Constitutional Law
Outline – Spring 2006

Formalistic opinion: ignores the circumstance that give rise to the suit, and use definitions. This is defined as local transaction.

Realistic approach: attempt to determine the actual economic impact of the regulation or motive of congress.

Levels of scrutiny
- Rational basis: Court will uphold government action so long as
  o Legitimate state objective: broad concept, includes health, safety, general welfare
  o Rational relation: must be rational relation to the means and end. Must show that government acted arbitrary and irrational
  o Used in:
    ▪ Dormant commerce clause (but also must show that state burden greater than interstate burden)
    ▪ Substantive due process: so long as no fundamental right is affected, this is the test (i.e. economic regulations)

- Strict scrutiny: Court will uphold government action so long as
  o Compelling objective: Court is going to look at the actual purpose of the government. Means must be necessary to achieve the goal.
  o Necessary means: no enough that there is a rational relation. No less restrictive means that would accomplish the government’s goal.
  o Used in:
    ▪ Substantive due process/fundamental rights: i.e. privacy (marriage, child-rearing, use of contraceptives)
    ▪ Commerce clause if not commercial (i.e. congressional pp)

STRUCTURE OF THE CONSTITUTION

I. CONFERRAL OF POWER
   A. Article I: conferral of powers to the Congress (§1), §8 enumerates specific powers to Congress. What is not enumerated is thereby excluded. Delegation
      1. Bill of rights: Is it redundant to confer specific powers and then provide a duty to forbear? Was it necessary to have amendments? Yes. If Congress created a state religion it would be immediately invalidated. No arguing needed. However, without amendments, there would be much debate. Would it fit into a power? An implied power (e.g. Commerce Clause)? A personal thought, Articles and Amendments are bookends to the realm of legislation
      2. The constitution isn’t a legal code; the fact that something wasn’t enumerated doesn’t mean it’s beyond Cong’s powers, too impractical to enumerate everything.
   B. Article II: confers powers to the executive branch
C. Article III: conferral of judicial power as well as inferior courts that Congress might establish.

II. Declaratory v. Constitutive Powers: Declaratory powers are stated elsewhere; constitutive powers lay it out for you

A. For example: Article 1, Section 8 gives Congress the authority to create inferior courts, which is constitutive of that power. Article 3, Section 1 refers to inferior courts, which is declaratory of the power already created in Article 1

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JUDICIAL POWER

I. Establishing Judicial Review over Constitution and Fed. Statutes

A. Rule: The Supreme Court has the power to review Congressional legislation and decide if it violates the Constitution.

B. Cases:

1. (Marshall) Madison v. Marbury: Marbury was assigned as justice of the peace by outgoing President Adams. The Secretary of State (Madison) refused to deliver the commission. Marbury sued for a writ of mandamus directly to the Supreme Court.

   a. Holding: substantively, Marbury entitled to his assignment, but Marshall wanted to create a judicial review over legislation. So said that although the Judiciary Act gave SC the jurisdiction, the constitution did not, and constitution trumps statute.

   b. Is the Constitution superior to legislation?

      - Judge Gibson argues that this usurps the power vested in Congress and the President. Shouldn’t they decide what is Constitutional?

      - Marshall uses a reductio ad absurdum (to prove P you use: from not P an absurd outcome, that proves P) argument that shows Constitution is superior.

         o If no superiority, congress can alter constitution by an ordinary act. Absurd because at they very nature constitutions are fundamental and paramount law of the nation.

   c. Do courts have the power of judicial review to resolve issues between the two? No evidence that Philly had constitutional review in mind.

      - Marshal argues from the constitutional text.

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

         o Treason – individual rights argument

         o Oath of Office – Justices swear to uphold the Constitution. (weak)

   d. Precedents for Judicial Review:
• Locke: the constitution is the will of the people and the power of government is in the people. If legislature ignores the will of the people, judiciary must remedy that.
• Hamilton: people themselves are sovereign as expressed in the Constitution and are superior to the work of representatives.
  o Although folks are now worried about judiciary being superior, they have neither the purse nor the sword.
• State courts: handful of state courts in pre-Marbury time had constitutional review for state constitutions, some precedent.

e. Other Arguments for Judicial Review
  • Countermajoritarian Role – Congress represents the majority and therefore might create laws that infringe the minority’s constitutionally guaranteed rights. Federal judges are appointed for life and therefore less susceptible to political pressure.
  • Stability – If each branch were free to interpret the Constitution there would be no final answer because:
  • Practicing self-limitations:
    o Court typically decide for the only issue presented by the facts (narrow holding)
    o Court will not decided the Constitutional issue if the case can be decided on some other grounds.
    o Courts can attempt to construe statutes as to not conflict with the Constitution

f. Other Arguments against Judicial Review
  • Antidemocratic – Federal judges are not elected officials and therefore not politically accountable. To vest final authority over the Constitution’s meaning is a repudiation of the principle of democratic self-governance.
    o Substantive due process declaring “liberty to contract”
    o Bush v. Gore
  • Entrenched Error – it is very difficult to correct mistaken judicial interpretations. The only avenues for correction are: court changes mind, impeachment, amendment or new justices

II. Establishing Judicial Review over State legislation
  A. Rule: The Supreme Court has the power to review the constitutionality of State court decisions on the meaning of federal law.
  B. (Story) Martin v. Hunter’s Lessee: Martin and Hunter both claim land; Martin by grant from Lord Fairfax and Hunter from VA (conflicting with 1783 peace treaty).
  1. Judiciary Act of 1789: created federal court system and make-up of the supreme court. At issues was the constitutionality of §25, which provided for SC judicial review of the highest court of a state when it involves (1) validity of federal statute (2) constitutional or federal treaty questions (3) construction of a treat is against the title, right or privilege of an individual
  2. Story:
a. *On uniformity*: “If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states…”

b. *On sovereignty*: federal constitution cut back on state sovereignty (i.e. supremacy clause).

3. **Why is judicial review inevitable here?**
   a. Constitutional review of state court decisions is the glue that holds the union together during times of instability.
   b. Provides uniformity when there is stability.

**III. Limiting review**

A. **Rule: The Exceptions clause** (Art. 3, §2, ph 2). The appellate jurisdiction of the Supreme Court is conferred “with such exceptions and under such regulations as Congress shall make,” thus Congress can remove its jurisdiction even when a case is pending in the federal

   1. Most commentary agrees that Congress does have *carte blanche* constitutional power to make legislation.
      a. Congress can cut back on kinds of cases SC may hear, and can cut back on anything federal courts here
   2. However, good constitutional policy dictates that there should be limits to Congress or we might have jurisdictional stripping.
      a. Act of congress can only create policy, not restrict constitutional rights.

B. **Jurisdiction Stripping**: congress does indeed have at least some power to control the boundaries of the supreme court’s appellate jurisdiction

   1. *Ex parte McCardle*: McCardle writes anti-Reconstruction articles and is arrested; he files a writ of habeas corpus. Under 1867 law, SC was empowered to hear those cases on appeal. During oral arguments, Cong revises act to repeal SC review of habeas corpus decision from lower courts, fearing they would find reconstruction acts unconstitutional.
      a. Court yields; says it has no jurisdiction.
      b. Note statute not taking review of h.c. review away, only those heard on appeal from lower court. D still can file h.c. review directly in SC
      c. Note statute is neutral, can effect both state and D.
   2. *U.S. v. Klein*: But Congress does not have unlimited power. Claim for compensation for property destroyed by Union Army. Klein argued that his Presidential pardon declared him *loyal*, and therefore deserving of his compensation. Congress passed legislation that said Presidential pardons of such nature heretofore declared a person *disloyal*, and directed courts to dismiss for want of jurisdiction for any such person.
      a. Take-away: any jurisdictional limitations be congress must be neutral and not deice the merits of a particular case.

C. **Seattle Audobon Society**: “Spotted Owl” case. Environmentalists brought suit challenging the legality of logging in old growth forests. Congress altered the laws governing the case and specifically listed this case saying that it was now legal.
1. Distinguish with *Klein*: this was a “change in law, not specific results under old law.”
2. Owls do not have individual rights.

**CONGRESSIONAL POWER**

Congress may act only if there is express or implied authority. State governments can do anything except that which is prohibited. Congress can only do what is authorized

I. **THE “NECESSARY AND PROPER” CLAUSE**

A. **Broad Reading (Hamilton):** Since it is impossible to determine what is truly “necessary,” it would always lead to problems. A better understanding is found in the means/end matrix. The ends are the enumerated powers granted to Congress. The means are the legislation made by Congress to reach those ends or powers.
   1. this is the modern approach with deference to the Congress on the means (a rational basis standard)

B. **Narrow Reading (Madison and Jefferson):** To allow a broad reading would destroy the central character of the government: a limited government and render the enumerate powers nugatory
   1. Constitutive: clause is merely declaratory not constitutive.
   2. Slippery slope argument: If we allow any means convenient, there is no stopping…soon Congress could legislate who’s going to win American Idol.
   3. Normative argument: action leads to an undesirable effect

C. **Scope (McCulloch)**

1. **Rule:** The “necessary and proper” clause gives Congress the power to select the means by which to accomplish legitimate ends of the national government. (Marshall)

2. **Case:** Maryland enacted a tax upon all banks in the state that were not chartered by the state. This statute only applied to the Bank of the United States which was a national bank created to control the money supply. Bank refused to pay tax. Two questions had to be answered by Marshal’s Court.

   a. **Marshall’s exercise in judicial interpretation**
      - **Past Practice:** past practice is not dispositive, but a strong presumption in favor of the bank’s constitutionality.
      - **Delegation Doctrine:** MD – powers of the gov’t were delegated to the states. Marshall - powers of the general government were not delegated to the states, but the people of the states. States are an organizational device for allowing the expression of popular sovereignty.
      - **Structure of the Constitution:** Marshall - the generality of the instrument warrants inferences to later specifics.
      - **Necessary and Proper Clause:** any means calculated to reach that end is allowed. “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.”

Marshall then applied this interpretation and stated that a national bank could be of service to the legitimate ends of taxation, spending, borrowing, and maintaining a national defense.

- **State taxation:** If state could tax a federal instrument, the state could conceivably thwart federal powers.

### II. The Commerce Clause

**A. Purpose:** Uniform national market. States can not isolate their economy or protect their own citizens from unfair trade. Consequences would be destroying the national economy with state competition. We want every person to be able to participate in the national economy without fear of embargoes, custom duties, or regulations. Vision of the Framers (Hood).

1. **Anti-Broad interpretation:** purpose not to give Congress authority to control states police power over local grade manufacturing regulations
2. **Commerce:** intercourse for the purpose of trade (may need to distinguish from manufacturing)

**B. Modern test:** act comes within the commerce clause if:

1. activity being regulated substantially affects commerce, and
2. the means chosen are reasonably related to Congress’ objectiv

**C. Scope:**

1. **(Marshall) Gibbons v. Ogden:** Ogden receives license to steamboat from state, Gibbons from the U.S. Both bodies regulating the same matter, if federal law good it is supreme.
   a. Can the federal government regulate navigation? Raa argument, if they couldn’t regulate this, what could they regulate?
   b. Establishes rule that State’s can control completely internal matters, otherwise federal government has plenary power.
   - Issue is what counts as completely interior traffic to a state?
   c. **Dissent:** enumeration of powers would not have been made if supposed to be so flexible. (limited power over interstate commerce)

**D. Before 1937:** Oscillation between formalism and realism. Generally took a narrow approach

1. All in all: Commerce clause goes through pretext argument, reductio ad absurdum, insulation techniques (manufacture v. commerce; direct v. indirect) state police power, and slippery slope. (see below)

2. **Economic regulation/Dual federalism approach:** court saw areas of economic life as either solely left to the state or left to the federal branch. No overlap.
   a. Congressional regulation fell within the commerce clause son long as the activities being regulated had “substantial economic effect” on interstate commerce.
   a. **Insurance contracts are not part of interstate commerce and are not commodities, therefore may not be protected by the commerce clause from state discrimination.**

4. *Kidd v. Pearson*: Iowa statute forbids manufacture of liquor. Statue applied to a company that manufactured liquor in Iowa but sold all out of state. Narrow reading, buttressed by a formalistic def. of manufacture
   a. **Commerce clause does not apply to manufacturing because legislature should have control over things that are manufactured in the state even if they eventually become out of state commerce exclusively.**

5. *The Daniel Bell*: federal safety regulation applied to a ship that transports interstate goods wholly within the state. Broad, realist approach.
   a. **Congress has the power to regulate local activities of instrumentalities of interstate commerce in order to protect interstate commerce itself.**

   a. **Invokes indirect/direct effects to distinguish manufacturing from commerce, manufacturing only has indirect effects.**

7. *Hood*: Under NY statute, NY refused to give a Boston milk distributor, Hood, a license to construct a plant in New York in order to sell milk to the Boston market.
   a. **Laws that constitute sheer economic protectionism are invalid per se.**

8. (Holmes) *The Shreveport Rate Case*: Early example of a realist approach. Federal commission set maximum rates for interstate shipment between LA and TX cities. TX set rates lower for rails entirely within the state. ICC ordered this “price discrimination” to stop interfering with interstate commerce.
   a. **Congress may regulate the intrastate activities of “instruments of commerce” so long as those activities had a “close and substantial relation to interstate traffic,” and the end is (1) safety (2) efficiency (3) or uniformity.**

   a. **Congress may regulate activity that is found to be “essential,” “necessary,” and “indispensable” to the flow of interstate commerce.**

10. *Public welfare*: use of commerce regulation for moral regulation. During early 1900’s courts more sympathetic to this type of regulation.
    a. **The Lottery Case** (Champion v. Ames) (articles harmful to public morals) Congress prohibited the interstate shipment of lottery tickets.
Congress’s regulatory power of interstate commerce allows the prohibition of articles deemed harmful to the public morals.

- Harlan quotes *McCulloch* that if it is a legitimate end then the means should be allowed. (end- public morals)

b. *Hammer* (Child Labor Case): Reacting to public outrage toward the practice of child labor, Congress prohibited the interstate shipment of goods made by children. Narrow reading.

- Congress cannot prohibit articles of commerce that are themselves “useful or valuable” because of the way they are manufactured.
  - Court feared that if Congress could regulate intrastate, noncommercial activities, then it could control anything in the name of commerce
  - Unconstitutional because it sought to control means of production
  - Shoots down this through the pretext doctrine, this a pretext for moral regulation.
  - Holmes’ dissent: Congressional motive is irrelevant. So long as the regulatory technique employed by Congress involved interstate commerce, it does not matter what indirect effects it may have.

E. Early resistance to the New Deal

1. (Holmes) *Schechter Poultry*: (1935) Greatest public uproar in New Deal litigation. Congress imposed minimum wages and prices upon the poultry industry. Schechter, a poultry wholesaler sold only to NYC retailers, and bought from NYC market, but nearly all poultry came from out of state.
   - Local activities that are at the end of the “stream of commerce” do not have a direct effect upon interstate commerce.
     - Reminiscent of protective principle. Back to *Kidd* and *Knight*.
     - Don’t buy the emergency argument
     - Hear you get Holmes (of the Shreveport decision) going against the government. This was a weak case that he did not want to be the test case.

2. *Carter v. Carter Coal Co.*: (1936) This was an even bigger blow to New Deal than Schecter. Statute imposed maximum hours and minimum wages for coal miners. Nearly all the coal produced would be sold in interstate commerce.
   - Congress may not regulate activity that does not have a direct, logical, and linear link to interstate commerce.

3. Roosevelt tired of getting these decisions, attempts to pack the court by new legislation that fails miserably.
   - Undermines the judicial branch if you allow the president to alter the make-up with an eye to a substantive outcome.

F. The Revolution of 1937: Recognition of a congressional “police power,” turn from diminution of federal power to the expansion of it.
1. Application recently, Congress can regulate:
   a. if activity **substantially effects** interstate commerce: loosened this standard the nexus required between activity and interstate commerce. Realist opinion
      - NLRB v. Jones Laughlin(1937) (NLRA) prohibited certain “unfair labor practices.” Though JL only produced steel in Penn., JL employed a vast number of employees in other states and its corporation extended nationwide. NLRB sought injunction to stop J&L from firing workers, NLRA constitutional
      - Marks a shift bc recognizes that the “production” aspect of the process counts as commerce.
   b. Not only if acts taken alone have substantial effect, but also an entire class of acts, if the class has a substantial effect, even though one act has not effect. (**cumulative effect theory**)
      - **Wicker v. Filburn:** farthest the court has ever gone in using the commerce clause. Farmer planted more bushels of wheat than was permitted by federal regulation. He attacked the validity of the penalty imposed upon him because he contended the wheat was not sold, but used by his farm and therefore had no effect upon interstate commerce.
   c. Congress’s power may regulate commerce not matter what is motive or purpose might be as long as means are reasonably adopted to the ends.
      - Darby: (1941) FLSA barred interstate shipment of goods not produced in accordance with the set maximum hours and minimum wages, AND prohibited the employment of people to make interstate goods not at these standards.
      - Overrules hammer (**child labor case**). Important case because this is congress regulating goods that are not wicked themselves.
      - **Argument:**
        - Role of congressional intent and motive: don’t matter, as long as means are within the constitution, good to go. So much for the pretext doctrine
        - Substantial effect is a criterion
        - Plenary power of congress: commerce regulation is plenary
        - Relaxed standard of the means: like McCulloch
        - Status of the 10th amendment: doesn’t instruct the courts on what to do.

2. Breadth of the police power: Historically, the courts did not allow Congress to pass statutes effectively regulating private racial discrimination. Congress attempted through 13th Amend, §2 and 14th Amend. enforcement provision (only for state actors –still good law)
   a. Now though, congress can regulate local racial discrimination in public accommodations because of the substantial effect on interstate commerce.
Heart of Atlanta Motel: 1964 Civil rights act prohibited discrimination by private businesses that deal with public accommodations to interstate travelers. Hotel owner lost this appeal.
  o Paulson wonders if this is a legal fiction that the Commerce Clause was at all intended to operate this way.
  o Note the difference in regulating morals (lottery case), where power not always recognized and regulating morality, where power is more likely to be recognized

b. Congress can regulate even on purely local matters if it has a substantial effect on interstate commerce. Congress has general police power
  ▪ No longer look at whether court would recognize federal interest beyond transportation itself, until 1995 the question is whether any activity would be found unrelated to the commerce clause. To the logical end, Congress could regulate lots of criminally activity traditionally for the states (i.e. rape, murder)
  ▪ Perez:

    c. Perez v. United States: Act prohibited loan sharking, because usually involved with mobs and maybe an interstate effect there. Court upheld conviction of Perez

3. Limitations on the police power
   a. The Court will not hypothesize a rational basis for a statute when Congress has made no effort to find the activity’s substantial effect upon interstate commerce. Activity must have some economic dimension

      ▪ Lopez: (1995) Gun Free School Zone Act made the possession of a gun on or near school grounds a crime. It never considered the impact this activity had on interstate commerce.
      ▪ Applicable test from Lopez, law not valid if
        o “neither the actors nor their conduct have a commercial character,”
        o “neither the purposes nor the design of the statute have an evident commercial nexus,” and
        o the law “seeks to intrude upon an area of traditional state concern.”

   b. Congress may not regulate a local crime simply because the national aggregated impact of that crime has substantial effects on interstate commerce. Must be an economic connection

      ▪ U.S. v. Morrison: (2000) Violence Against Women Act created a cause of action against “a person who commits a crime of violence motivated by gender.” Despite a explicit findings that gender-motivated violence had a substantial effect upon interstate commerce, the Court ruled it unconstitutional.

III. OTHER ENUMERATED POWERS
A. **Taxing power**

1. **Congress may not use taxes as penalties.**
   a. *Child Labor Tax*: Statute imposed 10% tax on any companies who had children as employees. Court reasoned that this statute was a penalty because:
      - only employers who *knew* they were employing children would be taxed;
      - the amount of tax was not proportional to the ratio of children working in the company; and
      - enforcement of the tax was enforced by the Labor Department and not the IRS.
         o Essentially, this is a pretext (punishment and regulation through taxation) and although that sometimes flies, this was unduly restrictive

2. **Congress probably can regulate under guise of taxing, so long as there is some real revenue produced and not unduly restrictive**
   a. *Kahriger*: Revenue Act of 1951 – had pretext of raising revenue, but really regulated intrastate gambling. Court only cares if it raises money

B. **The Spending Clause**

1. **While Congress may spend for the general welfare, it may not regulate for the general welfare.**?
   a. *General Welfare clause*: Art I§8
      - Narrow reading: Madison felt $ could only be spent for the purpose of the enumerated powers. Phrase is mere tautology
      - Broader interpretation: Taxing and spending limited by general welfare but goes beyond the enumerated powers. Congress’ intent was not to limit taxation to enumerated powers.
   b. *U.S. v. Butler* (1936) Through Agricultural Adjustment Act, Congress sought to raise farm prices by limiting production. Tax was levied on processors. Tax revenues were used to pay farmers who entered into contracts to limit production of farm commodities.
      - Court concluded that Congress was coercing farmers to join this system. This was regulation and not spending.
   c. *Steward Machine* (1937) Social Security Act a credit against federal payroll taxes so long as employers contributed to state unemployment compensation schemes. Court upheld the statute reasoning that it was not a “weapon of coercion, destroying or impairing the autonomy of the states.”
      - Cardozo dissented arguing there is a distinction between coercing behavior and compelling behavior. His argument: (1) Law assumes the free will of individuals, (2) free will is compatible with acting on motivation, therefore the distinction should be made b/t motivation and coercion. In motivating, you still have an alternative. In coercion, there is no alternative.

IV. **WAR POWER**
A. **Means enabling power of the n and p clause support congressional power to regulate and economic condition partially produced by an intense war effort.**

1. *Woods:* 1948 Housing and Rent Act froze rents at their wartime levels, court says that is legitimate
   a. Paulson concern over an abuse, when does wartime end? Japanese internment.
   b. Concuring opinion says we need limits, if hostility has ceased entirely, no extension of congressional power.

B. **Congress can use any means necessary when implementing a treaty, even if it does not comport with the enumerated powers but may not do so in violation of constitutionally guaranteed individual rights**

   a. Statutes are enacted pursuant to the constitution (art.1 §8), but treaties are not subject to that.
   b. Extends necessary and proper clause to more than the enumerated powers, uses *raa* argument. If n +p could not be extended, how do you implement treaties outside of enumerated powers?

2. *Reid v. Covert:* Bricker amendment that gave American military courts jurisdiction over any service members. D convicted of murder and due to implementation of treaty, can’t get a jury trial.

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**DORMANT COMMERCE CLAUSE**

The mere existence of the federal commerce power restrict states from discriminating against or unduly burdening interstate commerce.

Dormant commerce clause: principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. If law burdens interstate commerce it violates dormant commerce clause if burdens outweigh the benefits of the law. Can be struck down if non discriminatory. Created from common law.

Privileges and Immunities clause of art. 4 §2: state may not deny out of state-ers the privileges it accords its own citizens. Only an anti-discrimination provisoin

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I. **Evolution of Exclusivity:**

A. In *Gibbons* court says there is exclusive federal power over interstate commerce. Marshall says not like concurrent powers of taxation where there is a legit purpose for both state and federal involvement.

B. Then move to *Plumey*, where the court states have some police power that can not be exclusively federal control. i.e. regulation of adulterated margarine

C. Then we get an outright rejection of *Gibbons*, in *Cooley*. Court recognizes matters of local concern regulation of which unavoidably involve some regulation of interstate commerce.

1. *Cooley:* regulation regarding registration of local pilots. Congress delegated some power to them to do this.
a. The enumerated power granted to Congress to regulate interstate commerce does not per se invalidate a state law on the same subject matter, but Congress may affirm concurrent regulatory power with the state.

b. This signifies the end of the exclusivity doctrine.

c. There is a normative argument in that the state may have best ability to control the subject (i.e., close to the matter, knows how to handle specifics, etc.)

D. Then we get even further, where Congress declares that when state regulation is in the public interest, it survives the challenge notwithstanding the discriminatory effects (Prudential Ins. Co. – state tax on out of state insurance company – would come out differently today.)

II. Analytical Approach

A. Is this a question of safety where the statute is not facially discriminatory? Strong presumption of validity to the statute, but never the less weigh burdens on interstate commerce, validity of safety claim, and actual purpose (Brennan’s Kassel-criteria). DC issue

a. The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation

B. Is there no safety concern or facially discriminatory language? If yes, go to Pike formula (like a rational basis test). DC issue

1. Even handed (free from discrimination)
2. Legitimate state end; (usually deference to state)
   a. Promoting own economic interests not legit.
3. Only incidental effects on interstate commerce, regulations passes muster then
4. Unless, burden on ISC is clearly excessive in relation to putative local benefits.
   a. Note the first three parts really question if the statute discriminates against interstate commerce. So if there is no discrimination, perform the proportionality test

C. If discriminatory on its face or has discriminatory effects, give Strict Scrutiny (Incoming, Outgoing, and Reciprocity commerce)?

1. Compelling objective: Court is going to look at the actual purpose of the government. Means must be necessary to achieve the goal.
   a. Not a compelling objective to isolate your state from common problems
2. Necessary means: no enough that there is a rational relation. No less restrictive means that would accomplish the government’s goal.
   a. Note: discrimination will always count against the statute unless there are no less onerous means (hard to find)
3. If discriminates against civil liberties or livelihood, use the PI clause.

III. Example Cases:

A. Safety Provisions
practice—85-90% of rigs exceeded these limits, deference to state, good to go. No judicial fact finding function.

2. **Southern Pacific:** Court moves away from pure rational basis test of Barnwell, and weighs burdens of AZ law that restricts types of trains used in state. Invalidate law for high burden on ISC, and safety reasons did not really pan out.

3. **Bibb:** IL requires trucks to have certain mudflaps that turn to put huge burden on interstate commerce and no worse safety implications

4. **Kassel:** Iowa banned certain truck-trailers from its roads, so trucks effectively had to drive around Iowa. This was not about safety, actual purpose was something economic.

B. **No facial discrimination or safety issues**

1. **Pike:** AZ required that AZ-grown cantaloupes be packed in AZ-specific containers so their origin would be clear an AZ would improve its image. 
   a. Legit state interest in protecting economic health and use of its name on packaging. Although there is a legit state purpose here, its minimal local benefit is outweighed by the burden imposed on interstate commerce

C. **Facial Discrimination**

1. **Baldwin:** NY statute regarding pricing of milk applies to NY state dealers buying milk from out of state. In famous Cardozo opinion, he says this is discriminatory on its face (about incoming commerce) Why?
   a. Statute places a direct burden on interstate commerce by seeking to eliminate competition between the states. One state in its dealings with another may not place itself in a position of economic isolation—not even the police power can give the authority to do this.
   b. Court looks to discriminatory effects, rather than bad motives, easier to prove.
   c. Gibbons—"if there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints."

2. **Welton:** MO statute requires peddlers to have license unless products grown, produced, or manufactured in MO. Statute is discriminatory because there is a less onerous alternative—they could have required licenses for everyone.

3. **Hunt:** NC statute requiring containers to have no grade other than US grade on them. Ostensible purpose is to eliminate confusion and deception caused by the states all having their own grading system. Discriminatory effect = Washington grading standards better than US standard, which gave them a competitive advantage—this statute strips that away from them and imposes costs for making different crates to send to NC.
   a. There is a less onerous alternative, both grading systems on carton
4. **Edwards:** CA law which made it illegal to bring indigent person into the state with knowledge of his indigence. State says the law was to help health, morals, and finance.
   a. *Kassel* like argument, state cannot not isolate itself from difficulties common to all states by restraining the transportation of persons and property across its borders
5. **Dean Milk:** (economic barrier) WI ordinances to control where milk comes from depending on where pasteurized and where processed. The inspector would not travel beyond certain radius.
   a. Although ordinance itself not discriminatory, it erects economic barriers and there are nondiscriminatory alternatives (people could pay for inspection) so it is a no-go
   b. Dissent: The fact that the statute imposes burden on trade does not mean that it discriminates against interstate commerce. The alternatives here are not necessarily better. State regulation is within state police power.
   a. State may use discriminatory means to serve a legit state police power, i.e protecting fisheries if no less onerous means
7. **Philly Waste case:** NJ law prohibits the importation of wasted from outside NJ. Ostensible purpose of NJ is to extend life of landfills, prevent threat to environment from waste from outside the state. Court strikes law because smelled a rat, this was not about health and safety. But try to avoid determining legislative purpose.
   a. A state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within the state. Also a less onerous alternative—regulate ALL waste, even in-state.
8. **Hughes** (Strict Scrutiny – burden shift): OK statute provides that no person may transport or ship minnows for sale outside the state which were seined or procured within the waters of OK. H, of TX, transported natural minnows from OK dealer.
   a. The statute is discriminatory on its face and even though there may be a legitimate purpose there is a less onerous alternative (treat in-state and out-of-state the same). This is classic statement on strict scrutiny

**IV. PRIVILEGES AND IMMUNITIES** (Art. IV, §2)
   A. **Definition** state may not discriminate against non-residents, designed so citizen A goes to state B and enjoys the same privileges as citizen B
   1. Discrimination must be in regard to civil liberties or ability of folks to earn their livelihood. In reality civil liberties are rarely litigated under the PI clause.
2. only fundamental rights to national unity protected, such as right to be employed, practice one’s profession, and engage in business.
3. command doctrine of equality: order is to bring up the treatment of less favored group to the level of the more favored group.

B. The PI clause and the dormant commerce clause:
   1. Both used to challenged state laws that discriminate against out of staters.
      a. PI can be used only if there is discrimination against out of staters
      b. DCC can be used if there is an undue burden on interstate commerce regardless of whether the law discriminates against out of staters.
   2. Corporations and aliens can sue under the DCC but not PI.
   3. No market participant exception under PI so if state is discriminating for state jobs, not going to work.

C. Test:
   1. is a fundamental right at stake – Brennan dissent, now law, says this does not really matter; (2) state law will be upheld if it is substantially related to a substantial legitimate state interest and no less onerous alternative

D. Cases:
      a. Laid out the some general headings of un-enumerated rights, including: Protection by the government; enjoyment of life and liberty; right to acquire and possess property; pursue happiness and safety, writ of habeas corpus, exemption of higher taxes than other citizens.
   2. Baldwin: instater could get elk hunting license much smaller fee. SC said constitutional, elk hunting is a hobby and nothing to do with earning your livelihood, no fundamental right essential to nationa unity.
      a. Brennan dissent is the law now: Whether the right is fundamental does not matter; rather, what is important is the state’s justification for the discrimination. Use test created by him outlined above.
   3. Toomer: $25 fee v. $2500 fee for licensing fees of shrimp boats.
      a. nonresident boats are not source of any problem (conservation)—use the same size boats, same equipment; differential here is completely unreasonable and clear that state is out to gouge nonresidents; less onerous alternative
         ▪ Where differential reasonable, probably will be okay because states are providing benefit to their residents.
   4. Hicklin: Alaska statute that said you must show preference to residents when employing to decrease unemployment.
      a. The law is invalid under Brennan’s test: (1) problem is that residents are uneducated and that is causing unemployment, not nonresident employment; (2) therefore, no substantial relation.
   5. Piper: must be resident of NH to be admitted to bar.
      a. The law is invalid because there is nothing in precedents suggesting that the practice of law should not be viewed as a “privilege” and it is important to the national economy.
6. **Camden:** Ordinance which required at least 40% of the employees of contractors be Camden residents.
   a. because the problem was middle class flight, nonresident employment caused the problem, and the ordinance was designed to keep people in the city, the law was upheld.

V. **PREEMPTION**
   A. We are back to the context where there is a federal statute at issue, but it is not right on target. If it were the federal statute is supreme (Art. VI - supremacy clause) Issue is whether Congress has taken over the field to negate state statute.
   B. **Rice Criteria:** begin with a presumption in favor of state regulation, then look to grounds for rebuttal. Ask which criteria apply best and why?
      1. pervasive federal scheme; or
      2. dominant federal interest; or
      3. state law stands as obstacle to the accomplishment of congressional purpose i.e. conflicting objectives? (use 2nd to determine the third)
   C. **Example Cases**
      1. **Hines:** 1941 - PA statute required aliens over 17 to register yearly, carry identification. Federal statute only required one-time registration and no requirement that they carry identification.
         a. Pervasiveness: complete scheme of federal regulation, broad and comprehensive.
         b. Dominant federal interest: interest in international affairs and protect US citizens abroad
      2. **Askew:** FL law which imposed strict liability for any damage incurred by the state or private persons as a result of an oil spill. A federal statute imposed strict liability for cleanup costs.
         a. Pervasiveness: Court upheld the law because the federal law only addressed cleanup costs incurred and the state law had to do with damages to the state and was not pervasive.
      3. **Pacific Gas:** Federal scheme to promote construction of nuclear power plants—federal regulation of safety issues. CA statute that no construction on plants until waste issue is addressed.
         a. Can validate laws if created on different grounds. Federal statute was pervasive in the safety field. But courts stretches and says CA law created on economic grounds, therefore CA statute valid.
      4. **Ray:** Federal law designating the design and operating characteristics of oil tankers. WA law adopted with aim of regulating in particular respects the design, size, and movement of oil tankers in Puget Sound.
         a. Although the court found that the two laws were inconsistent and that the safety regulations alone were invalid, it upheld the WA statute because it provided an alternative (tugboat) to the WA requirements

VI. **STATE AS A MARKET PARTICIPANT**
   A. **Definition:** state may favor its own citizens in dealing with a govt-owned business and in receiving benefits from govt programs. So if a state is literally
a participant in the market itself, the commerce clause doesn’t apply and it can discriminate.

B. Controversy
1. **Pro:** recognizes the state as a legitimate participant in the market, and frees up burdens placed on it by commerce clause
2. **Con:** simply a gimmick for avoiding the constraints properly imposed by the commerce clause.

C. Cases:
1. **Hughes:** MD pays a bounty to instate and out of state auto hulk processors, but required out of state folks to provide more title information.
   a. Court introduces market participant exception arguing that the state, as a market participant is not more constrained by the d.c.c. than a private participant.
2. **Reeves:** SD built cement plant in response to shortage and had a statute that gave in-state purchasers preference. When producing more than it needed, sold to out-of-state buyers like R.
   a. Because SD is a market participant, there is no violation of the commerce clause.
   b. **Dissent:** This is economic protectionism. If SD functioned in the market then at the same time it cannot withhold cement for the benefit of its own citizens—it is an either/or situation.

D. Limitations
1. Market participant exception does not extend beyond the transaction to which the state is a party as a market participant.
2. **Wunnicke:** Alaska statute that required purchasers of its timber to have the timber processed in the state before being shipped out of state.
   a. Alaska is a market participant vis-à-vis the sale, but not the processing of timber and is imposing conditions down stream.

VII. INTERGOVERNMENTAL IMMUNITY
A. Two approaches:
1. 10th Am. is not a separate constraint on Congress; it’s just a reminder that Cong can legislate only under Constitutional authority
2. 10th Am protects state sovereignty from federal intrusion. Reserves a “zone of activity” for state control.
   a. Until 1937, court went with this reserved approach
   b. Then 1937 to 1995, the opposite

B. **Gibbons until 1937:** Court limited the scope of Cong power
1. Hammer v. Dagenhart – limit on regulation
2. Butler – limit on regulation of production

C. 1937 – 1995, nothing was declared unconstitutional
1. **National league:** The exception, declared FLSA wage/hour regs unconstitutional as it applies to state employees. Could apply to private citizens through commerce clause, but not the state.
   a. 10th amendment prohibits congress impairing the state integrity and ability to function effectively in the federal system. Impair state
function because so costly, and federal government is stripping state’s discretion to decide how they wished to allocate.

b. Criteria laid out in NL
   - Must regulate the states as states.
   - Must address matters that are indisputable attributes of state sovereignty.
   - State compliance with the federal obligation must directly impair the states’ ability to structure integral operations in areas of traditional government function.
   - Relation of state and federal interests must not be such that the nature of the federal interest justifies state submission.

2. Garcia: (1985) extension of wage/hour regs to municipally owned and operated transit system. Issue: is this a traditional government function?
   a. Overturned National League, because line between traditional government function and not is too hard to draw. Criteria are unworkable and inevitably lead to judicial subjectivity.
   b. But this does not mean there are no limitation upon the federal government, however interests are protected by procedural safeguards inherent in the structure of federal government, not judicially created limitations.
      - i.e. two senators from a state, state control of electoral qualifications, electoral college.
   c. Dissent: 10th Amend reduced to meaningless rhetoric.

3. Printz: (Back to NL) Federal statute that compelled state officers to temporarily execute federal law by performing background checks on purchasers of handguns.
   a. State can not compel a state to perform federal law. Even after Garcia, court recognized limits on Congress’ right to interfere with state legislative process

4. Alden: Probation officers tried to bring suit first in federal court (dismissed) and then in state court for alleged violations of the FLSA. Congress attempts to compel states to be subject to private suits for money damages in court.
   a. The immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself.

**FUNCTION OF THE JUDICIARY – SUBSTANTIVE DUE PROCESS**

Issue: *is a palpable invasion of rights secured by fundamental laws.*

In the beginning (i.e Slaughter-house cases) it looks like the privileges and immunities clause of the 14th amendment would be doing the work.

- **Slaughter-House Cases:** LA legislature had granted monopoly in handling livestock to Crescent City Livestock Co. Several butchers brought action challenging the power of the state to grant such a monopoly arguing that it is not allowed under the privileges and immunities clause of the 14th Amendment.
The privileges and immunities clause of the 14th Amendment speaks only of privileges and immunities of the citizens of the US, not citizens of the states—the privileges and immunities clause does not carry over the rights to the states. Merely declaratory.

The Court said the overriding purpose of the 13th and 14th Amendments was to guarantee the freedom of the slaves.

The Court recognized privileges and immunities belonging to US citizens—claim against government, protection, participation in government, etc.

Although the first attempt at carry-over was with the privileges and immunities clause, due process clause is ultimate vehicle for carry-over. This is because slaughter-house rendered p+i useless.

I. Rise of substantive due process - economic Liberties (until 1937)

A. 3 principles defining this *Lochner* era:
   1. freedom to contract is a basic right, protected under the 14th amendment due process clause
   2. Govt can interfere with freedom of contract only to serve a valid police power purpose. Infuses a lassaiz-fair economic policy into due process to strike over 200 social and economic laws. (prompts FDR court-packing plan)
   3. It’s a judicial role to scrutinize legislation interfering w freedom of contract

B. Anti *Lochner*: look to lochner, adkin’s, Baldwin dissent

C. Ultimate rule: final rule for economic infringements on due process is a rational basis test.

D. Cases: Progression from total *Lochner*, to a rational basis analysis and strict scrutiny for individual rights
   1. *Lochner*: NY labor law that no employee shall be required or permitted to work more than 10 hours/day.
      a. The law is invalid because it interferes with the right of contract between the employer and the employees, which the court says is protected by the 14th Amendment.
      b. Anti lochner: this is an absurd contention because it presupposes equality of bargaining power. Also, there is not a constitutional right to liberty of contract.
      c. (Harlan Dissent) Liberty of contract is subject to state regulations and validity of state statute enjoys presumption of validity—rational basis test. What the law is today!
      d. (Holmes Dissent) The issue is one of policy, not rights, and on policy questions the people are sovereign. There is no reason why the legislature should not employ economic theory on which they have settled.
   2. *Muller*: OR statute that provided that protected the weak female in industry
      a. The law is valid because right to contract can still be restricted.
         - Court talks about some bullshit that the differences between men and women justify the statute
- This is exception to the substantive due process rule

3. **Adkins**: Act of Congress setting minimum wage for women and minors in D.C.
   a. The law is invalid because it forbids the freedom of contract by fixing wages for adult women who are capable of contracting for themselves. Rerun of **Lochner**. Allow maximum hours because that is state police power (why Muller allowed).
   - (Holmes Dissent) He emphasizes many legal restrictions that prevent person from doing things. For example, people cannot make contracts that are against public policy.

4. **Baldwin**: This is another Holmes dissent. He does not want 14th Amend to take away states’ rights.

5. **Nebbia**: NY Milk Control Board to set the retail price of milk.
   a. Laws comply with substantive due process so long as they are not “unreasonable, arbitrary or capricious” AND “the means selected must have a substantial relation to the end” – rationale basis
   b. Much of the language in the opinion suggests **Lochner** court was coming to an end. The election of Roosevelt and the New deal, the depression, and threat of court packing contributed to a shift in philosophy on the court towards greater deference to legislative intervention in economic affairs.

6. **West Coast Hotel**: Hotel challenging a wage/hour reg.
   a. The court upheld the law saying that employees are not in an equal bargaining position, the restriction will help employees as a class, and will hold prevent some of the workers from becoming wards of the state. Overrules **Adkins** – state governments can regulate health safety and morals
   b. Dissent: formalist opinion because says you can’t change what the constitution means due to changing economic times.

7. **US v. Carolene**: Filled Milk Act prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat. Purpose is to prevent fraud, protect health.
   a. Court applies a presumption of constitutionality and minimum rational analysis in the case of economic regulations subjected to due process attack (introduces rational basis).
   b. But most notably, in footnote, anticipates strict scrutiny standard where rights are concerned, rather than policy

8. **Olsen v. Nebraska**: Statute in question fixed the maximum compensation which a private employment agency might collect from an applicant for employment.
   a. Court moves away from liberty to contract, and applies a rational basis test, upholding the law.

9. **Whalen v. Roe**: NY statute that required recording of personal information from folks how purchase drugs with legal and illegal market.
a. No longer deference to the *Lochner* idea of invalidating statutes for unreasonable interference with a right of an individual to his personal liberty.

b. Court validates law individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.
   - Legislation which has some effect on individual liberty may not be held unconstitutional simply because a court finds it unnecessary. Again, rational basis test.
   - **note: this extreme deference to legislature a bit skewed.** While there is deference to legislature on economic issues, court still uses Lochner style arguing to undo social legislation surrounding privacy rights.

II. **INCORPORATION DOCTRINE**

A. **Bit of history:** Originally after the Bill of Rights was ratified, it checked only the exercise of federal power. At the time this was the only threat to individuals. States were limited only by their own constitutional provisions or understanding of natural law.

B. **Now-a-days:** bor is applied to state and local governments through incorporation into the due process clause of the 14th amendment. Starting in late 19th century advocated incorporation. DC protects fundamental rights including those part of the bor that are deemed fundamental.

C. **Issue:** To what extent should the Bill of Rights check the exercise of state power?

D. **Spectrum of theories about interpretation of rights** (how do you argue)
   1. Intentionalists: looks exactly to intent
   2. Value laden theories
   3. Moral theories of law: Natural law is the old fashion expression for a moral law theory.

E. **Types of incorporation**
   1. Some said all are fundamental – total incorporation
      a. more practically the total incorporation won out, one by one SC found nearly all bor incorporated except for: 2nd amendment right to bear arms, 3rd amendment right to not have soldiers quartered in a home (never been litigated, although come on), 5th amendment right to grand jury indictment in criminal cases, 7th amendment right to jury trial in civil cases., 8th amendment right against excess of fines. Rest of 8th has been incorporated but has not ruled on this portion.
   2. Selective incorporation – only some parts are fundamental. In one sense they prevailed. Never were all incorporated, so in a sense they won out.

F. **Cases:**
   1. *Barron:* No incorporation. Action against the Baltimore to recover damages for injuries to Barron’s wharf property arising from the acts of the city.
a. The 5th Amendment taking clause that the government cannot take property without just compensation does not apply to the states as the Constitution only applies to the federal government.

2. *Palko*: Selective incorporation. CT statute permits appeals by state in criminal cases. Appellant argues that this is double jeopardy and this is violation of 14th Amendment (incorporating the 5th Amendment).
   a. Only those rights which are (fundamental) “implicit in the concept of ordered liberty” are carried over by the 14th Amendment (e.g. 1st Amendment rights – READ HOW HE DOES THIS). Immunity from double jeopardy is not carried over.

3. *Adamson*: Appellant argues that 5th Amend that no person shall be compelled to testify against himself is fundamental national privilege or immunity protected against state abridgment.
   a. Apply *Palko* reasoning to say freedom from self-incrimination under the 5th Amendment does not carry over to the 14th Amendment.

4. *Malloy*: Here the court incorporates 5th Amendment freedom from self-incrimination. Today the law reflects nearly complete incorporation. Read to understand how does it incorporate

III. Modern substantive due process and the doctrine of privacy

A. Court has been surprisingly willing in the last 15 years to strike down legislation which it finds to violate important non economic interest. It is essential judicial creation of implied rights (unenumerated rights)
   1. anti: makes some weary in a democracy for the court to say what is a right and what is not, leave it to the legislature, infusion of nat. law illegitimate.
      a. Court interprets laws, not make them
      b. Court makes its own value choices and displace elected government
   2. Pro: the court is a countermajoritarian check, okay with infusing ideas of natural law into the 14th amendment.
      a. Fundamental divide between those arguing that the court has a central role v. no role at all.

B. Incorporation v. Due Process: Note the close tie between substantive due process (and the questions this raises) and the incorporation doctrine?
   1. you get out of the liberty clause of the 14th Amendment what you put into it.
   2. The incorporation issue is about what we put into it.
      a. Literal incorporation plus has room for doctrine of autonomy going beyond what is found in the first 8 amendments.

C. Test: rational basis test used for economic rights, but where a fundamental right is impaired by a statute applied a strict scrutiny test.
   1. 2 tiered approach: no fundamental right – virtually no scrutiny, fundamental right – strict scrutiny, virtually no statute impairing them can pass the test.
      a. Decision of “fundamentalness” can be dispositive in the case.

D. Right to privacy: Court has generally held that rights relating to sex, marriage, child-bearing and child-rearing are fundamental. They fall within the broad category of the “right to privacy”
E. Cases:

1. **Meyer**: NE statute that prohibited teaching in any language other than English in the elementary grades of public or private school.
   a. Court says liberty reaches to “the right of the individual…to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children,” etc.
   b. Decided in 1923, extending the liberties and restricting regulations

2. **Pierce**: strengthened this doctrine by striking down OR statute that required parents to send their children to public school.
   a. These 2 cases extended the concept of liberty beyond economic due process to the area of personal and family autonomy, laying the foundation for the modern right of privacy decisions
   b. (Dissent) Holmes and Sullivan say this is a policy question best reserved to the legislature.

3. **Poe**: CT statute that proscribed the use of contraceptives. The case was dismissed for lack of standing.
   a. (Harlan Dissent) Developed the theme of “liberty” in the 14th Amendment as “including a freedom from all substantial arbitrary impositions and purposeless restraints.

4. **Griswold**: Again, the CT statute that prohibited the use of contraceptives. This time the case was heard.
   a. Douglass introduces concept of *penumbral rights*.
      - Various amendments create a “zone of privacy” including the 1,3,4, 5, 9, and 14th Amend. that is protected from governmental intrusion.
      - 1st: freedom to associate and privacy in one’s association
      - 3rd: not having to quarter a soldier in your house during peace, privacy in the house
      - 4th: right of folks to be secure in the persons and have no unreasonable searches creates privacy of your body
      - 5th: no self-incrimination allows a person to create a zone of privacy that the government can’t touch
      - 14th: liberty guaranty, privacy in lifestyle
      - The freaky business going in a husband and wife’s bed is within this zone of privacy.

5. **Roe v. Wade**: TX made it a crime to “procure an abortion” except upon “medical advice for the purpose of saving the life of the mother.”
   a. right to privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.
      - Blackmun relies on *Griswold, Pierce, Myer*, but wishy-washy
   b. Strict scrutiny application:
      - During the first trimester, the state has no compelling reason to restrict abortion.
      - Second trimester, the state has compelling interest in preserving and protecting the health of the pregnant woman—can regulate
so long as it relates to preservation and protection of maternal health.

- Third trimester, state’s interest in protecting the potentiality of human life becomes compelling and the state can prohibit abortion except where necessary to preserve the life of the mother.

c. (Dissents) Thought this was an example of judicial legislation.
d. No real improvement in doctrinal terms outside of an application of strict scrutiny test/privacy issue, source of the right still in the dark – language about 14th Amend. wishy-washy

6. **Casey:** Upheld Roe – states cannot prohibit abortion prior to viability. But changed reasoning, regulation should be allowed unless it poses an undue burden on abortion, no more strict scrutiny, changes to a rationale basis. (implications of this discussed in Scalia dissent in **Lawrence**). Affirms viability line but overrules trimester framework.
   a. Allows for medical advances.
   b. O’Connor could have used strict scrutiny and made the abortion a more highly protected. Roe uses ss for trimester, O’Connor now uses rb to validate viability issues (should have used ss for viability, would have made is stronger)

7. **Bowers:** GA law criminalized sodomy. H was charged with committing the offense in his own bedroom with another male. Challenged the validity of the law as applied to homosexual sex.
   a. There is no fundamental right to engage in homosexual sex.
   b. Doctrine: no connection between “family, marriage, or procreation on the one hand and homosexual activity on the other…”

   - History: long national history and tradition of suppression of homosexual behavior. This right is not “deeply rooted in history and tradition.” *Moore*
   - Prudential Concerns: prudence counseled caution in expanding the categories of fundamental rights and without more support in history and tradition the claimed right is better left in a minimally protected category.
   - *Since this was found not to be a fundamental right, rational basis test.*
   - (Blackmun Dissent) Highlights the specificity problem. When you frame the issue with such specificity (whether homosexual sex is a fundamental right), you reduce it to an absurdity. The guarantee of privacy should be applied at a more general level.

8. **Lawrence:** same issue as **Bowers**. Takes on Blackmun’s broad approach of privacy. On the downside they test the old rationale basis test.
   a. Kennedy argues that historically not prohibited, other countries don’t prohibit, and emerging recognition of liberty interest in sex. Use the rational relation test and says no legit state purpose
   - Issue with this though, is that anyone (namely Scalia) can come up with a rational state interest… not a strong argument.
b. Maybe Lawrence and Casey are about the supreme court not wanting to call the right to abortion or homosexual activity a fundamental right and apply ss. So they apply the weaker rb test so they don’t have to take a strong stance on these issues.

FUNCTION OF THE JUDICIARY – SLAVERY

Prior to the 13th Amendment, slavery was constitutional. Prior to the 14th amendment, there was not constitutional assurance of equal protection and no limit on race discrimination.

Several provisions in the constitution that amounted to a legalization of slavery:
- **3/5 Clause:** (Art. 1, §2, Para 4) Interest primarily from the standpoint of representation. In terms of representation in Congress, southern states were happy to have slaves regarded as persons to gain more seats. Every 5 slaves treated as 3. But normally treated as chattel.
- **Prohibition Clause:** (Art 1. §9) Prior to 1808, no prohibition of the importation of slaves from abroad. Language set down by the framers
- **Fugitive slave provision:** (Art. 4, § 2, para 3) Fugitive slaves who escaped in one state should be delivered to the owner of that slave in another case (on the claim of the slave holder) Most notorious of the provisions. Topic of the *Prigg* case.
- **Art 1, §9, para. 4:** This hints at a limit on the potential taxation of slaves and is to be read in tandem with Art 1 §2, para 3.

How does it fit into our discussions? Every discussion of the relationship between federal and state governments was directly or indirectly about the slavery question.
- Court consistently enforced the institution by ruling in favor of slave owners and against slaves.
- At no point prior to the civil war did the SC significantly limit slaver or even raise a question about it’s constitutionality.

Cases
*Prigg*: Slave catcher entered PA and took back a slave without permission of a judicial official as stated in PA statute (which did not allow violent means to be used). Court overruled statute saying it was against a federal law of 1793.

**Rule:** Fugitive slave matters were within the federal government’s exclusive jurisdiction.

Unpopular in North b/c it ruled against its anti-slavery law, and unpopular in South b/c it made slavery a federal interest.

*Dred Scott*: Dred Scott was a slave in MO who traveled with owner to IL (free state). After owner’s death, estate was assumed by John Sanford, citizen of NY—Dred Scott brought action claiming in federal court on diversity that earlier residence in free state liberated him from slavery.
- **issue:** the question of what happens when a slave enters another state that does not recognize slavery: Is he a permanent slave? Once free, always free? Revert back?
- Court (Taney) held that:
o Federal court has no jurisdiction over Scott b/c he is not a person by meaning of the Constitution – made up out of whole cloth
  ▪ some bullshit argument that framers considered them not be citizens but an inferior class of beings with not rights and privileges.
  ▪ Does not follow that if you have rights as citizen of state, you have rights as citizen of the union.
  ▪ If “all men are created equal” language applied to slaves, then provisions above flatly inconsistent with that. Did not mean to include slaves in that language.
  o He had never been free;
  o Congress cannot forbid or abolish slavery in its territories.
- Dissent: (Curtis) blacks were free at the founding of the Constitution because it included all free persons and there were free blacks at the founding of the Constitution.
  o Curtis argues with reductio ad absurdum: If Taney followed his rule of must citizenship, then no women could be citizens because they do not have all rights.
  o Taney’s reference to the slave clauses makes us believe he is talking of all blacks. Case of black as citizens in 1789

Frederick Douglas Speech
- Intentionalism v. Textualism – Douglass wants to make least of intentionalism and make most of textualism
- Insisted upon textualism as the approach and then he exploits it:
  o 3/5 deprives the South of 2/5 of the vote. Hence, it is antislavery.
  o End of slavery clause basically said that the price you have to pay is to end slavery by the 1808. (Criticize by saying it only said “importation” from Africa).
  o Fugitive Slave Clause: “slaves” not meant but indentured apprentices who had the right to enter into a contract.

SEPARATION OF POWERS

I. POLITICAL QUESTION
A. Definition: Court will not decide cases that involve a political question because (1) separation of powers – matters committed by the constitution to another branch should not be heard before the judiciary and (2) prudential concerns that some cases is it simply unwise to hear even though constitutional.
  1. on one reading the separation of powers doctrine is a label of checks and balances and the political doctrine provides exception
  2. if the separation of powers is underscoring the separateness of the branches, then the political doctrine promotes the separation of powers doctrine.
  3. Pro: Might this intervention in political matters undermine the authority of the court. maybe back in Marbury v. Madison time, but not now.
  4. Con: too vague, no check on exec and legis.
B. **Test:** Factors identifying political question follow. If any one of the factors is present in a case, it is a nonjusticiable political question.

1. **Textually demonstrable commitment** of the issue to a coordinate political department.
2. **Lack of standards:** Lack of judicially discoverable and manageable standards for resolving the issue.
3. **Prudential considerations:**
   a. Impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.
   b. Impossibility of a court’s undertaking independent resolution without expressing lack of the respect due to coordinate branches of the government.
   c. Unusual need for unquestioning adherence to a political decision already made.
   d. Potentiality of embarrassment from multifarious pronouncements by various departments on one question.

C. **Cases:**

1. **Luther:** (1841) RH state government coup, conflict of two constitutions. Political question, because they can’t declare gov’t legit, no standards, create

2. **Baker v. Carr:** TN legislature did not reapportion itself for 60 years. Plaintiffs argued that this was a violation of the equal protection clause of the 14th Amendment.
   a. The question of reapportionment is not a political question and was really an equal protection clause argument.
   b. Did not satisfy any of the factors above and is justiciable.
   c. Seems to be in contrast with Luther because this is a legislature question, not going to fix itself, needs judicial intervention. Maybe today, Luther would be decided differently

3. **Goldwater:** Senator Goldwater challenged the validity of President Carter’s unilateral abrogation of a defense treaty with Taiwan.
   a. 4-justice plurality thought the case was a political question because of the desirability of speaking with one voice on foreign affairs.
   b. (Powell Concurrence) He agrees that the claim should be dismissed but not because of political question. He says the issue is not ripe because Congress has not yet acted
   c. (Rehnquist Concurrence) This is a political question because the Constitution is silent on abrogation of treaties and nothing in constitution states standard to review.
   d. (Brennan Dissent) President alone has the power of recognition. If recognizes the People’s Republic of China, the abrogation of the treaty must follow.

4. **Powell:** Powell was elected but the House refused to seat Powell because he had allegedly embezzled House funds and lied to the House (exclusion as contrasted with expulsion). Powell argues that he could only be excluded if he did not meet the reqts of age, citizenship, and residence in Art. I §2.
a. **Textually demonstrable commitment** to Congress to judge based on the 3 standards and if not met to exclude (limited sole grant). But where Congress excludes P even though he meets the qualifications, this falls outside the power of Congress and is justiciable.

b. Court read the power to exclude narrowly to preserve democratic principles—the people elected Powell.

5. *Nixon*: Nixon was chief judge impeached, removed from office. Senate rule allowed Senate committee to hear evidence, then that report is given to full Senate. N says this doesn’t comply with Article I, §3 which requires the Senate to “try all impeachments.”

   a. **Textual commitment** in this case: the full clause states that “the Senate shall have sole Power to try all Impeachments.” Court also pointed to lack of finality problem.

6. *Mora*: Soldier claimed that his orders to serve in Vietnam were illegal because the war was unconstitutional. No declaration of war from Congress, but president continued to send troops. Constitutionality of war is a political question and is nonjusticiable.

II. **EXECUTIVE POWER** – foreign affairs/war power

A. Problem: very few powers expressly granted by the constitution to the president. Unlike Congress, whose powers are expressly delineated in Art. 1§8, many of president’s powers are implied. (generally through Art. 1 §1).

B. Approaches:

1. No inherent presidential power; it all comes from constitutional or statutory authority (*Youngstown majority*)

   a. *Youngstown steel*: During Korean War, steel workers and companies could not reach an agreement and workers planned to strike. Truman ordered the Secretary of Commerce to seize the steel mills and keep them running by agreeing to the union’s terms. Labor dispute or war time issue?

      ▪ Court said seizure is unconstitutional because act did not stem from act of congress or constitution itself. And congress had passed an act and chosen to leave out the power of the president to seize companies.

      ▪ The court rejected the notion that president has war power to do this. And if he had it, theater of war is not large enough and no declaration of war.

2. **Inherent authority exists unless the president interferes w another branch’s power**

3. President may exercise powers not mentioned in the Constitution as long as he doesn’t violate a law (*Youngstown Jackson concurrence*)

   a. 3 zones of presidential authority:

      ▪ *presidential power is at its maximum when president acts with express or implied authorization of Congress.*

      ▪ *Least power when presidential action is incompatible with expressed or implied will of Congress.*
• Zone of twilight—when absence of congressional grant or denial of authority.

4. **Implied acquiescence.** Congress may sometimes be found to have impliedly acquiesced in president’s exercise of power in a certain area. Not dispositive, but a factor in the analysis of close cases.
   a. *Dames & Moore*: In settlement of Iran hostage crisis, president requires all creditors with claims against Iran to be heard before an international tribunal.
      ▪ Court finds congress implicitly authorized the practice by a long history approving the use of executive agreements between a president and a foreign power to settle a dispute
      ▪ Use this narrowly!
      ▪ Difference between this and *Steel Seizure Cases* is that here we have statutory authorization from prior acquiescence.

5. **Inherent powers may not be restricted by Congress and may act unless the Constitution is violated.** Art. II, §2 and the need to present a unified fact to the world dictate the presidents role in implementing nation’s foreign policies
   a. *Curtiss-Wright*: Joint resolution of Congress authorized president to prohibit sale of arms. President prohibited sale to Bolivia. CW challenges prohibition as an unconstitutionally broad delegation of legislative power to the president.
      ▪ Court held prohibition constitutional and underscored the plenary and exclusive power the president in the area of international relations
      ▪ Statement that the federal government can exercise only the enumerated powers and necessary implied powers is categorically true only with respect to internal affairs. In the maintenance of international relations, congressional legislation must often accord to the president a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. This follows long legislative history.
      ▪ Difference between internal and external powers stems from the fact that internal powers were delegated from pre-constitutional states, but external powers were not.

III. **DELEGATION PROBLEM**
   A. **Non-delegation doctrine:** Congress may delegate authority sufficient to effect its purpose. Congress can: (1) authorize the courts, the president, or an administrative agency to make rules in areas specified by Congress and subject to congressionally specified guidelines; or (2) condition legislation upon a finding of fact by president or agency.
      1. Congress must declare a policy and define the circumstances in which its command is to be effective.
   B. **Purpose:** to ensure accountability—unelected administrators are not directly accountable to the electorate.
1. But, this did not work—court has consistently held delegations to be constitutional. But in no case has the court rejected the nondelegation doctrine.

C. Cases:
   1. Schechter: NIRA authorized president to approve codes of fair competition (minimum wage/hour). Secretary of Agr. was to determine the extent to which the codes advanced congressional objectives.
      a. Unconstitutional because unfettered discretion given to the executive power. Congress has not really placed any limits on president.
   2. Yakus: The Emergency Price Control Act set out a temporary scheme for regulations fixing prices. Standards to guide were “fair and equitable and will effectuate the purposes of the act.” President is directed to stabilize prices, wages, and salaries so far as practicable.
      a. Congress set clear purposes and standards.
   3. Mistretta: shows demise of nondelegation doctrine bc court approved a broad delegation of power to the US Sentencing Commission to promulgate sentencing guidelines. Commission is composed of fed judges.
      a. Dissent: judges are making policy assessments – which is congress’s job

IV. LEGISLATIVE VETO
   A. With the demise of the non delegation doctrine, how will issues of power of administrative agencies be controlled? Congress created a legislative veto in the 1930s to put a check on administrative agencies’ actions.
   B. Definition: Congress, acting pursuant to statutory authority, invalidates an agency’s action by a resolution that is not presented to the president.
   C. Problem: For congress to adopt a law there must always be passage by both houses (bicameralism) and presented to the president to sign or veto (presentment). With LV Congress was essentially passing new legislation via resolution, without presentment and sometimes bicameralism required by the constitution.
      1. Always unconstitutional. If congress wants to adopt a law has to pass both houses and have presentment. A veto is essentially a legislative act. Anything less is legislative veto and those are unconstitutional.
      2. Paulson argument: this is not a normal article 1 bill, they have already passed the law through article 1 requirements when they delegated the power, no need to do this again when checking it.
      3. Hobson’s choice: if you follow the court, no delegation at all or you delegate and have no overview.
   D. Chadha: Provision of congressional act authorizing one house of Congress, by resolution, to invalidate the decision of the executive branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the US. AG found that Chadha met the statutory requirements to be permitted to stay but House reversed.
      1. formalist opinion that amounts veto to a legislative act. Can’t pass legislative act without bicameralism and presentment.
a. Formalistic because it does not address the reality of the situation, that congress should have some power to check administrative agencies.

2. (White Dissent) He took a functionalist approach. It is anomalous to permit Congress to delegate power to administrative agencies but not allow it to check the exercise of administrative discretion by legislative veto.

V. REMOVAL AND INDEPENDENT COUNSEL QUESTION

A. Appointment power: according to Art. II§2, president has power to appoint officers of the US, subject to Senate confirmation. Congress can vest power of appointment of inferior officers in president, courts, or heads of departments. Nothing in Constitutional text about removal. (congress can not itself nominate folks)

1. Principal officers are those who exercise significant authority pursuant to the laws of the US—must be appointed by president with 2/3 Senate approval.

2. Rule: Only officers appointed in the constitutionally prescribed manner could undertake executive or quasi-judicial tasks.
   a. Buckley: Under FEC Act a majority of FEC members was appointed by president pro tempore of the Senate and Speaker of the House. FEC was given direct and wide-ranging enforcement power such as instituting civil actions against violations of the act as well as extensive rule-making and adjudicative powers.
      ▪ Such powers could be exercise only by officers of the US appointed in accordance with the appointments clause and therefore cannot be exercised by the FEC.

B. Removal: constitution silent on removal power, so left to the discretion of the supreme court.

1. quasi legislative officers: where a federal appointee holds a quasi-judicial or legislative role, Congress may limit or block the president’s right of removal.
   a. Humphreys Executor: Congress had limited the president’s power to remove members of the FTC, but president could remove on certain conditions.
      ▪ The court distinguished this case from Myers in that the officers here in question perform quasi-legislative and quasi-judicial functions rather than executory functions.
      ▪ Independence from legislature needed for FTC to be effective.

2. purely executive officers: president has the exclusive power to remove executive officers whom he has appointed. (but see Morrison)
   a. Myers: statute providing that the president can’t remove the postmaster unconstitutional because he is performing an executive duty.
   b. Weiner: War crimes commission. It is in the executive branch, but performs a quasi-judicial function. So can restrict president removal power.
- Congress needs to insulate folks from political removals.
  c. *Morrison*: Federal law authorized the US Court of Appeals to appoint an independent prosecutor to investigate and prosecute alleged crimes (after attorney general investigation). The independent counsel could not be removed by the president for any reason but could be removed by the attorney general for good cause.
  - **New rule**: congress may impede president removal power of inferior executive officers so long as removal does not impeded the president’s ability to perform is constitutional duty.
  - **Rationale**: need separation of removal power because the counsel could be investigating the president, and given executive branch removal power through the attorney general.
    o Removal of independent counsel not central to the president’s exercise of power.
  - *(Scalia Dissent)* argues that there is a violation of the separation of powers when *any* executive power is transferred to another branch. At the time, this formalistic opinion was widely criticized, but now this appears to be the realistic opinion (after Monica and Bill).

**VI. FEDERAL ELECTION PROCEDURES**
A. *Bush v. Gore*:
   1. Equal protection: can’t recount votes because way set out violates equal protection. Because not uniform and only certain counties were recounted, folks votes counted differently.
   2. Paulson hates this case. There is no federal question here. Federal elections should be left to states. clear language in Article II which leaves the resolution of outstanding disputes over electors to the Congress
      a. If we are concerned with equal protection remand to states and let them set up a uniform standard

**VII. THE EXECUTIVE/CONGRESS ON THE WAR POWER**
A. President has power to move in an emergency and then turn to congress after the fact to seek authorization
B. **War Powers Resolution of 1973**
   1. Express reassertion of Congressional power to declare war.
   2. Constraints on president on introduction of troops: (1) when Congress declares war; (2) specific statutory authorization; (3) national emergency.
   3. Imposes many other conditions. There is a delegation of congressional power to the president but it is limited and defined. Passed to balance long standing presidential assumption of power in the area.
   4. Has not been followed by the executive branch at all—Bush’s statement on the Iraq Resolution demonstrated this.
C. **Prize cases**: Did president have power to impose a blockade without congressional authorization during the civil war.
1. did not want to declare war because did not want to vindicate the status of the confederacy (want to call them belligerents, not a legit nation state)
2. so yes, president can act without declaration of war.

D. *Ex parte Miligan*: American charged with aiding and abetting the enemy. But he was arrested during normal activity while in the US, and a US citizen. Laws of war don’t apply here because no direct hostilities in Indiana. Entitled to a jury trial.
   1. no basis for military trial of a civilian who is a US citizen taken out of his Indiana home. No arrested on the battle field.
   2. Doctrine of necessity: measures taken in a time of necessity (like arresting folks) must be in proportion to the emergency at hand.
      a. Same principle in Youngstown Steel.

E. *Ex Parte Quirin*: Nazi saboteur case. Petitioners are enemy belligerents even the US citizen, and president has the power under Article 15 of the Articles of War to convene a military tribunal for the prosecution of enemy aliens in a time war with a formal declaration of war by Congress.
   1. Powers are not restricted by constitutional provisions in the 5th and 6th Amendments and in Article III, § which apply to civilians but not to enemy aliens in an alternative forum. Denied 5th and 6th amendment safe guards. This is okay because Art. 15 of articlest of war you can convene a military tribunal for the prosecution of enemy aliens (need a formal declaration by congress)

F. *Hamdi*: congressional authorization of Hamdi’s retention
   1. everyone has a right to a writ of ha