PART I: JUDICIAL POWER

-Marbury v. Madison: holds that Marbury is entitled to the commission, a judicial remedy will not interfere with the executive’s constitutional discretion, mandamus is the appropriate remedy, § 13 that authorizes the court to issue a mandamus is unconstitutional
-When the officer is not removable at the will of the executive, the appointment is irrevocable.
-The original jurisdiction of the Supreme Court cannot be enlarged by Congress or the Court.
-The Court has original jurisdiction in all cases involving ambassadors, other public ministers and consuls, and those in which a state shall be a party (Art. 3 § 2).
- Mandamus is left to appellate jurisdiction.
-The Constitution controls any legislative act repugnant to it.
-Judicial Review: The Court must determine which of the conflicting rules (constitution or statute) governs the case.
-This is the very essence of judicial duty.
-A law repugnant to the constitution is void. Courts, as well as other departments, are bound by that instrument.

Precedents for Constitutional Review
-No precedent in English common law.
-Some basis in Locke’s “Second Treatise on Government” and the fear of legislative abuse.
-Hamilton in Federalist No. 78 presupposes judicial review.

Supreme Court Review of State Court Decisions
-Martin v. Hunter’s Lessee: VA court refused to obey the mandate of the Court to grant land to Martin who had the land from U.S. treaty
-The appellate power must extend to state tribunals.
-Congress has the right to remove all cases within the scope of the judicial power from the state courts to the federal courts at any time before final judgment.
-State prejudices might obstruct the administration of justice.
-The motive is the importance and necessity of uniformity of decisions throughout the whole country upon all subjects within the purview of the constitution.

-Section 25 of the Judicial Act of 1789 granted the Court final review of the highest court in a State when the validity of a treaty was in question (appellate power not limited in Const.).
-The power of the Court to declare acts of the states void under the Constitution rests on stronger foundation than the power to strike down federal legislation.

The Centralized System of Constitutional Review in Europe
- Centralized constitutional review reserves constitutional issues for a special constitutional court.
- Constitutional review expressly provided.
- When German court declares unconstitutional, it is removed from the books (indirectly invalidated in U.S. because of stare decisis).
- German court can decide questions of abstract judicial review (no case or controversy yet, concrete review only), declare dangerous political parties unconstitutional, rule on disputes between branches, and hear individual constitutional complaints/
- Sixteen judges sit in two chambers (Senate); each Senate hears certain cases
- Germany also has a Supreme Court that hears appellate decisions with or without constitutional questions.

The Question of Congressional Control over the Appellate Jurisdiction of the Supreme Court
- **Ex parte McCardle**: while habeas corpus case was pending in Court, Congress repealed Court’s jurisdiction over the case
  - Congress’s power to make exceptions to the appellate jurisdiction of the Court is given by express words (Art 3, § 2).
  - Overt holding is that Congress can make exceptions restricting jurisdiction, even in pending cases, but a closing reading shows that the repeal did not remove the 1789 Judiciary Act that still gave the Court the power to grant habeas corpus.

- **U.S. v. Klein**: while a case on confederate pardons was pending, Congress passed a statute altering the affect of a pardon and removing the Court’s jurisdiction to her cases regarding presidential pardons
  - Congress cannot prescribe rules of decision to the judiciary in cases pending before it (when it violates separation of powers).
  - Court’s essential role is to protect the rights of dissidents and minorities whose interests are most likely to be sacrificed in majoritarian politics.

- **Robertson v. Seattle Audubon Society**: Congress passed legislation creating less strict environmental requirements and stated that the new requirements were to be applied to pending lawsuits as well
  - For statutory claims (where Congress can rewrite the substantive law), Congress can in fact micromanage courts’ application of law.
-Case is not about individual rights but rather policy. The Court demands a higher degree of scrutiny with rights.

**Result:** Congress can not amend or create statutes that alter pending lawsuits regarding individual rights (separation of powers problem), but in some cases, Congress may be able to do so in creating policy.
-There are internal (Art 3. § 2) restraints on Congress’s ability to organize courts as well as external constraints (stemming from elsewhere in the constitution (Bill of Rights) and essential functions of court).

**Political Question Doctrine:**
-**Baker v. Carr:** TN reapportionment of voting districts; presents no nonjusticiiable political question; reapportionment necessary for equal protection
  -The nonjusticiability of a political question is primarily a function of the separation of powers.
  -Unless one of the following is inextricable from the case, there should be no dismissal for political question:
    -Textually demonstrable constitutional commitment to another branch
    -A lack of judicially discoverable and manageable standards for resolving (only used as support, always a way)
    -Requires policy decision not suitable for judiciary
    -Resolution would express lack of respect to other branches
    -An unusual need to adhere to a political decision
    -The potentiality of embarrassment because decisions made by two branches
  -The court’s forbearance in deciding questions is self-imposed, so it can change its mind as to what is/not a political question.
-**Courts usually stay out of questions of:**
  -Foreign relations, dates of durations of hostilities, validity of enactments, and republican form of government (Guaranty Clause)
  -Will hear these cases if they do not violate any of the six standards

-**Goldwater v. Carter:** Carter terminated a treaty with Taiwan and recognized China; is a political question
  -Powell: A dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. The other branches must reach a constitutional impasse (case not ripe, would not be a political question).
-If Congress chooses not to confront the President, it is not the court’s task to do so.
-Rehnquist: It is a political question because it involves the authority of the President to conduct foreign relations and the extent to which Congress is authorized to negate the action of the President.

-Powell v. McCormack: House did not allow Powell to take his seat for disciplinary reasons; not a political question
-Textually demonstrable commitment to Congress is to judge only the qualifications set forth in the Constitution, not ones they create.
-Free from review for judging express requirements.
-The case only involves an interpretation of the Constitution, so there is no embarrassing confrontation between branches, or lack of respect to coordinate branches, or policy determination.
-Since it is only a constitutional interpretation, there are clearly judicially manageable standards.

-Nixon v. U.S.: judge impeached and challenges Senate impeachment procedure; nonjusticiable political question
-The lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to another branch.
-Senate has the sole power to try all impeachments. The word “try” lacks sufficient precision to afford any judicially manageable standard of review.
-Impeachment was designed to be the only check on the judiciary, and judicial review of impeachment proceedings is counterintuitive.

-Mora v. McNamara: requested a declaratory judgment that the Vietnam War was illegal; nonjusticiable political question (did not grant cert)

-Marbury: The acts of an officer conforming to the will of the President can never be examinable by the courts.

**Result:** In possible political question cases, the court uses the *Baker* criteria in a pretty straightforward manner and may consider other separation of power problems.

**PART II: CONGRESSIONAL POWER UNDER COMMERCE CLAUSE AND OTHER ART. I § 8 POWERS**

*Background to the Constitution*
-Art. I § 8, paragraphs 1-17 enumerate Congress’s powers (constitutive, creation).
Paragraph 18 is the Necessary and Proper Clause (declaratory, implied in the other expressly stated powers).

If viewed as constitutive (only what is absolutely necessary and proper) then is a restraint.

Background of the “Bank” Case

The question is whether chartering a national bank was within the powers delegated to Congress by Article I.

Madison and Jefferson argued that “necessary and proper” meant that only the means necessary to the end could be used, not any means possible.

Slippery slope claim: analyze the causal claim from the normative judgment (is that far of a reach desirable)

Hamilton argued that a government has the right to use all the means requisite and fairly applicable to the attainment of the ends of expressed powers. The only question is whether the mean to be employed has a natural relation to any lawful end (collection of taxes is end, the proposed bank is means).

McCulloch v. Maryland: MY imposes a tax on U.S. bank; MY claims bank is unconstitutional and, in constitutional, MY can tax the property of the U.S.

Delegation doctrine: the powers of Congress were delegated to it by the States. MY argues that states did not delegate power to form a bank.

Marshall: power delegated by people, some powers a state cannot delegate (raise army)

The U.S. government is supreme, and its laws, when made in pursuance of the constitution, form the supreme law of the law.

Useful only if federal statute is constitutional

A government, entrusted with such ample powers (lay taxes, regulate commerce, declare war, raise armies) must also be entrusted with ample means for their execution.

MY argues the Madison “only what is absolutely necessary” argument. The clause is restrictive of selecting means of executing the enumerated powers.

“Necessary” means no more than that one thing is convenient, useful, or essential to another. To employ the means necessary to the end means to employ any means calculated to produce the end.

The clause is not a limitation.

Also, the clause is with the grants of power, not the limitations (Art. 1 § 9).

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not
prohibited, but consist within the letter and spirit of the constitution, are constitutional.
-Marshall’s Five Methods of constitutional interpretation: (1) look to the text, (2) theory and structure of the government established by the Constitution, (3) consequences of decision, (4) history surrounding the adopting of the text (framers discussed and did not prohibit bank), and (5) precedent (had been a prior bank)
-The federal government is sovereign over all citizens (can tax them all). State governments are sovereign only over its own citizens (cannot tax citizens in other states or the government).
- The whole may tax the parts but not vice versa.

Congressional Regulation of Commerce: The Early Experience

-Hood: the state may not promote its own economic advantages by curtailment or burdening of interstate commerce
- The state may not protect its own inhabitants from competition or isolate its own economy. The economic unit is the nation.
- The interdependence of the states requires the protection of interstate movement of goods against local burdens.

-Gibbons v. Ogden: NY/NJ steamboat monopoly; congress may regulate
- Commerce “among” the states means commerce that concerns more states than one (navigation is part of commerce).
- The completely internal commerce of a state is reserved for the state itself.
- The commerce clause is plenary (may be exercised to the utmost).

-Paul v. Virginia: state statute discriminated against insurance companies incorporated in other states; not interstate commerce
- Issuing a policy of insurance is not a transaction of commerce
- Narrow reading of commerce clause, eventually overturned

-Kidd v. Pearson: state statute prohibited the manufacture of liquor; not interstate commerce
- The statute’s object is to prevent, not the carrying of liquors out of the state, but to prevent their manufacture within the state (formalist definition of manufacturing as local).

-The Daniel Bell: federal regulation applied to steamboat that traveled in entirely intrastate waters but transported interstate merchandise
- Federal jurisdiction would be entirely ousted if several agencies were allowed to each take up a product and transport it to the boundary line of a state.
- More expansive view of commerce power
-In early twentieth century, congress passed the Sherman Antitrust Act and the Interstate Commerce Act.

-The Lottery Case: federal law prohibiting transport of lottery tickets across state lines held constitutional
  -Commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages.
  -The power to regulate commerce includes the power to prohibit commerce (plenary power).
  -The end is to keep the channels of commerce free from the transportation of illicit or harmful articles. States can do so under the police power, so Congress can enact a law under the commerce clause with the same purpose.
  -Expansion of commerce power to include regulation of public morals

-**Formalism**: does not take impact into account, looks to see if certain categorical/conceptual criteria are satisfied; fails to address the problem that gave rise to the case in the first place
  -**Realism**: determine the actual economic impact or the actual motivation

-U.S. v. Knight: Sherman Act does not reach to a monopoly where all manufacturers are within one state
  -Manufacture is secondary to the primary power of regulating commerce. Manufacture affects commerce only incidentally and indirectly (direct/indirect = transport/manufacture).
  -Formal approach, does not take into account affect of monopoly in commerce of other states

-Shreveport Rate Case: a train may not set intrastate rates discriminating against interstate traffic
  -Congress’s authority, extending to interstate carriers as instruments of interstate commerce, embraces the right to control their operations in all matters have such a close and substantial relationship to interstate traffic that the control is (1) essential to securing of traffic, (2) efficiency of interstate service, and (3) maintenance of fair terms.
  -Wherever the interstate and intrastate transactions of carriers are so related that the regulation of one involves the control of the other, it is Congress that is entitled to prescribe the final and dominant rule.
  -Easy use of realist approach
- **Stafford v. Wallace:** statute prohibiting packers from engaging in a variety of improper trade practices
  - Whatever threatens to obstruct or unduly to burden interstate commerce is within the regulatory power of Congress (broad reading)

- **Hoke v. U.S.:** the Mann Act (public morals), prohibiting the transportation of women in interstate commerce for immoral purposes, was constitutional
  - One of the broadest early statements of the commerce-prohibiting power: commerce includes transportation, the power is plenary, and Congress may adopt not only means necessary but also those convenient to regulate any transportation.

- **Caminetti v. U.S.:** the Mann Act is applicable to activities not constituting commercialized vice

- **Hammer v. Dagenhart:** child labor law prohibiting transportation of goods manufactured by children held unconstitutional
  - The act does not regulate interstate commerce but aims to standardize workers’ age.
  - The mere fact that the goods were intended for interstate commerce does not make their production/manufacture subject to federal control.
  - The production of articles intended for interstate commerce is a matter of local regulation.
  - Decision ignores the effect of child labor on states that have abolished it.
  - A statute must be judge by its natural and reasonable effect.
  - Holmes dissent says that if act is within Congress’s power, indirect effects do not make it unconstitutional.

- **Result:** Early cases are inconsistent and have no straightforward method of determining what is/not interstate commerce (secondary/primary, close and substantial). There seems to be a consensus that manufacture is not commerce, and transportation is. If it is interstate commerce, Congress’ power is plenary.

**Constitutional Crisis**
- Roosevelt’s New Deal acts were received hostilely by the courts.

- **Schechter Poultry v. U.S.:** NLRA authorized pres. To approve codes of fair competition developed by boards from various industries; codes established wages and hours; poultry shipped interstate to Schechter; unconstitutional
Extraordinary conditions do not create or enlarge constitutional power.
The mere fact that there may be a constant flow of goods into a State does not mean that the flow continues after the property has arrived and become commingled with property in local use (formalist argument).
Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.
Hours and wages have no direct relation to interstate commerce (government argues that hours and wages lower prices).
Activities local in their immediacy do not become interstate because of distant repercussions.

-Carter v. Carter Coal: act confers power to fix the minimum and maximum price of coal at every coal mine; unconstitutional (Sutherland)
-Quotes Kidd in that manufacture is not commerce. Mining is a local activity.
The distinction between direct and indirect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about (one pound or one ton of coal does not make a difference).
The evils are all local evils regardless of the effect of prices on interstate commerce.
-Cardozo (dissent): Mining/agriculture/manufacturing are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other.

-FDR’s court-packing plan: for every justice over 70, the pres. could appoint another justice; meant to put his own people in the court

Judicial Resolution of the Crisis

-NLRB v. Jones & Laughlin: National Labor Relations Act, which establishes right to collective bargaining and created a board to enforce unfair labor practices, is constitutional
-Acts that directly burden or obstruct interstate commerce, or its free flow, are within the reach of congressional power.
-It is the effect upon commerce, not the source of the injury, which is the criterion.
The fact that the employees concerned were engaged in production is not determinative. The question is to the effect upon interstate commerce (Realist standard).
-The stoppage of production (by strike) would have a most serious effect upon interstate commerce. The effect would not be indirect or remote.
-Broad reading of commerce clause, probably saved the court from the court-packing plan.

-U.S. v. Darby: statute constitutional that prohibits interstate transport of lumber manufactured by workers paid less than minimum wage
-While manufacture is not itself interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.
-Interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows (overrules Child Labor argument).
-Whatever their motivation and purpose, regulations of commerce that do not infringe some constitutional prohibition are within the plenary power (extraordinary deference to Congress).
-Congress may choose the means reasonably adopted to the attainment of the permitted end, even though they involve control of intrastate activities.
-Unanimous decision

-Kentucky Whip v. Illinois Central: reaffirmed Lottery in upholding a law that made is unlawful to transport in interstate or foreign commerce goods made by convict labor in violation of state law
-Harm in transportation may come from subject (noxious chemicals), purpose (prostitution), federal policies, or protection of state policies

-Mulford v. Smith: the motive of Congress in exerting the power is irrelevant to the validity of the legislation

-Wickard v. Filburn: wheat marketing quota that includes wheat grown only for personal use is constitutional because of the aggregate of all small farmers on interstate commerce
-The power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices (opposite of Carter).
-Judiciary defers to Congress in conflicts of economic interest between the regulated and those who are advantaged by it.
-**Result:** Narrow formalistic readings of commerce clause disappeared in the face of national necessity and the threat of court-packing. In the end, the court allowed any law Congress had a reasonable basis for to stand and did not question Congress’ motives. Substantial economic effect test, not direct/indirect

*State Action Problem*

- First public accommodations statute, based only of 14th Amend., declared unconstitutional (1883); second statute, based on 14th Amend. and Commerce Clause, unanimously upheld
- Kennedy’s believed the statute’s power came from 14th Amend., but the administration relied primarily on the commerce clause

-Civil Rights Cases: 1875 public accommodations statute held unconstitutional; no power under 14th Amend.
- The 14th Amend. restricts state actions, not the actions of individuals in society towards each other.
- The question is whether the government is sufficiently involved so that the ostensibly private action becomes state action.

-Marsh v. Alabama: company town could not prevent expression of first amendment rights
- The more an owner, for his advantage, opens up his property for use by the public in general, the more his rights become circumscribed by the constitutional rights of those who use it.
- A state cannot permit a corporation to govern a community of citizens so as to restrict their fundamental liberties.
- Constitutional rights trump property rights and public policy.
- State action also applies to public shopping centers (*Logan Valley*).

-Terry v. Adams: private political group chose the “suggested” the political candidate and excluded African-Americans from the club
- A state violates the 15th Amend. to permit within its borders the use of any device that produces the equivalent of a prohibited election.
- Private club is instrumentality of the state when it undermines constitutional guarantees.
- Prevents people from voting and state does nothing to prevent, so in violation of 15th Amend.

-Shelley v. Kraemer: racially restrictive housing covenants unconstitutional because judicial enforcement is state action
-The action of state courts in enforcing a substantive common-law rule formulated by those courts may not result in the denial of rights guaranteed by the 14th Amend.
-State action includes action of state courts and judicial officers.

-**Result:** State action can be found in any act remotely related to the state or if the state refuses to act to protect a right.

*The Civil Rights Cases*

- The 1964 Civil Rights Act provides equal access to places of public accommodation is its operations affect commerce or if discrimination by it is support by state action.
- Inns and hotels affect commerce per se.

- **Heart of Atlanta v. U.S.:** 1964 Civil Rights Act as applied to inns is constitutional under the commerce clause
  - Discrimination by race burdens interstate commerce, in a qualitative and quantitative manner.
  - Congress was not restricted by the fact that the particular obstruction to interstate commerce was also a moral and social wrong.
  - Extraordinary deference to Congress on means

- **Katzenbach v. McClung:** restaurant that received food from interstate traveled is subject to Civil Rights Act
  - Congress has determined that refusals of service to blacks have imposed burdens upon the interstate flow of food and upon the movement of products generally.
  - Where legislators have a rational basis for finding a chosen regulation scheme necessary to the protection of commerce, the court’s investigation is at an end.
  - Distinction between enforcement of morals (*Lottery*) where Congressional power ought not to be recognized and enforcement of morality (nondiscriminatory policies) where power is appropriate
  - Moral end, commerce clause means

- **Result:** The Court wants to enforce the provisions of the Civil Rights Act, so it will find ways for the commerce clause to apply; very deferential to Congress, rational basis review only

*Crime Regulation*

- **Perez v. U.S.:** loan sharking held to affect interstate commerce so may be regulated under the commerce clause
-Most federal statutes criminal statutes are for crimes against the government or criminal activity crossing state lines.
-Commerce clause reaches into three areas: (1) channels of interstate commerce misused (shipment of stolen goods, kidnapping), (2) protection of the instrumentalities of interstate commerce (thefts from interstate shipment), and (3) those activities affecting commerce.
-Activity can be reached by Congress if it exerts a substantial effect on interstate commerce

Change in Direction of Court and Commerce Clause

-U.S. v. Lopez: statute creating a federal offense for possessing a firearm in a school zone is not within the powers of Congress
  -The proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.”
  -The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, affect any sort of interstate commerce.
  -Transaction must be commercial in nature to be open to congressional regulation.
    -Just as formalist definition as direct/indirect
  -Court does not consider economic effects because regulation is non-economic.
  -Slippery slope: if Congress could regulate here, they could regulate anywhere
  -Thomas (concur): get rid of substantial effects test and return to more original understanding
  -Kennedy (concur): more important is federal/state power balance; statute intrudes upon traditional state concern (education);
    Paulson’s favorite part
  -5/4 decision

-U.S. v. Morrison: Congress did not have authority to create a federal civil remedy for victims of gender-motivated violence
  -Unlike Lopez, Congress had express findings on how sex crimes affected interstate commerce. Congressional findings alone will not sustain the constitutionality.
  -Test is whether the statute affects an economic endeavor with substantial effects on interstate commerce.
    -Gender-motivated crime, like gun possession, is not economic activity.
  -The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states (Perez?).
-Dissent notes the formalist notion on non/economic distinction and refutes the slippery slope charge because Congress will restrain itself (or the people will) if it encroaches too much upon state powers (*Gibbons* defer to Congress argument).

**-Result:** Court looks to the three categories. If the case is in the third, the test is whether the statute affects an economic endeavor with substantial effects on interstate commerce. The court is split on whether to decide substantiality themselves or defer to Congress. If the activity is economic, Court will defer as before.

*Congressional Regulation Pursuant to Other Art. I, § 8 Powers*

**The Taxing Power**

-Congress has repeatedly invoked the taxing power when the commerce power seemed unusable

-**Child Labor Tax Case:** law imposed a tax on employers of children
  -So long as raising revenue is primary motive, secondary motive is not important. Taxes are outside Congress’ powers when they primary motive is punishment/regulation and the secondary is raising revenue.
  -When motive is raising revenue, excessive nature of the tax is irrelevant.

-U.S. v. Kahriger: an occupational tax on bookies was constitutional
  -Unless there are penalty provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.
  -End of the *Child Labor* pretext test

**-Result:** Court no longer looks to pretext; if tax is reasonable, it is permissible. To uphold tax measure, argue that it is reasonably a revenue-raising measure and court should not look into motive; to defeat, argue that revenue-raising is not congressional motive (will probably fail)

**The Spending Power**

-Probably the most important of all Art. I § 8 powers in its impact on the actual functioning of the federal system.
- Litigation about the scope of power has been rare because restrictive doctrines regarding standing to sue have traditionally barred taxpayer challenges to federal spending programs.

-U.S. v. Butler: act that paid farmers only to farm a limited amount of acreage was not a valid exercise of spending power; another invalidated New Deal act
-The spending clause confers a power separate and distinct from other enumerated powers. Its confines are set in the clause that confers it (qualified by the phrase “for the general welfare”) (Hamiltonian view followed by court).
-Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action (economic coercion).
-Congress has no power to enforce its commands to the end sought by the act. It may not indirectly accomplish those ends by taxing and spending to purchase compliance.
-Stone (dissent): this is not economic coercion because threat of loss, not hope of gain, is the essence of economic coercion.

-Steward Machine v. Davis: unemployment compensation provision provided a tax credit to induce the enactment of state laws that complied with federal standards held constitutional
-State claims coercion because government places conditions on the benefits. Court says there is no coercion because coercion is when you have no choice (difference between motive and coercion).
-Saps Butler of most of its force

-Result: Resolution of court crisis again removes formalistic test (coercion) and relies on discretion of Congress in absence of overtly unconstitutional measure

The War Power and Foreign Affairs

-Woods v. Cloyd W. Miller Co.: congressional authority to regulate rents after the declaration of peace held constitutional
-The war power does not necessarily end with the cessation of hostilities.
-Congress may not invoke the war power indefinitely after the war has ended, but here they are dealing with a condition of which the war was a direct and immediate cause.
-Jackson: War powers should not last as long as the effects and consequences of the war.

-Missouri v. Holland: statute based on U.S. treaty with Britain regarding the killing of migratory birds is constitutional
-What an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty may be able to do (power of U.S., not power of Congress).
-The executive has the express right to make treaties, and under Article VI, treaties are part of the supreme law of the land (after ratified by 2/3 of Senate). A statute made to enforce a treaty is valid under the necessary and proper clause.
-Bricker Amendment tried to amend the constitution so that a treaty could only become effective as law through legislation that would be valid in the absence of a treaty. It failed just short.

-Reid v. Covert: executive agreement with Britain permitted military trials of U.S. servicemen and dependants; treaty unconstitutional because violated 5th and 6th Amendments
   -It would be manifestly contrary to the objectives of those who created the Constitution to construe Article VI as permitting the U.S. to exercise power under an international agreement without observing constitutional prohibitions.

-Result: While a treaty can do what a act of congress cannot, a treaty cannot undermine the constitution or guaranteed rights.

PART III: COURT REGULATES IN ABSENCE OF CONGRESSIONAL REGULATION

DORMANT COMMERCE CLAUSE
   -How would the court respond if there were congressional regulation

Question of “Exclusivity”

-Gibbons v. Ogden: Congress and NY issued steamboat licenses
   -The court did not resolve the question of whether, in the absence of a conflict between the state and federal license, the state was free to regulate and license navigation.
   -State’s argument is that an affirmative grant of power (interstate commerce regulation) is not exclusive, unless in its nature it cannot be exercised by both federal/state.
      -Defense, raise army
   -Federal argument, and that accepted by Marshall, is that the full power to regulate implies the whole power.
   -In concurrent powers (taxing) each party has full power within its own realm.

-Plumley v. Commonwealth of Massachusetts: law did not violate Congress’ commerce power in prohibiting the sale of oleomargarine in-state
   -The state should have plenary control over the protection of its citizens against fraud and deception in the sale of food products (police power regulation), but the state does not have power to regulate.
-**Cooley v. Board of Wardens**: PA law requiring the use of a local pilot in the DE River did not conflict with Congress’ power to regulate commerce.

- The grant of commercial power to Congress does not contain any terms that expressly exclude the states from exercising an authority over its subject-matter.

- Whatever subjects of the commerce power are in their nature national, or admit only of one uniform system, may justly be said to be of such a nature as to require exclusive legislation by Congress.

- Looks not to nature of power but to the nature of the subject (need for local control)

- Congress may delegate a subject not requiring uniformity to the states.

- **Prudential Ins. Co.**: where Congress declares that a state regulation is in the public interest, the statute survives a challenge even though the statute might well fail in the absence of congressional authorization.

- **Result**: Today, no exclusivity doctrine survives. A state statute is valid in absence of a good Congressional statute or competing national interest.

**Deference to the State versus the Balancing of Competing Interests**

- **South Carolina v. Barnwell**: SC’s specifications of truck size did not impose an unconstitutional burden upon interstate commerce.

  - It has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character, may never be dealt with by Congress (state roads may be one).

  - State purpose affecting interstate commerce, whose purpose is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition.

  - So long as the state action does not discriminate, the burden on interstate commerce is one that the Constitution permits it.

  - The judicial function stops with the inquiry whether the means chosen are reasonably adopted to the end sought. The court is to ascertain upon the whole record whether it is possible to say that the legislative has a rational basis.

  - Deference to legislature on safety grounds.

- **Southern Pacific v. Arizona**: AZ law limited train size within state; unconstitutional burden on commerce.
-Where Congress has not acted, the Court is under the commerce clause the final arbiter of the competing demands of state and national interests.
-If the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national system.
-Shift from legislative deference to balancing test between costs to interstate commerce and benefit to the state.

-Pike v. Bruce Church: AZ required fruit grown in the state to be packed in a certain way; affected out-of-state packers; unconstitutional
-Where the statute regulates without discrimination to effectuate a legitimate local interest, and its effects on commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation to the putative local benefits.
-If a legitimate local purpose is found, the question becomes one of degree (balancing test).
-Court also looks to see if it could be promoted as well with a lesser impact on interstate activities (strict scrutiny?).

-Bibb v. Navajo Freight Lines: IL mudguard law would force interstate trucks substantial time and money, so is unconstitutional burden
-This is one of the few cases where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce.
-A state that insists on a design out of line with the requirements of almost all the other states may sometimes place a great burden of delay and inconvenience on those interstate motor carriers traveling in its territory.
-Balancing test goes against state because of dubious safety rationale and direct conflicts with other states

-Kassel v. Consolidated Freightways: IA statute prohibits use of double trailers; unconstitutional because the burden has no significant countervailing safety interest
-If safety justifications are not illusory, the court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce (but the court will examine whether the safety concerns are legit).
-IA’s evidence is not sufficient to prove not safe.
-The state cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it.
-Balancing test against IA because dubious safety rationale
-Brennan (concur): three methods of looking at dormant commerce clause cases: (1) deference to state legislatures; (2) balancing in safety cases; (3) actual/discriminatory purpose, established by imputing the bad purpose of the legislature
-Rehnquist (dissent): defers to state on safety grounds

**Result**: To pass muster, state legislation affecting interstate commerce must be nondiscriminatory. The benefits to the state (whether safety or otherwise) must be greater than the burdens imposed on commerce. The court will most likely examine the safety rationale proposed by the state.

*Incoming Commerce*

-Baldwin v. G.A.F. Seelig: out-of-state milk importers must pay a tax; unconstitutional as tantamount to a customs tax
  -Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state.
  -When a state discriminates against interstate commerce, its actions are presumptively invalid.
  -Question to be answered is whether the state regulation gives local businesses an unfair advantage over out-of-state competitors, regardless of the justification articulated by state legislators.
  -If there was a less discriminatory means of attaining the goal, then the inference arises that the state “really” intended to regulate interstate commerce.

-Welton v. Missouri: statute that required licenses for peddlers selling out-of-state goods but not MO goods was discriminatory
  -A state may not subject special restrictions to interstate commerce until it has become incorporated into the property of the state.

-Hunt v. Washington State Apple: NC statute required apple crates to bear only the national grade; discriminated against Wash. apple sellers
  -Statute burdened out-of-state sellers with different grades with no safety or other benefit to state. There were also less discriminatory means available.

-Edwards v. California: CA law prohibiting the bringing of an indigent person into the state unconstitutional
  -It is certain that a state may not isolate itself from difficulties common to all states by restraining the transportation of persons and property across its borders.
- **Healy v. Beer Institute**: CT statute required that beer prices were no higher than prices in bordering states; discriminatory
  - The statute discriminates against brewers and shippers of beer engaged in interstate commerce and applies solely to interstate brewers.
  - If other states could enact such a law, the lowest price in the nation would be the lowest price everywhere.

- **Dean Milk v. Madison**: Madison, WI ordinance prohibits sale of milk pasteurized from outside a 5 mile radius (wanted to inspect plants); discriminatory
  - Madison clearly discriminates against interstate commerce, but it can do so if there is a clear health and safety interest and no reasonably nondiscriminatory alternative.
  - Since there are alternatives, is discriminatory

- **Breard v. City of Alexandria**: law requiring consent of residents to engage in door-to-door sales upheld
  - Where there is a reasonable basis for legislation to protect the social (not economic) welfare of a community, the court will not deny it.

**Result**: A discriminatory law is presumptively invalid, and it takes a lot to overcome the presumption. A valid purpose and adequate means will fail. Only a valid purpose and the least discriminatory means possible will pass muster. Also, the court will find evidence of discrimination very easily.

  - If has discriminatory effects, then use less discriminatory means test
  - If discriminatory on its face of has bad motive, then justifies inference of discriminatory means

**Environmental Issues**

- **Philadelphia v. New Jersey**: NJ did not permit transport of trash to its landfills from out-of-state; discriminatory
  - Whatever NJ’s purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from origin, to treat them differently.
  - A state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders.
  - No basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other (not a quarantine law).
  - Could limit landfill use generally
Hughes v. Oklahoma: OK statute prohibiting sale of its minnows outside the state unconstitutional

- Challenges under the commerce clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources (state’s wildlife is not the property of the state).
- Apply *Pike* test
- Burden is on party to show discrimination; once shown, burden is on state to justify it in terms of local benefits and less discriminatory means

Maine v. Taylor: ME statute prohibited the import of live baitfish; upheld because legitimate concern and no less discriminatory means

- Uses *Hughes* standard
- The proffered justification for any local discrimination against interstate commerce must be subjected to the strictest scrutiny.
- Factfinding is the basic responsibility of district courts, and appellate courts should respect their findings.
- It is not required that a state develop new and unproven means of protection at an uncertain cost in order to create a less discriminatory means.

**Result:** In environmental cases, the state has to have a legitimate need to protect and no less discriminatory means. The state’s interest cannot be simply to protect is natural resources from out-of-state users because the less discriminatory means is to limit the resource generally.

**Preemption**

*Rice:* presumption of favor of state regulation

- Presumption may be superceded by Congress if congress evidences a purpose to do so by:
  - scheme of federal regulation so pervasive so as to leave no room for the states to supplement it
  - dominant federal interest, assumed to preclude enforcement of state laws
  - state policy produces a result inconsistent with federal objectives

- *Rice* criteria used frequently

Hines v. Davidowitz: PA alien-registration statute conflicted with federal statute; federal statute preempts PA’s

- First must determine whether PA law stands as an obstacle to the accomplishment and execution of the objectives of Congress (*Rice* 3)
-The nature of Congress’ power, the object sought to be attained, and the character of the obligations imposed by law, are all important in considering whether supreme federal enactments preclude enforcement of state laws on the same subject.

-Pennsylvania v. Nelson: PA statute that prohibited sedition against PA and the U.S. government struck down because federal legislation already governed sedition against the U.S.
-Uses Rice criteria and applies all three

-Askew v. American Waterways: FL statute imposing costs for damage incurred by oil spills was not preempted by federal law imposing a minimum liability for costs incurred by the federal government in cleaning up spill
-No collision between the federal and state act.

-City of Burbank v. Lockheed: ordinance setting times when no planes could take off preempted by FAA and Noise Control Act
-Pervasive control vested in federal agencies leaves no room for local control (Rice 1).

-Pacific Gas and Electric v. State Energy: CA statute preventing construction of nuclear power plants not preempted by Atomic Energy Act that set national safety standards for nuclear facilities
-AEA has complete control over safety standards, so state cannot makes its own decisions regarding the safety of nuclear power.
-AEA does not require construction of plants or determine need for power, so state can decide for economic reasons not to build (but not for safety reasons)

-Ray v. Atlantic Richfield: federal law regarding navigation of Puget Sound preempts some of WA law regarding same thing but not all of the law
-Specific state safety requirements will not stand in the face of federal requirements on the same topic.
-State can regulate pilotage of vessels Congress the Act does not address.

-Result: A state and federal law on the same subject can be concurrent so long as the Rice criteria do not apply

State as Market Participant

-Hughes v. Alexandria Scrap: MD pays a bounty to in-state and out-of-state auto hulk processors but required the latter to provide more title documentation; constitutional
-Nothing in the commerce clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.
-If state is acting as market participant, it can discriminate as to who it trades with.

-Reeves v. Stake: SD sold excess cement production to neighboring states but limited sales to SD during shortage; constitutional
  -Market participant sale to only instate buyers is protectionist only that it limits money spent from its treasury to those it was meant to serve (like education, state-run power plant).

-South-Central Timber v. Wunnicke: Alaska required that timber taken from state lands be processed within the state prior to export; unconstitutional
  -Unlike the other cases, this imposes conditions down-stream (foreign commerce implicated), involves natural resources (Hughes), and restricts resale.
  -The limit of the market-participant doctrine must be that it allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.
    -Cannot impose conditions outside that market

-Result: If a state is acting as a market participant, rather than a market regulator (is spending its own money to create), there is no limitation on who is can sell to. The market participant can only affect its own market, not other related markets.

Interstate Privileges and Immunities
- The Privileges and Immunities Clause (Art. IV § 2) used for arguments that the court must account for fundamental rights and liberties even when they are not specified by the Constitution.
  -Founders meant as a command doctrine (outsider be treated as well as the insider)

-Corfield v. Coryell: fundamental privileges and immunities are:
  -Protection by the government
  -enjoyment of life and liberty
  -the right to pass through or reside in another state, including employment in the state
  -to claim the benefit of habeas corpus
  -to institute and maintain action in courts of state
  -to take, hold, and dispose of property
  -exemption from higher taxes than are paid by other citizens
  -right to vote
-Access to oyster beds can be limited to NJ residents.

-Baldwin v. Fish and game Commission: cost of hunting license more expensive for out-of-state hunters; constitutional
  -P & I Clause has been interpreted to prevent a state from imposing unreasonable burdens on citizens of other states in their pursuit of common callings within the state.
  -The legislature is not bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.
  -A state’s interest in its resources must yield when it interferes with a nonresident’s right to pursue a livelihood in a state other than his own.
    -Elk hunting is a recreation, not employment
  -Brennan (dissent): Discrimination against nonresidents permissible when (1) nonresidents are the source of the problem, and (2) the discrimination practice bears a substantial relation to the problem

-Toomer v. Witsell: SC law imposing a much larger boat fee for non-resident commercial fishers held unconstitutional
  -Employment; fee not proportional to any legit protection

-Hicklin v. Orbeck: Alaska statute required employment of residents over nonresidents in construction projects; unconstitutional
  -Statute is violate of P & I Clause because discriminates against non-residents seeking to ply their trade within the state.
  -Nonresidents were not cause of unemployment; untrained workers were the problem
    -Must be a reasonable relationship between the dangers represented by non-citizens and the discrimination practiced upon them (Brennan’s Baldwin dissent)

-Supreme Court of NH v. Piper: rule limited NH bar to state residents held unconstitutional
  -Employment; no basis for the discrimination

-United Building v. City of Camden: city ordinance requiring percentage of city contractors be city residents upheld
  -Statute speaks to a legit problem (middle class flight) and problem is caused by nonresidents, but is remanded to see if really is a problem

-Result: P & I Clause cases usually only employment cases. States must have a valid reason to exclude out-of-state workers (they must be the problem).
State Immunity

-Question is whether the 10th Amend. insulates core functions and interests of state government from federal influence

-National League of Cities v. Usery: Congress extended minimum wage to public employees employed by the states; unconstitutionally interferes
  -Congress may not exercise power in a fashion that impairs the states’ integrity or their ability to function effectively in a federal system.
  -It is one thing to recognize the authority of Congress to enact laws regulating individual businesses. It is quite another to uphold a similar exercise to the states.
  -States are immune from regulation under the commerce clause where functions essential to separate and independent existence of the state are concerned.
  -May substantially restructure affairs of local governments, supplants policy choices of states’ elected officials

-Garcia v. San Antonio Transit: municipal ownership of mass-transit system is not exempt from minimum wage standards
  -Overrules National League because the boundaries of regulatory immunity test (traditional government function) are unworkable
  -The role of federalism in a democratic society (state sovereignty) assures the states of autonomy.
  -The political process determines that autonomy (through representatives in congress), not the judiciary.

-Printz v. U.S.: Brady Bill forcing local officials to conduct background checks; unconstitutional because compels state officers to enforce a federal policy (incompatible with dual sovereignty)
  -Where the whole object of a law is to direct the functioning of a state executive, and hence to compromise the structural framework of dual sovereignty, a balancing of burdens/benefits is inappropriate.
  -State courts can enforce federal policy (adjudicative functions), but state executive cannot (administrative functions).

-Alden v. Maine: probation officers filed suit against the state as their employer; case dismissed because a citizen cannot sue the state
  -Congress does not have the power to subject nonconsenting states to private suits for damages in state courts.
  -States are immune from suits by nonresidents by the 11th Amend.
  -States retain a residuary and inviolable sovereignty in addition to the sovereignty of the nation.
-States must consent to suits brought by others states or the federal government.
-Sovereign immunity applies to states but not lesser entities or state officers.

**Result:** If the federal act interferes with the principle of dual sovereignty, the court will probably side with the state. Judiciary will decide if immunity is infringed upon and not leave it to legislators.

**PART IV: SCOPE AND ROLE OF JUDICIAL FUNCTION**

-Criticism of the judiciary is especially intense when it strikes down legislation on grounds that it conflicts with a right not actually enumerated.
-The interpretivist position comprehends theories of review grounded in literalism and originalism.
-Noninterpretivists endorse a judiciary that develops rights and liberties, even if not enumerated, and assumes the risk of working with natural law.

*Slavery and the Constitution*

-13th Amend. invalidates 3/5 person clause and fugitive slave clause

-Groves v. Slaughter: Mississippi constitution forbade importing slaves into the state for sale; clause requires legislation, so moot point
-  
  -Baldwin (concur): Although a state could abolish slavery, it cannot allow slavery and prohibit the slave trade (slaves items of commerce if states recognize them as such).
-Wherever slavery exists, by the laws of a state, slaves are property in every constitutional sense, and for every purpose.

-Prigg v. Pennsylvania: Pennsylvania law prohibiting self-help in recapturing escaped slaves held unconstitutional
-  
  -Central to the decision was the conclusion that fugitive slave matters were within the federal government’s exclusive jurisdiction (federal question).
-Subject of fugitive slaves in Art. IV § 2 and is self-executing
-  
  -The fugitive slave clause, interpreted in the only matter that is sensible, manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.
-  
  -Purpose of Fugitive Slave Act (which is superior to any conflicting state law) is to provide for state help and redress if self-help fails.
-Dred Scott v. Sandford: status of nonfugitive slaves in free states; slave claimed his earlier residence in a free state liberated him from slavery
- Taney: Three issues: (1) Scott’s status was governed by the law of the forum state, MO; (2) MO Compromise unconstitutional; and (3) federal court lacked jurisdiction because blacks were not citizens.
- Just because one has all the privileges and immunities of a state does not mean that he must be a citizen of the U.S.
  - No state can create a new U.S. citizen (uniform rule of naturalization).
  - Blacks were not included in “all men are created equal” because the Framers never meant that reading.
  - Curtis (dissent): some blacks were citizens when the constitution was written, and it is unlikely that the document removed rights from citizens.

-Result: All cases overruled by Civil Rights Amendments. Dred Scott’s differentiation between state and national citizens still stands. Paulson hates Taney.

*Rise of So-Called Substantive Due-Process*
- Is due process used as a check on legislative power

-Slaughter-House Cases: state-granted monopoly of slaughter houses; butchers claim under 14th Amend.; law upheld
  - The 14th Amend. was meant for the benefit of blacks only and does not change any rights of whites.
  - The P & I clause of 14th Amend. refers to U.S. citizens only and does not enforce the Bill of Rights protections against the states.

  - What the P & I clause could not do, due process clause could

-Lochner v. New York: wage and hour regulation of baking industry violated liberty of contract and thus due process clause
  - The general right to make a contract in relation to one’s business is part of the liberty of the individual protected by the 14th Amend.
  - The act that interferes with a man’s right to be free in his person and in his power to contract must have a direct relation, as a means to an end, to a legitimate state interest (health and safety) to be valid.
  - Holmes (dissent): begins his substantive due process dissent; on state policy questions the state is sovereign

-Muller v Oregon: minimum hour requirement for women upheld against substantive right to contract claim
Legislation designed for women may be sustained, even when like legislation is not necessary for men and could not be sustained, because women have special needs and conditions.

-Adkins v. Children’s Hospital: minimum age for women and children statute unconstitutional; later overruled
  -Sutherland: Every possible presumption is in favor of the validity of an act of Congress until overcome beyond reasonable doubt.
  -That the right to contract is a part of the liberty protected by the due process clause is no longer open to question.
  -The exercise of legislative authority to abridge the freedom to contract is justified only by the existence of exception circumstances.
  -Women no longer need special protection (right to vote now), so their right to contract prevails over police power protection of them.

-Baldwin v. Missouri: Holmes (dissent): Holmes last-ditch effort to quash substantive due process.
  -His influence, after his resignation, began to prevail.

-Nebbia v. New York: state milk price controls upheld
  -Argument is that the milk industry is not a public utility, so it cannot be controlled by the state.
  -A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted for its purpose.
  -No more independent review of economic legislation; must have proper legislative purpose and means reasonably related to ends (rational basis).

-West Coast Hotel v. Parrish: minimum wage for women upheld
  -Realist view at unequal bargaining conditions and other effects
  -Sutherland’s dissent very formalistic (interpretation of constitution does not change over time). He and the other dissenters (Roosevelt court) weren’t there much longer.

-U.S. v. Carolene Products: federal interstate milk transportation act upheld
  -No review of economic legislation other than rational basis, no substantive due process for economic freedom
  -Facts supporting the legislative judgment are to be presumed.
  -Court anticipates a higher standard (strict scrutiny) when prejudice against minorities is concerned.

-Olsen v. Nebraska: state employment agency compensation act upheld
- We are not concerned with the wisdom, need, or appropriateness of the legislation. Differences of opinion should be left to legislators.

- Whalen v. Roe: state recording of names of those who received prescriptions upheld
  - State legislation that has some effect on liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary.
  - Individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.

- Result: Economic substantive due process is completely dead, but it celebrated a heyday in which it invalidated minimum wage statutes. Question in economic due process cases was whether the public welfare measure or individual rights was most important.

Incorporation

- Making the Bill of Rights applicable to the states

- Barron v. Baltimore: suit to recover damages to property caused by the city; Marshall held 5th Amend. did not apply to states
  - The constitution was ordained by the people of the U.S. for themselves, for their own government, not for the government of the individual states.
  - Takings clause applicable only to U.S. government.

- Palko v. Connecticut: double jeopardy clause should not be incorporated through the 14th Amend.; selective incorporation theory
  - Argument is that whatever would be a violation of the original bill of rights if done by the federal government is now equally unlawful by force of the 14th Amend. if done by a state (court rejects).
  - Cardozo: Those rights “implicit in the concept of ordered liberty” become valid against the states.
  - Double jeopardy is not “of the very essence of a scheme of ordered liberty,” nor does its presence violate a “principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.”
  - The process of incorporation has its source in the belief that neither liberty nor justice would exist if the right was sacrificed.

- Adamson v. California: self-incrimination not incorporated
  - Not a right implicit in the concept of ordered liberty
-It is an illogical reading of the 14th Amend. to believe that it protects only a summary of the Bill of Rights protections and could not include others.
-Black (dissent): dislikes the court’s “natural law” formula for deciding (substitutes its own concepts of justice for that of constitution) and argues that natural reading of 14th Amend. is that it did apply bill of rights to states

-Result: Selective incorporation practically has been total incorporation (only grand jury clause of 5th and guarantee of jury trial in civil case remain specifically rejected); selective incorporation still used

Modern Substantive Due Process and the Privacy Doctrine
-Substantive due process applied to personal and family liberty

-Meyer v. Nebraska: due process right encompassed teacher’s right to teach German and parent’s right to have him instruct their children
-Statute fails the rational basis test because is arbitrary and capricious
-If there was a fundamental right to learn German would use strict scrutiny (rational basis for policy; strict scrutiny for rights).
-Liberty means right of the individual to engage in common occupations, acquire useful knowledge, marry, establish a home and bring up children...

-Poe v. Ullman: Connecticut birth control prohibition raised no controversy because not enforced
-Harlan (dissent): Liberty includes a freedom from all substantial arbitrary impositions and purposeless restraints.

-Griswold v. Connecticut: same Connecticut statute unconstitutional because against right to privacy
-Specific guarantees in the bill of rights have penumbras formed by emanations from those guarantees that help give them life and substance.
-Right to privacy found in penumbra of 1st, 3rd (quartering of soldiers), 4th (search and seizure), 5th (self-incrimination), and 9th (enumeration not meant to deny others).
-Concur: right of privacy in marriage fundamental because rooted in traditions
-Black (dissent): No stated right to privacy, so there is none.
-Eisenstadt extended right of privacy beyond married couples to the right of the individual in family matters.
-Interpretivists (Bork) hate the decision because no textual right to privacy.
-Roe v. Wade: statute making it a crime to have an abortion struck down as against a woman’s right to privacy
  -Right of privacy articulated in Griswold grounded in the due process clause of 14th.
  -Since right to privacy is fundamental, law must pass strict scrutiny (justified only by a compelling state interest in the least restrictive means).
  -Right of privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.
  -At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of abortion (right is qualified).
    -State may regulate abortion to the extent that the regulation reasonably relates to the preservation and protection of maternal health.
  -Rehnquist (dissent): in creating the amendment, they did not intend to create a right to abortion (interpretivist approach)

-Regardless of what original intentions may have been with respect to the court’s role, the judiciary has established itself as an institution that is expected at times to second-guess the wisdom and even displace the output of the legislative process.
  -Later cases have distinguished between the government’s affirmative interference with abortions and affirmative actions to support them (state does not have to help pay for them.
  -Parental notification statutes upheld with judicial bypass.

-Cruzan v. Director, Missouri: state may require clear and convincing evidence of person’s consent to die
  -Like the right to abortion, the right to die implicates the due process freedom from bodily restraint and intrusion.
  -State’s interest in preserving a human’s life may be stronger than its interest in preserving a fetus.
  -A person does have a constitutionally protected liberty interest in refusing unwanted medical treatment.
  -The constitution does grant a competent person a constitutionally protected right to refuse lifesaving treatment.

-Bowers v. Hardwick: right for homosexuals to engage in sodomy not recognized (specificity problem, framing the issue with such that it is reduced to absurdity)
  -Due process clause protects only traditionally recognized rights from legislative interference (rights deeply rooted in history and tradition).
-Otherwise illegal conduct is not always immunized with it occurs in the home.
-Look to history and religion to show that sodomy has always been condemned, and the framers could never have intended it to be protected.
-Blackmun (dissent): involves right to be left alone and independently define one’s identity, so should be protected; men have fundamental interests in controlling the nature of their intimate associations with others; right to be secure in own homes is fundamental (sex not dangerous to persons engaged or others like drugs).

-Lawrence v. Texas: the due process clause protects the right of free adults to engage in private conduct in the exercise of their liberty (much different framing of issue); overrules Bowers
- The statutes seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals (Blackmun’s Bowers dissent, autonomy of self).
- The relevant history and tradition are of the last half century, not the history of time (states and Europe abolishing sodomy laws).
- Court does not decide under equal protection because states could prohibit the same conduct between heterosexuals as well and get around ruling.
- Dissent (Scalia): looks to issues as right to participate in homosexual sodomy; end of moral legislation

-Result: The right to privacy (free from bodily intrusion) stems from 14th. Blackmun’s idea of autonomy of self is prevalent in recent decisions. The test in right of privacy cases is determined by balancing liberty interests against the relevant state interests (not strict scrutiny because ss is a presumption of a right that the state has the burden to show they are not unfairly limiting, almost is more like rational basis, which is what is used in Lawrence).

Approaches to Constitutional Interpretation
- Interpretivism (intentionalism, originalism): constitutional questions are decided by looking to the Framers’ or Reconstruction Congressmen’s intentions
- Bork: Majority tyranny: when legislation invades the areas properly left to individual freedoms
- Minority tyranny: when the majority is prevented from ruling where its power is legitimate
- The court’s power is legitimate only if it has a valid theory, derived from the constitution, of the respective spheres of majority and minority freedom.
-Deciding without a constitutional basis opens a chasm between the reality of the court’s performance and the constitutional and popular assumptions that give it power.
-Judges must stick close to the text and the history, and their fair implications, and not construct new rights.
-A court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.
-Why should the court, a committee of nine lawyers, be the sole agent of change?
-Substantive due process, as revived by Griswold, is and always has been an improper doctrine.
-We are at the mercy of legislative majorities when the constitution is silent.

-Against interpretivism: Given what it takes to amend the constitution, it is likely that a recent amendment would represent at least the sentiment of a majority.
-Dworkin: Impossible to determine the intention of a particular delegate, nonetheless the intention of the delegates as a whole.
-Have to look to whose intention counts, what psychological state counts (meaning or hope), what happens when they never thought of a possible aspect (just because they never contemplated it doesn’t mean they disagreed)

-For Noninterpretivism: the moral reading of the law has been around since there was law, and even judges that oppose it do it anyway, for any decision is at least partially based on one’s morals
-Certain vague constitutional phrases could only be understood in reference to morals (“free, equal, due”).
-When a law is clear an unambiguous (3rd Amend.), of course morals have no role. But much of the constitution is not clear.
-The moral reading does not ask judges to put their own morals in unrestrained. Rather, they must find the best conception of constitutional moral principles (what equality really means).
-Kant: persons are ends in themselves

PART V: SEPARATION OF POWERS
-No separation of powers clause in constitution; draw meaning from the structure of national government and our understanding of what the Framers contemplated in the establishment of the three separate branches
-Resolution of disputes more ad hoc than principles, courts unwilling to address
- The two approaches taken by the court (formalism and functionalism) roughly correspond to strict interpretation and pragmatic interpretation.
- Framers thought separation of functions was essential to free government because it protected liberty by avoiding the usurpation of power by the respective departments.
- Madison in Federalist No. 47 notes that some mixing and coordination was practically necessary and not contrary to separation of powers.

Judicial Interference

- Baker v. Carr: TN reapportionment of voting districts; presents no nonjusticiable political question; reapportionment necessary for equal protection
- The nonjusticiable of a political question is primarily a function of the separation of powers.
- Unless one of the following is inextricable from the case, there should be no dismissal for political question:
  - Textually demonstrable constitutional commitment to another branch
  - A lack of judicially discoverable and manageable standards for resolving (only used as support, always a way)
  - Requires policy decision not suitable for judiciary
  - Resolution would express lack of respect to other branches
  - An unusual need to adhere to a political decision
  - The potentiality of embarrassment because decisions made by two branches
- The court’s forbearance in deciding questions is self-imposed, so it can change its mind as to what is/not a political question.
- Courts usually stay out of questions of:
  - Foreign relations, dates of durations of hostilities, validity of enactments, and republican form of government (Guaranty Clause)
  - Will hear these cases if they do not violate any of the six standards

Executive Power

- Art.2 § 1 constitutes the executive power

- Youngstown Sheet & Tube v. Sawyer: Truman issued an executive order directing the secretary of commerce to seize and operate nation’s steel mills in order to avoid a strike and have steel for Korean conflict; violated separation of powers
  - Argument is that the president’s actions amount to lawmaking
Government’s argument is that president was acting as commander in chief and as chief executive (vesting clause and duty to execute clause)
- The president’s power must stem either from an act of Congress or from the constitution (no statute here, congress rejected such a statute previously).
- The commander in chief does not have the ultimate power to take possession of private property in order to keep labor disputes from stopping production.
- The executive power does not apply because this is lawmaking. The power to adopt such public policies is for legislators, not executives.
- Jackson (concur): sets up three categories and the powers of each
  - President with authority from Congress: presidential authority at its highest
  - President w/o congressional authority but with their consent: power depends upon the imperatives of events
  - President against Congress, either expressed or implied: power at his lowest
- Bad idea to write emergency powers into statute or constitution because extends an invitation to use them (Germany)
- Challenge to formalists would be to question if situation is same if enemy forces were attacking American soil (would show that formalist was a pragmatist whose attention to circumstance was simply more difficult to trigger)

-U.S. v. Curtiss-Wright: presidential embargo on arms sales to certain countries made pursuant to a congressional joint resolution upheld
- The federal government’s exclusive control of foreign affairs stems from sovereignty (passed to federal government from England, states never had it).
- The president alone has the power to speak or listen as a representative of the nation. He alone negotiates treaties.
- Congressional legislation must often accord to the president a degree of discretion and freedom from statutory restriction that would not be admissible were domestic affairs involved.

-Dames & Moore v. Regan: responding to Iranian hostages, Carter blocked the removal or transfer of all property interests of the Iranian government under U.S. jurisdiction; action upheld
- Since action was taken with congressional authorization (implicit from other claim settlement acts), it is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
- What constitutes congressional acquiescence still not clear
Past practice does not, by itself, create power, but long-continued practice, known to and acquiesced in by congress, would raise a presumption that the action had been taken in the pursuance of its consent.

Also, the claims tribunal had power to arbitrate claims and provide relief

Analysis is more consistent with the concept of a government of separated institutions sharing powers than with a conception of strict separation.

**Result:** Presidential authority is more expansive in foreign affairs than domestic. Jackson’s three categories are influential. What constitutes congressional acquiescence is unclear.

**Non-Delegation Doctrine**

- Agencies (part of executive) have been granted considerable lawmaking power.
- Under current doctrine, there are very few, if any, constitutional restraints on Congress’ power to delegate.
- Only two decisions that have invalidated federal statutes on nondelegation grounds
- Congress must express its “will” because it is congress that is accountable to the people

**Shechter Poultry v. U.S.** act authorized industry and labor groups to create codes of fair competition, which would have to be approved by the president; unconstitutional

- The court focused on whether there is any adequate definition of the subject to which the codes are to be addressed.
- Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws may be needed or advisable for the rehabilitation of trade.
  - “Fair competition” is too vague to have an understanding of congress’s objectives.

**Yakus v. U.S.** statute provides for an agency to determine maximum prices as will effectuate the purposes of the act; upheld

- Unlike *Shechter*, purpose and method of attaining purpose are clear.
- The only concern of courts is to ascertain whether the will of Congress has been obeyed.
- The definition of the purposes must sufficiently mark the field within which the agency is to act so that it may be known whether he has kept within compliance of the legislative will.
The non-delegation doctrine has never been dismissed, so it is possible that the court could return to it, but for now, the court looks to Congress’ expression of its will for clarity and ambiguity, but they always find it.

**The Legislative Veto**
-Is an alternative method for congress to check the executive

-Immigration and Naturalization Service v. Chadha: one-house legislative veto over decision of attorney general to allow immigrants to remain (pursuant to statute) found unconstitutional; decision not followed today
  -Art. 1, § 7 states that every order, resolution, or vote shall be presented to the president.
  -The bicameral requirement and presentment clauses are essential constitutional functions.
  -The requirements of Art. I do not need to be applied to every action, but only those which may properly be regarded as legislative in character and effect.
  -Is legislative in effect because it alters the rights of people
  -When the framers sought to confer special powers on one house, independent of the other house or the president, they did so in explicit, unambiguous terms (impeachment, appointments).
  -White (dissent): legislative veto necessary because of the increasing reliance congress has placed upon it
  -Congress and courts have ignored this decision because of its unworkability.

-Result: The legislative veto is alive and thriving regardless of this decision.

**Removal Questions**

-Myers v. U.S.: Wilson removed a postmaster from office w/o the consent of the Senate; upheld
  -House has sole power to impeach; executive has sole power to remove all other executive officers.
  -Wilson’s removal was lawful because it is unconstitutional to limit the president’s power to remove an executive branch official by requiring the senate’s agreement.
  -The power to remove subordinates is inherently part of the executive.
  -The president may remove executive officials only, not quasi-judicial officials.
Nothing in the constitution distinguishes between levels of inferior executive officers, so there should be no constraints in removal, whether it is a cabinet member or a postmaster engaged in the discharge of their normal duties.

Congress had not vested in the president alone the power to appoint the postmaster; hence his appointment must be a major one, and his removal is left to the president alone.

Holmes (dissent): The position was created by congress, so congress could abolish it (same result as removal).

*Marbury* said that president could not remove judicial officers.

**Humphrey’s Executor v. U.S.**: Roosevelt removed the commissioner of the federal trade act

*Myers* extends only to purely executive officers, not officers who occupies no place in the executive department.

President cannot remove quasi-legislative or quasi-judicial officers.

**Weiner v. U.S.**: president appointed but could not remove members of war claims commissions, a quasi-judicial body (must be impeached)

The differentiation between those who can be removed and those who can’t derives from the difference in functions between those who are part of the executive establishment and those whose tasks require absolute freedom from executive interference.

**Buckley v. Valeo**: congress had power under statute to appoint members of federal election commission; duties of commission could only be performed by officers of the U.S. (appointed by pres.)

Art. 2, § 2 gives president the power to nominate all officers.

Congress still has power to appoint its own inferior officers to carry out appropriate legislative functions.

Principal officers are selected by the president alone with the advice of the senate. Congress may allow inferior officers to be appointed by the president, heads of departments, or by the judiciary.

**The Independent Counsel Question**

**Morrison v. Olson**: court permitted judicial appointment of special prosecutors to investigate and prosecute allegations of criminal wrongdoing in the executive branch; special prosecutor cannot be dismissed by the executive without cause
- Special prosecutor is an inferior officer (subject to removal by higher executive, limited duties) so does not need to be appointed by the president.
- Congress’ decision to vest the appointment power in the courts would be improper if there was some incongruity between the functions normally performed by the courts and the performance of their duty to appoint.
- Improper for executive to appoint here (investigation of itself)
- Congress can not reverse for itself the power of removal of an officer charged with the execution of the laws except by impeachment.
- Removal here by executive (attorney general)
- The real question is whether removal restrictions are of such a nature that they impede the president’s ability to perform his constitutional duty (not by nature of office as executive or quasi-something).
  - “At will” termination not necessary here, “good cause” will do fine.
- Scalia (dissent): very dangerous holding, the office could cause a danger to functioning of executive easily, could not get rid of the special prosecutor (darling of Clinton admin.).

Sentencing Guidelines

-Mistretta v. U.S.: panel that included some judges created the federal sentencing guideline; did not violate separation of powers or delegation
- The nondelegation doctrine does not prevent Congress from obtaining the assistance of coordinate branches.
- Case and controversy clause is not dispositive as the sole extent of judicial duties because judges do other things that are perfectly permissible.
- The principle of separation of powers does not absolutely prohibit judges from serving on commissions such as that created here (judges may wear tow hats, just not both at one time).

- Result: Interbranch appointments offend separation of powers only if it impairs the functions assigned to one of the branches. Court follows a functional analysis towards legislative efforts to promote an efficient and workable government. Separation of powers not strict.

Federal Election Procedures

-Bush v. Gore: ballot recounts stopped
-There is no constitutional right to vote for electors for the president.
-The state legislature’s power to select the manner for appointing electors is plenary (Art. II § 1).
-Equal protection applies to the manner of voting; the state may not value one person’s vote over another’s.
-Question is whether the recount procedures are consistent with the state’s obligation to avoid arbitrary and disparate treatment of the members of its electorate.
  -Problem is the matter of fairly determining the “intent of the voter” with handing chads.
  -The process is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter.
-No adequate procedure could be created and employed by the statutory date set by the state, so the recount must be stopped.
-Like Baker, federal interference necessary in state voting
-Dissent: Should defer to the state courts on questions of state law; should respect decisions of state judiciary
-Dissent: Should extend the deadline, especially since one of the reasons for the delay was the stay granted while this case was pending
-Dissent: Should never have taken the case because no substantial federal question but is rather a question of state law

**Result:** Hard to tell what motivated the judges to rule as they did: constitutional or political motives. The dissent seems to have the better argument with regards to state sovereignty.

*The Executive and the Congress on the War Power*
- President claims autonomous authority as commander in chief.
- Congress sought to interpose its judgment, relying on powers to declare war and raise and support armies.

- The Prize Cases: Lincoln’s order declaring a blockade of Southern ports and seizing ships sustained even though there was no declaration of war
  - Question is whether a state of war existed, not whether a declaration of war had been issued (would have recognized confederacy as independent state)
  - Situation is different from a war abroad because president has more power when suppressing an invasion on U.S. soil (more need for quick decisions).
-Ex parte Milligan: right to jury guaranteed to man who had never been in the military who was brought before a military commission
  - No provisions of the constitution can be suspended during any of the great exigencies of government.
  - There is a power to suspend habeas corpus during times of great crisis, but there was no crisis in Indiana at the time (martial law cannot arise from a threatened evasion).
  - Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction.

-Ex parte Quirin: German spies may be tried by military commission (created by president) without jury
  - Petitioners were charged with an offense against the law of war, which the constitution does not require to be tried by jury.
  - Unlawful combatants (enemy belligerents) are subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.
  - Does not matter that they are not U.S. citizens.

-Senate Committee Report of 1967: extensive review of constitutional groundrules and historical developments in the expanding role of the executive in committing armed forces to overseas actions
  - The executive has acquired virtual supremacy over the making as well as the conduct of foreign relations.
  - Evidence is abundant that the framers did not intend the executive to have the power to initiate war.
  - Before 1900, the president was authorized to employ forces for “acts of war” (unimportant cases like pirates).
  - The use of the armed forces against sovereign nations without authorization by congress became common practice in the 20th century.
  - Roosevelt started an undeclared naval war in the Atlantic before formal declaration of involvement in WWII.
  - Congressional resolutions implied acceptance of the view that the president already had the power to use the armed forces in the ways proposed and that the resolutions were no more than expressions of congressional support and national unity.
  - Gulf of Tonkin resolution constitutes an acknowledgment of virtually unlimited presidential control of the armed forces.
- **War Powers Resolution of 1973**: adopted over a presidential veto in response to above committee report
  - Powers of the president as commander in chief may be exercised only pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on U.S.
  - The president shall consult with congress before introducing armed forces into hostilities.
  - In the absence of a declaration of war, the president must submit to congress a report setting for the circumstances.
  - If congress does not declare war after receiving the report, the president must terminate use of forces within 60 days.
  - The president should also remove forces if congress directs so by concurrent resolution.

- **Authorization for Use of Military Force Against Iraq Resolution**: authorizes use of forces in Iraq pursuant to War Powers Resolution

- **Result**: The executive no longer has absolute power to declare and conduct war. Congress now has more of a role. War powers do not include the ability to restrict rights of non-combatants in the absence of martial law.

*The Courts on the War Power – Prisoners of War*

- **Hamdi v. Rumsfeld**: indefinite detention without trial of a U.S. citizen on U.S. soil as an enemy combatant unconstitutional
  - Congress authorized the president to use all necessary and appropriate force against those associated with the Sept. 11 attacks.
  - Detention may last no longer than active hostilities, but the war on terror could last indefinitely.
  - The writ of habeas corpus remains available to every individual detained within the United States.
  - The risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real.
  - A citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker.
  - Only applicable to those in long-term imprisonment.
  - Scalia (dissent): Suspension of habeas corpus clause allows congress to relax the usual protections temporarily; two choices, no habeas corpus claim or presence of claim, there is no middle ground as articulated in this case
-**Rasul v. Bush**: U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay

-**Result**: Courts will not allow rights to be suspended because of claim that the events warrant it. The court tries to balance the person’s right with the necessities of waging war.

  -When arguing against a right, use a balancing test; when for the right, establish a presumption in the right’s favor