I. Judicial Power

Structure of the Constitution – Constitutional Pattern

a. Conferral of Powers
   i. Article I – Legislative Powers
   ii. Article II – Executive Powers
   iii. Article III – Judicial Powers (SC became one federal court in 1789)

b. Specific Powers
   i. Art. I, §8 – specific conferrals of power on the Congress 17
      specific, 1 inference
      1. The enumeration of specific powers in Section 8 means
         that those powers not expressly enumerated are
         expressly excluded and reserved for the people →
         development of a system of limited government
   ii. Paragraph 18 → Necessary and Proper Clause
       1. Madison reads the necessary and proper clause in a narrow,
          hard-nosed way: “limited and enumerated powers”
          “necessary to an end,” “incident to the nature of the
          specified powers”
   iii. 1st Amendment – separation of church and state
       1. conferral of power and imposition of duty are different
          modalities (this is a denial of power)
          2. The Amendments are typically express denial of powers
             while the Articles are the conferral of powers

Constitutional Clauses

1. Necessary and Proper Clause
   a. James Madison – Slippery Slope Argument
      i. Systematic Ambiguity – the end eventually will become the
         means
      ii. If the incorporation of a bank were allowed, then many
         intrusions of the federal government into the economy
          1. If we allow the incorporation of a US Bank, that will
             lead to X,Y,Z [causal claim]
          2. X,Y,Z are undesirable [normative (measure of what is
             good or bad) premise]
          3. slippery slope argument can be attacked by questioning the
             evidence of the causal chain
   b. Hamilton’s Means and Ends
      i. The necessary and proper clause warrants the means of a bank to
         the end of the realization of the Articles of the Constitution
      ii. If an end is comprehended within the specified powers and is not
         clearly prohibited by any particular provision, it can be safely
         deemed to be within the compass of national authority
c. Randolph - In a federal system, the powers granted will be enumerated in any case and this suggests limitations on the sovereignty of the federal government
   i. Article I, Sec. 10 – Might read “absolutely necessary” as necessary and “necessary” as simply useful

d. *McCulloch v. Maryland*
   i. Marshall’s relaxed reading of the necessary and proper clause. [the bank is necessary as means to an end] – BROAD INTERPRETATION OF NECESSARY AND PROPER CLAUSE
      1. The broad reading is intuitively right (range of possible means)
      2. The narrow reading of the necessary and proper clause would unduly constrain the Congress
      3. “Only its great outlines should be marked” except when the specific point cannot be inferred from the general point, then the specific point will be included in the Constitution

   ii. Means/End Analysis ➔ Sovereign powers include the right to exercise whatever appropriate means is necessary to achieve an end (to employ all of the requisite means)
      1. **Appropriate Means**
      2. **Reasonable Relation to**
      3. **Legitimate End**

   iii. Motive is irrelevant – Although other ends may be achieved, this does not invalidate the power
      1. Model of Parts and Wholes - The whole is the federal unit or the state, and the parts are the constituents; taxation is fine b/c the parts being represented are those being taxed

**Constitutional Review**

*Marbury v. Madison ➔ POWER OF CONSTITUIONAL REVIEW*

a. The only case besides Marbury in which Constitutional Review is exercised is the Dred Scott case. In the post civil war period, the power does aggregate.

b. Marshall ➔ Constitutional conferral is limited to appellate jurisdiction; if they had meant to give original jurisdiction, they would have done so (the enumerated power excludes any other
   a. Statutorily; original jurisdiction is implied

c. **For the first time, congressional legislation is declared unconstitutional.**

d. **This case is the beginning of Constitutional Review. It is not found in the Constitution.**

e. It is also hard to read Article 3 as conferring jurisdictional power. The conferral of original jurisdiction is a grant of enumerated powers. Anything not enumerated is excluded.

f. This is all proven by *reductio ad absurdum* argument.
   a. If the opposite is absurd, it must follow that this is true.
g. **2 issues:**
   a. Marshall wants to establish that the Constitution is different from and indeed superior to legislation such that when there is conflict between them, the Constitution prevails.
   b. The courts have the power of Constitutional review, not the Congress.

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<td>John Marshall</td>
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*Eakin v. Raub* → deals w/ the second issue; legislative power is a sovereign power and for the courts to overturn this power would be unconstitutional. The judiciary has the power to interpret the laws, but it does not have the power to scan the authority of the lawgiver.

Constitutional Review in Europe
- In German courts, once a law is declared invalid, the courts issue a ruling of general invalidity binding on all, not just the parties in the current case
  - Retroactive application
- Decentralized system in the US → more than one court deciding constitutional matters; Centralized system in Germany → limited to one court for constitutional systems
- This is different from our courts b/c our courts do not have the power to hold a statute unconstitutional
  - Case and Controversy Clause → Article 3, Section 2, Paragraph 1
  - The result is a proactive application → *Stare Decisis*
- abstract judicial review differs from concrete judicial review; you do not need a case to decide that a statute is unconstitutional
- German courts can hear political questions
- The Supreme Court in the US is both a constitutional court and the highest appellate court; in European countries, these courts are separate, but on the same level
- Southwest Case – Marbury of Germany; the extension of a term would be unconstitutional b/c the federal government cannot meddle in state law; this law is null and void (never did exist)
It would be a mistake to declare that the statute never existed, only that it is not applicable

**Martin v. Hunter’s Lessee**

a. Story points to Constitution; Article I; Section 10: disabilities and prohibitions imposed upon the states

b. Criminals need to be able to appeal if there is an issue of individual rights. **This is support for the appellate jurisdiction of the federal courts.**

c. Factors:
   a. **Independent and Adequate State Grounds Required** – Art. III, §2
   b. **No Review of State Law Issues**
   c. When state constitutional provision interpreted as co-extensive w/ comparable federal constitutional provision

d. Most Important Concerns
   i. **The preservation of the Union in a time of instability.**
   ii. **Uniformity.**

**Cooper v. Aaron** (judicial supremacy or judicial exclusivity)

a. Did the courts alone have power to determine what the Constitution says or do other officials in the government have the power to determine this as well?
   a. Jefferson ➔ each branch has power to interpret the Constitution
   b. What is Arkansas’s position on the effort to enforce federal law on the basis of Brown v. Board of Education? There is no power to enforce that decision in AR. Instead, **the people of AR will enforce state legislation.**

**Court Stripping** – Congressional Control over SC Appellate Jurisdiction

Art. III, §1 – Fed. judiciary power vests in SC & inferior courts as Cong. may establish
Art. III, §2 – SC shall have app. juris. as to law/fact w/ exceptions as Cong. shall make

**Ex Parte McC cardle** ➔ The Judiciary Act of 1789 also provides for Jud. Review of H.C. rulings of lower courts (rule does not correspond to the holding)
   - Court cannot inquire into the motives of the legislature
   - **Congress can limit the appellate jurisdiction of SC if it is neutral**

**Klein** ➔ cannot decide the merits of the a case under the guise of limiting jurisdiction.
   - This is a separation of powers cases (allowing the case to be remanded would blur the line b/t the legislature and judiciary)
   - **Congress cannot impose its interpretation of the laws in pending cases!!!!**
   - SC does not intend to w/hold appellate jurisdiction except as a means to an end
   - **Congress has constitutional power to make Supreme Court an appellate court**

**Seattle Audubon** ➔ statute is binding even though the case is pending (Klein was more convincing case of Congressional interference)
- This is held b/c an individual’s rights (Klein) are more protected than environmental rights
- **Constitutional rights claims always prevail over policy arguments** (Any congressional acts curbing the appellate jurisdiction of the Supreme Court)

Limits on Congressional Power on Appellate Jurisdiction:

- **Internal Restraints** → limits on Congressional power inherent in Art. III; exceptions cannot be exercised if it inference w/ core functions/essential role of SC in Const. plan
- **External Restraints** → Congress cannot single out classes of litigants from SC jurisdiction

**Scope of the Exceptions Clause**

- as a matter of naked constitutional power, there is no reason not to believe that Congress has Cart Blanc (unlimited power)
- If we look at this from the standpoint of good constitutional policy, then we will want to insist upon some limitation on the exceptions clause – Marbury (if we seal off every road that will lead to review in the federal courts, then this would deny people their constitutionally protected rights)

**Congressional Power over Constitutional Rights**

**Katzenbach**

- 14th Amend. §5: Enforcement of Equal Protection Clause: “Appropriate” means rational. The Congress has to come up with means that bear a relation to an end in that the Congress could have rationally have believed that these means would be likely to bring about the end. **RATIONAL BASIS TEST.**
  - According to this case, this is a weak test
- **Boerne v. Flores** → Anything that alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause; must have proportionality b/t harm alleged and remedy (restricts Katzenbach)

**II. Congressional Regulation**

  i. Under the Commerce Clause

**Marshall’s Interpretation of the “original understanding”**

**McCulloch v. Maryland**

- broad reading of “necessary and proper clause”
- “Legitimate Means” for “Appropriate End”
Early Cases: Formalism v. Realism

**Gibbons v. Ogden**
- broad reading of Commerce Clause
- Federal law is only supreme over state law if it is constitutional.
- Commercial Regulatory Power as plenary power
- **Commerce Clause**
  - Navigation ➔ Transportation Generally
  - Commercial Regulation ➔ Between the States
  - Plenary Power ➔ Where commerce clause applies, it applies to everything related
- State Police Power: health, safety, welfare (Hood v. DuMond)
  - There is no general power in the Congress like the State Police Power. Everything has a limitation.
- **Paul v. VA** ➔ insurance policy is not a transaction of commerce;
  - FORMALISTIC OPINION w/ narrow reading of commerce
  - limited to “commodities”
- **Kidd v. Pearson** ➔ narrow reading of commerce
  - Manufacture [1st definitional trick] is beyond the scope of the commercial regulatory power, with the exception of transport regulation
- **Daniel Ball** ➔ because the case is transport (b/t states), it is governed by the commercial regulatory clause (broad reading of commerce)
- **US v. Knight** ➔ The monopoly would have an effect on interstate commerce, but restraint would be an indirect result [2nd definitional trick]
  - direct vs. indirect result
  - If a national power extends to all contracts, there would be little left for state control
- **Slippery Slope Argument Criteria:**
  - Causal ➔ This is fundamentally correct.
  - Effect is desirable ➔ consider child workers statute

**Champion v. Ames (Lottery Case)**
- The end for the means of regulation is legitimate b/c it prevents that which would harm the public morals.
- Exercise of the plenary power; Congress can ban items in interstate commerce

**Houston Railway** (intrastate rate vs. interstate rate; price discrimination)
- Congress is empowered to regulate where the intrastate commerce gives rise to a discriminatory power over interstate commerce.
- Criteria for understanding how this standard (close and substantial relationship to interstate commerce) is to be applied:
  - Safety
  - Efficiency
  - Fair Terms
- Where the intrastate commerce would unduly burden interstate commerce the freedom from discrimination, this is treated as a uniform market [REALISTIC APPROACH]

_Hammer v. Dagenhart_ (Child Labor Case)
- Holmes’ Metaphor – “into the current or stream of interstate commerce”
- **Protection in the name of public morals**
  - The sad irony in this case is that while the court is happy to endorse the Congress in statutes in the name of public morals, when there is a truly profound genuine morals case, the court will not endorse this case
- **Distinction by Nature of the Goods** → the goods themselves are harmless in this case while the goods are wicked in the Lottery Case according to Justice Day
- This is manufacturing, not transportation. Therefore, this does not fall under the commerce clause.
- **Congress does not have the power to interfere w/ state's police power**
- **DISSENT:** Justice Holmes; Reading the commercial regulatory power as a plenary power

Federal:
Broad Reading of Commerce Clause → _Gibbons v. Ogden_
Plenary Power
Pretext – protection against our worst instincts
Reductio ad absurdum –

State:
Insulation Techniques →
Distinction b/t manufacture and transport
Direct/indirect
Slippery slope
Police power

Constitutional Crisis – Laissez Faire court rejects Roosevelt’s legislative program

_Schecter Poultry_ (Live Poultry Code – stabilize prices)
- **Exercise of Emergency Powers** – Extraordinary conditions do not enlarge or create the Constitutional Power.
- The effects on interstate commerce are merely indirect effects; this is not a case for broad expansion of the Commercial Regulatory Power.
- Lip service to the realist standard in Shreveport

Court-Packing Plan → FDR – Depression warrants the exercise of extraordinary powers; Court - Cannot change the constitutional powers at will. This questions the validity of the document.
- Scope of the commerce clause and the necessary and proper clause become fused.
Revolution of 1937: Congressional “general police power” is recognized

*Carter Coal* → replay of child labor case
*Jones & Laughlin* → realist standards are written into statute
*Darby* (overrules child labor) → deference to Congress; rational basis standard is relaxed, anything goes

*Wickard v. Filburn* (Ag. Adjustment Act)
- This is only a negligible amount of wheat. But, this must be looked at as an aggregate case of every farmer and their effect upon the market. *This case is representative of a class of cases.* [EFFECT OF AGGREGATION ON REGULATION.]
- As long as the regulation is fair, workable, and wise, where there is a connection, there is no need to worry about the question of the means. *This is an issue for the Congress.*
- Judicial will defer to the voice of the people (Congress)

Civil Rights Cases of 1883 (there must be a link b/t slavery and discrimination)
- The government does not have the power to write legislation that would reach as far as relationships b/t individuals. The power of the Congress is limited to discrimination stemming from state action. *This is not a code of domestic law for the regulation of private rights.*

Senate Committee Hearings of 1963
- The proposed civil rights act is constitutional either under the commerce clause or under the 14th amendment.
  - Raises the problem w/ the 14th amendment b/c the subject in question is a private business and there is no state action.

**State Action Doctrine**

*Marsh v. AL* (religious materials distribution)
- State’s analogy to homeowner regulating their own property
  - *Justice Black’s response* – Ownership does not mean absolute dominion; the more you open up your property to public access, the more your property rights become limited [rights trump over countervailing policies & constitutional rights trump over property rights]
  - The implied assent was the open access of the town. This town is freely accessible to the public. This was assent to the distribution of materials.
Shopping Centers

I. Union v. Logan Valley → union picketers; private ownership does not change things is a significant way, not if the surrounding property is not under the same ownership

II. Lloyd Corp. v. Tanner → Vietnam war protestors; there was no relationship b/t the picketer’s activities and the shopping center

III. Hudgens v. NLRB → the owners in the previous cases were allowed to exclude picketers only b/c the gov’t had conferred the power to do that

Party Primaries

I. Nixon v. Herndon → striking of discriminatory statute; the action of the party is state action b/c “the committee operated as representative of the State in the discharge of the State’s authority.”

II. Grovey v. Townsend & Smith v. Allright → resolution limiting membership of the parties; the parties determination for the state of who shall vote in primaries is state action

III. Terry v. Adams → This is a quasi-election which will effect the actual election and blacks are being discriminated against. There is a function as a surrogate of the party.

Shelley v. Kraemer (sell only to whites) → When a state legislature passes a law that is unconstitutional (even a restrictive covenant), then the Supreme Court has a right to hear such a case as a jurisdictional matter.

Heart of Atlanta Motel

- Textual Support –
  - “Qualitative Effect or Burden” → the impairment of a Black’s pleasure and convenience in travel resulting from an uncertainty in finding travel;
  - “Quantitative Effect” on Commerce → This discouraged travel among blacks, effecting the volume of services being undertaken in interstate commerce

- Competing Ends: Promoting Commerce and Preventing Discrimination
- Extraordinary deference to Congress on means

Katzenbach v. McClung (Ollie’s BBQ – take-out for blacks)

- This is a rational basis; have to look at this class of activities in the aggregate, not just this instance.
  - This is enough and the facts in this instance do not count. The only thing that needs to be shown is that this particular case is not utterly capricious and arbitrary.
- THE RATIONAL BASIS TEST IS APPLIED BY ASSUMING THAT CONGRESS HAS A RATIONAL BASIS FOR MAKING THIS LEGISLATION.
- None of this matters b/c we are trying to decide cases under the Commerce Clause that should be decided under the 14th Amend.
Perez v. US
- There is no connection of Perez to organized crime. But, there is a class of organized crime that affects interstate commerce. Putting Perez in this class is an assumption and is never stated.
- There is now a full blown police power w/in the Congress. This may have been inevitable and unavoidable, but this means that these arguments have to continue to by made under the CC instead of 14th Amend. [This was corrected in 1995]

ii. Pursuant to other Art. I, §8 powers

Taxing and Spending Power

SD v. Dole
- The conditions of the Spending Power:
  a. General welfare
  b. Unambiguous
  c. Related to the federal interest [This is the condition in question]
  d. Other constitutional bars may independently bar this condition [10th Amendment; Article 1, Section 9]
- O’Connor’s DISSENT:
  o OVER-INCLUSIVE ➔ This is not good for being over-inclusive. The problem arises only if applied to a state that controls a right.
  o UNDER-INCLUSIVE ➔ This is even more problematic. Makes no sense either. This is doing nothing rather than something when something falls short of the goal.
- Coercion ➔ when federal gov’t does not give state a choice

War Power

Woods v. Miller Co. ➔ Where the effect that the legislation is addressing can be traced back to the war, then the war power can reach to such a situation. (DISSENT: When does this reach stop?)

MO v. Holland
- To tie the Necessary and Proper Clause to Article II, Section 2 would be to take away the treaty power.
- What is the distinction b/t “made in pursuance” and “made in the authority of” the Constitution?
  o Made in pursuance is a narrower context; police power of the States
  o Made under authority the formal conditions of treaty making are satisfied
- In the treaty-making context, the Congressional powers are not bound by Article II, Sec 2
- Bricker Amendment – to use MO v. Holland to keep powers w/in the states
Undoing of post-1937 Commerce Clause

Lopez (Gun-Free School Zones Act)

- Three purposes of commerce clause:
  a. May regulate the use of the channels of interstate commerce
  b. May regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities
  c. May regulate those activities having a substantial relation to interstate commerce; those activities that substantially affect interstate commerce.

- All the cases referred to have a purely economic activity (and that is why the Commerce Clause was upheld): intrastate coal mining (Hodel), intrastate extortionate credit transactions (Perez), restaurants utilizing substantial interstate supplies (McClung), hotels catering to interstate guests (Heart of Atlanta), production and consumption of home-grown wheat (Wickard).

- If there is no economic activity in the first place, there is no reason to speak of substantial affects.

- Slippery slope → if this is under the commerce clause, what would not be? If this argument is accepted, we would be hard-pressed to find any activity by an individual that Congress is w/o the power to regulate. [Endorsing the McClung rational basis test.]

- CONCURRENCE (Kennedy): This is part of the checks and balances system.

Morrison

- Rejection of the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction b/t what is truly national and what is truly local.
  o Important difference b/t Lopez and Morrison? Vast Congressional findings of fact.

- This does not remove the authority to define the boundary

III. Dormant Commerce Clause

- Competing Interests b/t State Regulation and Federal Commerce Clause -

Exclusivity

Gibbons v. Ogden

- Doctrine of Exclusivity → The power of a sovereign state over commerce amounts to nothing more than a power to limit and restrain it at pleasure…..this power must be exclusive; therefore, this grant carries with it the whole subject, leaving nothing for the state to act upon.

- This is not a dormant commerce clause case, but an issue of whether a state and federal law can coexist. The state law must yield to the federal law.

- Doctrine of exclusivity would prohibit the state regulation of anything that affects interstate commerce at all and is not purely local.
Plumley v. MA → Although criminal laws may affect trade, this is part of the state’s general police power and exclusivity does not reach this far.

Cooley (local pilot for port)
- Rejection of exclusivity doctrine.
- The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter.
- If the subject of the regulation is national, then Congress retains exclusive power to regulate that subject matter. The Congress cannot assign this power to the states.

Prudential Insurance → Upholding of a state law as a condition of doing business in the state.

Transportation

Barnwell
- Two-part standard for state regulations:
  a. Acting w/in the scope of the state police power
  b. Whether the means of regulation are reasonably adapted to the end sought
- The only court review power is to determine if there is a rational basis.
- 1. Rational Basis Standard Prevails
  2. It prevails as a means of deferring to the legislative judgment.
  3. This is a means for letting the people decide.

Southern Pacific (AZ limit of 14 train cars)
- The court is to determine the reach of the Commerce Clause, not the state legislature. [Complete opposite of his opinion in Barnwell.]
- The state goes too far and impedes on the uniformity required by the Commerce Clause. The rational basis test is replaced with a balancing formula [b/t state interests and national uniformity]
  o The balancing in this circumstances – Does the effect of the law as a safety measure outweigh the national interest in keeping uniformity?

Should we favor the rational basis test favoring the legislature or the balancing of the interests which favors the courts?

Bibb (IL law for curved mud flaps)
- When there is balancing, there has to be independent standard.
- Like any law that conflicts with federal regulatory measures [state] regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow. – reading of dormant commerce clause
Pike Formula

**Pike v. Bruce Church**

- 4 conditions for resolutions of Commerce Clause cases:
  - **Statute regulates even-handedly**
    - Prevention of economic discrimination
  - **Means to a legitimate ends**
    - Legitimate state interest, legitimate state purpose/end, falls w/in the state police power [for our present purpose, these are all synonymous] → identify legitimate ends by going to expressly conferred powers (health, welfare, safety)
  - **Only incidental effects on interstate commerce**
    - The balancing test must be applied - substantial
  - **Proportionality Rule - local burdens have to be in proportion to local benefits**

**Kassel** (no doubles in IA w/ exceptions)

- The incantation of a purpose to promote the public health or safety does not insulate a state law from a Commerce Clause attack. This “weighing” by the court requires, and indeed the constitutionality of the state regulation depends on, “a sensitive consideration of the weight and nature of the regulatory concern in the light of the extent of the burden imposed on the court of interstate commerce.”
- Rational Basis Ruling; Dissenting → The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.
- Balancing Test; Court in Kassel → The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by state’s lawmakers, and not against those suggested after the fact by counsel.
- Protectionism; Majority and Dissent → Protectionist legislation is unconstitutional under the Commerce Clause (economic discrimination, bad purpose, bad motive)

**Incoming Commerce and State Legislation**

**Baldwin**

- One state in its dealings with another may not place itself in a position of economic isolation
- You often do not what the legislative intent is. Therefore, it should be based upon the facts of the situation. [Legislative motive is irrelevant to dormant commerce clause cases since the Constitution’s concern is with state interference with interstate commerce, not the lawmakers’ state of mind.]
- **Strict scrutiny standard:**
  - Legitimate end
  - Least onerous of the alternatives (non-discriminatory)
Scalia applies this b/c under the balancing test, the court’s decisions leave open the possibility that a state may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives.

*Welton v. MO* → There were less onerous alternatives in this case.

*Hunt v. WA Apples* → The court declines to use this legislative purpose argument and argues the discriminatory effects of the statute.

*Edwards v. CA* → There is a prohibition on attempts on the part of any single state to isolate itself from difficulties common to all of them.

*Dean’s Milk*
- Even with legitimate safety interests and no conflict with federal laws, if there is still a less onerous alternative, a statute will be invalidated.
- DISSENT: The court should not dictate to the state which alternative should be used. Also, no alternatives should be taken b/c the state has the power to regulate health b/c the legislature supports the people’s voice. These are policy questions and not individual rights, this choice should be left to the people. This is an argument for deference to the state legislature. Otherwise, you are depriving the people of their voice to this issue.

*Maine v. Taylor* → Adds another factor (Environment) to Four Rubrics: Health, Safety, Welfare, Environment

*Breard v. Alexandria* → Homeowner’s right of privacy outweighs burden on interstate commerce

*Philly v. NJ* → There is a less onerous alternative. Do not need an imputation of bad purpose.

*Exxon v. MD* → The court looked for “bad purpose” (actual purpose). Finding none, it upheld the statute despite the great advantage it gave to in-state independent dealers.

*MN v. Clover Leaf* (no plastic milk containers)
- A nondiscriminatory regulation serving substantial state purposes is not invalid simply b/c it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State’s legitimate purposes does such a regulation violate the Commerce Clause.
- Avowed leg. Purpose means the actual state purpose. Can only talk about if it is a bad state purpose. Otherwise, then you would go w/ the ostensible state purpose.
- Brennan is bending over backwards to uphold state legislation.

Reciprocity Provisions

*Cottrell* → Rec. Prov. create discriminatory effects
Outgoing Commerce

Hood v. Du Mond ➔ Although the state has broad power to protect its citizens for reasons of health and safety, the state may not promote its own economic advantage by curtailment or burdening of interstate commerce.

Hughes v. OK

- **Commerce Clause Analysis** [Hughes Test – Strict Scrutiny Test] ➔
  a. whether the challenged statute regulates evenhandedly w/ only “incidental” effects on interstate commerce either on its face or in practical effect; [two paths]:
     i. even-handedness (no discriminatory purpose)
     ii. extent of the burden on interstate commerce [third Pike condition]
  b. whether the statute serves a legitimate local purpose; and if so,
     i. To ascertain the state’s purpose independently of the state’s own account [balancing]
     ii. Bad motive or bad purpose.
  c. whether alternative means could promote this local purpose as well w/o discriminating against interstate commerce

- When discrimination against commerce is demonstrated, the **burden falls on the State** to justify both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

- **THIS IS DIFFERENT FROM THE PIKE TEST B/C LESS ONEROUS ALTERNATIVES ARE ADDRESSED IN THE THIRD CONDITION. THIS IS NOT DEALT W/ IN PIKE.**

- Economic Discrimination [Protectionism] also can take two paths:
  o Discriminatory on its face [means] OR Discriminatory effects
  o Bad motive or purpose to discriminate

- This creates four rubrics for the state police power: environment, health, safety, welfare. However, these are narrowed in this case.

Cities Service ➔ The central purpose of the commerce clause is to prevent the state’s exploitation of a natural resource from less lucky neighbor states.

Camps Newfound/Owatonna ➔ The difference b/t profit and non-profit organizations is only illusory for the purpose of the Commerce Clause. It still applies and taxing is a government interest. (Scalia’s dissent: compare the non-profit exemption to in-state tuition)

  i. Preemption
Both the federal gov’t and the states have regulated a subject, but their laws do not conflict.

Rice Criteria
- A. presumption in favor of state law
- B. Grounds for Rebuttal
  1. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Pervasiveness]
  2. Federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Dominant Federal Interest or Purpose]
  3. Subject sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose or the state policy may produce a result inconsistent with the objective of the federal statute. [Inconsistency] (The state objective cannot be squared w/ the federal purpose)(Hines’ Language: Does it frustrate federal regulation]
  4. Physical impossibility of joint compliance – FL LIME

Hines
- The Third Criteria is the best bet b/c it incorporates everything from the Second Criteria and then takes it a step further.
- EXAM!!!!! Exclusivity question – Is there only uniform national system permitted?
  - Yes, in order have uniformity in compliance and enforcement, there must only be one national system. This creates more freedom for resident aliens.

PG & E (prohibition of nuclear plants) → There is an admission from the state that the real concern was economic in nature; safety is not the real concern.

FL Lime
- Whether a state may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (Hine’s statement of the third Rice Criteria → frustrates federal regulation)
- THE STATE AND FEDERAL STATUTES CANNOT BOTH STAND SIMULTANEOUSLY. → Rice being extended to a 4th criteria.
  - There was no other way for federal regulation to prevail.
- The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons, either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.
ii. State as Market Participant

- When the states do not try to regulate commerce, but instead intervene in commercial markets and become “market participants.”

Two developments strengthening the role of the states in regulation
1976 - State’s Rights

I. National League Case \(\rightarrow\) purports to find a doctrine of state immunity

II. Market Participation Exception \(\rightarrow\) states as players in a market; state is immune from regulation under the dormant commerce clause [remains a problematic area]

EXAM \(\rightarrow\) Why is the Market Participation Exception Problematic?????? It is problematic to view the state as just another economic factor.

Reeves
- Even handedness \(\rightarrow\) State should be free to make decisions just as private persons in business can make decisions. Anything else would not be even-handed.
- DISSENT: This is an example of Protectionism. This is precisely what the dormant commerce clause is supposed to prohibit.

Wunnicke
- Just b/c the state can be market participant in one part of the chain of commerce; this does not make it a market participant “down stream.”
- The market-participation exception cannot extend beyond the transaction to which the state is a participant. After that, the state is acting in a regulatory capacity.

iii. Interstate Privileges and Immunities

- Article IV, §2: clause was designed to ensure that states would not discriminate against the citizens of other states b/c of their citizenship in those states.

Corfield
- Fundamental Rights \(\rightarrow\) Meaning of P & I Clause [These rights cannot be regulated.]
- Second P & I Clause \(\rightarrow\) Fourteenth Amendment (Equal Protection Clause)
  - Can be read as entitlements

Baldwin
- Fundamental Rights Analysis
- DISSENT: Deciding whether a right is fundamental has no place in this analysis. Instead, there should be an application of the strict scrutiny standard; the state must justify the discrimination.
These leads to an analysis of the state’s purpose. Nothing has been said that would justify this.

- **Toomer v. Mullaney principles** → state discrimination is permissible where:
  - The presence of or activity of nonresidents is the source or cause of the problem or effect w/ which the state seeks to deal; and
  - The discrimination practiced against nonresidents bears a substantial relation to the problem they present

*Toomer* → There is no relationship b/t danger presented by nonresidents and the severe discrimination practiced against them.

**Hicklin** (AL Pipeline)
- It is wrong to uphold a discriminatory employment practice where an unskilled, habitually unemployed in-state worker is given the same preferential treatment as a highly skilled and educated resident who has never been unemployed.
- Even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a reasonable relationship b/t the danger presented by non-citizens and the discrimination practiced upon them.
- **STATE’S PURPOSE IS NOT REFLECTED IN THE MEANS ADOPTED.**

*Piper* → Protection of fundamental right (right to livelihood) and no nexus b/t objective and discrimination.

*Camden* → The purpose is strong enough to justify the discrimination. However, this is only intrastate commerce.

iv. Intergovernmental Immunity

\[
\begin{array}{cc}
\text{A - power} & \text{B - immunity} \\
\text{Vertical lines} & \Rightarrow \\
\text{Positive correlation} \\
\text{Horizontal lines} & \Rightarrow \\
\text{Negative correlation} \\
\text{Cross-Lines} & \Rightarrow \\
\text{Contradictions} \\
\end{array}
\]

B – liability & A - disability

(If Party B enjoys immunity, then B has no power, hence disability; But, if Party B has liability, then B has power)

**National League of Cities**
- Federal Regulation…..(moving line)…..State Regulation…..(fixed line)…..Immunity from government regulation
The line dividing federal and state regulatory powers moves back and forth. By contrast, if we are talking about constitutionally protected immunity, a person enjoys this as a *trump right* *b/c* no countervailing governmental policy can undermine this.

- A state government enjoys immunity from governmental interference on state labor matters.

**Four conditions for state immunity:**

- States as states – inhibit its ability to function as a federal system
- Addresses matters that are attributes of State sovereignty – power to *locate seat*
  - Functions essential to separate and independent existence (National Cities)
  - Impermissibly interferes with integral governmental functions of their bodies (National Cities)

- Because the line between state and federal regulation is variable and the line for immunity is fixed, this is why the immunity can be extended to states. But, this could change at any time. Immunity may not always be given to states because of the moving line between state and federal regulation.

- Analogy between state immunity and individual’s constitutional rights. (Rehnquist got this wrong.)

**Garcia**

- Additions to the standards from National League
- State compliance with federal obligation must directly impair the States’ ability to structure integral operations in areas of traditional governmental functions.
- The relation of state and federal interests must not be such that the nature of the federal interest justifies state submission.

- Defining traditional governmental functions in the courts has resulted in 1) inconsistency with the points of federalism and 2) these seem unworkable.

- The underlying problem is one’s conception of federalism. By rejecting the idea that there are a set of traditional governmental functions, we are encouraging the states to experiment. This has been demonstrated in the environmental area. If the judiciary were to adapt standards, this might prohibit the states from doing what they do best.

- What Blackmun is suggesting is that the members of Congress wear two hats. One is doing the work of the federal government’s legislative body and one is to behold their constituents of the state. One should not be used to do in the other.

**Printz**

- Scalia’s rubrics for interpretation:
  
  a. Early Congressional statutes – historical practice *Scalia’s argument depends upon the distinction b/t administrative and adjudicatory, but this is not a strong distinction.* [It would have been better to point out that the states has no choice in the matter.]
  
  b. Structure of the Constitution; Dual Sovereignty
c. **Jurisprudence of the Court;** The federal gov’t may not compel the states to enact or administer a federal regulatory program.

*Alden*
- The states are required to relinquish a portion of their sovereignty only when this is in some provision in the constitutional plan.
- *Congress cannot subject states to private suits in state courts.*

IV. **Function of the Judiciary**

**Slavery and the Constitution**

a. **3/5 clause –** Article I, § 2, Par. 3 → Slaves count as 3/5 of a person for reasons of population

b. **Prohibition Clause (1808) –** Art. I, § 9, Par. 1 → Congress preventing from legislating on the issue of slaves

c. **Fugitive Slave Provision –** Art. II, § 2, Par. 3

d. **Capitations Tax or Federal Poll Tax –** See #1 and Art. I, § 9, Par 4 → will be administered in keeping with the 3/5 clause

**Derek Bell**
- There is a deep conflict in and among the principles of protection of property and liberty & justice for all.  
  - This is associated with three different problems:
    - **Interstate commerce and the slave trade** (Groves v. Slaughter)
    - **Return of fugitive slaves** (Prigg v. Penn.)
    - **Status of slaves in the federal territories** (the status of a slave having spent time in a free territory)

**Groves v. Slaughter**
- Since Congress has exclusive power, MS can hold legislation for slave trade
- **DISSENT:** Congress has the exclusive power to regulate interstate commerce, but slaves are not part of interstate commerce, they are persons. [So why do they not have rights?]

**Prigg v. PA → Penn. does not support slavery and they want to prohibit self-help measures from public law** [this law was rendered unconstitutional]

**Dred Scott**
- Three Options for Slaves who enter free states:
  a. **Permanent Slave Status →** status as a slave does not change
  b. **Once Free, Always Free →** once taken into a free state, will be free from thereafter
  c. **Reversion →** The slave who is taken into a free state becomes free there, but as soon as he returns to a slave state, the slave status reattaches
- The status of a slave is un-changing. A slave is not a citizen of the US, but property. Therefore, they cannot sue in federal court. Congress has no power to forbid or abolish slavery in the territories.

- If you are a citizen of a state that does not mean that you are a citizen of the union.

- DISSENT (Curtis) → At the time of the Constitution, state citizenship that existed before the ratification speaks to United States citizenship after the ratification. “Must necessarily” This creates no alternatives for standards of citizenship on which an appeal could be made. If you can show that you are a citizen of a state, it must necessarily follow that you are a citizen of the United States.
  
  o If these blacks were citizens of states before the ratification of the Constitution, they would then be US citizens afterwards.
  
  o Article 4 enumerates many questionable citizens (paupers, vagabonds, and fugitives) shall be entitled to all of the privileges and immunities of free citizens. (But, if it is not included then it is excluded.) Free blacks are not in the enumeration. Therefore, this exception does not apply to them.

Frederick Douglass

- Defends textualism v. intentionalism. Textualism makes possible an anti-slavery position of the Constitution. Only if text does not make the clause clear do you then refer to the intention of the writers.
  
  o 3/5 argument – This is a penalty to slave states. They deprive 2/5 of their representation in Congress.
  
  o Migration & Importation Clause – This clause was only supposed to last for a limited time. That means that the slave trade was to come to an end.
  
  o Insurrection Clause – where insurrection is traceable to slavery, have a reason to bring slavery to an end.
  
  o Fugitive Slave Provision – the slave cannot owe service to anyone b/c there is no contract

Substantive Due Process

- Court protection of rights not specifically mentioned by the Constitution as “fundamental rights” –

Slaughter-House Cases

- The attempt here was to use the privileges and immunities clause to carry over rights found elsewhere in the Constitution. The vehicle for carrying over these rights has been the Due Process Clause. At the beginning, it seemed that the P & I clause would be this vehicle.

- Possibilities:
  
  o The 14th Amendment carries over none of the rights in the 1-8 amendments.
  
  o Carries over some of the rights.
- Carries over exactly those rights.
- Carries over some, but not all, and at the same time, recognizes some additional rights not recognized in the other amendments
- Carries over exactly those rights and recognizes some additional rights.

- Privileges and Immunities eluded to by the appellant are tied to citizens of the states. This means that vindication of these rights is left to these states. This is to say that the 14th Amendment does not carry over rights from the Bill of Rights.

**Due process clause comes to be used as a check on legislative power for substantive economic rights guaranteed by due process.**

**Lochner**
- DISSENT (Harlan): The standard that ought to be applied in evaluating the means is whether these survive the rational basis test; Liberty of contract is subject to state regulations, and validity of state statute enjoys presumption of validity
- DISSENT (Holmes): The court is substituting one policy for another. If this is going on, this is not left for judicial interpretation. This is a matter for the legislature to decide.
- Both dissenting opinions treated this as a question of policy, not constitutionally protected rights as the majority.

**Muller v. OR** (women are baby makers, upholding min. hours) → exception to substantive due process

**Adkins v. Children’s Hospital** (minimum wage is unconstitutional)
- DISSENT (Taft): The court has no business substituting its view for what is the appropriate policy as opposed to the legislature.
- DISSENT (Holmes): There are many limitations on an individual’s right to contract.

**Baldwin v. MO** (Holmes’ Dissent) → Deplores the misuse of the 14th Amend. Due Process Clause in depriving the states of their police power.

**Nebbia**
- The only question that counts is whether the regulatory means are arbitrary. This is an example of the rationale basis test.
- If the old rational basis applies, this is to say that the substantive due process approach washes out. But this is not the end of substantive due process.
- This is a legitimate state interest (health, safety, welfare, and environment).
  - Since the right of privacy cannot be found in the Constitution, a more radical approach must be taken and this must be interpreted as a right of privacy/autonomy based upon a political/moral principle.
West Coast Hotel v. Parrish → Formal overruling of substantive due process (but this relies on the invalid assumption that employees have equal bargaining power w/ their employers)

Carolene Products
- Is there a strong or weak standard vis-à-vis the rational basis test? This is a relaxed standard. This is a presumption of validity.
- Anticipates the distinction b/t claims of rights (strict scrutiny standards) and claims of mere policy (relaxed standard). Anticipating a stricter standard as applying the rational basis test to discrimination.

Olsen v. NB → As long as there is a rational basis made by the state legislature b/t the means and the end, the court will not interfere.

Whalen v. Roe
- The state was not able to demonstrate the necessity of the regulation. Using the rational basis test, no one is asking the state to demonstrate the necessity
- The court is rejecting all traces of Lochner. There is nothing unreasonable about the connection b/t the means and the end.

Incorporation

Barron v. Baltimore
- The Bill of Rights does not apply to the States.
- Marshall → Limiting the application of the taking clause to the Congress. Therefore, this does not apply to the states.
- The argument draws on the text of the instrument (not the intentions of the legislature). The federal gov’t was what was created by the Constitution; therefore, this is the entity to be regulated by the document.

Palko v. CN (allows double jeopardy) → Liberty is a fundamental right, but not if we are merely talking about double jeopardy

Adamson v. CA
- Not all of the Bill of Rights is carried over to 14th Amendment
- DISSENT (Black): Express Incorporation. Accuses the court of applying a natural law standard. He means that the court is arbitrarily choosing what is fundamental based on their own intuition.

Modern Substantive Due Process – Privacy Doctrine (shift from economic liberty to personal liberty)

Meyer v. NB
- broad interpretation of liberty
Holmes dissented in this case arguing that there was no right at issue here, but a matter of policy best left to the state legislature.

- **Cannot interfere w/ liberty w/ method that is arbitrary and has no rational basis unless there is reasonable relation w/ some legitimate purpose; CONSTITUTIONAL RIGHTS TRUMP OVER POLICY W/ LEGITIMATE PURPOSE**

**Griswold v. CN** (contraception)
- There are core rights and penumbra rights. There are zones of privacy.
- **Constitutional warrant for going on the expressive rights conferred in the first 8 amendments**
- (1) The main argument is that there is cluster of peripheral rights (including marital privacy). (2) There is also a Reductio ad absurdum argument in this case that if you can prohibit this privacy right, you can prohibit any privacy right (right to invade someone’s home). There is no point to a law in the state unless it can be enforced.
- **CONCURRENCE (Goldberg): This argument is not to be limited by the 14th Amendment Due Process Clause. He argues the 9th Amendment indicates the view of the framers that the first 8 rights were not exhaustive of our rights.**
- **DISSENT (Black): Rejects (1) Harlan’s expansive reading of liberty and (2) Douglas’ penumbral reading of the bill of rights. He feels that the court is worrying about moral concepts instead of concepts of law. “Natural justice” is a way of talking about morality. Cannot rely on other’s intuition as to what is right and what is wrong.**

**Roe v. Wade**
- **This points to the autonomy argument.** The specific point of this argument is that human beings, therefore women, therefore pregnant women are in ends in themselves. This prevents the AMA or anyone else from using them as some means to an end. [Non-interpretism has one looking to morals and political views. These principles call the shots on large issues of constitutional theory.]
- **THERE IS NO DIRECT SUPPORT FOR THE CONCEPT OF PRIVACY IN THE CONSTITUTION.**
- **These rights are penumbra from the core (Preamble) in the “blessings of liberty.”**
  - Autonomy
  - Family
  - Health

**Michael v. Gerald** (Paternal Rights)
- Common Law – (Maternity) the mother is the legal mother of any child to whom she gives birth; (Paternity) the father obtains paternal rights only through marriage; the parental rights of the unwed biological father is dependant on the substantial relationship of the child w/ the father and the mother
- Fundamental Rights qualify as liberty. Talk about trump rights leads to the use of the rational basis test.
- DISSENT (Brennan): Cannot be too specific; must adopt broad language. Too much issue specificity in determining whether this is a constitutionally protected right.

**Bowers v. Hardwick** (sodomy)
- White claims that that sodomy does not fall w/in the concept of ordered liberty b/c the prohibition against the conduct in question has ancient roots.
- Problems w/ White:
  a. Makes the language too specific. Must be broader to be a constitutional issue.
  b. The historical laws do not address homosexuals, so his historical analysis cannot be held up.

V. Separation of Powers (Legislative and Executive)

- There is no separation of powers clause in the Constitution. -

**Executive Power versus Congress**

*Youngstown Sheet – Steel Seizure Case*
- Vertical Axis of Fed. power and state power; Separation of powers is on a horizontal axis (Leg…..Exec…….Jud.)
- Source of executive powers: Congress or the Constitution. There are no congressionally granted powers. The Constitutional sources of power are in Article II. (1) Executive power shall be vested in the president (2) Faithfully execute the laws (3) Commander and chief of the army and navy. [NONE OF THESE PROVISIONS APPLY AS A GRANT OF POWER FOR THIS ACTION.]
- CONCURRENCE (Frankfurter): There have been many provisions for presidential seizure. But, these seizures by other presidents had Congressional cover. There is a) no declaration of war or b) a statutory cover which would grant Congressional cover.
- The court reads the fact very narrowly as to stay away from a grant of executive power when it does not seem absolutely necessary.

**Curtiss-Wright**
- The court points out that even if there were a problem w/ the delegation of powers in the domestic matters (internal affairs), it does not necessarily follow that there is a problem in foreign matters (external affairs.)
  o These foreign powers (war powers) vest in the central government whether this came about through a constitutional context or not. [Again, analogy to self-defense; we have this power whether it was specifically statutorily written or not.] **There are no limits of the**
doctrine of necessity, except that it has to be what is necessary to address the problem.

Congress vs. Executive – Delegation Problems & Legislative Veto

Dames & Moore
- **Non-delegation doctrine** ➔ the units of government are sealed, and thereby, insulated from the others. This separation of powers makes for trouble when you consider when Congress delegates power to the executive branch w/ an eye to creating an administrative agency that makes law in place of Congress.
  - The non-delegation doctrine. Ensures that Congress is creating laws and not giving this power to someone not elected to do so. What is retained by the Congress is to direct the agency to act w/in constraints set by the Congress. Congress lays down an “intelligible principle” with which the agency must act. Congress may delegate what the agency does, but not the principles with which the agency acts.
- Since the Congress is representative of the people, they cannot just delegate authority of law w/out retaining part of the law-making decisions.

Schecter Poultry
- The dilemma w/ the non-delegation doctrine ➔ Reasons for keeping: Congress has to delegate some things that they do not have expertise in, but there must be some accountability to the Congress. Either the statement of the principle is so broad as to be worthless, or the Congress is unable to specify any principle at all (they are not close enough to the area to make regulations for the agencies).

Yakus
- An agency rule could only be overturned if there were an absence of standards for guidance of the Administrator’s action, so that it would be impossible for a proper proceeding to ascertain whether the will of Congress has been obeyed. Only then would the Court be justified in overriding its choice of mean for affecting its declared purpose.

Whitman v. American Trucking
- The general pretence that the administrative agencies are not engaged in legislation is that they are actually given legislation. The courts should just accept this (that agencies are legislative powers) and move on to adequately limit these agencies by statute. This may throw out the non-delegation doctrine once and for all. But at the end, he still brings up the “intelligible principle” language.

Chadha
- The practice of accountability by the legislative veto has become so entrenched, that this case did not have the effect of wiping out the power.
CONCURRENCE (Powell): This is a judicial function. It is addressed to named individuals with respect to events in the past (retrospective). This looks like a judicial holding. Determinant rather than specific. This is called a separation of powers problem.
  - The legislative veto is an important power that is needed. There are appropriate safeguards in place so that this power is not abused.

- The reasons for giving the president a veto power: Concern over ill-advised legislation that is hastily drafted. This follows the checks and balances.
- Bicameralism: All of the provisions in the constitutional authority of the laws refer to this. The rationale is that the legislature will otherwise exceed their powers (DESPOPISM AND TYRANNY).
- PURELY LEGISLATIVE: If they are legislative in purpose and effect. This means that is has the effect of altering the legal rights, duties, and relations of persons (all outside the legislative branch).
- Powell’s Concurrence: Separation of powers is much more narrow and tailored to fit the situation at hand. A MUCH BETTER RATIONALE FOR THIS CASE.
- DISSENT (White): Without the legislative veto, Congress is faced with a Hobson’s choice (horse owner): either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws w/ the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies.

Removal Question

Formalism vs. Functionalism
  - Formalism emphasizes maintaining the structure of the Constitution by reading the “letter of the law” [STRICT READING]
  - Functionalism reads the constitutional framework as fluid; Tend to defer to legislative judgment; [BALANCING OF INTERESTS]

Myers v. US
  - Postmaster may be removed by the President w/ the advice and consent of the senate.
  - The court determined that this was an unconstitutional restriction on the executive's removal power. In order to execute the laws, the president has the power to select those who help him. Having the powers to select those who work for him, he should intuitively have the power to terminate them.

Humphrey’s Executor (FTC): This branch is not purely executive. The Congress in this instance can limit the removal power. This commission is not to be understood in terms of executive function, but instead quasi-legislative and quasi-judicial. Even if the branches are sealed, their functions are not.
**Buckley v. Valeo** → Have to follow the appointments clause; otherwise the power would be given to Congress

**Morrison v. Olsen** (independent counsel)
- Distinguished from Humphrey’s Executor. Here, the function is quintessentially executive. The court is not looking to define labels respecting functions. **In the end, the question is whether the function is something that interferes w/ the President’s ability to carry out his functions.**
- There is no problem w/ the limitations b/c there is no intrusion or limit on ability to carry out functions.
- Scalia’s Dissent → emphasizes that the executive power is vested in the president (strict formalism). Any compromise that reduces this power is unconstitutional.

**Bush v. Gore**
- In response to the court on the Equal Protection argument, there are irregularities, but the problem is two-fold. (1) It is hard to see which individuals were prejudiced to the errors and which were not (in contrast to the reapportionment argument) (2) where one needs help on reading the ballot and/or the machines reach the level of discrimination (as in Miami-Dade County blacks), there is an Equal Protection Problem that was never mentioned by the court.
- **Even if we do take the court at its word in the Equal Protection Argument, if the FL court did not fix all of the problems, then the SC is going to take its power to fix anything.**
- DISSENT (Stevens): Unitary Code – Historically, the FL Supreme Court has decided state election issues. It follows from the state unitary code that the state court should also decide federal election disputes. Analogy b/t the “intent of the voter” standard and the “reasonable doubt” standard.
  - The majority is looking for standards that do not exist. Applying one standard over another will not benefit the situation. Therefore, the “intent of the voter” standard is just as good as the “reapportionment” standard.
- Souter (DISSENT): The Congress had provided for finality w/ the state governor making the final decision.
- Breyer (DISSENT): Comprehensive Scheme in the legislative history points to Congress as the “constitutional tribunal” for this issue. [See Electoral Count Act of 1887]

**Political Question Doctrine**

**Baker v. Carr** (TN Reapportionment)
- The Guarantee Clause involves cases which contain a political question, and are therefore non-justiciable. **What is a political question? Best resolved by the political branches of the gov’t.**
- **There are criteria for determining what a political question is:**
- Is there a textually demonstrable constitutional commitment to another branch (coordinate political department)?
- Is there a lack of judicially discoverable and manageable standards for resolving the issue?

**Prudential Considerations (in our interest to insulate from judicial review)**
- Is there an impossibility of deciding w/out an initial policy determination of a kind clearly for non-judicial discretion?
- Is there an impossibility of a court’s undertaking independent resolution w/o expressing lack of the respect due coordinate branches of gov’t.?
- Is there an unusual need for unquestioning adherence to a political decision already made?
- Is there a potentiality of embarrassment from multifarious pronouncements by various departments on one question?

There are criteria for determining what a political question is:
- Is there a textually demonstrable constitutional commitment to another branch (coordinate political department)?
- Is there a lack of judicially discoverable and manageable standards for resolving the issue?

- In applying these criteria, should ask which applies best. If one applies, it would follow that others also would apply.
- None of the Criteria for the application of the political question doctrine is met.
- The political question doctrine does not insulate the reapportionment question from judicial review.
- Clark’s Concurrence → He does not support judicial intervention, but he is willing to support intervention here b/c there is no other practical means of appeal. There was no help from the political bodies.
- Frankfurter’s Dissent → There are no standards for the application of the Equal Protection Clause in a political question. The second criterion is explored.

*Goldwater v. Carter* (Taiwan Treaty)
- Powell (Majority) → This issue is not ripe for judicial review. Both Congress and the Executive must have acted in creation of an express conflict. [Therefore, the Senate must have passed the Goldwater resolution.] Then, it would be justiciable.
None of the criteria triggers the political question doctrine.

- DISSENT (Brennan): The political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed. [THERE IS A CLEAR GRANT OF POWER TO THE EXECUTIVE; THIS IS WHY THE JUDICIAL INQUIRY CAN GO NO FURTHER.]

*Powell v. McCormack* (refusal to seat new rep)

- There is no expulsion unless one is already seated.
- A broad reading of the adjudicatory power under Art. I, §5. If this is construed broadly, then by hypothesis, there is of a “textually demonstrated constitutional commitment” to determine the matter that is insulated from judicial review.
- The narrow reading of the adjudicatory power holds the power to the three rubrics that are listed. Because these rubrics are enumerated, this excludes everything else.
  - Give effect to the people’s will.
  - There is no discretionary power granted to the Congress in the Constitution to exclude like there is an expulsion power. [No nonsense principle → Otherwise, the expulsion power would not be needed, with a 2/3 vote.]
- Although this would normally be a political question, what the Congress is trying to do is outside their power under Art. I, §5.

*Nixon v. US*

- Impeachment Trial Clause; Art. I, §3, cl. 6 → Senate shall have sole power to try all impeachments
- There is a connection b/t the first and second criterion (text and standards). The fact that there is a lack of standards may lead to an inference that there is a textual commitment to another branch. [Usually a number of these criteria will apply, but try to get the one that applies best.]
- If the framers intended for this to be only a judicial trial, why would they be so non-precise when there are specific requirements for that which has been expressly enumerated?
- The framers’ views support another conclusion. First, there would most likely be two sets of proceedings, both a Senate and a criminal hearing. This creates two forums. Second, if checks and balances is the standard then the legislature should have a check on the judiciary as there is in this case.
- Finality → Opening the door of Senate impeachments would result in chaos. There may be a parade of horribles.
- Relief to be granted → what would the court do to someone who was impeached?
- IMPEACHMENT TRIALS OF JUDGES ARE NON-JUSTICIABLE.
War Power: Executive vs. Congress

Mora v. McNamara
- Art. I, §8, cl. 11 (War Power) → power to declare war is a congressional power.
- Stewart → These are justiciable questions.
- Douglas → Quote from Thomas Jefferson. Not only should Congress check what the executive does, but a special sort of check in determining how the war should be financed.
- Standard Form:
  o Long-lasting emergency.
  o There is no Congressional authorization at all.
- This has lead to an aggregation of the war power on the part of the president at the expense of the Congress.

War Powers Resolution of 1973
- FROM THE SENATE REPORT: The war power is invested to the Congress in the Constitution. But, it has been conceded that the President in his capacity as commander in chief had authority to use the armed forces as he saw fit. This became “fait accompli.” The president now has the war power through a “customary constitutional law.” [ACQUIENSECE ON THE PART OF THE CONGRESS TO GIVE THE PRESIDENT WAR POWER.]
- The Senate Committee Report has not been taken all that seriously by the executive branches. This underscores the intractability of the conflict.

Prize Cases
- Lincoln did not want to make part of the US an enemy b/c this would recognize the Confederacy as a Republic. The president has the power to suppress an insurrection as if it were an international war.

Ex Parte Quirin (Germans sneak in)
- Executive Proclamation → Citizens of countries that the US is at war w/ are to be tried in a military tribunal. This is about the law of war, which is a range of provisions in (1) customary international law and (2) treaty law.
- Once you have congressionally declared war, then the exercise of these powers is under the Executive.
- The Constitutional Rights do not restrict the president in conferring a military tribunal as long as the requirements have been met. ….