Approaches to Con Law Review

A. Reductio ad absurdium
   1. Want to prove P.
   2. Assume the opposite -- -P
   3. Generate from -P a contradiction (an absurdity A) A follows from -P
   4. Draw out the conclusion, that is, P must be true

B. Tautology – true by stipulation

C. Slippery Slope evaluation
   1. Causal Claim
      a) Is this a causal connection which is valid
   2. Evaluate the effect
      a) Good thing or bad thing.

D. Formalism v. Functionalism
   1. Use when dealing w/ scopes of power
   2. Functionalism: pragmatic
   3. Formalism: limits executive power, clause bound approach
      a) formalist hides behind sealed units of govt structure
      b) Often results in a broad holding

E. Interpretivist and noninterpretivist args
   1. Use when dealing with fundamental rights

II. Standards of Government Review

A. Rational Basis Test: as long as reasonable people could come out with this view
   1. There must be a legitimate state objective: Practically any type of health, safety, or general welfare goal will be found to be legitimate
   2. There must be a rational relation to the state objective: the means chosen by the government and the state objective must be rationally related to the end. Only if government has acted in a completely arbitrary and irrational way will it not be found
   3. The individual who is attacking the government action bears the burden of proving irrationality
   4. Government action nearly always upheld
   5. When use the test? Policy questions
      a) Dormant commerce clause:
         (1) State regulation has to pursue legitimate state end, and be rationally related to that end
         (2) The state’s interest in enforcing its regulation must outweigh any burden imposed on interstate commerce, and any discrimination against it
      b) Old Substantive due process
         (1) As long as no fundamental right is affected, use this test.
         (2) Economic regulations (old substantive due process) upheld under this test

B. Strict Scrutiny Test – Hughes test
   1. There must be a compelling (really legitimate) objective,
   2. The means chosen by the government must be necessary to achieve the compelling/legitimate end. The fit between the means and the end must be tight, not just rationally related.
      a) Is the legislative provision necessary to a legitimate state purpose?
      b) Is there no less onerous alternative
   3. The government body being attacked has the burden of satisfying the test
   4. Gov’t action almost always struck down
5. When use the test? **Constitutional rights questions**
   a) Dormant Commerce Clause when statutes are discriminatory on their face
   b) Modern Substantive due process
      (1) Where government action affects fundamental rights and the P claims his substantive Due Process is violated, use this test.
      (2) Marriage, childbearing, abortion, contraceptives
   c) Equal protection review???
Part I—Major Developments on judicial and congressional power.

Power to Review Congressional Legislation on Constitutional Grounds—Marbury v. Madison (1803)

- **Supremacy Clause**
  - The Supreme Court is empowered to review acts of Congress (the Judiciary Act of 1789) and void those which it finds to be repugnant to the Constitution. (This will not again be used until 1857)

1. The Laws must furnish a remedy for a violation of vested legal rights unless there is something to exempt it from legal investigation, or exclude the injured party from legal redress. There was a vested right (the appointment had been made) so there should be a remedy.

   The signing and sealing of the appointment went beyond the power of the President, but is an instrument of the whole government.

2. **USSC Jurisdiction dictates that the Judiciary Act of 1789 is unconstitutional because it contradicts the Constitution in that it cannot expand the ceiling of federal court jurisdiction (Jurisdictional)**

<table>
<thead>
<tr>
<th>Statutory Power</th>
<th>Constitutional Power</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appellate</strong></td>
<td></td>
</tr>
<tr>
<td>Government’s Lawyer</td>
<td>Move to dismiss on statutory grounds that it grants appellate review for writs of mandamus. If you are asking for mandamus you must go through the circuit courts. The appellate jurisdiction should be applied to the last sentence of the clause.</td>
</tr>
<tr>
<td><strong>Original</strong></td>
<td></td>
</tr>
<tr>
<td>Marbury’s Lawyer</td>
<td>Will have to argue original jurisdiction granted by statute. If you view the semi colon as creating a new clause. Makes the most of the semi colon and confines the appellate jurisdiction to those immediately following. It is though we have begun with a new sentence.</td>
</tr>
<tr>
<td><strong>Original</strong></td>
<td></td>
</tr>
<tr>
<td>Marshall</td>
<td>Agrees that this is what the Congress intended. What appears to the conferral of statutory power is not protected by the Constitution and is deeming it unconstitutional. Congress intended to confer original jurisdiction on the court, but there is no cover. They are without power.</td>
</tr>
<tr>
<td><strong>Appellate</strong></td>
<td></td>
</tr>
<tr>
<td>Marshall</td>
<td>The constitutional conferral is limited to appellate jurisdiction. If they had meant to grant a general original jurisdiction, but the listing of specific categories flies in the face. The enumeration excludes anything and everything not enumerated.</td>
</tr>
</tbody>
</table>

Marshall knew that Jefferson had no intent to recognize the mandamus, and in doing so would greatly reduce the authority of the Judiciary. By examining the right first, he was siding with his Federalist brothers and vindicating Marbury, but then giving the ultimate power to the judiciary.

The theory of every written constitution must be that an act of legislation repugnant to it is void.

3. **Justified Judicial Review—USSC Supreme (Philosophical)**

- It is a necessary inference from a written constitution, for otherwise written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.
- It is a necessary aspect to the judicial role of interpreting law.
- It is implied from the command of the Supremacy Clause that the Constitution is the supreme law of the land and is to be binding on state courts. It would be absurd to allow legislation to supercede the constitution, any legislation that contradicts the constitution will be deemed void.
Does not compel the conclusion that the court is the final interpreter of the constitution—Gibson

Each branch might be entitled to determine for itself the meaning of the Constitution—Gibson

- It is implied from the fact that Article III gives the federal courts jurisdiction over all cases arising under the constitution.
- It is implied in the fact that judges take an oath to support and uphold the constitution.
  - Not an effective argument—circular reasoning

--Arguments on behalf of constitutional review (Textual)
- There is nothing in the Constitution, which specifically denies judicial review.
- The Constitution is the greater and supreme power. The constitution is the written words of the people and the people are supreme to the representatives of the people.
- The Constitution is regarded as a fundamental law. The interpretation of laws is within the power of the courts. The courts may then interpret the constitution as well as any law passed by the leg. If there is an irreconcilable difference between the constitution and any law passed by the leg, the superior of the 2 ought to be preferred. The superior of the two is the intention of the people over the intention of their agents.

--Arguments against constitutional review
- There is nothing in the Constitution that specifically supports judicial review.
- The idea that any one federal branch can void the acts of another federal branch makes people feel that the 2 branches are then not equal.
- Since the judiciary are appointed for life and Congress represents the majority, the judiciary may be said to thwart the will of the people who might speak through their Congressional representatives

Centralized v. Decentralized Judiciary

--Differences between our judicial system and the European system
1. The European centralized constitutional court has an abstract review power—can hear the questions apart from a concrete case.
   a. Art 1 §2—when the court is speaking in its judicial capacity it must be hearing a case before it.
2. If the court in Europe rules against a statute it must be removed from the books. This is not the case here in the US, here it stays on the books, but is not supported by the constitution. This is something that our courts cannot do. Can do only that which is necessary.
Addressed Political Questions, which US courts do not
3. USSC is both a constitutional court and an appellate court.

Power to Review Highest State Court decisions adverse to federal law—Martin v. Hunter’s Lessee
*Hunter brought an action of ejectment against Martin (Fairfax heirs.) According to Hunter he possessed the land because of Virginia’s 1777 legislation which ordered the confiscation of the land of loyal British subjects and in 1789 the land was conveyed to David Hunter.
*The Fairfax heirs contended that their rights were supported by treaties of 1783 and 1794 giving protection to British owned property.
*VA Court of Appeals refused to comply with the SC decision.

ISSUE: Can the Supreme Court review state court decision as afforded them in Sec 25 of the Judicial Act of 1789?
1. The Framers had left the specifics up to the legislature to decide (Structural Argument)
   a. Constitution creates a SC and gives Congress discretion whether to create lower federal courts(art III)
   b. If Congress did not set up the tribunals than the SC would be powerless to hear any cases, except for the few fitting within its original jurisdiction.
   c. Specified limited original jurisdiction and broad appellate jurisdiction
d. Section 25 of the Judiciary Act of 1789—can expand the appellate jurisdiction
   i. Confers federal appellate jurisdiction
      1. Art III—§2-whole judicial power of US shall be vested in one court
         a. Constitution and federal law trump state law
         b. There must be a court of final say—Art III—gives USSC supremacy clause and does not indicate whether they have review of state or federal court decisions—just says constitutional concerns which are heard in state court
         c. Not a reviewer of state law, but of federal law—eliminates any real concern about state sovereignty which, however, had been cut back by other provisions of the constitution
      2. Art VI—Supremacy Clause—Uniformity
         a. Declares the Constitution as the supreme law of the land
         b. Judges in every state are bound
         c. No state law can be created contrary to it
   ii. Provides for Sup. Ct. review of highest court of a state in 3 types of cases
      1. Where the validity of a US treaty or statute is questioned and decided invalid
      2. Where the validity of a State statute or State authority is questioned as being repugnant to the US constitution, US treaties, or US laws and is decided valid.
      3. Where the construction of any clause of the US constitution or US treaty, or US statute is questioned and decided against the title, right, privilege or exemption specially set up or claimed under it?

Exclusivity of the Supreme Court to interpret the Constitution—Cooper v. Aaron (1958)
State of Arkansas legislature and governor refuse to be bound to the Brown v. Board of Education holding—the 14th amendment forbids states to use their governmental powers to bar children on racial grounds from attending schools where there is a state participation through any arrangement, management, funds, or property.

ISSUE: Can the US Supreme Court’s constitutional interpretations be ignored by State courts or State officials; or do they have the exclusive power to interpret the constitution?

1. “If the leg of the several states may, at will, annul the judgments of the courts of the US, and destroy the rights acquired under those judgments, the con itself becomes a solemn mockery.”
2. Uniformity is needed—Art III
3. It must imply judicial supremacy if it is to be judicial power. If we agree that the Supreme Court is given the authority to interpret the Constitution, then we must give it the supremacy over other courts if it is to have any power. Supremacy Clause Art VI
   1. Jefferson—each branch should have this power of interpretation.
4. Dicta—
   1. Judicial power is limited to the case and controversy at hand
   2. Supremacy and Exclusivity equate the Con with what the court says it is.
   3. This can’t be—what about judicial error
Congressional Control over appellate jurisdiction of the USSC

a. Procedural legislation does not violate art III §1—Congress has the power to establish the inferior courts of the judiciary and in turn curtail the jurisdiction of the courts. *Separation of Powers* _Ex parte McCardle_ (1869)

i. Facts—McCardle petitioned the Supreme Ct. for a writ of habeas corpus. During arguments, congress repealed a statute granting the court jurisdiction to review habeas corpus actions.

ii. Holding: Congress has the power to curtail the appellate jurisdiction of the Supreme Court

iii. **Exceptions Clause**—art III §2—“with such exceptions, and under such regulations as the Congress shall make.”

   1. Naked Constitutional Power—absurd
   2. Some restraints on this power

      a. Cannot destroy the essential role of the USSC

         i. Internal limits—in art III (any constraint on their authority over the judiciary?)

      b. Exceptions cannot be inconsistent with the essential functions of the USSC under the constitution

         i. External limits—stem from elsewhere in the Con.

            1. Essential functions(1st and 14th amendments)
            2. Resolve inconsistent or conflicting interpretations
            3. Maintain supremacy
            4. Protect con rights of minorities

   iv. Judiciary Act gives them the authority to hear original *habeus corpus* acts

b. Congress cannot pass substantive legislation and in turn impose its interpretation of the law in pending cases. Any Congressional jurisdictional limitation must be neutral—**U.S. v. Klein** (1871)

   i. Klein received a presidential pardon before appeal, Congress passed new statute nullifying presidential pardons and stripping SC of jurisdiction to decide cases where a pardon was granted. This was a change in the law and not the scope of the judiciary(where Congress does have authority)

   ii. By allowing this act it would blur the line between the judicial and the legislature. Case on the **separation of powers**. Interfering here and intruding into a case underway, interference. This is a violation of the separation of powers and not exceptions clause argument. If that is right, we still don’t have any help on the exceptions clause.

   iii. Congress may alter the scope of the appellate review of the USSC (as dictated by art. III) and may specify rules or evidence or procedure, but Congress may not direct the courts how to decide.


      a. Audubon sued Robertson. While the case was pending the Congress made the requirements more lenient and provided that compliance with the new requirements would satisfy any pending violations of the previous requirements.

      b. USSC—“a change in (procedural) law, not specific results under old law”

Congressional Power to Expand Constitutional Rights—**Katzenbach v Morgan**(1966)

Klein and McCardle by embracing conflicting views of congressional authority over SC jurisdiction, leave the question of political controls over Court jurisdiction in a shadowy realm. Consequently the debate over such congressional controls is principally about policy and political prudence and not constitutionality Helms Amendment—deny jurisdiction to the USSC and lower federal courts in any case arising out of any State statute, ordinance. . .

Congress can place its own restrictions—using 14th §5 or explicitly saying no review. (see Fischer 46)
Art I §9—appropriations powers—would have prohibited the DOJ from expending funds
Administrative Procedure Act prohibits judicial review over agency action “committed to agency
discretion by law”
Congressional Power to expand Constitutional Rights

B. The Congress itself can enforce the equal protection clause and their reading of it that goes beyond the interpretation established in the courts—Katzenbach v. Morgan (1966)
   a. 14th § 1—Equal Protection Clause
   b. 14th §5—give Congress the power to enforce appropriate legislation for the provisions of this article. A second implied powers doctrine. Necessary and Proper
   c. How much power do the enforcement clauses of the amendments give Congress. Some say just enough to provide relief in cases of violation. Others believe it gives them the power to legislate.
      i. South Carolina v. Katzenbach—15th amendment left Congress chiefly responsible for implementing rights created. Goes beyond forbidding violation of the amendment. The remedies are left to the courts.
      1. Rational Basis Test (policy questions)—So long as the Congress had acted rationally enacting legislation n and p to securing nondiscriminatory voting, the court would defer to congressional judgment. The courts determine the substance of the 15th amendment but Congress is free to ascertain facts that establish substantive violations and then act to remedy those violations.
   d. ISSUE: Constitutionality of §4(e) in prohibiting the enforcement of the election laws of NY requiring ability to read and write English as a condition of voting. Many P.R. residents have been unable to vote because of these NY laws. Seeking a judgment, that §4 is invalid and an injunction prohibiting appellants from either enforcing or complying with §4e
   e. AG of NY—Exercise of Congressional power under §5 of the 14th amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the amendment that Congress sought to enforce. Court must decide if the literacy test is what is prohibited by the Equal Protection Clause
      i. USSC already ruled on this in Lassiter v. Northampton County Board of Elections (The court had concluded that a state may condition the right of suffrage on literacy tests)
   f. USSC—The congress itself can enforce the equal protection clause and their reading of it that goes beyond the interpretation established in the courts
      i. Remedial powers of the Congress to address “unconstitutional acts not directly connected with voting”
         1. Eliminating this barrier to PR voting helped secure equal treatment in the provision of public services. If they have the right to vote they will have more opportunities.
      ii. Congress could reasonably have concluded that the English language literacy test itself violated the 14th amendment’s equal protection clause. Means/End Matrix Congress might have concluded that the NY motive was discriminatory, and not encouraging people to learn to read. The cost of denying the right to vote is too much in order to achieve the end of people learning English.
      iii. Dissent—Congress’ view cannot displace the role of the Judiciary in making an independent determination of whether they have exceeded their powers. They have amendments to make constitutional determinations.
         A. It rejects the principle of judiciary primacy in constitutional interpretation by permitting Congress to ignore or even reverse the Court’s con judgments according to substance of the 14th, 15th amendments.
         B. No factual data.
   C. Congress should enjoy deference when role as fact finder is superior to that of the state or by the courts. Oregon v. Mitchell
      a. Court split on whether the Congress had to power to specify voting ages under §5 of the 14th. Says Congress is superior fact finder and will defer judgment to them.
1. 4—use it for remedial power  
2. 3—cannot remedy it under equal protection clause  
3. 1(Black)—Congress could not invade the state’s power to leg on state elections w/o finding that there was “disc on account of race.”

b. Congress, unlike the courts, doesn’t have to explain its decisions. Therefore can adjust/balance/decide questions of competing principles w/o having to articulate a theory that might haunt them later.

c. Where issue is less a matter of content rights than a division of responsibility b/w congress and states it is better to leave it to the Congress.
   i. Reflects a balance b/w state and national interests and national/state gov’ts.


d. Morgan’s Threat to Marbury—Harlan in his Oregon v. Mitchell dissent—
   i. Congress’s expression of its view cannot displace the duty of this court to make an independent determination whether Congress has exceeded its powers. The reason for this . . . inheres in the structure of the Constitutional system itself. Congress is subject to non of the institutional restratins imposed on judicial decisionmaking, it is controlled only by the political process. In Art V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have a final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.

D. City of Rome v. U.S.—Congress could prohibit electoral schemes with discriminatory effects even as the Court itself concluded on the same day that such schemes were not themselves violative of the 15th amendment. Rational Basis test

E. Boerne v. Flores—Court could not find a rational basis for using equal protection clause of the 14th for religious freedom restoration act. OVERTURNS MORGAN
   i. Held that the statute which was designed to prevent state and local governments from infringing on religious freedom failed the test as the leg record failed to show large scale
   ii. Violations of the constituional rule that the statute was purportedly enforcing.
   iii. Denying Congress what they had given them in Katzenbach
Part II—Congressional Power under the Necessary and Proper Clause

Broad Reading of the Necessary and Proper Clause—McCulloch v. Maryland

a. Madison/Randolph/Jefferson—Necessary and proper only extends to those things enumerated. Constitution is not a general grant of power. The means end analysis is never ending.
   i. Slippery Slope Argument. Very narrow reading.
   ii. “To be implied in the nature of the federal government would beget a doctrine so indefinite, as to grasp every power”
   iii. “Those that have written constitutions are circumscribed by a just interpretation of the words contained therein”
   iv. Necessary would give Congress a free hand.
   v. Finds proper to be a restriction.

b. Hamilton/ Marshall—relation between the means and end, must be the criterion of the constitutionality.
   i. The Bank—Aid in the collection of taxes (art 1 §8 p.), administration of public finances (art I §8)—paras 2, 5, and 6.
   ii. Natural relation between the means and the end and wherever the end is required the means are authorized: wherever a general power to do a thing is given, every particular power necessary for doing it is included.
   iii. “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”
   iv. The expressly conferred powers are the legitimate ends.
   v. The means must be appropriate and are the implied powers

c. Issue #1—does Congress has the power to incorporate a bank in the first place
   i. Art 1 §8, has set out great fundamental powers—enumerated powers.
      1. The implied powers are those that are necessary to execute the express powers.
      2. The structure of the Constitution is short(an outline) and does not say everything as it is not a legal code. This leads to a broad reading. By explicitly taking away powers you are implying that there are implied powers, or why else would you explicitly take powers away.
      3. Some things have to be enumerated as they could not be implied—art 1 §9—end of slave trade.
      4. The Constitution comes from the people and not the states.
   ii. Necessary and Proper
      1. The notion that the clause is restrictive is absurd—it does more than tell congress they can legislate. They already were told that.
      2. Congress used “absolutely necessary” in §10. Knows the difference.
      3. Among the powers §8 and not the limitations §9
      4. The Convention was concerned with it looking like the gov’t had too much power. If there intent was to restrict they would have been more explicit.
   iii. The power is reserved to the people and not the states. Even though the states ratified the Constitution. This is irrelevant. They had to send a delegation. It was a matter of convenience.
   iv. Proves to Marshall that the Constitution can adapt to the ages.
   v. Marshall’s approach to constitutional interpretation
      1. The theory and structure of the government established by the Constitution
      2. The text
      3. The history surrounding the adoption of the text
      4. The consequences of decision: the argument reductio ad absurdum
      5. Precedent
d. 2nd issue—MD had the power to tax real property of the US Bank because of the loss of tax it suffered from not having something else there that could be taxed.
   i. The Bank represents all the people and the State cannot impose on those that it does not represent.
   ii. The real property on the other hand has no problems with this representation since the property is that of the State.

e. Today’s McCulloch Importance—The court will not strike congressional action so long as it is not constitutionally prohibited and is rationally related to objective that are constitutionally enumerated powers.
Part III—Congressional Regulation under the Commerce Clause and pursuant to other art I § 8 powers

Jackson in Hood—“The distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage is one deeply rooted in both our history and law.” CB 558

2. Commerce Clause=Uniformity
   a. States are not separate economic units
   b. Cannot isolate their economies
   c. Free access to every market

3. Judicial Test for the Scope of the Power
   a. So long as Congress is validly exercising its commerce power.
   b. Rational
      i. Noncommercial acts that were intended to affect commerce, and which would necessarily and immediately do so sufficiently affected commerce to be part of commerce and subject to regulation
   c. Reasonable means

4. What does the Commerce Clause Reach?
   a. The channels of interstate commerce
   b. Protects instrumentalities of interstate commerce
   c. Those activities affecting commerce

5. What is Commerce?
   a. Transportation is defined as interstate commerce—*Gibbons v. Ogden*(1824)—Realist
      i. Court struck down a NY act that provided for licenses to operate steamboats b/t NYC and NJ; alternate federal regulation gave license to these waters.
      ii. The supremacy clause is not enough because we have to show that the statute is valid and thus we need to focus on the commerce clause.
      iii. The court held that the federal Statute that was contrary to the state law was a valid exercise of the commerce power and thus preempted the conflicting state statute.
         1. Congress can regulate to the extent that the navigation was a part of interstate commerce. Intrastate commerce is outside the scope.
         2. Since Congress had acted, it displaced the local law.
      iv. Ogden’s lawyers tried to rely on the 10th amendment—doesn’t apply
      v. Scope of the Clause—5 motifs
         1. Meaning of commerce
         2. range and application of the commercial regulatory power
         3. limits of the regulatory power—Plenary Power
         4. the question of exclusivity
         5. The reasons for rejection of national regulation of the commercial regulatory power.
   b. Selling insurance is not commerce—*Paul v. Virginia*(1868, narrow)—Dormant-formalistic
   c. Manufacturing is beyond the scope of the commerce clause—*Kidd v. Pearson*(1888 narrow)—
      Dormant (Formalistic)
   d. A steamer that only travels intrastate, but transport interstate goods is susceptible to federal regulation under the commerce clause—*The Daniel Bell*(1870, broad)—Realist

6. What is Interstate/Intrastate Commerce?—Early oscillation between form alism(strict interpretation) and realism(economic impacts)
   b. Direct/Indirect Effects—Commerce Clause Power does not reach to the monopolistic manufacture of Sugar—*U.S. v. E.C. Knight*(1895)—Formalist
      i. USSC says that they may have a monopoly of sugar manufacture, but this did not constitute a monopoly of commerce in sugar (10th amendment)
ii. Formalistic—commerce is an indirect result of the monopoly.
   i. Slippery Slope
   ii. Might have succeeded if they had more evidence that the monopoly on manufacture so
       affected the trade of sugar.
   iii. Dissent—Harlan—Means/End—if congress has discretion of the choice of the means to
       advance an end.

c. Close and Substantial Relationship—If intrastate commerce is discriminatory towards interstate
   commerce, then Congress can regulate it. When they are so intertwined that Congress cannot
   regulate one without regulating both, they can do both. 
   Houston, East, & West Railway Co. v. U.S. (1914)(Shreveport Case)—Realist
   i. Realist or functional approach –Modern approach
   ii. Safety, efficiency, and uniform (fair market)
   iii. RR is an instrument of commerce.
   iv. Protective principle

d. Stream of Commerce—regulation of trade practices in selling livestock all fell within interstate
   commerce. Stafford v. Wallace (1922, broad)—Metaphors (stream, flow)—Realist
   i. The stockyards were a _throat_ through which the current of interstate commerce flows.
      The actions of the brokers were essential, necessary, and indispensable to the flow of
      interstate commerce.
      1. Similar to Knight, but the court doesn’t go that way, instead taking a more realist
         approach.
   ii. Intrastate activities that threaten to obstruct or unduly burden the freedom of interstate
       commerce is within the regulatory power of Congress.

If Congress had a police power, they would use it, since they don’t, they regulated or prohibit commerce

e. The Commerce Clause gives Congress the power to prohibit the interstate movement of items
   that will harm the public morals. The Lottery Case (1903)—Realist
   _This is really a state police power_
   The real end is to protect morals, and the Commerce Clause was tacked on as a valid end.
   This is a pretext argument.
   “For the protection of all the people of all the states”—this a moral issue.
   Slippery Slope

f. Dual Sovereignty Principle—Federal power cannot impinge upon the zone of state power,
   Emergence of the Federal police power—Hammer v. Dagenhart (Child Labor Case) (1918)—
   Formalist
   i. Congress cannot use its commerce power in a way which would permit Congress to
      displace state authority over matters of purely local concern (health and safety of kids)
   ii. The USSC struck down the child labor laws because it was to regulate the production of
       goods. If it were otherwise they would be able to regulate the manufacture of everything.
   iii. Gov’t—uniform control of child labor is necessary, lest differing state policies, laws, give
       rise to inequities in the market.
   iv. Slippery Slope argument is absurd
   v. Unlike the lotto tickets, the goods that are in the stream of commerce of not harmful in
      and of themselves.
   vi. Dissent—the power of the Congress to regulate cannot be curbed by the chance that it
       might effect the functioning of the state. It is a plenary power
Constitutional Crisis—The New Deal—FDR was threatening the expand the court and appoint new justices that would hold on cases the way he wanted. “Two of the horses are pulling in unison today, and one is not”

\[g\] Denies Realist Standards in analyzing transportation of goods—*Schechter Poultry* (1935)—Formalist
  \[i\] The interstate transportation (stream) of the poultry ended when it reached the distributor in NY.
  \[ii\] The power of Congress can extend only to those non transport concerns which directly affect the interstate commerce—Shreveport—no close and substantial or direct
  \[iii\] If regulating the wages is necessary to control prices than you should regulate all facets of the industry
    \[i\] Emergency Powers are limited—cannot enlarge or create constitutional power.
  \[iv\] This is a formalist decision reviewed in a realist manner.

\[h\] End of Laissez-Faire Court—*Carter Coal* (1936)—Formalist
  \[i\] Employee relations—constitutes production and not trade—and local issues
  \[ii\] Again distinguishes commerce and manufacture.
  \[iii\] It is the relationship between interstate and intrastate—looking for a direct correlation—and not the magnitude of it. It must be the proximate cause of the effect and not include some intervening agency.
1937 REVOLUTION—Resolution of the Crisis

Substantial Economic Effect
Rejects Bad Purpose
Intrastate commerce may be regulated if it so effects interstate

Rational Basis Test (ex. employee/employer relations)

Cumulative Effect

i. It is the Substantial effect on Commerce and not the Source (or relation) (Realist approach)—
   NLRB v. Jones & Laughlin Steel Corp (1937)
   i. Impairing the efficiency, safety, or operation of the instrumentalities of commerce—The Congress lifted this language and reasoning from the Houston, East Case—where the case law supports the present position of the Congress.
   ii. Occurring in the current of commerce is now subsumed under the substantial economic effect—Stafford Case
   iii. Causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
   iv. Unequal bargaining power can substantially burden and affect the flow of commerce.
   v. Protection of employee rights will protect and safeguard commerce from injury, impairment, or interruption
      1. Promotes flow by removing strife
      2. Encourages friendly practices
      3. Restores equality.

j. Rejects Inquiry into Bad Purpose of Congress—U.S. v. Darby (1941)—Overrules Child Labor Case—Realist
   i. Court finds that as long as you can show that the commerce clause applies, the purpose for regulating is irrelevant.
      1. Employment ban was substantially related means to the valid end of closing interstate commerce to the products of substandard labor conditions.
      2. These standards so effected interstate commerce by giving the products of such labor a competitive edge in the marketplace.
   ii. The legitimate end (regulating commerce)—justified the means (criminalizing employer conduct)
   iii. 10th amendment not a bar—as long as there is no violation of a specific check on its power.
   iv. No longer accept the argument that the goods themselves are harmless—Kentucky Whip

k. It doesn’t matter that not all of the goods being manufactured will not leave the state. Mulford v. Smith. Realist (Tobacco case)

l. Rational basis test used to support the position that the number of hours worked will affect the employers competitive position. Maryland v. Wirtz—Realist

m. Cumulative Theory—Aggregation—Wickard v. Filburn—Realist
   i. We can regulate a farmer who never sells his wheat in the market place because his production leads to his failure to buy in the market.
   ii. His production affects interstate commerce.
   iii. Justified because of the aggregation of other farmers and the impact that will have on commerce.

Modern Commerce Clause Standards
--Congress could set terms for the interstate transportation of persons, products, or services even if this constituted prohibition or indirect regulation of single state activities.
--Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity.
--Congress could regulate—under a combined commerce clause/nec and prop analysis—intrastate activities in order to effectuate its regulation of interstate commerce.
Breadth of the post-1937 congressional “general police power”

7. State Action Doctrine—Initially, rejects the use of the P and I of the 14\textsuperscript{th}, so we go to CC

The Constitution limits governments only and does not ordinarily limit private action. There must be state action for the government to act.

\begin{itemize}
\item[a.] Court rejected the argument that Congress had authority to act under enforcement provisions of the 13\textsuperscript{th} and 14\textsuperscript{th}—\textit{The Civil Rights Cases}
  \begin{itemize}
  \item[i.] 13\textsuperscript{th}—slavery, 14\textsuperscript{th}—equal protection, 15\textsuperscript{th}—voting rights
  \item[ii.] Narrow interpretation of the 1875 Civil Rights Act with protection limited to State’s overt discrimination
    \begin{itemize}
    \item[1.] The 14\textsuperscript{th} is limited to government conduct only, and therefore cannot extend to discrimination in inns and theaters etc.
      \begin{itemize}
      \item[a.] Due Process and equal protection only prohibit state action.
      \item[b.] § 5 does not permit Congress to regulate private conduct
      \item[c.] Congress only has the power to enforce the 14\textsuperscript{th} it could not use that power to extend the scope of the substance of the Amendment to private conduct
      \item[d.] They could correct a constitutional wrong committed by the states, but not those committed by private individuals.
    \end{itemize}
    \item[2.] The 13\textsuperscript{th} amendment—operates directly on private conduct when it comes to slavery—but discrimination in public places has nothing to do with slavery. This is no longer good law.
  \end{itemize}
\end{itemize}
\item[iii.] Dissent (Harlan)
  \begin{itemize}
  \item[1.] 13\textsuperscript{th} empowered Congress to protect former slaves from discrimination because of their race.
  \item[2.] §5 of 14\textsuperscript{th} invested Congress with the power to enforce all provisions of the amendment.
\end{itemize}
\item[iv.] Effect of this was Congress had to use commerce clause power for civil rights enforcement
\item[b.] What is State Action?—Are we creating a legal fiction of state function to get around the restrictions on the 14\textsuperscript{th} amendment.
\item[c.] Public Function—Private persons exercising governmental powers should be regarded as state actors or those traditionally exclusively reserved to governments—\textit{Marsh v. Alabama}(1946)
  \begin{itemize}
  \item[i.] A company town counts as an instrumentality of the state where it undermines the 1\textsuperscript{st} and 14\textsuperscript{th}. The operation of the town was a public function.
  \item[ii.] Balancing test between property rights and 1\textsuperscript{st} rights—latter wins.
  \item[iii.] Dissent
\end{itemize}
\item[d.] Shopping Centers
  \begin{itemize}
  \item[i.] Logan Valley Plaza—the leaflets being distributed were related to non union employees being hired
  \item[ii.] \textit{Lloyd Corporation}—was distinguished from above because the leaflets were related to the war and had no relation to the center.
  \item[iii.] \textit{Hudgens v. NLRB}—Privately owned shopping centers could be treated as public only when that property has taken on all the attributes of a town.
\end{itemize}
\item[e.] White Primaries
  \begin{itemize}
  \item[i.] \textit{Nixon v. Herndon}—The Texas Dem party adopted racially exclusive qualifications that were struck down on the grounds that the Democratic party was wielding power that had been expressly delegated to them by law.
  \item[ii.] \textit{Grovey v. Townsend}—If there is no state action and the dem party adopts racially disc rules, it is immune from judicial review.
  \item[f.] State Action is implied—\textit{Terry v. Adams}(1953)
\end{itemize}
\end{itemize}
i. The Jaybird primaries ultimately decide the democratic nominee and the state run primaries and elections merely ratify what has already been decided.

g. State court decisions upholding restrictive covenant count as state actions vis-à-vis the 14th amendment—*Shelley v. Kraemer (1948)*

i. *Martin* gave them the jurisdictional basis for reviewing this state court decision.
Civil Rights Cases of 1964—Using the Commerce Clause

RFK—need to look to the commerce clause—The early Civil Rights Cases—indicate that the 14th was applicable to only state action. Now, we might say that because of the increase in state regulation of private businesses more may be attributed to the states. However, that ruling has never been overruled and as such the Commerce Clause is a more sound approach.

8. Substantial effect of racial discrimination on interstate commerce—Heart of Atlanta Motel—
   a. Initially a moral issue(13th and 14th don’t work so they go to Commerce) Upheld the act on congressional findings that local racial discrimination inhibited interstate travel by Blacks.
      i. A moral end is now associated with the commerce clause.
   b. Could regulate because of the substantial effect.
   c. Need to work on morals v. Morality
      i. Morals—liberty has been denied without an application of the harms principle
      ii. Morality—protecting the liberty and equality.
   d. Deference to Congress—Rational Basis Test

9. Rational Basis—Katzenbach v. McClung(Ollie BBQ)
   a. Court lends no credence to testimony from f dc to the effects that the means are counterproductive—if they integrate the restaurant the whites won’t eat there—the rational basis test would fail on this one.
   b. Aggregation(Wickard)
   c. Deference to Congress—Rational basis—language from the hearing and not findings in the act.
   d. End is to promote interstate commerce and the means is to prohibit discrimination.

    a. Congress can regulate a class of activities that substantially affects interstate commerce without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.
       i. There was no evidence that Perez was involved in extortion outside of NY.
       ii. Class of loan sharks as a whole can be said to have a substantial effect on interstate commerce. (Wickard principle of aggregation)
    b. Where the class of activities regulates is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.
    c. Used a rational basis test—deference to Congress
    d. Dissent—Stewart—Adopting the truth as the standard for the rational basis test. When the rational basis test comes up with an erroneous result you should substitute it with the truth.
       i. He sees no relationship.

    a. Used commerce clause to create mining land use standards for the expressed purpose of protecting society and the environment from such activities.
    b. Adversely affects commerce and the public welfare—de facto federal police power.
    c. Defers to congress because of strong environmental argument

12. Back to the Commerce Clause and the undoing of the 1937 “Revolution”
    a. Commerce Clause is reigned in—U.S. v. Lopez (1995) Gun free zone act found to be an unconstitutional use of the commerce clause
       i. Argues that the activity is non-economic in nature and applies a slippery slope to the government’s arguments.
          1. Use of channels of interstate commerce—does not apply
          2. Regulate and protect the instrumentalities of interstate commerce—does not apply
          3. Power to regulate those activities that substantially affect interstate commerce.
ii. Needs to show the substantial connection if the matter is noncommercial intrastate activities—the court will make its own assessment and not defer to Congress—the Congress in this case never considered in floor debates and thus did not indicate a rational basis for their decision. There were no findings to support this.

iii. Concur—Kennedy—the statute intrudes upon an area of traditional state concern (education)

iv. Dissent—Souter—Important to defer to Congress as a means of undergirding the democratic process. Rational Basis Test

v. Dissent—Breyer—takes up the case for substantial economic effects on the merits and applying the rational basis test.

1. Found the majority was contrary to case law
2. Rejects commercial/noncommercial distinction.

vi. Effect on Heart or Katzenbach
1. The core activity in Katzenbach is clearly commercial, unlike Lopez so the effects that are trotted out might be more legitimate in the eyes of the court.

vii. Effect on Perez
1. Majority cited Perez several times. The activity was clearly commercial in nature.


i. Emphasizes the non economic character of the activity

1. **If it is not inherently economic, you cannot draw that connection?**

ii. Addresses slippery slope to government’s argument re: substantial economic effects.
a. **Taxing**—Art I §8—“Congress shall have the power to lay and collect taxes”—Congress may tax things it does not have the power to regulate.
   i. Narrowest holding—Madison—to lay and collect taxes to provide for the general welfare—gw is understood in terms of other art I §8 provisions
   ii. Court’s reading—the only power granted is to tax in order to provide for the payment of debts and for the general welfare.
   iii. Broad reading—independent powers in art I §8 para 1 include an independent power to provide for the general welfare.
   iv. There are both explicit and implied limits on this tax power.
   v. Court found that the tax (raise revenue) imposed on companies employing children was a penalty (punish, regulate) and not a tax—*Bailey v. Drexel Furniture*(1922)—Child labor tax case
      1. only employers who knew they were employing children were liable
      2. the amount of tax was not proportional to the child labor employed
      3. the enforcement was in the hands of the Labor Dept and not the IRS.
      4. Pretext argument—congress purports to be doing one thing and does another under the pretext of the former. Because of the earlier ruling (*Hammer v. Dagenhart*) that wouldn’t let them do it with the commerce clause they are now trying to do it with a tax.
   vi. Tax was upheld despite its clear regulatory intent to prohibit gambling—*U.S. v. Kahringer*(1953)
      1. Accepted that the registration merely made the tax easier to collect and thus the regulation was related to the collection of the tax.
      2. Even if it was a penalty—it was a tax.

b. **Spending Clause**—Art I §8—to pay the debts and provide for the common defense and general welfare of the United States
   i. Congress is not limited to spending only to achieve the specific powers granted in article I, rather Congress may spend in any way it believes would serve the general welfare so long as it does not violate another constitutional provision—*U.S. v. Butler*(1936)
      1. The tax sought to stabilize farm prices by curtailing agricultural production. It authorized the Sec of Agri to make contracts with farmers to reduce their productive acreage in exchange for benefit payments. The payments were to be made out of funds payable by the process: a processing tax imposed upon the first domestic processing of the particular commodity.
      2. Madison—Congress was limited to taxing and spending to carry out the other provisions granted in Art I.
      3. Hamilton/Court—Congress could tax and spend for any purpose to serve the general welfare. This is a separate and unique clause from those already enumerated.
      4. Congress could not purchase compliance with a regulatory scheme that it could not otherwise constitutionally enact.
      5. It was coercive
   ii. All behavior is motivated—assumes free will—*Charles C. Steward Maching Co. v. Davis*(1937)(liberal reading)
      1. 1935 SSA challenged. The act provides for a credit to employees of up to 90% where the state in question has set up its own unemployment program. Is it coercive?
a. Was there an alternative  
b. Unattractive course of action?

iii. Congress can regulate indirectly what it cannot regulate directly when the tax is related to a legitimate end—*South Dakota v. Dole*

1. The end—general welfare—safe interstate travel—highway safety
2. Limitations
   a. Must be in pursuit of the general welfare
   b. Must be unambiguous
   c. Must be related to the federal interest
   d. Other constitutional provisions may provide an independent bar—cannot induce the state to do something unconstitutional.
   e. Cannot coerce—$ was a mild encouragement

3. Dissent—O’Connor
   a. Did not think that the condition was reasonably related to the expenditure of federal funds on highways.
   b. The conditions could extend no further than to specify how the federal money is to be spent. The drinking age was a regulation and not a condition.

c. **War Power**—Art 1 §8 “Power to declare war, to raise and support armies, to provide and maintain a navy, to regulate the armed services, and to tax and spend for the national defense”

   i. Legislative power to regulate in order to facilitate waging war even though officially the war has ended—*Woods v. Cloyd Miller*

   1. Court upholds federal housing and rent act of 1947 under the war power.
   2. Causal connection between the war conditions and the post War exploitation of rental housing market—Necessary and Proper Clause
      a. War does not end with hostilities
   3. Concurring—Jackson—warns of the extended use of the war powers.

d. **Treaty Power**—

   i. Congress could use any means necessary and proper to implement treaties and that Congress need not rely upon its other enumerated powers to do so and state sovereignty does not trump treaty power. *Missouri v. Holland*

   1. Couples nec and proper clause with treaty making power under art I §8 powers.
   2. Erases any federalism based limits on the power of Congress to implement treaties.
   3. Rejected the notion that it violated 10th.
      a. National interest is involved
      b. Subject matter is only in the state temporarily
      c. Not sufficient to rely on states to regulate birds
   4. Formal treaty making conditions must be satisfied
   5. Bricker amendment—Where they are self-executing, they have no validity in the land where they run contrary to the Constitution.

   ii. Executive agreements cannot violate constitutional rights—*Reid v. Covert*

   1. Constitutional Rights trump over countervailing policies.
   2. Bricker amendment is unnecceary.

iii. See Goldwater v. Carter—by saying the subject is non justiciable they are indicating that the Pres can rescind a treaty
Part IV The Court Regulates in the absence of Congressional Regulations—The Dormant Commerce Clause

- All State laws must be rationally related to a legitimate state purpose—Rational Basis Test
  - Rational (Baldwin and Seelig)
    - Deferential to legislative judgment
    - If there are any facts that establish a plausible connection between the law and some state goal the rationality of the relationship is proven.
  - Legitimate—if the purpose is not legitimate the law is auto void
    - Economic protectionism

- State laws that unjustifiably discriminate against interstate commerce are prohibited by the dormant commerce clause until and unless Congress permits the states to discriminate—(Strict Scrutiny)
  - Facial—it is invalid unless the state proves it has a legitimate objective that cannot be accomplished with less onerous alternatives—strict scrutiny—Hughes test. (Philadelphia, Maine v. Taylor, Hughes)
    - Will not inquire into the question of whether, in actual practice, the law has a discriminatory effect on interstate commerce. Only examines the alternatives offered by the state
    - Reciprocity Provisions are facially invalid (Limbach, Sporhase, Cottrel)
  - Economic Protectionism
    - Laws that are protectionist in their effect and adopted as merely a means to another end are treated like facially discriminatory laws: they are void unless the state proves that it has a legitimate objective that cannot be accomplished by any less discriminatory alternative—strict scrutiny. (Maine v. Taylor)
  - Discriminatory Application of neutral laws
    - A neutral law may be applied in a fashion that is so discriminatory and economically protectionist that the law, as applied, will be automatically invalid. (H.P. Hood)

- Burden Doctrine
  - Nondiscriminatory state laws that unduly burden interstate commerce are prohibited by the dormant commerce clause until and unless Congress permits the states to impose the burden.
    - The Pike Test—burdens place on interstate commerce by the law are clearly excessive in relation to the putative local benefits of the law
    - Balancing Benefits and Burdens
      - The burdens must heavily outweigh the benefits (Southern Pacific)
      - Accessing Burdens (Bibb, Kassel)
        - If discriminatory—dis and burden doctrine
        - Not assessed in isolation—the burden might depend on the law of other states.
      - Assessing benefits
        - Not measured in isolation—Kassel (exceptions)
        - How much the law actually accomplishes (Southern Pacific)
        - Sometimes say that state laws which deliver real, nontrivial health and safety benefits are valid without the necessity of balancing burdens and benefits, but even then it often inquires into the purported benefits in order to determine whether or not those benefits are illusory or real.

14. Question of Exclusivity, bases of State regulation, and congressional authorization
   a. Exclusivity of the Congress to regulate commerce—Gibbons (1803)
      i. No analogy between the power to tax and the power to regulate commerce.
      ii. The powers to tax between the state and federal gov’ts do not overlap. States have no power to regulate commerce with foreign nations or among the several states as that is the power of Congress.
iii. If the laws of the state interferes with that of Congress, it will be immaterial whether the laws were passed in virtue of a concurrent power “to regulate commerce with foreign nations and among the several states or in virtue of a power to regulate their domestic trade and practice.

iv. Exclusive to States—inspection laws

v. Exclusive to Congress—War powers,

vi. Johnson—Power to regulate commerce is exclusively in the hands of the Congress
   1. states could regulate incidently so long as their regulation did not interfere with interstate commerce.
   2. He is only looking at the conflict between the constitution and the state law and not the federal law that was issued.

b. State does not have power to regulate conditions of sale, but retains plenary control over those aspects of sale fraught with fraud and deception (state police power). Plumley v. Common of MA
   i. Convicted of violating a MA law prohibiting the sale of adulterated oleomargarine.
   ii. Food has always been under the state police power (health, welfare of citizens, safety, environment)
   iii. Criminal law is at issue here and that is a state concern

c. Rejects the Exclusivity Doctrine and finds that states have some regulatory authority when the nature of the subject is local—Cooley v. Board of Warden
   i. Pennsylvania law required that all ships use local pilots when they navigated in the Delaware River. Plaintiffs paid the penalty, then sued for restitution claiming that the local pilot law conflicted with Congress’ power to regulate commerce.
   ii. Inherently National—requires nationally uniform rules—Congress has exclusive power
   iii. Inherently local—states were free to act unless Congress acted to preempt them. The state and the congress shared concurrent power to regulate inherently local activities.
   iv. The court finds that the mere grant to Congress of the power to regulate commerce, didn’t deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention with a single exception not to regulate this subject, but to leave its regulation to the several states. This is exclusive to the pilots.
   v. Since there was no federal law on the books, if Court had said that the state couldn’t regulate there would be a void

d. State law was in the public interest—Not a dormant commerce clause case—Prudential Insurance Co. v. Benjamin—Congress recognized state power(interest) in this area even though such regulation probably discriminated against interstate commerce.
   i. The SC tax was only on foreign insurance companies doing business in the state.
   ii. Previous case finds insurance is not commerce.

15. Transportation Cases—deference to balancing to actual purpose—and burdens

a. Analysis of Commerce Clause challenges to state regulations (Kassel)
   i. Defer to Legislature
   ii. Burdens imposed balanced against local benefits to be received (except with safety concerns)
   iii. Actual purpose—protectionist legislation is unconstitutional under the commerce clause even if the burdens and benefits are related to safety rather than economics.

b. Deference to the State Legislature—South Carolina State Highway Department v. Barnwell Brothers (1938)
i. General Assembly of S.C. of April 28, 1933 prohibits use on the state highways of motor trucks and “semi-trailer motor trucks” whose width exceeds 90 inches, and whose weight including load exceeds 20,000 pounds.

ii. It is the role of congress to decide if state legislation which regulates something that they haven’t legislated imposes on their Constitutional Power.

iii. Found a rational basis rather than specifics
   1. acting within their state police power
   2. no discrimination is evident

iv. Says balancing test is for the legislature and not the judiciary.

v. **Rule:** burdens on interstate commerce will not count against the policy so long as there is a prima facie case on behalf of the safety end.

vi. When the court is reviewing transportation cases they will give great deference to the legislature.  Not so true with RR.

   i. The AZ Train Limit Law of May 16, 192 makes it unlawful for any person or corporation to operate within the state a railroad of more than 14 passenger or seventy freight cars.
   
   ii. Balance—State safety interests v. burden on interstate commerce (the safety provision actually caused more accidents)
      1. Must look at the facts
      2. The burden on ISC was greater then the benefits received(there were little if any safety benefits)
   
   iii. The court and not the state legislature is under the commerce clause the final arbiter of the competing demands of state and national interests.
   
   iv. The states are given authority over local state concern even though it affects commerce, as long as it does not materially restrict free flow of commerce across state line, or interfere in matters of uniformity of regulations of a national concern.
   
   v. Sets itself apart from Barnwell by noting the difference between the railroads and highways.
   
   vi. Dissent—Black—this should be the domain of the state legislature unless there is no rational basis.  The court is acting like a super legislature (performing fact finding)
   
   vii. Dissent—Douglas—only intervene where state discriminates against interstate commerce.  Changes his tune below.

d. **Balancing —Bibb v. Navajo Freight Lines (1959)**
   i. Burdens imposed on the trucking companies to alter their mudflaps for IL, heavily outweighed any benefits to IL
      1. There was little safety rationale offered as support—plus the mudflaps were actually shown to be more dangerous.
      2. Because there seemed to be no rational basis (and possibly discrimination), the balancing test was employed.
      3. Douglas’ Departure from respecting local interests—Douglas is putting on his balancer cap from a rare departure.  Because the inequities are so great.  The state law did not promote a state purpose

e. **Balancing + Actual Purpose—Kassel v. Consolidated Freightways Corp(1981)**
   i. IA statute allowed single but not double semis on highways claiming a safety benefit. However, there were exceptions that benefited locals, but burdened interstate (doubles used border towns, permitted doubles for farm equipment.  Evidence of protectionism leads one to balance.
   
   ii. Balance—ostensible state safety interest (found illusory) vs. burden on interstate commerce.
iii. Concurring—Brennan—Actual purpose analysis
   1. Discriminatory purpose—imputes a bad purpose to the legislature which is a hard row to hoe.
      a. Evidence of Protectionism—no need to balance of figure out purpose

iv. Dissent—Rehnquist
   1. Deference on safety grounds—Cannot infer the purpose of the statute by looking at the record. You cannot infer that all the lawmakers voted for the statute for the same reason.

16. **Pike Formula**—a state law that does not discriminate against interstate commerce is presumed to be valid. It is void if the challenger to the law can show that the burdens placed on interstate commerce by the law are clearly excessive in relation to putative local benefits of the law.
   a. Even-handed (free from discrimination) and
   b. Legitimate State purpose (End of local interest) and
   c. Only incidental effects on ISC—then it passes muster unless,
   d. Those effects (burden) are not out of proportion to putative end (local interest benefit)
   e. **Pike v. Bruce Church** (1970)—AZ fruit and veg standardization act required cantaloupes to be packed and labeled a particular way in AZ. AZ grower packed his in CA.
      i. State interest—maintain high standard for growers—legitimate state purpose
         1. The interest was not being served because AZ name was not being attached to a superior product.
         2. Proportionality was off

17. Incoming Commerce—
   a. Use Pike if non discriminatory
   b. Use Hughes (Strict Scrutiny) if discriminatory
   c. NY law prohibited the distributors to buy milk from out of state for prices lower than the minimum payable to producers in NY. **Baldwin v. Seelig** (1935)
      i. Ostensible Purpose—trying to ensure an adequate milk supply
      ii. Actual purpose—protect NY producers and discriminate against producers outside the state.
      iii. TEST—Bad motive is difficult to prove. Thus go to discriminatory effects and no exercise of state power is going to be held constitutional where it leads to discriminatory effects. The exception is if there are no other alternatives and in this case there were.
       d. The court found a requirement that a peddler who deals in out of state goods needs a license and those who deal in state good do not. **Whelton v. MO** (1875)
          i. There was a less onerous alternative—license everyone.
   e. Hybrid Standard—When discrimination is demonstrated, the burden falls on the state to justify both in terms of local benefits and the unavailability of less onerous alternatives. **Hunt v. Washington State Apple** (1977)
      i. NC regulation held discriminatory because it held that “closed containers” of apples shipped into NC bear no other grade than US grade or standard and WA had higher and more superior grading which they were barred from using
      ii. The burden shift to NC to show the benefits they would receive.
      iii. Burdens the WA dealers, leaves the NC unaffected
      iv. Loss of competitive advantage for WA dealers—impossible to attract customers to the product—but what customers buy the apples from closed containers, these are probably going to distributors.
      v. Leveling effect
vi. There is a less onerous alternative—put both labels on the box.

f. A state is prohibited from isolating itself from problems common to the states of the federal union—*Edwards v. CA*
   i. A regulation forbidding one to transport indigent into the state with knowledge of indigency is discriminatory even though thy argued that the indigents cause health, moral, and financial problems.

g. It is discriminatory for a state statute to require that out of state beer prices not be higher than those charged to neighboring states—*Healy v. Beer Institute*
   i. No local regulation of pricing decisions that have a link to interstate market
   ii. Doesn’t immunize state laws from commerce clause challengers where the state law regulates the intrastate market.
   iii. They would in effect be deciding what out of state sources of beer are allowed to charge in CT.

h. Combination of discriminatory effects and possible protectionist purpose may trigger application of the Hughes Test. *Dean Milk (1951)*
   i. City of Madison ordinances make it unlawful to sell milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant w/in a 5 mi radius of Madison. Also, prohibits the sale of milk or the importation of milk for sale in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials.
   ii. Do these prohibitions impose a constitutional burden upon interstate commerce.
   iii. Legitimate local purpose—local health regulation
   iv. Still unconstitutional
      1. There are less onerous alternatives
         a. The local plants could do the inspections
         b. The local health commissioner was aware of a model milk ordinance as an alternative.
      2. The above points to the discriminatory nature of the law

v. Dissent
   1. Doesn’t think the court should dictate the alternatives with health laws with bona fide purposes.
   2. These are policy decisions and not individual rights and should be left to the legislature.

i. State law is upheld despite obvious (facial) discrimination—*Maine v. Taylor*
   i. ME statute prohibiting the importation of live baitfish.
   ii. Issue: Do these prohibitions impose an unconstitutional burden upon interstate commerce?
   iii. Is there a legitimate local purpose?—Environmental Interest—prevent foreign baitfish from infecting native baitfish with disease.
   iv. Discriminatory on its face—Use Hughes Test

v. Hughes Test
   1. Does the statute serve a legitimate local purpose—in this case environmental and therefore great deference to the state
   2. Is the purpose one that cannot be served as well by available nondiscriminatory means.—there are no other alternatives.
   3. If both yes than it stands
   4. Rule for the Hughes Test
      a. A state must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.
b. Shielding in state industries from out of state competition is almost never a legit local purpose, and state laws that amount to simple economic protectionism consequently have been subject to a virtually per se rule of invalidity.
c. Impediments to complete success cannot be a ground for preventing a state from using its best efforts to limit an env risk.
   vi. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

j. Where there is a reasonable basis for legislation to protect the social, vs. economic, welfare of the community, it is not for the USSC to deny the exercise of a sovereign state. Breard v. City of Alexandria
   i. Door to door salesman arrested in LA for failure to obtain the prior consent of residence owners as required by statute. The ct. upheld the law.
   ii. Homeowner’s right of privacy outweighed burden on ISC. Pike Test
   iii. Not discriminatory on its face—no Hughes test

k. Economic protectionism can reside in legislative means as well as ends—Philadelphia v. New Jersey
   i. NJ law prohibited the importation of waste originating outside the state.
   ii. Ostensible Purpose—Protecting the environment and public safety of NJ
   iii. Actual Purpose—suppress competition and stabilize the cost of solid waste disposal (Economic protectionism)
   iv. Facially discriminatory—Purpose doesn’t matter because the means are illegitimate—less onerous alternatives were available.
   v. Dissent—quarantine analogy.

l. Even if instate will be greatly advantage if there is no bad purpose it will stand—Exxon Corp v. Maryland
   i. MD statute forbade big refineries from operating retail stations in the state. Court upholds despite the advantage to instate dealers.
   ii. Did this prohibition impose an unconstitutional burden upon interstate commerce?
   iii. Looks for a bad purpose, but doesn’t find one.
   iv. Dissent—Blackmun—sees a bad purpose and wonders why they didn’t look to see if there were less onerous alternatives.

m. Empirical Linkage of Means to ends not needed under minimal scrutiny—Minnesota v. Clover Leaf Creamery
   i. Statute banning the retail sale of milk in plastic, but permitted sale in paperboard cartons. Court upholds.
   ii. Do these burdens impose an unconstitutional burden upon interstate commerce?
      1. Ostensible purpose—presents a waste management problem, promotes energy waste, and depletes natural resources
      2. Actual purpose—Promote the economic interests of the pulp companies.
   iii. It does not matter that empirical evidence proved that the statute perversely served its purposes
      1. “Where there was evidence before the legislature reasonably supporting the classification, the law would be upheld regardless of the strength of the empirical evidence that the legislature was mistaken”
      2. Applies the Pike Test (a-c=rational basis and proportionality) because it was not disc on its face—looks like an environmental issue.
a. Evenhanded
b. Legitimate purpose
c. Incidental effects
d. Proportionality Rule is not violated—this statute does not overly benefit local milk producers. Out of state will also benefit.
e. Once he finds there is no discrimination he does not need to look to less onerous alternatives.

iv. Paulson—Violates the Due Process and fails the Rational Basis Test—no basis for the act in terms of what they’re ultimately trying to achieve. Restricting the use of plastic containers will not lead to environmental benefits.
   1. The means are not rationally related to the ends.
   2. The means is to ban plastic containers and the end is to change consumer’s habits.
   3. Unreasonable burden was also cited.

n. The Commerce Clause creates the necessary reciprocity and reciprocity provisions are facially discriminatory. Cottrell
   i. MS law requires the purchase of milk in MS be conditioned on the reciprocal sale of MS milk in the other states. LA milk producer challenges the law.
   ii. They may pursue their remedy in court if they found that they do not have free access to other states.
   iii. Discriminatory effects where LA producer is denied entry to MS markets because LA didn’t honor reciprocity vis-à-vis MS milk

   i. Ohio statute awarding tax credit to fuel dealers for ethanol purchased in Ohio or in State enjoying reciprocity agreement with Ohio appears on its face to be discriminatory.
      1. There was no agreement between IN and OH so New Energy did not get credit
      2. Economic discriminatory taxation: out of state manufacturer treated different from in state manufacturer.
   ii. Go to Hughes Test—there is a less onerous alternative—direct subsidy to State industry.

   i. Nebraska prohibited the export of ground water to states that refused to permit the export of their ground water to NE.
   ii. Does this prohibition impose an unconstitutional burden upon interstate commerce?
   iii. There is a legitimate state purpose—water conservation
   iv. Facially discriminatory—CO did not allow the export of ground water so they were not able to comply with the agreement. Use Hughes Test
   v. Less Onerous Alternatives? They might have been able to just prevent the exportation of water altogether

18. Outgoing Commerce—
   a. Use Pike if non discriminatory
   b. Use Hughes (Strict Scrutiny) if discriminatory
   c. H.P. Hood & Sons v. Du Mond (1949)
      i. State of NY denying a MA corp. the permit to have additional facilities in NY to ship milk out of state. Protectionism. Ct. strikes down.
      ii. Did these prohibitions impose an unconstitutional burden upon interstate commerce
      iii. Purpose—protect local economic interests
      iv. Bad purpose—curtail interstate commerce to aid local economic interests. No consensus on how he reached this decision.
      v. Dissent—points to milk problem and finds a good purpose.
d. **Pike v. Church (1970) Pike Test**  
   i. *Rational Basis, plus proportionality test*

e. Hughes Test—Strict Scrutiny—applied when there is discrimination on its face—*Hughes v. Oklahoma (1979)*  
   i. OK statute proscribing transport for out of state sale of minnows taken from OK waters. Ct. strikes down.  
   ii. Do these prohibitions impose an unconstitutional burden upon interstate commerce?  
   iii. Discrimination is evident—Go to Test  
      1. Is there a legitimate state interest?—Conservation  
      2. Are there less onerous alternatives?—set up controls everywhere including instate intake of the minnows

f. Local Interest is sufficient to off-set a rather harsh burden on interstate commerce—*Cities Service v. Peerless Oil and Gas (1950)*  
   i. OK sets a min price for natural gas produced in OK and sold in interstate commerce. Upheld.  
   ii. Legitimate state purpose—yes, conserving—enough to counterbalance an incidental burden on interstate commerce.  
   iii. The court never applied the Hughes Test—went to Pike  
   iv. Court—“Cannot say that a clear national interest is so harmed that state price fixing is in violation of the commerce clause  
      1. but isn’t state exploitation of its natural resources in ISC via price fixing a class case of discrimination? DUBIOUS

g. The market is in one state—*Parker v. Brown (1943)*  
   i. CA Agricultural Prorate Act established a marketing program for the raisin crop. The program limited the ability of producers to sell their grapes. Ct. upholds.  
   ii. Do these prohibitions impose an unconstitutional burden upon interstate commerce?  
   iii. The purpose was to conserve the agricultural wealth of the state and to prevent economic waste in the marketing of agricultural crops of the state.  
   iv. Not discriminatory—use Pike—legitimate purpose, means reasonable to the end, no discrimination.  
   v. A means of stabilizing the market in the absence of a federal program—entire raisin crop is in CA.

h. CC precludes a state from mandating that its residents be given a preferred right of access, over out of staters to natural resources located within its borders or to the products derived there from. *Camps NewFound/Owatonna (1997)*  
   i. Petitioner is a ME nonprofit org that operates summer camp for kids of specific religious faith. 95% of campers are from out of state. ME statute provides a fed exemption from taxes for nonprofit orgs in ME if they benefit ME residents. If they primarily benefit out of staters only a small exemption. Petitioner gets NO exemption. Ct says discriminatory and strikes it down. Discriminatory on its face!  
   ii. Do these prohibitions impose an unconstitutional burden on interstate commerce?  
      1. Children are not articles of commerce and the product of the camp is produced and consumed entirely in ME  
      2. Doesn’t matter that it is non-profit  
      3. Discriminatory on its face because it distinguishes between entities that serve principally intratstaters and those that principally serve interstaters.
iii. Dissent—The differential is justified on the ground that the State is legitimately providing a service to residents of the state in the form of a tax exemption.
19. Preemption

a. If Congress has passed a law and it is a lawful exercise of congressional power, the question is whether the federal law preempts state or local law.

b. No Congressional statute right on target (if there were it would be a supremacy clause issue), but Congress has taken over the field.
   i. We must ask how Congress would have moved if they had moved at all.

c. Approach
   i. Start with the presumption of continuing state regulation (rebuttable presumption)
   ii. Grounds for rebuttal—Then look to Rice Criteria to rebut
   iii. If presumption goes unrebutted, then the state regulation stands

d. Even where Congress has not entirely displaced a state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.

e. Rice Criteria (1947)
   i. Pervasive Federal Regulation Scheme leaves no room for state to supplement.
   ii. Dominant Federal Interest will be assumed to preclude enforcement.
   iii. State law stands as an obstacle to the accomplishment of congressional purpose
   iv. Physical impossibility of joint compliance

f. Dominant Federal Interest—Hines v. Davidowitz (1941)
   i. State statute required aliens over 18 to register every year, carry their id card with them. A year later a federal statute required aliens over 13 to register once and did not required them to carry their id with them.
   ii. Look to the Rice Criteria and find which one fits best.
      1. 2 would be satisfied by the fact that this is an international scheme
      2. 3 is better because, the enforcement of the state regulation would be viewed as an obstacle to a federal objective—to embrace immigrants and not treat them as a thing apart.

f. All Three applied—Pennsylvania v. Nelson(1956)
   i. Penn. Sedition Act prohibited sedition against both PA and US. Nelson charged with uttering sedition against US. Smith Act: Fed act which prohibited the knowing advocacy of the overthrow of the government of the US by force and violence. Ct found Penn act invalid
      1. All three of the Rice Criteria apply
      2. Federal law has occupied the field to the exclusion of the parallel state legislation, the dominant interest in Fed Gov’t precludes state intervention, and the administration of the state acts would conflict with the federal plan.
   ii. Dissent—both state and fed have an interest in preventing sedition—they can be squared away.

h. The statutes are concerned with different things, No Preemption—Askew (1973)
   i. Florida Oil Spill Prevention and Pollution Act imposed strict liability for any damage incurred by the State or by private persons as a result of an oil spill in the States territorial waters. Congressional Water Quality Improvement Act of 1970 subjected shipowners and terminal facilities to liability w/o fault up to $14,000,000 and $8,000,000 respectively for cleanup costs incurred by the fed govt as a result of oil spills. Ct. upholds the state law. No preemption.
   ii. Has Congress preempted the field to require the state statute to yield to federal law.
   iii. Congress had presupposed state and federal coordinated effort
   iv. Congress statute dealt with clean up whereas the state statute dealt with liability.

i. Meets all three—City of Burbank (1973)
i. Burbank ordinance declaring it unlawful for a so called jet aircraft to take off from specific airport between 11pm and 7am. (affected only 1 flight/ week) Fed aviation Act and the fed noise control act requires uniformity in aviation. Ct. finds state law preempted and invalid.
   1. The scheme of federal regulation is pervasive (1)
   2. Dominance of federal interest
   3. Inconsistent with federal objective

ii. Dissent—history of congressional action in this field demonstrates an affirmative congressional intent to local regulation.

j. USSC let’s them off the hook by reading in an economic v. safety purpose (which the federal regulation covered) Pacific Gas and Electric

   i. CA law—no construction of new nuclear plants until adequate storage and means of disposal of nuclear waste. A 1974 moratorium will remain in place until what is demonstrated—safe and effective disposal. (safety and economic) Federal Act of 1954—the federal government is responsible for safety (safety)

   ii. Has congress preempted the field?

   iii. Court bent over backwards to read CA’s statute such that the State is taking decisions on economic grounds which are not preempted by federal law.
      1. Whether to go ahead with the construction at all. Once they decide to go ahead, then the details of such construction are all regulated by the feds.
      2. Knows that the real purpose is safety, but reads it as state power over economics.

k. Both federal and state regulatory schemes can stand if the state scheme does not interfere with the federal one. Florida Lime

   i. CA regulation in question—prohibits the sale of avocados which contain “less than 8 percent of oil by weight. Federal marketing standard—attributed no significance to oil content. The Florida growers are questioning the state statute. Upheld.

   ii. Has the Congress preempted the field to require the state statute to yield to the federal act? No, both laws can stand.
      1. The Florida avocados will not meet the standards under the CA reg even though they do under the federal one.
      2. CA Purpose is to ensure the maturity of avocados reaching retail markets.
      3. Federal Purpose—restore and maintain parity prices for the benefit of producers of agricultural commodities, to ensure the stable and steady flow of commodities to consumers, and to establish and maintain such minimum stds of quality and maturity as will effecuate such orderly marketing of such agricultural commodities as will be in the public interest.

   iii. Physical Impossibility Analysis
      1. Is it a physical impossibility to comply with both the federal and state regulations?
         a. A holding of fed exclusion of state law requires no inquiry into congressional design where compliance with both regs is a physical impossibility for one engaged in interstate commerce.
      2. If it is not a physical impossibility to comply with both, does the nature of the subject matter require the state law to yield?
         a. If the subject demands exclusive fed reg in order to achieve uniformity vital to national interests, then preemption.
         b. Congressional reg of one end of the stream of commerce doesn’t ipso fact oust all state reg at the other end.
3. If it is not a physical impossibility and the nature of the subject matter doesn’t require the state law to yield, then is there any explicit declaration of congressional design to displace the state reg?
   a. Does the state purpose frustrate the realization of the federal purpose?
   b. There is nothing in the federal regulation that underscores federal control.

iv. Dissent—The CA law erected a substantial barrier to the accomplishment of congressional objectives. The pervasive fed regulatory scheme (Rice #1) leaves no room for state supplementary laws.

1. When the state law that conflicts with the Federal law provides an out to comply with both, the Court will uphold. *Ray v. Richfield Co.* (1978)
   i. Sketch background leading to Wa. State Law. Early 1970s, Atlantic Richfield oil refinery in Cherry Point in Puget Sound. The super tankers involved in transportation lead WA state legislators to enact "tanker law"
   ii. Ok to require pilots on registered vessels (foreign), but not ok with enrolled( domestic trade, where there was already federal regulation)
   iii. Held the design/tug requirement of the tanker law to be invalid
   iv. There were two objectives
      1. Vessel Safety
      2. Protect Marine environment

v. Statutory construction indicates that uniform national standards were intended.

vi. Dissent—Safety features alone are invalid. You can affirm the truth of the second statement, but note that no one would assume the truth of the alternation to the truth that both are true. Can’t find the second alternate statement from the truth of the entire statement. The standard safety features taken by themselves are invalid. It’s an either or argument.
State as Market Participant

m. How is it problematic?
   i. When a state acts a market participant rather than a sovereign regulator or markets the
      limitations of the dormant commerce clause do not apply. When a state is participating in
      the marketplace rather than regulating it, the state is treated just like a private party. This
      is not always a fine line. Like private market participants a state, when acting as a market
      participant, may discriminate against interstate commerce. If government is providing a
      service it will help recoup your taxes.
   ii. Dormant commerce clause analysis is not applied.

n. YES—Reeves, Inc v. Stake (1980)
   i. Whether consistent with the Commerce Clause, the State of South Dakota, in a time of
      shortage, may confine the sale of the cement it produces solely to its residents. Was SD a
      market participant?
   ii. Market Participant or Protectionism?
      1. There is nothing in the constitution to limit the state’s participating in commerce.
      2. They are not engaged in economic protectionism.
   iii. Hoarding resources
      1. Cement is not a natural resource, even if they are hoarding it.
   iv. Competitive advantage—even if the out of staters have trouble competing that cannot be
      laid at the feet of SD.
   v. Free Market Forces—SD got involved because the market wasn’t working.
   vi. Dissent—it is problematic to view the state as just one more economic actor. All of the
      other trappings of the state remain—its taxing power which makes it distinct from the
      private party.

o. NO—South Central Timber Development v. Wunnicke (1984)
   i. Alaska requires that timber taken from state lands be processed w/in the State prior to
      export (this gives Alaska timber processers work). South Central challenges the
      constitutionality of this policy against the Commerce Clause. Supreme Ct finds law
      invalid.
   ii. Do these prohibitions impose an unconstitutional burden upon interstate commerce or is
      the state acting as a market participant?
      1. The requirements(processing) that AK is imposing go beyond the role they are
         playing as a market participant(sales)
      2. Petitioner cannot use Reeves because this is natural resources case.
20. Interstate Privileges and Immunities

a. Art IV §2—the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states.
   i. This clause comes up in employment contexts. Not very stable.
   ii. An alternative to the commerce clause.
   iii. No application to corporations
   iv. What are the privileges and immunities?
      1. Fundamental Rights are protected—Coryfield v. Coryell—At issue was a NJ statute to the effect that non residents were not allowed to gather clams and oysters from NJ waters. Challenge brought by PA resident. USSC decided that gathering oysters was not a fundamental right. Bushrod List
         a. Protection by the government
         b. Enjoyment of life and liberty with the right to acquire and possess property of every kind and to pursue and obtain happiness
         c. The right of a citizen of one state to pass through or to reside in any other state for purposes of trade
         d. Writ of habeus corpus
         e. To institute and maintain actions of any kind in the courts of the state
         f. To take and hold and dispose of property
         g. An exemption from the higher taxes
      2. The modern view is those rights are protected which are basic to the maintenance or well-being of the union
         a. State can make some distinctions between residents and non residents—voting.
      3. The reconstruction Congress drew on Corfield as a source for their PI in the 14th amendment. 14th—bring the disfavored group up to the standard of the favored group. Tie the clause to specific entitlements.
      4. Are they absolutely or conditionally protected

b. Sport Hunting is not a fundamental right protected by the PI clause—Baldwin v. Montana (1978)
   i. 1975—Montana residents--$4; Non residents--$151, 1976—Montana residents $9; Non residents combo license--$225 residents--$30. These are sport and trophy hunters.
   ii. Purpose of the PI clause is to prohibit unreasonable burdens
   iii. Standard—only with respect to PI bearing upon the vitality of the Nation as a single entity must the state treat all citizens, resident and nonresident equally, it must be a basic right. Hunting for sport is not a basic fundamental right.
   iv. Dissent—Brennan—doesn’t see why we must decide whether a right is fundamental. He wants a strict scrutiny standard applied so that the state will justify its differential treatment. **BRENNAN TEST?**
      1. **Are non-residents being discriminated the real problem**
      2. **The discrimination by the state is the least onerous solution.**

c. “Non residents must be shown to constitute a peculiar source of the evil at which the statute is aimed” Toomer v. Witsell(1948)
   i. SC—imposed a $2500 per-boat-fee on non residents while imposing a $25 fee on residents. GA shrimpers challenged the law as a violation of the interstate pi clause. Struck down.
   ii. Was there any basis to say that the out of state fisherman would have any real impact on the shrimp industry? The court doesn’t buy this argument.
   iii. Brennan drew on this decision for his dissent in Baldwin
d. If justifications for the law are insufficient it will not stand (Brennan Test). *Hicklin v. Orbeck* *(1978)*
   
   i. Alaska “Requires all oil and gas leases, easements, or right of way permits for oil or gas pipeline purposes –require the employment of qualified Alaska residents.”
   
   ii. Brennan is using his model from Baldwin dissent—the State’s purpose isn’t reflected in the means adopted
      
      1. There were not many Alaska residents applying for the cards. The applicants were unqualified for the posts in question and there was an acute employment problem in Alaska which was not the result of nonresidents taking their jobs.
      
      2. Even if the non residents were the problem, this is not the solution and there is a less onerous alternative.

e. Again, state must have sufficient justification for denying out of staters a fundamental right. *Supreme Court of New Hampshire v. Piper* *(1985)*
   
   i. Limiting membership in the NH bar to state residents. Piper lives in Vermont, 400 yards from the NH border. She is told that she will have establish residency in NH. Struck down.
   
   ii. The practice of law is considered a privilege under the pi clause.
   
   iii. Some interest in constitutional policy—McCordle problem—the court has naked power to rein in the appellate jurisdiction of the court.
   
   iv. The issues of the state were illegitimate—Why might it be useful to have nonresidents practicing law in NH—unpopular claims have difficulty finding local attorneys. If the state is worried about lawyers practicing from a great distance—a local atty could be available for unscheduled meetings.
      
      1. Apply strict scrutiny test—No reason is advanced for denying out of staters (justification inadequate) and there were less onerous alternatives.

   
   i. Statute required 40% of workers on city projects to be city residents.
      
      1. remanded to the lower court to determine if there was a substantial reason for differential treatment.
   
   ii. State purpose—wanted to stop middle class flight.
   
   iii. This was not sufficient because the people that moved still worked in the city and the State’s purpose of having them live and work was not being realized.
   
   iv. There seemed to be no substantial connection between the ends and the means (Brennan dissent)
21. **State immunity doctrine**—Congress is restrained in the manner it uses its commerce power to regulate the states because of the 10th amendment.

   a. 10th—restates the Constitutional structure in that states retain all government powers not exercised by the federal government or prohibited to the states by the Constitution subject to whatever limits the people of any state may impose through their state Constitution.

   b. Pre-requisites for state immunity from federal regulation
      
      i. It is said that the federal statute at issue must regulate the States as States
      
      ii. The statute must address matters that are indisputably attribute of state sovereignty
      
      iii. State compliance with the federal obligation must directly impair the state’s ability to structure integral operations in areas of traditional governmental functions
      
      iv. The relation of state and federal interests must not be such that the nature of the federal interest justifies state submission.

   c. Judicially enforceable federalism limits—*National League of Cities (1976)*
      
      i. Congress extended the Fair Labor and Standards Act to include state employees—who were not getting paid for overtime. Struck down.
      
      ii. Congress could not validly employ its commerce power to (Hodel Test)
         
         1. Regulate states as states
         
         2. Impinge on essential attributes of state sovereignty—right to determine wages
            
            a. These functions that are essential to separate and independent existence so that Congress cannot abrogate the State’s plenary authority.
            
         3. Directly impair state ability to structure integral operations in areas of traditional governmental functions, unless the nature of the federal interest justified submission to state regulation.
            
            a. What are traditionally governmental functions (immune)—in this case it is setting the wages and hours of its employees
            
            b. What are traditionally non governmental (subject to CC)
            
            c. Litigation following this proved that the above distinction was not adequate.

   4. Rehnquist—10th amendment rights are analogized with individual rights. They will trump other countervailing policies. This is faulty because the 10th amendment involves statutory rights not individual rights.

      a. The state government enjoys an immunity from Congressional interference. Commerce Clause is limited by the 10th amendment.
      
      b. However, unlike one’s individual rights that are unmovign, the line separating federal and state regs is a moving line. Policies can and do change. Constitutional rights are enjoyed as a trump right, but regulatory rights are not.

   5. Dissent—Brennan—see below

      a. Congress represents the people and will not do them in. They are representing the people that they are legislating for. This is a political question best left to the legislature and the power of the people to elect officials to represent them.
      
      b. Nothing in the 10th amendment counts as a limitation or an affirmative limitation—it is declaratory—that which has not been surrendered to the Congress remains in the State’s power.

   d. Overrules National League, now politically enforceable federalism limits—*Garcia v. San Antonio Transit Authority (1985)*

      i. Argument as to if SAMTA (government) is exempt from the constitutional reqs of the FLSA because of their status as a governmental entity. Upheld
      
      ii. Rejects the “traditional governmental function”
1. Instead looks at it in the context of Federalism (structure of government)—let the
state’s experiment
   a. State’s within their authority must be free to engage in any activities that
      is citizens assign to the state—this is incompatible with the National
      League standards—the judiciary should not decide what is in their best
      interests.
2. This is a political issue and not a judicial one.
   a. The states residuary and inviolable sovereignty was entrusted exclusively
to Congress for safekeeping since the built in restraints that our system
provides through state participation in federal governmental action was
deemed sufficient to protect the state’s autonomy
   b. Any restraint on the exercise of the commerce power must find its
justification in the procedural nature of the political process, and it must
   be tailored to compensate for possible failings in the national political
   process rather than to dictate a sacred province of state autonomy.
      i. There must be a defect in the national political process.
3.Rejects history as a standard
4. Rational Basis
   iii. Dissent—Powell is trying to say that the National League standards have been reiterated
in the 8 year period. This is not true. Sees this holding as reducing the 10th amendment to
meaningless rhetoric.
   iv. There is little life left in the Garcia doctrine because it gave Congress the principal
responsibility for defining federalism. 1990s there have been numerous challenges—see
below. The revival of federalism below is a product of the times

e. Moving Away Garcia—Cannot direct State Official to Perform Federal Administrative duties—
Printz v. United States (1997)
   i. Whether certain interim provisions of the 1993 amendments to the gun control act—
Brady Handgun Violence Prevention Act commanding state and local law enforcement
officers to conduct background checks on prospective handgun purchasers and to perform
certain related tasks violates the Constitution. Struck down as being incompatible with
our system of dual sovereignty.
   ii. Strict Scrutiny
   iii. Detailed Analysis since there is no constitutional text speaking to the question:
      1. History—It was a matter of necessity in the past to impose obligations on state
courts to perform federal duties. This is not conclusive—Consent is still required.
         a. Adjudicative v. Administrative—if it is administrative it is in violation.
      2. Structure of the Constitution—The Articles of Confederation proved that it was
ineffective to use state governments as instruments of the federal government.
         a. Congress has the power to regulate citizens and not states.
         b. Constitution contemplates that the States will represent its citizens.
         c. Dual Sovereignty—requires two spheres. Necessary and proper ensures
that the law does not violate this dual sov.
      3. Precedent of the Court
         a. Preservation of state autonomy is less undermined when they are given the
ability to make policy v. being directed to do something.
         b. State will cover the costs and Government will take the credit.
         c. Even if it is a minimal burden, it is still an issue of sovereignty.
   iv. Dissent
      1. Federal law may impose a greater duty on state officials because of the oath that
they take
      2. Doesn’t see the significance of lack of historical directives in this area.
f. Moving Away from *Garcia—Alden v. Maine (1999)*

i. The powers delegated to Congress under article I do not include the power to subject nonconsenting states to private suits for damages in state courts concerning violation of federal regulations. State of Maine did not consent

ii. Petitioner—Where Congress enacts legislation subjecting states to suits, that that overrides the sov immunity of the state.

iii. Court
   1. Art 1 § 8—Supremacy Clause only raises the question of where it is a valid exercise of federal power and not if it overrides state sov.
   2. Nec and Proper does not allow forcing of states into courts as a means of achieving objectives.
   3. Silence—it occurred to no one that the states would not be immune to suits in their own courts without their consent.
   4. Would a congressional power subject nonconsenting states be consistent with the Constitution? Violates their sovereignty
      a. Financial integrity of the states is at issue
      b. Assures the state and the nation from unanticipated intervention

iv. 11th amendment—makes explicit reference to state’s immunity from suits—commenced or prosecuted

v. It is the structure of the Constitution—fundamental aspect of the sovereignty which the states enjoyed before the Constitution
   1. 10th amendment confirms this sovereign immunity.
   2. Federal system preserves the sovereignty in two ways
      a. Reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.
      b. Secures the rejection of a concept of central government that would act upon and through the states in favor of one that works together.

Concurring Sovereignty
   i. Only relinquish state sovereignty when there is a constitutional issue present. Martin
22. Slavery and the Constitution—How the 14th amendment serves to recognize and apply claims of basic constitutional rights to the states
   a. Ignore issue of supremacy and instead goes for a procedural out—Groves v. Slaughter (1841)
      i. MS constitution proscribed the importation of slaves into the state.
         1. Purpose was to protect their own slave trade.
      ii. Slaughter—state law affects interstate commerce. The court ignores this and instead says that the provision was not self-implementing and required legislation and there was none and therefore no force.
      iii. Dissent—McClean—Exclusivity of the Commerce Power
          1. If Congress had acted—Supremacy
          2. If Congress had not acted, Exclusivity and MS out of it.
          3. Denies that slaves are persons and therefore not a part of commerce—no need to address this question here.
      iv. Dissent—Taney—Holds that states have the exclusive power
   d) Dissent—Baldwin—Defends exclusivity
      a. Wherever slavery exists, by the laws of a state, slaves are property in every constitutional sense and thus must be treated as articles of commerce
      b. Therefore, the provision must be invalid because if there was no object of police other than that which gives to its own citizens a privilege which is denied to citizens of other states then it is inconsistent with the US Constitution
   b. Prigg v. Pennsylvania (1842)—formalist approach
      i. MD slave catcher applied to the Penn magistrate for a certificate of removal for an escaped slave. Denied. MD slave catcher removed a black from PA on his own. PA had enacted legislation allowing alleged fugitive slaves to be detained ONLY by judicial officers requiring strict proof or ownership and making a privated capture of a suspected fugitive slave a crime. MD slave catcher convicted. Court strikes down PA law as inconsistent with the Constitution and federal fugitive slave legislation
      ii. Purpose of the PA Act—to discourage self help in the capturing of slaves.
          1. It purports to punish the very act of seizing and removing a slave, which the Constitution was designed to justify and uphold.
      iii. Art IV §2 is self-executing (Fugitive Slave Provision) and continues to be even after a federal statute has been implemented that restricts that power.
          1. Purpose was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property in every state of the Union.
          2. As such no state law or regulation can restrain that clause or exercise.
          3. Requires state cooperation? State court magistrates enforce the federal legislation. This goes against the exclusive power argument.
          4. What do we make of the fact that a federal statute was passed restricting the power. Court says it is necessary and proper and further precludes the state from playing a role.
      iv. Taney (Concurring)—States were given a duty by the Constitution in this realm. States are forbidden to pass any laws that would impair this provision, but no restrictions on statutes to enforce it.
      v. McClean (Dissenting)—Argues that self-help is not authorized by an act of Congress and may be prohibited by the state. The specific rule takes precedent over the general rule.

c. Status of non-fugitive slaves in free states—Dred Scott (1857)
i. Three options for slave status
   1. Permanent slave status—the law of slavery continues to stay attached to the slave who has entered a free state. The status is permanent and unchanging
   2. Once free, always free. The slave taken by his master into a free state becomes a free man. This was the position of the court in the first round. But, an evidentiary mistrial.
   3. Reversion—the slave who is taken into a free state becomes free there in the sense that his master loses the power to control him, but as soon as he returns to a slave holding state, the status of slave reattaches to him.

ii. Dred Scott is a slave and this cannot be removed

iii. Blacks are not citizens of the US because they cannot be.
   1. Question of citizenship—Tries to distinguish between citizen of the state and of the nation.
   2. Curtis Dissent—The Constitution has no power to determine citizenship
      a. At the ratification, if you were a citizen of a state you became a citizen of the nation.
      b. If free blacks were citizens of states before the Constitution, they are therefore citizens of the states after.
      c. Citizenship is not contingent on the possession of all rights—women were denied many rights and were still citizens.

iv. The federal court had no jurisdiction over the case. Congress has no power to forbid or abolish slavery in the territories. Slaves as property are protected by the due process clause. Art I §9
   1. Taney is talking about slaves
   2. Curtis is not

v. Modern Implication
   1. You can be a citizen of the US without being a citizen of a state
   2. You cannot be a citizen of any state, without being a citizen of the U.S.

d. Frederick Douglas—Sharp distinction between intentionalism and textualism.
   i. He is defending textualism and the strategy determines the course. Intentionalism will not satisfy.
   ii. 3/5 as a penalty on the slave states—a disability—the constitution is anti-slavery document that encourages abolition.
   iii. Importation clause is read to mean that the southern states that choose to join the union will be punished by the end of the slave trade in 20 years. The price of coming into this federal union is that your slave trade will end.
   iv. There is a slave trade and the article is addressed to the slave trade and importing blacks from Africa—think of MS legislatures amending their constitution
   v. Insurrection Clause—where the insurrection is traced to slavery we have a reason to bring slavery to an end.
   vi. “Fugitive Slave Provision”—indentured servants were being talked about because slaves are property and not persons and therefore they cannot enter contracts to work.
Rise and Fall of Substantive Due Process

e. 5th amendment bars federal government from denying due process—procedural
f. 14th amendment applies only to the states and their political subdivisions—“No state shall deprive any person of life, liberty, or property without due process of law.”
   i. Fundamental rights—strict scrutiny
   1. After the 1930s economic rights are no longer considered fundamental
   2. Incorporation Doctrine—makes the Bill of Rights applicable in some form
   3. Judicial protection of unenumerated rights
   ii. Non-fundamental rights—minimal scrutiny—rational basis test

g. Scenarios for carrying over the basic constitutional rights (Bill of Rights) to the States
   i. The 14th amendment carries over none of the first 8 amendments.
   ii. 14th Carries over some, but not all of the first 8.
   iii. Black’s position—14th amendment carries exactly those rights covered in the first 8 amendments.
   iv. The 14th amendment carries over some, but not all of the rights, and at the same time recognizes some additional rights not enumerated in the first eight amendments.
   v. 14th amendment carries over the rights and at the same time recognizes some additional rights not enumerated.

h. The vehicle for carrying this over was the 14th amendment due process clause because the privileges and immunities clause was not recognized as sufficient.

i. Freedom from economic regulation became constitutional in the name of substantive due process in the beginning.

j. 14th amendment Privileges and Immunities does not carry over Bill of Rights as the pervading purpose is the issue of slavery—Slaughter-House Cases (1873)
   i. Ostensibly as a health measure, LA gave the city a monopoly on the slaughterhouses. The excluded butchers challenged the statute, claiming that it deprived them of their trade and violated the 14th—due process, equal protection, and P and I clauses.
      1. P and I—Distinguished between state and federal citizenship and said that the 14th dealt with federal citizenship (habeus corpus, free from slavery) and the statute was a state citizenship concern.
         a. Slavery is really the only concern of these amendments.
      2. Due Process—Had not been deprived of any due process
      3. Equal Protection—Expressed doubt that the clause covered anything more than state racial discrimination.
   ii. Dissent—Field—These are rights belonging to citizens as such. 1866 Civil Rights Act is declaratory of the 14th amendment. Fundamental rights carried over with P and I.
   iii. Dissent—Bradley—Fundamental rights—gives us the Civil Rights Cases later.

k. 14th Amendment Due Process Clause as a Check on State Legislative Power and Economic Due Process—Lochner v. New York (1905)
   i. NY law prohibited bakery workers from working more than 10 hours daily or 60 hours per week. Lochner was convicted and fined for employing a baker for more than 60 hours per week. Court reversed.
   ii. The State may regulate labor conditions to achieve public health and safety, preserve public morals, or further general welfare only if it is reasonable.
      1. Found there was no reasonable ground—to violate one’s liberty of contract which is constitutionally protected?
         a. Bakers were not shown to be in need of protection—oh really.
         b. The law did not involved public health, safety or morals despite NY’s contention because thre was no “direct” relation between the end (preserving baker’s health) and the means(limiting working hours)
         c. The real object was not health but to regulate hours
   iii. Dissents
1. Harlan—Rational Basis Test—The means are lawful and as such apply this test. Cited various medical authorities that concluded it was material danger to the health of bakers to work long hours. Question of policy.

2. Holmes—“the word liberty in the 14th amendment is perverted when it is held to prevent the natural outcome of a dominant opinion.”
   a. Noted that Darwin’s natural selection should not apply to social relationships.
   b. Issue of policy and not rights, and people are sovereign with regards to policy.

l. Exception to the Economic Substantive Due Process—Muller v. Oregon (1908)
   i. An Oregon law that limited women to no more than 10 hours labor in a day was upheld even though it violated the women’s right to contract.
   ii. Overwhelmed the court with data that women were inferior and the public interest in health mothers and the need to protect women.

m. Women are now equal to men and thus enjoy the same freedom to contract—Adkins v. Children’s Hospital (1923)
   i. The court charges that the fixing of a minimum wages for women and children counts as price fixing and argues that the law forbids that in the name of freedom of liberty under the due process clause because the right to contract is party of the liberty protected by the 14th amendment of the Due Process clause.
   ii. 19th amendment gave women the right to vote and now they didn’t need special treatment.
   iii. Dissents
      1. Taft—Economic Policy—Court should not substitute its view.
      2. Holmes—people have safeguards on their power to contract. This is a state issue.

Rejection of Lochner

n. A state is free to adopt any economic policy that protects public welfare—Nebbia v. New York (1934)
   i. Laws comply with substantive due process so long as they are not (Rational Basis Test, Harlan’s dissent in Lochner)
      1. unreasonable, arbitrary, or capricious (no longer public interest test)
      2. the means selected shall have a real and substantial relation to the object sought to be obtained.
         a. NY sought to stabilize the milk prices to preserve an adequate supply of milk.
         b. Even though this is not a public utility—the court is going to allow regulation.
   ii. Was not discriminatory

o. Reveals the lie in Lochner that there is unequal bargaining power—West Coast Hotel Co v. Parrish (1937)
   i. Washington State act fixing minimum standard wages for women and minors is upheld
      1. Undermines Lochner, and overrules Adkins.
   ii. Satisfies Rational Basis Test
      1. Not arbitrary or capricious—State could consider unequal bargaining power of women
      2. Legitimate public purpose—if paid too little they will become wards of the state
   iii. Dissent—Formalist approach—constitution does not change with ebb and flow of economic events.
p. Deference to Congress and beginning of higher standard for prejudice against discrete and
insular minorities—*U.S. v. Carolene Products (1938)*
   i. Filled milk act—prohibited the sale of bad milk. Court upheld and said it did not violate
      the due process provision of the 5th amendment.
   ii. There was a rational basis and regulatory legislation affecting ordinary commercial
       transactions is constitutional unless proven that there is no rational basis.
   iii. FN 4—When it is a rights question, a stricter standard of review will be needed.

q. No more liberty to contract—*Olsen v. Nebraska (1941)*
   i. Statute fixes the maximum compensation that private employment agencies could collect
      from applicants from employment. Upheld
   ii. NE SC-unconstitutional because it would violate due process clause—liberty to contract
   iii. USSC—substantive due process does not protect economic freedom of contract. Great
        deference to the legislature.
        1. This is a policy question and not a rights question.

r. Old Substantive Due Process is put to REST—*Whalen v. Rose (1977)*
   i. Statute requiring the pharmacists to keep a record of people receiving prescribed drugs.
   ii. The district court held that the state wasn’t able to demonstrate the necessity of the
       regulation
   iii. Ostensible purpose—regulate drug use, control use of drugs
   iv. Rational Basis Test—State legislation reflects a rational decision nothing unreasonable
       about the assumption that patient identity might help state’s efforts to control dangerous
       drugs.
   v. Privacy Concerns were not impaired.
23. Incorporation

a. No Incorporation of the 5th Amendment—*Barron v. Major and City Council of Baltimore* (1833)—
   i. Barron alleged that the city ruined his wharf by deterring streams in the area and making it too shallow for boats. Takings Clause Argument.
   ii. 5th amendment must be understood as restraining the power of the general government and is not applicable to the legislation of the states—Marshall
      1. Bill of Rights had been intended by its Framers to restrain federal power alone (structural argument)
      2. When the Constitution restrains state power it does so expressly, thus blunting any argument that the bill of rights should be read to restrain state power by implication.

b. Selective Incorporation—*Palko v. CT* (1937)
   i. The State is allowed to appeal when the prosecution fails to get it right. Allows for double jeopardy which is not permitted under the 5th amendment.
   ii. 14th amendment is the device for bringing it in, but not automatic. The requirements?
      1. Fundamental rights—indispensable condition of nearly every other freedom—or-
      2. Test
         a. Implicit in ordered liberty—or-
         b. Allow incorporation where to abolish would violate a “principle of justice so rooted in the traditions of ordered liberty.”
      3. Double Jeopardy does not satisfy the above—justice will still be done without this right.

c. Selective Incorporation—*Adamson v. CA* (1947)
   i. Appellant claims the provision of the 5th amendment that no person shall be compelled in any criminal case to be a witness against himself is a fundamental national privilege or immunity secured, through the 14th Amendment against deprivation by state action because it is a personal right, enumerated in the fed BOR. Court says no incorporation
   ii. Due Process Clause of 14th does not bring them all in.
   iii. Dissent—Black—Accuses the court of employing a natural law standard. Picking and choosing. If there is no fundamental way to decide the fundamental rights than it becomes arbitrary and capricious.

d. Incorporates 5th amendment—*Malloy v. Hogan* (1964)
   i. Almost full incorporation.
24. Modern Substantive Due Process and the Privacy Doctrine

Shift from Economic liberty to Personal Liberty
Need to be able to point to a Constitutional right to Privacy (penumbra)
If Fundamental Right—Strict Scrutiny
If not—Rational Basis Test

a. Personal Liberty—Meyer v. Nebraska (1923)
   i. Statute proscribes the teaching of any other language other than English in public or private elementary schools. Struck down.
   ii. Violates 14th amendment—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, raise children”
   iii. Rational Basis Test—might have been upheld if they had offered justification

   i. Ban on birth control law. Constitutionality challenged. Court dismissed for lack of standing since the statute was no longer enforced.
   ii. Dissent—Harlan—develops the theme of liberty in the 14th amendment as including a freedom from all substantial and arbitrary impositions and purposeless restraints.
      1. Must balance the respect for liberty and the demands of an organized society.

c. Penumbra rights are defined—Griswold v. CT (1965)
   i. Prohibited the use of contraceptives an assisting others to use them. Struck down.
   ii. Asserted that he was not reviving substantive due process and then did it.
   iii. The amendments have penumbras, formed by emanations from those guarantees that help give them life and substance.
      1. Zone of Privacy—forbade governments from preventing married couples from using contraceptives. 1st, 2nd, 3rd, 4th, 5th, 14th
      2. Penumbra Test—(NAACP v. AL)
         a. Begin with specific right
         b. Go from specific right to penumbra right
         c. Ask whether from penumbral right you can find the core right which your penumbral is drawn (in the Constitution)
         d. NAACP—right to associate taken from freedom of assembly in 1st.
   iv. Concurring—Goldberg—14th concept of liberty can go beyond the BOR.
   v. Dissent—Black—Rejects the expansive reading of the 14th and the penumbra rights
      1. doesn’t see the difference between applying this natural law to enforcing personal rights vs. economic rights.
   vi. Dissent—Stewart—rejects substantive due process
   vii. Bork—see 187 Fischer

d. Expands right of privacy—Roe v. Wade (1973)—non interpretivist
   i. Texas statute at issue—made it a crime to procure an abortion or attempt one, except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.”
      1. She wished to terminate her pregnancy. She was unable to get a legal abortion because her life did not appear to be threatened by the continuation of the pregnancy. she could not afford to travel to another jurisdiction to have an abortion. The Statutes abridged her right of personal privacy, protected by the 1st, 4th, 5th, 9th, and 14th amendments.
   ii. The right of privacy, whether found in the 14th or in the 9th amendment, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The
detriment of denying this right is clear. Forced maternity will impose on a woman a distressful life and future. Psychological harm, mental and physical health would be taxed.

1. Looks to the liberties defined in *Meyer*

iii. Must apply a strict scrutiny test

iv. State interest—safeguarding the health of the mother, maintaining records, and protection of potential life.

1. There is a limit to what can do to one’s body. The right to an abortion is not unqualified and must be considered against important state interests in regulation.

v. Compelling state interest is viability—when we reach that point the state interest will prevail.

vi. The Constitution does not define “person” in so many words. 14th §1—citizens (persons born or nat in the US), also in the due process and equal protection. It seems to have only a postnatal application. Persuaded by this and that past abortion laws were much more lenient, the 14th amendment does not include the newborn.

vii. The court need not decide when life begins. There are many conflicting theories.

viii. The statute sweeps too broadly. Makes no distinction between abortions performed early in pregnancy and those performed later, and it limits the reason as saving the mother’s life.

ix. Concurring

1. Stewart—rights are within the personal liberty of the 14th amendment DP
2. Burger—Troubled with reliance on science and medical data
3. Douglas
   a. Autonomous control over development and expression of oneself—1st
   b. Freedom of choice in basic decisions of one’s life—subject to some police power control. Need compelling state interests
   c. Freedom to care for one’s health and person, freedom from bodily restraint.—compelling state interest

x. Dissent

1. Rehnquist—thought rational basis a better test, when 14th was passed there were 36 abortion statutes in states.


i. STATUTE—a child born to a married woman living with her husband was presumed to be a child of the marriage.

ii. ISSUE: Whether the relationship between persons in the situation of Michael and Victoria have been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.

iii. Court—impossible to find that it has

1. Always been a presumption of paternity—aversion to illegitimate children and promotes peace and tranquility in the states and family.
2. No case precedent dealing with this

iv. Michael claimed that his 14th amendment rights(substantive due process) outweighed the state’s interest in preserving the family unit.

1. Scalia held that his “liberty” rights were limited

v. Dissent—Brennan—Accuses the issue of being framed too specifically—could have framed it in terms of parenthood as a constitutionally protected liberty.

1. discredits reliance on history and tradition.


i. Statute—“a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”
ii. ISSUE: Whether homosexuals conduct was protected by the right of privacy against criminal prohibition by state sodomy laws.

iii. Court—sought to identify those rights that qualify for heightened judicial protection.

   1. “implicit in the concept of ordered liberty” such that liberty nor justice would exist if sacrificed.” Palko
   2. “deeply rooted in this Nation’s history and tradition” Moore

iv. Uses an historical argument—which ends up not being any good—19th c. sodomy statutes did not address homosexual behavior.

v. Prudential Concerns—Was not going to immunize activities that are done in the home that would be criminal if done elsewhere.

vi. Other privacy matters were concerned with marriage and procreation.

vii. Enforcement of moral(lottery) v. morality (racial discrimination)

viii. Dissent—Blackmun—“Right to be let alone”

   1. Decision—protecting one's choices
   2. Spatial—one that protected certain places, one’s home, from gov’t control

ix. Dissent—Stevens—Statute is not enforceable against heterosexuals and thus we have a statute that is not enforceable for the vast majority of the population of GA.
Part VI Separation of Powers

No separation of powers clause in the Constitution. Draw the meaning of the separation from the structure of national government and our understanding of what the Framers contemplated in the establishment of the three separate branches and checks and balances. Certain powers conferred upon the different branches. Gives us the structure of articles I, II, III.

No consistent approach, thus the resolution of disputes is more ad hoc than principled. Court is reluctant to address the separation of powers issue. When they have they have failed to touch upon crucial issues—power to commit troops to battle—political accommodation in conflicts vs. authority to exercise power.

Two approaches to analyzing—
1. formalism—strict interpretation
2. functionalism—pragmatic interpretation theories of con law

Establishing a Framework for Considering Power Relationships
The text allocates power among the three branches—separation and checks.
1. Power is vested in the branches, but there is language that speaks to the checks
2. Breadth and limit of the powers are undefined, inviting a degree of fluidity.

Court understands there will be tension and conflict and is thus reluctant to step in.
Court’s reluctance might also stem from the disagreements that arose during the framing of the Constitution—reflects a pragmatic accommodation of a number of concerns including the fear of tyranny, preservation of liberty and efficiency of action by the government.

How the Framers Conceived Separation of Powers
Framers concerns
1. weaknesses of the Articles of Confederation
2. concerns about tyranny and distrust of government

State constitutions—separation was essential to free government, because it protected liberty by avoiding usurpation of power by the respective departments and it preserved the independence of the citizenry because tyranny by one department was avoided.

18th Century political philosophers—
Madison wanted to include amendments to confirm the separation of powers.

25. The Executive versus Congress

a. What is vested in the executive is less clear than for the other branches but also because in confronting the practical need for national leadership, confidence, swift action in crises, the court have differed in their analyses as to whether separation of powers creates formal and functional limits on or provides justification for the President’s authority to act.

b. Illegitimate Exercise by the President of what is properly seen as a Congressional Power—Steel Seizure Case(Youngstown Steel v. Sawyer) (1952)
   i. Was the President acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills during an armed conflict with Korea? NO.
   ii. The order was made on findings of the President that his action was necessary to avert a national catastrophe, which would inevitably result from a stoppage of steel production,
and that in meeting this grave emergency the President was acting within the aggregate of his constitutional power of the Nation’s Chief Executive and Commander in Chief.

1. Vesting Clause—Art II §1, para 1—executive power vested in Pres/not a separate power, but a means of introducing President into the nomenclature.
2. Faithful Execution Clause—Art II §3—congress makes them, pres executes
3. Commander in Chief Clause—Art II §2 para 1—this is labor/not military

iii. There was no statutory authority—
   1. There were already limitations on this type of action—Taft-Hartley Act
   2. However, there was silence from the Congress—acquiescence—condoning the action. The failure of Congress to protest means that they are going along with the President’s executive order.

iv. There was no express language in Constitution

v. Concur—Frankfurter—1947 act was tantamount to express denial of such power to the President. Indicates their understanding of the drastic power
   1. Gloss of Executive Power—all precedents including congressional authority.
   2. Power of President is a product of history and practice
   3. No declaration of war and no statutory cover.

vi. Concur—J.Jackson—Tripartite Test
    Pres acts pursuant to an express or implied authorization of Congress
    President acts in absence of either a congressional grant or authority
    President takes measures incompatible with the expressed or implied will of Congress
    1. Necessity knows no law—where there is a bona fide emergency that counts as a suspension of laws—similar to a self-defense argument.
       a. Measures taken have to be in proportion
    2. Does not see this as wartime, but just a labor dispute.

v. Dissent—Vinson—Defends emergency powers—A power not expressly given to Congress is nevertheless found to rest exclusively with Congress. Framers did not intend to create an office of power that is without authority to exercise powers of Government at a time when the survival of the Republic is at stake.

c. Source and Lack of limits on the President’s Foreign Power—Curtiss-Wright (1936)
   i. SC upheld a presidential embargo on arms sales to Paraguay and Bolivia made pursuant to a joint resolution of Congress.
      1. Does this count as a constitutional delegation of lawmaking powers to the President.
      2. Can Congress delegate to the President, or any other branch, its “lawmaking power.”
   ii. Even if there were problems with the delegation of powers here in the domestic context, it will not follow that there is comparable problem when it is foreign.
      1. Internal affairs—classically, we are talking about most of Art I sec. 8 powers. Where do they come from? These powers are derived from those powers that were carved from the states as a part of the state police power
      2. The international powers came from Great Britain from the Crown initially to the Continental Congress. The foreign powers vest in the federal government in any case and are necessary and are not subject to limitations.

   i. Executive agreements providing for nullification of attachments of Iran assets, and transfer of claims pending in US courts to arbitration is justified on the grounds of long standing Congress acquiescence.
   ii. President’s action was at its maximum because it was done with pursuant to Congressional authorization
1. Congress had implicitly approved the practice of claim settlement by executive agreement

2. International Claims Settlement Act of 1949
   a. to allocate to US nationals funds received in the course of executive claims settlement with Yugo.
      i. *Indicates that Congress exactly this thing in mind*
   b. provide procedure whereby funds resulting from future settlements could be distributed.
26. Non-Delegation Doctrine

a. The three branches of the government are sealed units insulated from others?

b. Where Congress delegates power to the executive branch who then makes law in place of the Congress.

c. Why Congress delegates this power?
   i. Too much to do.
   ii. Wouldn’t be that helpful setting out fine tune regulations—we need expertise in the agency law making bodies—we don’t have this expertise in the Congress.
   iii. Pass the buck to the administrative agency. Let them do it

d. Are there any constitutional constraints on the power on the Congress to delegate?

e. The non delegation doctrine surfaces—retain its power to legislate—have to do it within the constraints set by the Congress—intelligible principle in accordance with which the law making within the agency must be carried out.

f. Congress can delegate the mechanics of the rule, but cannot delegate the standard for which the agency makes law.

g. Since the Congress is accountable to the people, the Congress cannot simply give away its power to a group of people not answerable to the people

   i. Whether there is any adequate definition of the subject to which the codes are to be addressed
   ii. Fair competition was not defined by the act.
   iii. Unfair competition—common law—relates to palming off one’s goods as those of a rival trader.
   iv. Congress cannot delegate to the President an unfettered discretion to make whatever law he thinks may be needed or advisable for the rehabilitation and expansion of the trade or industry. Look to the Act to ascertain the limits that have been set.
      1. President as a condition of approval is required to find that the trade or industrial associations or groups, which propose a code, impose no inequitable restrictions on admission to membership and are truly representative.
         a. Relates only to the status of the initiators and not the permissible scope of the laws.
      2. Pres is required to find that the code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.
      3. The Pres will tend to effectuate the policy of this title.
         a. President may impose his own conditions—his discretion.
         b. No rules for making rules, no standards
      4. President’s power is unfettered.
   v. The problem here is either Congress statement of the principle is too broad or general as to be worthless or the Congress falls flat on its face for being unable to specify any principle at all.
   vi. The legislative veto was used after Schechter to ensure accountability.

n. When Congress has stated the legislative objective, prescribed the method of achieving that objective and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price fixing power and the particular prices to be established the delegation will be valid. Yakus v. United States (1941)
   i. Whether the Emergency Price Control Act involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices.
When the agency states that the statute provided no intelligible principle to guide the agency’s exercise of authority, the delegation will be unconstitutional. *Whitman v. American Trucking Association, Inc.* (2001)

### 27. Delegation Problems: Congress v. Executive

**a. Chadha (1983)**

1. Does the legislative veto violate the art I requirements for lawmaking? **YES** (Formalistic)

   1. 244(c)(2)—authorizes one House of Congress, by resolution, to invalidate the decision of the executive branch, pursuant to authority delegated by Congress to the AG to allow a particular deportable alien.

   2. No debate, no vote, no presentment—beyond the exceptions listed above, but are there others?

   a. Every bill (legislative act) must pass both houses of Congress to become law (Bicameralism)

      i. Law must be carefully considered by the national officials—fear of legislative despotism—divided the body against itself.

   b. Every bill or legislative act must be presented to the President for signature or veto. (Presentment)

      i. Madison was adamant about including this in the Constitution.

      ii. There are exceptions—House power to impeach, conduct trials, Senate has unreviewable powers to approve appointments and treaties. *Art 1 §3.*

   3. The Framers felt the powers given to Congress were the powers to be most carefully circumscribed.

      a. Gave President the veto power for this very reason

      b. It is clear that the framers ranked other values higher than efficiency and they imposed the checks on the legislature for a reason.

      c. The Legislative veto has been used as a shortcut that has circumvented the system that the Framers instituted. This is especially clear when the legislative veto is replacing the other option—bicameralism and presentment.

      d. The Framers were under a system that permitted arbitrary governmental acts to go unchecked. With all the obvious flaws of delay untidiness, and potential for abuse, we have not found a better way to preserve freedom.

   ii. Set down a criterion to identify what is peculiarly legislative a provision

      1. one reading is—its legislative if it was legislative in purpose and effect.

      2. Another reading—had the purpose and effect of altering the legal rights, duties, and relations of persons, all outside the legislative branch—if this were allowed everything would be legislation.

   iii. Concur—Powell—This is a separation of powers problem. Addressed to named individuals in reference to events in the past. Looks more like a judicial holding than legislation. Retrospective rather than prospective.

   iv. Dissent—White—Criticizes the court for the formalistic approach—should be functional

      1. The bicameralism and presentment was already satisfied.

      2. They should be able to check the power they have delegated to the executive.

      3. Hobson’s choice—Either they give up delegating powers or they abandon accountability.

   v. There is no specific authorization of a legislative veto—there were no administrative agencies for 50 years after the Constitution was ratified.

### 28. Formalist v. Functionalist Approach
a. Formalist—relies on particular provisions of the text and other documents reflecting the Framers design for government. Demand strict adherence to the functional boundaries separating the branches of the government and understanding that except for provisions expressly spelled out by the Framers each branch should exercise its own powers. Do not question whether it promotes liberty.
   
   i. Formalistic Opinion—one that fails to come to terms with the exigencies that gave rise to the litigation in the first place.
      
      1. Knight Case—doesn’t talk about the problems that gave rise to the cartel.
      2. Chadha—for those that are unhappy with the court’s position here. There was no effort at all to deal with the issue, accountability. Justice White does address this. Nearly 300 leg vetoes before Chadha. 200 new legislative vetoes written into statutes since Chadha.

b. Functionalists—argue that the formalist approach is mechanical and projects a notion of scientific precision.
   
   i. Conceives the constitutional framework as more fluid.
29. Appointment, removal powers, and independent counsel, the executive v. Congress
   a. Appointments Clause—Art II §2 cl.2--
   b. When the majority of the members of a commission are appointed by the Congress, and there duties are essentially executive—the appointments are unconstitutional—Buckley v. Valeo (1976)
      i. Must conform to the art II § 2 para 2, lest the powers of the appointees be limited to those that the Congress might delegate to members of its own committee.
   c. Unrestrictable power of the President to remove purely executive officers—Meyers v. U.S (1926).
      i. “Reasonable implication from the President’s power to execute laws that he should select those who (Postmaster) were to act for him under his direction in the execution of the laws. AS his selection of this officials is essential, so is their removal.
      ii. The inclusion of the provision that he receive the consent of the Senate was invalid.
   d. Where the functions in question are not executory functions, the Congress may well see fit constitutionally to impose powers—Humphrey’s Executor (1935)
      i. FTC had specified causes for removal
      ii. Quasi-judicial and Quasi-legislative—distinguished from Meyers.
   e. The statute was silent on removal and did not specify permissible grounds to remove. Wiener
      i. The functions were judicial in character and held the removal by the Executive illegal.
      ii. If not purely executive, than the power to remove existed only if the Congress conferred it.
   f. Upholds the Judicial Power to Appoint (does not count as a significant grant of executory power to the courts) and the Congressional Limit Attorney General’s power to remove (does not impeded presidential ability to perform duties) Morrison v. Olson (1988)
      i. Facts—
      ii. Held that the provisions do not violate the
         1. Appointments Clause—this is an inferior officer and there is nothing that limits the power of congress to vest appointment powers in the courts of law
            a. Subject to removal by a higher executive officer other than Pres
            b. Empowered by the Act to perform only certain duties
            c. Limited in jurisdiction
            d. Limited in tenure
         2. The limitations of Art III
            a. Does not think it prohibits Congress from vesting misc powers in the Special Division pursuant to the act.
         3. Interfere with the President’s authority(Separation of Powers)
            a. Does not involve an attempt by Congress its own powers
            b. No judicial usurpation of executive powers
            c. Does not impermissibly undermine the power of the executive.
               i. Imposing requirements of good cause does not undermine the executive.
      iii. Dissent—Scalia—Argues that there is a violation of the separation of powers when any executive power is transferred to another branch.
         1. The appeared to be a very formalistic and rigid intepretation—which it was. However it now appears to be quite realistic taking into account the ill effects of independent counsel on president’s ability to carry out duties.
         2. When two branches of the government are involved, neither one nor the other is correct.
30. Election Procedures


b. Issues

i. Whether the recount procedures the FL SC adopted are consistent with its obligations to avoid arbitrary and capricious disparate treatment of the members of the electorate
   1. Concluded that the formulation of uniform rules to determine intent based on these recurring circumstances is practicable and necessary.

ii. Whether a state court with the power to assure uniformity has ordered a statewide recount with minimal safeguards.
   1. There must be some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

c. Dissent—Stevens, Ginsburg, and Breyer

i. There are three options when there is an issue with the election (no federal question is posed)
   1. Art II § 1 cl.2
   2. 3 U.S.C. §5—safe harbor
   3. Equal protection clause
      a. Does not make a good claim for this application
   
ii. The Legislative employed a unitary code—indicating it intended the USSC to play a role. They have resolved state election disputes and will resolve federal ones as well.

d. Dissent—Souter

i. Should not have issued the stay and the counting could have continued.

ii. Procedures under 3 USC §15. A process set out for the reception of the electoral votes.

iii. No outstanding question of finality here. The Congress had provided for finality—determinate steps down the line.

iv. He sees a problem if the identical voting machines and ballots are interpreted differently. Equal protection issue. Remand to Florida to come up with uniform standards.

e. Dissent—Ginsburg

i. The USSC has rarely rejected the high court interpretations of the state law.
   1. Usually extreme social unrest—Jim Crow and Early 19th c. context

ii. The USSC is looking at an aspect of the structure of state government.

iii. There is no equal protection claim—they are looking for a utopia that does not exist.

f. Dissent—Breyer

i. The Congress decides on the disputes if the state submits two slates of electors

ii. Appeal to the constitutional text and to legislative sources—close to Scalia and Rehnquist norm.
31. The Political Question Doctrine: The Judiciary or the Executive vs. the Congress

a. This doctrine treats certain kinds of cases as nonjusticiable “political questions.”
   i. Constitutional Core—consists of those issues that courts may not decide because the Constitution mandates that they be finally decided by other branches of the federal government.
   ii. Prudential—consists of those issues that the Court thinks best left undecided by the courts, because there is insufficient information upon which to decide or judicial decision would undermine the courts or compromise some other important principle of democratic governance—separation of powers.

b. Reapportionment in cases of malapportioned voting districts is required by the equal protection clause—*Baker v. Carr*(1962)
   i. Six factors that identify the political question
      1. Is there a textually demonstrable constitutional commitment of the issue to another branch? (Constitutionally mandated) Art 1§8
      2. Lack of judicially discoverable and manageable standards for resolving it. (Constitutional and Prudential (wise) Concerns)
      3. Impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion
      4. Impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.
      5. Unusual need for unquestioning adherence to a political decision already made
      6. Potentiality of embarrassment from multifarious pronouncements by various departments on one question Prudential Concerns
   ii. Although, only one of the above factors is necessary, several are often present.

c. *Coleman v. Miller*
   i. Facts: Carter announces that the US is going to recognize The People’s Republic of China as the sole government of the country. A week later, the State Dept notifies the government of Taiwan, that the treaty with Taiwan will be terminated in one year.
   ii. Goldwater—revocation of the treaty is not possible without the consent and advice of the Senate.
   iii. The decision to recognize a country is an exclusive executive prerogative.
      1. Constitutionally unproblematic.
      2. Abrogation of the mutual defense treaty with Taiwan must be terminated.
      3. Provisions in the treaty which said that either party could terminate the treaty on years notice.
   iv. Concurring—Powell agrees that Goldwater’s claim is to be dismissed. Not ripe for judicial review
      1. What would the senate have to do to create an express conflict—pass the resolution with 2/3 with those present voting for the thing. It would be justiciable at this point. He quarrels with his colleagues in the application of the Baker v. Carr criteria
   v. None of the criteria triggers the political question doctrine. He is suggesting that none of the criteria applies.
      1. Textually demonstrable
      2. Standards—only the constitutional division of power between Congress and the President-
      3. Prudential concerns that call for mutual respect among the three branches of government.
   vi. Concurring—Rehnquist
1. Though expressly conferring power on the Senate to ratify treaties, the Constitution is silent on the abrogation
2. While the Congress controls adoption of constitutional amendment, it is silent on ratification following an earlier rejection.

e. Powell v. McCormack (1969)

i. Powell was elected in 1966, serving in the House. He is not seated, and was not permitted to take his seat—or excluded. He sues in the District Court—dismissed for nonjudiciability. Congress can exclude only if they don’t meet the Art 1 §2 requirements (residence, age, citizenship). This falls within Congress’ realm. Where however, the standing qualifications have been met, falls outside of the power of the Congress and is therefore justiciable.

ii. Justiciable

1. The text of constitution demonstrates that the Congress did not have the broad power asserted by the respondents to determine the qualifications for membership in the House
2. Judicial resolution will not lead to embarrassment because there is textual support.
3. The Select Committee—found that Powell met the standing qualifications but that he had asserted an unwarranted privilege, etc. The Speaker of the House—only a majority vote would be needed to exclude Powell and declare the seat vacant, the House adopted such resolution of exclusion. More than 2/3’s majority. There is also language on expulsion of House Members—Art 1 §5. There is no expulsion unless one is already seated
4. Adjudication power—power to determine whether the standing qualifications were satisfied.
   a. A broad reading of the adjudicatory power—if it is read broadly it falls into Carr #1.
   b. The narrow reading holds the adjudicatory power to the three rubrics that are listed.
      i. Because they are enumerated they exclude anything else that has not been enumerated.
      ii. From rep democracy—the people chose him and he should be seated.
      iii. It would effectively nullify the Convention’s decision to require a two-third vote for expulsion.

f. There is a textually demonstrable commitment of impeachment to the Senate and thus nonjusticiable.—Nixon v. US (1993)

i. A Senate delegated a committee of 12 senators, in pursuance of Rule 11, to hear evidence. The committee gave the entire Senate a copy of the transcript and the Senate convicted on that basis. Nixon argued that the senate had not complied with art I §3 cl. 6 which requires the Senate to try all impeachments.

ii. The court concluded that the type of trial is for the Senate to decide, since the full clause states that the Senate shall have sole power to trial all impeachments.

1. Dismisses the claims that the full Senate did not hear it or that it wasn’t a trial (had a broader meaning at the time of the Framers—they enumerated other things in this clause)

iii. Court identified the lack of finality problem as an additional basis for its ruling.

iv. Concur—White—Justiciable—It would be against Nixon on the merits.

32. War Powers: The Executive v. Congress

a. Constitutionality of the Vietnam War was held to be a political question—Mora v. McNamara (1967).

i. Point to the prudential concerns
1. The Power to declare war is a Congressional Power
2. May the Executive order those to participate in a war when no war has been declared
3. Of what relevance are the present treaty obligations of the United States
4. Of what relevance is the Tonkin Gulf Resolution War Powers Resolution of 1973
   ii. Dissent—White—We cannot make them go away by not hearing them and he sees them as justiciable.
   iii. Dissent—Douglas
      1. Jefferson—Congress ought to be a check on the executive since they are the ones paying for it. The Congress has to figure out the payment.

b. War Powers Resolution of 1973—Effort on the part of the Congress to reassert its power to declare war, this after a long period of acquiescence to executive exercise of the war power.
   i. The congress is belatedly protesting the Presidential exercise to declare war. Reasserting its art I § 8 powers.
   ii. Putting teeth into the reassertion to declare war by giving President restricted power.
   iii. Nixon vetoed it, but it was passed over his head.
   iv. Bush I and Clinton have both violated it. When the conflict is deep they are not inclined to follow it.
   v. It is natural tendency to stay away from war and label it as an emergency.

c. No official declaration of War during the Civil War (as it would have vindicated the South’s status as an independent nation state) Prize Cases (1863)
   i. Ships carrying goods to the Confederate states were seized by Union Ships, pursuant to Lincoln’s order declaring a blockade of Southern ports. Did he have this authority to order this blockade without a Declaration of War.
   ii. A British vessel—the Hiawatha was given 15 days to leave the port of Richmond, just ahead of the blockade. Would not be able to arrange for a tow to get it out to sea and was stuck in the port three days into the blockade.
   iii. There would have been no problem if they had a declaration of war.
   iv. Lincoln had the power to put down the insurrection and this includes the power to blockade the ports.

d. The President has the power under art 15 of the articles of war to convene a military tribunal for the prosecution of enemy aliens in a time of war—with a formal declaration of war by the Congress at hand. Ex Parte Quirin (1942)
   i. German nationals—only one’s citizenship was possibly U.S. He was not executed. The Germans had gone through training and then made their way to the U.S by submarine.
   ii. Military Tribunal proclamation
      1. The law being applied—law of war (articles of war)
      2. 1058 of the supplement #31—whole range of things. Reference to art 15 as the articles of war. Congressional codification of the parts of the law of war. 1054 have reference to the articles. There is a trial before a military tribunal and at the same time the defendants in the military tribunal go to federal court petitioning for a writ of habeus corpus.
   iii. They are not entitled to the civil trial
      1. The government points to the status of the petitioners as enemy aliens and beligerants.
      2. The president has provided in his proclamation for an alternative forum—a military commission.
         a. Start with enumerated war powers of the Congress
         b. Move onto the Presidential powers take action as the Commander in Chief
            i. in the context of art 15—Congress has specifically provided for military tribunals.
ii. How do you tell a spy from a soldier— their uniform
3. The courts argument is completed by showing that the 5th and 6th amendment rights do not restrict the president from convening a military tribunal as long as those have been met. There was a declaration of war.