I. Constitution Generally
   A. Conferal of powers
      1. Legislative power on Congress – Art. I § 1
      2. Executive power on President – Art. II, § 1
      3. Judicial power Supreme Court – Art. III, §1
   B. Language
      1. Language of the constitution is either
         a. constitutional – creates a power OR
         b. declaratory – merely announces a power that already exists

II. Federal Judicial Power – major developments
   A. Authority to review federal laws/executive actions
      1. Contit. is silent about judicial review of exec. and legis. acts
      2. Marbury v. Madison – est. judicial review of legis. or exec. decision that may be in conflict w/ constit., and if so, they are invalid
         a. Facts: Marbury ass’gn commission as justice of peace by outgoing Pres. Adams (federalist) the day before Jeffersonians (Republicans took office). Marbury’s comm. didn’t get delivered to him, so he sought writ of mandamus to force Madison (Jefferson’s sec. of state) to deliver the comm.
         b. substantive q. (brilliant b/c decided b/f juris. q) – P was entitled to comm. b/c
            a. appointment effective once signed and sealed, not delivered and was entitled to remedy b/c duty of ct.’s to provide remedy for every wrong
            b. appointment of judge diff. from cabinet member that can be dismissed at will by Prez.
         c. juris q. (real importance of the case) - § 13 of judiciary act is unconstit. b/c
            i. it purports to give S.Ct. orig. juris. to issue mandamus but
            ii. Art. III, § 2, para. 2 of con. only gives S.Ct. orig. juris. over cases involving foreign diplomats and states.
               a. what isn’t enumerated isn’t there, S. Ct. can’t have orig. juris. over anything but the enumerated instances
               d. political dimension – Marshal decided subst. q. first b/c wanted to est. Marbury was in the right but found no juris. b/c if had granted relief to Marbury, Prez. wouldn’t have followed and would have discredited S. Ct. in its early stages.
         e. Paulson’s evaluation of arguments
            i. const. trump of conflicting legis. Acts
               a. reduction ad absurdum (Marshall)
                  i. assume opposite of premis is true – legis. on same level as con.
                  ii. opposite yields absurd results – const. is an absurd attempt by people to limit a legis. power that is unlimitable, constit. would be meaningless.
c. proves your premise – b/c constit. not meaningless, its prov. must trump legis. Acts
b. Gibson’s (Eakin v. Raub) counter
   i. to declare a law void that was passed according to Congress’s Art. I power is an usurpation of that power
ii. judicial power to review Act to determine whether conflicts
   a. Plain language (Marshall)
      i. lang. of constit. – judicial power shall extend to all cases arising under this constit.
      ii. legis. Act arises under constit (Art. I)
      iii. judicial review extends to legis. act
   b. slippery slope against Marshall (Gibson in Eakin v. Raub)
      i. causal claim- if grant judges some substantive review power then their power for review will keep growing
         NOTE: he predicts power growing to review election results and qualifications of legislators
      ii. normative eval. (is the result a bad thing) – not bad for judges to inquire into elections or leg. qualifications
      iii. result – Gibson’s arg. doesn’t support his point
c. checks and balances
   i. Marshall – judiciary acts as check on congress
   ii. Gibson’s conunter – the ppl. are the check on Cong.
      a. framer’s didn’t intend a collision b/t branches
d. oath of office
   i. Marshall – Justices swear to uphold the constit.
   ii. Gibson’s counter – every officer of gov’t takes the oath
      a. giving effect to an unconstit. law is not a positive act violative of the constit.

4. Other arguments re: Judicial Review
   a. arguments for judicial review:
      i. Countermajoritarian view – Congress rep. majority and therefore might pass laws which infringe on minorities rights. Whereas, justices appointed for life and therefore apolitical.
      ii. Stability – if each branch free to interpret the constit. there would be no final answer b/c
         a. branches would interpret consti. in their favor
         b. court’s decision would have limited effects b/c overruled by another branch
      iii. Judicial self restraint
         a. court decides only issue presented (narrow holding)
         b. courts no decided constit. issue if can be decided another way
         c. courts attempt to construe stat. so as not to conflict w/ constit.
   b. arguments against judicial review
i. Antidemocratic – fed. judges aren’t elected officials and therefore not politically accountable. To vest final auth. over constit. is repudiated of prin. of democratic self-governance. See:
   a. Substantive due process in “liberty of contract”
   b. Bush v. Gore dissent

ii. Entrenched Error – very difficult to correct mistaken interpretation by judiciary. Can only correct through:
   a. subsequent ct. overrules, appoint new justices, impeachment, constit. amendment

B. Authority to review state laws
   1. Less problematic than review of fed. laws b/c if states can pass laws repugnant to fed. laws then states will not be part of the republic
      a. threatens cohesiveness of fed. system itself
      b. review power is inevitable b/c constit. review of state dec. is the glue that holds the union together during times of instability (Holmes)
         i. if not just be a loose confederacy of states (slippery slope)
   2. S. Ct. can review state laws/ct. decisions for conflict w/ fed. laws interp.
      a. Martin v. Hunter’s Leaseee
         i. Facts: S. Ct. acquired jurisdiction to hear appeal from VA state ct. decision under §25 of Judiciary Act b/c involved a treaty. S. Ct. reversed state ct.’s decision. State ct. refused to give effect to S.Ct.’s judgment b/c held §25 was unconstitutional.
         ii. rationale
            a. Art III – grants appellate jurisdiction over all cases arising under the constit. regardless whether heard in state or fed. ct.
            b. Supremacy Clause – federal law must be supreme to state
            c. Uniformity – necessity for uniformity of constit. interpretation throughout the United States
      Note: state judges are independent when hearing exclusively state claims

C. Alternative approach to constit. review –centralized judiciary
   1. American judiciary is decentralized – every ct. can hear constit. claim
   2. German/many other countries are have constitutions which provide for a centralized judiciary
      a. differences
         i. each state has their own court for constitutional interpretation
            a. if a ct. of orig. juris. has a constit. question, it stays proceedings and gives the question to the constitutional ct.
         iii. if statute is found unconstitutional, the entire statute is invalid
            a. in US ct’s the statute is just set aside, but usually fades away b/c of stare decisis
         iv. ct. can issue mandate to parliament to repeal or re-write laws
         v. ct. can hear abstract reviews
            a. in US must be an actual challenge to the statute
         vi. ct. divided into 2 senates, each w/ own specialty, appointed only for 12 yrs. or age 70
vii. jurisdiction over disputes b/t high state organs
   a. in US don’t hear disputes b/c of political quest. doct.
b. similarities
   i. parliament expressly enumerates jurisdiction
      a. in US jurisdiction is inferred (Marbury v. Madison)
   ii. jurisdiction over fed.-state conflicts
      a. in US – fed. judiciary Act § 25 and modern counterpart
   iii. citizen can bring compl. for gov’t failure to recognize a constit. right
      a. in US citizen can bring compl. under title 42, civil rights

D. Limits on Judicial review

1. Congress’ power to “strip” the courts of appellate jurisdiction under the exceptions clause (Art. III §2, para. 2)
a. McCordle
   i. FACTS: journalist imprisoned under the Military Reconstruction act for writing incendiary comments. Applied for writ. of habeas but was denied. Appealed to S. Ct. under Act which gave ct. appl. juris. over habeas claims. After arguments were heard by ct. but b/f the ct. passed judgment, Congress repealed the habeas act taking away S.Ct’s juris to hear the case.
   ii. Rule: Congress can withdraw S.Ct.’s appl. juris. under the Exceptions Clause (appl. ct. juris conferred “with such exceptions…as Congress shall make) any time b/f judgment
   iii. Hornbook Rule: Congress’ power to reign in appl. juris. under the exceptions clause is unlimited
   iii. Paulson’s View: last line of the opinion states “it does not affect the juris. which was previously granted” which may reference §14 Judiciary act giving ct. power to issue writ of habeas
      a. POINT – case doesn’t speak to ct.’s acquiescence to ct. stripping power b/c retained habeas juris. under another act.
b. Yerger
   i. FACTS: like McCardle also imprisoned under Military Reconstruction act. Unlike McCardle, he seeks habeas under §14.
   ii. RULE: Ct. grants jurisdiction to issue writ under §14 even though congress stripped juris to hear writ under Habeas Act.
   iii. Rat.: a. b/c of importance of appl. review, if congress strips appl. review by repealing or passing an law, ct. will construe it narrowly to apply only to that law.
   iii. Point: proves ct. fight congress trying to strip them of juris.

2. Congressional power to decide the outcome of a case by changing the laws
a. Klein
   i. FACTS: P pardoned and sought to recover property that was taken away. While on appeal to S.Ct. congress passed act undoing the pardon and stripping ct. of jurisdiction.
ii. RULE: Act stripping S.Ct. of jurisdiction to hear a pending case and imposing its interpretation of the law invades judicial function and violates separation of powers.
   a. congress’ act was basically an attempt to decide the case for the court.
   b. case involved an indiv. right, where congress has less discretion to restrict

b. Seattle Audubon
   i. FACTS: Environmental group sued Forest Service alleging violated environmental laws. While on appeal congress changed the laws so Forest Service was in compliance.
   ii. Ct. upheld the change in law
      a. this was just a change in law rather than an attempt to tell ct. how to interpret evidence or alter jurisdiction (like Klein)
      b. case involved policy, not indiv. rights (like Kline)

3. General Theme of court stripping
   a. Theory for court stripping
      i. Framers did not place any limit on congress’ ability to withdraw app. juris. under the Exceptions clause (no internal constraints)
      ii. Congress is branch that has power to make laws, ct. should only interpret them.
         a. Countermajoritarian – ct.’s are making the laws by overturning congressional intent, and congress (not the ct) represents the ppl.
   b. Theory against court stripping
      i. Congress can’t pass laws which restrict guaranteed rights protected by the constit. (external constraints of the constit.)
         a. Ct. gives effect to the ppl’s will by enforcing the constit. when congress gets it wrong – protects the minority
         b. protecting indiv. rights is an essential function of the ct. and more indiv. rights recognized now than in days of above cases (late 1800s)
      ii. reduction arg. – if S. Ct. did not have juris. to hear claims involving indiv. rights, could lead to liberties stripped, imbalance in gov’t, majoritarian control

4. Election issues are reserved by Art. II, §1 to the states
   a. Bush v. Gore – Ct. wrongly overruled Fl’s interpretation of its own laws re: election decision based on equal protection grounds
      i. Steven’s dissent – Art II lang. that election matters determined by states w/ deference by the state ct. to provide the final answer. addit., there is not fed. q. presented
      ii. Souter’s dissent – 1887 election laws leave the last word w/ congress. May be an equal protect. issue if diff. districts using diff. standards to interp. votes, but that should be remanded to state ct.
      iii. Ginsberg’s dissent – in past where Ct. has overruled state ct.’s interp. of its own laws (Martin v. Hunter’s Leasee) where
exceptions to the rule. The case poses a political question under the Guarantee Clause

iv. Breyer’s dissent – clear from legis. history that congress is to have the last word

NOTE: case dist. from Baker v. Carr b/c not talking about malapportioned districts, talking about prez. election at large

5. Political Question Doctrine
   a. insulates from judicial review some question where separation of powers issues loom too large (see Separation of Powers disc. below)

III. Congressional power under Art. I, § 8
   A. Generally
      1. Art. I, §8 lists certain enumerated powers of congress (constitutive)
      2. Model of limited gov’t – powers that are expressly enumerated, excludes any other powers vested in Congress
      3. Bill of Rights are express denials of gov’t power/citizens’ immunity, to compliment the enumerated powers to further ensure limits on fed. Gov’t
   B. The Necessary and Proper Clause (Art.I, §8, para. 18)
      1. Broad Reading
         a. McCullough
            i. Facts: MD enacted tax upon all banks in state not charted by the state. The statute only applied to Bank of U.S. (a federal bank) est. by congress to control money supply. Bank refused to pay tax.
            ii. Main issue: does congress have power to est. a bank.
            iii. Arguments:
               a. Hamilton (for broad reading)
                  i. n/p clause is declaratory of congress’ implied power to use any means nec. to achieve an end enumerated in the constit. (spending power, nat’l def., ect).
               b. Madison/Jefferson (narrow reading)
                  i. n/p clause is a restriction, it is constitutive of congress’ power to only use means necessary and proper to achieve an end
                     a. bank is not necessary to achieve the end
                     a. to imply power in nature of gov’t would give gov’t every power (slippery slope)
               iv. Marshall’s opinion/Rule – broad interpretation
                  a. means/end matrix
                     i. let the end be legit. and w/in scope of consti. then
                     ii. means which are appropriate, which are adapted to that end, are constitutional
               b. limits
                  i. end can’t be a pretext for executing powers not entrusted to gov’t
ii. means must not be prohibited by consti.

b. rationale
   i. Constit. is great outline – b/c general, everything that couldn’t be inferred is enumerated (static), everything else is outlined for inferences.
   ii. proper = appropriate (ignores necessary)

Note: precursor to modern “rational relationship” test – but rat. relationship implies truth as a criteria

C. Commerce Clause (Art. I, § 8, para. 3)

1. Generally
   a. Framers intent for CC (as stated in Hood) – states have police power to protect, health safety and welfare of their citizens. But states can only regulate internal commerce. This creates natural tendency for states to economically favor their own residents. Created a balkanization among the states, b/c each one doing their own thing w/out an eye to the greater good.
   b. Purpose of CC – created to provide uniform regulation of state trade

2. Broad Reading (Marshall’s opinion in Gibbons – NY ferry case)
   a. Congress’ regulatory power qua plenary power
      i. framers intent (Jackson’s statement in Hood – above)
      ii. states are disabled from protecting their citizens from outside comp.
      iii. if states regulated themselves, rivalries would break out
   b. Doctrine of Representation allows all states equal access to check congressional regulatory power
      i. alleviates fear of abuse of power
   c. Purely instate activities are open to state regulation

3. Early cases (pre-new deal) – oscillation b/t formalism and realism
   a. Formalism: limiting application of CC by comparing challenged statute to objective definitions (doesn’t address the real issue - discriminatory effects)
      i. insurance policies aren’t commodities, not reg. by congress and open to state reg., even where discriminatory for out of state insurance co.’s (Paul v. VA)
      ii. state only prohibits “manufacture” of alcohol, not carrying it into another state, even if all product is manufactured for out of state shipment (Kidd. v. Pearson)

Note: these are actually dormant CC cases b/c challenges to state statute w/out a conflicting fed. stat.
   iii. congress can’t regulate instate manufacture b/c causes a monopoly (discriminatory effect) across several states (Knight)
      a. manufacture is not commerce (indirectly related)
      b. transportation is commerce (directly)
      c. Congress can only regulate things directly related to comm
         i. slippery slope if congress can regulate all directly related things it will swallow up state’s police power
Note: Knight is classic example of formalist approach

iv. congress can’t est. uniform child labor laws b/c reg. instate manufacture, not transport.
   a. ct.’s arg.
      i. dist. from Lotto case b/c that involved transport of harmful goods
      ii. CC not created to prevent unfair comp. b/t states
      iii. reg. of child labor is state auth. and gov’t come crashing down if congress given power to reg. state auth. (slippery slope)

b. Holmes dissent/Paulson’s evaluation
   i. case exactly like Lotto – reg. morals
   ii. majority opinion puts states who rightly choose to reg. child labor at a disadvantage – exactly what CC was created for, to put states on equal footing
   iii. majority’s slippery slope is overdrawn

Note: when arguing for narrow reading, always trot out 10th Amend. just for good measure

b. Broad, realist reading of CC (address problem by determining the actual economic impact or motivation for the regulation)
   i. within field of navigation - federal safety reg. applied to boat carrying product wholly instate, but transporting goods from out of state (Daniel Bell)
   ii. to regulate public morals – fed. law prohibiting interstate transportation of lottery tickets upheld on grounds of “transportation” (Lottery Case)
      a. Paulson doesn’t like b/c “transportation” of lotto tickets was a pretext for regulating pub. morals – violates Marshall’s pretext limitation.
   iii. w/in field of transportation – congress can regulation intrastate transportation that has a “close and substantial relationship” to interstate comm. (Shreveport – classic realist opinion)
      a. Test for close and substantial relationship (empirical)
         i. safety OR
         ii. efficiency OR
         iii. uniformity (fair market)
   iv. w/in field of trade practices – instate trade practices that congress fears will probably burden interstate comm. are brought into the current of interstate commerce for fed. restraint (Stafford)
      a. “current” test is less workable than close/sub. relation. test

4. Laissez faire Court resists Roosevelt’s legislative program – shift back to formalism (reminiscent of Kidd/Knight)
   a. Schechter
      i. FACTS: following great depression Roosevelt & Congress had agency draw up Poultry Code w/ intent to stabilize industry prices. P, convicted of violated the code, challenged it as unconstitutional.
ii. RULE: Local activities at the “end of the stream” do not have a direct effect on interstate commerce

iii. strong formalist opinion (looking at direct/indirect effects) by Hughes, same who wrote Shreveport.
   a. waiting for a big case b/f turned the corner to realism
   b. Carter (carbon copy of Kidd/Knight) – magnitude of effect is irrelevant if the effect is not direct (logical and linear link to interstate comm.).
      i. diff. from Schechter b/c ct. not just ducking the issue

5. Revolution of 1937: Recognition of congressional police power (realism here to stay for awhile)
a. Congress may regulate any intrastate activity that exerts a substantial effect on interstate commerce (NLRB v. Jones & Laughlin – act prohibiting employers from firing b/c employees membership in Union upheld)
   i. incorporates rules from Shreveport & Stafford cases above
   b. Express overruling of child labor case (Darby – upheld law the prohibited shipment of goods by employer not conforming to min. wage/hours requirements)
      i. deference to congress – ct. rejects idea that congressional motive is in any way relevant
         a. relaxes McCullough’s “rational basis” test
         ii. re-affirms “substantial effects” test
         iii. congress’ power under CC is plenary and can’t be diminished by state action in the field (taken from Marshall in Gibbons)
   c. Aggregation – even if minor active. had no effect on interstate comm., congress can regulate if the effects could cumulate to effect interstate comm. (Wickard – farmer growing wheat for personal use)
      i. complete deference on choice of means to congress
   d. Evaluation of the 1937 Revolution “the 2nd revolution”
      i. effect – Congress acquires power that would have the framer spinning in their grave
         a. analogous to state police power – acquired gen’l power over a broad field.
      ii. was it a wise decision?
         a. explanatory – constit. was written at end of 18th cent. for small homogeneous country → later became a huge industrial country → impossible for orig. constit. to speak to everything.
         b. normative – revolution creates individual rights → rights are a good thing → revolution can be endorsed

6. Breadth of the post-1937 Congressional “police power”
a. The State Action Doctrine – the constit. only applies to fed. and state gov’t.
i. 1883 Civil Rights Cases – 1876 civil rights act, which applied the 14th Amend (prohibiting discrimination) to public accommodations found unconstit.
   a. only states can regulate discrimination by individuals
   b. slippery slope of gov’t starts regulating beyond state action
   c. trots out 10th Amend.
      i. problem – 14th Amend is more specific & recent than 10th Amend. (cannons of const. construction)
   b. The Public Functions Doctrine – if private corp. performing a function that counts as an instrumentality of the state, it must conform to constit. (Marsh v. AL – “company town” can’t discriminate against Johovas Witnesses passing out pamphlets)
      a. indiv. rights trump property rights
c. Civil Rights Act of 1864
   i. basically the same as the 1876 act but based on 14th Amend. and Congress’ authority under CC.
      a. establishes inns, motels, ect. effect interstate comm.
   ii. court unanimously upholds the Act based on CC authority
      a. Heart of Atlanta – hotel that catered to out of state travelers can’t discriminate
         i. adds another rubric to Shreveport’s basis for CC – promote volume of interstate travel, and discrimination discourages
         ii. only look to the overriding end, not just an ancillary end (morals) to decide if rat. basis test applies
      b. Katzenbach (Ollie’s BBQ) – restaurant that served local but received food from out of state can’t discriminate
   iii. Themes of Civil Rights cases
      a. using CC as a legal fiction (not intended to act this way) to support morality in the profound sense (freedom from discrimination)
         i. diff. from just enforcing morals, like in the Lotto case
      b. extreme deference to congress re: means
7. Another Illloration of Depth
   a. Ct’.s deference to choice of means goes too far
      i. Perez – ct. upholds stat. which convicts loan shark for purely instate activ.
         a. Dissent – no connection b/t means and end.
8. Undoing of the Police Power?
   a. police power went untouched until 1995
   b. Modern – Congress must make the economic connection clear (return to formalism)
      i. Lopez – ct. struck down Gun Free School Zones Act b/c regulating guns is non-economic in nature and even if congress has made substantial effects findings, a non-economic activity can’t have economic effects.
a. case represents a return to federalism concerns b/c CC power has gone too far and encroaching into state areas (education, criminal sanctions)
b. proof:
   i. using formalist categories (economic/non-economic) rather than looking at effect (guns hurt education which affects comm.)
   ii. not granting deference to choice of means
   iii. bright line of what can be regulated under CC
      a. channels of interstate comm.
      b. instrumentalities, person, things in interstate comm.
      c. substantial relation to interstate comm.
   ii. Morrison – struck down Violence Against Women Act despite congressional findings that violence against women had ec. effects
      a. again using formalist categories b/c violence against women is a non-ec. activ. therefore no ec. effects
      b. slippery slope if reg. one crime can reg. all crimes
9. A summary of CC arguments
   a. Formalist – narrow reading in favor of federalism – applies categories/definitions rather than addressing problem
      i. item being regulated in non-economic in nature (Kidd, Knight, Lopez, Morrison)
      ii. magnitude of effect is irrelevant if item is non-economic (Carter, Morrison)
      iii. slippery slope if state regulating things w/in states authority gov’t come crashing down (Knight, Morrison)
      iv. 10th Amend. reserves power to states not expressly conferred on congress
   b. Realist – broad reading in favor of plenary power – looks to actual effects to solve problem
      i. active. causes economic/discriminatory effect
      ii. substantial relations test (Shreveport)
      iii. deference to congress to choose means (Darby, Perez)
      iv. looks to overriding end (reg. comm.) not just ancillary end (morals) (Heart of Atlanta)
      v. aggregation (Wickard, Prez)
D. Taxing and Spending Clause – Art. I, §8, para. 1
   1. Congress can create any tax to raise revenue or spend if it believes will serve the gen’l welfare.
   2. Limit – the primary motive of laws passed pursuant to this power cant’ be to regulate local affairs
      a. Pre-1937 Ct. struck down laws as regulatory
         i. Child Labor Tax Cases – law taxing use of child labor struck down – Congress regulating behavior under pretext of taxing
ii. Butler – Tax which paid part back to farmers who agreed to limit their production (solve problem of over production causing decreased prices) b/c regulating farmers behavior.

  a. good interp. of gen’l welfare clause – may tax for anything that promotes the gen’l welfare (Hamilton’s view) as opposed to taxing only for things in other enumerated powers of §8 (Madison’s view)
  b. but goes against gen’l welfare clause and strikes down b/c tax is coercing farmers to joint the gov’t program.

b. Post – 1937

  i. Steward Machine – upheld program that gave employers tax credit if they paid into state employment program.

    a. model of conditional grants is a motive (b/c there are alternatives) not coercion (where there are no alternative)

  ii. Kahriger – ct. held tax that regulated gambling need only raise some revenue and be reasonably related to some tax need.

    a. majority throws out the pretext arg.
    b. Dissent – when regulatory effect swallows up taxing function, then must inquire into congressional motives

  c. Themes – ct is unpredictable here, best to use arguments

    i. for gov’t:

      a. revenue being raised for tax purposes
      b. as to regulatory component – ct. shouldn’t inquire into congressional motives
      c. providing incentives/tax breaks is not coercion, it is motivation b/c there is a choice

    ii. against gov’t

      a. law is acting as an undeniable penalty designed to regulate behavior under the pretext of a tax.
      b. regulating behavior is beyond the power of congress, only states can regulate behavior (10th Amend.)
      c. providing incentives/kickbacks is coercion b/c nobody, especially states, are going to turn down money

E. The War Power

  1. Not limited to cessation of hostilities but must be a causal connection b/t the war conditions and the problem congress is addressing.

    a. Woods – congress can regulate housing prices 2 yrs. after WWII ended b/c pricing problem caused by congress mobilizing troops (stopped construction) and de-mobilizing troops (shortage in housing).

      i. Jackson concurrence – stress need for causal connect or else risk abusing power

F. Foreign Powers

  1. Congress may use any means necessary and proper to implement treaties, even if implementation laws don’t rely on enumerated powers

    a. Missouri v. Holland – pursuant to bird migration treaty b/t US and Canada, implementing legis. which regulated migratory birds withstood
challenge by MO that congress not acting pursuant to an enumerated power and where therefore infringing 10th Amend. right.

i. N/P clause and Prez. treaty making power give power to congress to pass any laws needed to implement the treaty, or else the treaty making power would be void. (reduction ad absurdum)

ii. Holmes – diff. b/t enacting laws pursuant to the constit. (under an enumerated §8 power) and enacting laws under auth. of US (law rides piggy back to power to enter a treaty – need to be able to make the laws nec. to carry out the treaty)

iii. no constraints on implementing legislation

2. Unless the implementation law violates an indiv. right, in which case indiv. rights trump.

a. Reid v. Covert – treaty b/t US and Britain called for military trial of US dependents charged w/ crime on foreign soil. Covert could not be tried by military (without trial) pursuant to the treaty b/c it would violate her indiv. right (to jury trial).

i. indiv. rights trump policy

III. The Court Regulates in the Absence of Congressional Regulation

A. Evolution of the Dormant Commerce Clause – principle that state and local gov’t laws are unconstit. if place on undue burden on interstate comm. ASK JESS ABOUT “BRANDEIS BRIEF”

i. Is Congress’ power to regulate interstate commerce Exclusive?

a. the arguments

Gibbons (1808)

i. some powers are concurrently held by congress and state, like the power to tax by virtue of the 10th Amend (what wasn’t surrendered is retained)

ii. disanalogy bt/ concurrent powers to tax where state a fed. are taxing for different purposes and concurrent power to reg. interstate comm. where fed. and state reg. for same purpose

iii. majority (Marshall) doesn’t accept that exclusivity follows from the disanalogy but doesn’t reject either

iv. concurrence (Johnson) power to regulate = power to determine what is restrained and what is unrestrained → if congress chooses not to restrain something, states can’t step in and restrain it → exclusivity follows directly from power to regulate

Plumley (1894) – oleomargarine case

i. state can’t regulate condition of sale but retains plenary control over aspects of sale susceptible to fraud b/c in the interests of health, safety, and welfare of citizens (traditional police powers)

Paul v. VA, Kidd – see above under formalism

i. these would be struck down today

b. the resolution – congressional recognition = no exclusivity

Cooley (1851)
Exclusivity denied. Fed. law gave state power to regulate local pilots of the river. To deny state’s regulation would invalidate congressional recognition of state’s power.

Prudential (1946)

Even if the state reg. is arguable discriminatory, it survives when backed by Congressional recognition that regulation is in the public interest.

c. Modern rule:
   i. if congress has entered the field, states can’t regulate
   ii. if congress is silent, states can regulate unless it places an undue burden on interstate comm. or is economic discrimination
      a. if this is the case, the below tests apply
   iii. state can regulated even where discrimination if congress has endorsed the law
      a. endorsement must be unmistakably clear

2. No facial ec. discrimination (reg. on safety grounds) – evolution of a test for undue burden
   a. deference to state legis (minimal judicial facts finding)
      i. Barnwell (1938 axle weight case) – only looks into facts enough to determine whether means appropriate for legit. state interested (health, safety) – relaxed rational basis test.
      ii. Kassell (1981 Rehquist’s dissent) – rational basis is the test, safety benefits must be trivial to be struck down
      iii. See Pike below for another modified rational basis test
   b. balancing burdens against benefits (lots of fact finding)
      THIS IS THE PRIMARY TEST
      i. So. Pacific (1945 train slack case) – severe burden on trains entering state having to re-arrange and safety prov. actually caused more accidents (polar opposite of Barnwell)
         a. Black’s dissent – ct. is acting as a supper legis., not up to ct. to overrule legis. findings
      ii. Bibb (1959 mudflaps case) – harsh burden on interstate comm. having trucks either avoid IL or change their flaps and metal mudguards actually cause safety problems
         a. Douglas almost always defers to state legis. but not in this case b/c of such harsh burdens
      iii. Kassell (1981) – “illosury” safety benefits did not outweigh burden of banning “double” truck trailers on IA’s roads
         a. state can’t isolate itself from common problem of damage to roads
   c. actual purpose – is it discriminatory?
      i. Kassell (1981 Brennan’s concurring) – don’t second case legis. motive (deference) but use it to determine benefit they are actually seeking to achieve, then weigh against burden (balance). If benefit actually sought is discriminatory (actual purpose) then stat. is unconstit. b/c no “protectionism” under CC.
a. Brennan saw the purpose as giving local companies an advantage by keeping out of state truckers out.

3. The Pike Test – original case involved no facial discrimination
   a. Pike Test for undue burden
      i. checklist for deference to legis.
         a. if regulates even handedly (free from discrimination)
         b. to effectuate a legit. state purpose/interest and
         c. only incidental effects on ISC then stat. okay
      ii. unless burden on ISC is clearly excessive in relation to local benefits (this criteria peculiar to Pike facts)
   b. Modern application of Pike Test:
      i. if answer “NO” to criteria three → no discrimination → balance interests of state w/burden on commerce (see above cases)
      ii. if answer “Yes” to criteria one → discrimination → strict scrutiny applies (see below cases)

4. If state reg. is facial or underlying economic discriminatory motive
   a. Test – Strict Scrutiny
      i. discriminatory effects or bad motive may pass muster if:
         a. if regulating even-handedly (free from discrimination)
         b. to effectuate a legitimate state purpose
         c. only incidental effects on ISC then stat. okay
      ii. unless burden on ISC is clearly excessive in relation to local benefits (this criteria peculiar to Pike facts)
   b. Discriminatory Themes
      i. Law that apply only to products coming into the state, i.e., Economic Isolationism/Barrier
         a. Baldwin (1935) NY law requiring residents to purchase out of state milk at no less price than pay for instate milk struck down
            i. Cordozo - very reason CC drafted to prevent mutual jealousies among the states
         b. Welton (1875) MO law req. peddlers of out of state products to be licensed
            i. prime example of less onerous alternative – require everybody to be licensed
         c. Hunt (1977) NC law req. all apples shipped into state bear only US or standard grade struck down
            i. Ostensible goal was to prevent confusion of different grades but effect was to level the playing field b/t reputable WA apples and local growers
            ii. less restrictive alt. – use out of state grades in conjunction w/ standard grades
               GOOD EXAMPLE OF NOT FACIALLY DISCRIM. BUT DISCRIM. IMPACT
         d. Edwards (1941) CA law which prohibited bringing indigents into the state struck down
i. state can’t isolate itself from problems common to the several states
e. Healy (1989) CT law requiring out of state shippers of beer to affirm selling into CT at prices no higher than neighboring states.
   i. statute which applies only to out of state shippers is discriminatory on its face
   ii. dissent – there are no local distributors, so impossible to be discriminatory
f. Dean Milk (1951) WI city ord. stated milk sold in city be pasteurized at a plant w/in 5 mi. radius of city struck down
   i. creating an economic barrier is discriminatory even if for legit. interest
   ii. less onerous alt. – no barrier on milk that meets city’s standards
   iii. Black’s dissent – of promotes legit. interest then strict scrutiny shouldn’t apply
      a. problem w/ dissent – hard to determine legis. true motive
g. Breard (1951) Rep. of nat’l magazine arrested for selling door to door in violation of LA stat. requiring prior consent. Ct. upheld
   i. not discriminatory (applies to everybody)
   ii. law protecting indiv. rights (right to privacy) not subject to strict scrutiny
ii. Limiting out of stater’s access to natural resources
      i. where statute is facially discriminatory, less intent doesn’t need to be decided
      Paulson says arg. legis. bad purpose for good measure
   ii. less onerous alt. is to limit instate and out of state access to land fill
      iii. dissent’s analogy to quarantine bad meet is not good b/c not similar and law must be equally applied
   b. Hughes (1979) OK stat. proscribing out of state transport for sale of minnows seineed in state waters struck down
      i. there is a legit legis. intent but also less onerous alt.
      ii. less onerous alt. – limit total # of minnow procured in state waters (applies equally)
      iii. Good example of modern app. of strict scrutiny
      iv. overrules rule that state’s own their nat. resources
      i. again, protecting environment is legit. purpose
ii. no less onerous alt. b/c state not required to develop “new and unproven means” to meet the standard

**Note: Diagram on Maine v. Taylor Supp. #22**

B. Preemption – Congress has entered the field but not a direct conflict w/ state law

**NOTE:** if there was a direct conflict, congress would win due to Supremacy Clause

1. Argument in any given case:
   a. for state – federal statute doesn’t reach the case at bar
   b. for challenger – congress has taken over the field

2. The Rice Criteria
   a. start w/ a presumption in favor of continuing state regulation
   b. determine of congress has manifested a purpose to enter the field
      i. **pervasiveness** of fed. regulatory scheme
         a. if this applies, the below criteria can be used as proof
      ii. **dominant federal interests**
         iii. state policies conflict w/ federal policies, objectives, purpose
             a. focus on the underlying reason why each body promulgated their law – are they towards the same aim?
             NOTE: test is to figure out which criteria apply best and why
             - ii. and iii. often go together to prove i.

3. Application of the Rice Criteria
   a. Hines (1941) PA law requiring aliens register annually, carry registration cards, etc., preempted by fed. act w/ more modest requirements
      i. pervasiveness – complete scheme of reg., broad and comprehensive (main arg.)
         a. but dissent points out 19 other states have laws in the area
         so maybe majority is trying to wipe out state laws on point
      ii. dominant fed. interests – protection of US citizens in foreign countries demands reciprocity (indiv. rights, freedoms, no discriminatory burdens)
   b. PA v. Nelson (1956) – PA law which barred sedition against state or US preempted by Smith Act (prohibited advocacy to overthrow the US)
      i. could argue all three Rice Criteria apply here
      ii. dissent – no preemption where congress has not barred state from punishing the same acts under state law
   c. Askew (1973) FL law imposing strict liability damages for oil spills **upheld** b/c fed. law only imposed strict liability for clean-up cost incurred by fed’l gov’t
   d. City of Burbank (1973) – City law proscribing night air departures to control noise preempted by fed. aviation and noise control acts
      i. majority held fed. scheme was pervasive
      ii. dissent – not a “clear and manifest congressional purpose” to prohibit the exercise of a historic police power (noise control)
      **NOTE:** Paulson agrees w/ Rehquist’s dissent b/c fed. purpose is to avoid bunching and state law only applies to one night flight
4. Accommodation – state law may otherwise be preempted but ct. reads in a willingness of fed. gov’t to accommodate state reg. in furtherance of overall safety interests
      i. White goes out of his way to read the safety concerns out of the CA law to avoid preemption
         a. reads state law based on safety grounds so not preempted by fed. safety reg. in same area (nuclear materials)
   b. Ray (1978) – WA law reg. standard safety features of oil tankers operating in Pudget sound upheld in face of fed. law on exactly same point b/c WA law provided an alt. to their stricter safety features, to use a tug boat.
      i. White again for the state – although WA safety req. alone would have been preempted, the tug alt. allows prevents conflict.
      ii. Stevens Dissent – can’t force the tug alt. on pts that meet fed. law b/c it is discriminatory (costs $$ for the tug)
   c. Pauslon says Pacific Gas is “hornbook” example of preemption and Ray is arguable too but ct. willing to accommodate
      i. this is probably an exception to the rule but need to argue for test
5. Things to keep in mind when evaluating Rice Criteria
   a. statutory language v. facts – facts may take you in a very diff. direction from statutory language (ex. Paulson’s take on Burbank)
   b. are there grounds for accommodation
   c. presumption in favor of continued state reg. until it is rebutted.
C. Privileges & Immunities Art. IV. §2
   1. This is another way for the ct’s to curtail state discrimination (other than dormant CC) but used mainly in the employment context
      a. clause originally though to protect “fundamental” rights (Corfield) but this test no longer used.
   2. The right sought to be protected must be out of stater’s livelihood
      a. Brennan’s Test (from dissent in Baldwin – majority found law imposing much higher costs on out of state hunting license ok b/c hunting big game not a fundamental right)
         i. state discrimination (usually involves livelihood)
         ii. out of stater’s must be the source of the problem
         iii. law narrowly tailored to addresses the problem
      NOTE: “fundamental right” is not the proper test
   3. Applying Brennan’s test to other cases
      a. Toomer (1948) law imposing a huge fee on out of state shimpers struck down.
         i. conservation is the problem, not out of staters
         ii. law could have been applied evenhandedly across the board
      b. Hicklin (1978) AK “local hire” law struck down by Brennan himself
i. out of state hiring not the problem (as state argued) problem was locals not qualified for the oil jobs
ii. step two not needed if prong one not met
CC arg. also applicable
i. discrimination – yes
ii. legit. state purpose – yes
iii. less onerous alt. – yes, train Alaskans
c. Piper (1985) NH law requiring nonresidents couldn’t be members of the bar struck down.
   i. another standard – a livelihood that is “important to the national economy” is a protected “privilege” under the clause
d. Camden (1984) law requiring only residents be hired for city construction projects UPHELD
   i. non-residents are the problem – city loosing its tax base to non residents coming in to work but live outside city so don’t have to pay taxes.
   ii. law is narrowly tailored

NOTE: for exam, if P/I clause applies, also make CC arg. if possible (see Hicklin above) Question Paulson posed – is Brennan’s test diff. from strict scrutiny or diff.

TWO WAYS STATE CAN BE IMMUNE FROM CC REG.
D. Market Participant Exception – state participates in the market rather than regulating it.
   1. Gen’l theme – by participating in the market state is immune from CC restraints. Paulson says this is a not very convincing arg.
   2. State qua market participant - development
      a. Hughes v. Alexandria Scrap (1976) – state pays a bounty to processors of junk cars to serve envir. objectives, however, require out of state processors to produce more evid. of title to receive funding.
         i. majority – when state participating in market, subject to no more constraints than any other private citizen.
         ii. dissent – clear cut case of facially ec. discrim. under CC
            a. serving legit interest (envir. protection) but using discrim. means when less onerous alt. available.
      b. Reeves (1980) – state running cement factory w/ stat. that gives in-state purchasers preference in time of shortage over out of stater’s that had contracts. Stat. upheld
         i. majority – when the state is acting qua market participant, the constraints of “evenhandedness” (discrimination) don’t apply.
         ii. dissent – clear cut economic protectionism
   3. “Downstream” limit on market participant doctrine
      a. Wunnicke (1984) – AK stat. requiring purchasers of its timber to have timber processed is state is struck down.
         i. market participant exception doesn’t extend beyond the transaction to which the stat is a pty. state acting as participant in sale, but not in processes sing, therefore.
4. Arguments
   a. defending the exception – results of the state participating in the
      market are desirable (getting ride of rusty auto hulks in Hughes).
   b. arg. against – Ct. has never made a convincing analogy b/t states and
      private pty in the market place and allows state to do an end run around
      CC restraints
         i. need to expand on this disanalogy but nothing in notes
   c. a better way to reach same results is just have states grant subsidies
1. General theme – by participating state is immune from CC restraints.
   a. Paulson’s evaluation – this is an anomaly that is not very convincing,
      he’s with the dissent in each case
E. State Immunity – State’s immunity, as a sovereign body, from regulation
1. First, unsuccessful attempt at the doctrine
   a. Nat’l League – Fed. min. wage law not applied to states qua
      employers. Developed a standard for state immunity from CC reg.
         i. regulating states as states
         ii. states compliance w/ reg. would impair trad. gov’t functions
         iii. nature of the fed. and state interest not suggest state submission
   b. Nat’l League (Brennan’s dissent) – no immunity needed b/c extent of
      sovereignty decided by the ppl. through representativeness.
   c. Garcia – Overrules Nat’l league and adopts Brennan’s view (same
      issues as Nat’l League, whether benefits est. by fed. act extended to state
      workers) b/c no such thing as “trad. state function”
2. Modern Doctrine – trend towards recognizing state immunity
   a. Printz (1997) – Brady Amendments which required state officers to
      execute fed’l law by performing background checks on handgun
      purchasers, struck down.
      i. Scalia makes textualist argument that state have never b/f
         required to carry out administrative funct. of fed. gov’t (only
         adjudicative). When they have carried out admin. functions it was
         by consent only.
      ii. Paulson’s counter: state’s have been req. to carry out admin.
         functions (ex. order deportation of state’s enemies) and state’s
         “consent” to carry out admin functions (hearing fed. q. cases) isn’t
         really consent.
   b. Alden (1999) state employee brings suit for backpay of overtime in
      violation of a fed. act. Ct. holds state ct. aren’t required to hear suit by
      an indiv. against a state for money damages.
      i. focus on state immunity under 11th Amend. and immunity as a
         “fundamental aspect of sovereignty” pre-ratification
      ii. Structural arg. - b/c sets the stage this way, structure of item at
         issue (state sov.) won’t stand unless decides case certain way
         a. same type of arg. used in Martin v. Hunter’s Leasee
3. Paulson’s Counter Arguments
   a. Nat’l league’s analogy b/t state immunity and indiv. immunities under
      Bill of Rights is wrongheaded.
i. indiv. immunities always trump b/c fundamental but state immunity based on policy and changes w/ time
b. State’s have been required to carry out admin. functions
c. Kennedy structural arg. goes too far – structure of state won’t really come crashing down if don’t find immunity
d. IMPT. PT. – Kennedy notes in Alden, state ct.’s can be required to hear suits brought under 14th Amend. §5 – broad field

4. Theme: these cases are about the balance of state power
   a. the majority and dissent in all the cases argue about whether it is a job for the ct.’s or the ppl (through the political process) to address the issue
   b. this is the same argument that goes on in the abortion cases

IV. Modern Controversies Over The Function Of The Judiciary
   A. Slavery – as drafted, constit. neither endorsed nor forbade slavery in order to appease the pro-slavery states
      1. Ct. protects the slave trade
         a. Groves (1841) – to duck the issue, ct. dismissed on a technically challenge to MS constit. reg. slave trade b/c slaves commerce and subject to congressional CC reg.
         b. Prigg. (1842) – ct. viewed Art. IV §2, para. 3 as self executing, allowing slave catchers to capture slaves and bring them back w/out a judicial hearing despite a congressional act passed pursuant to Art. IV. requiring a hearing (Story says the hearing was only optional)
            i. rat. – where there’s a right (Art. IV) there’s a remedy
            ii. underlying issue – perhaps don’t want to upset the balance
      2. Slaves as property/not citizens
         a. Dredd Scott (1857) – ct. answered the question of whether non-fugitive slaves can become free by moving to slave state
            i. majority – black (free or not) were an inferior class at time constit. ratified and couldn’t become citizens of US, therefore they cannot become citizens of US (and entitled to all priv. involved) simply by their citizenship of a state → once a slave, always a slave
            ii. dissent – points to instances of black U.S. citizens at time of ratification (all free native born inhabitants)
               a. reduction ad absurdum comparing to women
   B. Lochner Era Substantive Due Process
      1. Background – the P/I clause of 14th Amend. is not carried over to the states
         a. Slaughter-House Cases (1873) state granted monopoly to slaughter house. Butcher’s brought suit under P/I clause of 14th Amend.
            i. ct. held purpose of 14th Amend. was to make slavery unconstit. therefore not a vehicle to carry Bill of Rights over to state citizens asserting a right against the state. it only applies to US citizens.
            ii. case overrules Dredd Scott but big blow to indiv. rights/immunities from state harm.
            iii. dissenting opinions arg. rights are carried over
2. The rise of substantive due process – economic liberties as a check on state legis. power by pre 1937 Lazie Faire Ct.

Note: “substantive” due process almost an oxymoron b/c due process associated w/ procedure.

Personal thought: this arose b/c bill of rights no carried over but ct. wanted to find some “fundamental rights” citizens had against a state?

a. Lochner (1905) ct. struck down state law limiting no. of hours bakers could work in a day. law est. to protect employee unequal bargaining power
   i. majority - equivalent b/t not letting indiv. work as much as they want and deprivation of freedom to contract
      a. all part of “life, liberty, pursuit of happiness”
   ii. Harlan dissent – liberty of K is for state reg. w/ strong presumption of validity
      a. notable b/c uses rat. basis test for policy issues rather than to determine constitutionality
   iii. Holmes – issue is policy, for the ppl. to decide not the ct.

b. Muller (1908) – state law imposes limit on work week for women. Ct. goes opposite way of Lochner.
   i. Brandeis Brief – overwhelms ct. w/ data of women’s plight in the workplace

c. Adkins (1923) – state min. wage for women and children unconstitutional.
   i. Like Lochner – “right to K part of liberty” protected by 14th Amend. due process clause
   ii. Taft dissent – ct. is substituting its policy judgment for legis.
   iii. Holmes – lots of restrict. on K to do illegal things-rat. basis test

d. Baldwin – another Holmes dissent – using sub. due process of 14th A. deprives states of their police power.

3. The fall of Lochner (ec. liberties) substantive due process – Holmes resigns in 1932 but his influence begins to take effect in the ct.

a. Nebbia (1934) – NY sets up board to control price of milk. Ct. UPHOLDS law analogizing to other state monopolies (utilities) which are valid b/c affect the public good.
   i. where law non-discriminatory and “reasonable relation to proper legis. purpose” it will be upheld
      a. transition away from substituting ct.s view of policy for that of legis. and going back to rational relation test.
   b. Parrish (1937) – state min. wage law for women and minors upheld, formally overruling Adkins.
      i. Holmes majority – absurd that employees enjoy equal bargaining power with employers (exploitation of employees and community has to pick up burden of providing for employee)
         a. opinion directly undercuts main premise of Lochner arg. and turns the corner away from economic liberties
ii. Sutherland’s FORMALISTIC dissent – ct. shouldn’t be looking at effects of min. wage and OUGHT (normative – the right thing to do) to interp. constit. consistently regardless of “ebb and flow”
  i. ct. uses rat. basis but extraordinary deference to Congress
  ii. real significance – in dicta, ct. anticipates a “higher standard” (strict scrutiny) when prejudice against minorities is concerned.
d. Olsen (1941) Ct. overruled State S.Ct. and upheld state law fixing min. price employment agencies may charge clients.
  i. ct notes law ct. only be overturned if ct. substituted its policy for legis. but that practice no longer given judicial validity
    a. another nail in coffin of Lochner Era
4. Modern (privacy) case – example of argument modern ct. have to get around to uphold privacy due process
   a. Whalen v. Roe (1977) NY law has state keeping records of drugs proscribed by Dr. UPHELD
     i. ct. applies rat. basis test in face of Lochner arguments
     ii. problem modern ct. faces – finding rat. to uphold privacy while dist. from Lochner substantive due proces
5. Themes
   a. this is another great example of constitutional change revolving around the Great Depression in 1930, Roosevelt’s New Deal in ? and his court packing plan (the other example is CC?).
     i. defense to why constit. interp. diff over time – framers intended the rights (privacy, gay rights) from beginning but just not recognized by ct.
b. need to distinguish Lochner Era sub. due process from modern due process in privacy rights
   i. similarities – ct. being antidemocratic and substituting its policy in place of policy of legis.
   ii. differences
     a. liberty of K protected from ec. reg. (arguably a valid police power) but privacy protects from state totalitarianism (taking control of shape and purposes of citizen’s lives)
     b. ec. reg. drastically diff. from privacy which address unequal social power of minorities (homophobia, sexual inequality, abortion as minority view)
D. The Incorporation Doctrine – what if any of the first 8 Amendments are incorporated to the states through the 14th A.?
1. Pre-14th A.
   a. Barron (1833) P sues state for “taking” against 5th A.
     i. Pre- 14th A. decision – Marshall asserts rights protected by the constit. only apply to the fed. gov’t
2. Post 14th A. – “Selective Incorporation”
a. Palko (1937) – state statute providing for state appeal of criminal trial not barred b/c 5th A. double jeopardy not incorporated to the states through the 14th A.
   i. Cordozo – only rights “implicit in concept of order liberty” are carried over to the states. 1st A. rights are implicit but 4th, 5th, 6th A. criminal trial rights area not implicit.
   ii. Paulson’s counter – 1st A. rights are presupposed by democratic order such that if not exist, the order would fall. 4, 5, 6th A. are also very important.

b. Adamson (1947) P argues 5th A. immunity from self incrimination carried over through 14th A.
   i. majority – 14th A. due process does not draw all rights under Bill of Rights
   ii. Frankfurter concurring arg. – no other justices have found total incorporation (adherentum arg. – appealing to personal considerations)
      a. Paulson counter – precedent has a weak role in Con. Law b/c past decision could be incorrect
      iii. Frankfurter concurring arg. – incorporation of only those rights that offend cannons of “decency and fairness”
      iv. Black’s dissenting resp. – worried about who decides what is decent and fair (nat.’l law)

3. Post 14th A. – “Total/Literal Incorporation”
   a. Malloy (1964) Ct. incorporates 5th A. freedom from self incrimination
   b. Black’s dissent in Adamson (above) – exactly those rights guaranteed by first 8 A.s are carried over, nothing more, nothing less
      i. holding judges to the letter of the law curbs judicial discretion (ample case history to show its needed – Dredd Scott)
   b. Today we have nearly complete incorporation w/ a few exceptions
      i. 7th A. right to civil jury trial and grand jury not incorp.

D. Modern Due Process & Privacy Doctrine
1. Personal and Family Autonomy – the groundwork for privacy
   a. Meyer (1923) state law prohibiting instruction of children in school in any language other than English is overturned as violative of 14th A.
      i. ct. stresses liberty as reaching beyond ec. freedom to right to engage in common occupations, acquire useful knowledge, marry, est. a home and bring up children
      a. uses rat. relation test
      ii. Holme’s dissent – ct. is substituting its policy for the legis.
   b. Harlan’s dissent in Poe (1965) ct. dismissed challenge to CT law prohibiting use of contraceptives.
      i. Harlan’s theme – liberty in 14th A. includes freedom from all substantial arbitrary impositions and purposeless restraints. If due process were merely procedural, it wouldn’t reach situations where deprivation of life, liberty by legislation

2. Privacy
a. Griswold v. CT. (1965) same CT statute prohibiting use of contraceptives is struck down as violative of 14th A.
   i. Douglas’ “penumbral rights” – “zone of privacy” b/t husband and wife is a penumbral right (draws from the core rights). right to privacy drawn from:
      a. 1st A. freedom of speech → freedom of opinion
      b. 3rd A. freedom from having to quarter soldiers → privacy
      c. 4th A. freedom from unreasonable search/seizure → priv.
      d. 5th A. freedom from self incrimination → privacy
      e. 9th A. – enumeration of rights does not deny other rights
   ii. Paulson’s critique – opinion not very sound, playing fast and loose w/ rights, but had to come up w/ something
   iii. Goldberg concurring – 14th A. is incorporates bill of rights plus other non-enumerated rights (that’s how its dist. from Lochner)
      a. reductio arg. – if 9th Amend. not incorporated then states could sterilize ppl.
      b. Paulson likes this arg. – first arg. to show that not every right in the constit. is expressly stated
b. Roe v. Wade (1973) TX law criminalizing abortion struck down as violative of right to privacy in 14th A.
   i. ct. recognizes departure from Griswold, right to privacy IS NOT based on an explicit constit. provision, nor is a fetus a “person” entitled to constit. right, therefore, right to privacy/abortion IS NOT absolute but is still a right b/c existed b/f ratification until late 19th century
   ii. Blackmun’s use of strict scrutiny
      a. compelling interest - state has a compelling interest in health of women and protecting potential life
         i. but compelling interest doesn’t kick in until point of viability
      b. less onerous alt. – doesn’t kick in unless compelling
   iii. Rehquist’s dissent – nothing in constit. to show intent of framers to recognize a right to privacy
3. Limits on privacy/autonomy
   a. Casey (1992) after shift in justices, ct. strikes down state law req. spousal notification for abortions (in line w/ Roe) but upholds 24 hour waiting period (contrary to Roe)
      i. replaces strict scrutiny w/ undue burden test for abortion - gov’t reg. stands unless places an undue burden on right to abortion.
         a. casts doubt onto the status of the right as a constitutionally protected immunity b/c strict scrutiny complements immunities, undue burden used for interest
      ii. refers to women’s “interest” (as opposed to “right”) in abortion competing w/ state’s interest
         a. sounds like competing policies rather than right v. policy
   i. White narrowly framed issue to make outcome on his side a certainty (whether constit. confers fund. right on homosexuals to engage in sodomy) also skews history of sodomy laws (early sodomy laws didn’t apply to homosexuals)
   ii. Blackmun’s dissent – looks at issue generally applying to right to be left alone (autonomy) and determines a fundamental right is conferred in two contexts of autonomy
      a. personal decisions – marry, whether to have kids, etc.
      b. places – the home is a place of privacy
   iii. Paulson’s critique: could have framed issue more broadly in include larger class of indiv. then arg.
      a. equal prot. clause (WHERE IS THE EQUAL PROT. CLAUSE?)

4. Privacy incorporated (“presupposed”) into autonomy
   a. this is the “incorporation plus” view of the incorporation doctrine. the 14th A. carries over the first 8 A.s “plus” autonomy.
      i. Kennedy – frames issue broadly, in terms of liberty) and picks up on Blackmun’s dissent, liberty/privacy presumes autonomy
         a. “dignity and autonomy area central to liberty protected by 14th A.”
         b. but goes strike the law down by analyzing state’s interest and finds no legit. state interest in infringing the right to autonomy (rat. basis)
      ii. Scalia’s dissent – state’s can regulate moral, job of the ppl. to decide if they go to far through the political process
      iii. Paulson’s critique – Kenedy’s use of the rat. basis test, like Casey leaves unclear whether this is a fundamental right

E. Dormant CC in the absence of Discrimination
   1. See sect. III above, also controversial topic about ct.’s role in interfering w/ state policy decisions
      a. similar to privacy issue in that no explict constit. right is being protected therefore debate whether state should be reigned in by the courts or leave it to the ppl. to deal w/ through the political process.
         i. problem w/ ct.’s doing it – substituting their policy for legis.
         ii. problem w/ ppl. doing it – rights of minorities aren’t protected since political process based on a majoritarian rule

F. Themes
1. Tension b/t intentionalist/textualist/non-interpretivist and moralist/interpretivists
   a. textualist arg.
      i. look to framers intent
         a. Paulson asks why framers intentions should matter to us today
      ii. what isn’t written isn’t there
      iii. limits judicial discretion to stick to the written word
      iv. also pays attention to structure – specific prov. over general, more recent amendments over old ones
   b. moralist arg.
      i. look to moral theory behind consit.
      ii. reductio arg. if not recognize non-enumerated rights (see Goldberg’s concurrence in Griswold)
      iii. rights implicit in concept of ordered liberty
   c. depending on which approach you take det. how come out on substantive due process arg.
      i. moralist = privacy, textualist = no privacy b/c constit. silent

2. Regulation of morals

V. Separation of Powers
   A. Political Question Doctrine – insulates from judicial review some question where separation of powers issues loom too large. diff from separation of powers, which actually provides for checks.
      1. Criteria for determination
         a. Baker v. Carr (1962) TN legis. had not re-apportioned voting districts in 60 yrs. thereby causing some districts single vote to count many times more than others. Ct. held challenge under the 14th A equal prot. clause was not a political quest.
            i. Brennan’s criteria for identifying a political quest.
               a. Textually demonstrable commitment of the issue to a coordinate political dept. OR
               b. Lack of judicially discoverable and manageable standards for resolving the issue OR
                  i. Paulson says can’t use this criteria alone b/c too easy for ct. to subvert, but should always tack this on.
               c. Prudential concerns (4 of them)
                  i. impossible to decide w/out an initial policy determination of a kind clearly for non-judicial discretion
                  ii. impossible for court to undertake indep. resolution w/out expressing lack of respect due coordinate branches of gov’t
                  iii. unusual need for unquestioning adherence to a political decision already made
iv. potentiality for embarrassment from diff. pronouncements by various dept. on one question

2. Criteria in use – uncertain areas
   a. Powell v. McCormak (1969) issue of whether House could exclude an elected representatives for reasons other than enumerated in constit. was not a political quest.
      i. if House had excluded for reasons enumerated in the constit. this would easily be a PQ b/c textual commitment but excluded rep. met the enumerated criteria and House excluded for non-enumerated reasons
      ii. ct. read the constitutionally conferred power to excluded narrowly, to only encompass three enumerated reasons b/c Powell had been elected and ct. wanted to preserve democratic principles
   b. Nixon v. US (1993) whether a senate rule that allows a committee to hear evid. on impeachment trials rather than the senate as a body, violates constit.madate that senate “try” impeachment cases is a political question
      i. Rehquist for the ct. – this is paradigmatic example of the 1st criterion, textual commitment to Senate to try impeachments. ct. can’t get involved in how they choose to do that.
         a. diff. from Powell, where read constit. narrowly, b/c this didn’t involve democratic process.

3. Criteria in use – well est. areas that are political questions
   a. Goldwater (1979) Ct. held issue of whether Prez. has power to terminate treaty w/out power of senate was a political quest.
      i. Rehnquist concurring – constitutional silence as to what role senate plays and involves Prez. role in foreign affairs makes this a political quest.
         a. Paulson say’s Rehquist is a big proponent of PQ doctrine
      ii. Powell concurring (in judgment only) – not a political quest. unless each branch exerted their full power and have reached an impasse (here senate as a body didn’t bring suit, just one senator)
      iii. Brennan dissent – not a political question where need to determine antecedent quest. of whether a branch had sole constit. power to make a decision
   b. Mora v. McNamara (1967) whether the Vietnam war is unconstitutional b/c congress not made declaration is a political quest.
      i. dissents – the debate over extend of Prez. war powers and congress’ role has been long ongoing and will not go away unless the court faces it head on.
      ii. Paulson’s view – where there has been no congressional decl. of war, it may be useful to have the ct. on record
   c. the guarantee clause (need section) is another well est. area where political question kicks in b/c it meets Baker v. Carr standards

4. Critique
a. the doctrine may very well be too broad (ex. inability to review Prez.’s war power)
a. Marshall’s concern in Marbury v. Madison, however, is that a narrower doctrine would undermine the Ct.
  - Prez. needs to have discretion to exercise his political powers and is held accountable only to the ppl.
  - Marshall also noted that where indiv. rights at stake, there could never be a political question

B. The Executive Power
  1. Domestic Limits
    a. Youngstown – During Korean conflict steel workers about to strike which would stop steel production. Prez. ordered seizure of the mills and keep them running to avoid “nat.’l catastrophe.” Prez. sent message to congress and they don’t respond. Mill owners challenged and ct. held unconst.
      i. Prez. arg. 1) w/in Prez. powers (vesting clause, faithfully executed clause, commander and chief clause) b/c of war in Korea, 2) congressional acquiescence by not responding
      ii. majority – congress passed Act which specifically refused to give prez. emergency power in face of emergency b/c would interfere w/ collective bargaining
        a. this turns on ct. viewing problem as a labor dispute
      iii. Jackson concurring – three criteria to eval. prez. auth
        a. power at max. when acts w/in express or implied auth. of congress – not the case
        b. power at lowest when action incompatible w/ express or implied will of Congress – not the case
        c. gray area when absence of congressional grant of auth. or denial of auth – case at bar, no power b/c action taken must be proportional to emergency
      iv. Vinson dissent – Prez. has broad powers to act in nat.’l emergencies
        a. perceives as emergency rather than labor dispute
      v. Paulson compares the abuse of emergency powers to downfall of Weinmar Rep., former Prez. used emergency powers so much that when Hitler stepped in a precedent was already set for a single leader to run the country

NOTE: see gov’t arg. for range of clauses where Prez. auth. stems from

2. In Foreign Affairs – broad powers
  a. Curtiss-Wright (1936) w/ congressional agreement Prez. banned sale of arms to Bolívia. ban challenged as unconstitutional delegation of law making power from legis. to exec. branch. ct. upheld.
    i. fed’l gov’t has expansive powers in foreign affairs, though unenumerated, flowing from sovereignty, which are located in the executive.
a. diff b/t internal power (more limited) and external powers is that internal surrendered by the states at ratification but foreign affairs power came directly from the Crown.
ii. only limit on foreign power is doc. of necessity (response of self defense must be proportional)
b. Dames & More (1981) Prez. ordered claims against Iran, stemming from exchange of hostages for blocked assets, must go to arbitration. P appealed that Prez. acting w/out congressional approval.
i. Fed. Act settlement of claims w/ foreign country via an executive agreement showed clear acquiescence on part of congress (meets Jackson’s first rubric)
   a. compare w/ Youngstown, struck down w/ no acquiescence
   ii. Paulson – looks like should be a political question but not
      a. prudential concerns are respected in how ct. decides case
      b. involves indiv. rights – no PQ
c. When does Prez. need congressional approval in foreign affairs?
i. Treaty – must be approved by Senate
ii. Executive agreement (no diff. from a treaty) – no congressional approval needed

C. Congressional Power to Delegate
1. Non-Delegation Doctrine – where there is a delegation of power from congress to the executive branch (admin. agency) the “principle” or standard that governs law making in the agency is retained by congress.
   a. purpose – to ensure accountability, unelected administrative officials are not directly accountable through the political process
   b. why delegate in the first place?
      i. if congress had to make every law, they would be overwhelmed and ineffective
      ii. congress doesn’t have the expertise in every field
      iii. allows congress to “pass the buck” to admin. agencies to duck political ramifications of some decisions
   c. The doctrine was enforced by the Laize Faire ct. during the New Deal Legis – Schecter: Act auth. exec. branch to approve codes for fair comp. struck down b/c congress placed no limits on exec. unfettered discretion to make laws for the rehabilitation of trade industry
d. Post 1937 the doctrine not enforced – Yakus: Act auth Prez. to address price fixing by stabilizing prices. Although standards (fair and equitable regs) were no more clear than Schecter, ct. upheld the act dist. it from Schecter
e. Modern ct. - because of the standards of the doctrine are too vague, it has been seen as unworkable and basically a dead letter
   i. the concern over accountability of admin. agencies remains, especially considering they pass more laws than all other branches combined and are seen as the “fourth branch” of gov’t
   ii. modern trend towards limiting admin agencies (Lopez)
2. The Legislative Veto – Congress gets veto power to counteract any agency laws that congress has fault with
   a. came up as an alt. to the unworkable non-delegation doct.
   b. seen as a good alt. to solve the accountability problem but…
   c. Chadha (1983) INS Act delegated auth. to AG (exec. branch) to recommend suspension of deportation of aliens but reserved veto power in only one house. AG recommended suspension of Chadha’s deportation. House exercised veto power. Ct. held unconstitutional.
      i. majority – peculiarly legis. functions must pass bicameralism (both houses) and presentment (pres. approval) under Art. 1 § 7
         a. here the veto is a legis function b/c 1) it is legis. in its character and effect and 2) it effects the legal rights and duties of persons outside the legis. branch
         b. Paulson says this criteria is hopelessly vague – under it, even judicial decisions would be legis.
      ii. Powell’s concurrence – legis. veto is a judicial function (which are retrospective whereas legis. functions are prospective) and therefore violates sep. of powers (Paulson – good arg.)
      iii. White’s dissent – Congress faces a Hobson’s choice: either have no admin. agencies at all (inconceivable b/c they do more work than all other branches combined) or have admin. agencies w/ no accountability
      iv. Paulson – great example of a modern day formalist opinion
         a. doesn’t address the underlying issues giving rise to the adjudication (accountability)
         b. hides its resolution in a cloak or forms (bicameralism, presentment)
   d. Chadha has not been taken seriously and legis. vetos are still used

D. Removal Power
1. Appointment power: Art. II, § 2, para. 2 - Subject to senate conf., Prez. has power to appoint ambassadors, fed. judges and other officers of US (principal officers). Congress can vest power of appointment of inferior officers in prez., ct.s, or heads of dept.
   a. but nothing in constit. about removal
2. Appointment - congress has no indep. appointment power
   a. Buckley (1976) Ct. held fed. act which provided for appointment elections commission officers (2 by prez., 2 by house, 2 by senate) unconstit.
      i. election comm. officers are US officers b/c don’t merely operate in the aide of congressional auth. to legis. and congress has no auth. to appoint US officers
         a. take note of dist. b/t US and inferior officers
   a. Myers (1926) law requiring prez. get senate consent to remove post master in OR found unconstit.
i. Marbury est. president has complete discretion to remove cabinet members b/c seen as ext. of himself

ii. textualist arg. – nothing in constit. distinguishes cabinet members from other exec. officers
   a. i.e., prez. has complete discretion over removal of executive officers

iii. policy arg. – postmaster also exercises prez.’s discretion
   a. postmaster’s aren’t inferior officers

iv. dissents – congress created the office through statute → congress can abolish the office → congress has power over term of office
   a. Paulson – this line of reasoning does not follow
   b. Humphrey’s Executor (1935) Prez. fired FTC commissioner in violation of stat. which required removal for cause only. Ct. upheld stat. and found in favor of commissioner for backpay
      i. dist. from Myers in that postmaster is purely executive officer where as FTC commissioner serves a quasi-legislative function
         a. where officer serves a quasi-legis. or adjudicative function there are restraints on prez.’s removal
   c. Wiener (1958) Commissioner of War Claims commission (settle claims for compensation by POWs) perform an adjudicative function, therefore there are restraints on Pres. removal power
   d. Morrison (1988) notwithstanding indep. counsel’s purely executive (prosecutorial) function, appointment by branch other than prez. (judiciary in this case) and restrictions on removal do not violate constit. in
      i. indep. counsel is an inferior officer, therefore congress can delegate appointment (to judicial branch in this case)
         a. test is not whether serves a purely exec. function (like in Buckley) but look at all factors – removal by hirer exec. branch official (AG), accountable to somebody other than prez., empowered to perform only certain duties
         b. Art. II (see above) doesn’t preclude interbranch appointment of inferior officers as long as no conflict w/ function of the branch doing the appointing or encroach on power of other branches
            i. no conflict here b/c judicial branch appoints attorneys to act as prosecutors in some contexts
            ii. doesn’t cause conflict w/in judicial branch Spec. Div. itself doesn’t review indep. counsel’s claims
      ii. restrictions on AG’s removal power for good cause not an encroachment on sep. of powers
         a. AG still has some removal power
         b. that is must be for good cause complies w/ Humphrey’s and Weirner standards for inferior officers
         c. restrictions don’t impede prez. function
i. this came back to bite and make Scalia’s dissent look brilliant b/c Clinton investigation did impede his functions

iii. Scalia’s **Formalistic dissent**
   a. indep. counsel performing a core exec. function (prosecutorial) there for no restrictions on removal
   b. formalist – not addressing problem of how to resolve the conflicts of interest in investigating the exec. branch official but rather sticks to definitions.

iv. Paulson’s critique – this is a VERY IMPT. opinion for modern controversies
   a. majorities trade-off of sacrificing some separation of powers to resolve the conflict of interests in investigating exec. branch is helpful for investigating officials other than the prez.
   b. but problem persists, after Clinton, of investigating prez.

i. indep. counsel is an inferior officer – although

   i. delegation of auth. to judicial branch is **okay b/c standard is sufficiently detailed and no more suitable branch for the delegation**
      a. new test for the non-delegation doctrine
   ii. appointment by congress is okay b/c inferior officers
   iii. even if prez. removes from comm., still remain judges (no threat to the judiciary)

4. Theme
   a. branches aren’t totally insulated from each other

E. The War Power – strain b/t executive and congress

1. Background
   a. Art. I, §8, para. 11 give power to Congress to declare war

2. Aggregation of Powers in the Exec. Branch
   a. Prize Cases (1860s) Prez. ordered blockade of confederate ships w/out a decl. of war by congress was upheld
      i. congress didn’t declare war b/c didn’t want to recognize confederacy as a sovereign nation
      ii. framers intent – **prez. has duty to protect nation from attack** and under the laws of war (jure belli) a blockade is authorized
         a. Greer – no congress. auth to protect nation needed, but congressional acquiescence in this case through subsequent acts of approval help est. legitimacy.
      iii. dissent – decl. of war is necessary regardless of circum., prez. has not implied war powers

NOTE: this is the only case to directly address Prez. war power
b. Ex Parte Milligan (1866) during civil war, private citizen’s arrest and trial b/f military tribunal was an unconstitutional deprivation of right to jury trial and suspension of writ of habeas corpus
   i. Marshall law can’t be imposed in a state that simply b/c threatened invasion, there must be actual invasion
      a. doctrine of necessity – defensive measures taken are limited (both in duration and scope) to danger presented
   ii. where detainee is a private citizen and no Marshall law, prez. doesn’t have the power to suspend writ. of habeas corpus

  c. Ex Parte Quirin (1942) during WWII, prez. proclamation that German spies captured in US would be tried by military tribunal and congress’ codification of the proclamation did not violate 5th and 6th Amend.
   i. dist. from Milligan b/c petitioners charged w/ offenses against the law of war which Constit. not require jury trial
   ii. prez. proclamation w/in auth. under conferred by congress (unwilling to decide if w/in his auth of no formal decl. of war)
   iii. Hout’s citizenship doesn’t relieve him of jurisdiction of law of war b/c he is a belligerent
      a. Paulson – is Hout entitled to civil trial to determine if he is a belligerent

NOTE: diff. b/t Quirens (suspension of contit. rights okay where formal decl. of war and detainees are not citizens but belligerents) and (suspension of constit. rights not okay where detainee is a non-military citizen and no Marshal law/civil ct.s are up and running)

3. Result of aggregation
   a. Fullbright Senate Committee Report of 1967 – sketched aggregation of power on part of prez. at expense of congress
      i. 1940’s – Roosevelt committed military forces to various operations w/ congressional consent
      ii. late 1940’s – ambivalence on part of congress and America at large as to the war powers
      iii. 1950 – Truman commits forces to Korea under guise of UN “police action”
      iv. late 1950’s – congress unconstitutionally gives prez. authority (unconstit. b/c under Art. I only congress has the auth.) to use troops in certain parts of the world
      v. 1960’s – Golf of Tonkin Resolution: congress acknowledges virtually unlimited presidential power to use armed forces
         a. prez. used this as support. for Vietnam war but didn’t admit needed congressional approval

b. Paulson’s evaluation
   i. developed a customary constit. law to give war powers to prez.
      a. like adverse possession: congress repeatedly acquiesces war powers to prez., over became a change in legal positions where prez. enjoys the power and congress is deprived
ii. also like property law, landowner can block adverse possession by protesting – see WPA at end of Vietnam War

4. War Powers Resolution of 1973 – express reassertion of war power in the legis. branch. Prez. war power limited to:
   a. declaration of war by Congress
   b. specific statutory authorization
   c. nat’l emergency created by an attack on US
   d. other provisions
      i. Prez. must report to Congress w/in 48 hours of deploying troops
      ii. if Congress doesn’t declare war w/in 60 days Prez. must withdraw troops (unless congress gives extension or is unable to meet)
      iii. Prez. can extend the 60 day window by 30 days if certifies that continued use is necessary w/ respect to the safety of withdrawing the troops
   e. WPR analogous to Chadha (legis. veto)
      i. the act delegates the war powers to exec. branch
      ii. 60 day window acts as a two house “veto” on prez. discretion
   f. disanalogy to legis. veto – no Prez. has ever taken the restrictions seriously whereas trad. legis. veto is effective

5. Modern interpretations
   a. Prez. have largely ignore congress’ reassertion in WPA
      i. Bush’s and Clínton’s military actions w/out decl. of war
   b. detention of American citizens
      i. Hamdi v. Rumsfeld (2004) detention of US citizen by prez. w/ congressional approval to use all nec. and appropriate force against persons involved in terrorist attacks does not justify denial of citizen’s writ of habeas w/out specific findings of fact that he is a belligerent.
         i. ct. again ducks the issue of whether detention w/out congressional approval is constitutional
         ii. prez. can detain citizen indefinitely as long as hostilities persist pursuant to the congressional act
         iii. must be specific findings of fact to determine US citizen was a belligerent, prez. can’t rely on decl. of one person where the allegations area challenged.
            a. answers the question posed by Quiren
            b. O’Conner comes to this conclusion by balancing interests of gov’t against interest of indiv.
               i. Paulson – again O’Conner eroniously has us using a balancing test (like Casey) when weighting indiv. rights against gov’t policy – test should be strict scrutiny
            iii. Scalia’s dissent – since writ of habeas has not been suspended (pursuant to Art. I, §9, para. 2) by congress,
detainee should be released immediately if not charges are brought – text of the constit. demands it
c. detention of foreign nat’l
      a. Gauntanamo Bay base is w/in US jurisdiction
      b. foreign nat’l entitled to writ of habeas hearing b/c:
         i. constit. confers the right to those who claim to be held in violation of the constit.
         ii. applies to foreign nat’l’s their country is not at war w/ US, they deny engaged in aggression against US, have not been charged or afforded access to a tribunal, being held in jurisdiction of US

VI: General Themes
   A. Test for constitutionality of laws
      1. rational basis – used when looking at non-fundamental rights
         a. means rationally related to a legit end/purpose (note, end can’t be a pretext for bad motive)
      2. strict scrutiny – uses to determine constit. of law infringing on an indiv. immunity/fundamental right
         a. test:
         b. contexts
            i. privacy
            ii. facially ec. discrimination
   B. Formalist v. Realism/Functionalist
      a. Morrison
   C. Textualist v. Moralist