly creates privileges in a few at their expense. The Court talks about the purpose of the 14th amendment: they believe that the purpose of the 13th and 14th amendments was solely to provide for the freedom of the former slaves. The Court makes a distinction between citizenship of a state and citizenship of the United States. The Court then states that the privileges asserted by the Ps are privileges and immunities of the state, and are left to the legislature of the state. In other words, the 14th amendment does not carry over rights to the states. In Fields’ dissent, he assumes that there are privileges and immunities that belong to the citizens, and that the role of the states is not to interfere with these rights.

c. **Allgeyer v Louisiana.** The Court struck down a law prohibiting insurance contracts written by out-of-state companies that had not been certified in Louisiana. This identified the Court’s readiness to strike down laws interfering with a laissez-faire economic system. The Allgeyer Court’s investment in previously repudiated economic rights theory followed one year after it had deferred to prescriptive segregation as a reasonable exercise of state police power. What initially had been peripheral to the 14th Amendment thus had become central, and what once was at its core had become marginal.

6. **The Rise of Economic Due Process.** With just a few years after the 1873 decision, pressures on the Court to review the substance of state economic regulation proved compelling. First, the nation’s rapid post-Civil War economic development coincided with the rise in “laissez faire” economic theory, according to which industrial growth and national well-being would be maximized by minimizing government interference with business.

7. **Lochner v New York.** Supreme Court, 1905. **Facts:** The indictment charges that the P violated labor law of the state of New York, in that he required and permitted an employee working for him to work more than sixty hours in one week. The statute says that no employee shall be required or permitted to work more than ten hours per day. This act is an absolute prohibition upon the employer. The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may work. **14th Amendment:** The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment. Under that provision, no state can deprive any person of life, liberty, or property without due process of law. If the act is within the power of the state, it is valid. But the question is: is this within the police power of the state? **Is the act valid?** There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. With no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by the act. It must be upheld, if at all, as a law relating to the health of the individual engaged as a baker. It does not affect any other portion of the public than those who are engaged in the occupation. Clean bread does not depend upon whether the baker works ten hours per day. The limitation of the hours of labor does not come within the police power on that ground. **State’s right vs. Individual rights:** Which of the two prevail – the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that it relates to public health does not render the act valid. The act must have a more direct relation – as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. The limit of the police power has been reached and passed in this case. We cannot shut our eyes to the fact that many of the laws like this are passed for other motives. The purpose of a statute must be determined from the nature and legal effect of the language employed, and not from their proclaimed purpose. It seems that the real objective was simply to regulate the hours of labor between the master and his employees in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. **Dissent: (Harlan)** The liberty of contract may, within certain limits, be subjected to regulation designed and calculated to promote the general welfare, or to guard the public health, morals, or safety. If there be doubts as to the validity of the statute, that doubt must be resolved in favor of its validity, and the courts must leave the legislature to
meet the responsibility for unwise legislation. It is plain that this statute was enacted in order to protect the physical well-being of those who work in the bakery business. The courts are not concerned with the wisdom or policy of legislation. I find it impossible here to say there is no real or substantial relation between the means employed by the state and the end sought to be accomplished. There is much evidence that working more than ten hours a day may be dangerous. **Dissent: (Holmes)** It is settled that the state may regulate life in many ways. Many laws (such as Sunday laws and schools laws) interfere with the right to contract. NOTES: The state statute required that employers observe a 60 hour work week. The state is decided by appealing to economic liberty drawn from the 14th amendment due process clause. Now suddenly, we’ve drawn economic liberty from the due process clause (something meant to deal with procedure). This is a very one sided holding (gives the employer a lot of freedom). The pattern in these cases: the goal of the courts is economic freedom, or freedom of contract (forgetting that freedom of contract presupposes equal bargaining power), this economic liberty is drawn from the due process clause, and is constitutionalized by these cases.

8. **Analysis of Lochner test.** The Lochner test was an extremely stringent one: First, it required a very close fit between the statute and its objective. In the majority’s words, there had to be a real and substantial relationship between the statute and the goals which it was to serve. This tight fit was absent in Lochner because bakers could have been protected by less restrictive measures. Second, only certain legislative objectives were acceptable. Regulation of health and safety was permissible, but readjustment of economic power was not.

9. **Relation to fundamental interests.** Even today, strict due process scrutiny is used by the Court where a fundamental interest is at stake. Perhaps the Lochner Court’s mistake was in treating freedom of contract as a fundamental interest.

10. **Other decisions of the Lochner era.** The Lochner decision was followed by three decades of decisions elevating contractual liberty and property rights to a level of constitutional significance capable of thwarting panoply of social and economic legislation. The net result was a standard of review by which the Court independently assessed the premises and merits of legislation and struck down what it considered an unreasonable intrusion upon economic freedom. But not every statute directly affecting economic rights was overturned.

11. **Muller v Oregon.** Supreme Court, 1908. The Lochner case invalidated maximum hour statutes as they pertained to bakers. But the Court was willing to allow such laws where it found that the benefited class for some reason needed special protection, beyond that given to workers in general. Thus here the Court sustained a law barring women in a factory or laundry for more than ten hours in a day; the decision viewed women as members of a weaker class “disadvantaged in the struggle for subsistence,” and therefore needing special protection.

12. **Adkins v Children’s Hospital.** Supreme Court, 1923. The Court here struck down a minimum wage law for women. The Court did this in lieu of Muller; again the rationale was freedom of contract. One explanation is that the maximum hours rules could be seen as promoting a legitimate health objective, whereas it was hard to see minimum wage rules as promoting anything other than a lessening of economic inequality.

13. **Baldwin v Missouri:** Supreme Court, 1930. Judge Holmes, dissenting: I express anxiety at the ever increasing scope given to the 14th Amendment in cutting down the constitutional rights of the states. We should remember the great caution shown by the Constitution in limiting the power of the states, and should be slow to construe the 14th amendment as committing to the court’s discretion, the validity of whatever laws the states may pass.

**SUBSTANTIVE DUE PROCESS – THE MODERN APPROACH**

1. **Initial decline of Lochnerism.** Lochner, and its judicial philosophy, were subjected to intense criticism in the three decades which followed that case. In addition to this criticism, the election of FDR, and his New Deal programs, convinced many people of the need for aggressive legislative programs to ensure the nation’s economic survival. Such large scale government intervention in economic affairs was clearly at odds with the freedom of contract philosophy. The decline of Lochnerism was presaged by Nebbia where the Court sustained a NY regulatory scheme for fixing milk prices.

2. **Nebbia v New York:** Supreme Court, 1934. The court upheld a state milk price control despite due process challenges. Price control is unconstitutional only if arbitrary, discriminatory, or irrelevant to the
policy the legislature sought to adapt. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. The Nebbia decision employed a relaxed standard of review, and also repudiated one of the jurisprudential building blocks in the late 19th century evolution toward substantive due process review. Nebbia’s requirement of a substantial means-end relationship was essentially the test of Lochner. But this Court was determined not to impose its own views about correct economic policy.

3. **West Coast Hotel v Parrish:** Supreme Court, 1937. The appellant conducts a hotel. The appellee was employed there as a chambermaid and she brought suit to recover the difference her wages and the minimum wage set for the state. Appellant challenged the minimum wage provision as repugnant to the due process clause of the 14th amendment. The Court upheld the minimum wage provisions on the grounds that there exists a strong notice in paying people enough to live on. This case represented a virtual last stand for economic rights. Four dissenting judges made a final pitch for economic rights as a function of substantive due process. **Justice Sutherland (dissenting):** This statute is similar to the one in Atkins that was invalidated. Contracts of employment are included in the due process rule. Because this statute applies only to women, it is arbitrary. A year after the Parrish decision, the court formally disassociated itself from economic rights analysis as a function of due process review. The Court here explicitly overruled Adkins. The Court mentioned the state’s interest in protecting the health of women. But it gave substantial weight to the state’s interest in redressing women’s inferior bargaining power.

4. **Judicial abdication in economic cases.** Nebbia explicitly (and West Coast implicitly) preserved the requirement of a real and substantial relation between an economic regulation and a legitimate state objective. But cases following West Coast virtually abandoned even this degree of scrutiny between means and ends in economic cases.

5. **United States v Carolene Products:** 1938. Does the Filled Milk Act of Congress, which prohibits the shipment of skimmed milk compounded with any fat, so as to resemble milk or cream, transcend the power of Congress to regulate interstate commerce or infringes the 5th Amendment. There is no need to consider here more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of power. The Court made it clear that a presumption of constitutionality would be applied in the case of an economic regulation subjected to a due process attack. A similarly deferential opinion arose two years later:

6. **Olsen v Nebraska:** 1941. Nebraska’s Supreme Court had held that a statute fixing the maximum pay a private employment agency could collect from an applicant was unconstitutional under the due process clause. The Supreme Court, however, was not concerned with the wisdom, need, or appropriateness of the legislation. The Court continues to distance itself from its Lochner past. The Court in Whalen stressed disinterest in independently assessing the statute’s wisdom when it upheld a law requiring pharmacists to transmit the identity of all persons obtaining prescription drugs.

7. **Whalen v Roe:** 1977. Can NY record, in a data file, the names and addresses of all who have certain drugs prescribed to them. The holding in Lochner has been implicitly rejected many times. There was nothing unreasonable on the part of the NY legislature.

**INCORPORATION DOCTRINE**

1. **Generally.** Our first general theoretical problem in this part of the course is to consider how the 14th amendment serves to carry over to the states certain constitutional rights set out in the Bill of Rights. What from the Bill of Rights (addressed to the Federal government) carries over to the states, by way of the 14th amendment (addressed to the states)? About five possibilities respecting the carryover: (1) the 14th amendment carries over nothing from the first 8 amendments (the Bill of Rights); (2) the 14th amendment carries over some, but not all, rights guaranteed in the first 8 amendments; (3) it carries over some but not all, and recognizes some rights beyond the first 8 amendments; (4) the 14th amendment carries over exactly those rights from the first 8 amendments; (5) it carries over exactly those rights, and in addition, some rights beyond the first 8 amendments.
2. **Barron v Mayor and City Council of Baltimore**: Supreme Court, 1833. The P sues to recover damages for injuries to the wharf property of the P arising from the acts of the D. P argues that the Fifth Amendment, which inhibits the taking of private property without compensation, should be extended to the states as well. The Court feels that this is a limitation on the exercise of power by the federal government. This was rightly decided for its time; it was not until the 14th amendment that the Bill of Rights was made applicable to the states. With the rise of 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. By the process of incorporation, over the course of a few decades, most of the bill of rights was made applicable to the states. Justice Cardozo set forth groundwork for theory of selective incorporation that largely has been subscribed to since.

3. **Palko v Connecticut**. Supreme Court, 1937. A state statute permitting appeals in criminal cases is challenged by appellant as an infringement of the 14th amendment. Appellant was indicted for the crime of murder in the first degree. A jury found him guilty of murder in the second degree and he was given life. The state appealed this decision pursuant to the Act. D was brought to trial again. He argued that this was double jeopardy, and violated the 14th amendment. The argument is that whatever is forbidden by the 5th amendment is also forbidden by the 14th. The 5th, directed at the federal government, creates immunity from double jeopardy. There is no general rule that whatever is a violation of the bill of rights by the federal government would also be a violation by force of the 14th amendment if done by a state. Certain aspects of the Bill of rights may be rejected by a state: the 5th, the 6th. Some cannot be rejected: the 1st. Only those rights which are implicit in the concept of ordered liberty are carried over by the 14th amendment. Competing against this theory was (1) Frankfurter’s understanding that liberty was to be defined by the courts, (2) the view of Black on total incorporation, and (3) the view that not only did the bill of rights extend, but also the fundamental liberties.

4. **Adamson v California**. Supreme Court, 1947. The 14th amendment does not draw all the rights of the bill of rights under its protection. Frankfurter: The 14th amendment should not extend the 5th amendment to the states. When a case is brought alleging a violation of the 14th amendment, the question is not whether the action sued on was one of those in the bill of rights, but rather whether the action deprived P of due process of law. This inescapably imposes upon the Court an exercise of judgment. Black (dissenting): He believes the 14th amendment should extend the bill of rights to the states, according to the amendment’s history. He does not believe the natural law formula should be used. Dissent: Should extend. And natural law should be used.

5. **Today**. The original selective incorporation formula considered whether an amendment was so fundamental as to be implicit in the concept of ordered liberty. Three decades later, in **Duncan v. Louisiana**, the Court changed its criteria to consider whether an amendment was fundamental to the American scheme of justice. Only the grand jury clause of the 5th and 7th amendment guarantee to a jury trial in a civil case remains rejected.

**MODERN SUBSTANTIVE DUE PROCESS AND THE DOCTRINE OF PRIVACY AND AUTONOMY**

1. **Overview**. We turn now to those cases, mostly modern, in which the Court has in effect given substantive due process protection for certain non-economic rights. In contrast with the economic rights area, where the Court has virtually abstained from meaningful due process review since the late 1930s, the Court has been surprisingly willing, during the last fifteen or so years, to strike down legislation which it finds to violate important non-economic interests.

2. **Two-tier scrutiny**. This dichotomy stems from the fact that the Court has applied two or more different standards of review in substantive due process cases. In the case of economic rights, the Court has required merely that there be a rational relation between the statute and a legitimate state objective. But where the Court finds that a fundamental right is impaired by a statute, it has applied a scrutiny that is stricter in two respects: (a) the state’s objective must be compelling; and (b) the relation between that objective and the means must be very close, so that the means can be said to be necessary.

3. **Which rights are fundamental**. In the substantive due process area, the rights which the Court has found to be fundamental have tended to be in the related areas of sex, marriage, child-bearing, and child-rearing.
   a. **Right to privacy**. Generally, the Court has treated most of the interests it has found to be
fundamental as falling within the broad category of the right to privacy. However, the Court’s use of the term privacy often differs substantially from what we consider the term to mean. In many cases, a better term is personal autonomy.

4. **The early non-economic cases.** Although vindication of non-economic rights by use of the substantive due process doctrine has become of great practical importance only in recent years, several much older cases make similar use of the doctrine.

5. **Meyer v Nebraska.** Supreme Court, 1923. **Issue:** Whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the P by the 14th Amendment. **What rights are protected?** The court has not tried to define the liberty thus guaranteed, but without doubt, it denotes not merely freedom from bodily restraint but also the right to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God, and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. This liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. **Education:** It is the natural duty of the parent to give his children education suitable to their station in life. Mere knowledge of the German language cannot reasonably be regarded as harmful. P taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment. The **purpose of the Act:** It is said that it was to promote civic development by inhibiting training in foreign tongues and ideals before they could learn English and acquire American ideals. The purpose of the Act is easy to appreciate. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to P. The interference is plain enough and no adequate reason therefore in time of peace and domestic tranquility has been shown. Justice Holmes and Sutherland dissented on the ground that the regulation was not unreasonable. Holmes believed in deference to legislative judgments about social welfare. **NOTES:** The statute prohibited the teaching of children of any language other than English. Let’s suppose preliminarily that we are dealing with a rationale relation test. What kind of right are we talking about? If it’s a right at all, it’s a constitutional right. Then what would that say about the rationale relation test? Even if reasonable and perfectly rationale, it still shouldn’t be able to take away a constitutional right. Is there a basis for rejecting that this is a recitation of the rationale relation test? The whole thing is going to be subject to the review of the courts (rejecting the rationale relation test). (NOTE: a modern court would probably look to the strict scrutiny doctrine when dealing with a constitutional right). It’s hard to determine how McReynolds arrives at this: is he balancing the interest of the school vs. the interest of the child? He’s drawing some of his cues from the old substantive due process doctrine, but, he is in some trouble making sense of the doctrine in this context. This case gives expression to our general problem: do we have anything like doctrinal support for the privacy doctrine, or is it resting on substantive due process (something that proved to be a washout in the older context)?

6. **Pierce v Society of Sisters.** Supreme Court, 1925. The Court followed its reasoning in Meyer to strike down an Oregon statute requiring parents to send their children to public schools: The statute interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.

7. **Birth Control.** The first major modern-era case which used a substantive due process like approach to protect a fundamental right was Griswold. In the late 19th century, many states enacted statutes prohibiting contraceptives. The Comstock Law, passed in 1873, made information about contraceptives obscene and made its circulation through the mail a crime. By 1960, the laws were repealed in most states. Connecticut was an exception. That law imposed an absolute ban on the use of contraceptives. The Supreme Court declined to consider the Connecticut law in two cases. Justice Harlan wrote an influential dissent in one of them, which defended an independent guarantee of liberty found in the 14th amendment: “The best that can be said about the 14th amendment is that it represents the balance our Nation has struck between that liberty and the demands of organized society. The liberty is a rational continuum which includes a freedom from all substantial arbitrary impositions and purposeless restraints, and also recognizes that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.” After this decision, the Planned Parenthood League of Connecticut opened a clinic in New Haven, practically inviting prosecution. Ten days later, after serving 75 women, the executive director and medical director were arrested. This time the Supreme Court addressed the constitutionality of the birth control statute. Douglas’ opinion for the Court pieced together the right of privacy.
8. **Griswold v Connecticut.** Supreme Court, 1965. The Act: We do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation. The Right to privacy: In *NAACP v State of Alabama*, we protect the freedom to associate and privacy in one’s associations, nothing that freedom of association was a peripheral First Amendment right. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. The Third Amendment in its prohibition against the quartering of soldiers is another. The 4th explicitly affirms the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The 5th enables citizens to create a zone of privacy which government not force him to surrender to his detriment. The 4th and 5th were described in *Boyd v United States* as protection against invasions of the sanctity of a man’s home and the privacies of life. The 14th has been described as creating a right to privacy. The law in question seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand since a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which are overly broad. **Concurrence:** The idea that liberty embraces the right of marital privacy is supported by the language of the 9th amendment. The history of the 9th amendment reveal that the framers believed that there are additional fundamental rights which exist alongside those fundamental rights specifically mentioned in the first eight amendments. Judges must look to the traditions and collective conscience of the people to determine whether a principle is so rooted as to be ranked as fundamental. **Concurrence:** In my view, the proper constitutional inquiry in this case is whether the Connecticut statute infringes the Due Process Clause of the 14th amendment because the enactment violates basic values implicit in the concept of ordered liberty. **Concurrence:** This law deprives married couples of liberty without due process of law. There is a realm of family life which the state cannot enter without substantial justification. **Dissent:** The law is offensive; however, this does not make it unconstitutional. The power to determine the appropriateness of laws is left to the legislature. **Dissent:** The law is silly. But it does not violate the constitution. NOTES: Two subsequent decisions extended the holding in Griswold beyond the marital bedroom. One of those cases protected the right of privacy of the autonomous individual; it revived a central theme of the Lochner era decisions: it protected the individual’s freedom from unjustified government restraint. NOTES: Harlan’s dissent in *Poe v Ullman* is instructive. Creating a right of privacy: It’s helpful to go to Douglas’s example from *NAACP v State of Alabama*. That is a penumbral First Amendment right. He uses the right of assembly/freedom of speech as the core right. He also talks about the prohibition of quartering soldiers, the right to be secure against search and seizure. He also mentions the *Boyd v United States* and *Mapp v Ohio* cases. Goldberg also makes a reductio ad absurdum argument; does the power have the power to sterilize as well? He is saying that 1) there is nothing is the constitution that protects us from such a measure, and 2) that it is equally clear that the constitution protects us from such a measure. Then by analogy, the right of privacy, although not mentioned in the constitution, is there nonetheless. The dissent admits that the law is grotesque, but says that there is nothing in the constitution that forbids it. Where is the doctrine coming from? Douglas is saying that the peripheral rights taken together (1st, 3rd, 4th, 9th, the 14th (the dissent asserts that there is no criterion exists for applying the 9th- one reading of it is that an enumeration of a right doesn’t necessarily also mean exclusion of what’s not enumerated) together constitute a right of privacy. Goldberg concurs, but doesn’t buy this argument. He says that the 14th amendment establishes this right. NOTES: The breakthrough in the post-World War II period. This case awakens the substantive due process question, here, in the case of privacy – but the doctrinal question remains open. In this case, he lists several possible amendments that lend support to this right to privacy. The doctrinal basis for privacy remains open.

9. **Abortion.** The right of privacy which the Court found to exist in Griswold has been extended to the abortion context. The case recognizing that the right of privacy limits a legislature’s freedom to proscribe or regulate abortion was the landmark case of *Roe v Wade*.

10. **Roe v Wade.** Supreme Court, 1973. **Appellant’s Argument:** She says the Texas statute improperly invades a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. She claims this right is in the concept of personal liberty embodied in the 14th amendment’s due process clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, or among those rights reserved to the people by the 9th amendment. **The Right to privacy:** The
constitution does not explicitly mention this right, but a line of decisions has recognized that a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the constitution. The court has found at least the roots of that right in the 1st, 4th, 5th amendments, in the penumbras of the Bill of Rights, the 9th amendment; or in the concept of liberty guaranteed by the first section of the 14th amendment. Only personal rights that can be deemed to be fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. The right to an abortion: This right of privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the state would impose upon the pregnant women is apparent. Direct harm medically diagnosable even in early pregnancy may be involved. It may force upon the woman a distressful life and future. Psychological harm may be imminent. There is the distress of an unwanted child. At any time? Appellant argues that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time. With this we don’t agree. At some point in pregnancy, the interests of the state become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right cannot be said to be absolute. If the suggestion that a fetus is a person is established, the appellant’s case collapses. All references to “person” in the constitution, however, refer to postnatal. This persuades us that the word person as used in the 14th amendment does not include the unborn. As we have noted, it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly. When does life begin? We need not resolve the difficult question of when life begins. The court is not in a position to speculate. Some religions believe life starts at birth. Physicians tend to focus on viability (24-28 weeks). Others focus on the moment of animation. The state’s interest in the life of the mother: The compelling point is at approximately the first trimester. Until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. If a medical physician determines that the pregnancy should be terminated, the judgment may be effectuated free of interference from the state. The state’s interest in life of fetus: The compelling point is at viability. The statute sweeps too broadly; it violates the due process clause of the 14th amendment. Concurrence: Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the 14th amendment. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. Concurrence: The 9th amendment obviously does not create federally enforceable rights. Many rights come within the meaning of liberty in the 14th amendment. Some rights are fundamental, and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a “compelling state interest” must be shown in support of the limitation. Where fundamental personal rights and liberties are involved, the corrective legislation must be narrowly drawn to prevent the supposed evil, and not be dealt with in an unlimited and indiscriminate manner. Dissent: I have difficulty concluding that the right of privacy is involved in this case. If the statute prohibited an abortion even where the mother’s life was in jeopardy, I have no doubt that it would lack a rational relation to a valid state objective. The application of the compelling state interest standard will require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be compelling. It seems to me that the right to an abortion is not a fundamental right. Dissent: I find nothing in the constitution to support the court’s judgment. The Court apparently values the conveniences of the mother more than the continued existence and development of the life or potential life that she carries. NOTES: Between 1973 and 1989, the Court generally invalidated state abortion regulations that discouraged women from seeking an abortion or made the procedure more difficult of more expensive. The Court struck down a law that required spousal consent and parental consent. They reasoned that the state could not delegate a veto over the woman’s decision. The Court refused to force the government to pay for abortions for poor women. In Webster v Reproductive Health Systems (1989), the court weakened the standard of review, and appeared to invite the state to impose greater restrictions on women’s access to abortions. After that, the Court upheld parental notification statutes that provided for a judicial bypass mechanism. NOTES: She is asking for an injunction to prohibit the District Attorney from applying the Texas statute against her. According to her, her constitutional basis for rejecting the statute is found in several places, and using every kind of argument: 1st, 4th, 5th, 9th, 14th, etc. The opinion talks about abortion under the common law, and how it was much more lenient. The Court, referring to these various amendments in previous cases, is talking about a number of related problems, all of them decided by appeal
to something in the Bill of Rights and the liberty concept in the 14th amendment. Not one of the cases mentioned lends support to the Court’s claim that the idea of “privacy” is evident in the constitution. Appellant argues that there’s an unqualified abortion right stemming from these principals. The Court says that she has a right to an abortion but it is not unqualified. The state has countervailing state interests, and, according to the court, the state’s interests become most compelling at the end of the first trimester, and then at the point of viability. The state concedes that there is no support from the case law concerning the definition of a person. Rehnquist (dissenting) says that the intentions of the reconstruction Congressmen that gave us the 14th amendment do not indicate that they were concerned with issues of privacy. Should the intentions of those Congressmen be relevant today?

11. The right to die. Should a terminally ill or comatose patient have the right to choose to die with dignity? The so-called right to die is really a series of sub-issues, on which the law is just starting to develop. The Supreme Court has issued two major decisions, one on the right to decline unwanted medical procedures. Over the past few decades, state courts and legislatures have increasingly accepted claims that competent adults have a right to terminate life-sustaining medical treatment and even to euthanasia. The New Jersey Supreme Court, for example, held that Karen had a right to terminate treatment protected by the right of privacy under the Constitution. Recently, courts have considered whether the constitution protects assisted suicide or voluntary, active euthanasia. The Court of Appeals for the Ninth Circuit held that Washington state’s statute prohibiting physician assisted suicide or terminally ill patients who wish to hasten their death was unconstitutional because it placed an undue burden on the exercise of a 14th amendment liberty interest. The Michigan Supreme Court held that the federal constitution’s due process clause does not prohibit states form imposing criminal penalties on individuals who assist others in committing suicide. In 1994, Oregon became the first state to allow assisted suicide when voters approved a ballot initiative permitting physicians after a fifteen day waiting period to prescribe lethal medication to terminally ill patients who have expressed the desire to die. In Cruzan, the Supreme Court addressed for the first time whether the constitution conferred a right to terminate life-sustaining medical treatment. Both forced pregnancy and forced medical treatment can be seen as violations of physical autonomy. The right to terminate medical treatment implicates the due process freedom from bodily restraint and intrusion, as well as its protection of life-defining decisions. The state likewise asserts an opposing interest in sustaining human life. The state’s interest in preserving the life of a fully developed human being may be stronger and less controversial than its interest in protecting the potential life of a fetus. The danger of ending a life without proof of the patient’s free choice may outweigh the liberty interest in ending one’s life. Cruzan is also a case about the constitutionality of state procedures for determining requests to terminate treatment. The question before the Supreme Court was whether the federal constitution prohibits Missouri from making its decision the way it did. For critics of judicial activism, the right to die, life the right to an abortion, invites the court to interfere in an area best left for resolution by state legislatures. According to this view, the fundamental liberty to terminate medical treatment is also a judicial invention, without adequate support in the language of the constitution or the history of the nation.

12. Cruzan v Director, Missouri Department of Health. Supreme Court, 1990. Facts: P was rendered incompetent as a result of severe injuries sustained during an automobile accident. Her parents sought a court order directing the withdrawal of their daughter’s feeding and hydration equipment after it became apparent she had no chance of recovering. The Missouri Supreme Court held that because there was no clear and convincing evidence of her desire to have this withdrawn, her parents lacked authority to effectuate such a request. Refusing Treatment: This right can be inferred from precedent. But determining that a person has a liberty interest under the due process clause does not end the inquiry; whether their constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests. We assume that the constitution would grant a competent person a constitutionally protected right to refuse lifesaving treatment. P wants this extended to incompetent persons: An incompetent person is person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment. Here, Missouri has allowed this, but has enacted a procedural safeguard to assure that the action of the surrogate conforms to the wishes expressed by the patient while competent. Missouri requires that evidence of the wishes be proved by clear and convincing evidence. The constitution does not forbid the establishment of this procedural requirement. Missouri’s interests: Missouri relies on its interest in the preservation of life. In this context, a state has more interest. A state is entitled to guard against potential abuses in these situations. We think a state may properly decline to make
judgments about the quality of life that a particular individual may enjoy, and simply assert an interest in the preservation of life. An erroneous decision not to terminate results in a maintenance of the status quo; an erroneous decision to withdraw life-sustaining treatment is not susceptible to correction. Alternative judgment: Ps also contend that Missouri must accept the substituted judgment of close family members even in the absence of substantial proof that their views reflect the views of the patient. There is no automatic assurance that their views will be the same as the patient’s. Concurrence: The liberty interest in refusing medical treatment flows from decisions involving the state’s invasions into the body. Artificial feeding cannot readily be distinguished from other types of treatment. The liberty guaranteed by the due process clause must protect an individual’s deeply personal decision to reject medical treatment. Concurrence: I would have preferred that we announce that the federal courts have no business in this field. It is up to the citizens of Missouri to decide, through their elected representatives, to determine this issue. It is at least true that no substantive due process claim can be maintained unless the claimant demonstrates that the state has deprived him of a right historically and traditionally protected against state interference. That can’t be established here. To raise up a constitutional right here we would have to create out of nothing some principle. Our salvation is the Equal Protection Clause, which requires that the democratic majority accept for themselves and their loved ones what they impose on you and me. Dissent: P has a fundamental right to end treatment, not outweighed by any state interest, and the Missouri Supreme Court impermissibly burdened that right. Does the due process clause allow Missouri to require a now-incompetent patient to remain on life support absent rigorously clear and convincing evidence that ending treatment was the patient’s express choice. No state interest could outweigh the rights of an individual in P’s position. The state has no interest in preserving someone’s life, completely abstract from the interest of the person living that life. Accuracy of the P’s determination must be our touchstone. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now vegetative, would wish to avoid further medical treatment. Dissent: To be constitutional, Missouri’s act must, at a minimum, bear a reasonable relationship to a legitimate state end. I believe it is an effort to define life, rather than protect it, that is at the heart of Missouri’s policy. NOTES: The majority began by holding that a competent person has a constitutionally protected liberty interest in refusing medical treatment. But the problem was that Nancy was not a competent person. So the question became, may Missouri require that such procedures be discontinued only when there is clear and convincing evidence that this is what Nancy would have wanted? The Court answered yes.

13. Sexuality, including homosexuality. A person’s sexual conduct – apart from any issues of procreation or family life – will now receive substantive due process protection, as the result of an important 2003 decision invalidating a Texas law criminalizing homosexual sodomy. Lawrence overruled a fairly new precedent, of Bowers.

14. Bowers v Hardwick. Supreme Court, 1986. Issue: The issue presented is whether the constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal. We disagree: We disagree with the court of appeals that the Court’s prior cases have construed the constitution to confer a right of privacy that extends to homosexual sodomy. None of the rights in those cases resembles the right of homosexuals to engage in acts of sodomy. Despite the language of the due process clause, the cases have interpreted it to have substantive content, subsuming rights that are immune from state regulation. It was said that those liberties are those that are fundamental. None of the previous formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Because of the history of sodomy laws, a claim that this right is deeply rooted in tradition is, at best, facetious. Authority to discover new rights in the Due Process Clause: We decline to take a more expansive view. There should be great resistance to expand the substantive reach of those clauses; otherwise the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. Rationale basis: Even if the conduct at issue here is not a fundamental right, P asserts that there must be a rationale basis for the law and that none is present, except for the majority’s view that this is immoral. The law is constantly based on issues of morality. Concurring: In constitutional terms, there is no such thing as a fundamental right to commit homosexual sodomy. Laws against sodomy have very ancient roots. Nothing in the constitution deprives a state of the authority to pass this law. Concurring: There is no fundamental right here. However, P may be protected by the Eighth amendment. A 20 year prison term would seem to create a serious eighth amendment issue. Dissent: The case is about the most fundamental of rights; the right to be left alone.
The Court has recognized a privacy right along two distinct lines: first, it recognizes this right with respect
to certain decisions that are for the individual to make. Second, it recognizes privacy with regard to certain
places. This case falls under both. We protect those privacy rights because they form so central a part of
an individual’s life. What the court really has refused to recognize is the fundamental interest all
individuals have in controlling the nature of their intimate associations with others. That certain, but by no
means all, religious groups condemn the behavior at issue gives the state no license to impose their
judgments on the entire citizenry. The state must be able to advance some justification for its law beyond
its conformity to religious doctrine. Dissent: A proper analysis of this law’s constitutionality requires two
questions: first, may a state totally prohibit the described conduct by means of a neutral law applying
without exception to all persons subject to its jurisdiction? If not, may the state save the statute by
announcing it will only enforce the law against homosexuals? The fact that a majority has traditionally
viewed a practice as immoral is not sufficient to uphold a law barring it. Second, decisions by married
persons are a form of liberty protected by the due process clause. This protection extends to the unmarried.
A policy of selective application must be supported by a neutral and legitimate interest. NOTES: You’ll
note the distinction between enforcement of morals and morality in the profound sense. The county
attorney dropped the charges against P. Does the Equal Protection Clause play a role in the lawsuit? No,
but the second couple (a married heterosexual couple) being denied standing certainly raises equal
protection questions. Since married couples aren’t prosecuted for the same conduct, and the gay couple is,
you might have a challenge on equal protection grounds. The issue here, according to Justice White, is
whether the constitution confers a fundamental right upon homosexuals to engage in sodomy. This issue is
far too specific. In Blackmun’s dissent: The ability to define one’s identity might be seen as a first take on
the value of autonomy. He talks about the right of privacy with regard to certain decisions (whom to love,
etc.), and with regard with certain places (in your home – with reference to the 4th amendment). This
dissenting opinion is promising. In Burger’s concurring opinion: He says the laws against sodomy have
ancient roots. However, sodomy does have some history, but with respect to gays only this is a relatively
new phenomenon.

15. Lawrence v Texas. Supreme Court, 2003. Issue: This case involves liberty of the person both in its
special and more transcendent dimensions. The question is the validity of a Texas statute making it a crime
for two persons of the same sex to engage in sexual conduct. Facts: Officers were dispatched to a private
residence in response to a reported weapons disturbance. When they entered they found D and another
man having sex. The petitioners were adults and their conduct was consensual. Question of the case: The
case should be determined by asking whether Ps were free as adults to engage in the private conduct in the
exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.
For this inquiry we deem it necessary to reconsider Bowers. Precedent: The best starting point is with the
Griswold case. After Griswold it was established that the right to make certain decisions regarding sexual
conduct extends beyond the marital relationship. Eisenstadt stated the proposition that the law in question
impaired the exercise of their personal rights. In Roe v Wade, the Court held that her right to have an
abortion had substantial protection as an exercise of liberty under the Due Process Clause. Bowers: to say
that the issue is this case was simply the right to engage in certain sexual conduct demeans the claim the
individual put forward. The liberty protected by the constitution allows homosexuals the right to make this
choice. The historical grounds upon which Bower rests are more complex than that decision indicates.
Bowers is overruled. The present case: It doesn’t involve minors; not persons who might be injured or
coreced or where consent is not easily refused. It does not involve public conduct or prostitution. The Ps
are entitled to respect for their private lives. The due process clause allows them to engage in their
conduct. The statute furthers no legitimate interest which can justify its intrusion into the personal and
private life of the individual. Dissent: Nowhere does the court’s opinion declare that sodomy is a
fundamental right under the due process clause. The 14th amendment expressly allows states to deprive
citizens of liberty so long as due process of law is provided. Substantive due process prohibits
infringement of fundamental liberty interests, unless the infringement is tailored to serve a compelling state
interest. The court does not once describe sodomy as a fundamental right. Instead the court concludes that
the statute fails the rational-basis test. The court’s holding today effectively decrees the end of all morals
legislation. Justice Thomas adds that, although the law is silly, the court has no constitutional power to
change it. This is properly left to the legislature. NOTES: Kennedy is looking forward by presuming
autonomy of self (page 30 line 2). The Eisenstadt is an extension of due process based on equal protection
grounds. If you recognize this right with respect to married couples, then you should extend it to gays as
General problem. There are few powers which are given explicitly to the President. But unlike the Congress, whose powers are much more closely delineated, most of the President’s power, in both domestic and foreign spheres, is implied. This process of implication has been derived mostly from Article II § 1, which provides “the executive power shall be vested in a President.” 

2. No right to make laws. Despite its willingness to infer the existence of broad presidential authority, the Court has adhered to one over-arching limitation on presidential power: The President may not make laws; he may only carry them out.

3. Generally. We draw the meaning of separation of powers from the structure of national government and our understanding of what the Framers contemplated in the establishment of the three separate branches of national government and a system of checks and balances. The Court’s decision about whether of when to intervene in disputes about the exercise of power by one of the political branches itself presents concerns about separation of powers.

1. Youngstown Sheet v Sawyer. Supreme Court, 1952. Issue: Whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills. Facts: In 1951, a dispute arose between steel companies and their employees over terms and conditions of a new collective bargaining agreement. The employees gave notice of an intention to strike. The need of steel as a component of all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that seizure of the steel mills was necessary in order to assure the availability of steel. The President issued Executive Order 10340 directing the Secretary of Commerce to take possession of most of the steel mills and keep them running. The next morning the president sent a message to Congress reporting his action. Congress took no action. The steel companies brought action against the Secretary in district court. They alleged that the seizure was not authorized by an act of Congress or by any constitutional provision. Discussion: The president’s power, if any, must stem from act of Congress or the constitution. There is no statute that authorized this. The contention is that presidential power should be implied from the aggregate of his powers under constitution. The order cannot be properly sustained as an exercise of the president’s military power as Commander-in-Chief. Nor can the seizure be sustained because of the several constitutional provisions that grant executive power to the president. The founders of the nation entrusted the law making power to the Congress alone for better or worse. The order cannot be properly sustained as an implied authorization of Congress, his authority is at its maximum. 

Concurring: Congress has frequently specifically provided for executive seizure of production, transportation, communications, or storage facilities. The duty of the president to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power. Concurring: (1) When the president acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. (2) When a president acts without support of an act of Congress, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority. Therefore, congressional inertia, indifference or acquiescence may sometimes enable if not invite measures on independent presidential responsibility. (3) When the president acts incompatibly with the expressed or implied will of Congress, he power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers Congress has in the matter. We can sustain the president only by holding that seizure of such strike-bound industries in within his domain and beyond the control of Congress. Dissent: The Defense Production Act was extended in 1951. The presidency was deliberately fashioned as an office of power and independence. Our presidents have on many occasions exhibited the leadership contemplated
by the framers. The President acted to preserve the effect of the defense programs enacted by Congress. 

NOTES: Negotiations were under way in the steel industry and were going nowhere. Also the Korean conflict was going on. Truman communicated with Congress about what he had done after the fact. Congress took no action after both the first and second communications. Truman argues that the strike would jeopardize the war effort. The fact that this was not officially called a war is a farce. How do you adjudicate between the competing interests? Justice Vinson makes the case (in the dissent) that we are dealing with an emergency, and allowing the strike to go forward would jeopardize the war effort. The commander-of-chief provision refers us to a “theatre of war.” In this case, that is Korea – it can’t reach to seizing property where the theatre is halfway around the world. Jackson on the vesting clause: This is a generic term which simply establishes that certain powers are allocated to the executive (Article 2). Presidential seizures are pretty rare: 3 seizures by Roosevelt were not sanctioned by Congress – if these seizures are treated the same, there is little chance Truman’s can be justified. We are introduced to three rubrics: The least problematic involves express authorization; a middle ground arises where they may be a concurrent authority – questions arise about whether Congress has acquiesced; and the third (where Jackson feels Truman’s actions fall) is where the President takes action that is not authorized. There is a reference to three statutory policies that Jackson says Truman has acted inconsistent with (The selective service act of 1948: a warrant to the president to take over plants that refuse to fill mandatory orders – it was conceded that this didn’t apply; the defense production act of 1950: a provision whereby the president could take over any real property in the interest of national defense, but must provide just compensation at the time of the taking – it was conceded that this provision didn’t apply; and the Taft Hartley act). So Jackson’s analysis is correct if you view the whole thing as being from labor. The Government is arguing that the President is exercising emergency powers: first, the labor discussion wouldn’t apply. The opposition to this is that it is bad to declare an emergency when there really isn’t one – and very tempting to abuse this power.

5. **Implied acquiescence by Congress.** Congress may sometimes be found to have impliedly acquiesced in the President’s exercise of power in a certain area. Where such acquiescence exists, this fact may be enough to tip the balance in favor of a finding that the President acted within the scope of his constitutional authority.

6. **Dames and Moore v Regan.** Supreme Court, 1981. **Facts:** This dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States. **Issue:** Did the president have authority to do this? **Discussion:** The President’s action was taken pursuant to specific congressional authorization, and therefore is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. We cannot say the petitioner has sustained that heavy burden. Congress implicitly approved the practice of claim settlement by executive agreement. The legislative history of the IEEPA reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Prior case law recognizes that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In addition, the President has provided an alternate forum. Congress has not disapproved of the action taken here. Where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims. **NOTES:** Once again, we are talking about presidential power. This must be read in the context of the hostage crisis in Iran. He had declared a national emergency. He froze assets and claims against Iran. The claims were to be handled through an international tribunal, which had powers of arbitration, which binding judgments. Rehnquist says that the Congress has accepted the president’s authority to enter into settlement agreements. There is a procedure for allocating funds for future settlement. We are cautioned of making too much of Jackson’s three-fold scheme. The hostage act of 1868 isn’t much help here. **NOTES:** Like Youngstown, here we get a commentary on Congressional authorization for the exercise of executive power – here an executive agreement to settle claims against a foreign country. The Court can look to statutory language that provides authorization – and this is precisely what is not found in the Youngstown case. There’s no deep divide between the Court as to the nature of the controversy (whereas the nature of the problem was in dispute in Youngstown).
7. **Foreign Affairs.** The Constitution gives the President substantially greater authority with respect to foreign affairs than with respect to domestic ones. Article III § 2 explicitly enumerates a number of powers given to him in this area (e.g., the Commander in Chief power, the treaty making power and the right to appoint ambassadors). But even more generally, the need to present a clear and unified face to the world dictates that the President bear a special role in implementing the nation’s foreign policy.

8. **United States v Curtis-Wright.** Supreme Court, 1936. **Facts:** The first count of an indictment charges that Appellees conspired to sell in the US certain arms of war to Bolivia in violation of the Joint Resolution of Congress, and the provisions of a proclamation issued on the same day by the president pursuant to authority conferred by § 1 of the resolution – which authorized the president to prohibit the sale of arms if he found that such a prohibition would contribute to establishment of peace in the region. The whole aim of the resolution is to affect a situation entirely external to the US, and falling within the category of foreign affairs. The two classes of power are different – the idea that the federal government can only powers enumerated in the constitution is categorically true with respect only to domestic affairs. An investment of the federal government with the power of external sovereignty did not depend upon the affirmative grants of the constitution. The President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the senate; but he alone negotiates. **NOTES:** The claim was that there was an unconstitutional delegation of power to the president. Can a Congress delegate its power? The congress had authorized the president to limit the sale of arms to Bolivia. Internal affairs are governed by Article 1 section 8. Those powers were possessed by the states initially, and they delegated certain powers to the Congress Article 1 section 8. Why can’t the states delegate foreign powers? They’re also found in Article 1 section 8. They can’t transfer these, because they don’t have them in the first place. With the Declaration of Independence, the foreign powers passed from the Crown to the Federal government. These powers vest in the federal government whether they are in a constitution or not. They are a necessary part of nationalism. **NOTES:** The nature of the crisis is absolutely fundamental; is it a labor dispute or is it a national emergency. The whole analysis unfolds from how you label this. The difficult part is to characterize the state of affairs in the appropriate way. If you want to describe it as an emergency in a time of war; what do you do? This is more a matter of our creativity – you might use a reductio ad absurdum argument. If it is a mere labor dispute, and it goes unresolved. The long labor dispute leads to a shortage in steel, and that reduces the war effort.

**Conclusion:** Not a labor dispute at all. If it’s a labor dispute, then everything necessary to resolve it is in the statute, and there wouldn’t be any room for the president’s action (what actually happens); if it’s a national emergency, then there’s ample power for the president.

9. **The non-delegation doctrine.** The understanding that the legislature is the exclusive lawmaking body no longer reflects reality. Agencies have been granted considerable lawmaking power. There are very few, if any, constitutional restraints on Congress’ power to delegate. The National Improvement and Recovery Act attempted to permit representatives of labor and management in each industry to meet and to design codes of fair competition. In the first case decided under NIRA, the Court invalidated a provision authorizing the President to prohibit the transportation in interstate commerce of oil produced in violation of state-imposed production quotas. The second case, Schechter involved the poultry code, which contained maximum hour and minimum wage provisions. The code also barred the sale of unfit chickens, and stated that buyers could not be allowed to select particular chickens. Schechter was prosecuted for violating both provisions. The non-delegation doctrine has all but disappeared as a constraint on the delegation of authority to administrative agencies. These are the only two cases that have invalidated federal statutes on non-delegation grounds. But Schechter itself has never been overruled. There is tension because these agencies possess rule making power and the rules have the force of law. Because they are in the executive branch, administrative agencies also have the power to enforce their regulations (and some even judicial power). Doesn’t this conflict with the separation of powers? This old view seems more idealistic. **NOTES:** A basic separation of powers: Congress makes the law, and the executive enforces the law. Why is this problematic? Administrative agencies, part of the executive branch, and have power thanks to a delegation of power from the legislature, and they make law every day of the week. Agencies are needed to specialize, etc. Are there any constitutional constraints on the Congress’ power to delegate? Not many constraints; due to the necessity of delegation. Historically, the problem was seen differently. Historically, there was a non-delegation doctrine. It said: 1) Congress can delegate the mechanics of law making to the executive branch, 2) Congress cannot delegate the principle or standard in accordance with
which the agency makes law (example: safety in the nuclear field). Why this distinction? The idea was that the Congress must remain accountable to the people.

a. **Justifications.** (1) Complex regulations are better handled in a specialized agency; (2) Law may change rapidly and Congress does not want to make a law that it would have to later change; (3) Allows Congress to act, but avoid controversy.

b. **Principles.** The non-delegation doctrine: The principle that Congress may not delegate its legislative power to administrative agencies. Non-delegation = Congress may delegate the mechanics of lawmaking to the executive branch BUT the Congress cannot delegate the principle or standard in accordance with which the agency now makes the law. Illustration: The nuclear field – safety. The point of the non-delegation doctrine: (1) the accountability of Congress to the people. Fundamental policy choices were supposed to be made by the Congress; (2) promote predictability; (3) provide a check against arbitrariness.

c. **The demise of the doctrine.** In the 60 years since Schecter not a single federal law has been declared an impermissible delegation of legislative power. Broad delegations are needed in a complex world. The strong consensus over the last half century of allowing broad delegations of legislative power to administrative and regulatory agencies of all types.

d. **Schecter v United States.** Supreme Court, 1935. **Facts:** The Court struck down a law as an unconstitutional delegation of power. NIRA authorized the president to authorize codes of competition. The Secretary of Agriculture and Administrator for National Recovery were required to determine the extent to which the codes advanced congressional objectives. **Discussion:** The act does not define fair competition. The question turns upon the authority which section 3 of NIRA vests in the president to approve or prescribe. Congress can not delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. The restrictions this act places upon the president leave untouched the field of policy envisaged by section 1. The president, in approving the code, may impose his own conditions, adding to or taking from what is proposed, as in his discretion he thinks necessary to effectuate the policy declared by the act. Such a sweeping delegation of power is without support in the decisions upon which it relies. **NOTES:** The non-delegation principle is violated in this case. What if you argue that there is a standard prescribed by the code: “fair competition.” The court here suggests that this doesn’t count as the standard as it is too broad. This doctrine did not prove to be viable. It’s not practical. The Congress produced a so-called legislative veto.

e. **Yakus v United States.** Supreme Court, 1944. **Issue:** Does the Emergency Price Control Act involve an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices. P in these cases were tried and convicted on several counts of indictments charging violation of the Act by willful sale of wholesale cuts of beef at prices above the maximum prices prescribed by regulations. The Act sets prices of commodities and rents. The standard by which the Administrator uses to guide him speaks in fairly general terms. That Congress has the authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power are not questioned here. The act is thus an exercise by Congress of its legislative power. Congress has stated the legislative objective, has prescribed the method of achieving that objective and has laid down standards to guide the administrative determination of both the occasions for the exercise of the power, and the particular prices to be established. **NOTES:** Is the difference explained by the fact that the price controls exist during WWII?

10. **Delegation of executive powers.** Congress does have considerable flexibility in assigning to the Judicial Branch tasks that might be thought law making ones, at least where the subject matter relates to the role of the courts.

11. **Mistretta v United States.** Supreme Court, 1988. The issue is the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission. The Commission is a body created under the Sentencing Reform Act of 1984. Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the commission excessive legislative discretion in violation of the constitutionality based non-delegation doctrine. We do not agree. We have generally recognized that Congress cannot
delegate its legislative power to another Branch. But that does not forbid them from obtaining assistance from its coordinate branches. So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power. Congress prescribed the specific tool for the Commission to use in regulating sentencing. Does the act violate the separation of powers? The Commission is not a court and does not exercise judicial power, although placed in the judiciary branch by the Act. This is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other branches or that undermine the integrity of the judiciary. The constitution does not preclude judges from serving on the Commission.

12. **The Legislative Veto.** In the 1930’s the Congress created the legislative veto as a check on the actions of administrative agencies. It is unconstitutional.

13. **Immigration and Naturalization Service v Chadha.** Supreme Court, 1983. **Facts:** An INS judge suspended an order against D, whose visa had expired. The Attorney General ordered the suspension after finding that D had lived in the US for over seven years. The order had remained valid for a year and a half. After the House vetoed the Attorney General’s decision, the Court of Appeals found that the House had no power to order D’s deportation. If Congress wants to overturn an executive action there must be bicameralism. Anything less is a legislative veto. **NOTES:** The nondelegation doctrine proved to be unworkable, and was replaced by the legislative veto; this was thought to be okay until Chadha. After Chadha, little attention has been paid to this rule – it would have you believe that all 200+ legislative vetoes are overruled, but that has not happened. § 1254(c)(2) gives the house the ability to overrule a decision taken in the executive branch; here it was a decision to suspend deportation proceedings. The Attorney General makes findings that Chadha had been here for seven years, and was in good moral character – and the immigration judge orders the suspension of the deportation order. These are legislative judges, odd since they function within the executive branch – not to be confused with Article III judges. Executing the legislative veto was not seen as an Article I action because it had already been set down in the law – it does not count as new legislation, it counts as monitoring of legislation already passed. Can Congress constitutionally over turn an executive action without following proper Article I procedures. Article I matters: there are four classes of exceptions (impeachments, etc.) Talk about bicameralism: It takes us back to checks and balances. Powell says this is a clear violation of the separation of powers; the legislative veto is something judicial in nature. Powell has the better of the argument; suggesting that it looks like adjudication. What’s the difference between adjudication and legislative action? White’s opinion is set out as a dilemma. Require for a formalistic opinion: It fails to address the issue that gave rise to the lawsuit; and secondly, the court shrouds its failure to address the issue in a cloak of forms (bicameralism, etc). Chadha is formalistic because is meets these criteria. One choice is that you have no agencies at all, or you take agencies without accountability at all. Is the court endorsing non-accountability? (Paulson doesn’t like this opinion). Most have ignored the Chadha rule. Why? It is so anomalous.

14. **The Removal Power.** The President, not Congress, is given the power to appoint federal officers. Article II § 2 provides that the President shall “nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, Judges of the Supreme Court, and all other Officers of the United States.” That section further provides that Congress “may be law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

   a. **Interpretation.** This means Congress may not appoint federal officials. In the case of principal officers, the President nominates a candidate, and the Senate must decide whether to approve the nomination. As to such officers, Congress may not take away the President’s right of appointment. Members of the Cabinet and ambassadors are examples of top-level officers. In the case of lower-lever federal officials, Congress does have the right to limit the President’s right of appointment. Congress cannot make such appointments itself, but it may give the power of appointment to (1) the President, (2) the judiciary, or (3) the heads of departments (Cabinet officials).

   b. **Dividing line.** The Supreme Court has established the dividing line between principal and inferior officials in a way that leaves few if any employees other than Cabinet members, ambassadors, and federal judges as principal officers.
c. **Buckley v Valeo.** Supreme Court, 1976.  
**Facts:** Ps question the constitutionality of the federal election campaign act of 1971. It was argued that the commission violated the doctrine of separation of powers because Congress retained the power to appoint several members of the commission.  
**Discussion:** Ps argue that since Congress has given the commission board powers, Congress is precluded from vesting in itself the authority to appoint those who will exercise such authority. It is clear from the constitution, that total separation of the three branches was not contemplated. The president participates in the lawmaker process by being able to veto bills, etc. The idea that because Congress has authority to regulate a field that it must therefore have the power to appoint those who are to administer the regulatory statute is contrary to the language of the appointments Clause. Principal Officers are selected by the president with the advice and consent of the senate. Inferiors may be appointed by the president alone. The Court defined officer of the U.S. to include any appointee with significant authority pursuant to the laws of the U.S.

15. **The President’s right to remove appointees.** Apart from setting out the process for impeachment, the Constitution does not state whether and when the President, Congress, or both, may remove federal appointees and employees. Accordingly, it has been left to the Supreme Court to determine the extent of the President’s right to make such removals. The presumption is that where the president has a removal power, it shall be unfettered.

a. **Myers v United States.** Supreme Court, 1926.  
**Facts:** M was appointed Postmaster at Portland, Oregon, under a statute that provided that postmasters shall be appointed and may be removed by the president and with the advice and consent of the Senate. President Wilson removed Myers from his office without the consent of the Senate. The government claimed that Myers’ removal was lawful because it is unconstitutional to limit the president’s power to remove an executive official by requiring the senate’s agreement.  
**Discussion:** (Taft): The president needs an aid to meet the responsibility of enforcing the law, and needs to be able to remove those under him for discipline. To require him to file charges and submit them to the consideration of the senate might make impossible that unity and coordination in executive administration essential to effective action. There may, however, be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the president may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. There may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interest of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its renditions, as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer has not been wisely exercised. Congress could limit the power of the president to remove inferior officers-say, by creating a civil service, for removal only for cause. It can do so only because Article II, §2 allows congress to vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments. But congress had not vested in the president alone.  
**NOTES:** There’s a wrinkle in this case. Is the Postmaster a cabinet member? No. As far as the appointment power is concerned, the inferior officers are appointed with the advice of the senate so that would go against an argument of symmetry.

b. **Quasi-legislative and quasi-judicial officers.** Where a federal appointee holds a quasi-judicial or quasi-legislative role, Congress may limit or completely block the President’s right of removal.

c. **Humphrey’s v United States.** Supreme Court, 1935.  
**Facts:** The FTC was created in 1914 to enforce certain provisions of the antitrust laws and to define and eliminate unfair methods of operation. Proponents of the act wanted a nonpartisan organization. President FDR sought to replace Commissioner Humphrey.  
**Issue:** Does the FTC act, stating that the president can remove any officer for misbehavior, restrict the power of the president to remove a commissioner except for misbehavior? Is there a constitutional reason to find this restriction invalid?  
**Discussion:** The office of postmaster is essentially unlike the office now involved that the decision in Myers cannot be accepted as controlling. A postmaster is an executive officer. The FTC is an administrative body created by Congress to carry into effect legislative policies. Such a body cannot be
characterized as an arm of the executive. The right to restrict the president’s power of removal will depend upon the character of the office. The Myers decision is confined to purely executive officers. NOTES: Roosevelt felt that he wasn’t taking the purpose that lay behind the FTC seriously. The removal provision of this Act has the constraint that he can only remove for cause. The government argues that the removal provision is unconstitutional, and they rely on the Myers decision. The Court distinguishes Myers by saying that his duties were restricted to solely executive functions. In the FTC, by contrast, there are quasi-legislative and quasi-judicial functions going on.

- **Congress silent.** In the quasi-legislative or quasi-judicial situation dealt with by Humphrey, the President may remove only if Congress has explicitly conferred the right of removal. **Weiner v United States,** Supreme Court, 1958. **Facts:** By the War Claims Act of 1948, Congress established that Commission with jurisdiction to receive and adjudicate claims for compensating those which suffered personal injury or damage as a result of WII. Three persons would compose the commission, at least two of whom were to be members of the bar, to be appointed by the president, by and with the advice and consent of the Senate. Weiner was appointed by Truman. He was removed by Eisenhower. **Discussion:** The most reliable factor for drawing an inference regarding the president’s power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. It was an adjudicating body. NOTES: Here it is held that the president cannot remove when the commission’s function is clearly adjudicative in nature.

16. **The independent counsel question.** Until 1988, the rule seemed to be that if a purely executive officer had been appointed by the President, Congress may not limit the President’s right to remove that officer. But in a case upholding a statute setting up a system of special prosecutors to investigate alleged wrongdoing by executive officials, the Court seems to have changed this rule. The rule now seems to be that Congress may limit the President’s right to remove even a purely executive officer, so long as the removal restrictions are not “of such nature that they impede the President’s ability to perform his constitutional duty.”

17. **Morrison v Olson,** Supreme Court, 1988. **Issue:** This case presents a challenge to the independent counsel provision of the Ethics in Government Act of 1978. **Holding:** These provisions of the Act do not violate the Appointments Clause of the Constitution, Article II, section 2, clause 2, or the limitations of Article III, nor do they impermissibly interfere with the president’s authority under Article II separation of powers. **The Act:** This allows for the appointment of an independent counsel to investigate and, if appropriate, prosecute certain high ranking Government officials for violations of federal criminal laws. The Attorney General conducts a preliminary investigation. He then reports to a special court created by the act. If the Attorney General believes an investigation is warranted, then an independent counsel will be appointed. The counsel will be removed if they are substantially impaired in doing their job, or upon their completion of the investigation. The counsel must also make reports to the House. **The Appointments Clause of Article II:** The President shall nominate officers with the advice and consent of congress; but the congress may by law vest the appointment of such inferior officers in the president alone, the courts of law, or in the heads of departments. The constitution divides, for the purposes of appointment, officials into two classes. The initial question is whether the appellant is an inferior or a principal officer. If a principal, the Act is a violation of the appointments clause. Appellant is clearly an inferior officer. First, appellant is subject to removal by a higher executive branch official. Second, appellant is empowered by the Act to perform limited duties. Third, the office is limited in jurisdiction. Fourth, the office is limited in tenure. **Even So:** Appellees argue that even if appellant is inferior, the Clause does not empower congress to place the power to appoint such an officer outside the executive branch. They contend that the Clause does not contemplate congressional authorization of inter-branch appointments. The Clause seems clearly to give Congress significant discretion to determine whether it is proper to vest the appointment of executive officials in the courts of law. **Appellees argue that the powers vested in the special division by the Act conflict with Article III.** The powers described above do not impermissibly trespass upon the authority of the executive branch. We are more doubtful about the Special Division’s power to terminate the office of the counsel. This is not a power that could be thought of as typically judicial. Nonetheless, this is not a significant encroachment upon the executive power. **Separation of Powers:** Does the
Attorney General’s power to remove the counsel only for cause interfere with the President’s powers? Does the act reduce the president’s ability to control the powers of the counsel? This Act gives the executive the power to remove; this case is like Humphrey’s. We cannot say that the good cause standard unduly trammels executive authority. Congress is not attempting to increase its own powers at the expense of the executive branch. Nor does it work any judicial usurpation on the executive. Nor does it undermine the executive by preventing it from accomplishing its constitutionally assigned functions. NOTES: Once the special prosecutor was appointed, she could only be removed by the Attorney General. This case seems to stand for the proposition that the Executive may be deprived of the power to appoint, and the untrammeled power to remove an inferior officer, even where the appointment relates to purely executive functions. The sole dissenter, Scalia, contended that the separation of powers principle required that the President maintain complete control over the investigation and prosecution of violations of law. Since even by the majority’s reasoning the President’s control over the special prosecutor was curtailed, in Scalia’s view the Act was clearly a violation of the separation of powers. NOTES: There is something to be said for Scalia’s dissent is Morrison – the official should be answerable only to the executive. Is there a problem with the special division’s removal power? The Court found that this is not a significant encroachment. Then we come to the separation of powers questions. Does this interfere with the President’s power? How does this case conflict with Myers? Congress is not given itself any direct role. Does the inability of the president to control the powers of the independent counsel violate the separation of powers? Scalia’s dissent is truly “prescient” – it predicts what happens 10 years later with Clinton. Either there is real independence on the part of the independent counsel (a violation of Article II), or there is not effective prosecutor at all. Scalia’s decision is seen as formalistic. 10 years later, the issue is seen quite differently. Perhaps the impeachment power should be the sole means of discipline; not the special counsel – it has to be independent, but it can’t be. For every individual who didn’t like Ken Star, someone did. From a constitutional standpoint, the problems with the independent counsel are most acute when the President himself is the object of the investigation.

18. The Federal Election Process. As a result of the Court’s decision that effectively handed the 2000 election to Bush, voters now seem to have some sort of equal protection right to have their votes counted according to uniform standards.

19. Bush v Gore. Supreme Court, 2000. Facts: On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami Dade County. It also ordered the inclusion in the certified vote total of 215 voted from Palm Beach and 168 votes from Miami Dade for Al Gore. The court ordered all manual recounts to begin at once. Bush and Cheney filed an emergency application for a stay of this mandate. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean complete way. A state legislature’s power to select the manner for appointing electors is plenary; it may select them itself, if it so chooses; but in each of the several states the citizens themselves vote for presidential electors. The State can take back the power to appoint electors. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. Issue: Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. Discussion: Much of the controversy seems to stem from the ballot cards designed to be punched with a stylus, which have not been perforated with sufficient precision for a machine to count them. The Florida Supreme Court has ordered that the intent of the voted be discerned from such ballots. It is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida’s command to consider “the intent of the voter” is unobjectionable as an abstract proposition and starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and necessary. The actual process by which the votes were to be counted under the Florida Court’s decision raises further concerns. The order did not specify who would recount
the ballots. This process is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. We are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed. **Concurrence:** Article II section 1 clause 2 provides that each state shall appoint, in such manner as the legislature thereof may direct, electors for president and vice president. The scope and nature of the remedy ordered by the Florida Court jeopardizes the legislative wish to take advantage of the safe harbor provided by 3 usc section 5. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy section 5. Yet four days before this deadline, the Court ordered a recount of tens of thousands of votes. The remedy prescribed by the Supreme Court of Florida cannot be deemed an appropriate one as of December 8. **Dissent:** The constitution gives the states the primary responsibility for determining the manner of selecting the presidential electors. It hardly needs stating that Congress did not impose any affirmative duties upon the states that their governmental branches could violate. Failure of the Florida Court to specify in detail the precise manner in which the intent of the voter is to be determined is not a constitutional violation. **Dissent:** We see no reason why Florida couldn’t meet the deadline. **Dissent:** Federal courts defer to state high court’s interpretations of their own state law. NOTES: The distinction we made in the Marbury case the political explanation and the legal justification. The political explanation we found in Marbury was a result of the bind he found himself in. At the same time, to simply dismiss the case would have deprived Marshall to vindicate Marbury’s position, and to vindicate the position of the federalists generally. So, as a political explanation of what happened, we get Marshall’s decision to hold the statutory provision in question unconstitutional. This is not a legal justification for or against anything. The justification comes in Marshall’s argument for constitutional review. In Marbury, the lack of a clear legal justification for the exercise of the constitutional review power does not mean that the court had no such power; it just means that the question was open – and over a long period of time, the constitutional review power then aggregates. What’s the political explanation for Bush v Gore? One can speculate that the future composition of the court had an effect – if Gore won, the old timers may have been replaced.

20. **The President and the Congress on the War Power.** After Vietnam, increasingly the White House claimed autonomous authority under the constitutional power of the President as Commander in Chief, and increasingly, Congress sought to interpose its judgment, relying on its powers to declare war and to raise and support armies. Two problems: Was there legal justification for the use of military forces in Vietnam without a formal declaration of war? Does Congress have power to enact guidelines for the use of armed forces in overseas hostilities short of declaration of war? Article I grants the Congress the power to declare war and the authority to raise and support the army and navy. Article II makes the President the Commander in Chief. The president has a duty to defend the United States, and if the president always had to turn to the Congress, the delay might be fatal. Once the president has taken such actions, he would go to congress for what has been done. What if the emergency goes on and no congressional authorization in the form of a declaration of war? There are extensions under the War Power Resolution. This Resolution was a response to an aggregation of the war power to the president at the expense of the congress. The Senate Report says that Congress had acquiesced so many times that the war power had aggregated in the president. The War Powers Resolution of 1973 at 5(c) speaks of a legislative veto. Section 8 is a direct reaction to the Gulf of Tonkin resolution. President Nixon vetoed the War Powers Resolution, and it passed over his veto.

- The Prize Cases have addressed the constitutionality of Presidential war making without a congressional declaration of war. Little exists in the way of law as to the circumstances where the President may use troops without congressional approval or as to what Congress may do to suspend American involvement in a war. The Prize Cases: A rare Court consideration of presidential powers to commit armed forces came during the civil war. The Supreme Court sustained most of President Lincoln’s seizures of goods pursuant to his blockade of Southern ports even though there had been no congressional declaration of war. Justice Grier’s majority opinion: Congress alone has the power to declare a national or foreign war. The constitution confers onto the President the whole executive power. But by the Acts of Congress of February 28, 1795 and March 3, 1807, he is authorized to call out the militia and use the military and naval forces in case of
invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States. If war is made by invasion of a foreign nation, the President is bound to resist, and does not need to wait for any special legislative authority. Justice Nelson’s dissent: Before an insurrection against the Government can be dealt with on the footing of a civil war, it must be recognized or declared by the war-making power of the government. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the state can be punished in his person or property.

NOTES: The issue is really whether the Civil War can be treated the same as a foreign war. Did the President have the power to impose a blockade without Congressional authorization? Would there have been any problem if there had been a congressional declaration of war? No, that would have been no case at all. This was the civil war – there might have been certain reluctance on the part of Congress to declare war. In recognizing a declaration of war, you recognize the foreign state; the union was not willing to recognize the confederates as a separate nation. There might be authorization apart from a declaration of war that would authorize the president to impose the blockade. In the international sense, the laws of war give the president the right to suppress an invasion.

• Challenges are likely to be dismissed as political questions (especially in foreign affairs).
• It is unresolved as to what constitutes a declaration of war sufficient to fulfill the requirements of Article I of the Constitution.
• Is it unresolved whether and how Congress can put other limits on the President’s use of troops in foreign nations – Is the War Powers Resolution Constitutional? It states that the President may introduce U.S. Armed Forces into hostilities or situations where hostilities appeal imminent only pursuant to: (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by attack upon the U.S., its territories or possessions or its armed forces. It says the President must consult with Congress if possible before such actions, and that the President must withdraw after 60 days if no formal declaration of extension has been made. However, the War Powers Resolution passed over a Presidential veto. No President has recognized congressional power as stated in the act. This controversy goes on and in light of recent developments; there is every reason to believe it will be with us for some time.

21. Ex parte Milligan: Supreme Court, 1866. Milligan presented a petition to be discharged from an alleged unlawful imprisonment. Milligan is a citizen of the United States, has lived for twenty years in Indiana, and at the time of the grievances complained of, was not and never had been in the military service of the United States. He was arrested by order of the General commanding the military district of Indiana, and has since been kept in close confinement. He was brought before a military commission, tried on certain charges, found guilty, and sentenced to be hanged. Milligan insists that the Military Commission did not have jurisdiction to try him upon the charges, because he was a citizen of the United States and the state of Indiana, and had not been a resident of any of the states whose citizens were arrayed against the government, and that the right to trial by jury was guaranteed to him by the Constitution of the United States. It is said that jurisdiction is proper under the “laws and usages of war.” However, they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. In Indiana, federal authority was always unopposed, and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no way connected with the military service. Milligan also deserved a trial by jury. While serving, a soldier surrenders his right to the civil courts. All other citizens are guaranteed this right to trial by jury. Martial law cannot arise from a threatened invasion; the necessity must be actual and present, the invasion real. Martial law is confined to the locality of actual war. Concurrence: The petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offense, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether. However, when writ is suspended, the Executive is authorized to arrest as well as to detain; and that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention. We think Congress has power, though not exercised, to authorize the military commission which was held in Indiana. We by no means assert that Congress can establish and
apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. But where the nation is involved in war, it is within the power of Congress to determine to what states such danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety. There are three kinds of military jurisdictions: one to be used in both peace and war; one to be used in times of foreign war outside the United States; and one to be used in time of invasion or insurrection within the United States, or during rebellion with the states. The first is jurisdiction under military law; the second may be called military government, superseding the local law; the third may be called martial law, and is called into action by Congress, or temporarily by the President. We think the Congress’ power to authorize trials for crimes against the safety of the national forces, may be derived from its constitutional authority to provide for governing the national forces. NOTES: The people arrested were prominent anti-war democrats. Why don’t the laws of war apply? There is no basis for martial law; the threat of such hostilities does not suffice.

22. **Ex parte Quirin**: Supreme Court, 1942. Did the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President, conform to the constitution. Petitioners were born in Germany, and all have lived in the United States. All returned to Germany between 1933-1941. All but one are citizens of the German Reich, with which the United States is at war. After the declaration of war between Germany and the US, petitioners received training at sabotage school in Berlin. Four boarded a German submarine and when to Long Island, where they landed at night, carrying with them explosives, fuses, and timing devices. They wore German infantry uniforms, and buried these close after landing. The four others boarded a German sub and landed in Florida. The came ashore at night, wearing German uniforms, and carrying explosives. All were taken into custody by the FBI. All had received instructions to destroy war facilities, and were to receive salary from the German Government. The President appointed a military commission to try petitioners for offenses against the law of war and the Articles of War. On the same day, the President declared that “all persons who are subjects, citizens, or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States, and are charged with committing or attempting sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals” – and also denied access to the courts. Petitioner’s main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that they are entitled to be tried in civil courts with a trial by jury, which the fifth and sixth amendments guarantee. We are concerned only with the question of whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. These petitioners were charged with an offense against the law of war which the constitution does not require to be tried by jury. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. United States citizens who associate themselves with the military arm of the enemy government, and with its aid enter this country bent on hostile acts are enemy belligerents with the meaning of the Hague Convention and the law of war. Petitioners argue that even so, they are still entitled to a trial by jury. The Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission. NOTES: German spies were attempting to blow up munitions factories. Roosevelt’s proclamation authorizes their trial before a military tribunal – as laid out in the laws of war (old treaties, Hague, Geneva conventions, customary international criminal law, etc.). The government replies that the petitioners are enemy belligerents. They are spies (they didn’t have their uniforms on), and so long as the president has provided for a military tribunal, there is no constitutional objection thereto. NOTES: A different result because of the different status of the criminals. However, Haupt was a citizen. If Milligan and his friends enjoyed a civil trial according to constitutional law, why not Haupt? The Court distinguishes Haupt’s case from Milligan: what about his right as a citizen to a trial in a civil court? They say Milligan was not part of, or associated with, the armed forces of the enemy. This is fine, but is it good enough? It remains that Haupt was a citizen, and the civil courts are up and running.

23. **The Senate Committee Report of 1967**: It was understood by the framers that the president in his capacity as commander in chief of the armed forces would have the right, indeed the duty, to use the armed
forces to repel sudden attacks on the United States, even in advance of Congressional authorization to do so. It was further understood that he would direct and lead the armed forces and put them to any use specified by Congress but that this did not extend to the initiation of hostilities. The framers wanted to give the president the power to repel sudden attacks, and not given him the power to initiate war. Such use by the president of the armed forces in the 19th century – such as suppressing piracy, protecting Americans in backward areas, hot pursuit of criminals across frontiers – without authorization by Congress, came to be accepted practice, sanctioned by usage though not explicitly by the constitution. Though constitutional interpretation at this time was far from consistent – one opinion enjoyed wide acceptance: the president could constitutionally employ American military force outside the nation as long as he did not use it to commit acts of war. An act of war in this context usually meant the use of military force against a sovereign nation without that nation’s consent and without that nation’s having declared war upon or used force against the United States. The Expansion of the Executive Power in the 20th Century: The use of armed forces against sovereign nations without authorization by Congress became common practice in the 20th century. President Roosevelt expanded executive power over the use of the armed forces to an unprecedented degree. The exchange of overaged American destroyers for British bases was accomplished by executive agreement, in violation of the Senate’s treaty power, and was also a violation of the international law of neutrality, giving Germany legal cause, had she chosen to take it, to declare war on the United States. The transaction was an emergency use of Presidential power, taken in the belief that it might be essential to save Great Britain from invasion. In 1941, he committed American forces to the defense of Greenland and Iceland and authorized American naval vessels to escort convoys to Iceland. When one American destroyer was fired on by a German submarine, Roosevelt announced that any American naval vessel would shoot on sight any German or Italian ships west of the 26th meridian. He had essentially committed the United States to a naval war in the Atlantic. By the late 1940’s there had developed ambivalence as to the war power in the minds of officials in the executive branch, Congress, and the country at large. It was widely conceded that the president had the authority to use the armed forces in any way he saw fit. Truman put troops in Korea in 1950 without Congressional authorization. The Gulf of Tonkin resolution represents the extreme point in the process of constitutional erosion that began in the first years of this century. The resolution constitutes an acknowledgment of virtually unlimited presidential control of the armed forces. The committee rejects the contention that the war powers as spelled out in the constitution are obsolete and strongly recommends that the congress reassert its constitutional authority over the use of the armed forces. NOTES: War Powers Resolution of 1973: This was a response to the problem posed in the Committee Report – namely, as the report says, the Presidential aggregation of the war power in place of the congressional war power. These two documents raise a nice question about constitutional change. We have seen, in the context of the commerce clause cases, what constitutional change can come to (the Revolution of 1937, for example).

24. Hamdi v Rumsfeld: We are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an “enemy combatant,” and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. In response to the attacks of September 11, Congress passed a resolution authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States. Soon after, the president dispatched troops to Afghanistan. This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. Hamdi was born an American citizen, and moved to Saudi Arabia as a child – by 2001, he resided in Afghanistan. At some point, he was turned over to the US military. The Government contends that Hamdi is an enemy combatant, and that this status justifies holding him in the US indefinitely – without formal charges or proceedings – unless and until it makes the determination that access to counsel or further process is warranted. The threshold question before us is whether the executive has the authority to detain citizens who qualify as “enemy combatants.” There is no definition for this term, but in this case it means an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. So we answer, whether the detention of citizens falling within this definition is authorized.
The Government argues that no explicit congressional authorization is required, because the Executive is given plenary power to detain pursuant to Article III, but we do not need to address that question because the Congress has in fact authorized Hamdi’s detention through the AUMF. We conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe, and that the AUMF satisfied § 4001 (a)’s requirement that a detention be pursuant to an Act of Congress. We hold that the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the president to use. There is no bar to this Nation’s holding one of its own citizens as an enemy combatant. A citizen can be part of or supporting forces hostile to the United States, etc. Hamdi objects that Congress has not authorized the indefinite detention to which he is now subject. It is a clearly established principle of the law of war that detention may last no longer than active hostilities. If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of necessary and appropriate force and therefore are authorized by the AUMF. Ex parte Milligan applied to a resident of Indiana arrested while at home there. Had Milligan been captured while assisting Confederate troops on the battlefield, the holding may have been different. Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. The parties agree that the writ of habeus corpus remains available to every individual detained within the United States. The Government argues that no further process is due. However, under the definition of enemy combatant, Hamdi would have needed to be part of or support forces hostile to the United States, etc. The habeus petition states only that when seized, Hamdi resided in Afghanistan. This assertion is not a concession that one was captured in a zone of active combat, etc. We reject the notion that Hamdi has made concessions that eliminate any right to further process. Mathews v Eldridge dictates that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government’s asserted interest, including the function involved and the burdens the government would face in providing greater justice. Substantial interests lie on both sides of the scale in this case. The risk of erroneous deprivation of a citizen’s liberty without sufficient process here is very real. We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker. But exigencies of the situation may demand that enemy combatant proceedings be tailored to alleviate their potential burden to the executive. For example, hearsay may need to be accepted as the most reliable available evidence. A burden shifting scheme would meet the goal of ensuring that the errant tourist has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion. This process is due only when the determination is made to continue to hold those who have been seized. It is possible that the standards here articulated could be met by an appropriately authorized and properly constituted military tribunal. Ginsburg and Souter, concurring in part, dissenting in part, concurring in judgment: the plurality does, however, accept the Government’s position that if Hamdi’s designation as an enemy combatant is correct, his detention is authorized by an Act of Congress as required by § 4001(a), by the AUMF. Here, I disagree. The issue is how broadly to read the Non-Detention Act. In requiring that any Executive detention be pursuant to an Act of Congress, Congress necessarily meant to require a congressional enactment that clearly authorized detention of imprisonment. The need for a balance of powers between the branches of government requires an assessment by Congress before citizens are subject to lockup, and also the need for a clearly expressed congressional resolution of the competing claims. The AUMF never so much as uses the word detention. It suffices to say that the Government has failed to justify holding him in the absence of further Acts of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a showing that § 4001 (a) is unconstitutional. Scalia and Stevens dissenting: Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the constitution’s suspension clause, allows Congress to relax the usual protections temporarily. No one contends that the congressional AUMF is an implementation of the Suspension Clause. There are times when military exigency renders resort to the traditional criminal process impracticable. The Habeas Corpus Act of 1679 makes it clear that indefinite imprisonment on reasonable suspicion is not an option absent a suspension of the writ. Historical documents indicate that the only alternatives are to charge a crime or suspend the writ. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would
have no such authority. But if the law of war cannot be applied to citizens where courts are open
(Milligan), then Hamdi’s imprisonment without criminal trial is no less unlawful than Milligan’s trial by
tribunal. Where those jurisdictional facts are not conceded – where the petitioner insists that he is not a
belligerent – Quirin left the pre-existing law in place: Absent suspension of the writ, a citizen held where
the courts are open is entitled either to criminal trial or to a judicial decree requiring his release. The
AUMF is not remotely a suspension of writ. Thomas dissenting: The plurality qualifies its recognition of
the President’s authority to detain enemy combatants in the war on terrorism in ways that are at odds with
our precedent. In my view, the structural considerations discussed demonstrate that we lack the capacity to
second-guess this determination. Due process requires nothing more than a good-faith executive
determination. NOTES: The traditional stance of the Court dealing with “larger” issues of war had the
Court invoking the political question doctrine. The constitutionality of war is a political question. One
might say that war has been committed to the Congress textually. The question of who declares war has
been give clear from the beginning (Congress) – but that has not happened – war has not been declared.
So, we cannot follow the political question. The Court resorts to the prudential criteria: (1) textual
commitment to another branch; (2) courts can’t piece together an alternative; (3) another branch has spoken
(THIS STEMS FROM THE TINY SNIPPET OF MCNAMARA). Why was there no employment of the
political question doctrine in Hamdi, Milligan, etc.? Because in these cases the question of an “individual’s
right” (typically the write to a writ of habeas corpus) can be answered apart from the larger constitutional
question of war and peace. McNamara was different; and thus, the Court insisted that the army generals
had no colorable claim unless the Court would be prepared to declare war unconstitutional. NOTES: Here
the question is whether Congressional authorization of Hamdi’s detention, in the context of the response to
September 11, warrants suspension of the citizen’s right to petition for writ of habeas corpus. Scalia turns
up as the champion of Hamdi’s rights under the constitution. Does Hamdi have a write under the
constitution to petition for a writ of habeas corpus. The Court holds that the citizen cannot be deprived of
his right to petition for this writ. Hamdi was a US citizen who wound up in Afghanistan. It is alleged that
Hamdi was captured by the Northern Alliance and was turned over to the US government. He winds up in
Guantanamo Bay, is transferred to South Carolina. Hamdi’s father files a petition for writ of habeas corpus
– saying that he is an aid worker who had been in the country less than two months. The Mobb’s
Declaration: this counted as the government’s evidence for the claim that Hamdi was an enemy
combatant. The declaration is important because it is the sole evidence on behalf of the government’s
position. According to Mobb’s, Hamdi was actively fighting with the Taliban – his unit had surrendered,
etc. The District Court, with regards to the Mobb’s Declaration, thinks that it is inadequate, and they
request further materials to try to figure out what was really going on (an independent check on the veracity
of the Mobb’s Declaration). The Court of Appeals reverses – suggesting that if the Mobb’s Declaration is
accurate, that provides a constitutional basis for Hamdi’s detention – precedent in Ex Parte Quirin for the
Court of Appeals opinion: regardless of citizenship, etc. (1) The government argues that no congressional
authorization for Hamdi’s detention was even required in the first place, because the Executive power
under Article II suffices here, specifically his power to control the army (as commander in chief). This
argument is passed on by the Court because there was congressional authorization. The AUMF is the
congressional resolution passed a week after September 11. The government argues that the 1971 Act
(forbidding detention except when expressly authorized by Congress § 4001 (a)), doesn’t apply to the case
of a detention in a military scenario (they argue that it’s restricted solely to civilian detentions). In making
this argument, the government refers back to the AUMF – and the Court buys this argument. Then we get
to the question of indefinite detention – Hamdi is arguing that the “war on terror” could last forever. What
about the government’s argument that Hamdi’s status as an enemy combatant is something that has been
determined? The Court rejects this argument flatly. The circumstances surrounding his capture remain
unclear. THE HEART OF THE OPINION: the Court goes to the Mathews v Eldridge balancing test,
recognizing that there are legitimate interests on both sides of the issue. Note the problem: the balancing
test may be possibly justifiable in Mathews, where there was a statutory right, but it WON’T FOLLOW
THAT A STRAIGHTFORWARD BALANCING TEST IS APPROPRIATE WHERE
CONSTITUTIONAL RIGHTS ARE AT STAKE. But the case comes out correctly – but wouldn’t a safer
route been a presumption in favor of constitutional immunity by way of the strict scrutiny test? Note that if
you are arguing against the right at issue, do the balance a little differently. If for it, use the strict scrutiny
test. Souter: They contend that the non-detention act of 1971 requires Hamdi’s release. Scalia and
Stevens dissenting: Scalia speaks of the Suspension Clause (found in the constitution at Article 1 § 9
paragraph 2 – given the right to suspend habeas corpus at times of open warfare). Scalia says the writ
hasn’t been suspended – so the only alternative would be to charge Hamdi with treason. Since neither has happened, he is entitled to be released. **Thomas:** Detention falls under the war power.

25. **Rasul v Bush:** Stevens: These two cases present the narrow question whether the US lacks the jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. Since 2002, the US military has held petitioner’s along with about 640 other non-Americans captured abroad. The Bay is leased from Cuba, and under the agreement: the US shall exercise complete jurisdiction and control over and within said areas. In 2002, petitioners filed actions challenging the legality of their detention. All alleged that none of the petitioners has ever been a combatant against the US or has ever engaged in terrorist acts. Congress has given courts the authority to hear applications for habeas corpus by any person who claims to be held in custody in violation of the constitution or laws or treaties of the US. The constitution forbids suspension of the writ except in cases of rebellion or invasion when the public safety may require it. The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the US exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.” The courts do have jurisdiction. **Kennedy concurring:** The decision in Eisentrager indicates that there is a realm of political authority over military affairs where the judicial power may not enter. First, Guantanamo is in every practical respect a US territory. Secondly, the detainees are being held indefinitely. **Scalia, Rehnquist, Thomas dissenting:** The Court boldly extends the scope of the habeas corpus statute to the four corners of the earth. The consequence of this holding allows an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. **NOTES:** No charges were ever filed, no access to counsel. The district court dismissed on the grounds that the detainees were outside the United States (in Guantanamo). However, this is distinguishable from Eisentrager. These are not foreigners. They are imprisoned in a territory over which the US exercises exclusive jurisdiction and control.