1. Judicial Powers

- Article 1, Section 1: Legislative powers vested in House & Senate
- Article 2, Section 1: Executive Powers vested in President
- Article 3, Section 1: Judicial power vested in Supreme Court and inferior courts established by Congress; in 1789, only 1 federal court (Supreme) existed
- First 3 articles follow a pattern: constitute the republic by conferring powers.
- Article 1, Section 8: Confers specific powers on Congress (18 paragraphs of implied and specific conferrals—paragraph 9 gives power to constitute tribunals)
- Article 2 gives president and secretary of defense the power to form military tribunals completely within executive branch. (Congress forms military courts)
- In 1789, any power not expressly numerated is excluded → power of the people; means for developing a system of limited government.
- 1st Amendment: Congress shall not establish a religion
- Two interpretations:
  1. This is a duty; or
  2. This is an express denial of power to establish religion.
- Is express denial of power more of a disability?
- Is the “necessary” clause really necessary?
- Madison was opposed to the clause and was concerned that an open interpretation would give congress carte blanche to do anything. If the bank was a means, it should have been an expressly conferred power.
- Hamilton interpreted the “necessary” clause to allow a national bank as a means to realization of expressly conferred powers. (Regulation of the value of money)
- Means-End matrix
- Madison thought there was a systematic ambiguity of means and ends and that something could be both a means and an end.

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<th>Means</th>
<th>End</th>
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<tr>
<td>1st Matrix</td>
<td>National Bank</td>
<td>Accumulation of money</td>
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<tr>
<td>2nd Matrix</td>
<td>Federal monopoly on commercial banking.</td>
<td>National Bank</td>
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- Madison’s Slippery Slope argument: Allowing incorporation of a bank will allow all sorts of intrusions.
- Hamilton’s attack of Madison’s Slippery Slope argument:
  1. A national bank will only result in a monopoly on commercial banking if it is desired.
  2. If something is undesirable, people will not allow it to occur. (Ex: Opponents of the Equal Rights Amendment said that it would result in unisex toilets as a scare tactic)
  3. A burden of proof is needed to show that the slippery slope argument is true.
  4. The true meaning of sovereign power is being able to employ means that are naturally related to the ends.
• **McCulloch**: Study of Congressional as opposed to Judicial power.
• 1816: 2nd U.S. Bank established with intent to control expansion of credit (role of Federal Reserve today); important to control credit during time of boom, but bank promoted the boom rather than controlling credit.
• McCulloch was a crook who looted the bank w/ unsecured loans and overdrafts; economic boom ended in 1818 and the bank became a scapegoat.
• MD legislature responds with a $15,000 tax on banks; McCulloch refused to pay.
• McCulloch draws on Judicial Act of 1789; argues that MD has no power to impose taxes on a federal instrumentality.
• MD argues that it is unconstitutional for congress to even incorporate a U.S. Bank in the first place.
• 2 Issues
  1. Is the U.S. Bank Constitutional?
  2. Can MD impose a state tax on the local branch of the U.S. Bank?

  • McCulloch could argue that the power contested by the state of MD was in the original constitution; Conversely, MD could argue that what was valid in 1791 is no longer valid; also the framers had rejected it originally and it may not have been constitutional.
  • The constitution was unconstitutional from the Articles of Confederation Standpoint
  • Marshall: Strong presumption in favor of past practice; historical argument that powers are delegated by the people (not the state) and the state serves as merely an administrative device.
  • Supremacy Clause (Article 6, paragraph 2): The Constitution is the law of the land.
  • Interpretation of “necessary”: Only what is absolutely necessary? Anything that is convenient? Any means sufficient to produce the desired end?
  • Enforcement measures can be drawn from necessary/proper clause: post offices, roads, punishment of counterfeitors, piracy.
  • If MD levied a reasonable property tax on all banks in the state, this would pass constitutional muster for 2 reasons:
    1. This tax is not discriminatory, b/c all property of its kind is taxed in the same way. All MD banks enjoy the same “fairness.”
    2. The doctrine of virtual representation applies; U.S. Bank “rides piggyback” on MD charter banks.
  • Why is **McCulloch** a judicial power case?
    1. Broad interpretation of constitutional power.
    2. Veritable treatise on the concept of the Constitution.
    3. Even though **McCulloch** deals with Congressional power, it is an example of the Supreme Court exercising its reviewing power.

*Marbury v. Madison* (1803)
• Federalists lose 1800 election, try to fill appointments during lame duck period
• John Marshall appointed as Chief Justice after John Jay declined nomination
• Outgoing president John Adams appoints nominates of peace; when the presidential term ends at midnight, not all paperwork has been processed.
Jefferson becomes president at midnight, orders SOS Madison to not deliver forgotten nominations; Marbury sues Madison for not delivering the justice of peace nomination made by Adams.

Marbury asks Marshall for mandamus (directive from bench)

Gov’t argues that a deliberate transmission of the appointment is required (not a good argument).

What is the role of the presidential seal? Formality, but still provides evidence/proof of what has transpired.

Difference between executive appointee and judge: executive appointees can be dismissed by president b/c they are an extension of the president; pres. cannot dispose of judges b/c judiciary is independent.

Substantive Issue: Does Marbury have the right to be appointed?

Legal Issue: What are the powers of the Supreme Court?

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<tr>
<td>Gov’t lawyers</td>
<td>Move to dismiss on grounds of appellate jurisdiction only for supreme court.</td>
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<tr>
<td>Marbury’s lawyers</td>
<td>Original jurisdiction</td>
<td>Original jurisdiction</td>
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<tr>
<td>Marshall</td>
<td>Original jurisdiction</td>
<td>Appellate jurisdiction</td>
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Marbury uses original jurisdiction as opposed to appellate; Marbury’s lawyer confines appellate jurisdiction.

What was the intent of listing specific categories for original jurisdiction?

1st time Congressional legislation is declared unconstitutional; why does Marshall do this? To support federalist position by giving a substantive victory to Marbury.

High court power was started by Marbury holding.

Marbury’s hollow victory: As a federalist figure, his position was vindicated; his right was recognized, but did not get commission.

*Reductio ad absurdum* arguments (to hold otherwise would be absurd)

1. To prove P: The Constitution controls any legislative act repugnant to it.
2. Assume the opposite: ~P, namely it is not the case that the constitution controls any act repugnant to it.
3. An absurdity: The Constitution is on a level with ordinary legislation and is alterable when the legislature shall please to alter it.
4. Therefore P is the case.

Early 19th Century: departure from status quo; constitutional law not yet defined; less perception that the Constitution was “hard law”

Reasons for the rule in Marbury: Marshall wants to establish that the constitution is different from and superior to legislation such that when there’s a conflict between them, the constitution prevails; if the constitution were simply another piece of legislation, then any new legislation would automatically override it.

Why do courts have the power to decide the power of the constitution? Declaring a law void is not a usurpation of legislative power because leg. power is sovereign.

Gibson’s issues in Marbury:
1. Constitutional Law versus Legislative Law
2. Court’s power
3. Legislature can police itself.
• **4th Part of Marbury**
  1. Art.3, Sect. 2, ¶1: Argument for Constitutional review supported by the “arising under” clause.
  2. Art.1, Sect. 9., ¶5: No tax or duty shall be laid on articles exported from any state; direct conflict between legislation/constitution.
  3. Bills of attainder: legislation sanctioning individuals/ex post facto laws; courts should be able to review these departures from the constitutional norm.

• **2nd Part of Marbury**
  - Mandamus power; hard to read
  - Conferral of original jurisdiction; enumerated powers
  - Exceptions clause ordinarily tied to appellate jurisdiction
  - Marshall gets into trouble reading statutorily conferred grant of mandamus power as original jurisdiction.

### German vs. American Constitution

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<tr>
<td>Constitutional Review</td>
<td>Centralized-Constitutional Court in Carlsberg hears constitutional matters</td>
<td>Decentralized-many courts decide constitutional matters</td>
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</table>
                          | 2. Constitutional Court decides on matter.  
                          | 3. Court commands parliament to rewrite laws to be in agreement with the constitution. | -U.S. Courts do not have the power to hold laws unconstitutional  
                          |                                                              | -Art.3, Sect. 2, ¶1 limits courts to the case or controversy being heard.  
                          |                                                              | -Stare decisis (common law) follows earlier court decisions. |
| Enabling clause        | Art 93, Sect. 1, ¶2: allows for abstract judicial review in Germany; actual cases are not needed. | None |
| Constitutional Court Makeup | -16 justices  
                          | -Sit in two chambers (senates)  
                          | -One chamber selected by each house  
                          | -Justices serve 12 year terms | (No Constitutional Court) |

- German Const. Court settles disputes between organs of federal government; recent dispute whether it was constitutional to send troops to Bosnia (out of NATO territory); Const Court decided it was OK; U.S. Supreme Court could not decide on this issue b/c it’s a political question.

- **Southwest Case**
  - 3 former states wanted to consolidate into 1 state, required writing provisions into the constitution
  - Article 118: Modifies Article 29 for Southwest area, authorizing citizens to undertake a reorganization program.
  - 3 Southwest states could not agree on anything, had to await a federal reorganization plan.
  - 1st reorganization statute: Extended terms of state legislators
  - 2nd reorganization statute: Established procedures for reorganization; Article 79(3) prevents Nazism from reoccurring.
  - Reorganization statutes undermined voice of people in Baden; sovereignty of states.
  - Elimination of state legislature altogether?
• No power to tamper with state procedure/sovereignty, but constitution has provided for reorganization.
• Extending terms of state legislatures is unconstitutional because it interferes with state sovereignty → Null and Void

Precedents for Judicial Review
Constitutional Review of legislation
• Not many precedents for the Marbury review power (more philosophical than legal)
• In England there was parliamentary supremacy; no judicial review existed.
• Federalist Paper #78 has 2 premises
  1. Construction is an expression of the people’s will
  2. If legislature/congress depart from the people’s will, the judiciary should correct the mistake.
Problem: Justification is fine for the first generation because its will is expressed in the constitution, but what about the will of future generations; question of legitimacy of constitutional review power.

Supreme Court Review of State Court Decisions
Martin: litigation for 100 years over land in Virginia (Supp #5)
1783: End of Revolutionary War → restoration of property seized from Britain
1789: VA grants land to David Hunter from Lord Fairfax’s estate.
1789: Judiciary Act lists powers of Supreme Court
1794: Litigation over land in favor of Martin/Jay Treaty confers title.
1810: Hunter appeals to VA Court of Appeals and wins judgment in his favor, reversing 1794 decision
1813: Philip Martin (Martin’s heir) brings action in U.S. Supreme Court, reversing VA Court of Appeals. High Court issues an order, commanding VA Court to overturn their decision. VA Court refuses to comply on grounds that Section 25 of the Judiciary Act is unconstitutional.
1816: Martin II
  • VA Court of Appeals proposal could be destructive/allows emancipation
  • Need for uniformity among states
  • John Calhoun resigned as vice president, b/c he wanted a confederacy
  • Justice Story’s strategy is to offer a panoply of federal powers over states to establish a presumption of federal power and show absurdity of what VA Court is attempting.
  • Federal appellate power is necessary to prevent deprivation of rights.
Martin power is more important than Marbury power

Does Judicial Review Power Imply Supremacy?
Cooper v. Aaron (1958) p.12
• Issue of judicial exclusivity: Do the courts have exclusive power to determine what the constitution says?
• Jefferson’s view: Each branch of government has the power within its own sphere to interpret the constitution.
• Arkansas position: People of Arkansas will follow state legislature repugnant to Brown v. Board of Education.
• Cooper decision to uphold federal law over state law is easy, but from 1955-early 1960’s, southern states enacted legislation to interfere with federal laws.
• Federal law prevails when state laws conflict with federal laws, nothing in Cooper is helpful in making sense of the conflict.

The Question of Congressional Control over appellate jurisdiction of the Supreme Court:
EXCEPTIONS CLAUSE CASES

Ex Parte McCardle (1868)
1. 1789: Judiciary Act: State courts authorized to issue habeus corpus
2. 2/5/1867: Habeus Corpus Act authorizes federal courts to grant habeus corpus to anybody that has been illegally detained (former slaves; McCardle was a journalist in Mississippi)
3. 3/2/1867: Military Reconstruction Act
4. 11/1867: McCardle writes slanderous article and gets detained
5. 11/11/1867: McCardle files habeus corpus petition, using Article 3, Section 2, ¶3 right to jury trial with jury of peers
6. 2/17/1868: Supreme Court denies govt’s motion to dismiss
7. 3/12/1868: Repealer Act, repealing Habeus Corpus Act
8. 3/25/1868: Pres. Andrew Johnson vetoes Repealer Act
9. 3/27/1868: Veto overridden in Congress
10. 4/12/1868: Supreme Court upholds, using rule that Congress can make exceptions to appellate jurisdiction of Supreme Court even though Judiciary Act allows writs of habeus corpus.
• McCardle does not put exceptions clause power to the test because the rule does not correspond to the holding.

United States v. Klein (1871) p.31
• Wilson was a former confederate sympathizer who had his land seized
• Pardon allowed Wilson to retain land
• Klein was administrator of Wilson’s estate, prevailed in court of claims
• Congress passed a statute voiding the pardon
• Supreme Court denies motion to remand, holding the statute is unconstitutional
• Blurry line between judicial/legislative branches-legislative interference w/ judicial
• Case deals more w/ separation of powers than w/ Article 3

Robertson v. Seattle Audobon Society p.34
• Audobon argued that forestry would kill spotted owls
• Forest service argued that protecting species would devastate business
• Congress passed law changing forest service’s requirements
• Less Congressional interference than in Klein
• Property rights have supremacy over administrative regulations

Naked Constitutional Power: There must be some restraints on the exceptions clause.
1. No reason not to believe that Congress has carte blanche in terms of exceptions clause
2. From the standpoint of good constitutional policy, one will want to insist upon constraints on the exceptions clause because if every road allowing judicial review is sealed off, then U.S. citizens are being denied their constitutional rights.
Congressional Power to Expand Constitutional Rights

Katzenbach v. Morgan (1966) p.17

Background

1. Appropriate for court in Cooper to give voice to a claim of judicial supremacy in the context at hand.
2. Dictum in Cooper on judicial exclusivity/supremacy has been read broadly.
3. Problematic for 2 reasons
   A. Broad reading ignores viewpoint that judicial reading is limited to the case at hand. Broad statements on constitutional meaning must be arrived at in a common law fashion.
   B. Supremacy doctrine appears to equate constitution with what court says it is, failing to account for mistaken decisions (Dred Scott)

- Rhetorical Question: Shouldn’t the president have the power to refuse to carry out an unconstitutional act of the courts or legislature.
- 14th Amendment, Sect. 1: “Equal protection of the laws”→Was this originally included in Article 4 privileges and immunities clause?
- 14th Amendment, Sect. 5: Congress has power to enforce the amendment→Same as implied powers doctrine in original Constitution?
- Katzenbach: Broad interpretation of new implied powers doctrine?
- Voting Rights Act: Issue of fairness and whether Act is appropriate in NYC, b/c there are several hundred thousand Puerto Ricans in NYC.
- U.S. Attorney General originally brought the suit; N.Y. Board of Elections wanted Section 4(e) of Voting Rights Act declared invalid, sought injunction
- 4(e) violation of 10th Amendment: States have powers not delegated to the U.S. by the Constitution.
- Lassiter case (1959) allowed states to condition the right of suffrage on literacy tests, sets scope of equal protection clause as argued by NY Attorney General.
- If N.Y. state law passes muster under 14th as interpreted in Lassiter, then the other laws conflicting with it must yield.
- “Appropriate” is interpreted to mean “rational” meaning that Congress must have rationally believed that means would bring about the end.
- Brennan uses rational basis test, which is much weaker than strict scrutiny
- Brennan defends constitutionality of Voting Rights Act: it enables Puerto Ricans to obtain perfect equality of civil rights and equal protection of the laws.
- Brennan: fundamental right to vote should not be denied; not enough to justify discrimination.
- Brennan is not sure that literacy requirement is really an incentive to learn English; possibly an incentive to keep Puerto Ricans from voting.

- Smith (1990): Members of Native American Church denied state unemployment benefits b/c of ceremonial use of illegal drugs.
- Congress enacts Religious Freedom Restoration Act (1993); counteracts state laws that undermine religious practices
- Boerne v. Flores (1997) overturns part of Katzenbach
- City turns down building permit application to enlarge a church
• Narrows Section 5 power of Congress under 14th Amendment by requiring proportionality between means/end. Challenged statute failed the test b/c legislative record failed to show large scale violations of the constitutional rule the statute was enforcing.

Judicial Review wrap-up
1. Congress has constitutional power to reign in appellate jurisdiction of the Supreme Court.
2. Any Congressional Acts curbing appellate jurisdiction of the Supreme Court would be a matter of policy, but constitutional rights always trump over prevailing policies.

2. Congressional Regulation

Commerce Clause
• Commercial regulation and taxation are both concurrent powers (federal, state, city)
  * Gibbons v. Ogden (1824) p.480
  • Ogden gets right to operate steamboats on New York waters as assignee of Livingston and Fulton who have exclusive rights from state legislature.
  • Gibbons obtained license by an Act of congress to operate boats on the same water as Ogden.
  • Ogden sued successfully in New York Court of Chancery to enjoin Gibbons.
  • Gibbons had statutory authority to appeal from the Judiciary Act of 1789
  • If language denies validity of state law, must show validity/constitutionality of federal law.
  • Ogden’s lawyer argues that commerce may not include navigation-ridiculous proposition.
  • Power to regulate commerce extends to several states and Indian tribes
  • Plenary powers: where commerce clause applies, plenary power applies to everything related to commerce.
  • Countervailing state doctrine in Constitution: state police power applies to health welfare, safety & education; sanctioned by the 10th Amendment; in terms of classical learning, Congress has no state police power.

  * Paul v. Virginia (1868) p.482
    • Out of state insurance companies challenged VA statute that required out of state carriers to pay for licenses to sell insurance in VA on discrimination grounds.
    • Justice Field rejected the challenge on the grounds that issuing insurance is not a commercial transaction.
    • Formalism in the law is almost invariable a pejorative term

  * Kidd v. Pearson (1888) p.482
    • IA statute prohibited manufacture of liquor.
    • IA manufacturer wanted to sell it out of state.
    • Court held that manufacturing is beyond the scope of commercial regulatory power and that the commerce clause is limited to transportation. (emaciated)

  * The Daniel Ball (1870) p.483
    • Court held that federal steamboat safety regulations apply to boats even if they only travel in one state, because the goods may still be in the interstate commerce stream.
United States v. E.C. Knight Co. (1895) (Supp #6)
- American Sugar controlled as much as 93% of the sugar market.
- U.S. sued for a violation of the Sherman Antitrust Act.
- Trial court dismissed and the U.S. Supreme Court affirmed the dismissal, on the grounds that manufacture for out of state export does not of itself make something an article of commerce.
- Court also held that regulation of local businesses manufacturing goods for commerce should be under states’ control.

Champion v. Ames (The Lottery Case, 1903) p.484
- Federal Lottery Act of 1895 prohibits transport of lottery tickets across state lines.
- Question of whether Congress is regulating a legitimate end or purpose: protection of public morals?
- If states can prohibit lotteries, can Congress prohibit interstate lottery ticket transportation?
- State prohibition of lotteries is within police powers, but Harlan says that prohibiting carriage of tickets is not inconsistent with limitations on Congressional powers.

Houston, East & West Texas Railway Co. v. United States (Shreveport Case, 1914) p.487
- Railway set intrastate rates that discriminated against interstate traffic.
- Decision is important b/c it establishes the “right to control matters having a close and substantial relationship to interstate traffic”
- Rubrics
  1. Safety/security
  2. Efficiency
  3. Uniformity/fairness

Stafford v. Wallace (1922) p.488
- Supreme Court upholds law prohibiting various improper trade practices (Packers & Stockyards Act of 1921); in the stream of commerce = subject to federal regulation

Hammer v. Dagenhart (Child Labor Case, 1918) p.489
- Exploitation of children in the labor market; issue of morality.
- Tragedy/irony of child labor case: Although court is happy to enforce public morals (gambling, liquor), when there is a philosophical morality issue, court will not uphold.
- Law in question: Congressional authority to prohibit goods manufactured by children under 14 or overworked children under 16.
- Dagenhart was father of 2 children in question; Hammer was U.S. Attorney
- Dagenhart wanted to enjoin enforcement of the Act so his children could work and earn money; got injunction in federal district court.
- The nature of the goods involved is different from the lottery case b/c lottery tickets are evil in nature; also there is a difference here between commerce and manufacturing b/c commerce involves transportation.
• If one state regulates child labor while another one doesn’t, it creates a competitive advantage
• Classic commerce clause case: moral outrage of child labor or unfair trade problems w/ child labor.
• Day’s reasons for overturning law:
  1. No Congressional power to equalize competition that creates economic discrimination if left untreated.
  2. Slippery slope argument (Paulson thinks it’s outrageous)
• Holmes dissent: plenary power; laws are within Congress’s constitutional means to protect national welfare.

• Concepts supporting Federal & State Power
  1. Broadening of the commerce clause affects framers purpose
  2. Plenary power (broadly construed)
  3. Pretext argument: On pretext of regulating commerce, government is protecting people from the “worst things.”
  4. Reductio ad absurdum arguments
  5. Difference between manufacture and commerce
  6. Slippery slope
  7. Police power

Constitutional Crisis
*A.L.A. Schechter v. United States* (1935) (Supp#7)
• During great depression, prices and wages were falling in a vicious cycle.
• National Industrial Recovery Act: established codes for industrial fields; live poultry code prohibited child labor, set minimum wage, established unions, 40 hour work weeks, set price floor to stabilize prices with minimum wages. Delegated congressional power to the president. President requests codes to be drawn up by industries; self-regulation of industries and codes approved by president.
• Schechter brothers convicted of violating wage/hour and purchasing regulations. Accusation of selling sick, TB infected chickens below price floor.
• Justice Hughes Majority:
  1. Extraordinary conditions do not create extraordinary powers.
  2. Codes were violated during manufacturing as opposed to commerce process.
  3. Schechter brothers did mostly local business.
• Argument for Act: Actions of poultry company have an effect on interstate commerce.
• 1929-30 in Germany: Congress could not agree on a budget; chancellor exercised constitutional emergency powers to set a budget. After that, emergency powers became a rule rather than exception. Slippery slope argument would apply in Germany in 1930.
• Tendency has been to stay away from emergency powers in U.S.
• Necessary and proper clause was not used during great depression; use of meanings limited to evaluating relationship between means/end.

*Carter v. Carter Coal Co.* (1936) (setback for Roosevelt’s new deal) p.492
• Coal Industry used strip mining techniques; exploited mines until cost>profits; workers were subject to pay cuts.
• 1935: Bituminous Coal Conservation Act regulates hours, wages, etc.
• Litigation between coal company and its president; president thinks Coal Act is unconstitutional, files suit against his father.
• Justice Sutherland uses Kidd slippery slope argument in his opinion; designates between commerce and manufacturing; considers coal mining to be manufacturing.
• Cardozo dissent makes means/end argument where the Act is a necessary means to stabilize prices, so the act is constitutional.

Resolution of the Crisis

NLRB v. Jones & Laughlin (1937) (Supp #8)

• National Labor Relations Act of 1935; revolutionary organization of labor.
• “Congressional findings” are part of the Act.
• Roosevelt: Result of refusing to allow employees to organize impedes the industry.
• Draws on one of Hughes’ earlier opinions (Shreveport) citing efficiency/safety reasons.
• Π alleged that Δ fired employees that had tried to organize.
• Δ cited 10th Amendment, state police power in an attempt to get itself off the hook.
• Problem posed in this case is more “congenial” than the problem in Schechter because of dramatically more substantial economic dominance; near vertical monopoly, enormous operation, over 500,000 employees; 75% of steel produced in PA is shipped out of state.
• Holds that steel industry is a “great basic industry” affecting interstate commerce; subject to congressional regulation.
• Could the same problem arise that arose in the Child Labor Case if one state required union membership and another state did not?

United States v. Darby (1941) p.496

• Δ tries to keep salaries lower ($0.16/hr instead of $0.24/hr)
• Issue of whether gov’t can set minimum wage standards of persons engaged in manufacture; application of the pretext argument (doing b under the guise of a; bad purpose; illegitimate end)
• Δ argued about commerce being a pretext for regulation of workers hours; court rejects this argument; court is not interested in allegations of a bad purpose b/c if it can be shown that commerce clause applies, the end is realized as being for commercial purposes for this facet of commercial regulation.
• Once it can be shown that commerce applies, the purpose is legitimate.
• Plenary power, citing Gibbons: presupposes that the commerce clause applies
• Darby has been described as a boot strap operation: find a point at which commerce clause then show its reach all across the boards, by virtue of the plenary power.
• Reasonable basis test is weak in modern case law, but used in Darby: If Congress deems its means to be appropriate, data showing otherwise is irrelevant and the Supreme Court will hold that the belief is reasonable.
• Supreme Court has no problem with Congress’s true motive to regulate labor as opposed to controlling shipping.
**Mulford v. Smith** (1939) p.500
- Reasonable basis test applies: No specific data needed on volume of tobacco sold out of state to make tobacco industry subject to commerce clause.

**Wickard v. Filburn** (1942) p.501
- Filburn harvested 239 extra bushels of wheat over the allotment; was supposed to pay $0.49 penalty for each bushel over the limit or store the excess or relinquish the excess wheat to the government.
- Filburn failed to obtain a marketing card or buy from a licensed vendor; vendor is also subject to penalty.
- How does the Agricultural Adjustment Act reach Filburn? Controls market price by keeping wheat off the market.
- How does one small-time farmer affect the big picture? Not by much, but if all farmers are aggregated together, then each farmer’s harvest affects market prices.
- Supreme Court has nothing to do with wisdom or fairness of regulation.
- If everything looks as if it’s going according to plan, Supreme Court does not worry; defers to Congress and assumes rational basis.

**Modern Cases**
- Equal Protection legislature in 1875 (Fisher p.75)
- Protection was not limited to state-operated facilities or state actions; applied to inns, public conveyances (transportation), privately operated facilities open to the public (theaters & places of amusement)
- 14th amendment provided grounds for acting against states that denied equal accommodations; possibly a basis for acting against private citizens.
- Benjamin Butler (R-Mass): Makes tri-fold distinction between public and private instrumentalities:
  1. Publicly owned (law applies)
  2. Privately owned but open to public (law applies)
  3. Private homes, etc. (law does not apply)
- Attorney Gen’l Devens worried that 1875 legislation might not work b/c it brings privately owned facilities within the scope of state action.

**The Civil Rights Cases** (1883) p.1347
- 13th-15th Amendments are Constitutional counterparts to the Civil War victory
- 13th: Ends Slavery
- 14th: Equal protection—protection for blacks delayed until 1960’s; Section 5 gives Congress the power to enforce Section 1.
- 15th Voting rights for black men
- Court holds that federal gov’t and Congress do not have power to pass legislation that reaches as far as the 1875 Civil Rights Act; argues that the proposition that power only reaches to the state and not to private entities; Bradley: “it would be running the slavery argument into the ground to make it apply to every act of discrimination;” Harlan Dissent: “It is a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions on state laws or state action.”
State Action Problem

*Marsh v. Alabama* (1946) p.1351: Δ distributed religious materials on sidewalk in a company owned town; signs were posted that prohibited distribution of literature w/o express permission; Δ ignores warning and is arrested for trespass; 14th amendment needs a vehicle to carry over 1st amendment rights (religion & press) to the state; state claims it has property rights to prevent trespassers; Black holds that the more property is open to the public, the more circumscribes common law property rights become as constitutional rights loom larger; also holds that 1st amendment rights are more fundamental and supersede property rights; Reed dissent: Difficult to extend 1st amendment onto private property w/o assent of the owner; (Paulson sez there was implied assent by opening up the town & providing public access.)

Shopping Centers: *Lloyd & Hudgens* hold that shopping centers had a right to exclude picketers b/c they have municipal authority to exclude.

*Terry v. Adams* (1953) p.1356: 15th Amendment Issue: Jaybirds were acting as a surrogate for the Democratic party; Court holds the Jaybirds are not permitted to deprive voters to vote in primaries on account of race; Minton dissent: “15th Amendment erects no shield against merely private conduct however discriminatory or wrongful.”

*Shelly v. Kraemer* (1948) p.1368: Covenant restricts sale of property to whites only for 50 yrs. (in what is now the thugged out hood of North St. Louis); Is a restrictive covenant is a mere promise? Perhaps, b/c court holds that by granting judicial enforcement of these agreements, the States have denied petitioners the equal protection of the laws, so the agreements cannot stand.

*Heart of Atlanta* (1964) p.504: Justice Clark notes that the legislative history of the Civil Rights Act is based on 14th Amendment Equal protection clause and commerce clause; even if most guests are from GA (they’re not), hotel is still part of interstate commerce b/c of national advertising & billboards; the “objective” of not depriving personal dignity is a moral end associated w/ commerce clause; “qualitative” refers to the impairment of blacks’ pleasure & convenience in travel b/c they cannot find lodging; if blacks have difficult travel conditions, they will be less likely to travel, thus reducing the volume of commerce; commerce clause gives Congress the power to promote the free flow of commerce.

*Katzenbach v. McClung* (1964) p.506: BBQ restaurant buys 46% of the food it sells from out of state, but no evidence of out of state customers; restaurant prohibited blacks from eating inside, claiming it would lose business if they were allowed inside; court uses rational basis arguments to hold that prohibiting discrimination in restaurants helps to promote commerce.

*Perez* p.508 (1971): Modern law—federal criminal law prohibiting certain loan sharking practices; by 1971, the developments of 1937 have led to full-blown (general regulatory) police power in Congress, but the Constitution has not been rewritten to give expression to the police power, so public law has to continue making arguments via the Commerce Clause; Stewart dissent: there is no connection between Perez’s thuggery and interstate commerce.

**Taxing Power**

*Child Labor Tax Case* (1922) handout 11: Issue of what is the difference between a tax and a penalty: a tax produces revenue while a penalty discourages a course of conduct that is
proscribed; the Act in question imposed a tax of 10% of annual net profits for employers that employ children; Justice Taft argues that the “tax” is a penalty b/c the **regulatory dimension looms larger the revenue raising; pretext argument**: regulate to prohibit child labor under the pretext of raising of revenue; Taft fails to distinguish the precedent cases he cites; merely suggest that child labor tax law carries with it a panoply of regulatory measures that cannot be ignored; the pity from policy/morality: so long as practices being regulated are relatively innocuous, the Court OK’s the statutes, but with Child Labor regulations, the Court comes down hard.

*U.S. v. Kahriger* handout 11 (1953): Federal law taxing interstate gambling is upheld on the grounds that the power to tax has indirect effects like many other federal powers (Challenger claimed Congress was penalizing gambling under the taxation pretext); dissent views the law to be an infringement on states’ rights.

**Spending Power**

*U.S. v. Butler* handout 11 (1936): Fed. spending program that subsidized farmers who reduced their production in order to increase demand was found unconstitutional b/c it was beyond Congress power to spend for gen’l welfare; conflict btw. Madison’s “spending for gen’l welfare only thru expressly enumerated powers” (tautology) and Hamilton’s “congressional power to tax/spend to provide for gen’l welfare.” Stone dissent views the program as voluntary as opposed to coercive.

*Steward Machine* handout 11 (1937): Upheld employment compensation provisions of the Social Security act that imposed a payroll tax and also gave generous tax credits for contributions to a state unemployment fund; Cardozo’s rationale: (1) Law assumes freedom of will; (2) Free will is not only compatible with acting with a motive, it is also presupposes a motive; (3) Coerced & compelled behavior is also done with a motive, but coercion means forcing unattractive behavior with no alternative, while compulsion is a selection of one behavior more attractive than the other.

*South Dakota v. Dole* handout 12 (1987): Seduction is not coercion; SD had a choice in this case b/c it faced only a 5% cut in highway funds if it didn’t raise it’s drinking age to 21(I argued that a 5% cut was coercion, and Paulson “begged to differ” but also said that “reasonable people could disagree”); Congress could not directly regulate drinking age-state power under 21st Amendment; conditions for not being coercion p.245: (1) general welfare (safe highways); (2) conditioning receipt of fed. funds must be unambiguous; (3) Conditions on federal grants might be illegitimate of they are unrelated to federal interest (Is highway safety related to highway funding?); (4) Other Constitutional provisions may prevent conditional grant of federal rights (i.e. 10th Amendment); O’Connor dissent: No essential nexis btw hwy construction $ and drinking age; purpose of legislation is to regulate drinking age, which is both over inclusive (hinders 18-20 yr olds who don’t drink and drive) and under inclusive (doesn’t prevent people 21 and over from drinking and driving) w.r.t. public safety; also, the constitution no longer addresses alcohol rights.
**War Power and Foreign Affairs**

*Woods v. Cloyd Miller* handout 12 (1948): Issue of what defines national emergency; some effects of a war outlast the end of fighting; court upheld Housing & Rent Act that froze rents at wartime levels on the ground that effects of war are still being felt by people who can’t find housing due to shortages.

*Missouri v. Holland* handout 12 (1920): 10th amendment argument; U.S. attempted to enforce Migratory Bird Treaty Act made from a treaty; Π (State of MO) argues that states are being deprived of their police power & 10th amend. Rights; U.S. argues the law is necessary to enforce the treaty, even if it falls outside scope of enumerated powers; court upholds Act on the grounds that if the treaty is OK, then so is the law to implement the treaty; combined use of supremacy clause with necessary and proper clause.

*Reid v. Covert* handout 13 (1957): Δ (soldier’s wife) found guilty of murder pursuant to executive agreement; issue of jurisdiction over soldiers abroad; America wanted jurisdiction over its servicemen; Covert’s defense: she’s not a soldier, once she came back to the U.S., she was not getting a jury trial (Lack of due process); Art 3, §2, par.3: trial by jury when crime is committed outside of territorial limits; but statute provides that accompanying armed forces outside of U.S. is subject to jurisdiction; given jury trial b/c it is a Constitutional right that cannot be infringed.

**Changing direction in Commerce Clause cases**

*U.S. v. Lopez* p.514 (1995): Criminal law is typically local; increasing amounts of fed. criminal laws (*Perez*) in recent years; CA1 held that the Gun-Free School Zone Act took the commerce clause too far; Rehnquist: commerce clause cannot swallow up local power, but w/ expansion of commerce, there’s greater need for regulation; applying the 3 categories under commerce clause to guns in school: (1) Not a channel of commerce; (2) not an instrumentality; (3) maybe has a substantial effect; substantial effect was found in a lot of cases (i.e. mining, lending, restaurants, wheat) but all of those cases dealt with economic activity and guns in school are not economic; gov’t argues: (1) violent crime imposes substantial costs spread out thru insurance; (2) violent crime creates a financial disincentive to travel to perceived violent areas; (3) threatened learning environment results in unproductive citizens and an adverse effect on nation’s well-being; Rehnquist makes a slippery slope argument, holding that if gov’t’s argument is accepted, it would be hard to find any activity not subject to Congressional regulations; under rational basis test (*McClung*), no findings are necessary, but this does not address economic activity; Souter dissent: defer to legislative policy; Breyer dissent: defer to legislative jgmt.

*U.S. v. Morrison* CB Supp p.2 (2000): Statute in question provides a federal civil remedy for victims of gender motivated violence; college student was an alleged victim of sex crimes committed by college football players; rapists were initially punished by the school, then the punishment was dropped; Π sued under fed law when she found out the punishment was dropped; court struck down the law b/c rape lacks a substantial effect on interstate commerce; non-economic activity, slippery slope applies; findings not sufficient to establish const. of provision.
Slavery and the Constitution

Slavery appears in 4 places in the Constitution:

1. Art 1, § 2, par 3: Three-fifths clause
2. Art 1, § 9, par 1: Congress prohibited from legislating on importation of slaves until 1808; law was enacted in 1808, but not enforced very well.
3. Art 4, § 2, par 3: fugitive slave provision
4. Art 1, § 9, par 4: no capitation or direct tax not in proportion w/ census.

5. Groves v. Slaughter Supp #15 (1841): MS state constitution amended in 1832 to protect local slave marker from outside competition; Π argues that slave trade affects interstate commerce, so part of a state const that disagrees w/ U.S. const commerce clause is not valid; the court held that the state needed to pass activating legislation and until then the const provision has no force; justices dissented (in dicta only) over whether slaves are part of interstate commerce or not.

Prigg v. Pennsylvania Supp #15 (1842): Fugitive Slave Act of 1793 allowed slave catchers to reclaim slaves and return them to masters; Prigg seized a slave in PA and went to a magistrate for a certificate of removal (Penn law prohibited pure self help w/o a certificate); Prigg denied a certificate, seized the slave anyway, and was convicted for violating the state law; Justice Story holds that PA law is unconstitutional b/c fugitive slave provision in Art. 4 is self-implementing; Story feared that state legislation constraining slave owners from recovering slaves would prevent southern states from entering the Union; PA argued that self-implementation is not an enumerated power; Story counters that under PA’s proposed interpretation, nothing would get done. Decision is an assertion of federal power; Story is anti-slavery, but is a nationalist and wants to carry forward the involvement of the government in the slave trade.

Cruel irony of Prigg: 14th Amendment Equal Protection clause has no self-implementation and required Civil Rights Act 100 years later to be implemented.

In statutory construction, the specific norm takes precedence over the general rule. Constitution is more general and statutes are more specific.

Dred Scott v. Sandford Supp #15 (1857): Addresses status of slaves in federal territories & slave states after spending time in a free state; background on Rachel p.7; Taney holds that Scott is a slave and not a citizen; issue of federal court not having jurisdiction is never addressed; holds that Congress has no power to regulate slavery in territories and that slaves have no due process; Taney argues that blacks had inferior status at the time of the constitution; argues that fugitive slave clauses are directed to blacks as a separate class of citizens; this confuses slaves w/ blacks in general; Taney argues that state & nat’l citizenship are independent (this bifurcation still exists today).

Curtis dissent: Looks to Articles of Confederation to determine status of slaves before Constitution; if one is a state citizen at time of adoption, this implies one is a U.S. citizen; there is no other possibility-this covers all ground and leaves no alternative open; in A of C, free blacks were counted as citizens in 5 different states.

Reductio ad absurdum argument: Majority argues if free blacks were understood as citizens, then they would be entitled to privileges & immunities, BUT if citizenship implied having all privileges, then women are not U.S. citizens.
Douglass Paper Supp #15: textualism makes possible a number of claims about the anti-slavery character of the constitution; slave trade was only supposed to last for 20 yrs-this was the price that slave states had to pay for entry into the union

III. Dormant Commerce Clause-Court Regulates in absence of Congressional Regulation

Early Cases

Plumley p.527 (1894): MA state law prohibited sale of adulterated oleomargarine; Δ was imprisoned for violating statute and denied writ of habeus corpus; law upheld b/c it did not violate commerce clause but rather was a valid exercise of state police powers (health, safety, welfare); doctrine of exclusivity reaches far but not to state criminal laws.

Cooley v. Board of Wardens p.528 (1851): State law required local pilots on ships cruising PA waters; 1789 fed statute provides that questions of pilotage are still regulated by state law; Π pays fine then sues for restitution under commerce clause; Π makes exclusivity argument that id a subject of regulation is national (commerce), then Congress has the exclusive power to regulate that matter and Congress cannot give away power to regulate things for which it has exclusive authority; normative argument: local community has the best understanding of fine-tuning regulations that respond to the problem; court rejects exclusivity argument and upholds the law on the grounds that commerce does not apply to pilotage; also argues that mischief would ensue if states were denied the power to regulate pilotage.


South Carolina Highway Dept. v. Barnwell p.531 (1938): State statute prohibits use of state highways by trucks exceeding a certain weight or width; at that time, 85-90% of trucks exceeded that weight limit; elaborate fact finding done re; safety & maintenance of highways; findings showed that gross weight was not an accurate way to measure hwy damage and that axle weight did more damage, esp. if uneven; Supreme Ct. upholds the law on the grounds that hwys are built, owned & maintained by the state for its citizens; safety concerns/police power.

2 prong standard in Barnwell (p.532)
1. Within scope of state police power? (what is the end?)
2. Means are reasonably adapted to the end?

Questions about rational basis are left to the legislature; courts cannot act as legislatures.

Balancing Competing Interests

Southern Pacific p.533 (1945): Statute limits the length of trains in AZ; trial court decides against the state legislature (gutsy move); facts indicated that state law did not promote safety, but if legislators thought laws promoted safety, the laws should stand under the Barnwell rule; Justice Stone views the uniformity of train length to be indispensable b/c the opportunity cost of conforming would impede train travel; the nearest freight yards to break up trains that are too long are in Los Angeles or El Paso; Stone replaces rational basis with balancing formula (bottom of 534); need to appeal to some entity independent from the state legislature must look at findings of the court rather than deferring to the legislature; other states allowed 120-160
cars; w/ shorter trains, 30% more train traffic required, leading to more accidents; data indicated there is a slight but dubious advantage b/c more traffic is likely to cancel out lower slack action hazards; slack action is free movement between 2 cars, providing greater stability when taking turns, aids in starting of heavy trains and requires less heavy locomotive.

Black dissent: Court is deciding what evidence is best in place of the elected body representing the people; if the legislature gets it wrong, vote for someone else.

Bibb v. Navajo Freight Lines handout #17 (1959): IL had contoured mud guard requirement for trucks (big ups to those Springpatch legislators!!); fed district court found this law to be an obstruction of commerce b/c states allow straight flaps (AR requires them); state had interest in safety b/c legislative findings indicated the contoured guards protected from flying debris; other findings indicated the contoured guards did not do a better job b/c they disrupt brake functioning, retain too much heat inside steel well causing brake failure; if it were just a question of safety and commerce was irrelevant, it would pass rational basis test and statute would be upheld; trucking companies could “interline” (switch trailers & rigs) or weld contoured mudguards onto trucks while driving thru IL but this would be impractical/dangerous for transport of perishable goods or explosives; when there is an extraordinary burden on interstate commerce w/o any improvement on safety, even Douglas will balance.


4 part balancing test
1. No economic prejudice (on its face)
2. Legislative interest or purpose within state police power
3. If the impacts on interstate commerce are only incidental, the state law is upheld unless the burden exceeds local benefits.
4. The local burdens have to be in proportion to the local benefits.
The state of AZ can regulate state matters with an eye toward promoting financial returns; decision in favor of Π corporation against the state, weighing the burden against the benefit; if Π’s operations can be performed more efficiently out of state, the state cannot insist on operations being performed in the state.

Kassel v. Consolidated Freightways Corp. Supp #18 (1981): Iowa had law requiring 55 ft. single trailers; Π trucking co. preferred using doubles in IA b/c of cost and efficiency; border towns allowed neighboring states’ limits; Π’s burden of not using doubles: (1) divert traffic; (2) use singles; (3) detach doubles; all of these choices drove up costs; IA’s position: promote safety & reduce roadway by diverting trucks: this let the cat out of the bag; double trailers have similar handling, turning & braking as singles and are safer in regard to rear wheel deviation from front wheel path (off-tracking); bottom of 307: hwy safety is a traditional matter of local concern—a strong but rebuttable presumption; if court uses balancing it must rely on independent fact finding; if using rational basis, the legislative findings suffice.

Brennan concurrence: defends rat basis test; balance burden on commerce against benefit sought by legislature; Brennan “smelt a rat” when IA governor vetoed a bill with an eye toward diverting traffic and lowering road costs; protectionism & economic discrimination is a bad purpose & motive; however, safety does not require a balancing test

Rehnquist dissent: defer to state legislature and consider “overall” safety benefits.
Incoming Commerce

*Baldwin v. G.A.F. Seelig, Inc.* p.539 (1935): Commodity prices collapsed during the great depression; NY Milk Control Act fixed minimum prices paid by milk dealers to their producers including out of state producers; about 30% of NY milk imported from out of state; licenses to sell milk in NY were denied to people not complying w/ regulations; Seelig buys milk from VT @ prices below those set out in the act; Cardozo rejects the argument that NY is trying to ensure an adequate milk supply under the state police power (health) b/c NY is protecting its own producers at the expense of interstate commerce; Cardozo sez that no exercise of state police power will pass constitutional muster when it leads to discriminatory effects except when it (1) advances a legitimate social purpose and (2) it cannot be served by reasonable nondiscriminatory alternatives. (“least onerous”)

*Welton v. Missouri* p.541 (1875): MO required special licenses for peddlers of goods manufactured out of state; this was discriminatory and there were 2 less onerous alternatives: (1) require licenses for everybody; (2) require license for nobody.

*Hunt v. Washington State Apple Advertising Commission* p.542 (1977): NC law required all closed containers of apples to have U.S. grade and **no other grading labels**; this caused confusion b/c 7 states have their own grading system; WA apples are known to be superior and had a more extensive and costly grading system and were sought after in other states, but law prohibits attracting attention to apples being from WA; there was a less onerous alternative of putting both state and federal grading labels on the boxes; this would require U.S. standard and allows WA to market its own apples; “closed container provision” was evidence of discriminatory nature, b/c dealers/brokers/wholesalers who tend to know something about apples were being deprived of the info.

*Edwards v. California* p.543 (1941): CA law prohibited indigents from entering state; CA argued that influx of indigent immigrants created health, moral and $$ problems; law was overturned b/c one state shall not have the right to deflect problems that all states must deal with.


*Dean Milk Co. v. Madison* p.545 (1951): Madison law imposed no duty for inspectors to inspect out of town milk while prohibiting the sale of milk not locally inspected in Madison; discrimination violated commerce clause and the 14th Amendment (denial of due process by arbitrary means); less onerous alternatives (1) Madison could use its own inspectors to inspect out of town milk then bill those dairies for the inspection; (2) Model Milk Ordinance imposes no geographical limits but allows a city to require its own inspection standards. Black dissent: endorses regulation as a legit exercise of police power, believes it is a good faith effort on city’s part; also defends city’s right to choose its own regulatory alternative; policy questions should be left to people represented by legislature; Black not worried about modest effects of local discrimination b/c to regulate those effects deprives people of their voice.

of state wildlife laws); \( \Delta \) challenges constitutionality; Maine argues it has police power to protect the environment; \( \Delta \) argues Maine is discriminating to obtain exclusive mkt (it is discriminatory on its face); applied Hughes test (legit purpose? Less onerous means?); waiver argument p.334: Congress authorizes discriminatory state regulations in some contexts, only if congressional direction is “unmistakably clear.” 3 types of parasites were found on out of state fish that could threaten ME aquatic environment; Taylor had expert testimony to deny threat of parasites, claimed that professional baitfish farms raise fish in ponds that have been drained to ensure no parasites; “actual benefits sought” are a departure from “ostensible purpose”; CA1 notes that ME is the only state to prohibit importing live baitfish and other types of fish are shipped in; state agency remarks led to economic protectionism and fish could swim in from other states; CA1 decides on discriminatory effects basis b/c there is no evidence of trying less onerous alternatives.

Dist court upholds; CA1 reverses; Supreme Court reverses & upholds the law with a standard of review: if not irrational or clearly erroneous it must stand; Blackmun applies the rat basis test b/c he is not convinced that findings are wrong & gives enormous deference to state’s environmental concerns.

**Breard v. Alexandria** p.549 (1951): Local law required salesmen to obtain consent of residence owners before going door-to-door; upheld b/c it did not discriminate against out of state salesmen; dissent thought it favored retail merchants.

**Philadelphia v. New Jersey** p.550 (1978): NJ state law prohibited out of state garbage in its landfills; NJ had environmental concern that its landfills were filling up; economic protectionism/bad legislative motive; case decided on discriminatory effects; there was a less onerous alternative of slowing the flow of all waste into NJ landfills.

**Exxon v. Maryland** p.554 (1978): MD statute in response to fuel crisis prohibited refiners from operating gas stations in MD in order to prevent refiner-owned stations from receiving preferential treatment; Supreme Court upheld; possibly incorrect decision if balancing effects on interstate commerce; possibly correct decision if only looking for a bad motive decision by state legislators; Blackmun dissent: law favors in-state businesses (not many refiners in MD?); no evidence that legislature explored less onerous alternatives; possible to regulate w/o barring out of state retailers completely?

**Minnesota v. Clover Leaf Creamery** Supp #20 (1981): MN law prohibits retail sale of milk in non-returnable plastic bottles; state trial court “throws everything at state legislature” (1) finds the law discriminatory against out of state plastic producers; (2) says means are not related to the objectives set out in the act; doubtful that banning plastic throwaways (means) would bring about desired change in consumers’ habits (using recyclable bottles) b/c paper cartons are still allowed; (3) finds the MN law to be an unreasonable burden on interstate commerce; MN Supreme Ct. affirms trial holding on means/end not being related rationale; U.S. Supreme Ct. reverses, denying discriminatory practice b/c it does not specifically single out interstate commerce; in state and out of state pulpwood/paper carton producers both will gain from the law; claims that gains are exaggerated by trial court.

**It is not necessary to address least onerous alternatives in this case b/c there is no (facial) discrimination.**
Reciprocity Provisions p555-556 these are unconstitutional b/c they effectively form cartels
- Cottrell-struck down
- Limbach-struck down
- Sporhase-struck down (1982); would have been OK despite discrimination b/c restricting out of state withdrawal of NE groundwater advanced legit gov’t purpose of protecting environment, but reciprocity makes it unconstitutional.

Outgoing Commerce
Hood v. DuMond p.557 (1949) NY state law allowed denial of add’l facilities to acquire & sip milk out of state in order to protect local interests; Hood was a milk distributor located in MA; 90% of Boston milk supply from out of state, 8% from NY; Hood would benefit from a new depot in NY b/c of shorter delivery/lower costs; “ostensible” purpose of NY law was to remedy the inadequate milk supply in Troy, NY with legitimate state police powers (health); court strikes down law b/c of it curtails the volume of interstate commerce; improved health is not a legitimate ends for the means involved here.

Hughes v. Oklahoma handout #21 (1979)
Hughes Test: If a law is discriminatory, then ask: (1) Does it serve a legitimate state purpose; (2) If so, are less onerous alternatives available.
Unlike Maine, Hughes addresses less onerous alternatives; OK law prohibits out of state sale of minnows procured within OK waters; overturned for violating the commerce clause; embargoes are the most flagrant form of protectionism.

Cities Service p.562 (1950): OK sets a price floor on nat’l gas sold out of state; upheld b/c it protects a natural resource and incidental burdens are OK in this case.

Parker v. Brown p.562 (1943): Cali Raisin Marketing program was upheld, despite limiting producers’ abilities to sell their grapes, b/c an enormous percentage of raisins are from Cali.

Recent Developments
Camps Newfoundland/Owatonna

Preemption
Rice

Hines v. Davidowitz

Pennsylvania v. Nelson
Askew

City of Burbank

Pacific Gas & Electric

Florida Lime

Ray

Market Participation

Alexander Scrap

Reeves

Limbach

Wunnicke

Interstate Privileges & Immunities

Corfield

Baldwin

Toomer

Hicklin

Piper
Camden

**Intergovernmental Immunity**  
*National League of Cities*

Garcia

Printz

Alden

**IV. Persisting Controversy over Judiciary Function**

**Substantive Due Process**  
*Slaughter House Cases*

Lochner

Muller

Adkins

Baldwin

Nebbia

Parrish

**Carolene Products**

**Olsen v. Nebraska**

**Whalen v. Roe**
Incorporation
Barron

Palko

Adamson

Malloy v. Hogan

Modern Substantive Due Process/Privacy Doctrine

Meyer v. Nebraska

Poe v. Ullman

Griswold

Roe v. Wade

Michael H. v. Gerald D.

Bowers v. Hardwick

V. Separation of Powers between Congress and Executive

Executive Power/Foreign Affairs
Youngstown

Curtiss-Wright

Dames & Moore
Political Question Doctrine

Baker v. Carr (1963) p. 42

- Political Question Doctrine: Courts are not allowed to decide on political questions, but can decide on “political cases.”
- 7 types of political questions:
  1. War & Foreign Relations
  2. No applicable criteria, no precedence in the area, no judicial authority
  3. Potential disruption of the balance of power; typically the separation of powers stands behind the political question doctrine
  4. Dates of Duration of Hostilities: War power can be used to enact legislation after the cessation of hostilities (i.e. Woods housing shortage case)
  5. Validity of Enactments: courts will not settle disputes over procedural ambiguities in legislation.
  6. Status of Indian Tribes
7. Republican form of Government (*Luther v. Borden* held that the court will not decide over old colonial charter gov’t or new constitutional government has power in Rhode Island; Taney held: (1) court decision would cause chaos; (2) no state court has recognized judicial responsibility for settling state government authority; (3) federal courts follow state courts unless there is constitutional ground to overturn; (4) guaranty clause is not to be resolved by judiciary)

*Goldwater* (3 inquiries for nonjusticiable political questions taken from *Baker*)
1. Resolution if questions committed by the Constitution to a coordinate branch of gov’t.
2. Resolution of the question moves beyond areas of judicial expertise.
3. Prudential considerations counsel against judicial intervention?

*Poewll v. McCormack*

*Nixon v. U.S.*

**Executive and Congress on War Power**

*Mora v. McNamara*

**Prize Cases**

*Ex Parte Quirin*