CONSTITUTIONAL LAW OUTLINE

I. CONSTITUTION’S TEXT, HISTORICAL CONTEXT, AND INTERPRETIVE METHODOLOGIES

A. Methods of Analysis: The Court has adopted several diverse methods of interpreting the Constitution. However, courts decide cases on the narrowest grounds possible.

1) **Text:** The Textual Method looks to the words in the Constitution as playing a central role in the interpretive analysis, looking directly at the textual provision.

2) **Original Intent:** The Original Intent Method shares the same goals as the Textual Method and seeks to learn the Framers’ original intent by looking to the debates and the Federalist Papers preceding the adoption of the Constitution.

3) **Constitutional Structure:** The Constitutional Structure Method seeks to decide cases based on: a) the Constitution’s maintenance of separation of powers or b) the Constitution’s federalism framework. The Court will decide if a particular result is implicit in the structure of the Constitution.

4) **History and Tradition:** The History and Tradition Method looks at the historical backdrop around which a particular Constitutional provision was adopted. As far as tradition, the Court may grant protection based upon traditional societal needs.

5) **Political Theory:** The Political Theory Method may seek analysis based on “principles of our democratic system.”

6) **Social Policy: (Fairness/Justice):** The Social Policy Method seeks to construe the Constitution in a light that creates sound social policy.

7) **Precedent and Doctrine:** The Doctrine Method focuses on the pattern and practice that has worked and is largely Stare Decisis or the Rule of Precedent. The Court may wish to adhere to a previous decision. As Brandeis said, “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than be settled right.” The court may also choose to revoke precedent. In ignoring precedent, the Court is freer in Constitutional Law than other areas of law.

B. Historical Foundation: The Constitution came about after dissolution of the Articles of Confederation. The Constitution is designed to simultaneously: a) strengthen government and b) weaken government.

1) **Problems in 1787:** The Articles of Confederation, ratified in 1781, plagued the young country with several problems.

   i) **State Protectionism:** In the Articles, there was no supremacy clause, no power to tax and no power to regulate commerce. Problems arose because states “mucked” around with commerce instead of leaving it to the national government

   ii) **Extreme Populism:** There was a lack of protective property rights, and other problems such as states creating their own currency, which triggered inflation (which was good for debtors but bad for creditors).

   iii) **Uncertainty:** There was a general feeling that the federal government was incompetent, unable to govern and that there was a need for structure. Regional differences mired the country in squabbling as autonomously-acting states undermined and undercut the federal government.
2) **Goals of the Constitutional Convention:** The Framers brought two distinct notions to the Convention.

   i) **Limited, Enumerated Powers:** Rather than living under the idea that the government held all the power regardless, the Constitution a) **weakened** government in that it encompassed the idea that the people were actually giving power to the government. The limited, enumerated powers b) **strengthened** government in that they were considerably broader than the power held under the Articles of Confederation.

   ii) **Separation of Powers:** Convention further established notion of separation of powers: one central government comprised of separate executive, legislative and judicial branches.

3) **Federalists vs. Anti-Federalists:** Two camps emerged with regards to the document.

   i) **Federalists: Pro-Constitution:** The Federalists were comprised of men like James Madison and Alexander Hamilton who believed in the benefits the Constitution entailed.

   ii) **Anti-Federalists: Anti-Constitution:** The Anti-Federalists were led by men like Thomas Jefferson who believed in decentralized and smaller government; more “pure” democracy manifested by participation and not by just voting; a Constitution that could change often by successive generations; a more agrarian populace and debt relief. (Jefferson, for example, was a tremendous debtor.)

**II. JUDICIAL REVIEW**

Judicial Review is the power to review legislation/executive acts/regulations and declare such laws unconstitutional.

A. **Theory of Judicial Review:** Judicial Review was born with Marbury v. Madison. [**Marbury v. Madison (1803):** Marbury had been given a job as Justice of the Peace by outgoing President John Adams. Incoming President Thomas Jefferson’s Secretary of State, James Madison, refused to deliver the commission. Under the Judiciary Act of 1789, Marbury filed suit in the Supreme Court for a writ of mandamus directing Madison to deliver his commission. **Held,** Justice John Marshall reasoned: 1) Marbury did have a right to his commission; 2) Marbury did have a judicial remedy in that the Court can order the President to deliver the commission (but could not review political decisions); 3) the Act giving the Supreme Court jurisdiction to decide such matters is unconstitutional. Marshall, did not get the job.]

   1) **When an Act of Congress is Unconstitutional:** The Court, as it did in Marbury, can rule that a statute is unconstitutional when it violates the Constitution. [**Marbury: Held,** Judiciary Act violates Constitution because it grants powers to the Court not vested by the Constitution.]

   2) **The Constitution Prevails:** When a statute comes up against the Constitution, the Constitution, as supreme law, prevails.

   3) **The Judiciary Reviews:** “It is emphatically the province and duty of the judicial department to say what the law is.” [**Marbury:**]

   4) **Review is Supreme and Exclusive Law of the Land:** What the Supreme Court decides is enforceable; (though it may be difficult to enforce if the President or Congress are at odds.) Essentially, the Supreme Court is 1) the authoritative voice on the Constitution; 2) the Exclusive Interpreter; 3) It can invalidate actions; 4) Compliance with Decisions can be consensual. [**Cooper v. Aaron (1958):** Arkansas refused to enforce Brown v. Board of Education decision, claiming the law did not apply to the state. **Held,** Supreme Court is the ultimate interpreter of the Constitution, law does apply to the state and is binding.]
B. Limits on Judicial Power: The Court is limited to only justiciable “cases or controversies.”

1) **(Who?): A Party with Standing**: Only a party with “Standing to Sue” may bring an action over an issue to be decided by the Court. Additionally, the case must (usually) be appealed to the Court (unless the Court has original jurisdiction). Certain factors can show standing. [Lujan v. Defenders of Wildlife (1992): Wildlife organization sued Interior Department for not following Endangered Species Act, curtailing their ability to observe wild animals. *Held*, The plaintiffs do not have standing to sue because they fail black letter law requirements: a) No injury in fact; b) No causation; c) No redressability.]

   i) **Injury in Fact**: The plaintiff must suffer “concrete” harm, not “vague, uncertain harm.” Such harm can be “physical, economic or deprivation of a particular right. [Lujan] An association can sue for non-monetary loss if any of its members can, as well. Injury in fact does not include procedural irregularity, but harm. [Lujan, Concurrence.]

   ii) **Causal Connection**: The “But For” Test: would harm against plaintiff continue?

   iii) **Redressability**: Even if the plaintiff sought relief they wanted, would they get the “state of the world they want?”

   iv) **Constitutional vs. Prudential Standing**: Prudential standing means the court is choosing to allow at its own discretion.

2) **(What?): Only Legal Questions are Reviewable**: The Court can only review legal questions, not political acts that are within Presidential or Congressional discretion. “Political” does not mean political issues, but issues that are to be decided with finality by one of the other branches.

   i) **Equal Protection as Legal Question**: Equal Protection of voters is a legal question. [Baker v. Carr (1962): Voters in Tennessee challenged the state legislature’s failure to re-apportion the Tennessee General Assembly in sixty years; they claimed the legislature’s failure violated the equal protection clause by “debasement of their votes.” *Held*, the voters’ claim was not a nonjusticiable “political” question.]

   ii) **House Deciding Qualifications as Legal Question**: The House’s setting of qualifications for its members if a legal question. [Powell v. McCormack (1969): House member passed all Constitutional qualifications for office but was denied seat by House because of alleged embezzlement and perjury. *Held*, Allowing House to determine for itself the qualifications of its members was not a political question, but a constitutional question and was thus justiciable.]

   iii) **Foreign Affairs as Political Question**: Foreign Affairs if a political question. [Goldwater v. Carter (1979): Senator Goldwater challenged President Carter’s treaty with Taiwan; *Plurality*, The President’s actions on foreign affairs is a political question, the country must have a single voice on foreign affairs.]

   iv) **Impeachment as Political Question**: Impeachment is not a legal question. [Nixon v. United States (1993): Federal judge in Mississippi impeached for high crimes and misdemeanors, tried by Senate committee, convicted by entire Senate, challenged that he was not tried by the full Senate; *Held*, “Nixon’s argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.” Political if: a) there is a textually demonstrable commitment to other branches; b) lack of judicially discoverable statutes.]
3) **(When?): Ripeness and Mootness**: The party’s claim must also pass a test of ripeness and mootness – whether claim has been brought at right time and whether legal redress can be given.

   i) **Ripeness**: Ripeness requires that the plaintiff show that there is an adversarial situation that actually exists. This can be shown through the fact harm that has happened.

   ii) **Mootness**: Mootness requires that the plaintiff show that there is an interest throughout the litigation in need of resolve.

4) **(Where?):** Geographic and Hierarchical dimensions influence judicial review.

5) **No Advisory Opinions**: The Court cannot issue opinions which “advise” or that consider just a hypothetical situation.
III. NATIONAL POWERS IN THE AMERICAN FEDERAL SYSTEM: FEDERALISM

A. Review of State Court Rulings by the Federal Courts:

1) **Federal Jurisdiction:** If a federal question emerges in state court, and goes through the state supreme court, the Supreme Court has authority to review. [Martin v. Hunter’s Lessee (1816):] Plaintiff Martin wanted land back, had been taken by Virginia and given to Hunter according to a Virginia statute which allowed for seizure of land held by British loyalists; statute was in conflict with Federal Treaty ending American Revolution, Virginia Supreme Court ruled for Hunter’s Lessee, Supreme Court reversed. *Held*, The decision of the state’s highest court could be reviewed by the Supreme Court because a) § 25 of the Judiciary Act granting Supreme Court power to review was constitutional; b) case concerned a federal question: whether the statute violated the Federal Treaty.] [Cohens v. Virginia: State prosecuting two men for selling District of Columbia lottery tickets in Virginia, Virginia is a party, Virginia claims that Supreme Court only has original jurisdiction, not appellate because the state is a party. *Held*, Supreme Court rules for Virginia against the men, however it also asserts jurisdiction, “The judicial [power] extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.”]

   i) **Inhibits State Abuse:** Leaving Federal Questions up to the Supreme Court inhibits abuse. [Martin: *Held*, “State attachments, state jealousies, and state interests, might sometimes obstruct or control…the regular administration of justice.”]

   ii) **Allows Uniformity:** Leaving federal questions up to the Supreme Court brings uniformity. [Martin: *Held*, “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.”]

2) **Exceptions to Federal Review of State Interpretation of Federal Law:** A state court’s decision with regards to federal law (when an alternative state issue is also present) must be both “adequate” and “independent” to be shielded from Supreme Court review.

   i) **Adequate State Ground:** The state’s ground of decision must be adequate; it must fully sustain the result and not itself violate any provision of the Constitution or federal law, otherwise Court’s decision would be advisory. An “adequate” state ground must: a) not deny due process; b) advance a legitimate state interest; c) be applied consistently.

   ii) **Independent State Ground:** The state’s ground must be independent; it must not be based on the state’s understanding of federal law. The state court’s interpretation must be “independent” of federal law, the state court cannot use a federal standard, for example.

iii) **Adequate and Independent State Grounds Test:** If the result would be the same by the Supreme Court, then the state decision was on adequate and independent grounds.

3) **Judicial Intervention:** The Court may intervene in matters normally left to the states. [Bush v. Gore (2000):] Gore filed suit contesting certification of Florida’s electoral vote by Florida Secretary of State and circuit court denied; Florida Supreme Court ordered manual recounts to find “intent of the voter,” Bush filed for emergency stay of the order, cert granted by US Supreme Court. *Held*, 1) Non-uniform recounts ordered by Florida Supreme Court in accordance with Florida election code violated equal protection clause of the Fourteenth Amendment; 2) No remedy was possible by December 12, the day by which a state’s selection of voters shall be conclusive. *Dissent:* The Court should not intervene, it is a state matter and the Court should not interpret a state law, this is not an extraordinary case requiring intervention, there is enough time to count all the votes and still be certified and electors to be chosen.]
B. Federal Government Power under the “Necessary and Proper” Clause:

1) The “Necessary and Proper” Clause: The “Necessary and Proper” Clause (Art. I, § 8, cl. 18), “Congress shall have Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...”, is not a specific power but a power enabling Congress to select the best route to achieve Congressional goals.

   i) Express Powers: Express powers are the powers specifically enumerated in the Constitution, such as building roads and post offices.

   ii) Implied Powers: Implied powers are not enumerated but given to Congress, such as delivering the mail.

2) Definitive “Necessary and Proper” Means: Different meanings of “Necessary and Proper” appear throughout the Constitution, the “Necessary and Proper” clause has been interpreted to mean a legitimate ends to achieve a Congressional power. [McCulloch v. Maryland (1819): Congress chartered the Bank of the United States, a national bank designed to regulate the money supply, generally a precursor to the Federal Reserve, Maryland excessively taxed the Bank, the Bank refused to pay. Held, Maryland’s tax on the bank was unconstitutional, Congress has very broad powers to select the means to implement it powers (taxing, spending, borrowing, national defense), “We must never forget that it is a Constitution we are expounding.”]

   i) “Necessary and Proper” Pretext Warning: Though Congress may implement its powers through “Necessary and Proper” means, it cannot enact a law under the pretext of exercising one of its powers if Congress does not indeed have that enumerated power.

C. The Affirmative Powers of the Federal Government:

1) The Commerce Clause: The Commerce Clause (Art. I, § 8, cl. 3), “Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Court’s interpretation of “commerce” can be divided into three phases.

   i) The 1824-1936 Commerce Clause: Prior to 1937, “commerce” was considered to mean an interstate activity. [Gibbons v. Ogden (1824): Gibbons held a federal license to operate a steamboat between New York and New Jersey, Ogden had a license from New York, Ogden wanted Gibbons to stop. Held, The US grant of license to Gibbons was a legitimate exercise of the commerce clause because it concerned navigation, Congress can act in such a way, thus preempting the NY grant.]

   • Items in Interstate Commerce: An item in interstate commerce, essentially moving across states lines, is commerce. [Champion v. Ames (1903): Held, Congress can regulate the interstate mailing of lottery tickets.] [Hammer v. Dagenhart (The Child Labor Case) (1918): Held, Interstate shipping of textiles produced by child labor could not be regulated because the items were textiles and not a finished product; “manufacturing” is not “commerce.”]

   • Activities Directly Connected to Interstate Commerce: Activities with a direct connection could be regulated. [United States v. E.C. Knight Co. (1895): Held, Congress can regulate one person’s buying of 98% of nation’s manufacturing capacity for sugar because manufacturing of sugar only “incidentally and indirectly” affected interstate commerce.]

   • Instrumentalities of Interstate Commerce: An instrumentality of interstate commerce could be affected. [The Shreveport Rate Case (1914): Held, Congress can regulate imposition of intrastate rail rates (inside Texas) because it is an instrumentality of interstate commerce (between Texas and Louisiana).]

- **Channels and Instrumentalities of Interstate Commerce**: Congress can, essentially, regulate the channels of commerce and the way those items are produced. [**United States v. Darby** (1941): Georgia lumber manufacturer challenging prohibiting shipment of lumber, he violated wage and employment law. *Held*, a) Congress can regulate interstate shipment for any reason whatsoever; b) Congress can regulate intrastate goods based upon the labor conditions by which goods were produced effectively overturning *Hammer*.

- **Activities with a Substantial Effect on Interstate Commerce**: Congress can regulate activities with a substantial effect on interstate commerce. [**Wickard v. Filburn** (1942): *Held*, Congress can regulate personal growth of wheat because it had a substantial, albeit trivial, effect on interstate commerce.] [**Perez v. United States** (1971): *Held*, Congress can regulate loan-sharking activities, they involve credit and are often part of organized crime, which is interstate, also.] [**Heart of Atlanta Motel v. United States** (1964): *Held*, Congress can regulate hotel’s refusal to serve African Americans through Title II of the Civil Rights Act, thus African Americans would travel less, interstate commerce affected.] [**Katzenbach v. McClung** (1964): *Held*, Congress can regulate restaurant’s discrimination against African Americans through Title II, enough food (46%) was purchased from out of state, thus interstate commerce.]

iii) The Modern Commerce Clause: Since 1995, a restricted view of “commerce.”

- **Channels of Interstate Commerce**: Congress can regulate channels of IC.

- **Instrumentalities of Interstate Commerce**: Congress can regulate the instrumentalities of IC.

- **Activities with a Substantial Effect on Interstate Commerce (with Test)**: To show an activity has a substantial effect on IC, the Court applied a strict test.

  - **Substantial Effects Test**: Congress must make findings to demonstrate the activity’s substantial effect on IC. [**United States v. Lopez** (1995): Congress passed the Gun Free School Zones Act, prohibiting guns in school zones. *Held*, In order to push the limits of the Commerce Clause, the commercial activity must be a) “economic” in nature or the regulation of the activity must be “an essential part of a larger economic activity;” b) if the phrase “economic” is expanded to cover non-commercial activity, it will be viewed with a “fatal disposition.” *Dissent*, Congress had a “rational basis” for deciding that the activity affected IC. [**United States v. Morrison** (2000): Congress passed the Violence Against Women Act, allowing a new civil cause of action against “a person who commits a crime of violence motivated by gender.” *Held*, “Gender-motivated crimes are not economic activity.” *Dissent*, Congress provides findings, not anti-federalism because states want this regulation.]
iv) **Commerce Clause Flow Chart**: Ways Congress can direct state behavior:

1. **Does the Law Regulate the State Itself?**
   - Yes: Go to 10th Amendment Cases
   - No: Does the Regulated Activity or Product Directly Affect IC?

2. **Does the Regulated Activity or Product Directly Affect IC?**
   - Yes: Law is Constitutional
   - No: Is there a Substantial/Indirect Effect on IC (Individual Aggregation)?

3. **Is there a Substantial/Indirect Effect on IC (Individual Aggregation)?**
   - Yes: Law is Unconstitutional
   - No: Is the Activity Economic in Nature? [Lopez; Morrison]

4. **Is the Activity Economic in Nature?**
   - Yes: Law Probably Unconstitutional
   - No: The Taxing Power

2) **The Taxing Power**: The Power to Tax (Art. I, § 8, cl. 1), “Congress shall have Power to Lay and collect Taxes, Duties, Impost and Excises…” is independent of other powers.

   i) **Taxation as Revenue-Raiser and Regulation**: Taxation is “incentive-izing” tool, altering people’s behavior. The Tax Power must be used to either raise revenue or for regulation pursuant to one of Congress’ other powers. [United States v. Kahriger (1953): Held, Tax imposed on “bookies” and wage-makers with a separate requirement to provide registration (to help prosecution) was constitutional because the means were related to IRS’ collection of a valid tax.]

   ii) **Taxation Cannot be a Penalty**: The tax power cannot be used to penalize. [Bailey v. Drexel Furniture (1922): Child Labor Tax imposing excise tax 10% on annual net profits on every employer of child labor. Held, Tax unconstitutional because a) regulation of ages not related to revenue; b) Mens rea was required; “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”]

3) **The Spending Power**: The Power to Spend (Art. I, § 8, cl. 1) is an additional power which has not been scaled back as the Commerce Clause has been.

   i) **Conditional Spending**: Congress can use conditions on money to regulate states. [South Dakota v. Dole (1987): Congress withheld 5% of federal highway funds from South Dakota because state allowed 19 year olds to buy 3.2% beer. Held, Congress can withhold in order to make SD enforce 21 drinking age if the condition: 1) is in pursuit of the general welfare, by which it is up to Congress to decide; 2) is unambiguous so the state can exercise a choice; 3) is related to the national interest, (drinking age goes up, drunk driving goes down); 4) cannot conflict with other constitutional rights; 5) cannot be coercive upon the state. Dissent: The condition of 21 drinking age is not necessarily related to safer highways, for instance juveniles who don’t drive are penalized; conditional spending is fine as long as Congress tells how money should be spent.]
D. State Defenses to the Federal Government: The Tenth and Eleventh Amendments:

1) **The Tenth Amendment**: The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus powers not given to the federal government are maintained by the states.

   i) **Congressional Regulation of States**: The Tenth Amendment limits Congressional infringements on state autonomy. [National League of Cities v. Usery (1976): Congress amended the Fair Labor Standards Act according to the Commerce Clause to include all employees of states and local governments as subject to minimum wage and maximum hour provisions. *Held*, FLSA Amendment unconstitutional, states should be able to act as “sovereign governments”; essentially Congress has gone too far.][Garcia v. San Antonio Metro Transit Authority (1985): Municipal transit authority was subject to minimum wage and overtime restrictions of the FLSA. *Held*, Deciding which are traditional government functions is “unworkable;” instead, political checks will do the work, state sovereignty will not be destroyed, FLSA does apply to states. National League of Cities overruled.]

   ii) Congress Cannot:

   - “Commandeer State Legislatures”: Congress cannot make a state legislative process enforce a federal regulation. [New York v. United States (1992): Low-Level Radioactive Waste Policy Amendments Act of 1985 required states, inter alia, to take title to their radioactive waste after a certain time. *Held*, Court struck down provision because it forced states to regulate pursuant to Congressional direction; Congress cannot “commandeer” state legislatures, transparency and accountability are important so federal, state legislatures do not blame each other; Congress can use other political processes.]

   - “Commandeer State Officials”: Congress cannot make a state executive enforce a federal regulation. [Printz v. United States (1997): The Brady Handgun Violence Prevention Act commanded the Chief Law Enforcement Officer of each county or city to conduct background checks on prospective gun purchasers. *Held*, Congress cannot impress such officers into service; a) Text: little in text; b) Original Intent: State sovereignty, Such power by Congress is presumably absent; c) History – Precedent: No precedent; d) History – Practice: Look to 1st Congress to determine; e) Structure/Policy: Sovereignty, Congress would receive credit, not the states, unfunded, accountability would be with whom?…it should be with the President as executive. *Dissent*: a) Text: Oaths Clause, look to the “People,” e) Structure/Policy: the states are represented, locality would be enhanced rather than making the federal government bigger.]

   iii) Congress Can:

   - “Bless” State Agreements: According to the Interstate Compact Clause, agreements between states require the blessing of Congress, “No State shall, without the Consent of Congress, enter into any Agreement or Compact with another state.” (Art. II, § 10, cl. 3).

   - **Prohibit Sale of Drivers Personal Information**: Congress can. [Reno v. Condon (2000): Driver’s Privacy Protection Act prohibited states from selling personal information held by DMVs. *Held*, Act constitutional because law “regulates the universe of entities that participate as suppliers to the market;” constitutional through the Commerce Clause; Court very protective of privacy.]
2) **The Eleventh Amendment**: The Eleventh Amendment provides, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

   i) **Before the Eleventh Amendment**: Before the Eleventh Amendment, a state could be sued by a citizen of another state in federal court. [*Chisholm v. Georgia (1793): Held, Georgia amenable to suit by citizen of South Carolina.*]

   ii) **State Immunity under the Eleventh Amendment**: Under the Eleventh Amendment, adopted because of the uproar over Chisholm, a state cannot be sued by certain citizens (corporations as well as individuals) in federal court. The Eleventh Amendment has been expanded to include citizens of its own state, essentially forbidding suit by citizens of any state. [*Hans v. Louisiana (1890): Held, Defendant state cannot be sued by citizen of defendant state.*]

   iii) **Exceptions to the Eleventh Amendment**: There are exceptions to the Eleventh Amendment. 1) The United States can sue states in federal court; 2) States may sue other states in federal court; 3) Citizens may sue municipalities in federal court (as long it is not essentially as suit against the state); 4) Citizens may sue individual state officers in federal court and such a suit can only seek a prospective injunction, not a retroactive award. 5) Citizens may sue if the state has specifically consented, and/or counterclaims are involved.

   iv) **Congress Can Waive State Immunity**: Congress can waive a state’s immunity from suit if Congress passes a law seeking to enforce either the 13th, 14th or 15th Amendments (equal protection, voting rights, due process, etc.) and Congress makes its intention to subject states to federal suits clear. Thus Congress cannot abrogate a state’s immunity when Congress legislates based on a separate enumerated power. [*Seminole Tribe of Florida v. Florida (1996): Held, Congress could not force states into federal court for non-13th, 14th, 15th Amendment questions.*]

   v) **Immunity in State Courts**: Immunity from suit in federal courts extends to immunity from suit in state court. [*Alden v. Maine (1999): Held, State could not be sued in its own court under the FLSA, such would “ultimately commandeer the entire political machinery of the State against its will.”*]

**E. Limitations on State Autonomy:**

1) **Preemption by Federal Law**: Federal authority preempts state authority due to the Supremacy Clause (Art. VI, cl. 2). Federal law’s preemption is subject to a descending method of analysis. Sometimes federal law is floor and states can grant more rights, (the state may have a minimum wage of $7.00, versus a national $6.25). Sometimes, however, federal law is ceiling. [*Crosby.*]

   i) **Express Preemption**: Express preemption involves a federal law’s preemption of a state law that Congress intended to preempt.

   ii) **Conflict Preemption**: Conflict preemption means that it is impossible to comply with both federal and state authority, either in law or in regulations, thus frustrating the federal purpose. [*Crosby v. National Foreign Trade Council (2000):* Massachusetts enacted a law that forbid state agencies from buying goods or service from companies doing business with Burma. Congress enacted a statute that imposed mandatory and conditional sanctions on Burma. *Held,* the Massachusetts statute was struck down because it “presented an obstacle to the accomplishment of Congress’s full objectives under the federal Act,” whereby 1) the President had control, not Massachusetts; 2) there were limited sanctions; 3) there was gradualism in the sanctions. *Note,* Court decided on
narrowest ground possible.] [Florida Lime & Avocado Growers, Inc.: Federal regulation had one standard for certifying ripe avocados, California had another. Held, compliance with both regulations was not impossible, “there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field.”] [Geier v. American Honda Motor Co. (2000): Motorist was injured after collision in which car did not have an airbag (passive restraint) which made manufacturer negligent under DC tort law. Held, 1) federal law (National Traffic and Motor Vehicle Safety Act) does not preempt common law tort actions; 2) the Act does not limit ordinary preemption principles; 3) NTMVSA preempts the DC safety standard because the standard conflicts with Department of Transportation standard requiring that some, but not all, 1987 automobiles have airbags, DOT studied extensively and had 7 reasons, etc. Dissent, Court should be careful about making incursion onto state grounds; clear statement should be made.]

iii) Field Preemption: Field preemption means that the federal government’s power in that field is exclusive, thus states are preempted from regulating in that area. [Pacific Gas & Electric co. v. State Energy Commission (1983): PGE challenged a California regulation that forbid the construction of nuclear plants until a state agency determined that there was a demonstrated method for the disposal of the nuclear waste as preempted by the Atomic Energy Act. Held, Congress had not sought to regulate the economic aspects of nuclear power through the AEA, just the safety aspects, thus California regulation was not preempted.]

2) The Dormant Commerce Clause: Because of the Commerce Clause, the states are barred from regulating interstate commerce even in the absence of federal legislation concerning the area of interstate commerce or preemption. States, however, are given power in health and safety.

i) Restrictions on States’ Power over National Economy: According to restrictions in Art. I, § 10, “No state shall…”; restrictions in Art. I, §§ 1 & 2, “Full Faith and Credit…”; restrictions in Art. VI, the Supremacy Clause; and related restrictions, states are limited in their power over the national economy.

ii) Rationale for Restrictions on States: Stopping states from “behaving badly.”

• Historical: State protectionism should be restrained.

• Economic Theory: Most agree (conservatives and liberals) that federal markets are better; country should essentially be “Federal Free Trade Zone.”

• Political Theory: Accountability should be sought, Court should prevent states from imposing burdens on out-of-staters just because out-of-staters do not vote.

iii) Law Discriminates Against IC: Discrimination against out-of-state commerce will subject a state law to invalidation. The Court has developed a three part test to determine when discrimination invalidates a state law, regardless of the state’s purpose:


[Oregon Waste Systems v. Dept. of Environmental Quality (1994): Oregon law charged $2.25 per ton on out-of-state waste disposal, $0.85 per ton on in-
state waste disposal to make up for difference paid by in-state taxes. *Held,* Difference in fees was not equivalent, law thus invalid.]

• **Acceptable if No Less Discriminatory Means:** If no less discriminatory means of achieving the end are possible, discrimination may be valid. [*Maine v. Taylor (1986):* State law forbid importation of out-of-state baitfish to prevent entry of non-native parasite. *Held,* State law valid because less discriminatory means not possible to achieve legitimate ends.]

2) **In Its Effect:** Even though there is no direct ban or tax, a law might still be facially discriminatory. [*Hunt v. Washington State Apple Advertising Commission (1977):* North Carolina forbid apples sold in state from displaying any grading system but USDA’s, thus depriving Washington Apple vendors of using their superior grading system. *Held,* law discriminated in its effect.]

  [Bacchus Imports, Ltd. v. Dias (1984): Hawaii law imposed tax on liquor sales, exception for liquor made by plants grown locally. *Held,* state law was effectively protectionist.]

iv) **Law Burdens IC: The Pike Test:** A state law’s burden on interstate commerce will subject it to invalidation. [*Pike v. Bruce Church, Inc. (1970):* Arizona statute required Arizona-grown cantaloupe be packed in Arizona, an identified as being from Arizona, thus enhancing Arizona cantaloupe reputation. *Held,* Despite Arizona objectives in enhancing cantaloupe prestige, burdens on IC outweighed benefits.]

  • **The Test:** To be valid, the statute: 1) must be an even-handed regulation (treating all the same); 2) promote a legitimate local public interest; and 3) its effects on IC must be only incidental and the burden on IC cannot outweigh local commerce. [*Southern Pacific v. Arizona (1945):* Arizona law required shorter train lengths, thus railroads had to “break up” on either side of state before entering. *Held,* statute invalid because it led to higher burdens and dubious benefits.]

  [Kassel v. Consolidated Freightways (1981): Iowa prohibited large trucks such as triple deckers from driving through state. *Held,* Safety benefits of prohibition were dubious, burdens incurred on other states that trucks then drove through outweighed benefits.]

v) **Market Participant Exception:** When state is a market participant it can favor its own citizens and businesses, the Dormant Commerce Clause does not apply. [*Reeves, Inc. v. Stake:* South Dakota sold cement, restricted sale to just citizens of South Dakota. *Held,* South Dakota market participant, can discriminate.]

  • **No Downstream Restrictions:** As a market participant, a state cannot impose restrictions in area in which it is not a market-participant. [*South-Central Timber Development Inc. v. Wunnicke (1984):* Alaska regulation required that timber sold to purchasers was required to be processed in the state. *Held,* State cannot implement “downstream” regulations because the state is a market participant in the timber-selling market only, not the timber processing market.]

  • **Participant Through Contracts:** A state can be a market participant through contracts. [*White v. Massachusetts Council of Construction Employers (1983):* *Held,* Boston could require that 50% of construction workers be Bostonians, was market participant through construction contracts.]
IV. NATIONAL POWERS IN THE AMERICAN FEDERAL SYSTEM: SEPARATION OF POWERS

A. Presidential Encroachment on Congressional Authority: Article II grants executive power.

1) **Presidential Power in Wartime**: During wartime, the president may test his power.  
   
   [*Youngstown Sheet and Tube v. Sawyer (1952)*]: During the Korean War, President Truman ordered the Secretary of Commerce to seize the country’s steel mills in the face of an impending steelworkers strike. Truman claimed seizure was necessary to avert shortage of steel and prevent repercussions on War. *Held*, The President can only derive power from a statute, thus Congressional legislation or the Constitution itself. *Concurrence (Frankfurter)*, Congress 1) had considered allowing the President to seize, it was not granted, however, legislative intent cannot be inferred from inaction; 2) previous executive assertions of power do not add up to the power Truman seeks. *Concurrence (Jackson)*, The President has three forms of power: 1) Constitutional power authorized by Congress; 2) “Zone of Twilight” power when there is no action by Congress but president acts because he thinks he can; 3) Power is at its “Lowest Ebb” when Congress say “don’t do” but president acts Congressionally anyway.]

   i) **Limiting Presidential Authorization**: The War Powers Resolutions of 1973: The Act authorizes the president to use armed forces only when there is: 1) a declaration of war; 2) specific statutory authorization; 3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

   ii) **Authorized Presidential Action**: The court can infer legislative [*Dames & Moore v. Regan (1981)*]: President Reagan suspended claims pending against Iran. *Held*, President was authorized to act accordingly by Congress, vaguely however.

B. Congressional Encroachment on Presidential Authority: Generally, Congress has the power and gives (or “delegates”) it to either the President or the Judiciary.

1) **Unconstitutional Encroachment**: A Congressional Act is unconstitutional encroachment if it essentially is an effort for Congress to get power.

   i) **Bicameralism and Presentment: Legislative Vetoes**: Bicameralism means that every legislative act must pass both the House and Senate to become law; Presentment means that every legislative act must be “presented” for presidential signature or veto. [*INS v. Chadha (1983)*]: The Attorney General suspended the deportation of an alien, Chadha. However, if either House of Congress disapproved of suspension, alien was again subject to deportation by “legislative veto.” *Held*, Forcing deportation of Chadha was a legislative act since it deprived Chadha of certain rights, a legislative act requires bicameralism and presentment, of which the legislative veto did not have. *Concurrence (Powell)*: The veto is not an unconstitutional legislative act, but rather an unconstitutional judicial act because Congress is finding Chadha does not meet a criteria. *Dissent*, Congress does have this power, Court should adopt a flexible-based approach.

   ii) **Granting Executive Functions to Legislative Officer**: Congress cannot grant executive functions to an officer Congress can remove. [*Bowsher v. Synar (1986)*]: As part of Balanced Budget Act, Congress enacted legislation requiring the Comptroller General to determine specific spending reductions in the event that Congress failed to do so, then require the President to implement Comptroller General’s decisions. *Held*, Act is unconstitutional because it bestows on the Comptroller General, “an officer controlled by Congress,” executive powers. [*Metropolitan Airports Authority v. Citizens for the Abatement of Aircraft Noise (1991)*]: Congress transferred authority of National and Dulles to a Virginia state authority under the review of 9 Congressional members. *Held*, review board unconstitutional, executive power given to legislators.]
2) **No Unconstitutional Encroachment**: A Congressional Act is constitutional encroachment when Congress is essentially delegating power, thus the fundamental balance is not upset.

   i) **The Independent Counsel Law**: Independent counsel provisions do not encroach upon presidential authority. [**Morrison v. Olson (1988)**: *Held*, Using flexible, functional approach, Independent Counsel provisions of the Ethics in Government Act are not unconstitutional. *Dissent*, Prosecuting crime is a classic executive function, if we have a problem with the executive we can impeach and try.]


C. Delegation of Legislative Power:

1) **Impermissible Delegation of Legislative Power**: Congress may not give away its power.

   i) **The Line-Item Veto Act**: [**Clinton v. New York (1998)**]: Line-Item Veto Act gave the president power to cancel 1) any discretionary budget authority; 2) any item of new direct spending; 3) any “limited” tax benefit. *Held*, Act unconstitutional because cancellation of certain provisions essentially amounted to a unilateral rewriting of a written statute. *Dissent*, Act is no different than delegating because the President has certain discretion.

2) **Permissible Delegation of Legislative Power**: With regards to administrative agencies, there is a test Congress must pass to delegate legislative power.

   i) **Administrative Agencies**: Considerable textual support for administrative agencies can be found in the Constitution. (Art. I §§ 1, 8; Art. II §§ 1,2,3.) [**Whitman v. American Trucking Associations, Inc. (2001)**]: Congress delegated authority to EPA to set air quality standards. *Held*, When Congress confers decisionmaking authority upon agencies, Congress must set forth an “Intelligible Principle.”

D. Presidential Privileges and Immunities:

1) **Executive Privileges**: Privileges deal with the protection of certain information; privileges cabin off certain areas from judicial or legislative proceedings; privileges arise from relationships or status. Broadly, privilege concerns anything under Art. II, narrowly privileges may just pertain to the military, etc. [**United States v. Nixon (1974)**]: President Nixon had secret tapes of conversations pertaining to Watergate, Court ordered the tapes turned over, Nixon claimed he had absolute executive privilege to withhold the information. *Held*, Nixon did not have executive privilege to the information; in deciding whether a president has privilege, the court will balance the need for confidentiality with the need for information. [**GAO v. Cheney**: GAO wants names or people who met over Energy Task Force, Cheney claims executive privilege of the names. Suit different than in Nixon because Congress want information, not court.]

2) **Executive Immunities**: Immunities deal with actions and accountability.

   | Can the President Be Sued? |
   | Civil: | Yes [**Clinton v. Jones**] | No [**Nixon v. Fitzgerald**] | | | No (promotes un-fettered decisions) | Yes |
   | Criminal: | No | No | Yes? | No | Yes |

(Though not criminal charges have never been brought, such would cripple the presidency.)

E. The Impeachment Power of Congress: The president can be impeached for “Treason, Bribery or other High Crimes and Misdemeanors,” though there is no definition for what these are. The design of impeachment is to make it difficult to impeach the president. The House impeaches, Senate tries.

F. The Pardon Power of the President: The aims and goals of the pardon power are: 1) error correction; 2) reform because the criminal may have changed; 3) Closure or national healing (Nixon, Vietnam draft-evaders; 4) Mercy; and 5) Justice. Pardons can only be granted for federal crimes, with few limitations.
V. INDIVIDUAL RIGHTS

A. The Religion Clauses of the First Amendment: According to the First Amendment, “Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof;”

1) **What Constitutes a Religion**: Courts have generally shied away from defining a religion. [Afrika v. Pennsylvania (1981): Prisoner, according to his religion, refused to eat any prison food except that which was raw food. *Held*, First, it must be a religion: a) it must address fundamental and ultimate, imponderable questions; b) it must be a belief-system comprehensive in nature; c) it must have certain formal and external signs. Second, the party must be following the religion: a) is the belief sincere?; b) is it a belief religious in nature?; c) “does a legitimate and reasonably exercised state interest outweigh the proffered first amendment claim?”

2) **The Free Exercise Clause**: The purpose of the Free Exercise Clause is to prevent prosecution of religious belief. There was little litigation concerning the Free Exercise Clause for the first hundred years because it did not bind the states until the Fourteenth Amendment in 1868. The Clause may be “improperly informed” by the Protestant tradition in which belief is separate from conduct. [Braunfield v. Brown (1961): Pennsylvania state law required all retail businesses to be closed on Sunday, Orthodox Jewish shopkeeper challenged, his Sabbath was Saturday. *Held*, Law not a violation of free exercise because it was well justified by a secular purpose, burden on individual incremental.]

   i) **Prohibition of Religious Conduct**: Religious conduct can be prohibited as long as it is based on a neutral, generally applicable law. [Employment Division v. Smith (1990): Smith was fired by employer because he used peyote as part of sacramental rite of Native American Church, was denied unemployment compensation. *Held*, Religious use of peyote could be prohibited because it is by a “valid and neutral law of general applicability.”] [Church of the Lukumi Babalu Aye v. City of Hialeah (1993): City ordinance outlawed slaughter of animals, conduct essential to Santeria religious belief. *Held*, law not neutral and not generally applicable, specifically targeted Santerians.]

   - **No Test of Strict Scrutiny**: The Court sticks to the requirement that the law be a neutral, generally applicable law. [City of Boerne v. Flores (1997): Congress enacted Religious Freedom Restoration Act requiring test of strict scrutiny for burdens on religious conduct, government must prove burden is the least restrictive means of furthering a compelling government interest. *Held*, RFRA is invalid, Court decides what the test will be, Congress cannot change norm.]

3) **The Establishment Clause**: The purpose of the Establishment Clause is to prevent Congress from establishing a religion or enshrining religious beliefs.

   i) **The Lemon Test**: The Lemon Test requires three criteria to decide if a law violates the Establishment Clause. Law fails Lemon Test if the law:

   1) **Lacks a Secular Purpose**: Law cannot be motivated by religion. [Edwards v. Aguillard (1987): Louisiana law required the teaching of creation science in public school classrooms where evolution was also taught. *Held*, Law was motivated by a “preeminent religious purpose,” purpose of “promoting academic freedom” is stifled.]

   2) **Effectively Furthers, Advances, Promotes Religion**:

   3) **Creates an “Excessive Entanglement” Between Government and Religion**: 

16
ii) The Modified Lemon Test: The Modified Lemon Test supplants the old criteria. Law fails Modified Lemon Test if:

1) Lacks a Secular Purpose: Law cannot be motivated by religion. [Agostini v. Felton (1997): New York provided public school teachers to teach underprivileged children remedial reading and arithmetic in parochial schools. Held, New York was not barred from providing such aid because state’s motivation was neutral and secular.]

2) Effectively Furthers, Advances, Promotes Religion: (By producing government indoctrination or endorsement; classifying by reference to religion; creates and excessive entanglement.)


B. Freedom of Speech: According to the First Amendment, “Congress shall make no law…abridging the freedom of speech.”

1) Campaign Finance Reform: Spending money to deliver political speech is considered protected speech, contributing to candidates is not. [Buckley v. Valeo (1976): Federal Election Campaign Act: 1) capped limited expenditures; 2) limited contributions to candidates; 3) limited public financing expenditures; 4) limited personal expenditures. Held, 1), 4) Congress cannot limit expenditures on speech because speech is speech, corruption will not be limited; 2), 3) Congress can limit contributions to prevent corruption.]

i) Post-Buckley Contribution Limits: Buckley applies to states. [Nixon v. Shrink Missouri Government PAC (2000): Held, Buckley applies to states, the challenger must show a system of suppressed political advocacy, state did not need to show compelling interest.]

2) Flag Burning: Burning the flag is protected speech. [Texas v. Johnson (1989): Johnson burned an American flag and chanted with protesters, “America, the red, white, and blue, we spit on you,” and was convicted of desecrating the flag. Held, Flag burning is symbolic protected speech.] [United States v. Eichman (1990): Congress passed Flag Protection Act, making it a crime to mutilate, deface, defile, or burn the flag. Held, Act is unconstitutional, it prohibiting content-based speech.]

C. The Equal Protection Clause: The Fourteenth Amendment states, “No state shall...deny to any person within its jurisdiction the equal protection of the laws.” Questions regarding the Equal Protection Clause concern not whether the government can discriminate – but when it can.

1) **Race: (Very) Compelling Interest/Strict Scrutiny**: To discriminate based on race, the government must demonstrate a compelling interest.

   i) **Race as a “Plus Factor”**: Race can be used as a factor in decisions. [Regents of the University of California v. Bakke (1978): Bakke denied from UC Davis Med School, however lesser minority applicants were accepted, 100 spots were reserved in each class for minorities. *Held*, a) fixed quotas are unconstitutional; b) separate admissions tracts are unconstitutional; c) use of race as a “plus factor” is valid.]

   ii) **Limits on Use of Race**: [Hopwood v. Texas (1996): University of Texas Law School used race as factor in admission. *Held*, School cannot use race as a factor in admissions.]

2) **Gender: Important Substantial Interest/Intermediate Scrutiny**: To discriminate based on gender, the government must show an important substantial interest. [Craig v. Boren (1976): Oklahoma forbade the sale of 3.2% beer to men under age 21 but permitted the sale of such beer to women over 18. *Held*, Gender-based differences invalidated, even though law favors women, because “the relationship between gender and traffic safety” is “too tenuous.” Essentially, means to achieve objective not related to objective.]

   i) **Exceedingly Persuasive Justification**: In the case of single sex education, an “Exceedingly Persuasive Justification” is required. [Virginia v. United States (1996): Virginia Military Institute forbade admittance of women to further its purpose of training citizen-soldiers. *Held*, VMI’s objectives of adversative methods and diversity do not present an exceedingly persuasive justification for withholding women from VMI.]

3) **Sexual Orientation: Rational Relationship to State Interest**: To discriminate based on sexual orientation, there must be a conceivable rational relationship to the state interest. [Romer v. Evans (1996): Colorado voters amended Constitution to prohibit any Colorado government – state or local – from protecting homosexuals from discrimination, essentially excluding homosexuals from protection. *Held*, Colorado statute unconstitutional because it “is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.”]