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I.  STRUCTURE OF THE CONSTITUTION

• Art. I § 1 – confers power to Congress: enumerates specific powers granted to Congress. Follows John Locke’s idea of limited government: what is not enumerated is thereby excluded.
• Art. II § 1 – confers powers to executive branch;
• Art. III § 1 – conferral of judicial power as well as inferior courts that Congress might establish.
• Is it redundant to confer specific powers and then provide a duty to forbear? Was it necessary to have amendments? Yes. If Congress created a state religion it would be immediately invalidated. No arguing needed. However, without amendments, there would be much debate. Would it fit into a power? An implied power (e.g. Commerce Clause)? A personal thought, Articles and Amendments are bookends to the realm of legislation.

II.  JUDICIAL POWER VERSUS CONGRESSIONAL POWER

1. Establishing judicial review

   Marbury v. Madison

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

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

   Holding:  With a unanimous Court, Marshall issued an odd order of decisions to the questions asked:

   (i)  Substantive question: Marbury was entitled to his commission, and Marbury has a judicially enforceable remedy b/c it was the duty of the courts to provide a remedy for every wrong.

   (ii) Jurisdiction Question: Marbury could not be entitled to a writ of mandamus from the Supreme Court. § 13 of Judiciary Act provides that Supreme Court has original jurisdiction over these cases, but Art. III § 2 states that the SC may only have original jurisdiction over foreign diplomats or actions between states. Marshall reasoned that the § 13 of the Judiciary Act was repugnant to the Constitution. When a statute and a law conflict the Constitution must prevail and it is the duty of the Supreme Court to make this decision.

   (iii) Philosophical Arguments to decide two issues:

   a.  Is the Constitution superior to legislation? Reductio ad absurdum argument that shows Constitution is superior. Judge Gibson argues that this usurps the power vested in Congress and the President. Shouldn’t they decide what is Constitutional? Paulson says without Constitutional review the courts would always have to go along with legislation, then judiciary power would be usurped (also, look below at justifications for judicial review).
b. **Do courts have the power of judicial review?** Marshal argues from the constitutional text.
   
i. **Art. III § 2** – judicial power extends to all cases arising under the Constitution. Necessary aspect to the judicial role of interpreting law. Judge Gibson argues that this begs the question. Does that mean they interpret the Constitution?
   
ii. “no tax or duty…” – Constitution makes the judiciary a check upon Congress. Gibson – people provide the check.
   
iii. Bill of attainder – Without this check on Congress, they could invade people’s individual rights.
   
iv. Treason – individual rights argument
   
v. Oath of Office – Justices swear to uphold the Constitution. (weak)
   
vi. Article VI. para. 2 – Supremacy clause. This is beside the point here, because the clause is normally invoked in terms of conflict b/t federal and state government.

- **Other Arguments for Judicial Review**
  
  1. **Countermajoritarian Role** – Congress represents the majority and therefore might create laws that infringe the minority’s constitutionally guaranteed rights. Federal judges are appointed for life and therefore less susceptible to political pressure.
  
  2. **Stability** – If each branch were free to interpret the Constitution there would be no final answer because:
     
      i. The branches would probably interpret the Constitution in its favor leading to conflicting powers.
     
      ii. A Court’s decision would have limited effect. It could then be overruled by another branch.

  3. **Practicing self-limitations:**
     
      i. Court typically decide for the only issue presented by the facts (narrow holding)
     
      ii. Court will not decided the Constitutional issue if the case can be decided on some other grounds.
     
      iii. Courts can attempt to construe statutes as to not conflict with the Constitution

- **Other Arguments **against Judicial Review
  
  1. **Antidemocratic** – Federal judges are not elected officials and therefore not politically accountable. To vest final authority over the Constitution’s meaning is a repudiation of the principle of democratic self-governance. For example:
     
      i. Substantive due process declaring “liberty to contract”
     
      ii. *Bush v. Gore*

  2. **Entrenched Error** – it is very difficult to correct mistaken judicial interpretations. The only avenues for correction are:
     
      1. Court changes its mind
     
      2. appoint new Justices
     
      3. impeachment
     
      4. constitutional amendment
Martin v. Hunter's Lessee

Facts: Claim for title of land in Virginia. Authorized by Virginia statute, land of Britain’s loyalists was confiscated. VA statute possibly conflicted with 1783 peace treaty with Britain. Martin argued that SC was authorized by the Judiciary Act. Hunter argued that it was unconstitutional for the Supreme Court to overrule a decision of a State’s highest court.

Rule: The Supreme Court has the power to review the constitutionality of State court decisions on the meaning of federal law.

- Article III grants the SC appellate jurisdiction over all cases arising under the Constitution. Therefore, regardless if a constitutional issue is heard in state or federal court, the SC has power to review court’s decision.
- The Supremacy Clause states the federal law must be supreme.
- “If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states…”
- Why is judicial review inevitable here?
  1. Constitutional review of state court decisions is the glue that holds the union together during times of instability.
  2. Provides uniformity when there is stability.

2. Compare systems of Judicial Review

Germany’s System of Constitutional Review

- Germany has a centralized system for the judiciary. Not just any court can hear constitutional issues, but only constitutional courts may.
- These courts hear issue right away by pausing proceedings in the lower court until the constitutional court decides the issue. “Constitution begins with human dignity.”
  1. German courts are not compelled to justify constitutional review. It is stated within the constitution.
  2. German court has more power: Abstract Review: examine a statute and abrogate at the request of the government, or erase it from the books afterwards. For abstract review, Court may consider different facts and situations to look at the statute “objectively” in its entirety. U.S. may only hear and decided individual cases – cannot erase a statute.
  3. No political question doctrine. It may not duck issues of foreign affairs.

3. Breadth of judicial review

Cooper v. Aaron (Supreme Court vs. State)

Facts: (1958) In the wake of Brown v. Board, states claimed that the decision applied only to the particular parties in the case. Arkansas refused to desegregate its schools.

Rule: Because the “the federal judiciary is supreme in the exposition of the law of the Constitution,” the Supreme Court’s interpretation of the Constitution is binding on the state legislatures, executives, and judicial officers.
• Note this only determined **exclusiveness** when the government party contending an issue is a **state**. It did not say anything about its power over the executive or legislative branch. This has not been decided. An outright defiance by the President or Congress would probably create a constitutional crisis. However, the President is usually given some discretion in enforcing the Court’s decisions.

• Problematic in two ways: First, Court’s effect is only through *stare decisis* and an individual case’s dicta on the meaning of the Constitution does not extend to others. Second, it seems to equate the Constitution with the Court’s interpretation. This ignores judicial mistakes such as *Dred Scott, Korematsu*, and *Bush v. Gore*.

4. Limiting court’s ability to review

*Ex parte McCardle*

**Facts:** McCardle was imprisoned by military governor of Mississippi. After losing his first case in which he argued the Reconstruction Acts were unconstitutional, he sought a write of habeus corpus under a 1867 federal statute that granted the Supreme Court appellate jurisdiction of the case. After the argument in the Court, Congress stripped the SC of the power to rule on the case because it feared the court would rule the Acts unconstitutional.

**Rule:** The appellate jurisdiction of the Supreme Court is conferred “with such exceptions and under such regulations as Congress shall make,” thus *Congress can remove its jurisdiction even when a case is pending in the federal courts.*

• The last sentence of the opinion gives the **import** that the Court under another act would be able to hear and review this decision. This is essentially challenging the **Exceptions Clause** (enumerated power), warning Congress to not go to far with this.

*U.S. v. Klein*

**Facts:** 3 years later. Claim for compensation for property destroyed by Union Army. Klein argued that his Presidential pardon declared him *loyal*, and therefore deserving of his compensation. Congress passed legislation that said Presidential pardons of such nature heretofore declared a person *disloyal*, and directed courts to dismiss for want of jurisdiction for any such person.

**Rule:** Congressional legislation restricting the jurisdiction of the Supreme Court for specific cases invades its judicial functions and violates the separation of powers.

• Court relied upon separation of powers. Here, Congress attempted to command the courts how to interpret evidence before them without changing the governing substantive and procedural law. Therefore, Congress ultimately decided the case.

• If Congress wants to change the rules it must do so by changing substantive or procedural law that has neutral application upon all litigants.

*Robertson v. Seattle Audobon Society*

**Facts:** “Spotted Owl” case. Environmentalists brought suit challenging the legality of logging in old growth forests. Congress altered the laws governing the case and specifically listed this case saying that it was now legal.
Rule: A regulatory statute that binds both the administer and the interpreter of the law does not interfere with the judiciary’s power.

- Distinguish with *Klein*: this was a “change in law, not specific results under old law.”
- Consider if there are levels of importance to: (1) Criminal, (2) Civil, (3) Policy and Regulation

Exceptions Clause:

- **Art. III § 2:** Supreme Court has appellate review of all cases within the federal judicial power (except those in which the Court has original jurisdiction) “with such Exceptions, and under such Regulations as the Congress shall make.”
  
  i. Most commentary agrees that Congress does have *carte blanche* constitutional power to make legislation.
  
  ii. However, good constitutional policy dictates that there should be limits to Congress or we might have jurisdictional stripping.

  - Paulson’s Argument: Any Act of Congress under the “exceptions” clause can only create policy, but the Constitution guarantees rights. Therefore, constitutional rights may not be restricted by Congressional policy.
  
  - Could use a *reduction ad absurdum* argument here. To prove Supreme Court may not have all of its jurisdiction, say that may not. But if it could this would lead to liberties stripped, imbalance of government, majoritarian control

5. Court defines substantive rights

*Katzenbach v. Morgan*

**Facts:** § 4(e) of Voting Rights Act provided that persons who had completed the sixth grade in Puerto Rico could not be required to demonstrate proficiency in English in order to vote. New Yorkers challenged the constitutionality of this provision, stating it was beyond Congressional power.

**Rule:** Congress through § 5 of the 14th Amendment may declare and act on a more expansive interpretation of the Constitution than the Supreme Court has previously decided on the same issue.

- NY argues that a previous decision upheld this law, so in order for Congress to pass a law against this, the SC must rule it unconstitutional. **Brennan stated that this would deprive Congress of taking the initiative and relegate Congress to a subsidiary role.** (Would this then slow down the rate of change?)

- **Rational Basis Test** (Brennan says if Congress gives a good analysis then the Court will not reject it):
  
  1) First, the Court reasoned that Congress could have reasonably concluded that the elimination of such a barrier would provided Puerto Ricans equal treatment.
  
  2) Second, Court believed that Congress had the power within itself to decide if a literacy requirement violated equal protection.

*City of Rome v. U.S.*

**Facts:** Electoral system which allegedly discriminated against black candidates.

**Holding:** Despite the lack of evidence that an electoral system was designed to discriminate racially, it may still violate the Voting Rights Act because the Act
prohibits systems that either are designed with the purpose or have the effect of discrimination.

**Holding:** Congress has the power under the 15\textsuperscript{th} Amendment to ban a practice valid under such an amendment in order to preclude future violations of the 15\textsuperscript{th} Amendment.

*Oregon v. Mitchell*

**Facts:** 1970 amendments to the Voting Rights Act suspended all literacy tests nationally and provided other changes. Court upholds restriction on literacy tests.

**Rule:** Congress deserves deference on these issues because it is a superior fact-finding body.

*City of Boerne v. Flores* (partial overruling – step back)

**Facts:** Congress enacted the Religious Freedom Restoration Act (RFRA) in order to overturn a previous case decided by the court. Through the 14\textsuperscript{th} Amendment, the act prohibited governments from imposing substantial burdens on religious conduct unless such burdens were the least restrictive means of furthering a compelling governmental interest.

**Holding:** “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce’ not the power to determine what constitutes a constitutional violation.”

**Rule:** Congress may not define constitutional rights but merely enforce the rights that are “congruent” to constitutional rights with a remedy that is “proportional” to the scope of the constitutional injury addressed.

- Now it is a proportionality test.
- Declaring Congress only has a remedial power under the 14\textsuperscript{th} amendment, this is a partial overruling with Morgan.
- For it to be remedial, the act must have “congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.” There must be empirical evidence.

### III. The “Necessary and Proper” Clause

- **Broad Reading (Hamilton):** Since it is impossible to determine what is truly “necessary,” it would always lead to problems. A better understanding is found in the means/end matrix. The ends are the enumerated powers granted to Congress. The means are the legislation made by Congress to reach those ends or powers.

  - **Narrow Reading (Madison and Jefferson):** To allow a broad reading would destroy the central character of the government: a limited government. It must be truly necessary, and not merely convenient. If we were to allow a means to get to an end, then we must allow a means, to a means, *ad infinitum*, to get to the end. This would allow the government to at times create a monopoly. (eg., bank makes money and borrows money for government). This is a slippery slope argument.

#### A. Scope

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

- First, did Congress have power to create a national bank? Yes.
- Second, was Maryland constitutionally prohibited from taxing an instrument of the national government? Yes.
- Art. I § 8 enumerates specific powers granted to Congress including the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

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

First Question: May Congress incorporate a national bank? – Marshall’s exercise in judicial interpretation

- Past Practice: MD said first Congress also did not have power to create bank. Marshall - past practice is not dispositive, but a strong presumption in favor of the bank’s constitutionality.
- Delegation Doctrine: MD – powers of the gov’t were delegated to the states. Marshall - powers of the general government were not delegated to the states, but the people of the states. States are an organizational device for allowing the expression of popular sovereignty.
- Supremacy Clause: Marshall - If a federal law is valid, and a state law conflicts with the federal law, then the federal law must prevail.
- Structure of the Constitution: Marshall - the generality of the instrument warrants inferences to later specifics. Where they are not inferred, then they must be stated in the Constitution.
- Necessary and Proper Clause: MD (narrow reading) – only allow means that if Congress did not have, then they could not reach the enumerated powers. Marshall (broad reading) - in a body of work such as the Constitution, it is impossible to detail every means to solve future problems. Therefore, any means calculated to reach that end is allowed. “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

- Marshall then applied this interpretation and stated that a national bank could be of service to the legitimate ends of taxation, spending, borrowing, and maintaining a national defense.
- He qualified Congress’s discretion: “Should Congress, under the pretext of executing its powers, pass laws for the accomplishments of objects not entrusted to the government,” then it is the duty of the courts to overrule such an act.

Second Question: May Maryland tax the national bank?
• He then ruled that the power to tax an entity brought with it the power to destroy an entity. If it could tax a federal instrument, the state could conceivably thwart federal powers.
• **Doctrine of Virtual Representation** – MD may tax the bank as it would other banks because the state would not put a harsh burden on both its constituents and the national bank. U.S. enjoys the same fairness b/c people will complain if they have too much burden.

## IV. **The Commerce Clause**

### A. Marshall’s interpretation of the “original understanding”

**Gibbons v. Ogden**

- Art. I § 8 provides that “Congress shall have Power … to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

**Facts**: New York granted Fulton & Livingston a monopoly on steamboat navigation between New York and New Jersey. Ogden received a license from them to work the waters. Gibbons received a license from U.S. to navigate the steamboat in “coastal trade.” Ogden received injunction from New York courts to stop Gibbons.

**Rule**: Although not granting exclusive power to Congress to regulate commerce, the Court held that Congress can regulate such navigation that is part of interstate commerce.

- This is the first major statement that ruled State’s are allowed to control “completely internal matters” and that the Federal government’s control is a **plenary power** (complete and absolute).

### B. Early cases: oscillation between formalism, Realism

**Paul v. Virginia**

**Facts** : (1868) State discriminated against out of state insurance companies. Court ruled local transactions b/c they were executed locally.

**Rule** : Insurance contracts are not part of interstate commerce and may not be protected by the commerce clause from state discrimination.

**Kidd v. Pearson**

**Facts** : (1888) Iowa company manufactured liquor but sold all out of state.

**Rule** : Commerce clause does not apply to manufacturing even if the manufacturer sells exclusively out of state.

**The Daniel Bell**

**Facts** : Ships transported goods that were a part of interstate commerce but only transported them within state.

**Rule** : Congress has the power to regulate local activities of instrumentalities of interstate commerce in order to protect interstate commerce itself.

**U.S. v. E.C. Knight**

**Facts** : Company had a sugar monopoly. U.S. sued under the Sherman Act. Court found for the company.

**Rule** : Manufacturing is not “commerce” and only has indirect effects on interstate commerce.
• There was a slippery slope argument made here.

The Lottery Case (Champion v. Ames) (articles harmful to public morals)
Facts: Congress prohibited the interstate shipment of lottery tickets.
Rule: Congress’s regulatory power of interstate commerce allows the prohibition of articles deemed harmful to the public morals.
  • Harlan quotes McCulloch that if it is a legitimate end then the means should be allowed. Here, the driving force is public morals.

H. P. Hood & Sons v. Du Mond
Facts: New York law allowed issuance of operating license for a processing plant only if it was in the public’s interest and if the marker were not already saturated. Under this law, NY refused to give a Boston milk distributor, Hood, a license to construct a plant in New York in order to sell milk to the Boston market.
Rule: Laws that constitute sheer economic protectionism are invalid per se.

The Shreveport Rate Case (close and substantial relationship.)
Facts: Interstate Commerce Commission set maximum freight rates for interstate shipment between Shreveport, Louisiana, and Texas cities. Texas set rates lower for rails entirely within the state. ICC ordered this “price discrimination” to stop interfering with interstate commerce.
Rule: Protective Principle: In order to protect interstate commerce, Congress may regulate the intrastate activities of “instruments of commerce” so long as those activities had a “close and substantial relation to interstate traffic.”

Stafford (stream of commerce)
Facts: Packers and Stockyards Act regulated the practices of brokers and dealers at stockyards.
Rule: Congress may regulate activity that is found to be “essential,” “necessary,” and “indispensable” to the flow of interstate commerce.

Hammer v. Dagenhart (Child Labor Case)
Facts: Reacting to public outrage toward the practice of child labor, Congress prohibited the interstate shipment of goods made by children.
Rule: Congress cannot prohibit articles of commerce that are themselves “useful or valuable” because of the way they are manufactured.
  • Court distinguished the rule: In previous cases, Congress had the authority to prohibit the interstate movement of articles that are themselves “noxious evils” in which the interstate shipment itself had been part of the evil Congress sought to suppress.
  • Court feared that if Congress could regulate intrastate, noncommercial activities, then it could control anything in the name of commerce/
  • Holmes’ dissent: Congressional motive is irrelevant. So long as the regulatory technique employed by Congress involved interstate commerce, it does not matter what indirect effects it may have.
  • All in all: Commerce clause goes through pretext argument, reductio ad absurdum, insulation techniques (manufacture v. commerce; direct v. indirect) state police power, and slippery slope.

C. Laissez faire Court resists Roosevelt’s legislative program

Schechter Poultry
Facts: (1935) Through the National Industrial Recovery Act, Congress imposed minimum wages and prices upon the poultry industry. Schechter, a poultry wholesaler sold only to NYC retailers, and bought from NYC market, but nearly all poultry came from out of state.

Rule: **Local activities that are at the end of the “stream of commerce” do not have a direct effect upon interstate commerce.**
- This was a 9-0 court.
- Reminiscent of protective principle. Back to *Kidd* and *Knight*.

*Carter v. Carter Coal Co.*

Facts: (1936) Statute imposed maximum hours and minimum wages for coal miners. Nearly all the coal produced would be sold in interstate commerce.

Rule: **Congress may not regulate activity that does not have a direct, logical, and linear link to interstate commerce.**

D. The Revolution of 1937: Recognition of a congressional “police power”

*NLRB v. Jones & Laughlin*

Facts: (1937) National Labor Relations Act (NLRA) prohibited certain “unfair labor practices” such as firing people b/c of their affiliation with a union. Though it only produced steel in Penn., J & L employed a vast number of employees in other states and its corporation extended nationwide. NLRB sought injunction to stop J&L from firing workers.

Rule: **Congress may regulate any intrastate activity that exerted a substantial effect on interstate commerce.**

*United States v. Darby*

Facts: (1941) Fair Labor Standards Act barred interstate shipment of goods not produced in accordance with the set maximum hours and minimum wages, AND prohibited the employment of people to make interstate goods not at these standards.

Rule: **Congress’s plenary power may regulate or close the channels of interstate commerce no matter what its motive or purpose might be so long as the means are reasonably adapted to the end.**
- Congress’s regulations “are matters of legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”
- This overruled *Hammer v. Dagenhart*.

*Mulford v. Smith*

Facts: Agricultural Adjustment Act; marketing quotas on “flue-cured tobacco”

Rule: **If goods can be both intrastate and interstate commerce, then interstate regulation may apply to both kinds.**

*Maryland v. Wirtz*  (rational basis is recognized)

Facts: Fair Labor Standards Act; set wages to employees engaged in commerce or in the production of goods for commerce.

Rule: **“Where we find that the legislators [have] a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”**

*Wickard v. Filburn*
Facts: (1942) Farmer planted more bushels of wheat than was permitted by federal regulation. He attacked the validity of the penalty imposed upon him because he contended the wheat was not sold, but used by his farm and therefore had no effect upon interstate commerce.

Rule: So long as the cumulative effects of a class of activities regulated by Congress has a substantial effect on interstate commerce the law may be applied validly to a person whose individual activities have almost no impact on interstate commerce.
- Here, if more farmers behaved like the plaintiff, there would be a substantial effect upon interstate commerce. Aggregation Principle.
- Very weak standard employed here. What Congress deems appropriate is appropriate.

E. Breadth of the congressional “police power”

1. State action doctrine

Civil Rights Cases

Facts: Civil Rights Act of 1875 prohibited private acts of racial discrimination in the operation of public accommodations. § 5 of the 14th Amendment granted Congress power to enforce the substantive provisions of the Amendment, but was limited to government conduct only.

Rule: The enforcement provision of the 14th Amendment does not permit Congress to regulate private conduct that the States could not prohibit.
- This is still good law.
- Use of slippery slope in controlling individual’s behavior.
- The court also held that private racial discrimination is unrelated to the “badges and incidents of slavery” and cannot be controlled by Congress through § 2 of 13th Amendment. This has since be overruled.

Marsh v. Alabama (Public Function Doctrine)

Facts: Corporation had had constructed and owned and entire town that had “all the characteristics of any other American town.” Jehovah’s Witness was arrested for distributing religious material.
- Here, the state is forced to obey the first amendment b/c of the incorporation doctrine which carried over some of the principles in the ten amendments.
- State Action – state or its instrumentality has to do something.

Rule: Private parties exercising governmental powers should be regarded as state actors.
- The Court noted that it wasn’t the trespass law that triggered state action, but the profoundly public character of the town that transformed it to an agent of the state.

Terry v. Adams (white primary case)
- Previous cases: Nixon made any discrimination clearly stemming from the state unconstitutional (state action). The executive of Democratic Party in state got power from state to choose who voted in elections. In Smith, party only let Caucasians vote in primary which effectively would not let any African American candidates in.

Facts: (1953) Reacting to a previous SC decision that thwarted the Texas Democrats attempt to exclude African Americans, the voluntary club Jaybird Democratic
Association was formed. It admitted its purpose was to exclude blacks b/c it decided who the democrats’ candidate would be and this candidate always ran unopposed.

**Rule:** Four Justices thought the association was the Texas Democrats by another name and therefore the same holding in *Smith* applied. Three thought the state action was in the state inaction.

*Shelley v. Kraemer* (restrictive covenants)

**Facts:** (1948) Black owner Shelley purchased a home in Missouri that had a running covenant mad by the neighbors that prohibited the sale of a home to “people of the Negro race.” Kraemer sued to enforce the covenant.

**Rule:** A State’s enforcement of a racially restrictive covenant is considered state action subject to the 14th Amendment.

- Here, a court’s upholding of the covenant had the effect of a state ordering that one “must obey the racially restrictive covenant.” If the seller had refused to sell to the buyer, there would have been no state action.
- Argument is that a system of private agreements assumes the possibility of State action as enforcing the agreements.

2. Civil rights cases of 1964

*Heart of Atlanta Motel v. United States*

**Facts:** (1964) Title II of the 1964 Civil Rights Act prohibits racial discrimination by private businesses that deal with public accommodations to interstate travelers or, re: to restaurants if a significant portion of the food had come from interstate commerce. Heart of Atlanta Motel catered to interstate guests, attacked the validity of the act.

**Rule:** Congress can regulate local racial discrimination in public accommodations because of its substantial effect on interstate travel and commerce.

- Court must always interpret a statute, if possible, to preserve the consistency and interpretation of the statute.
- Paulson wonders if this is a legal fiction that the Commerce Clause was at all intended to operate this way.

*Katzenbach v. McClung*

**Facts:** Ollie’s Barbecue, restaurant in Alabama, served a local crowd but received 46% of its food from interstate commerce.

**Rule:** Even though no explicit finding, Congress may rely upon testimony in the deliberative process to provide a “rational basis for [Congress to find] a chosen regulatory scheme necessary to the protection of commerce.”

- Here, the Court says even the best viewing of the facts in favor of the defendant, it must go with Congress.
- Paulson thinks this is weak. Absolutely no rational basis.

3. Another illustration of breadth

*Perez v. United States*

**Facts:** (1971) Consumer Credit Protection Act prohibited loan sharking. U.S. thought this substantially affected interstate commerce and was a big part of organized crime which had an effect upon interstate commerce.
Rule: 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.”
- Here, the Court assumed along with Congress that he was a member of the underworld.
- At this point, it appears Congress has been given a general police power.

*Hodel v. Virginia Surfacing*

**Rule:** If Congress has made a determination that the regulated activity is part of or substantially affects interstate commerce the Court will defer to that judgment “if there is any rational basis for such a finding.”

4. The undoing of the “police power”?

*U.S. v. Lopez*

**Facts:** (1995) Gun Free School Zone Act made the possession of a gun on or near school grounds a crime. It never considered the impact this activity had on interstate commerce.

**Rule:** The Court will not hypothesize a rational basis for a statute when Congress has made no effort to find the activity’s substantial effect upon interstate commerce
- Kennedy and O’Connor found three factors. (1) “neither the actors nor their conduct have a commercial character,” (2) “neither the purposes nor the design of the statute have an evident commercial nexus,” and (3) the law “seeks to intrude upon an area of traditional state concern.”
- The Court asserts that the activity must have an economic dimension.

*U.S. v. Morrison*

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

**Rule:** Because the Constitution requires a distinction between what is truly national and truly local, Congress may not “regulate any crime as long as the nationwide, aggregated impact of that crime” has substantial effects upon interstate commerce.
- Same again here. There must be an economic connection.

Factors / “Be on the lookout”
- noncommercial activities
- check Congressional record
- Look for aggregate effect on money matters OR traditional gov’t function and state activity.
- States and private citizens alike (do not treat differently, this is normal commerce clause)

**F. Other enumerated powers**

1. The Taxing Clause
**Child Labor Tax Case**

**Facts:** (1922) Statute imposed 10% tax on any companies who had children as employees.

**Rule:** **Congress may not use taxes as penalties.**
- Court reasoned that this statute was a penalty because: (1) only employers who knew they were employing children would be taxed; (2) the amount of tax was not proportional to the ratio of children working in the company; and (3) enforcement of the tax was enforced by the Labor Department and not the IRS.
- Essentially, this is a *pretext* to the real motive.
- But there are several previous cases in which Taft could have gone with. In *Veazi*, heavy tax on bank notes. *McCray* – tax on yellow oleomargarine. *Doremus* – regulation of narcotics.
- Apparently, the Court didn’t like this b/c it was unduly restrictive.

**U.S. v. Kahriger**

**Facts:** Revenue Act of 1951 – had *pretext* of raising revenue, but really regulated intrastate gambling. Court only cares if it raises some money.

**Rule:** **As long as the regulatory tax produces “some revenue” and is reasonably related to enforcement of the tax, then it is likely to be treated as a legitimate tax.**

2. The Spending Clause

**U.S. v. Butler**
- General Welfare Clause – Art. I § 8 para. 1
- In narrowest reading, Madison felt money could only be spent for the purpose of the already enumerated powers.
- Hamilton thought it should be related to the power enumerated there. Taxing and spending.

**Facts:** (1936) Through Agricultural Adjustment Act, Congress sought to raise farm prices by limiting production. Tax was levied on processors. Tax revenues were used to pay farmers who entered into contracts to limit production of farm commodities.

**Rule:** **While Congress may spend for the general welfare, it may not regulate for the general welfare.**
- Court concluded that Congress was coercing farmers to join this system. This was regulation and not spending.

**Steward Machine**

**Facts:** (1937) Social Security Act a credit against federal payroll taxes so long as employers contributed to state unemployment compensation schemes. Court upheld the statute reasoning that it was not a “weapon of coercion, destroying or impairing the autonomy of the states.”

**Rule:** **Credits that are given upon the condition of compliance are not coercive devices that strip States of their autonomy.**
- Cardozo dissented arguing there is a distinction between coercing behavior and compelling behavior. His argument: (1) Law assumes the free will of individuals, (2) free will is compatible with acting on motivation, therefore the distinction should be made b/t motivation and coercion. In motivating, you still have an alternative. In coercion, there is no alternative.
South Dakota v. Dole
Facts: (1987) South Dakota sought a declaration that a congressional directive to withhold 5% of federal highway funds for any state that did not comply with its age requirements for alcoholic sales was unconstitutional.

Rule: Conditional offers must be in (1) pursuit of the general welfare, (2) unambiguous, (3) related to the “federal interest in particular national projects or programs,” (4) must not violate “other constitutional provisions,” and (5) cannot be coercive.
- Majority sees the end as highway safety.
- O’Connor dissents: Paulson says she has a problem understanding overinclusion. Just b/c we cannot help all of the problem, does that mean we can’t help part.

3. War power

Woods v. Cloyd W. Miller Co.
Facts: (1948) Housing and Rent Act froze rents at their wartime levels.

Rule: The means-enabling power of the necessary and proper clause supports congressional power to regulate an economic condition partly produced by an intense national war effort.
- In a concurring opinion, Justice Jackson stated his misgivings to such a broad rule. He feared it could “invoked in haste and excitement” without deliberation “amidst a patriotic fervor.”

4. Foreign affairs

Missouri v. Holland
Facts: (1920) MO challenged the constitutionality of federal legislation implementing a migratory bird treaty between Canada and the United States because the federal law preempted MO’s regulation of gamebirds.

Rule: Congress may use any means necessary and proper to implement treaties even if they do not rely upon Congress’s enumerated powers.
- Holmes did note that the treaty in question did not contravene the Constitution in any way.
- Holmes insinuated the Necessary and Proper can be extended beyond the enumerated powers.
- He uses reductio ad absurdum to extend N+P clause beyond enumerated powers. If N+P did not extend beyond, then treaties could not be conformed too unless already upon signing.
- Treaties are consummated when the formal condition is obtained.

Reid v. Covert (Bricker Amendment)
Facts: (1957) U.S. had treaties with other nations that gave American military courts jurisdiction over any servicemembers or their dependents on foreign soil. Civilian dependent was convicted of murder by a military court. Argued that Congress could not deprive her of her right to a jury trial.

Rule: Congress is free to implement treaties without regard to federalism restraints but may not do so in violation of constitutionally guaranteed individual rights.
- Paulson: Constitutional rights trumps any policy that affects that right.

V. DORMANT COMMERCE CLAUSE
1. Question of Exclusivity; Bases of State Regulation; Congr. “Authorization”
   - In *Gibbons v. Ogden*, Marshall and Johnson have similar but different views on exclusivity. Marshall felt that there was “great force” to the argument for exclusive control over interstate commerce, but did not need that to decide the case. Concurring Johnson went to the extreme to say that law was invalid on its fact b/c it attempted to enter into a realm of interstate commerce.
   - In *Plumley*, the Court ruled that a State may not have the power to regulate conditions of sale, but it has the right to protect its citizens from deception / misrepresentation. Protecting citizens from oleomargarine that was not correctly labeled was the interest of the “health, safety, and welfare of its citizens.” (Typical argument).
   - *Paul v. Virginia* (insurance K’s) and *Kidd v. Pearson* (alcohol) – Both involved statutes that intentionally interfered with interstate commerce, but the Court said it did not interfere. Paulson asks if these were decided correctly because they purposely discriminated.

*Cooley v. Board of Wardens* (uphold Congressional authorization)

**Facts**: (1851) PA statute requiring ships to take on pilots to enter or leave Philadelphia. Federal law in 1789 authorized states to regulate pilotage.

**Rule**: The enumerated power granted to Congress to regulate interstate commerce does not *per se* invalidate a state law on the same subject matter, but Congress may affirm concurrent regulatory power with the state.

- This signifies the end of the *exclusivity doctrine*. First of all, it is a paradox if taken to the extreme. If Congress has an exclusive power, why can it not delegate that power? Second, there is a normative argument in that the state may have best ability to control the subject (i.e., close to the matter, knows how to handle specifics, etc.)

- *Prudential Ins. Co.* – Where Congress declares that State regulation is in the public interest, it survives challenge even though the regulation might well fail in the absence of congressional “authorization.” Here, state levied a tax on out of state insurance companies.

2. Evolution of Court deference to state regulation


**Facts**: (1938) Act in SC prohibits use on state highways of motor trucks and semi-trailer trucks exceeding certain weight and width. Nationwide practice—85-90% of rigs exceeded these limits.

**Rule**: The court may apply a two prong test: whether state is acting within its province (state police power—health safety, etc.), whether means are appropriate.

- Here, Stone is pretty relaxed about whether means are appropriate—rational basis.

*Southern Pacific v. Arizona* (Massive change since *Barnwell*)

**Facts**: (1945) AZ Train Limit Law makes it unlawful for any person or corporation to operate within the state a railroad train of more than 14 passenger or 70 freight cars.
Rule: The Court no longer uses a rational basis test which gives deference to the State, but now balances the benefits and burdens through the facts as found by the trial court.
- Here, there was a big burden on interstate commerce because other trains had to stop to change before entering the state. Furthermore, the supporting benefit of “safety” was cut down because more accidents were occurring.

* * *

**Bibb v. Navajo Freight Lines, Inc.**
**Facts**: (1959) Illinois required truckers to wear a special kind of mudflap. 45 other states used a different kind.
**Rule**: Again, through the trial court’s finding the Court must balance the burdens on interstate commerce with the benefits given to the State.

* * *

**Kassel v. Consolidated Freightways Corp.**
**Facts**: (1981) Iowa banned certain truck-trailer combinations from its roads. All its neighboring states did not have such laws. There were so many exceptions that it undermined these benefits.
**Rule**: Like above cases, when safety is involved courts give a “strong presumption of validity” but nevertheless, the Court must measure “the weight and nature” of statute’s benefits to statute’s burden on interstate commerce.

* * *

**Test**: (Brennan) Courts should consider many factors:
- **(A) deference to State legislatures**, (“The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.” - Brennan doesn’t question lawmakers)
- **(B) balance the burdens inflicted on interstate commerce AGAINST benefits sought by the statute** (“The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel.” except-Brennan-in “safety” cases. Here, Brennan believes the correct question is to look at what Legislature sought to accomplish and what evidence was given them), and
- **(C) actual purpose** (i.e., discriminatory purpose which is not to be confused with “facial discrimination” or discriminatory effects. Discriminatory purpose is established by *imputing* the bad purpose to state legislature, which is very difficult to do. “Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.” - Here, Brennan believes Legislature purposely discriminated against interstate commerce. Protectionism. If blatantly discriminatory then regardless of the present effects, it is *per se* unconstitutional.)

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**Factors and Questions to ask?**
Is this a question of safety where the statute is not facially discriminatory? If yes, go to *Southern Pacific, Bibb, Kassel*, with strong presumption of validity to the statute.
Is there no safety concern or facially discriminatory language? If yes, go to *Pike* formula.
If discriminatory on its face or has discriminatory effects, give *Strict Scrutiny* (Incoming, Outgoing, and Reciprocity commerce)?
Do you consider avowed purpose or effects?

### Brennan Test from *Kassel*

<table>
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#### 3. Pike Formula

*Pike v. Bruce Church* (No safety issue)

**Facts:** (1949) AZ required that AZ-grown cantaloupes be packed in AZ-specific containers so their origin would be clear an AZ would improve its image.

**Rule:** Where state regulates (1) even-handedly (2) to effectuate a legitimate local public interest and (3) its effects on interstate commerce are only incidental, it will be upheld (4) unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits *(proportionality test)*.

- **NOTE:** Here, the court is not dealing with public safety, but business interest of the state.
- **Note** the first three parts really question if the statute discriminates against interstate commerce. So if there is no discrimination, perform the *proportionality test* (4).

#### 4. Incoming Commerce

*Baldwin v. G.A.F. Seelig, Inc.* (discriminatory on its face)

**Facts:** NY Milk Control Act established system of minimum process to be paid by dealers to producers and applies to NY state dealers buying milk from out-of-
state. The provision was enforced by refusing to license those who do not comply. NY declares that purpose is to insure adequate milk supply with an eye to economic welfare and health.

**Holding:** The Act is discriminatory on its face by placing a direct burden on interstate commerce by seeking to eliminate competition between the states. One state in its dealings with another may not place itself in a position of economic isolation—not even the police power can give the authority to do this.

- Court is looking at discriminatory effects rather than bad motive because easier to see.
- Gibbons—“if there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints.”

**Rule:** The exercise of state police power must yield when there are discriminatory effects.

**Rule:** Discriminatory effects might pass muster where state can show that it is legislating with respect to legitimate end and there is no less onerous alternative (strict scrutiny test). Welton, Hunt, Dean Milk

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**Welton v. Missouri** (alternative - require same of all)

**Facts:** 1875 - MO statute requiring peddlers to have license unless products grown, produced, or manufactured in MO.

**Holding:** Statute is discriminatory because there is a less onerous alternative—they could have required licenses for everyone.

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**Hunt v. Washington State Apple Ad Commission** (alternative)

**Facts:** 1977 - NC statute requiring containers to have no grade other than US grade on them. Ostensible purpose is to eliminate confusion and deception caused by the states all having their own grading system. Discriminatory effect = Washington grading standards better than US standard, which gave them a competitive advantage—this statute strips that away from them and imposes costs for making different crates to send to NC.

**Holding:** Statute is discriminatory and there is a less onerous alternative—both grading systems could have been used on the crate.

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**Edwards v. California** (isolation from common problems)

**Facts:** CA law which made it illegal to bring indigent person into the state with knowledge of his indigence. State says the law was to help health, morals, and finance.

**Rule:** (Similar argument in Kassel) A state cannot not isolate itself from difficulties common to all states by restraining the transportation of persons and property across its borders.

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**Healy v. Beer Institute** (Affirmance Statute)

**Facts:** CT law which made required out-of-state shippers of beer to affirm that prices in CT were no higher that the prices at which those products are sold in neighboring states.

**Holding:** This pricing regulation would undercut normal pricing decisions based on local conditions—regulation of this scale is power of Congress. Additionally, the statute is discriminatory because it applies only to interstate brewers or shippers of beer.

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**Dean Milk Co. v. Madison** (economic barrier)
Facts: WI ordinances to control where milk comes from depending on where pasteurized and where processed. The inspector would not travel beyond certain radius.

Rule: The ordinance is not totally discriminatory, but where a law erects an economic barrier and there are nondiscriminatory alternatives available (people could pay for the inspections or Model Milk Ordinance), the law is invalid. It does not matter what the avowed purpose is.

Holding: (Dissent) The fact that the statute imposes burden on trade does not mean that it discriminates against interstate commerce. The alternatives here are not necessarily better. State regulation is within state police power.

Maine v. Taylor (Environment – Strict Scrutiny)


Rule: Hughes test: If state statute is discriminatory, ask whether there is legitimate state purpose and, if so, whether there are less onerous alternatives.

Holding: The Hughes test is strict scrutiny that must be done by the district court. As to alternatives, the state must make reasonable efforts to avoid restraining the free flow of commerce, but it is not required to develop new and unproven means of protection at an uncertain cost.
  • Environment can be considered legitimate state purpose.
  • Deference to state in line with Hughes test. (this sort of looks like rational basis)

Holding: (Dissent) When a state employs a discriminatory measure the burden falls on the state to justify it both in terms of local benefits and unavailability of nondiscriminatory alternatives. (this looks more like strict scrutiny)

Breard v. City of Alexandria (Social – living conditions or habitat)

Facts: 1951 - Statute that required prior consent of owners before people could engage in door-to-door solicitations.

Rule: Statute is not discriminatory as it applies to in-state and out-of-state solicitors and homeowners’ right of privacy outweighs burden on interstate commerce.

Holding: (Dissent) Discriminatory because helps local merchants.
  • Moot point now because commercial speech is protected.

Philadelphia v. New Jersey

Facts: 1978 - NJ law prohibits the importation of wasted from outside NJ. Ostensible purpose of NJ is to extend life of landfills, prevent threat to environment from waste from outside the state.

Holding: What the legislature’s ultimate purpose was does not matter—what is important is if there are discriminatory effects. Here, the state is isolating itself—a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within the state. Also a less onerous alternative—regulate ALL waste, even in-state.

Holding: (Dissent) This statute is exercise of state’s health/safety regulation powers. Court rejects—can’t compare waste to diseased meat—even if you could, regulate in-state too.
  • “evil resides in legislative means as well as legislative ends.”
**Exxon Corp. v. Maryland**  
*(anomaly)*

**Facts:** MD statute that prohibited producers or refiners of petroleum products from operating retail service stations in the state. This is in the aftermath of the gasoline shortage where MD retail stations of large oil companies had received preferential treatment.

**Holding:** Finding no “bad purpose” the court upheld the law even though it gave in-state dealers an advantage.

**Holding:** (Dissent) If looking at discriminatory effects, this is not the least onerous alternative.
- Paulson says this is odd decision.

**Minnesota v. Clover Leaf Creamery Co.**  
*(enormous deference to state?)*

**Facts:** MN statute that banned the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitted the sale in other nonreturnable, nonrefillable containers. Ostensible purpose was to decrease solid waste problem, energy waste, depletion of natural resources.

**Holding:** Despite evidence that the law would favor certain industries and would not totally further the state’s purpose, the court upheld the law.
- Court thought there was a rational relationship between the means and the ends and that the local burdens were minor compared to local benefits under *Pike* #4 test (proportionality). Extraordinary deference to the state. Again, environment is a factor.

**Rule:** Nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a state industry.

5. Reciprocity Provision

**Great Atlantic & Pacific Tea Co. v. Cottrell**

**Facts:** MS law which prohibited the sale of foreign milk and milk products in MS unless the foreign state accepted Grade A milk and milk products from MS on a reciprocal basis.

**Rule:** Discriminatory effects where LA producer is denied entry to MS market because LA did not honor the reciprocity provision.

**New Energy Co. v. Limbach**

**Facts:** OH statute which awarded tax credit against the OH motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers if the ethanol was produced in OH or in a state that allowed similar tax advantages.

**Rule:** Out-of-state products are placed at substantial commercial disadvantage through discriminatory tax treatment. The state could get around this by subsidizing in-state manufacturers.

**Sporhase v. Nebraska**

**Facts:** NE law that restricted the withdrawal of groundwater from any well within NE intended for use in an adjoining state—only allowed the withdrawal if for use in another state if that state provided reciprocity to NE regarding the use of its water.

**Rule:** Court said this is legitimate state purpose (water conservation), but it is discriminatory and there are less onerous alternatives.
6. Outgoing Commerce

**H.P. Hood & Sons v. Du Mond**

**Facts:** NY statute whose application denies permit to out-of-state milk distributor for additional milk depot. Health commissioner found that Troy area had been inadequately supplied.

**Rule:** Court strikes down the law because it constitutes economic protectionism.

**Holding:** (Dissent) Local interests must be protected; economic not pejorative here.

**Hughes v. Oklahoma** (Strict Scrutiny – burden shift)

**Facts:** OK statute provides that no person may transport or ship minnows for sale outside the state which were seined or procured within the waters of OK. H, of TX, transported natural minnows from OK dealer.

**Rule:** Where (1) discrimination is evident, ask (2) legitimate state purpose?

And, if so, (3) is there a less onerous alternative?
- In applying this rule, look at evenhandedness of regulation to determine if discrimination (if evenhanded, don’t have to go on); usually will be a legitimate state purpose (don’t look at motive, but rather at effects).
- **Wild animals = natural resources.**
- If statute is discriminatory on its face, the burden shifts to the defendant to prove that there is a (1) legitimate purpose, and (2) no less onerous alternative.

**Holding:** The statute is discriminatory on its face and even though there may be a legitimate purpose there is a less onerous alternative (treat in-state and out-of-state the same). This is classic statement on strict scrutiny.

**Cities Service Gas Co. v. Peerless Oil** (Dis-analogy – year?)

**Facts:** 1943 - OK law which established a minimum wellhead price for natural gas produced in OK and sold interstate.

**Holding:** Court upholds the law saying that the preservation of natural resources is legitimate state purpose.
- Paulson says this is dubious decision—isn’t this exploitation of natural resources a classic case of discrimination??

**Parker v. Brown**

**Facts:** CA statute regulating the marketing of raisin crop with limits on producers’ sale of grapes for processing as raisins. Declared purpose was to conserve the agricultural wealth of the state and to prevent economic waste in the marketing of agricultural crops.

**Holding:** Court upheld the statute as means of stabilizing the market in the absence of a federal program. This is contrary to other cases, but it is because the entire US raisin crop is in CA and this is right after the Depression.

**Camps v. Newfound/Owatonna v. Harrison** (Scalia’s dissenting point)

**Facts:** ME statute that provides general exemption from real estate and personal property taxes for charitable institutions mainly for the benefit of state residents. ME nonprofit that operates camp of which 95% of campers are not residents of ME so it does not qualify for the exemption.

**Rule:** Because the camp is involved in interstate commerce a discriminatory tax differential cannot be upheld.

**Holding:** (Dissent) This is a means to provide public assistance to residents and that makes sense. **Compare in-state and out-of-state at public universities.**
7. Preemption

*Rice Criteria*

**Rule:** Begin with presumption in favor of state regulation. Then look to the grounds for rebuttal: (1) Pervasive federal scheme OR (2) dominant federal interest OR (3) State law “stands as obstacle to the accomplishment” of Congressional purpose. (Use the second criterion to determine this.) OR (4) physical impossibility of joint compliance (from *Fla. Lime*).

- *There can be either express or implied preemption.*

**Hines v. Davidowitz**

**Facts:** 1941 - PA statute required aliens over 17 to register yearly, carry identification. Federal statute only required one-time registration and no requirement that they carry identification. Constitution (Article I, §8, ¶4) states that Congress may “establish uniform rule of naturalization.”

**Holding:** The federal statute preempts the PA statute:

- **Pervasiveness:** complete scheme of regulation, broad and comprehensive plan. (This is main argument, but see dissent where he points out that 19 other states have these laws, so pervasiveness not clear.)

- **Dominant federal interest:** interest in international affairs and ensuring the protection of our interests in other countries by protecting alien interests in the US.

**Pennsylvania v. Nelson** *(Can argue all three Rice points)*

**Facts:** PA sedition act which prohibited sedition against both PA and US governments. Nelson was charged with violation of PA Act—challenged the act saying it contravened Smith Act.

**Holding:** The court struck down the law because Congress occupied the field to the exclusion of parallel state legislation, dominant interest of the federal government precludes state intervention, administration of state acts would conflict.

**Holding:** (Dissent) Congress didn’t bar the exercise of state power to punish the same acts under state law—no dominant interest.

**Askew v. American Waterways Operators** *(Environment)*

**Facts:** 1973 - FL law which imposed strict liability for any damage incurred by the state or private persons as a result of an oil spill. A federal statute imposed strict liability for cleanup costs.

**Rule:** Court upheld the law because the federal law only addressed cleanup costs incurred and the state law had to do with damages to the state.

**City of Burbank v. Lockheed Air Terminal** *(noise pollution vs. FAA)*

**Facts:** 1973 - City ordinance proscribing night air departures from the airport—affected only one flight weekly. Federal Aviation Act and Noise Control Act.

**Rule:** The ordinance is preempted by “pervasive control” of air traffic by congressional acts and need for uniformity.

**Pacific Gas & v. State Energy Resources** *(Emphasizes Co-operation)*
Facts: 1983 - Federal scheme to promote construction of nuclear power plants—federal regulation of safety issues. CA statute that addresses safety and economic issues.

Holding: Law is valid because the state is making decisions on economic grounds, which are not preempted by federal law.
- Paulson says court bent over backwards to read this as economic grounds rather than safety grounds.

*Florida Lime v. Paul* (Physical Impossibility)
Facts: CA statute that required 8% oil content in avocados—purpose was to ensure maturity and protect consumers. Federal regulations arrived at by FL avocado growers imposed different standards.

Holding: The CA statute and the federal regulations do not expressly conflict (3rd *Hines* criterion)—there is no physical impossibility in joint compliance (example of physical impossibility would be the mudflap case).

*Ray v. ARCO* (??? – Paulson does not like)
Facts: Federal law designating the design and operating characteristics of oil tankers. WA law adopted with aim of regulating in particular respects the design, size, and movement of oil tankers in Puget Sound.

Rule: Although the court found that the two laws were inconsistent and that the safety regulations alone were invalid, it upheld the WA statute because it provided an alternative (tugboat) to the WA requirements.

Holding: (Dissent) Safety regulations are invalid. Paulson agrees.

8. State as Market Participant

*Reeves Inc. v. Stake* (Actual participant in market)
Facts: (1980) SD built cement plant in response to shortage and had a statute that gave in-state purchasers preference. When producing more than it needed, sold to out-of-state buyers like R. In new shortage, reaffirmed in-state preference policy.

Holding: Because SD is a market participant, there is no violation of the commerce clause. Commerce clause typically isn’t an issue with these cases.
- Also, doesn’t involve foreign commerce, doesn’t involve a natural resource, and no restrictions on resale).

Rule: When the state is a market participant, the constraints understood under “evenhandedness” have no application and the state may discriminate against interstate commerce.

Holding: (Dissent) This is economic protectionism. If SD functioned in the market then at the same time it cannot withhold cement for the benefit of its own citizens—it is an either/or situation.

*New Energy Co. v. Limbach* (“primeval governmental activity”)
Facts: See above.

Holding: Market participant theory does not apply because OH action ultimately at issue is not purchase or sale of ethanol, but its assessment and computation of taxes—“primeval governmental activity.”

*South-Central Timber v. Wunnike* (cannot extend beyond participation)
Facts: Alaska statute that required purchasers of its timber to have the timber processed in the state before being shipped out of state.

Holding: The statute was struck down because Alaska was a seller and not a market participant in the processing. It was imposing conditions downstream. Market
participant exception does not extend beyond the transaction to which the state is a party as a market participant. Further, this is distinguished from Reeves because involves a natural resource.


_Corfield v. Coryell_

- Old statement on meaning of privileges and immunities. Washington sets out fundamental rights protected under the clause. Paulson says that was not what the Framers meant; rather, they meant to introduce an equality provision to keep the states from treating nonresidents worse than residents. But Reconstruction congressmen drew on this for understanding of second privileges and immunities clause in the 14th Amendment.
- This is distinct from equal protection which was meant to bring treatment of disfavored groups to level of favored groups. Both in 14th Amendment, so have to have different meaning.

_Baldwin v. Fish and Game Com. of MT_ (Fundamental right - incorrect test?)

**Facts:** 1978 - MT statute that called for much higher registration fees for out-of-state elk hunters.

**Holding:** MT statute is valid because the hunting in question is not done in pursuit of livelihood, but is recreational sport—this is not a fundamental right.

- Areas where privileges and immunities clause would apply would be to those privileges and immunities bearing upon the vitality of the nation as a single entity (e.g. suffrage)—hunting is not one of these. Paulson says this is weak criterion.

**Holding:** (Dissent—Brennan) USE THIS AS AUTHORITY!! Whether the right is fundamental does not matter; rather, what is important is the state’s justification for the discrimination. Comparable strict scrutiny test to _Hughes_ to determine whether discrimination permissible—permissible when:

- **The presence or activity of nonresidents is the source or cause of the problem or effect with which the state seeks to deal; and**
- **The discrimination practiced against nonresidents bears a substantial relation to the problem they present.**

_Toomer v. Witsell_

**Facts:** 1948 - SC law which regulated commercial shrimp fishing off the coast and imposed huge fee on nonresident boats.

**Holding:** The law is invalid under the Brennan’s test from dissent in _Baldwin_: (1) nonresident boats are not source of any problem (conservation)—use the same size boats, same equipment; (2) to relation to the problem. Differential here is completely unreasonable and clear that state is out to gouge nonresidents.

- Where differential reasonable, probably will be okay because states are providing benefit to their residents.

_Hicklin v. Orbeck_

**Facts:** Alaska statute requiring preference for employment of residents over nonresidents for purpose of decreasing unemployment.
**Holding:** The law is invalid under Brennan’s test: (1) problem is that residents are uneducated and that is causing unemployment, not nonresident employment; (2) therefore, no substantial relation.

*Supreme Court of New Hampshire v. Piper*

**Facts:** 1985 - NH rule which limited membership in the NH bar to state residents.

**Holding:** The law is invalid because there is nothing in precedents suggesting that the practice of law should not be viewed as a “privilege” as it is important to the national economy.

*Camden (Anomaly)*

**Facts:** 1989 - Ordinance which required at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents.

**Holding:** Because the problem was middle class flight, nonresident employment caused the problem, and the ordinance was designed to keep people in the city, the law was upheld.

- Renquist does not see a need to distinguish between interstate and intrastate wrongs—does not matter from the point of view of the aggrieved party.

10. Intergovernmental immunity

*National League of Cities v. Usery*

**Facts:** FLSA required employers to pay minimum wage and set maximum hours. Previously the act did not apply to the states, but 1974 amendments extended the provisions to almost all public employees employed by states and by their various political subdivisions. Cities argue protection under intergovernmental immunity.

**Holding:** “Insofar as the challenged amendments operate to directly displace the states’ freedom to structure integral operations in areas of traditional governmental functions they are not within the authority granted Congress.”

- Paulson says analogy between state immunity and individuals’ constitutionally protected rights (e.g. right to trial by jury) is faulty because the individual rights are trump rights with which the government cannot interfere. When talking about commerce, the line between federal and state regulation moves back and forth as a result of policy decisions and is not about individual constitutional rights. (See Hohfeld square as to individual constitutional rights)

**Test:** Criteria for determining whether states are immune from federal regulation:

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

- **Note that these criteria proved to be too abstract for courts to apply.**

*Garcia v. SAMTA* (Brief overruling of *NL* )

**Facts:** FLSA challenged again, this time in its application to SAMTA, mass-transit system which gets federal financial assistance.
**Holding:** *National League* is overruled and FLSA applies to SAMTA. *NL* overruled because standards were **unworkable** (what is traditional government function?), that history is not the appropriate source of a standard, because it prevents state from improvising in coming up with solutions to old problems (standards go against federalism). Blackmun also says scope of state autonomy comes from the political process, not the judiciary.

**Holding:** (Dissent) Powell was incorrect in saying that *NL* was applied in many other cases—was not applied in any. Also incorrect in saying *NL* was a balancing test—that was what the concurring opinion said.

*Printz v. United States* (back to *National* - background checks)

**Facts:** Federal statute that compelled state officers to temporarily execute federal law by performing background checks on purchasers of handguns.

**Holding:** Nothing in history, Constitutional construction, or prior jurisprudence suggests that the federal government can impose such responsibilities without the consent of the states; to hold otherwise would be incompatible with system of dual sovereignty.

*Alden v. Maine*

**Facts:** Probation officers tried to bring suit first in federal court (dismissed) and then in state court for alleged violations of the FLSA.

**Holding:** Congress has no power to compel states to be subject to private suits for money damages in its courts.

- The immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself.
- Private suits against non-consenting states may threaten financial integrity or subject public policy to control by mandates of judicial tribunes in favor of individuals.
- Kennedy says silence shows no one thought states would be stripped of this immunity. His is a structural argument.

**VI. FUNCTION OF THE JUDICIARY—SUBSTANTIVE DUE PROCESS**

*Slaughter-House Cases*

**Facts:** LA legislature had granted monopoly in handling livestock to Crescent City Livestock Co. Several butchers brought action challenging the power of the state to grant such a monopoly arguing that it is not allowed under the privileges and immunities clause of the 14th Amendment.

**Holding:** The privileges and immunities clause of the 14th Amendment speaks only of privileges and immunities of the citizens of the US, not citizens of the states—the privileges and immunities clause does not carry over the rights to the states.

- Court said the overriding purpose of the 13th and 14th Amendments was to guarantee the freedom of the slaves.
- Court recognized privileges and immunities belonging to US citizens—claim against government, protection, participation in government, etc.
- Dissents want the rights to carry over to the states.
- *Although the first attempt at carry-over was with the privileges and immunities clause, due process clause is ultimate vehicle for carry-over.*

1. The rise of substantive due process

   - *Oddity of “substantive” due process because due process normally associated with procedure. So-called economic rights are being*
constitutionalized as substantive rights in the name of the due process clause.

- 19th Century view from Mugler v. Kansas that courts must judge whether legislation “is a palpable invasion of rights secured by fundamental laws.”

Lochner v. New York

**Facts:** NY labor law that no employee shall be required or permitted to work more than 10 hours/day.

**Holding:** The law is invalid because it interferes with the right of contract between the employer and the employees, which the court says is protected by the 14th Amendment.

- Paulson says this is an absurd contention because it presupposes equality of bargaining power. Also, there is not a constitutional right to liberty of contract.
- Finally, he says that before labor legislation was exercise of state power, but this decision suspended that.

**Holding:** (Harlan Dissent) Liberty of contract is subject to state regulations and validity of state statute enjoys presumption of validity—rational basis test.

**Holding:** (Holmes Dissent) The issue is one of policy, not rights, and on policy questions the people are sovereign. There is no reason why the legislature should not employ economic theory on which they have settled.

Muller v. Oregon

**Facts:** OR statute that provided that no female employed in any mechanical establishment, or factory, or laundry shall work more than 10 hours/day.

**Holding:** The law is valid because while the general right to contract in relation to one’s business is part of individual liberty protected by the 14th Amendment, it can still be restricted.

- Court talks about some bullshit that the differences between men and women justify the statute and that women need to be “looked after.” What the fuck.
- This is exception to the substantive due process rule

Adkins v. Children’s Hospital

**Facts:** Act of Congress setting minimum wage for women and minors in D.C.

**Holding:** The law is invalid because it forbids the freedom of contract by fixing wages for adult women who are capable of contracting for themselves. Further, the price fixed has no relation to the job or ability of the employee.

- Rerun of Lochner.

**Holding:** (Taft Dissent) This is just an argument for economic policy. Just because the court disagrees with the policy on which the state decided does not justify invalidating the law.

**Holding:** (Holmes Dissent) He emphasizes many legal restrictions that prevent person from doing things. For example, people cannot make contracts that are against public policy.

Baldwin v. Missouri

**Holding:** This is another Holmes dissent. He is worried about the broad scope given to the 14th Amendment. He does not want it to take away states’ rights. Also talks about the oddity of the phrase substantive due process.

Nebbia v. New York
Facts: NY Milk Control Board to set the retail price of milk.
Rule: Laws comply with substantive due process so long as they are not “unreasonable, arbitrary or capricious” AND “the means selected must have a real and substantial relation to the object sought to be obtained.
- Much of the language in the opinion suggests *Lochner* court was coming to an end.

*West Coast Hotel v. Parrish*
Facts: WA act which authorized the fixing of minimum wages for women and minors. P was chambermaid and was not paid the minimum. Hotel challenged the act as repugnant to the due process clause of the 14th Amendment.
Holding: The court upheld the law saying that employees are not in an equal bargaining position, the restriction will help employees as a class, and will help prevent some of the workers from becoming wards of the state. Overrules *Adkins*.
Holding: (Dissent) The meaning of the Constitution does not change with the ebb and flow of economic events. He would give less deference to legislative judgment. His opinion is formalistic.

*United States v. Carolene Products*
Facts: Filled Milk Act prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat. Purpose is to prevent fraud, protect health.
Holding: The court upholds the law on the basis of a connection between the means and the end—weak standard (rational basis) set out by court in which it is not concerned with the wisdom of the legislation.
- Footnote—anticipates strict scrutiny standard where rights are concerned rather than policy.

*Olsen v. Nebraska*
Facts: Statute in question fixed the maximum compensation which a private employment agency might collect from an applicant for employment.
Holding: The law does not violate the due process clause of the 14th Amendment—the court is not concerned with wisdom, need, or appropriateness of the legislation—rational basis test.

*Whalen v. Roe*
Facts: NY practice of recording the names and addresses of all persons who have obtained, pursuant to doctor’s prescription, certain drugs for which there is both a lawful and unlawful market.
Holding: Individual states have broad latitude in experimenting with possible solutions to problems of vital local concern. Legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary. Again, rational basis test.

2. Incorporation doctrine
*Barron v. Mayor and City Council of Baltimore*
Facts: Action against the Baltimore to recover damages for injuries to Barron’s wharf property arising from the acts of the city.
Holding: The 5th Amendment taking clause that the government cannot take property without just compensation does not apply to the states as the Constitution only applies to the federal government.
This position changed with the rise of substantive due process—many aspects of the Bill of Rights were accounted for against the states by an expanded understanding of liberty under the 14th Amendment.

**Palko v. Connecticut Selective incorporation**

**Facts:** CT statute in question permits appeals by state in criminal cases. Appellant argues that this is double jeopardy and this is violation of 14th Amendment (incorporating the 5th Amendment).

**Holding:** Only those rights which are “implicit in the concept of ordered liberty” are carried over by the 14th Amendment (e.g. 1st Amendment rights). Immunity from double jeopardy is not carried over.

**Adamson v. California**

**Facts:** Appellant argues that 5th Amendment right that no person shall be compelled to testify against himself is fundamental national privilege or immunity protected against state abridgment.

**Holding:** “Not…all the rights of the federal Bill of Rights” are drawn into the rubric of 14th Amendment due process clause; in particular, freedom from self-incrimination under the 5th Amendment does not carry over to the 14th Amendment.

**Malloy v. Hogan**

**Holding:** Here the court incorporates 5th Amendment freedom from self-incrimination. Today the law reflects nearly complete incorporation.

3. Modern substantive due process and the doctrine of privacy

**Meyer v. Nebraska**

**Facts:** NE statute that prohibited teaching in any language other than English in the elementary grades of public or private school.

**Holding:** A teacher’s right to teach and parents’ right to engage him to so instruct their children are within the liberty of the 14th Amendment. The means adopted exceed the power of the state. The Court stresses “liberty” as reaching to “the right of the individual…to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children,” etc.

- *Pierce v. Society of Sisters* strengthened this doctrine by striking down OR statute that required parents to send their children to public school.
- *These 2 cases extended the concept of liberty beyond economic due process to the area of personal and family autonomy, laying the foundation for the modern right of privacy decisions.*

**Holding:** (Dissent) Holmes and Sullivan say this is a policy question best reserved to the legislature.

**Poe v. Ullman**

**Facts:** CT statute that proscribed the use of contraceptives.

**Holding:** The case was dismissed for lack of standing.

**Holding:** (Harlan Dissent) Developed the theme of “liberty” in the 14th Amendment as “including a freedom from all substantial arbitrary impositions and purposeless restraints.

**Griswold v. Connecticut**

**Facts:** Again, the CT statute that prohibited the use of contraceptives. This time the case was heard.
**Holding:** The law operated directly on an intimate relation of husband and wife which “zone of privacy,” a penumbral right. This penumbral right emanates from the 3rd, 4th, 5th, and 9th Amendments.

**Roe v. Wade**

**Facts:** TX made it a crime to “procure an abortion” except upon “medical advice for the purpose of saving the life of the mother.”

**Holding:** The court struck down the law as a denial of the “personal liberty” protected by the 14th Amendment’s due process clause. Blackmun declared that the “right to privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

• Blackmun relies on *Griswold, Pierce, Myer.*

• Because a woman’s right to an abortion was found to be part of the fundamental right to privacy, the court applied strict scrutiny.

**Holding:** Woman’s right to terminate her pregnancy is not absolute:

• During the first trimester, the state has no compelling reason to restrict abortion.

• Second trimester, the state has compelling interest in preserving and protecting the health of the pregnant woman—can regulate so long as it relates to preservation and protection of maternal health.

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

• *Is this noninterpretivist?* Yes because since it is a written Constitution, the court has no authority to import values and rights that have no fair textual connection to the Constitution.

**Holding:** (Dissents) Thought this was an example of judicial legislation.

**Michael H. v. Gerald D.**

**Facts:** M sought to establish paternity of V, child of an adulterous affair. CA presumption that a child born to a married woman living with her husband is a child of the marriage. This presumption is rebuttable only under limited circumstances.

**Holding:** The state has an interest in protecting the marital relationship. Historical evidence proved that traditions have rejected the claims of adulterous fathers to establish legally sanctioned relationships with their offspring born into another’s marriage—not a fundamental right.

**Holding:** (Brennan Dissent) The court framed the issue too specifically (“adulterous natural father”)—if the issue is framed more generally, namely in terms of parenthood as a constitutionally protected “liberty,” things look quite different. This is a specificity problem.

**Bowers v. Hardwick**

**Facts:** GA law criminalized sodomy. H was charged with committing the offense in his own bedroom with another male. Challenged the validity of the law as applied to homosexual sex.

**Holding:** There is no fundamental right to engage in homosexual sex. Court did not address heterosexual anal sex. The court looked at several factors:

• Doctrine: no connection between “family, marriage, or procreation on the one hand and homosexual activity on the other…”
• History: long national history and tradition of suppression of homosexual behavior. This right is not “deeply rooted in history and tradition.” Moore

• Prudential Concerns: prudence counseled caution in expanding the categories of fundamental rights and without more support in history and tradition the claimed right is better left in a minimally protected category.

• Since this was found not to be a fundamental right, rational basis test.

**Holding:** (Blackmun Dissent) Again, there is a specificity problem. The guarantee of privacy should be applied at a more general level.

**VII. FUNCTION OF THE JUDICIARY**

**A. Slavery and the Constitution**

*Groves v. Slaughter*

**Facts:** MS constitution prohibited the importation of slaves. Slaughter challenged validity of Constitution against the Commerce Clause. Congress has exclusive power of regulating commerce.

**Holding:** Supreme Court did not answer the substantive issue but ruled on a technicality.

*Prigg v. Pennsylvania*

**Facts:** Slave catcher entered PA and took back a slave without permission of a judicial official as stated in PA statute. Court overruled statute saying it was against a federal law of 1793.

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

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

*Dred Scott v. Sandford*

**Facts:** Dred Scott was a slave in MO who traveled with owner to IL and in MO Territory north of the compromise line before returning to MO. After owner’s death, estate was assumed by John Sanford, citizen of NY—Dred Scott brought action in federal court based on diversity jurisdiction and claimed that earlier residence in free state liberated him from slavery. Case posed the question of what happens when a slave enters another state that does not recognize slavery: Is he a permanent slave? Once free, always free? Reverts back to slave?

**Rule:** Court (Taney) held that (1) Federal court has no jurisdiction over Scott b/c he is not a person by meaning of the Constitution; (2) He had never been free; (3) Congress cannot forbid or abolish slavery in its territories.

**Rule:** Curtis: blacks were free at the founding of the Constitution because it included all free persons and there were free blacks at the founding of the Constitution.

- Curtis argues with *reductio ad absurdum:* If Taney followed his rule of must citizenship, then no women could be citizens because they do not have all rights.
- Taney’s reference to the slave clauses makes us believe he is talking of all blacks.

*Frederick Douglas Speech*
• **Intentionalism v. Textualism** – Douglas wants to make least of intentionalism and make most of textualism

• Insisted upon textualism as the approach and then he exploits it:
  1. 3/5 deprives the South of 2/5 of the vote. Hence, it is antislavery.
  2. End of slavery clause basically said that the price you have to pay is to end slavery by the 1808. (Criticize by saying it only said “importation” from Africa).
  3. Insurrection Clause: Bring insurrection to an end by ending slavery.
  4. Fugitive Slave Clause: “slaves” not meant but indentured apprentices who had the right to enter into a contract.

**VIII. DISTRIBUTION OF NATIONAL POWERS**

1. Executive power

   *Youngstown Sheet and Tube Co. v. Sawyer*

   **Facts:** During Korean War, steel workers and companies could not reach an agreement and workers planned to strike. Truman ordered the Secretary of Commerce to seize the steel mills and keep them running by agreeing to the union’s terms.

   **Holding:** Such a seizure is unconstitutional because the no presidential power to issue such an order stemmed from either an act of Congress or from the Constitution itself.

   - The court rejected the notion that Commander-in-Chief has power to take possession of property to keep labor disputes from stopping production of war materials.
   - President has no power to make law, only to enforce law.
   - There are inherent implied powers, but seizure of private property is legislative, so not inherent implied power of the president.

   **Holding:** (Frankfurter Concurrence) 1947 Act rejected the idea of giving the president seizure authority—express denial of such power. Says that things the president has done for a long time with Congress’ knowledge “may be treated as a gloss on executive power…”

   **Holding:** (Jackson’s Concurrence) Tripartite framework to decide whether president has power:
   - presidential power is at its maximum when president acts with express or implied authorization of Congress.
   - Least power when presidential action is incompatible with expressed or implied will of Congress.
   - Zone of twilight—when absence of congressional grant or denial of authority.

   **Holding:** (Vinson Dissent) President possesses inherent power to act in national emergencies. He perceives the situation much different than the court and concurring justices.

2. Executive power vis-à-vis foreign affairs

   *United State v. Curtiss-Wright*
Facts: Joint resolution of Congress authorized president to prohibit sale of arms. President prohibited sale to Bolivia.

Rule: Statement that the federal government can exercise only the enumerated powers and necessary implied powers is categorically true only with respect to internal affairs. In the maintenance of international relations, congressional legislation must often accord to the president a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. This follows long legislative history.

• Difference between internal and external powers stems from the fact that internal powers were delegated from pre-constitutional states, but external powers were not.

Dames & Moore v. Regan

Facts: Release of hostages secured in exchange for settlement of claims against Iran. Dames & Moore had claims against Iran it did not want settled. Claims Settlement Act and International Emergency Economic Powers Act spoke to this issue, but not directly.

Holding: Congress implicitly approved the practice of settlement by executive agreement through ICSA and IEEPA. Congress’s acquiescence supports this.

• Difference between this and Steel Seizure Cases is that here we have statutory authorization.

3. Delegation problem

• Non-delegation doctrine: Congress may delegate authority sufficient to effect its purpose. Congress can: (1) authorize the courts, the president, or an administrative agency to make rules in areas specified by Congress and subject to congressionally specified guidelines; or (2) condition legislation upon a finding of fact by president or agency. Congress must declare a policy and define the circumstances in which its command is to be effective.

• Purpose of doctrine is to ensure accountability—unelected administrators are not directly accountable to the electorate.

• This did not work—court has consistently held delegations to be constitutional. But in no case has the court rejected the nondelegation doctrine.

ALA Schechter Poultry Corp. v. United States (again)

Facts: NIRA authorized president to approve codes of fair competition. Industry and labor groups drafted these codes. Secretary of Agr. and Administrator for NIRA were to determine the extent to which the codes advanced congressional objectives.

Rule: This is an unconstitutional delegation of power because Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws he things may be needed or advisable for the rehabilitation and expansion of trade or industry. Congress has not really placed any limits on president.

Yakus v. United States

Facts: The Emergency Price Control Act set out a temporary scheme for regulations fixing prices. Standards to guide were “fair and equitable and will effectuate
the purposes of the act.” President is directed to stabilize prices, wages, and salaries so far as practicable.

**Rule:** Congress has the constitutional authority to prescribe commodity prices as a war emergency measure so long as the purposes and standards are clearly set out.

**Whitman v. American Trucking Association**

**Facts:** Clean Air Act requires the administrator of EPA to promulgate standards for air pollutants and to review them every 5 years.

**Rule:** The scope of the discretion the provision allows is well within the outer limits of our non delegation precedents. Almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

**Holding:** (Stevens Concurrence) Agency rule-making constitutes legislative power.

4. The legislative veto

**INS v. Chadha**

**Facts:** Provision of the Immigration and Nationality Act authorizing one house of Congress, by resolution, to invalidate the decision of the executive branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the US. AG found that Chadha met the statutory requirements to be permitted to stay but House reversed.

**Rule:** The action of a single house disfavoring suspension of deportation is a legislative act because it altered the legal rights, duties and relations of persons outside the legislative branch. The legislative veto does not meet either the bicameralism or presentment requirements. The legislative veto is invalidated.

- This is a very formalistic opinion.
- Paulson says doesn’t this turn all forms of lawmaking into legislation?
- Legislative veto still used.

**Holding:** (White Dissent) He took a functionalist approach. It is anomalous to permit Congress to delegate power to administrative agencies but not allow it to check the exercise of administrative discretion by legislative veto. He argues that legislative veto power secures accountability and is exercised pursuant to enacted law so it already met the Art. I lawmaking requirements. Also says this is adjudicative function, not legislative.

5. Removal and the “independent counsel” question

- Subject to Senate confirmation, the president has the power to appoint ambassadors, federal judges, and all other officers of the US whose appointments aren’t provided for (**principal officers**). Congress can vest power of appointment of **inferior officers** in president, courts, or heads of departments. Nothing in Constitutional text about removal.

- Congress may restrict the president’s power to remove inferior federal officers, but may neither restrict the president’s unilateral power to remove principal officers nor otherwise impose removal restrictions that impede the president’s ability to perform his constitutional duty.

**Buckley v. Valeo**
Facts: Under FEC Act a majority of FEC members was appointed by president pro tempore of the Senate and Speaker of the House. FEC was given direct and wide-ranging enforcement power such as instituting civil actions against violations of the act as well as extensive rule-making and adjudicative powers.

Holding: Such powers could be exercised only by officers of the US appointed in accordance with the appointments clause and therefore cannot be exercised by the FEC.

Rule: Only officers appointed in the constitutionally prescribed manner could undertake executive or quasi-judicial tasks.
- Principal officers are those who exercise significant authority pursuant to the laws of the US—must be appointed by president with 2/3 Senate approval.

*Myers v. United States*

Facts: Statute providing that Postmaster may be removed by president with consent of Senate. President tries to remove Postmaster in OR.

Rule: The statute is unconstitutional because the president’s removal power is incident to the power of appointment and the president has the exclusive power to remove executive officers whom he has appointed.

*Humphrey’s Executor v. United States*

Facts: Statute involves removal of members of the FTC. Congress had limited the president’s power to remove these members, but president could remove on certain conditions.

Holding: The court distinguished this case from Myers in that the officers here in question perform quasi-legislative and quasi-judicial functions rather than executory functions.

Rule: The functional character of the office determines whether the president can remove—if executory, can remove, but Congress can attach conditions to presidential removal of quasi-legislative or quasi-judicial officers.

*Weiner v. United States*

Facts: War crimes commission. It is in the executive branch, but performs a quasi-judicial function.

Holding: The court held that the character of the commission’s function suffices to restrict presidential removal power.

*Morrison v. Olson*

Facts: Federal law authorized the US Court of Appeals to appoint an independent prosecutor to investigate and prosecute alleged crimes. The independent counsel could not be removed by the president for any reason but could be removed by the attorney general for good cause.

Rule: Restrictions on removal of an inferior executive officer “cannot be made to turn on whether or not that official is classified as ‘purely executive.’…The real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”
- Found removal of independent counsel not to be central to president’s exercise of power.
- Interbranch appointments okay
**Holding:** (Scalia Dissent) argues that there is a violation of the separation of powers when *any* executive power is transferred to another branch. At the time, this formalistic opinion was widely criticized, but now this appears to be the realistic opinion (after Monica and Bill).

6. Federal election procedures

*Bush v. Gore* (Dissenting opinions)

- Supreme Court heard and decided the case despite clear language in Article II and in 3 USC §§5, 6, 15 which leaves the resolution of outstanding disputes over electors to the Congress. Offers Equal Protection as grounds.

**Holding:** (Stevens Dissent) Emphasizes the states’ role in selecting presidential electors and emphasizes likewise the court’s “settled practice” of accepting the opinions of the highest state courts as final on these questions. Equal Protection claim could be justiciable in case of reapportionment but never before has state reviewed standards the states delineated. There is no federal question, the court should not have heard the case.

**Holding:** (Souter Dissent) There is no reason for the Supreme Court to hear this. Recognizes the merit in the equal protection argument but would have remanded the case to the FL courts with instructions that they establish uniform standards.

**Holding:** (Ginsburg Dissent) There have been rare cases in the past where the Supreme Court has rejected a high state court’s interpretation of state law but there is no comparable recalcitrance in this case. Wonders why majority departs from its allegiance to system of dual sovereignty. Thinks it is utopian to think that a new standard would solve any equal protection problems.

**Holding:** (Breyer Dissent) Examines the legislative history and concludes that it is clear that Congress was to have the last word.

7. Political question doctrine

*Baker v. Carr*

**Facts:** TN legislature did not reapportion itself for 60 years. Plaintiffs argued that this was a violation of the equal protection clause of the 14th Amendment.

**Rule:** *The question of reapportionment is not a political question and is justiciable.*

**Test:** Factors identifying political question follow. If any one of the factors is present in a case, it is a nonjusticiable political question.

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

Reasons for nonjusticiability because of political question include need for finality, decision inherently political. Political question doctrine insulates from judicial review some questions where separation of powers question looms so large.

Goldwater v. Carter
Facts: Senator Goldwater challenged the validity of President Carter’s unilateral abrogation of a defense treaty with Taiwan.
Rule: 4-justice plurality thought the case was a political question because of the desirability of speaking with one voice on foreign affairs.
Holding: (Powell Concurrence) He agrees that the claim should be dismissed but not because of political question. He says the issue is not ripe because Congress has not yet acted – there must be a “constitutional impasse.” As far as the criteria, no textual commitment to president, standards are normal principles of interpretation, and prudential considerations would not be a problem. (But Paulson says you could argue the other way on all these criteria.)
Holding: (Renquist Concurrence) This is a political question because the Constitution is silent on abrogation of treaties.
Holding: (Brennan Dissent) President alone has the power of recognition. If recognizes the People’s Republic of China, the abrogation of the treaty must follow.

Powell v. McCormack
Facts: Powell was elected but the House refused to seat Powell because he had allegedly embezzled House funds and lied to the House (exclusion as contrasted with expulsion). Powell argues that he could only be excluded if he did not meet the requirements of age, citizenship, and residence in Art. I §2.
Rule: Issue of whether the House could exclude was reviewable by the courts and not a political question.
  • Textually demonstrable commitment to Congress to judge based on the 3 standards and if not met to exclude. But where Congress excludes P even though he meets the qualifications, this falls outside the power of Congress and is justiciable.
  • Court read the power to exclude narrowly to preserve democratic principles—the people elected Powell.
  • Congress could not expel because Powell had not been seated—if allow expulsion on the basis of additional criteria, expulsion provision not necessary.

Nixon v. United States
Facts: Nixon was chief judge in federal district court who allegedly accepted money in exchange for halting a prosecution. Convicted of making false statements before a federal grand jury, impeached, removed from office. Senate Rule XI allowed Senate committee to hear evidence, then that report is given to full Senate. N says this doesn’t comply with Article I, §3 which requires the Senate to “try all impeachments.”
Rule: Question of whether Senate Rule XI violates impeachment trial clause is nonjusticiable because there is a textually demonstrable commitment of impeachment to the Senate.
• The type of trial is for Senate to decide because the full clause states that “the Senate shall have sole Power to try all Impeachments.” Court also pointed to lack of finality problem.
• Different from Powell because there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the word “try” in the clause.

8. The executive and the Congress on war power

_Mora v. McNamara_

**Facts:** Soldier claimed that his orders to serve in Vietnam were illegal because the war was unconstitutional. No declaration of war from Congress, but president continued to send troops.

**Rule:** Constitutionality of war is a political question and is nonjusticiable.

**Holding:** (Stewart Dissent) Says that the problems will not go away if the court does not hear them—they are justiciable.
• If there is an emergency, the president will go to Congress after the fact for authorization. The problem arises when (a) the emergency continues and (b) Congress does not declare war.
• Fulbright Report—presidential war power is assumed because of congressional acquiescence to presidential action. To stop this, War Powers Resolution.

_War Powers Resolution of 1973_

• Express reassertion of Congressional power to declare war.
• Constraints on president on introduction of troops: (1) when Congress declares war; (2) specific statutory authorization; (3) national emergency.
• Imposes many other conditions. There is a delegation of congressional power to the president but it is limited and defined.
• Has not been followed by the executive branch at all—Bush’s statement on the Iraq Resolution demonstrated this.

_Prize Cases_

**Facts:** Blockade of Confederate ships with no war declared.

**Rule:** Executive has the power to put down the insurrection and this includes the power to institute a blockade of ports.
• Congress did not declare war because did not want to vindicate the status of the Confederacy as an independent nation state. There is nothing in the Constitution about what to do in the case of civil war.

_Ex Parte Quirin_

**Facts:** Petitioners are German soldiers who were trained at German sabotage schools. Went to US with explosives and proceeded to various points in the US to destroy war industry. Military commission to try them for their offenses—presidential proclamation said they were subject to law of war. They argue that they are being denied 5th and 6th Amendment safeguards and that the president has no power to try them by military commission.

**Rule:** President has the power under Article 15 of the Articles of War to convene a military tribunal for the prosecution of enemy aliens in a time war with a formal declaration of war by Congress.
• Powers are not restricted by constitutional provisions in the 5th and 6th Amendments and in Article III, § which apply to civilians but not to enemy aliens in an alternative forum.