Constitutional Law Outline

I. Judicial Power, Congressional power vis-à-vis the Judiciary, and the Political Question Doctrine [maybe see *Marbury* – court will not decides political issues, only legal issues?]

**Marbury v. Madison**, 1803, Marshall – judicial review, the power of the courts to declare laws as unconstitutional and invalidate them.

- **Holding**
  - Marbury had a right to his judicial commission, but the Court would not enforce this right because the jurisdictional law under which he was suing was unconstitutional.
  - The executive was subject to constitutional restraints that could be enforced by the judiciary.
  - Cannot grant remedy because the original action is not w/in the jurisdiction that Article III fixed for the Court.
    - Judiciary Act gives jurisdiction to the court, but this conflicts with the Constitution, so it’s invalid.
    - **Power to review Congressional legislation on constitutional grounds.**
  - The Opinion
    - Parts
      - Substantive question
        - Marbury does have a right to the commission once signed by the President and sealed by the Secretary of State. The commission was a “vested legal right.”
        - Legal remedy is required for a legal wrong. He is entitled to a remedy. → Marshall appeasing his party the Federalists; knows if he let them have it though it would undermine the judiciary, so really going the way Jefferson wants it to go (new incoming President).
      - Jurisdictional question
        - § 13 of the Judiciary Act of 1789 authorize original actions in the Supreme Court for writs of mandamus to officers of the United States. But, because the statute, as construed, provided for original actions, such as Marbury’s action, it violates Article III, which Marshall interprets as limiting the original jurisdiction of the Supreme Court.
          - Inconsistent provision so unconstitutional and void.
I.e. the Supreme Court has the power to invalidate a Congressional law that conflicts with the constitution.

- Constitution is one of defined and limited powers, chosen by the people. Since people chose written constitution its indicative that it should be supreme over Congressional laws (lest Congress have unlimited power).

- Judicial review – arguments philosophical and legal
  - It is emphatically the province and duty of the judicial department to say what the law is.
  - Previously recognized that the Constitution is the superior law of the nation, Marshall lays claim to the judiciary’s final authority on matters of constitutional interpretation.
    - **Concept of the Constitution as the law, and the judiciary as the institution with the final responsibility to interpret the law – cornerstone of judicial review today.**
  - If statute would prevail it would subvert the foundation of the written Constitution.
  - Framers
    - Must have intended judiciary to have the final say – language of the Constitution extends to “all cases arising under the Constitution.”
    - Other provision in the text that put limits on acts of government such as export tax clause, Bill of Attainder, ex post facto prohibitions, etc – Framers must have contemplated the courts would follow these terms instead of contrary acts by the legislature.
  - Oath of the judges requires them to support the constitution.
  - Supremacy Clause of Article VI – Constitution is the supreme law of the land, all laws must be made in pursuance of the constitution.

  - Suggests that Marshall has no argument and is begging the question. Marshall says that the judge’s decided, but makes no argument in support of this.
  - Says that if legislature law comes in conflict with conflict, there is superior obligation to go with constitution –
nowhere does it say that it has to be the *judiciary* that decides this.

- Slippery slope argument – if the judiciary can inquire into anything beside the form of enactment, then where will it stop? Can it call for election returns? Or scrutinize the qualifications of those who compose the legislature?

- **J. Holmes, J. Jackson** (Supp #2, p. 75): no inevitability (contrary to the rule in *Martin*).
  - Holmes – I do not think the US would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.
  - Jackson – The power of the SC to declare acts of the *states* void under the federal Constitution presents an entirely separate issue in our history… [and] rests on quite different [and stronger] foundations than does the power to strike down *federal* legislation as unconstitutional.

- **Marbury** as applied in future cases
  - Very unclear in the early years, power aggregated very dramatically during the last 1/3 of the 19\textsuperscript{th} century. Entrenched this power.
  - Model not been that influential – see European system. Our system is centralized; their system is decentralized. See section vi.

- Consider competing readings of the holding / rule in *Marbury*
  - Criticisms
    - Disapproval of the way in which Marshall strove to reach the conclusion concerning the constitutional authority of the Court over the other branches of the government.
      - The supremacy clause of Article VI does not solve this problem, says nothing concerning the relationship of the federal judiciary to other branches of government.
    - Criticism over Marshall’s arguments supporting judicial authority as merely bare assertions of authority rather than reasons for justifying that authority.
  - Concept of judicial review rests on 3 bases (*Marbury* seeks to establish the first two, and implies the third)
    - The Constitution binds all parts of the federal government
o It is enforceable by the Court in actions before it
o The judiciary is charged w/interpreting the Constitution in a unique manner so that its rulings are binding on all other departments of government.

- Constitutional review powers of the German centralized Constitutional Court – ask him exactly how detailed he wants out knowledge of this to be.
  - They have several constitutional courts – state issues of con law go to the state constitutional court, federal issues of law go to the federal con court. Have proceedings on the constitutional issue and send back to the court of ordinary jurisdiction to better inform the parties on the constitutional matter.
  - The German con court can strike down / wipe out the statues all together. In the United States, the court can only strike it down for the parties involved in the suit. US courts don’t have this power – Article III says that our courts are limited to the “case or controversy at hand.”
    o Offending provisions fade away in the United States through the process of *stare decisis*.
  - German courts have the power to abrogate the system. High court is empowered to issue directives to Parliament to enact certain laws in keeping with the constitutional court decision.

**Martin v. Hunter’s Lessee**, 1816, Story – establishes federal judicial power over state laws. [British loyalist vs. VA state grantee dispute over same piece of land].

- **Holding**
  - The Supreme Court has the jurisdiction and authority to review all state acts under the Constitution, laws and treaties of the United States. I.e. the Supreme Court can review the decisions of the highest state court decisions that are adverse to federal law (1789 Judiciary Act § 25).

- **Reasoning**
  - Uniformity – Supreme Court’s right and duty to be the single, final interpreter of federal law and the Constitution. Need entity to give final interpretation. Need the meaning and application of the laws, treaties and Constitution of the United States would have a uniform interpretation and application throughout the country.
  - Supremacy Clause – recognizes appellate jurisdiction in the SC over actions of the state courts, clearly shows framers anticipated that issues of federal law would appear in State courts.
See J. Holmes above and ask: why is review power inevitable here? I.e. why this is less problematic than decisions of federal law made by federal bodies (I.e. the Marbury phenomena)???

- If you do not check State decision on federal law the states can in effect say “to hell with you Washington.” Then would be giving the state court the highest authority.
- For example, in Martin the VA court of appeals says they will not carry out the orders because section 25 is unconstitutional, fractured holdings amongst the state courts.

Removal power???

**Ex Parte McCardle**, 1868 – two possible holdings, one that Congress has the broad power to limit jurisdiction of the Supreme Court to dictate case outcomes. [Post-civil war, Reconstruction legislation, McCardle appeal under Act and last minute Congress withdrew statutory right of appeal, Court complied w/withdrawal and dismissed the case for want of jurisdiction].

- Two readings of McCardle
  - “The McCardle rule” → Support for the broad power of Congress to limit the jurisdiction of the lower federal courts and the Supreme Court. It’s a general grant of power.  (Hornbook reasoning).
    - This reasoning has been used to support unsuccessful efforts to assert extensive congressional power over the jurisdiction of courts in order to control substantive results of court decisions on controversial topics like reapportionment, subversive activities, and school busing.
    - If this was true then reduces the effect of Marbury.
  - There is other Congressional authority out there, another route to the same end. If Congress had repealed both acts them we could assume the hornbook reasoning. (When read with Yerger).
    - Last line of McCardle – “It does not affect the jurisdiction which was previously exercised.”
    - Reference to the Judiciary Act § 14.
    - Judge was aware the Judiciary Act existed as an independent way around the jurisdictional issue.

Constitutional support – Article III, section 2, clause 2

- “In all cases affecting Ambassadors, other public ministers and consuls, and those in which a State shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, 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.”
**Ex parte Yerger**, 1868 (2 months later) – the repealing act at issue in *McCardle* did not affects the Supreme Courts certiorari jurisdiction. [Same type of habeus corpus act as *McCardle*].

- Importance:
  - The limitation of the appellate jurisdiction in *McCardle* had little practical effect on similar cases because an alternative review was available.
  - In *McCardle*, Congress was only withdrawing one avenue of appeal to the Supreme Court.
    - He extricates himself by petitioning for habeas corpus on the 1789 Judiciary Act (having learned from *McCardle*) and the Supreme Court uphold jurisdiction here under § 14.
    - Implication for *McCardle*
      - If § 14 is in place then the holding that Congress has the power to constrain the judiciary is false, it simply just eliminated one of the jurisdictional routes.
      - Leaves the *McCardle* rule empty because there is another provision out there doing the same thing.

**United States v. Klein**, 1871 – Congress may not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case; I.e. Congress cannot impose its interpretation of the law in pending cases. [Klein given presidential pardon proved he did not assist rebellion and under a statute could get his land back, appeal to Supreme Court and while appeal pending Congress passed statute to reverse result].

- Holding
  - Agree that Congress had the power under Article III to confer or withhold the right of appeal from Court of Claims decisions, but
  - Article III also requires that the judicial branch be independent of the legislative and executive branches – and this restricts Congress’s power. Congress passed its limit here separating the legislative from the judicial.
  - Supports contentions
    - Congress must exercise power consistent with the constitutional limitations and the independence of the judiciary.
    - Congress may not decide the merits of a case under the guise of limiting jurisdiction – limitations must be neutral.

**Seattle Audubon** – Congress can change the law applying to cases not yet decided. [Environmental group sue US Forest Services for violating environmental law, while suit
pending Congress pass law with less stringent environmental standards than those by existing statute such that US FS was in compliance].

- **Holding** – Statute is good law and simply “run of the mill” amendment.
- **Significance** – Congress can rewrite the substantive law and micromanage the courts’ application of the law?
- **Why this case is weaker than Klein** – don’t have an individuals **rights** at stake, there is only an environmental issue at stake. Simply a **policy** case with a **policy** issue where Congress has greater discretion.

- **Distinguish “internal” constraints on Congress versus “external” constraints of two sorts (1) stemming from elsewhere in the constitution; (2) turning on “essential functions” hypo.**
  - Internal constraints on Congress – Article III, § 2 “… with such exceptions, and under such regulations as the Congress shall make.”
    - Are there any constraints at all?
  - External constraints
    - Stemming from elsewhere in Constitution
      - Other parts of the constitution limit Congress’s power.
      - All other federal powers are subject to Constitutional limitations. Example – Congress has the right to define and punish piracy, but cannot do so in a way that violates the Bill of Rights.
      - Congress should not be able to exercise its power to create exceptions to federal jurisdiction that would violate the due process clause of the 5th Amendment, or other Constitutional limitations.
    - Turning on essential functions hypo
      - Article III was in place before there was a Bill of Rights, the courts role has changed fundamentally in response to the “rights revolution” and for the Congress to undermine the “essential role” of the courts is to deprive us of the only mechanism we have for checking abuses of legislative power.

**II. Congressional power under the “necessary and proper” clause, under the commerce clause, and under other provisions of art. I § 8. I.e. Sources of national authority and federal power.**

**Necessary and proper clause:** Congress shall have 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.” Art. I, sec. 8, p. 18.
A. Marshall’s interpretation of the “original understanding”

**MuCulloch v. Maryland**, 1819 – broad reading of the necessary and proper clause. [The ability of the federal government to charter the 2nd Bank of the United States; Maryland made tax on bank notes not chartered in state that was in effect a discriminatory tax on the national bank; MD sue when MuCulloch (cashier) refused to pay the tax].

- **Holding(s)**
  - The tax on the bank was invalid, in doing so the court held that the national bank was constitutional (if it wasn’t then MD not interfere w/federal authority).
  - Rejected MD “states rights” / sovereignty / federal limited power argument; thus establishing the basis for **federal supremacy**.

- **Issues**
  - The constitutionality of the US bank – yes, it’s constitutional.
  - Whether the state can tax the bank even if it is constitutional – no, it cannot because it doesn’t fit into the whole-parts analysis.

- **Opinion**, 3 distinct aspects of federal power
  - Federal government draws authority from the people
  - Interpreted Article I necessary and proper clause to allow Congress a wide scope of authority to implement the enumerated powers.
  - State legislation (including state taxation) might interfere with the exercise of these federal powers is invalid.

- **Broad interpretation of the necessary and proper clause**
  - Grant of power to Congress allows for the full effectuation of national goals.
  - Classic test for the existence of federal power: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”
  - Congress can create a 2nd Bank of the US because there is a reasonable connection between it and the enumerated Congressional power to ‘lay and collect taxes; borrow money; regulate commerce; declare and conduct a war; raise and support armies and navies.’

- **Supporting arguments**
  - Framers intended the nation to endure thus the government was have normal discretionary powers of a sovereign so that Congress can best choose how to effectuate national goals.
  - Structure of the Constitution – necessary and proper clause followed the enumerated powers, it is simply another enumerated power and the placement of the clause (last) indicates that rather than a limit on the
powers it’s an express recognition of the need to provide additional law making powers for the execution of other enumerated powers.

- Doesn’t need to be the means that are absolutely necessary, too restrictive, it would be illogical. Just need any reasonable means.

End: “legitimate”; also note “pretext” argument (Supp #2, page 31)

- “Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to affect any of the objects entrusted to the government, 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. This court disclaims all pretensions to such a power.”

- Means: “appropriate” – compare competing strategies:
  - Deferece to Congress (relaxed “rational basis” standard),
  - Truth as criterion of “rational”

- Hamilton on the first United States Bank – drawn on in the opinion supporting broad interpretation of the means.
  - “That every power vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions & exception specified in the constitution; or not immoral, or not contrary to the essential ends of political society.” ~ Hamilton

- Consequences of narrow reading (Madison, Jefferson on First US Bank, counsel for State of Maryland in *MuCulloch*)
  - Slippery slope argument – federal government will be destroyed because Congress then may do anything they want with whatever creativeness of like means.
  - Query whether this is to be taken seriously – the argument isn’t worth anything unless there are people that want it. Using this as a scare tactic.

- Undermines limited government – if general welfare clause can be implemented by any means ever than would render the enumeration of particular powers worthless.

- Issue of the “constitutionality” of the bank has not been settled in the courts. The first bank was decided in the Congress. Not constitutional
simply because it’s there – this begs the question. Need to appeal to something independent of Congress to get a reading on the truth of what the Congress says. Past practice is not dispositive.

**Commerce clause:** Congress shall have the power... “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” Art. I, sec. 8, p. 3.

**Gibbons v. Ogden,** 1824, Marshall – broad interpretation of “commerce.” [Concerns grant of a steamboat monopoly to a private company; NY grant Ogden exclusive right steamboats in waters; Gibbons began competing service; Ogden → Gibbons; Gibbons assert grant violated the commerce clause].

- Importance – Marshall laid the basis for later Justices to uphold a federal power to deal with national economic and social problems.
- **Holding(s):**
  - Monopoly was invalid because it conflicted with a valid federal statute. The federal statute governing the licensing of ships granted those ships the right to engage in coastal trade and the federal statute governs because it is the *supreme law of the law*.
  - Because state law conflicts with valid federal law, the state law violates the supremacy clause of Article VI.
  - In giving these holdings gave broad reading to the commerce clause.
- **Broad reading of the commerce clause**
  - Defined commerce as “intercourse” – extends to each state
  - Congress has the power to regulate “that commerce which concerns more states than one”
  - Extends to commerce where ever it is present – may be exercised w/in a state.
  - Not to be limited by the judiciary.
  - Some “internal” commerce of a state is beyond the power of Congress to regulate
    - Only those activities that are “completely within a 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” = “internal commerce of a state” is beyond the reach of federal power; reserved for state and local regulation.
  - Commercial regulatory power is a plenary power (CB 481)
    - “This power... is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”
  - Doctrine that checks on congressional exercise of commerce regulatory power stems from political processes.
Congressional wisdom comes from the people, they represent the people. They are influenced by elections, and these elections act as restraints by the people secure us from Congressional abuse w/the commerce clause.

“The are the restraints on which the people must often rely solely, in all representative governments.”

Congress will not sell out their own constituents.

**Hood**, on the framers intent
- Distinguishes between state power and federal power
  - State power: protect health, safety, and welfare.
  - Federal power: commerce
- Nation is economic unit, all states are interdependent so need to protect interstate movement of goods; lead to threatened anarchy in the early period of the states before the Constitution. Constitution arose from the purpose of a meeting to revise the Articles of Confederation and in particular a system of commerce across the land for uniformity.

**B. Early cases: oscillation between formalism, realism** (*see CB 474ff???)

Formal approach → Examine statute and regulated activity to determine if certain objective criteria are satisfied.

Realist approach → Attempts to determine the actual economic impact of the regulation or the actual motivation of Congress.

**Paul v. Virginia**, 1868 – *narrow* reading of “commerce.” [VA statute discriminate against out of state insurance companies].
- Holding:
  - Insurance policies are not “commodities” in test case challenging VA’s arguably discriminatory tax (economic discrimination!!!) on out-of-State insurance.
  - Not a transaction of commerce, contracts not interstate transactions.
  - Formalist opinion – settling the matter by definition. [Paulson says this is a bad argument].

**Kidd v. Pearson**, 1888 – *narrow* reading of “commerce.” [Iowa statute prohibiting the manufacture of intoxicating beverages w/in the State, sold all products out of state].
- Holding:
By definition, manufacture is not commerce.
Buttressed by formalist definition of “manufacturing” as local.
- Manufacture is transformation of raw materials into a change of form for use. The functions of commerce are different.

Slippery slope argument
- If allow manufacture to be considered commerce then the result would be that Congress would be invested with the power to regulate every branch of human industry.

Formalist opinion – definition for the reach of the commerce clause. Doesn’t touch on the effects of this manufacture for selling goods out of state.

The Daniel Bell, 1870 – broad, realist, more expansive reading of “commerce” w/in the field of navigation. [Steamer travel routes only in State, carried merchandise to other states. Issue of whether federal safety regulation applied to steamer.]
- Holding:
  - Yes, it applies.
  - Slippery slope argument – if authority does not extend to agency employed in commerce between the States but operating in one state then the entire authority of Congress over interstate commerce may be defeated; several agencies could travel border to border to get around federal jurisdiction and the constitutional provision would become a dead letter.
- Realist: The effects of navigating the steamer in-state waters has effects out of state.

The Lottery Case; i.e. Champion v. Ames, 1903, Harlan – Congress has the power to prohibit as well as regulate interstate movement or transportation. [Federal Lottery Act prohibiting the interstate shipment of lottery tickets, upheld].
- Holding:
  - Lottery tickets are an “evil”
  - Congressional control over the transport of lottery tickets.
  - Power to prohibit (as well as regulate) is dramatic expansion of congressional commercial regulatory power.
- Criticized from standpoint of Marshall’s “pretext” argument (i.e. consider legitimacy of the “ends”)
  - Congress is operating under the pretext of executing power of regulation of commerce, but really looking to ban public evil. Not legitimate ends.
  - Transportation is the pretext for something else that Congress is doing; then transportation argument alone just doesn’t cut it.
- (One reading) Example of legal enforcement of morals
Harlan makes the analogy that if the State can use police power with an eye to realizing a certain purpose (protecting public morals) then Congress can enact law under commerce clause with same purpose.

- Problem: state police power is different than Congressional power to regulate commerce.
- (Another reading) Commercial regulatory power as plenary power means *Lottery* is defensible.
  - Since lottery tickets transported from state to state, he could attach the commerce clause and thus find the authority to regulate.

**United States v. E.C. Knight Co.** 1895 [Government challenge sugar monopoly under the Sherman Antitrust Act for gaining control of the manufacture of refined sugar in the United States, charged w/constraining sugar trade in the United States (realist argument)].

- Holding – No, SAA can not be applied to monopoly.
- Direct / Indirect; (Primary / Secondary)
  - Manufacturing is secondary, indirect; Transportation is primary, direct.
  - Commerce clause only reaches to direct and primary.
  - Regulation of manufacture is reserved to the states and beyond the commerce power.
  - Theory that the monopoly might adversely affect interstate commerce not work either become market effect was only “indirect.”
- Slippery slope defeating application of the Sherman Act
  - If the national power extends to all contracts and combinations (i.e. defeating Sherman Act) 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.
- Formalistic opinion – (Paulson says this decision makes no sense, definitions should not suffice).

**Houston, East & West Texas Railway Co. v. United States; i.e. The Shreveport Rate Case.** 1914 (New Deal), Hughes – Congress can regulate intrastate activities that had an economic effect on commerce among the states. [Cheaper to ship things in TX (longer distance) than out of state (shorter distance)].

- Holding – RR loses, have to increase intra prices.
  - *Gibbons* completely interior approach has caveat
  - Broad reading of “commerce” within field of transport.
  - Standard of “close and substantial relation” is an *empirical test.*
  - It applies where there is:
    - Safety of traffic, or
• Efficiency of interstate service, or
• Uniformity (“fair” market; maintenance of conditions under which interstate commerce may be conducted upon fair terms w/o molestation or hindrance), sought as an end.
  • I.e. Economic discrimination.
  • Early example of “realist” or “functional” approach, in sharp contrast to “formalist” or “definitional” approach. Judge addresses the issues at stake.
  • Note: In most of these cases the state defends with boiler plate 10th Amendment argument – what is not expressly conferred to Congress is reserved to the States.

**Stafford v. Wallace**, 1922, Taft – broad reading of “commerce” with respect to trade practices. [Congress can subject meat stockyard dealers and commission men to regulation by the Secretary of Agriculture].
  • Holding: Resurrected Holmes’ current of commerce theory; Implied that activities that had an economic effect on commerce could be regulated (court did not follow up on this until 1937).
  • “Current,” “flow,” and “stream” metaphor: transactions occurring intrastate when considered alone can be conspiracies against interstate commerce; this brings it into the current of interstate commerce for federal restraint.
    • * This is an appeal to the effects – realist.
    • Metaphor created by Holmes (*Swift & Co*) when upholding the application of the Sherman Act to an agreement of meat dealers concerning their bidding practices at the stockyards that would fix the price of meat. Although this took place in one state, it was a temporary stop in the interstate sale of cattle. This was only an interruption in “a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.”

**The Child Labor Case; i.e. Hammer v. Dagenhart**, (1918), Day – narrow reading of “commerce,” arguing that manufacturing is “local” and its goods, shipped in interstate commerce are “harmless.” [Invalidate a federal statute that prohibited the interstate shipment of goods coming from a mining or manufacturing establishment that employed children under certain ages].
  • Holdings:
    • The act exceeded the commerce power because it regulated the conditions of production; this subject is reserved for state regulation under the 10th Amendment.
    • Although the government argued that the law was necessary to eliminate unfair competition, the Court found that Congress had no power to equalize market conditions that were not a part of interstate commerce.
Earlier prohibitions all related to the elimination of harmful items (food products) or commercial evils (lottery tickets), but nothing was harmful about the products made by children.

- Formalism – the government's brief reflects and “original understanding” of the commerce clause, and the problem at hand is critical; still the court holds against the Child Labor Act.
- The government's brief – uniform (national) control of child labor is necessary, lest differing State policies, laws, give rise to inequities (i.e. lack of uniformity) in the market.
  - Giving some states competitive advantages
- Hopelessly overdrawn slippery slope argument adduced by the Court: **Effect of the act** to regulate hours of labor of children in factories is purely state authority, if federal government act then state authority over local matters would be eliminated and our system of government practically destroyed. *Republic will come crashing down on us.*
- Holmes’s dissent: If the *Lottery Case* is good law, then the court has the power under the commerce clause to uphold the Child Labor Law too.
  - Main points:
    - Embargo theory of congressional power, effects of child labor on interstate commerce (economic basis).
    - Child labor is evil = public policy
- Justice Day distinguishes the *Lottery Case*:
  - Interstate transportation was necessary to accomplish harmful results, that which affects the evil.
  - In this case the actual goods are harmless. Child production is over by the time it gets to commerce.
  - The only effect of this act is to regulate the hours of labor children in factories work, this is for the state.
- Holmes Reply:
  - Nothing to do with evil, strictly commerce clause argument, as soon as send across state lines its within the powers of Congress to regulate. (???).

### C. Laissez faire Court resists Roosevelt’s legislative program

**ALA Schechter Poultry Corp. v. United States**, 1935, Hughes – [Code of competition (NIRA) set for poultry dealers in and near New York City regulating the conditions and price of labor, goal is to stabilize prices – the “sick chicken” case (had to buy full crate even if some were sick).]
o Holding: Act is invalid; it exceeds the scope of the federal commerce power. Employment practices of a poultry business did not have a sufficiently direct connection to interstate commerce.

o Court struck down federal attempt to deal with the national problem of the 1930s and the argument that the government has the expanding powers to deal with national crises.

o Court takes up issue, but denies application of realist standards of “current” or “flow” and “substantial effects, instead choosing to retreat to the slippery slope argument.

  o Flow of interstate commerce ceased when property arrived and commingled with mass property of the State for local disposition.

o Formalistic opinion.

o Court packing plan – Following his reelection in 1936, Roosevelt introduced his infamous “Court Packing Plan” that would alter the Court’s membership by adding additional members to the Court. Once a judge reached 70, President had the power to appoint a new judge. 6 were above 70 at the time. This plan died in Congress.

**Carter v. Carter Coal Co.,** 1936, Sutherland – endorsement of formalist’s definitional standard such as “direct” and “indirect” effects. [Court struck down coal act where all coal producers were required to follow hour labor standards and wages].

  o Holding:
    
    1. Regulation of the wages and hours of employees in mining and production was outside the commerce power.
    2. 10th Amendment analysis – relations between employers and employees is “purely local activity” reserved for the exclusive jurisdiction of the states unless it had a “direct” effect on interstate commerce.
       * *** Showed the Court was going to actively enforce its view of the 10th Amendment against national attempts to deal with the economic depression. Won’t let government control employee-employer relationships.
    3. Employment relationships only have an indirect effect. This is a vintage *Knight* argument.
    4. Overdrawn slippery slope argument: Power over every branch of human industry.
    5. Counts as the last gasping breath of the *laissez faire* court.

**D. The Revolution of 1937: In effect, a congressional “police power” is recognized.** [April of 1937 the Supreme Court adopted an approach to defining the commerce power that was quite different from that of the previous period].
**NLRB v. Jones & Laughlin**, 1937 – (Didn’t read this case; might want to refresh on this and the next case) Realist standards prevail with Court recognizing their application as per the statutory language. [Court upheld the National Labor Relations Act (which prescribed the minimum wage and maximum hours for employees in interstate commerce or production of goods for interstate commerce) and the labor board’s orders against an employer’s unfair interference with union activities].

- **Holding:**
  - No fault in the act that regulated labor practices “affecting commerce.”
    - Defined commerce as transactions among states and “affecting commerce” as those practices or labor disputes that might burden or obstruct commerce.
  - Rejected the production versus commerce distinction.
  - Means that the Court will no longer define the commerce power in terms of the 10th Amendment / reserved powers argument.
  - Rejected “stream of commerce” theory as only a metaphor to describe some valid exercises of the commerce power.
  - Intrastate activities could be regulated if they had a “close and substantial relation to interstate commerce.”

**United States v. Darby**, 1941, Stone – formal overruling of *Hammer v. Dagenhart (Child Labor)* with the Court in effect adopting governments brief from that case.

- **Holding:**
  - Upheld the direct regulation of the hours and wages of employees engaged in the production of goods for interstate shipment.
  - Congress can regulate intrastate activities that affect interstate commerce or the exercise of power of Congress over it.
  - Discarded the production-commerce distinction and the directness test.
  - Congress can choose to protect commerce from competition by goods made under substandard labor conditions because competition was a sufficient economic tie to interstate commerce, makes no difference how small the individual producers share of the shipments to commerce may be.
  - Extraordinary deference to Congress: Court rejects idea that Congressional motive or purpose, eve if it be regulatory, makes a difference.
    - Congress has plenary power to set the terms for interstate transportation.
    - Doesn’t matter what Congressional motive was as long as they did not violate a specific check on its power such as the provisions of the Bill of Rights.
  - Similarly, extraordinary deference on the means via relaxed reading of the “rational basis” test.
Note role of commerce clause as plenary power – so long as Congress does not violate a specific check on its power it could set any terms for interstate transportation.

**Wickard v. Filburn.** 1942 – control of supply of wheat, reaching to farm Filburn’s wheat kept for home consumption, is justified via aggregation theory even though it would be difficult/impossible for him to affect interstate transactions.

- **Holding:** The marketing quota legitimately could be applied to a farmer who grew a small amount of wheat, although the wheat was primarily to be consumed on his own farm with some to be sold locally.
- **Aggregation theory** – total supply of wheat affects market price. If many farmers just raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product.
  - The possibility of such an effect by a class of hypothetical actors (farmers) justified regulation of the individual farmer.
- Shows deference to the Congress concerning local activities and interstate commerce. Not for the judiciary to restrict congressional power by limiting subject matter of independently reviewing the “directness” of connections to commerce.
  - Regulatory scheme is the means, the end is a uniform market and stabilized prices.
  - Means is left to the complete discretion of Congress.
- **Note:** Reference in opinion (last paragraph) to Marshall’s doctrine, in *Gibbons*, on the role of the political process.
  - Return to broad definition of commerce = intercourse that affected more states than one.
  - Court has come full circle and returned to the broad view of the commerce power that had existed for most of our history.
  - From *Wickard*: It is the essence of regulation that it lays a restraining hand on the self interest of the regulated and that advantage from the regulation commonly fall to others. Conflicts of interest by the regulated versus those that benefit from it are wisely left to resolution by the Congress, and not the judiciary.

**a. Commerce clause from 1942 (Wickard) – 1995**

1. Settled test(s) for proper exercise of the commerce power.
   1. Congress could set the terms for interstate transportation of persons, products, or services, even if its constituted prohibition or indirect regulation of single state activities.
   2. Congress could regulate interstate activities that had a close and substantial relation to interstate commerce, established by
Congressional views of the economic effect of this type of activity.

3. Congress could regulation – under a combined commerce clause / necessary proper clause analysis – intrastate activities in order to effectuate its regulation of interstate commerce.
   ii. Gave deference to Congressional decisions.

E. Breadth of the post 1937 congressional “police power”

a. State action doctrine (as background to the Civil rights cases of 1964)

Civil Rights Cases, 1883 – very narrow interpretation of 1875 Civil Rights Act, limiting protection to States’ overt discrimination, thereby precluding effective use of state action doctrine. I.e. examines state action doctrine in application to private persons, i.e. railroads, hotels, and theaters. [Civil Rights Act of 1875 imposed penalties on anyone who interfered with the “full and equal enjoyment” based on race, case brought against RR, hotel, theaters for discrimination. Passed during Reconstruction Congress along with 13, 14, and 15 Amendments].
   o Holding – Act is unconstitutional
     o Discrimination did not involve state action required by the 14th Amendment, not private parties.
     o 14th Amendment only empowers Congress to regulate the activities that the Court independently would find to be a violation of section 1 of the Amendment.
     o Not justified under the 13th Amendment because that is only related to the abolition of slavery. Court will independently review this to insure that it was designed to eliminate the clear vestiges of slavery.
   o State action doctrine – Constitution imposes limits only on the state and federal government, whenever a suit is brought on the basis that they have taken actions that have violated the civil or political rights of another, there must be a determination of whether defendant’s action constitutes “governmental” or “state” action of a type regulated by the appropriate constitutional provision.\(^1\)
     o Because stopped at the state action doctrine at #1, don’t get to 2nd part of Act that allows free and equal enjoyment of “Inns, other public conveyances, etc.”
   o Dealt with applicability of constitutional restrictions and congressional legislation to private conduct.

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\(^1\) 13th Amendment is different – not only bans state-sanctioned slavery but it also forbids any person from having a slave.
**Marsh v. Alabama**, 1946 – “company town” counts as instrumentality of the State where it undermines the 1st and 14th Amendment guarantees. [Company privately owned an area encompassing both residential and commercial districts (no formal ties to state agency; Agents order a Jehovah’s Witness to leave business district and not hand out religious leaflets and if she didn’t leave she was trespassing].

- Same issue as above, would have violated 1st and 14th if state agency, but it was a private party, issue of their applicability to corporation that owned the town.
- Holding: Yes it applies.
  - Privately owned corporation acted as a municipality.
  - In determining the existence of a public function, the Court would “balance the constitutional rights of the owners of property against those of the people to enjoy freedom of press and religion.”
    - The people’s freedoms win.

- Modern case on the state action doctrine – an example where the doctrine is applied but doesn’t compromise and doesn’t reach too far; Court finds state action in a private entity performing a governmental function.

**b. Civil rights cases of 1964** – Upheld as constitutional Title II of the Civil Rights Act. This provision imposed penalties on anyone who deprived another person of equal enjoyment of places of public accommodation on the basis of the individual’s race, color, religion, or national origin. Covered all but the smallest rooming houses or hotels, restaurants, entertainment centers, or other retail establishments that made use of products that had moved in interstate commerce or that had otherwise affected commerce.

**Heart of Atlanta Motel Inc. v. United States**, 1964 – upheld restrictions w/respect to hotels. [Motel operator has transient guests, access to interstate highways, national advertising, national convention trades, 75% of its guests are from out of state; doesn’t want to serve blacks].

- Extraordinary deference to Congress on the means – don’t need formal congressional findings to support commerce power legislation; Congress can property collect information.
- The decision of motels not to serve blacks (like restaurants) makes it much more difficult for these people to travel from state to state.
  - If talking about “motel, hotel, or inn” it implicates Congress because these establishments affect commerce per se.
- Proper questions for judicial review:
  - Whether Congress had a *rational basis* (relation of means to the end) for finding that racial discrimination by motels affected commerce, and
If it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

- Competing ends, i.e. the promotion of commerce and correcting a moral wrong (pretext argument does not count here as argument against illegitimate end).
  - Morality = freedom from discrimination and personal dignity
- Shreveport criteria: substantial relation with a for the purpose of promoting safety, curbing economic discrimination, or promoting efficiency. This case is adding new fourth criteria: impedes interstate travel (and we want to promote or enhance the volume of interstate commerce).

**Katzenbach v. McClung; i.e. “Ollie’s BBQ”, 1964, Clarke – upheld Title II to restaurants.** [Ollie’s was located a mile away from an interstate highway; the Act applied to any restaurant that either served interstate travelers or that served intrastate patrons products of which a substantial portion had moved in interstate commerce; Ollie’s didn’t serve interstate patrons but purchased $70,000 meat from out of state supplier, ~ 46% of the meat].

- **Holding:**
  - This purchase of meat is enough to exercise commerce power.
  - IF the restaurant would not service interstate travelers then it would affect interstate transportation because it would make it harder for all interstate travelers to travel from state to state, because some restaurants would not serve interstate travelers.
  - No direct congressional testimony clearly established a relationship between discrimination in such establishments and interstate commerce. Search is not the role of the Court. Makes no difference that Ollie’s is small (Wickard aggregate principle).
  - Court lends no credence to testimony from the federal district court, to the effect that the means are counterproductive.
    - Ollie’s claims that if allow black people to eat there they will lose business; goes against purpose of statute; they will be deferring commerce.
    - Court need to apply to the whole of interstate commerce, not just one restaurant; reduce discrimination then increase commerce overall.
  - Extraordinary deference to Congress on means – If find that legislators “have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, out investigation is at an end.”
- See Senate Committee Hearings for background
- Consider the distinction between enforcement of “morals” (Lottery case), where Congressional power ought not to be recognized, and enforcement of “morality”
(nondiscriminatory policies), where recognition of Congressional power is appropriate.

c. **Another Illustration of Breadth (Federal Criminal Laws)** – The commerce power offers an independent basis for the enactment of federal criminal laws. Tests are identical to those used to analyze the validity of any federal regulation under the commerce power. To be a proper subject for a commerce based criminal statute, an activity must either (1) interstate channels are misused; (2) protection of instrumentalities of interstate commerce; or (3) be an activity that affects commerce.

**Perez v. United States**, 1971 – Extraordinary deference to Congress when reviewing criminal statutes enacted under the commerce power. [Perez found guilty of engaging in extortionate credit transactions in his loans to person in NY where all activities take place in NY and no evidence he is connected to organized crime or used commerce].

- **Holding** – Upheld Title II of Consumer Credit Protection Act (federal crime of extortionate credit transactions; i.e. loan sharking).
  - It is rational for Congress to conclude that even intrastate loan sharking (a commercial activity) affected interstate commerce by altering property ownership on a massive scale and financing criminal organizations that might operate in the several states.
  - Court never bothers itself with the question of how petty loan shark Perez finds himself in the class of those (in organized crime) affecting interstate commerce.
  - Kind of the position of the dissent, that loan sharking is a local matter that should be left to the states under the 9th and 10th Amendments.

- **Dissent (J. Stewart)**
  - Denies such power to Congress, arguing that rational basis standard isn’t met.
  - As applied in *Perez*, Congress could not rationally have believed that the requisite connection between the means and the end exists.
    - No distinction between loan sharking and other local crimes, can’t connect this to interstate commercial problems, just using this to make a local regulation.

**F. Other Article I, § 8 Powers**

a. **Taxing and spending clause** – The constitutional power to spend is coupled with the federal power to tax in the first clause of Article I, section 8. Congress has the power to spend for the “general welfare.” Congress cannot justify general regulations of private conduct simply by stating that it is passing the regulations to promote the general welfare of people in the United
States. However, Congress is given the power to tax and spend for the general welfare; Congress can tax and spend for purposes that are not set forth in the Constitution.

**Child Labor Tax Case**, 1922 – Court rejects taxing and spending clause as basis for Child Labor Tax Law of 1919, arguing that the measure is regulatory. [Challenge by Drexel of Child Labor Tax Law the imposes tax of 10% on the annual net profits of those employers that employ children].

- Holding – this tax is not a true tax but only a “penalty” for violating a commercial regulation. Thus, it was invalidated under the prior decisions because it exceeded the power of Congress and invaded the areas reserved for control by the states.
- Compare: Congress saw this is a way to circumvent the Child Labor decision by levying an excise tax on anyone who employed children under proscribed terms.
  - Didn’t work. In *Labor* the Court held that the commerce power did not justify a federal law that would restrict the transportation of goods across state lines that were made by child labor.
  - In *Tax*, the Court held that the tax on goods made through child labor was so high that it would effectively prohibit the types of child labor that Congress had attempted to end with its original child labor statute.
  - Both uphold the Supreme Court position that the 10th Amendment meant that child labor could only be regulated by the States, and not the federal government, Congress cannot use tax power to end child labor.

- Case turns on distinction between a “tax” and a “penalty”
  - Tax = way to raise revenue
  - Penalty = detours conduct, regulates behavior.
  - Also discusses “primary” and “incidental” motives
    - Primary motive needs to be as tax and raising revenue, ok if penalty is incidental.
    - Seem penalty is primary here.
  - See Marshall’s “pretext” argument in *McCulloch* – regulation of behavior is the pretext of the taxing; when do tax on the pretext of penalizing, then tax is not legitimate.

**United States v. Kahriger**, 1953 – illustrates the Courts dramatic shift in this area when an overtly regulatory measure (prohibiting the “taking of wagers”) in 1951 Revenue Act passes muster if “the wagering tax produces revenue.” [Upheld the Gamblers’ Occupational Tax Act which was a tax on people in the business of accepting wages (10% of wages); and made them register with IRS].

- Holding – law is constitutional
- So much for the “pretext” argument.
- Legislative history indicates that Congress is acting because the States are not regulating effectively in this area – cooperation between the two.
- Might want to revisit and refresh on this one, didn’t dedicate too much time to it in class.

**United States v. Butler**, 1936, Roberts – after fairly detailed discussion of competing interests of “general welfare” clause, the Court decides the case on the ground that processing tax is regulatory. I.e. very broad view of the federal spending power. [Passes on the 1933 AAA which sought to control the purchasing prices of farmers that had collapsed during the depression. Subsidize farmers to reduce crop, thus increasing prices. Money for subsidy came from tax.]

- Holding is inconsistent with the Courts own interpretation of the “general welfare” clause, as though spending to stabilize farm prices were not “providing for the general welfare.”
  - (Still good law) Defines “general welfare” → “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.” Strong, broad construction of spending power. Separate power not necessarily related to the other enumerated powers, if it was related then it would just be repetitive.
  - (Bad law) Holding part of the Agricultural Adjustment Act of 1933 is invalid because conditional grants to farmers (designed to reduce crop production) violated the 10th Amendment. Power to regulate farm prices is reserved to the states.
    - Doesn’t argue as boiler plate 10th Amendment, says this is coercive.
- This suggests that Roberts’ other argument – coercion – is doing most of the work here.
  - Puts economic pressure on the farmers, if don’t take subsidy then lose out.

**Chas Steward Machine Co. v. Davis**, 1937 – the Court upholds credit provisions for those paying into State unemployment fund, with liberal reading of taxing and spending clause and justly famous argument rejecting “coercion.” [Challenge to the Social Security Act of 1935 where employers have to pay tax, government attaches conditions and benefits to employers that pay into it, in competition with State plan].
  - Holding - constitutional
  - Coercion argument – draws the distinction between “motivated” and “coerced,” thus rejecting the coercion argument.
    - Law assumes freedom of will, all people have freedom to make choices.
    - Fits into a means-end matrix; freewill presupposes a motive. Intentional behavior is motivated behavior.
Coerced behavior is also acting from a motive – no difference between acting freely and being coerced if both are for a motive.

Another instance of the 1937 constitutional revolution

b. War Power

Woods v. Cloyd W. Miller Co., 1948 – Court upholds federal Housing and Rent Act of 1947 under the war power, although the measure was enacted after the War. [Congress uses the war power to regulate rents].

- Holding
  - Congress’ authority to regulate rent by virtue of the war power did not end with the Presidential Proclamation terminating WWII hostilities.
  - War power sustained Title II of the Housing and Rent Act of 1947.
  - There is a causal connection between War conditions and the post-War exploitation of rental housing market justifies this exercise of the war power in peacetime.

- Concurring opinion (J. Jackson)
  - Stresses the need for caution and suggests that if hostilities (and other military activity) had ceased entirely, this provision would be beyond the scope of the congressional war power.
  - War power dangerous power because used in times of heated patriotic passion.
  - Concerned about abuse and misuse of this power.
  - Still concurring because hostilities were not terminated, no peace treaty. These are not important details to majority.

Missouri v. Holland, 1920, Holmes – implementing legislation, following treaty agreement, is constitutional quite apart from whether the legislation reflects the Article I, § 8 powers. The 10th Amendment does not limit the federal treaty power. [Congress enact statute to protect migratory birds; courts invalidate because no constitutional provision empowered Congress to regulate this matter; THEN, the US sign treaty with GB involving same issue of protection; new statutes passed to implement the treaty; MO brought claim to prevent game warden from enforcing the treaty and regulation pursuant to it].

- Holding – regulations made pursuant to the treaty are constitutional and the 10th Amendment does not limit the treaty power.
  - Implemented the federal power of treaty power. Did not contravene any constitutional provision limiting congressional powers.
  - Thus only limit would be by the 10th Amendment, but 10th only applies to non-delegated powers, and the treaty power is specifically delegated to the federal government.
The “necessary and proper” clause coupled with the Presidential treaty making power (article II, section 2, paragraph 2) suffices.

This must suffice lest the president (with the approval of the senate) have no treaty-making power in those instances in which the treaty requires implementing legislation.

Holmes goes on to justify his position by distinguishing between law enacted “pursuant to the Constitution” and law made “on the authority of the United States.”

- Pursuant to the Constitution – flags the Article 1 § 8 powers.
- On authority of the United States – the formal acts required to enter into a treaty suffice; i.e. no constitutional/contextual constraints, and in enacting implementing legislation Congress rides piggyback on this doctrine.
  - The treaty is like a contract, there are no constraints on this content.
    (See narrowing in Reid).

Note: This case is about policy and birds and not about individual rights.

Reid v. Covert, 1957, Black – assuages concerns over circumvention of constitutional safeguards via treaty-implementing legislation. [Wife killed her military husband at an airbase in England. She was tried by a court marshal and found guilty. The US and GB signed a treaty that said that US courts could have exclusive jurisdiction over military and dependants.]

- Holding – Mrs. Covert cannot be tried, pursuant to executive agreement between the United States and Britain, under the provisions of the UCMJ (for military trial of dependents of those in uniform), for this would violate her constitutional right (to jury trial, etc.).
- Constitutional rights trump over conflicting policies.
- General definitive pronouncement on federal treaty power: “No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”
  - I.e. Constitution provisions limit the treaty power.
  - Given these limits on the scope of the treaty making power, unless treaties are contrary to the Constitution, they are equal in status to congressional legislation, and as expressly provided in the Supremacy Clause of Article VI, the supreme law of the land.
- This case responded to uproar after Missouri v. Holland + Bricker Amendment (wanted to hold that treaty can only be legislation if it could have been enacted in absence of a treaty).

**c. General Notes on Tax Power**

i. If argue for government:
1. Want to make most of revenue component, and minimize regulatory component. Argue revenue is raised here.
2. We don’t inquire into Congressional motives.
3. Conditional grants
   a. No coercion

ii. If argue against government and challenge tax measure:
1. Throw book at Congress – say they designed a penalty.
2. This is beyond the powers of Congress to make regulatory measure.
3. 10th Amendment argument.
4. Conditional grants
   a. Coercion – men are incapable of turning away from money.

G. The undoing of the post-1937 consensus? Back to the Commerce Clause [SC redefines the scope].

**United States v. Lopez,** 1995, Rehnquist [Invalidated a federal law that prohibited any person from carrying a firearm near any school, doesn’t fall in commerce power; possessing a gun near school does not “affect” interstate commerce.]

  o Holding:
    o Decision hinges on distinction between “commercial” and “noncommercial.”
    o Doesn’t change single state evaluation that is commercial, only changes degree of deference.
      ▪ If commercial then great deference, will be upheld as long as there is a rational basis.
      ▪ Not commercial then government needs to demonstrate a real factual basis for concluding that the single state activities have substantial effect on interstate commerce.
  o Courts reshaping of the categories where Congress may regulate under the commerce clause:
    o Use of channels of interstate commerce. [*Divided this into two standards*]
      ▪ Channels of interstate commerce
      ▪ Instrumentalities of commerce or people or products that travel in interstate commerce.
    o Regulate and protect the instrumentalities of interstate commerce even though threat may come from intrastate activities.
    o Regulate those activities having a substantial relation to interstate commerce; substantially affect interstate commerce.
- Changed to *substantial* effect; before Congress could regulate if insignificant or trivial effect.
- Also established *independent review* by the court if the regulated activity was not commercial or economic in nature.
  - Judiciary would still give *great deference* to congress if commercial/economic in nature. Cannot give same deference when not commercial in nature.
- In upholding a challenge to provision of the 1990 Gun Free School Zone Act, the Court argues:
  - That the activity, as *non-economic* in nature, does not fall within the scope of the commerce clause, and
  - That even if the Court were willing to address the premises of the government’s argument on “substantial effects,” the argument would prove too much (slippery slope).
- Ask: Is the causal claim in the slippery slope argument persuasive? The same slippery slope claim that if allow this then there would never be any limit on the federal power.
- Ask: Does the sealing off of “non economic activities” not mark a return to formalism (definitional categories, which take the place of a focus on effects)?
  - Argument that it is formalist: “economic” versus “non economic.” Carved out categories instead of looking at actual effects. “Commercial” versus “non-commercial.”
  - Seems like this is clear endorsement of formalist *Knish* case (indirect/direct).
  - What is driving this? ➔ Federalism, interest in State powers, bringing the powers back to the States, thinking that Congressional power has gone too far. Court has several options to deal with this:
    - Articulate a test that speaks to present day concerns.
    - Use “state immunity doctrine” to recognize state power.
    - Take the courts out of the business of deciding commerce clause questions all together (unless economic discrimination, because this deals with rights).
- Compare: J. Kennedy, concurring, who emphasizes the “federal balance” and argues that statute intrudes upon an area of “traditional state concern,” i.e. education.
  - States have sufficient power to enact measures that impose criminal sanctions for carrying guns to schools.
- Compare: J. Souter, dissenting, who emphasizes the importance of deferring to Congress as a means of under girding the democratic process.
  - See *Morrison* case
  - Guns affect commerce by undermining the quality of education.
 Threatens legal uncertainty in an area of law that seemed reasonable well settled – restricting Congress’ ability to enact criminal law for criminal acts that threaten American economy.

Compare: J. Breyer, dissenting, who takes up the case for “substantial economic effects” on the merits.

Guns in schools hurt education which hurts commerce because we have poorly educated individuals. We have deterioration of the schools, unemployability of children, will extend all over the country.


- **Holding:**
  - Emphasizes non-economic character of the activity being regulated, and
  - Adduces slippery slope argument to meet the governments arguments re: “substantial economic effects”

- **Return to formalism?**
  - Court won’t defer to Congress, in spite of large congressional findings about the impact of violence on women, because doesn’t fit the right category as a “non-economic” activity.

- **Slippery slope persuasive?**
  - SS argument: Federal police power, Congress would have the power to regulate everything. We would no longer have a government limited to enumerated powers if non-commercial acts wholly within one state like violence are enough to justify any federal action under the commerce clause. Because it’s *non commercial* (see formalism).
  - Suppression of violent crime is reserved in police powers to the various states.

- Court will not aggregate intrastate non-commercial activities (gender crimes) to determine if intrastate actions affect interstate commerce, but they will aggregate intra state commercial activities to determine that the intra state commercial activities affect interstate commerce.

- States have different remedies for violent victims, women are not being adequately protected because states not addressing the concerns of women.

- **Dissent (J. Souter) – raises the question of formalism**
  - Congress has better capacity to determine “substantial effects” – differs from Lopez because lots of data available.
  - Gender based violence bars women from full participation in the economy.
  - Categorical exclusions are unworkable in practice and unsupportable in theory.
o States now forced to enjoy new federalism, even though they may not want to [here Attorney Generals want Congressional legislation].
o The Founders considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.

III. The court regulates in the absence of congressional regulation: the “dormant commerce clause.”

a. Question of “exclusivity,” bases of state regulation, and congressional “authorization.”

Overall question – do the states also have the power to regulate commerce, or is it a power that is exclusively for Congress? Constitution provides little guidance for concurrent jurisdiction…

Exclusivity – could come in three forms:
1. Congress enacts statute pursuant to the commerce clause, this reflects its exclusive regulatory power. No state power where Congress has acted.
2. Congress hasn’t enacted a statute pursuant to the commerce clause, but might have. (Issue in Prigg, no power until Congress actually acts Cooley).
3. Internal commerce of state is not reached by the exclusivity doctrine, no ambiguity here.

Gibbons v. Ogden (???)
o Facts: Court struck down exclusive license that NY issues for steamboats on supremacy clause grounds. Did not resolve the question that if there was no conflict whether the state would still be able to regulate (here there was a conflict).
o Dicta in the case:
o Marshall’s dis-analogy
  - Concurrent powers addressed to the state in distinct / specific purposes. If no conflict, then no incompatability.
  - Disanalogy w/ concurrent interstate commerce regulations – conflict when both bodies purport to regulate the same thing.
  - Exclusivity does not follow from disanalogy – incompatability only arises if both bodies are exercising this power. State can regulate unless:
    • Congress gets in the act and regulates (then state is out)
• No Congressional regulation, but the state regulation is *economically discriminatory*, or undue burden on interstate commerce.
  o Paradigm of concurrent powers = taxation
    ▪ Marshall says this is different because *indispensable* to existence of both state and national.
    ▪ But different *purposes* – Congress taxes for national defense, States tax for education.
    ▪ Dis-analogy then between taxation and interstate commerce – different purposes for taxation, same purposes for interstate commerce.
      • No incompatibility when taking for different purposes, versus
      • Incompatibility when taxing for same purpose? (Paulson doesn’t think so).
    ▪ Incompatibilities arise when issue competing regulations (federal v. state regulating steam boats), so does exclusivity follow from this?
    ▪ Confused – Marshall rejects exclusivity doctrine?
  o Johnson concurring – proponent of the exclusivity doctrine

**Plumley v. Commonwealth of Massachusetts**
  o Holding: State does not have power to regulate conditions of sale (here, or oleomargarine), but retains “plenary control” over those aspects of sale fraught w/ “fraud and deception.” [I.e. this is a local issue, protecting people from fraud is a state issue].

**Paul v. Virginia, Kidd v. Pearson**
  o Employing today’s standards, were these dormant commerce clauses cases decided correctly?

**Cooley v. Board of Wardens**
  o Holding (Curtis): **Rejects the “exclusivity” doctrine**: congressional affirmation of *concurrent* State regulatory power follows from federal law, 1789, that recognizes continuing State regulation (of local pilotage issues).
    o Denying concurrent State power (in the name of exclusivity) would be tantamount to denying Congressional power to recognize continuing State regulation – an absurdity (Congressional Law of 1789 – endorsed the continuation of state regulation until Congress enacted other regulations). *Congress is recognizing the continuing validity of state power in the area.*
    o Locals are in the best situation to regulate.
There are years of state regulations on the books – if uphold exclusivity would be unmanagable for Congress to take this on. How will you get Congress to write all this legislation?

Facts: Penn law requires all ships to use local pilots when navigate Delaware River.

**Prudential Insurance Co. v. Benjamin** (piggybacks on *Cooley*)

- Holding: Where Congress declares that State regulation is in the public interest, it survives a challenge (based on claim that 3% tax levied in So. Car. On premiums paid to out-of-state insurance companies is discriminatory), even though the regulation might well fail in the absence of congressional “authorization.”
  - Economic discrimination – foreign insurance companies can’t compete. (Would have thrown out in dormant commerce clause case, different now since Congress expressly endorses).
  - Economic discrimination endorsed by Congress.

b. Transportation cases – from [A] deference accorded to the State, to [B] balancing, to [C] “actual purpose”.

Brennan’s scheme in *Kassel*:

(A) deference to the State legislature – see *Pike* on this

(B) Balancing (except in “safety cases”)

(C) Actual purpose / discriminatory purpose, not to be confused with (D)

[Non-*Kassel*:

(D) “Facial discrimination” or discriminatory effects – established by imputing the bad purpose to the legislature [usually hard to prove, see economic discrimination].

**Barnwell**

- Holding (Stone): [A] Deference to the state legislature on safety grounds.
  - Elaborate effort in the trial court to assess the means-end relationship “on the merits”
  - Legislature had heard *tons* of data, makes casual glance at the facts for the sake of his claim that there is a rational basis for the legislature to rule the way they did. Deference to the State is appropriate where rational basis test is met.
  - Safety is a legitimate state purpose.

- Facts: Case where Truckers → S. Carolina Highway department about weight and width restrictions on trucks.
  - Emphasized “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.” (Consistent w/Southern Pac below).
Southern Pacific

- Holding (Stone): [B] Balancing of State safety interest with the burden on the ISC.
  - Burden on interstate commerce outweighed the state’s equivocal evidence of safety.
  - Safety provision calling for shorter trains to eliminate “slack” effect was deemed to cause more accidents.
  - Difference from above – Stone taking factual record seriously (factual record was much stronger above).
- Facts: Az charged So. Pacific w/violating a state law prohibiting trains with more than 14 passenger cars of 70 freight cars from operating w/in the state. Ostensibly it was a safety measure. Practical effect was to impose a disproportionate burden on shippers (break up train or conform to very low Az limit) who engaged in long hauls, as opposed to short hauls, and things long hauls shippers were more likely to be using interstate as opposed to intrastate rail lines. Furthermore, safety data was ambivalent at best, added risks.
- Black dissenting: AZ court and SC sitting as “super legislatures.” Courts are taking it out of the hands of the legislature, and there for away from the people. This is a policy issue, should be left to the people.

Bibb v. Navajo Freight Lines, Inc.

- Holding (Douglas): Dubious safety rationale coupled with an extraordinary burden on ISC (interstate commerce) holds the Illinois act invalid.
  - Safety rationale: Metal mudguards proves to be safety hazard (collects heat, causes brake problems), so undermines safety rationale.
  - Burden on ISC: State of Arkansas requires old style mud flap, which is in direct conflict with the Illinois requirement of contour mud flap. Direct collision = onerous burden on interstate commerce.
    - SUGGESTS this is the POINT OF DEPARTURE in the very severe burden on interstate commerce where one state has an extreme regulation and a different state has another. [Especially since Douglas is going here, and he is a champion of deference to the legislature].
- Facts: Motor carriers challenge Illinois act that requires specific type of mud guards.

Kassel v. Consolidated Freightways Corp.

- Holding: Court decides against Iowa based on balancing test, see below.
- Facts: Iowa Act prohibits 65 foot long trucks in Iowa. Consolidated sues to be able to use these trucks in Iowa. Iowa says acting pursuant to police / safety powers.
**Held:** Twin is just as safe as 65-foot semi, state law impermissibly burdens interstate commerce.

- Defensible arguments on behalf of 3 options set out:
  - [Court, B] Balance of ostensible State safety interests vs. burden on ISC
  - [Brennan concurring, C] Discriminatory purpose
    - Economic protectionism going on here – want to discourage interstate truck traffic on Iowa’s highways. Protectionist – can’t shut off share of burden of maintaining interstate truck routes, makes nations highways more hazardous.
    - When have economic discriminatin can also point to violation of a constitutionally protected right.
  - [Rhenquist dissent, A] Safety grounds –
    - Thinks there is sufficient evidence to support safety justification, these trucks are prohibited in 17 other states.

c. **Pike formula, addressed in the main to [A] → deference to state legislature**

**Pike v. Bruce Church, Inc.**

- Holding – gives formula for deference to the legislature
- “Pike test” [summary of the law in this area]: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”
  - Evenhanded (free from discrimination)
  - Legitimate state purpose (or “interest”)
  - Only incidental effects on ISC, then State regulation must pass muster unless:
  - Proportionality condition is violated (“burden on ISC is clearly excessive in relation to putative local benefits”).
- Facts: Cantaloupe case where all melons in AZ have to be packed certain way. P (Cal) packs melons differently. State purpose – insure quality melons in their packing. Not inferior product though, not hurting legit state interest.
  - Satisfies first 3 criterion, so would go for state, but introduce 4<sup>th</sup> → “rule of proportionality.” Local benefit of AZ state growers not as great as to justify harsh burden on Cal packager.

d. **Economic discrimination**

Read Chapter 8 in Study Guide
Question – Does the state legislation discriminate against interstate commerce, i.e. whether the state law involves economic protectionism?

Answer – If effect is to protect from competitive interstate commerce, the legislation is invalid. If protecting under the guise of local health and safety concerns, it is invalid under the dormant commerce clause if there is a less burdensome, nondiscriminatory alternative.

**Baldwin**
- Holding (Cardozo): Invalidates NY State regulatory scheme that involves economic protectionisms.
- Facts: NY set minimum milk prices that dealers had to pay producers. NY milk dealers choose to buy out of state in order to get lower price. Act try to extend protective prices from out of state milk supply. I.e. can’t sell milk unless you paid minimum price for it, where-ever you got it from. Artificially raising the price of out of state milk.
- Consequences of protectionism:
  - Pulls from history – customs barriers and other economic retaliation amongst the states.
  - Balkanization of the states: “mutual jealousies,” “economic retaliation.”
- Rejects argument that purpose was to maintain an adequate supply of milk – would allow for virtually all state trade barriers against other states. The avowed purpose is to obstruct.

**Welton v. Missouri**
- Holding: Statute that requires peddlers to have licenses to sell in MO unless they were selling goods that were grown, produced, or manufactured in MO is discriminatory (advantage to instate merchants).
  - YES, economic discrimination.
- What here is the less onerous alternative?
  - Issue licenses to all peddlers: local and foreign.
- Anticipates a strict scrutiny test that says there (1) must be a compelling state interest, and (2) no less onerous alternative.

**Hunt v. Washington State Apple**
- Holding: North Carolina regulation that “closed containers of apples” shipped into N.C. bear no grade other than “applicable US grade or standard” is discriminatory.
  - A state law may discriminate (and thus be invalid) even if it does not contain discriminatory language on its face.
Discriminatory because it removed advantage from Washington apple growers consumer rating system.
NC claim it was to avoid consumer deception, however no evidence that consumers would be misled by apple quality (only crate labeled) and little burden of consumers outweighed by big burden on interstate commerce (have to change grading system). Could have used balancing test, however found act was discriminatory trade barrier.

What is the less onerous alternative? Use the state label w/the federal label.

**Edwards v. California**

- Holding: California regulation that forbids one to transport indigent into the State w/knowledge of indigency is discriminatory (poor people); the State cannot “isolate itself from problems common to all States.”
- Analogy to *Kassel* – state cannot render itself immune from commerce of people.

**Healy v. Beer Institute**

- Holding: Conn law requiring out-of-state shippers of beer into Conn to set prices no higher than prices in States neighboring Conn is discriminatory. State would in effect be deciding what out-of-state sources of beer are allowed to charge in Conn.

**Dean Milk**

- Holding: The state must show that the burden it places on interstate commerce is the *least restrictive burden* that is necessary to achieve the state’s legitimate interest.
- Facts: Madison, Wisconsin law that prohibits the sale in Madison of any milk that had not been packaged w/in the county in which Madison is located. Madison said need this so local inspectors could insure that locally sold milk was bottled safely.
  - Discriminatory – effectively prohibited milk supply businesses from creating bottling facilities outside of the state if they wanted access to the Madison retail market.
    - Fact that they also discriminate against milk *in state* does not escape the fact that it is still economic discrimination – then economic discrimination would be easy to accomplish.
    - Didn’t accept health rationale – less onerous alternatives available.
- Less onerous alternatives: Could charge a reasonable price for the cost of driving to N. Illinois to inspect milk out of the region. Charge Dean Milk for the cost of inspection. (This eliminates Madison’s defense of the Ordinance on the face of cost to the county).
- Black dissent: asks us, *what is the proper role of the judiciary here?*
- Paulson pointer: *adduce as full a set of reasons for the Court’s view, and for the dissents view.* (Anticipates part IV of the course).
Breard v. City of Alexandria – Commerce clause and privacy

- Holding: Municipality’s ordinance forbidding door-to-door salesman w/o prior consent, is upheld. No discrimination because the homeowner’s right to privacy outweights the burden on ISC.
- Court gives greater deference to legislation designed to protect the privacy interests of the community than it would give local regulatory schemes revealing an attempt to preserve local prosperity at the expense of nonresidents.

Philadelphia v. New Jersey

- Holding: Not enough for the state merely to claim that it wants to protect the health of its people or the environment or some other worthy purpose.
- Facts: State law barring importation into the state of garbage from other states (for disposal in privately owned landfills in the state) violated the dormant commerce clause. The waste is a form of commerce, good w/negative utility. Financially oriented goal of saving NJ landfills, deterring eventual expense of moving NJ waste out of states.
- Not the least restrictive means:
  - Preserving state’s environment through restricting the growth of landfills and saving residents money would be a legitimate interests.
  - However out of state garbage is identical to instate garbage, in terms of landfills.
  - Discrimination of out of state is not the least restrictive means of promoting preserving the environment.
    - Could tax instead on dumping, regardless of the origins of the garbage.
    - Need to control the flow of all waste into the State’s remaining landfills. Could slow the importation of waste, as long as effects on interstate commerce are “incidental.”
- Dissent – try to include this in group of quarantine laws upheld by the court in precedent cases, and “see no way to distinguish solid waste from germ-infected rags, diseased meat, and other noxious items.”

Hughes v. Oklahoma – Outgoing commerce, rejects the theory that the state “owns” all the wild animals w/in the state. Once caught the fisherman owns them, can’t be regulated in discriminatory way.

- Holding: Oklahoma statute proscribing transport out of State for sale there of minnows seined in Oklahoma waters doesn’t pass muster. Real purpose was to favor in-state processing of minnows, in violation of the dormant commerce clause. Where discrimination is evident, ask:
  - Is there a legitimate state purpose? [YES] And, if so:
Is there a less onerous alternative?

- Court answers YES in this case. Oklahoma can control the yield w/o drawing in-State/out-State lines.

- Dissent – statute even handed in application (no person)

**Maine v. Taylor** – can reject out-of-state products in order to protect significant local interests.

- Holding: State law banning out-of-State fishbait (live bait fish) into the State of Maine is upheld despite obvious discrimination.

- State interest: Maine’s State environmental interest is legitimate, and Maine succeeded with its argument that there was no less onerous alternative.
  - Environment as a factor plays a role here, good lawyers argue Maine’s case. No economic way for state to screen fish for parasites that might be foreign to the State. Purpose is to protect the aquatic environment.

- No less onerous alternative: Not possible for the state to screen all live bait fish any other way. No better way to regulate than a complete ban.

**e. Preemption – each case have a federal statute at issue.**

Article VI: Supremacy clause. If a state/local law come into conflict with a law of the United States, the state or local law will be invalid to the extent that it conflicts with the federal law.

Preemption: Discusses the issue of whether a federal statute excludes / invalidates any / all state or local laws regarding the subject governed by the federal statute. About statutory interpretation – if read to have excluded state regulation then it is said to have preempted state regulation. If it preempts, then the state law is invalid unless the federal law violates the constitution. Could be explicit or implicit preemption.

**Rice**

- Holding: Sets out preemption criteria

- Criteria:
  - Begin with a presumption in favor of State regulation
  - Grounds for rebuttal (*Rice criteria*):
    - Pervasive federal scheme
    - Dominant federal interest
    - State law “stands as an obstacle to the accomplishment” of congressional purpose (*Hines*).

**Hines v. Davidowitz** (before *Rice*, said there was no rigid formula)
Holding: Pa. statute, with requirement that aliens register annually, carry alien registration cards, etc. is preempted by congressional act with more modest requirements of aliens.

(Pervasiveness) Notes the supremacy of national power in the field of foreign policy, and sensitivity of regulating aliens w/foreign affairs. This preempts state regulation requiring registration of aliens.

Which of the Rice criteria applies

Sets out the test: under the circumstances of a particular case, does the state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (This category rides piggyback on the 2nd criterion).

Pennsylvania v. Nelson (elaborates the Hines rationale)

Holding: Pa Sedition Act (prohibits incitement or resistance) against PA and the US is preempted by the Smith Act (federal law that prohibits the knowing advocacy of the overthrow of the US government).

All three of the Rice criteria apply

Pervasiveness → Could lead to conflicts with federal laws because local prosecutions might interfere with federal undercover operations. Need national predominance.

Askew

Holding: Fl statute imposing strict liability for oil spills in the State’s territorial waters is upheld, despite congressional act imposing strict liability, for the latter is limited to cleanup costs incurred by the federal government.

Federal Act presupposes a coordinated effort w/the States

Does not preempt liability for oil spills, only addresses cleanup costs for oil spills.

City of Burbank

Holding: City ordinance proscribing night air departures from Hollywood. Burbank airport is held preempted by “pervasive control” of air traffic by congressional acts, this notwithstanding the fact that Burbank ordinance affected a single flight weekly.

Does the isolated Burbank ordinance, with noise control as the municipal purpose, fall w/in the scope of broad, ranging congressional acts drawn up with an eye to air safety?

Pacific Gas and Electric Co. v. State Energy Resources

Holding: California statute is upheld despite the fact that safety, preempted by federal law, played a role in California statute and decisions based thereon. The
court bend over backwards to read California’s statute such that the State is taking decisions on economic grounds, which are not preempted by federal law.

- Facts: California law forbid constructing nuclear power plants until demonstrated that safe means of disposing waste. Federal law talks about construction / operation of nuclear power plants.
  - Federal concern here = safety; it’s pre-empted by the federal law.
  - Say the constitutional state purpose = economic concern / types of facilities licenced, etc. * Problem – seems state law is also concerned with safety. The federal law leaves economic regulation to the state.

**Ray v. Atlantic Richfield Co.**

- Holding: State of Washington “standard safety features” of vessels is preempted by the federal law speaking to the same issues; but then the court inexplicably “disjoins” the State safety features to a tug escort provision and sets out alternatives as live options.
  - Is it really inexplicable? Or is J. White trying to accommodate the State regulations up to a point?
- Facts: AR operates oil refinery in Puget Sound. Crude oil comes in from pipeline and via tankers, some of them were over 40,000 DWT. This lead to the Washington Tanker law that regulated the design and size of tankers in the Puget Sound. Had safety requirements and a tug-escort provision.

**f. State as a market participant** (not a very convincing argument, not trying to regulate commerce but intervene in another way)

“Market participant” principle: A state may limit its own direct subsidy to persons or businesses that are domiciled in the state. Created to describe why a state giving economic subsidies to businesses domiciled in the state does not violate the commerce clause. Separates providing a subsidy from regulating the market. * The fact that a state is dispensing subsidies to in-state persons or in-state businesses will not allow it to place conditions on the use of those subsidies that discriminates against interstate commerce, such as imposing a tariff or a trade barrier.

**Hughes v. Alexandria Scrap Corp.**

- Holding: The state as a market participant is no more subject to the constraints stemming from the dormant commerce clause than are private market participants.
  - Introduces the market participant doctrine – not contemplated by the Commerce Clause because it did not interfere with the natural functioning of the interstate market, either though prohibition or though burdensome
regulation. Md. Didn’t enter market to constrict flow of hulks, but to bid on its price.

- Facts: Md. Pays a “bounty” to in-State and out-of-State processors of auto hulks, requiring, however, the latter to provide more ample documentation of title.
- Issue: Can the state mask its identity under the “market participant” doctrine?

**Reeves, Inc. v. Stake**

- Holding: So. Dak. Statute that gave in-State purchasers of cement preference at a time of shortage is upheld under the market participant doctrine.
  - When State acts as “proprietor” the constraints understood under “evenhandedness” have no application.
- Facts: SD build cement plant in response to recent regional cement shortages. Sent some out of state when produced more than they needed. Reeves was out of state buyer, 95% for 20 years. Again industry shortange and refused to sell out of state.
- Devil’s advocate: Work up disanalogies between the State as market participant and ordinary participants in the market?
  - Ordinary participants are subject to the market price – but state can influence the market price [JAF??].

**South-Central Timber Development, Inc. v. Wunicke**

- Holding: Invalidated an Alaska state law that required purchasers of state owned timber to have the timber partially processed w/in the state before they could ship it out of state. No majority, but most of the Justices agreed that a state did not have any right to “impose conditions downstream” in restricting how the recipient of state-owned timber (subsidized) would be used after the private individual received the timber.
  - Alaska is a market participant vis-à-vis sale, but not vis-à-vis the processing of the timber, which takes place downstream.
- Rule of law: Once a state gives a subsidy to a private person it may not prohibit that person from taking the subsidy outside of the state or using it outside of the state.
  - Limits the state’s largess.
  - Notice what this means → although interstate commerce is burdened when the state’s subsidy creates market inefficiency, the primary people who bear the burden are the people of the state that is giving the subsidy (some get it others don’t).

**g. Interstate “privileges and immunities”, art. IV, § 2**

Article IV, § 2: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”
Historical purpose: So some states would not discriminate against the citizens of other states because of their citizenship, i.e. insure comity among the states. [Seen as employment discrimination alternative to the commerce clause; no application to corporations].

- *Corfield v. Coryell* – early opinion that draws on A IV § 2 – issue is does out of state party enjoy protection under the PI clause to get oysters from NY water? No. Sets out the *fundamental rights included in the PI clause*. Employment rights don’t look large here.\(^2\)

**Commercial activity v. Recreational Activity**

**Baldwin v. Fish and Game Commission of Montana**

- Holding: The PI clause protects nonresidents of a state who engage in commerce involving wild animals (or fish), in contrast, that clause is inapplicable to non-residents who hunt wild animals as *recreational sports*.
  - Court draws from *Corfield* to set out characterization of ‘privileges and immunities’ as basic rights and concludes that elk hunting is not one of them. So the statute is OK.
  - Would be different if non-residents livelihood.
  - PI only applies when the PI bear upon the vitality of the nation as a single entity, otherwise states can distinguish among persons.

- Facts: Montana statute that calls for markedly higher fees for hunting licenses in the case of a non-resident is upheld.

- Dissent (Brennan): sets out criteria for handling PI cases.
  - Criteria: Can discriminate when nonresidents *cause the problem* and the state is trying to deal with or bears a *substantial relation*. (Illustrated in the *Camden* case).
  - [Arguably they do not apply here for the PI cases are largely confined to employment issues, and *Baldwin* is not such a case, in fact it has no economic dimension at all – so then Blackmun’s elaborate decision is beside the point].

\(^2\) Confines expressions of those PI that are “fundamental,” general heads including: protection by government, enjoyment of life and liberty, right to acquire and possess property of every kind, pursue and obtain happiness and safety, right to pass through or reside in other state for purposes of trade / agriculture / professional pursuits, writ of habeas corpus, institute and maintain acts in courts of the state, take hold and dispose of property, exemption from higher taxes that are paid by other citizens of the state, the elective franchise.
Toomer v. Witsell

- Holding (Vinson): South Carolina law imposing large fees ($2500 v. $25) on non-resident shrimp boats does not mass muster under interstate “privileges and immunities” clause. The fee is not proportional to whatever legitimate concern So. Carolina may have had vis-à-vis the costs of maintaining its shrimp industry.
- Test [violation of the PI clause]: whether there are valid reasons for a state to make distinctions based on one’s state citizenship and whether the degree of discrimination bears a “close relation” to these reasons. The clause outlaws “classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.”
- Test in layman’s terms:
  - Is it clearly discriminatory from an economic standpoint?
    - Yes, real problem here was the conservation of the shrimp.
  - If yes, is there a connection between the evils prevented and the regulation?
  - If yes, is it narrowly tailored to that evil?
    - No, in this case there is a less discriminatory and onerous alternative.

Hicklin v. Orbeck

- Holding (Brennan): Alaska local hire law is overturned.
- Brennan applies the standards adumbrated in his dissenting opinion in Baldwin. The State’s purpose is not reflected in the means adopted, unemployment of Alaskans stemmed in no small part from the fact that they were unqualified for the positions in question.
- Even if state could seek to alleviate its unemployment problem by requiring such hiring preferences, the state’s law could not withstand scrutiny under this clause because it is not sufficiently tailored to aid its intended beneficiaries (simply grants all Alaskan’s a flat employment preference).
  - Problem = unemployment rate
  - Statute = hiring pref. for Alaskans w/ oil and gas leases
  - Reason problem [need to identify underlying source of the problem] = poor education of citizens, regulating non residents does not help this problem. Need to train residents.
- Facts: Alaska law gave employment preference to Alaska residents over nonresidents for all oil and gas leases and other such agreements to which the state was a party.
- Is this test the same as strict scrutiny test? Different statements of same underlying doctrine?
**Supreme Court of New Hampshire v. Piper**
- **Holding:** NH rule limiting membership in the NH bar violates interstate PI clause. No basis for distinction between residents and non residents.
- **Analysis:** First determined whether the ability to be a lawyer is a type of public sector commercial activity protected by the PI clause (YES), and then determined whether the state has a substantial interest in restricting admission to its bar to persons who are residents of the state (NO).
  - Categorically court says law is privilege under Art 4 § 2, easy case, important for the national economy.

**United Building and Construction Trades Council of Camden County v. City of Camden**
- **Holding:** City ordinance outlining hiring preference to those residing in the city, in an effort to arrest “middle class flight” is constitutionally warranted for the measure speaks to the problem and the problem counts as a legitimate state purpose.
- **Court adopts a 2 step methodology to judge a state or local law that imposes a residency or citizenship classification in order to allocate construction jobs on city projects.**
  - (1) Is the discrimination against out of state residents a ‘matter of fundamental concern’?
  - (2) If yes, can the government justify the residency requirement?
- Can discriminate against nonresidents if they are shown to cause a particular harm to state or local interest – “to constitute a peculiar source of the evil at which the state statute is aimed.”
- Sent back to the trial court for findings of fact.

**h. State immunity doctrine**

As opposed to what we looked at before with the principle that prohibits the federal government from using the Commerce Clause to order the executive or legislative branches of state or local governments to take legislative, regulatory, or executive actions. Now looking at if the 10th Amendment and other federal principles creates doctrines that would provide states with a broader immunity from federal regulatory laws over the state instrumentalities themselves.

**Issue with Intergovernmental Immunity** – Can Congress regulate the activity of state governments w/no barriers beyond those it would encounter in governing the private sector?
National League of Cities v. Usery – brief flirtation the court had with upholding the principle of intergovernmental immunity.

  o Holding: Municipalities and States’ employees are excluded from coverage under 1974 amendments to the Fair Labor Standards Act (minimum wages and overtime payment) on grounds that States are immune from regulation under the commerce where “functions essential to the separate and independent existence” of the State are concerned.
    o If cities and states were to meet the required amendments they would have to spend a lot more money, cut back on programs, etc.
    o Infringed constitutional prohibition = 10th Amendment. [Test] Congress would not abrogate a state’s plenary authority over matters “essential” to the state’s separate and independent existence.
    o I.e. there are some areas that are immune from Congressional regulation.
  o Note: Analogy between “state immunity” and individual’s constitutionally protected right (immunity) is faulty. [Think of Paulson’s diagram that he drew on the board].
    o Fixed line where rights trump policies, below that there is a moving line between what the states are empowered to regulate and what congress is empowered to regulate. These are trumped by the individuals immunities. Nat’l League has us below the rights line because they are statutorily conferred rights.
  o Dissent (Brennan): Goes back to the classical learning: this is the end to be left to Congress, courts should not take these decisions away from the people. The Amendment extending the rights to public State employees was the will of the people.

Garcia v. San Antonio Metropolitan Transit Authority – overruled National League

  o Holding (Blackmun): overruled National League
    o The standards adumbrated for state immunity are unworkable – the “traditional governmental functions” standard.
    o The role of federalism in a democratic society assures the states of autonomy with particular decisions about the scope of that autonomy coming from the political process, not the judiciary.
  o Court over-ruled prior case law and held that neither the 10th Amendment nor the structure of the federal system justified restriction of Congress’ power to apply otherwise valid commercial regulations to state or local governments. The law in question was generally applicable and the state faced nothing more than the same minimum wage and overtime obligations that thousands of employers have to meet.
Printz v. United States – very limited federalism restriction on congressional power over state and local governments.

- Holding: Federal statute compelling State officers, in interim arrangement, to execute federal law (background checks on would-be purchasers of handguns) is unconstitutional for being “incompatible w/ our system of dual sovereignty.”
  - Immune where sovereign. Police protection is one fundamental aspect of state sovereignty. Congress can’t compel state officers to execute federal law where we are talking about an aspect of state sovereignty.
- Federalism principles that prevented the federal government from requiring state and local governments to enact legislation, and also prohibited the federal government from requiring state or local executive officers to implement federal law.
- Facts: Congressional Act of 1968, interim provisions before national background check system for handgun purchases is in place, state officers required to perform duties (reasonable effort to establish in 5 days if violation of law and provide reasons on request if unlawful).
- Think of Paulson’s spectrum???

Alden v. Maine – limits on federal power to subject states on suit in state court.

- Holding: Congress has no power to compel States to hear private suits for money damages in its courts.
- Facts: Employee → State of Maine for violation of overtime provisions of the FLSA in federal district court. Sue in state trial court, dismissed on sovereign immunity grounds because Maine did not consent to the suit.
- Note: Kennedy sets the state by sketching the place of the States in the “constitutional plan.”

IV. The persisting controversy over the function of the judiciary – slavery, substantive due process, incorporation, “modern substantive due process” or privacy.

a. Slavery and the Constitution

Article 1, § 2: taxes determined by free persons (=1) and all other persons (= 3/5).

Article 1, §9, p.1: “The migration or important of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.”
Article 4, §2, p.2: “A person charged in any state… 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.” Intended for fugitive slaves to be returned to the slave holder.

Article 1, §9, p.4: “no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.” (To be read with 3/5 clause above).

i. Groves v. Slaughter (1841)
1. Holding: A provision in the Mississippi constitution had no application until implemented by the legislature.
2. Facts: Miss. Const. proscribed the importation of slaves into the State (purpose to protect Miss own slave trade from competition). Groves defaults on notes given to Slaughter for importing slaves into the state. Judgment for Slaughter, the constitutional provision does not have implementing legislation.
3. Dissent (McLean): Congress has exclusive commercial regulatory power, but slaves are no article of commerce. Mclean’s dilemma \(\rightarrow\) exclusivity: if slaves are commerce then does Congress have exclusive power to regulate that? So we deny the premise that slaves are an article of commerce to get around that.

ii. Prigg v. Pa. (1842)
1. Holding: The self executing character of Article IV, sec. 2, para. 3 is self-executing, and this continues to be self-executing in spire of a federal statute that purports to restrict the exercise of the power.

Article IV, §2, p. 3 = “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.”

Fugitive Slave Act of 1973 = an owner/agent can seize a fugitive slave, but needs certificate of removal after the fugitive has been identified by a federal or state judge. Act passed in pursuance of above.

2. Effect of the holding: Invitation to kidnap, pursue by private means as long as no breach of the peace. Racist. Statutory requirement (to acquire certificate of removal) is a mere option.

iii. Dred Scott (1857)
1. Holding (Taney): Blacks cannot be United States citizens and therefore are not US citizens.
   a. At the time of the constitution blacks were subjugated class by the dominant race. Plays tricks here – treats all blacks as black slaves.
   b. Citizen of the state versus citizen of the United States are distinct things.
2. Issue: What is the legal status of a slave who enters a non-slave holding state or territory, and what happens in the event when the former slave later returns to the slave holding state? (Three options):
   a. Permanent slave status
   b. Once taken into free state, free wherever they go thereafter (Dred’s argument, current string of authority at the time).
   c. Reverts – when free then free, when slave then slave.
3. Dissent (Curtis): Points to actual cases of black US citizens in 1789. Everyone who is a citizen of a state is a citizen of the United States.
4. Additional point – the majority held that the Missouri Compromise exceeded Congress’ power (2nd big decision since Marbury). The original constitution had not given Congress any power to interfere with an owner’s vested rights in his slaves. Thus, the MC deprived owners of their vested property rights w/o due process of the laws.

iv. Frederick Douglass’s read on the constitution re: slavery
1. Textualist approach (read Constitution for its language = ensures an end of slavery and guarantee of freedom).
2. The 3/5 clause – disability on Southern States, deprives them of 2/5 representation
3. Importation clause – makes slave trade a dead letter, ends slavery no later than 1808
4. Insurrection clause (A1, S8, P15) – if need militia to put down insurrection is traceable to slavery then have mandate to bring slavery to an end.
5. Fugitive slave act – speaks of indentured servants, not slaves – slaves cannot owe service to anyone, implied being bound by contract.

b. Rise and fall of the so-called substantive due process
Privileges and Immunities Clause is not recognized as a vehicle for incorporating the Bill of Rights (although it was the early candidate). The due process clause is the ultimate vehicle for carry over. Possibilities for carry over of the Bill of rights are:

1. None carry over via the 14th
2. Some of the rights in the first 8 Amendments
3. Some of the first 8 Amendments and more
4. Exactly the first 8 Amendments
5. Exactly the first 8 Amendments and beyond

Oddity of “substantive due process” because “due process” thought to be procedural. Became a check on the legislative process. According to Mugler v. Kansas – we have fundamental right to economic freedom, this doctrine of freedom from economic regulation is constitutionalized in the name of substantive due process.

Slaughter-House Cases – uses the PI clause as the vehicle

Holding (Miller) – The “one pervading purpose” found in the 13th and 14th amendments is the freedom of the black slave. Therefore, it cannot be said that the 14th PI clause carries over to, and enforces against, the States those protections found in the Bill of Rights.

Reasons for rejecting the 14th:

Read “all persons born in US are citizens of the US and state where they reside” to be 2 types of citizenship: state and national. Thus, states can’t make laws that infringe on national citizenship.

National rights – use seaports, come to seat of government to assert claim, use navigable waters, etc.

LA statute for monopoly didn’t impair any P&I.

Due process is only procedural due process

Facts: LA legislature grants monopoly to Crescent Livestock Company. Butchers bring action, arguing they have been cut out, depriving them of a means of livelihood.

Due process:

Purpose is not to carry over first 8 Amendments, but rather to protect the former slave (overturning the Dred Scott case).

Privileges and Immunities Clause

Says addressed to appellants as their capacity as citizens of a state. Vindication of those rights is left to the government.

No carry over from the bill of rights.

Dissent: Reading of the PI clause renders it useless

Freedom on contract is something that the due process clause protects. This case represents the problems the Court was having from 1900 – 1937 when state legislatures
and the national government were enacting an increasing amount of legislation that regulated the economic and social life of Americans.

**Lochner v. New York**
- **Holding:** NY State statute, limiting the length of the work week, is unconstitutional on the ground that it interferes with the “right of contract” between employer and employee.
  - Absurd contention because it presupposes rough equality of bargaining power – compare with *Parrish*.
- **Facts:** New York law that limited the number of hours a baker could work to only 60 hours / week or 10 hours / day.
- **Due process clause**
  - Use of the 14th dpc as a check on State legislative power.
- **Harlan dissent** – “liberty of contract” is subject to State regulations, and validity of State statute enjoys a presumption of validity. Willing to accept statute as valid health measure. *Rational basis test.* This is a policy issue.
- **Holmes dissent** – argues that the issue is one of policy (not rights), and on policy questions the people are sovereign. Majority imposing its own theory of proper economic policy on the state of NY. Court need not endorse the view of economics – not for the court to impose economic theories.

**Muller v. Oregon** – an exception to the substantive due process rule
- **Holding:** Court upheld Oregon State statute limiting the work week of *women* as constitutional, for their “physical structure and… maternal functions place [them] at a disadvantage in the struggle for subsistence…”.
  - Right to contract can still be restricted even though individual liberty is protected by the 14th Amendment.
- **Facts:** Brandeis (attorney then) presented the court with massive documentation to justify the regulation of the work hours for women. Data showing plight of women carried the day.

**Adkins v. Children’s Hospital** – invites attention to the mainstream opinions of the day.
- **Holding (Sutherland):** unconstitutional minimum wage in Washington, DC for women and minors, arguing in the manner of *Lochner* that “the right to contract… is part of the liberty” protected by the 14th Amendment due process clause.
  - Restoration of the *Lochner* status quo.
- **Facts:**
  - Taft dissenting: Argument for economic policy. Just because the court disagrees with the policy on which the state decided does not justify invalidating the law, should not substitute view for that of the legislature. *Rational basis test* applies here.
Holmes dissenting: (more of the same) Emphasizes many legal restrictions that prevent person from doing things. People cannot enter into contracts that are against public policy. Rational basis test is clearly met.

**Nebbia v. New York** – reversed the public interest line of cases

- Holding: Court upheld State price controls on milk. Where the law has a *reasonable relation to a proper legislative purpose* and is not discriminatory, it will be upheld.
  - Legitimate exercise of the state’s police power
  - Rejects that milk is not business affect w/the public interest – no closed category or class of cases.
  - Laws comply with substantive due process so long as they are not “unreasonable, arbitrary or capricious” AND “the means selected must have a real and substantial relation to the object sought to be obtained.”
- Facts: NY established a regulatory board that had the authority to set minimum prices for the retail sale of milk.
- Much of the language in the opinion suggests that the *Lochner* Court (substantive due process doctrine to invalidate economic or welfare legislation) was coming to the end of the road. Court said: “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adapted to its purpose.” Courts do not have the authority either to establish an economic policy or to overrule the legislative choice of an appropriate policy.

**Economic Liberty Since 1937** – evolution toward more deferential standard of review.

**West Coast Hotel v. Parrish**

- Holding (Hughes): Upheld act – it is absurd that workers enjoy equal bargaining power with their employers, thereby undermining *Lochner* and formally overruling *Adkins*. Helps prevent workers from being wards of the state.
  - On freedom of contract: “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty w/o due process of law.”
  - Exploitation is a detriment to the community.
  - Deference to the legislature – traditional realm of the State over the employer-employee relationship.
- Facts: Washington State act fixing minimum wages for women and minors. P was a chambermaid and was not paid the minimum wage. Hotel challenged the act as repugnant to the due process clause.
Sutherland dissent: Formalistic opinion representing the old order. The meaning of the Constitution does not change with the ebb and flow of economic events.

**United States v. Carolene Products** – Footnote #4 most important
- Holding (Stone): Court rejects due process argument and the chance to resurrect substantive economic due process.
  - Shows extraordinary deference to the Congress (*rational basis*) – “facts supporting the legislative judgment are to be presumed” [here legislative finding that filled milk was injurious to the public health = congressional rationale]. Even w/o legislative findings, it’s to be *presumed*.
- Footnote 4: Court anticipates a higher standard (“strict scrutiny”) when “prejudice against discrete and insular minorities” is the concern. [Where rights are concerned rather than policy].
- Facts: Congress had passed legislation that prohibited the interstate shipment of “filled” milk (skimmed milk compounded with any fat or oil other than milk fat). Purpose is to prevent fraud and protect public health.

**Olsen v. Nebraska** – disinterest in the wisdom of legislative policy
- Holding (Douglas): The law does not violate due process clause – the court is not concerned with the wisdom, need, or appropriateness of the legislation – *rational basis test*.
  - Would have merit only if the precepts of the *Lochner* era still prevailed (old liberty of contract era). Another nail in the coffin to substantive due process.
  - Think about this in terms of *privacy* – can you reject the old substantive process and still make sense of the new.
- Facts: Statute in question fixed the maximum compensation which a private employment agency might collect from an applicant for employment.
- On *privacy* – problem of distinguishing old style substantive due process from its “modern” counterpart, namely privacy. The problem counts as one statement of the motif in the IV part of the course. (See CB 280 – 283).

The Supreme Court has not yet held that the right to privacy limits governmental powers relation go the collection of data concerning private individuals.

**Whalen v. Roe**
- Holding (Stevens): Statute was valid even if the right to privacy places some restriction on the ability of government to collect data concerning individual citizens. Relates to the legitimate goal of controlling illegal drug distribution and is reasonable in its limitations on the use and distribution of the collected data.
o Does threaten individual privacy, and for that reason the right to collect such
data normally would be limited by a duty to avoid unwarranted disclosure of
the information collected.
  o *Lochner*-style defense.
  o Facts: Court upheld NY law that required physicians and pharmacists to forward to
state authorities copies of prescriptions for medicines containing certain narcotics.

c. Incorpa**r**ation

Today virtually all of the provisions of the Bill of Rights have been incorporated in the
Fourteenth Amendment and made applicable to the states. Since 1934 there has been a
steady process of judicial inclusion of provisions of the Bill of Rights. Debate came down
to whether all of the Bill of Rights was to operate through the 14th Amendment or whether
specific guarantees would apply selectively.

**Barron v. Major & City Council of Baltimore**
  o Holding (Marshall): The 5th Amendment taking clause says that the government
cannot take property w/o just compensation does not apply to the states as the
Constitution only applies to the federal government.
    o The 5th Amendment is limited to Congress, Congress was the body it was
      addressed to in the first place in 1791.
    o This is going to change.
  o Facts: Action against Baltimore to recover damages for injuries to Barron’s wharf
property arising from the acts of the city.

**Palko v. Connecticut** – selective incorporation
  o Holding (Cardozo): Incorporation is “selective.” The Court will make a provision
of the Bill of Rights applicable to the states if the Court concludes that it was meant
to protect a “fundamental” aspect of liberty.
    o Underscores the role of 1st Amendment freedoms – these are “implicit in the
      concept of ordered liberty.” And “neither liberty nor justice would exist if
      they were sacrificed.” These are *presupposed* by the democratic order.
    o 5th Amendment (double jeopardy) is not incorporated. Might actually work in
      favor of the D.
  o Facts: Conn. State statute providing for prosecutorial appeal in criminal cases does
not trigger 5th Amendment immunity from double jeopardy, for incorporation is
justified only if the precept in question is “implicit in the concept of ordered liberty”
and “so rooted in the traditions and conscience of our people as to be as
fundamental.”
Adamson v. California (applies Palko)

- **Holding:** Not all of the rights of the federal Bill of Rights are drawn into the rubric of the 14th Amendments due process clause. In particular, freedom from self-incrimination under the 5th Amendment does not carry over to the 14th Amendment.

- **Facts:** Appellant argues that the 5th Amendment right that no person shall be compelled to testify against himself is a fundamental national privilege or immunity protected against state abridgment (right to fair trial is protected by dpc, and freedom from self incrimination is part of that).

- Black dissenting – talks about the “natural law” and indorses a “literal incorporation” of the bill of rights – exactly those guaranteed by the first 8 Amendments (need to hold judges to letter of law so they don’t abuse discretion).

Malloy v. Hogan

- **Holding:** Court incorporates 5th Amendment freedom from self-incrimination. Today the law reflects nearly complete incorporation.

  **d. Modern substantive due process and the privacy doctrine**

We are moving from the old view (economic liberty / laissez fair state / freedom of contract) → courts rejecting substantive due process / economic liberty → new doctrine of personal liberty. The proponents have chosen new arguments because the old arguments no longer work, discredited w/economic liberty. Can you defend the new one having rejected the old? *Meyer* is a case of transition.

Meyer v. Nebraska

- **Holding:** State statute prohibiting instruction in the schools in any language other than English is overturned as a violation of the 14th dpc; the Court stresses “liberty” as reaching to “the right of the individual… to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children.”

  - Extends the concept of liberty beyond economic due process to the area of personal family autonomy, laying the foundation for the modern right of privacy decisions.

  - **Note:** lack of doctrinal support.

- **Facts:** Court struck down a state law prohibiting the teaching of foreign languages in private as well as public schools by relying on the due process clause, not the 1st Amendment. Impinges on the liberty to make educational decisions.
Holmes and Sullivan Dissent – this policy judgment is best reserved to the legislature.

**Poe v. Ullman**

- Facts: CT statute that forbid the *use* of contraceptives. Action was brought to challenge this statute. It was dismissed for lack of standing.
- Harlan dissent: Develops the theme of “liberty” in the 14th Amendment as “including a freedom from all substantial arbitrary impositions and purposeless restraints.”
  - Invades marital privacy – intrudes upon the most intimate details of the marital relation.
  - Focuses on the right to privacy.

**Griswold v. Connecticut** – creation of the modern right to privacy / effort to create something out of nothing.

- Holding (Douglas): Statute impermissibly limited the right to privacy of married persons. Violates the due process clause because it deprived these married persons of the liberty protected by this fundamental right.
  - Repudiated *Lochner* and emphasized that the Court “did not sit as a super legislature.”
  - New argument ➔ Penumbras and emanations of several guarantees of the Bill of Rights established this right to privacy. This “zone of privacy” emanates from the 3rd, 4th, 5th and 9th Amendments.
- Facts: Held the same Conn statutes from *Poe* invalid because they restrict the right of married persons to use contraceptive devices (this time the case was heard). Appellants were a doctor and executive of the Planned Parenthood League, that were convicted for giving information and medical advice to married persons.
- Goldberg concurring: 9th Amendment evinced the historic belief that certain fundamental rights could not be restricted by the government even though it did not create specific rights. To determine these rights should look to the tradition and collective conscience of our people. “Marital privacy” is one of these – clear historic values in freedom of choice in marital relationships.
  - Does a *reductio ad absurdum* argument to support 9th Amendment (show not every constitutional right is expressly stated in the constitution – assume every right *is* stated, if so, nothing against state imposed sterilization.
o Harlan concurring: Due process clause protected fundamental liberties that were not expressed in the bill of rights. Looks at this as literal incorporation.

o Black and Stewart dissent: no constitutional basis, wants to expressly reject the idea that there is anything to substantive due process.

**Roe v. Wade** (see notes for what I should read here)

o Holding (Blackmun): grounds this “right to privacy” in the 14\textsuperscript{th} Amendments concept of personal liberty.

o Doctrinally leaves a good bit to be desired.

o Role played by strict scrutiny test:
  - With respect to the pregnant woman and w/respect to the “potential life,” when the State’s interest “becomes compelling.” Before that point, the woman’s constitutionally protected immunity from State interference is recognized. The right is then applied to overturn the Texas abortion statute.
  - State interest – abortion is not an absolute right (think procreation, medical standards protecting life).

o Facts: Statute makes it a crime to procure an abortion, or to attempt to do so. Only exception is when the abortion is undertaken under medical advice to save the life of a pregnant mother. Roe is pregnant woman, wants Texas statute to be unconstitutional and wants injunction from enforcement. Uses Griswold and trots out the penumbral doctrine in support for the right to privacy.

o Historically common law protected abortion up to the first trimester.

o Rhenquist dissent: Women are the ends themselves, not the means. Nothing in the intentions of the framers or the reconstruction congressmen who would hint at nothing remotely like privacy right.

**Casey**

o Holding (O’Connor, 3-judge plurality)
  - Strict scrutiny and trimester distinction – as recognized in *Roe v. Wade* – is abandoned.
    - Rejection of strict scrutiny standard means that the status of the right to an abortion is cast into some doubt, no general doctrine is there to undergird the right. SS compliments the constitutional protected immunity to which the claim relies. Talks instead of nature of pregnant woman’s “interest” – this does not bode well makes it look like we are
back to balancing test w/competing policies and not a constitutionally protected immunity.

- Facts: Court upholds a 24-hour waiting period as part of an informed consent requirement but overturns “spousal notification” requirement as constituting an “undue burden” [“great many women who are inflicted by abuse of husbands a spousal notice requirement enables the husband to wield effective veto over his wife’s decision”].

**Bowers v. Hardwick**

- **Holding (White):**
  - **History:** 19th century sodomy statutes – long history of outlawing sodomy
    - Problem: Did not address homosexuals in speaking to the particular activity at issue here. So well hidden those days, bigger fish to fry.
  - **Issue:** Does the Federal Constitution confer a fundamental right upon homosexuals to engage in sodomy?
    - Specificity problem → framing the issue w/such specificity that it is reduced to an absurdity. Whole case decides itself once it is set off like this – doesn’t pick up value here, write it out as if framers had particularly written out safeguards against such thing.
  - **Facts:** Police officer came to Hardwick’s apartment to serve him for violation of open container law and then discovered him committing sodomy against Georgia statute.
    - Distinguish here the enforcement of morals (associated w/work of local moral squad) from morality (war and peace).
  - **Blackmun dissent:** Guarantee of privacy (at a general level – right to be left alone) and introduces an element of justification of privacy in terms of autonomy.
    - Autonomy categories
      - Decisions – right to marry, etc = personal decisions
      - Places – talking about the home

**Lawrence v. Texas** – reverses *Hardwick*

- **Holding (Kennedy):** Texas law that prohibited sodomy between persons of the same sex violated the 14th Amendment due process clause.
o Doctrine of privacy lends itself to explication in terms of *autonomy*. Develops (in the name of *autonomy*) motifs outlined by Blackmun in *Bowers*, namely the need to be able to take fundamental decisions for oneself.

o Liberty is too broad to help with argument, turns to autonomy (=privacy). Undermines dignity (=autonomy) when using humans as means to an end (=abortion / sodomy).

o Arguable the case is decided by appeal to the rational basis test: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” [With respect to restriction of private sexual activity].

o Scalia: Wants to frame the issue the same way it was framed in *Bowers* [expresses surprise that the Court in *Lawrence* ‘leaves strangely untouched’ the conclusion of *Bowers* as White/Scalia frame it].

o New use of the *rational basis test* – don’t know though if there is a right being vindicated – if it’s a constitutional protected immunity then where is the *strict scrutiny compliment*? Only time will tell???

V. The separation of powers – the political question doctrine, executive power, congressional power.

a. The political question doctrine

**Political Question Doctrine**

Certain matters are really political in nature and best resolved by the body politic rather than suitable for judicial review. I.e. a doctrine of *nonjusticiability* and inappropriate for judicial consideration. (= Renders government conduct immune from judicial review).

Article IV, § 4 = the guarantee clause.

Separation of powers doctrine – the political question doctrine insulates other branches of government from the judicial check.

*The bright side of the political question doctrine* (*Baker*)

**Baker v. Carr**

o Holding: Upheld the justiciability of legislative reapportionment. A claim that arises under the Equal Protection Clause falls under (2). About judiciary relation to another branch of government, not the states.
Facts: Tennessee’s General Assembly failed to reapportion its legislative districts such that 1 vote in one county counted for 17 in another.

Test: Prominent on the surface of any case held to involve a political question is found: [last 4 are considered prudential criteria for the good of the body politic].
  o (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department.
  o (2) A lack of judicially discoverable and manageable standards for resolving it.
  o (3) The impossibility of deciding w/o an initial policy determination of a kind clearly for nonjudicial discretion;
  o (4) The impossibility of the court’s undertaking independent resolution w/o expressing lack of the respect due coordinate bracnces of government
  o (5) Unusual need for unquestioning adherence to a political decision already made.
  o (6) Potentiality of embarrassment for multifarious pronouncements by various departments of one question.

Frankfurter dissent – says be careful, if the courts wanted to find a way to hear the case then they would.

**Luther v. Borden** (1849)
  o Holding (Taney): This is a political question. The proper government of RI, and the guaranty clause are nonjusticiable. Only for the Congress and the President to enforce the clause.
  o Facts: Luther → Borden for breaking and entering into his house. D said ok because they were agents of RI and were doing it pursuant to military orders. P said this did not work because “before the acts complained of were committed, the government has been displaced and annulled by the people of RI and the P was engaged in supporting the lawful authority of the State.” SC asked to determine which group was the legitimate government of RI.

**Goldwater v. Carter**
  o Holding (Marshall): Political question and non justiciable. No standard in the Constitution governing the recission of treaties, and matter is dispute between coequal branches of the government the issue is nonjusticiaible until each branch has taken action asserting its constitutional authority.
  o Facts: Senators sue for declaratory and injunctive relief against President Carter after he announced plan to end treaty w/Taiwan, recognizing the People’s Republic of China (claim to the whole of the country) rather than the Natoinalist Gov. of Taiwan w/o the consent of the Senate. Senators argue that since need Senate approval to sign the treaty, should have it to get out.
Rhenquist (Concurring): Political question because involves the authority of the President in the conduct of foreign relations. Argument by analogy to Coleman.

Brennan (Dissent): Would have said action was justified by Article II, which gave the President exclusive power to recognize foreign governments. Abrogation of treaty is w/in Presidents power – not about whether the President has the power to recognize a country.

Powell (Concurring): Judicially discoverable and manageable standards because the decision in this case only required the Court to interpret the Constitution. Concurred in dismissal because not yet “ripe” because Congress had not yet to confront the president.

**Powell v. McCormack**

- Holding (Warren): The vote to exclude (as opposed to expel) Powell is justiciable and not a political question. Exclusion is governed by A1§5p1 – court has to interpret this clause, and can only exclude if don’t meet requirements (interpreted very narrowly). Different for expulsion where need 2/3 vote – might not be justiciable.
- Facts: Powell was elected to Congress, but the 90th Congress refused to seat him. Powell sued to be seated, to receive back pay, and for declaratory judgment that exclusion was unconstitutional.

**Impeachment**

**Nixon v. United States**

- Holding (Rehnquist): Nixon’s claim is nonjusticiable – framers intended that the judiciary, and the Supreme Court in particular, should have no role in impeachments.
- Issue: Whether the impeachment and removal from office of Judge Nixon was a political question. I.e. was a full Senate vote required for impeachment, or was the practice of committee of Senators to hear evidence and report to the whole body unconstitutional? There is a Senate rule 11 that authorizes this use of an impeachment committee. (Argues it violates A1,S3,C6 that the Senate will “try” all impeachments).
- White: It is justiciable but even if interpret on the merits and interpret “to try” he would still lose.
- Souter (concurring): Separation of powers – the political question doctrine establishes checks on powers otherwise there. Should read it emphasizing the separateness of the branches.

**Mora v. McNamera***** (get more notes here)**
Holding: It’s a political question and non justiciable.

Facts: P were drafted into armed for Vietnam. Argue that the military activity was illegal because the executive branch was unconstitutionally acting for want of a congressional declaration of war.

Stewart and Douglas dissent: Should be heard

Issues surrounding the political question doctrine that very well might be tested:

- Is the political question doctrine too broad?
  - Yes – If Congress declare war then they can w/stand judicial review of the matter. With no Congressional declaration then might be useful to have judicial intervention and declaration on the matter.
  - No – If narrower then court might get involved in various political conflicts and be unable to enforce its will (see Marbury)

Executive power, the Executive vis-à-vis foreign Affairs

Traditionally, the President is responsible for conducting the foreign affairs of the United States. Can’t find such plenary executive power explicating mentioned anywhere in the text of the constitution.

Article II of the Constitution.

The political question doctrine is an important exception to judicial review – demonstrates the Courts reluctance to take an active role in formulating foreign policy. Baker v. Carr.

Economic Regulations and the War Power

Steel Seizure Case

- Holding (Black): No express or implied statutory provision authorized the President in the seizure order. The President’s vested duty to see that the laws of faithfully executed refutes the idea that the chief executive can make the laws. Congress’s silence is not consent to the Presidential seizure.
- Facts: Worried about a steel workers strike during the Korean conflict (national catastrophe), President Truman issued an executive order to seize and operate many of the nation’s steel mills. Said it was valid under the “command-in-chief” power. Told Congress and they did nothing. Steel companies sue.
- Justice Jackson (concurring) has a 3-part analysis for the scope of the President’s war powers:
  - (1) President’s authority is at max when he acts pursuant to an express authorization of Congress.
(2) Absence of congressional grant, rely on own independent powers, where there is a zone where he and Congress may have concurrent authority. Therefore “congressional inertia… may sometimes… enable, if not invite, measures on independent presidential responsibility.”

(3) Acts contrary to Congress, executive power is very low and only.

Executive Agreements and Acts of Congress – the Iranaian Assets Litigation

**Dames & Moore v. Regan** – illustration of the broad presidential power to settle foreign claims by use of executive agreements.

- Holding (Rehnquist): upheld the constitutionality of the Executive Orders.
  - Congress explicitly authorized the President to nullify the post-freeze attachments and direct Iranian assets to Iran by statute.
  - As far as Iranian claims (as opposed to assets) there was evidence of legislative intent to invite broad presidential action. Congress has implicitly approved the practice of claim settlement by executive agreement.
- Facts: Iranians seize Am embassay in Tehran, held occupants hostage. Carter issued a blocking order that froze all the Iranian Government assets subject to the jurisdiction of the United States. Iran release hostages after signing agreement settling claims. Drops all claims w/ Iran – Carter and later Reagan signed series of executive orders to implement this agreement. P sue because order adversely affects P’s final judgment on contract claim w/gov of Iran. Wants to still be able to litigate against Iran.
- Not political question doctrine because an individuals claimed right is at stake here, needs to be heard.

The President and Congress

The Legislative Veto: Defining the Limits of Congressional Continued Oversight

Where Congress incorporates into legislation a provision known as the “legislative veto.” Congress seeks by statute to give itself what the Constitution gives to the President – generally in the realm of administrative agencies.

Challenged on several grounds:

1. The one-house veto provisions violate the sections of Article I of the Constitution requiring legislation to pass both chambers of Congress.
2. The legislative veto provisions violate the presentment clause of Article I requiring presentment of legislation to the President for approval or veto.
3. The legislative veto provisions generally contravene the separation of powers doctrine implicit in Articles I, II, and III.

**Immigration and Naturalization Service v. Chadha**

- Holding: the legislative veto provision contained in the Immigration and Nationality Act was unconstitutional. Requires that any “legislative veto” be passed as legislation by both chambers of Congress and presented to the President for approval or veto. Based on the legislature process provisions set out in Article I.
  - Violate the presentment clauses, and bicameral requirement. House action was “legislative in character, purpose, and effect.” (Tries to set out this criterion – in effect if they change persons rights, etc.)
- Facts: Chadha was alien in the US on nonimmigrant student visa. According to the INA, judge found his deportation could be suspended. According to INA had to go to Congress, either house could overrule. House vetoed suspension. This was not treated as “legislation.”
- White’s dissent: In practice doesn’t make sense. Some 200+ legislative provisions in statutes. *Hobson’s Choice*\(^3\) that if you want to stay in the business of administrative agencies then Congress no longer has control of them: either have *no* administrative agencies *ever*, OR, there will be administrative lawmaking w/o accountability to the people because there is *no check on power*. Would say that the courts view is *formalistic* because it doesn’t address the underlying issues (namely, accountability).

**Non-delegation doctrine** – problem is how do you provide a check on agencies in the democratic order? Congress tried to resolve this w/the legislative veto. *Chadha* calls this into question.

**Removal Power**

No express Constitutional clause dealing with a removal power over executive branch officials (other than Congress + impeachments). Such power has long been assumed to arise under Article II. Presidential control over purely executive functions would be seriously undermined by any efforts to limit this removal power. Seen as mere image of the appointment power.

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\(^3\) You either stay at home and buy no horse at all, or you come to the market but you get no choice as to the horse you get, you get the one closest to the door.
Constitution differentiates between two classes of officers. Primary officers must be nominated by the President and confirmed by the Senate. Congress has a choice with inferior officers and can vest appointment in the President, courts, or heads of departments.

**Buckley v. Valeo** – what is an “Officer of the United States” (where the whole problem starts)
- Holding: Congress violated Article II in providing that the President pro tempore of the Senate and the Speaker of the House could appoint the majority of the voting members of the Federal Election Commission.
  - None of those given the appointment power feel within the terms “courts of law” or “heads of department” as required by Article II.
  - I.e. CONGRESS cannot appoint.
  - FEC members are officers of the United States because of the functions they would have, don’t operate in aid of congressional authority but have significant administrative duties.

**Myers v. United States** – removal of executive officials and congressional restriction thereon.
- Holding (Taft): Affirmed Myer’s dismissal.
  - Starts with obvious point about President having unconstrained power to remove cabinet members, extrapolates from this to the lowly post-master position. *Textual argument – Myers is officer of the US.*
  - Facts: President sanctioned discharge of Myers, a postmaster in Portland, Oregon w/o Senate approval (as sanctioned by statute).
    - Government argues that it would be unconstitutional to limit the President’s removal power w/ requiring the Senate’s consent.

**Humphrey’s Executor v. United States**
- Holding: The President cannot remove a member of an independent regulatory agency in violation of restrictions in the statutory framework (where can only remove for cause).
  - The FTC is neither political or executive, but mainly *predominantly quasi-judicial and quasi-legislative.*
  - Says *Myers* only applies to all purely executive officers, and the Constitution does not grant the President unlimited removal power as to quasi-leg and quasi-judicial officers, even if they hold office through Presidential appointment.
  - Facts: FTC Act said President can only remove members for cause. Roosevelt remove for policy reasons, no cause.
**Weiner v. United States** – held invalid Eisenhower’s dismissal of a Truman appointee to the War Claims Commission even though absence of express congressional restriction on the President’s power of removal. Says there is a “sharp differentiation from those who are part of the executive establishment and those whose tasks require absolute freedom from executive interference.”

**The “Independent Counsel” Question**

**Morrison v. Olsen** – modern removal controversy, think also in light of Clinton and Bush. Might want to come back here and make sure I know what is really going on.

- **Holding**
  - Appointments Clause – does not violate.
    - The Independent Counsel is an inferior office w/in the meaning of the clause. Only certain limited duties, office is limited in jurisdiction. Subject to removal by higher ups. So can be appointed by the courts / Special Division.
  - Removal Clause – upheld the Act’s provisions limiting the powers of the AG (or President) to remove the Independent counsel. Could remove for cause, but the removal restrictions do not impede the President’s ability to perform his constitutional duty.
  - Facts – Mrs. Morrison is appointed as *independent counsel* to investigate Olsen, a high ranking government official.
  - Issue: Conflicting interests – IC is member of executive branch and is investigating those in the executive.
  - Scalia dissent -- formalistic or realist? She performs strictly executive functions. Formalistic – talks about as sealed bodies of government.

**Mistretta v. United States**

- Holding: Upheld the constitutionality of the United States Sentencing Commission, a group that promulgated sentencing guidelines in criminal cases. President appoints 3 members of Article III judges – have to wear two hats (judicial and administrative), but not two hats at the same time. President can remove only for good cause. * Does not violate the constitution.
  - No threat to judicial independence – still an Article III judge.

**Federal Election Procedures, the Role of the States, and the Supreme Court**

**The Right to Vote: The Electoral Franchise as a Fundamental Right**

**Bush v. Gore** – going to need to come back here too ## belongs in part 1 of the course.
Holding: System adopted by the FL SC was “inconsistent with the minimum procedures necessary to protect the fundamental rights of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.” The implementation of any recounts under state court authority should end, so that the FL Secretary of State can certify the vote totals and the electors be appointed in a manner that came w/in the time frame established by the federal safe harbour provision.

- The system for recount violated the equal protection clause – allowed identical ballots to be treated differently, skewing the election results by favoring some counties over others.
- Effectively rejected any argument that electoral college issues are entirely a political question to be resolved by Congress.

Facts: Vote took place on November 7, 200 – Gore won popular vote, Bush won electoral vote. FL vote was close and Gore sue for recount. Got up to the FL SC whose ruling effectively required a state-wide manual recount of ballots that had not been counted by the machines, the recounters were to examine each ballot that had been legally case to determine the intent of the voter who cast the ballot.

Rhenquist concurrence: Decided the Article II issue saying that the FL court ruling violated the provision of the Constitution granting the state legislature over appointment of electors.

Stevens dissent: A2, S1, P2 says that the state legislature is to determine how the electors are selected. Deference to the state courts. Also says that if a jury is asked to determine “reasonable doubt” the average person can determine “intent of the voter.”

Souter dissenting:

Ginsberg: Recognized that there are some circumstances where federal courts must reject state interpretations of state law.

The President, Congress, and the Use of the Armed Forces

Summary: This of war powers act as a kind of unit – as a response to the problem posed to the Fulbright committee report. This problem: Aggregation of a war power on the part of the President. This also raises the question of constitutional change – has it changed and if so how?

War Powers Act of 1973

Passed in response to growing concern about the ability of the executive to deploy the military to foreign nations to fight in informal wars in the name of the President’s assumption of congressional war power on the wake of the Vietnam conflict
(Congressional reassertion of power in the wake of apparent aggregation of power by the President). By late 1940 there was ambivalence by officials in the executive branch to the War Powers. Tension between Congress alone declaring war versus Presidents authority to use armed forces.

It restricts the executive’s authority to involve the US in foreign controversies w/o Congressional approval, w/exceptions if the United States is attacked. Allows for Congress to force the President’s hand and remove troops if no declaration of war at the end of 60 days.

War powers act is not a dead letter.

**Prize Cases** – constitutional language suggests that the President and Congress share the war power.
  - Holding (Grier): President Lincoln had the right to blockade southern states w/o a congressional declaration of war (wouldn’t be a problem had there been a declaration of war). The President has the power to determine if hostilities are sufficiently serious to compel him to act to suppress the belligerency or take defensive measures. President can *suppress insurrection*. President is bound to resist force by force, he does not initiate war, and it is a war even if the declaration is unilateral.
    - Source of legal authority is *jure belli* (“the law of war”).
  - Facts: Br vessel was given 15 days to leave Richmond ports, due to N. blockade of the S. Ship got stuck three. Other vessels also stuck there. Sue under the name of the “Prize cases.”
  - Nelson dissent: Need a declaration of war no matter what the nature of the war is.

**Ex Parte Milligan**
  - Holding: Laws of war don’t apply here because the civil courts are *open* and that should be enough. No need to resort to a military tribunal.
    - Necessity does not apply here – marshal law is only warranted during an actual war. Only can have necessity when there is an actual need. Not more than to meet the danger actually presented.
  - Facts: Milligan was a US citizen (prominent anti-war democrat), non soldier, who was brought before a military commission (army officials were unsure of Indiana juries). He was caught trying to seize ammunition at Union arsenals and save Confederate prisoners. Milligan petition for writ of habeus corpus.

**Ex parte Quirin** – Nazi case
Holding: Approved the use of court martial proceedings to try persons – including one who claimed US citizenship – who allegedly entered the country illegally for the purpose of sabotage.

Facts: P are Germans (one claims US citizenship), they boarded submarines on the French coast, land in Long Island carrying explosives with the mission to blow up various facilities in the US manufacturing war goods. Roosevelt declares they will be tried before a military tribunal under the laws of war. D claim they should be heard before a civil court, court say they are spies.

Hamdi v. Rumsfeld

Holding: W/o a majority opinion, the Court requires the government to give a US citizen held in the US to be given some type of hearing at which he could contest the facts on which the government based a decision to treat him as an enemy combatant. [Hamdi does have a right to a writ of habeus corpus].

- A1 S9 P2 says that can suspend writ of HC for rebellion or invasion as the public safety may require – here we have war ½ around the world, no reason to suspend here.
- Should be strict scrutiny here (fundamental right), but she is suggesting a balancing test (normally only for statutorily conferred rights).

Facts: Gov’t claim Hamdi took up arms w/the Taliban. Born in America, moved to Saudi Arabia, resided in Afghanistan. Was seized by the N. Alliance (coalition of military groups opposing the Taliban) and turned over to the US military. Transferred to Guantanamo Bay. Gov’t contends he is an “enemy combatant” and that his status justifies holding him indefinitely w/o formal charges or proceedings until makes decision that access to counsel or further process is warranted. Father filed writ of HC, claims son went to Afghanistan to do relief work and was only in the country for 2 months prior to Sept. 11 and couldn’t have received military training. Gov’t responded with declaration from Mobbs – saying he traveled to Afghanistan, affiliated w/the Taliban and received training.

- Indefinite detention doesn’t both court – says only will last as long as hostilities.
- Scalia – (gets it right), textualist, constitutional protected immunity. ##