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Constitutional Law Outline

I. Introduction
   a. Supreme court Practice, Procedure, and Composition
      i. [Handout]
   b. Ways of Interpreting the Constitution
      i. Text
         1. 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.
      ii. Original Intent
         1. 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.
      iii. Constitutional Structure
         1. 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.
   iv. History and Tradition
      1. 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.
   v. Political Theory
      1. The Political Theory Method may seek analysis based on “principles of our democratic system.”
   vi. Social Policy: (Fairness/Justice)
      1. The Social Policy Method seeks to construe the Constitution in a light that creates sound social policy.
   vii. Precedent and Doctrine
      1. 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.
   c. Historical Foundation:
      i. The Constitution came about after dissolution of the Articles of Confederation. The Constitution is designed to simultaneously: a) strengthen government and b) weaken government.
      ii. Problems in 1787: The Articles of Confederation, ratified in 1781, plagued the young country with several problems.
         1. 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.
         2. 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).
         3. 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.
      iii. Goals of the Constitutional Convention: The Framers brought two distinct notions to the Convention.
1. **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.

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

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

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

2. **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.)

d. **Brief summary of the justices**

   i. Chief Justice Rehnquist:
      1. Has been a staunch defender of state’s rights and limited federal judicial power.

   ii. Scalia:
      1. Considered among the most conservative members on the court.
      2. Unwilling to recognize any individual right not clearly stated in the Constitution; strict textualist.

   iii. Thomas:
      1. Has consistently voted with Scalia, anchoring the conservative wing of the court.
      2. Important commerce clause opinions

   iv. O’Connor:
      1. One of two critical centrist swing votes.
      2. Willing to give deference to state laws

   v. Kennedy:
      1. Considered conservative, but often votes with liberals on First Amendment issues.
      2. With O’Connor, provides a critical swing vote.

   vi. Souter:
      1. Has adopted liberal positions on affirmative action, racial redistricting, federalism, church-state issues, and individual rights.

   vii. Ginsburg:
      1. Takes liberal stands on civil rights, federalism and church-state issues. Prefers deciding cases on procedural grounds rather than broad principles of social justice.

   viii. Breyer:
      1. Viewed as conservative on economic issues and liberal on social issues. Has been a strong advocate for congressional authority on federalism questions.
      2. Issue of Text v. Policy

   ix. Stevens:
      1. Has supported affirmative action, abortion rights, and separation between church and state.

e. **Major Clauses & statutes**

   i. Judicial Function: Article III

   ii. The 1st Amendment
      a. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

   iii. The 10th Amendment
1. “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.”

iv. The 11th Amendment
1. “The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced and prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.”

v. Supremacy Clause: Art VI, § 2
1. Resolves issue of whether state or federal government is more powerful

vi. 28 USC 1257
1. Rules for determining if SC can review a state court decision

vii. 28 USC 1251
1. Congressional statute granting original jurisdiction to the court

viii. Article I, § 3, Clause 6
1. The “Senate shall have the sole power to try all Impeachments

ix. Art. I, § 1
1. “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives”

x. Art I, § 8
1. Specific Enumeration of Powers given to congress
   a. Necessary and Proper Clause
      i. Art. I, § VIII, clause XVIII: Congress has the power “to make all Laws which shall be necessary and proper for carrying into Execution the oregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department of Officer thereof.”
   b. Commerce Clause
      i. Art. I, § VIII, clause III: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”
   c. Spending Power
      i. Art I, § VIII, clause I: Congress has the power “to pay the devts and provide for the common Defence ngeeral Welfare of the United States.”

2. Article II, § 2
   a. Grants the President the power to make treaties with foreign nation, provided “two thirds of the senators present concur.”

xi. Article IV, § II
1. Privledges and Immunities Clause
   a. No state shall deprive citizens of other states of the privileges and immunities it accords its own citizens

xii. Article VI, paragraph 2
1. Pre-emption doctrine
   a. “This Constitution, and the Laws of the United States which shall be madein Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

f. Certiorari
   i. Certiorari is granted if at least four justices vote to do so. If denied, it is not a ruling on the merits.

II. The Supreme Court’s Constitutional Authority
a. Original Jurisdiction [28 USC 1251]
   i. Original and Exclusive jurisdiction of all controversies between two or more states.
ii. Original but not Exclusive jurisdiction of:
   1. All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties
   2. All controversies between the United States and a State
   3. All actions or proceedings by a state against citizens of another state or against aliens.

b. The Scope of Judicial Review
   i. Legitimacy of Judicial Review
      1. National supremacy
         a. Supremacy Clause: “This constitution, and the Laws of the US which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the US, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.”
         b. Judiciary function, is to decide Cases or Controversies using the constitution as the supreme law of the land (Art. III combined with the Supremacy Clause)
         c. Marbury v. Madison
            i. The SC is empowered to review acts of Congress and void those that it finds to be repugnant to the Constitution.
         d. The judicial review system is important, for if the court deems a law unconstitutional, they will simply not enforce the law.
      2. The Authority to Review State Court Decisions and Acts of State Governments
         a. Martin v. Hunter’s Lessee
         b. 28 USC § 1257
   c. Limits on the Judicial Power
      i. General limits
         1. No Advisory opinions
         2. No Foreign Affairs – this is left to the President and Congress
         3. Can hear solely cases and controversies[discussed below]
      ii. Party must have standing Standing
         1. Three main standing requirements
            a. The P must have suffered an “injury in fact.”
            b. There must be a “causal connection between the injury to P and the conduct complained of.”
            c. It must be likely, as opposed to merely “speculative,” that the injury will be redressed by a favorable decision for the P.
         2. Timing
            a. Mootness
               i. An actual controversy must exist at all stages of review, not simply when the case is initiated (the controversy cannot pass, or it will be moot)
               1. Exception: Issues involving events of short duration(e.g. economic strikes, pregnancy) are not moot if they are “capable of repetition, yet evading review.”
            b. Ripeness
               i. A court will not anticipate a question of constitutional law prior to the necessity of deciding it or pass upon issues that may or may not arise sometime in the future. This generally arises in suits for injunctions or declaratory judgments
               1. Remember, no advisory opinions
      3. Third Party Standing
         a. A person does not have standing to assert the rights of another who was injured by an allegedly unconstitutional act
i. Two reasons

1. Need
   a. A third party might not want to assert his rights, and the third party might not benefit from the assertion of his rights. The SC should not try constitutionality cases unnecessarily.

2. Advocacy
   a. A third party is probably the best advocate for his own claim

ii. Exception

1. As long as the P has been injured, if the 3rd party would find it difficult or impossible to vindicate his rights, the court will allow a third party to do it.

2. Statute: Congress can give standing through a statute

4. Public Interest is not enough to create standing
   a. Lujan v. Defenders of Wildlife
      i. The Endangered Species act requires that agencies, along with Secretary of the interior, make sure endangered species are protected in the decisions carried out by the agency. The ESA also allowed a civil suit to lie to enjoin an agency from carrying out actions in violation of the act. P brought suit against D, the secretary of the interior, for declaratory judgment that a recent regulation misinterpreted the ESA.
      ii. Held, Congress may not convert the public interest in proper administration of the laws into an individual right such that all citizens may have standing to sue.
      iii. The three fundamental standing requirements have not been met in this case.
         1. No member had an injury in fact, it there was no showing that the injury supposedly complained of was redressable.
         2. The “case or controversy” requirement is not met by a P raising only a generally available grievance about the government, where the harm is supposedly to ALL citizens.
            a. A taxpayer does not have standing to challenge the government when the interest effects all citizens.
         3. It is the EXECUTIVE branch's role to take care that the laws by faithfully executed.
      iv. Conc(Kennedy, Souter): Congress must identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.
      v. Diss(Blackmun, O’Conner): This is like INS v. Chadha, where the court relaxed the executive enforcement powers b/c they gave the courts judicial review; not a violation of separation of powers.

iii. The Review of State Court decisions

1. Background
   a. The First Congress [Judiciary Act of 1789] allowed the SC to hear three types of cases on appeal, all of which were to be cases in which state courts rejected claims made under federal law. If a state court upheld such claims, the decision could not be reviewed

2. Martin v. Hunter’s Lessee
   a. The Virginia SC was reversed by the United States Supreme Court, but the Virginia Court refused to comply with the reversal.
b. Held, The Supreme court has appellate jurisdiction over the highest state courts on issues involving the federal constitution, laws, and treaties

c. Rationale: The Judiciary Act is valid. The United States has power from the Constitution to review all cases which affect the Constitution, laws, or treaties of the United States.

3. **Cohens v. Virginia**

   a. This case extends the Martin’s decision to allow for SC review of all state court criminal judgments. The judicial power extends to “all cases arising under the Constitution or a law of the US, whoever may be the parties.”

4. **Statutory Approach – Modern** (28 USC 1257)

   a. Final judgments or decrees of the highest state court may be reviewed by the SC when:
      i. The validity of a federal treaty or statute is drawn into question
      ii. The validity of a state statute is drawn into question on the ground of it being repugnant to the Constitution, laws, or treaties of the US, or
      iii. Any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, statutes, or commissions or authority of the US.

5. **Adequate and independent state grounds**

   a. Review by the SC is limited to federal issues. If there is an adequate and independent state ground for the state court’s decision, the Court will deny review, because a reversal on federal grounds would not change the outcome and would be an advisory opinion

b. To determine:
   i. “If the state court decisions indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds,” then it is not subject to federal review [Michigan v. Long]

iv. **The Political Question Doctrine**

   1. **General**

      a. The court uses this to keep the checks and balances in place, leaving questions which do not belong to the court for decision to be decided by those other branches which rightly hold the power

      b. Courts will not hear when there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and management standards for resolving it.”

      c. Four General Criteria:

         i. A “textually demonstrable” constitutional commitment of the issue to the political branches for resolution

         ii. The appropriateness of attributing finality to the action of the political branches

         iii. The lack of adequate standards for judicial resolution of the issue

         iv. Avoidance of issues that are too controversial or could involve enforcement problems

   2. **Specific Limitations**

      a. Foreign Affairs

      b. Impeachment actions

         i. **Nixon v. United States**

            1. P Nixon was a former federal district court judge and was convicted on making false statements before a federal grand jury. The US House adopted articles of impeachment and presented them to the Senate. The Senate appointed a committee to hold
The committee made a report to the full Senate, which gave P three hours of oral argument to supplement committee record. The Senate voted to convict P on the impeachment articles, and P was removed from his office.

2. P then sued, claiming the Senate’s failure to participate in the evidentiary hearing as a full body violated the Senate’s constitutional authority to “try” impeachments.

3. **Held**, the courts cannot review the procedures whereby the United States Senate tries impeachment

4. **Rationale**
   a. This is a political question
   b. In this case, Article I, § 3, Clause 6 provides that the “Senate shall have the sole power to try all Impeachments”
   c. Judicial review of the Senate’s trying of impeachment would be inconsistent with the system of checks and balances. Impeachment is the only check on the judicial branch (life term, unless) by the legislature, and it would be inconsistent to give the judicial branch final reviewing authority over the legislature’s use of the impeachment process. The need for finality and the difficulty of fashioning relief also demonstrate why judicial review is inappropriate in this case.

III. The Affirmative Powers of the Federal Government

a. General
   i. This section deals with Federalism (i.e. the division of powers in the Constitution)
      1. Horizontal
         a. The Constitution divides the federal government into three branches with separate powers (Art. I, II, and III)
      2. Vertical
         a. The Constitution explicitly states that all powers not retained by the federal government will be left to the states

ii. The Legislative Power
   1. Art. I, § 1
      a. “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives”
   2. Art I, § 8
      a. Specific Enumeration of Powers given to congress

iii. The Necessary and Proper Clause
   1. General
      a. Art. I, § 8: Congress has the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department of Officer thereof.”
      b. This is in the powers section, and not in the limitations section: McCollough: “Does not mean absolutely necessary”
   2. The Deciding Case: **McCulloch v. Maryland**
      a. General: This case brings forth the notion of “implied powers” in the Constitution, and also sets forth the fact that the federal government is supreme.
      b. Maryland sought to impose a tax on the Bank of the United States, and the Bank refused to pay. McCulloch is the cahier of the Bank.
c. **Held,** even though the constitution does not expressly grant Congress the power to incorporate a bank, it can do so under a doctrine of implied powers. Also **held,** the federal government is supreme over the states so that a bank created by it pursuant to its constitutional powers is immune from taxation by the states.

d. Key Phrase: “Let the end be legitimate, let it be within the scope of the Constitution, [then] all means where are appropriate (i.e. necessary and proper) which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional.”
   
   i. The Constitution cannot contain exactly every power which would be needed to carry out its ends, and that’s why there is a necessary and proper clause
   
   ii. If a means is a direct mode of executing a power enumerated in the Constitution, then those means can be considered incidental to the enumerated power. The national legislature must be allowed discretion, with respect to the means by which the powers conferred upon it are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

e. Key Phrases: “A state, which represents only a part of the people, cannot act to control the government of the whole, which ahhs also been declared to be supreme.” AND “The power to tax is the power to destroy. It is also the power to control.” A state government cannot destroy or control the federal government

iv. The Commerce Power / The Commerce Clause
   
   1. General
      
      a. It was included in the Constitution under the hopes of creating a national economy free from the undue restraints imposed by the states. Since that time, it has had a large expansion into areas never comprehended by the framers.

   2. The Source of the Power
      
         
         i. “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

      b. The Commerce Clause MUST be read in conjunction with the Necessary and Proper Clause it order to ensure its effectiveness

   3. Regulation of Foreign Commerce
      
      a. Exclusive Federal Authority
         
         i. The regulation of foreign commerce, with very few exceptions, is exclusively within the power of the Federal Government.

      b. Very Broad in Power
         
         i. The Scope of what is foreign commerce has been held to be extremely broad. For e.g., it extends to any shipments made on the high seas even thought points of leaving and arriving are both within the United States [this could also be seen as interstatecommerce, though].

   4. Interstate Commerce Power
      
      a. Historical View
         
         i. **Gibbons v. Ogden**
            
            1. P (Ogd) sought to enjoin D from violating P’s monopoly over navigating a steamboat between NY and NJ. A NY statute had granted two men this exclusive right, which is how P obtained it. D was enjoined, but appealed arguing that the power of Congress to regulate commerce was exclusive, and NY could not do this.
            
            2. Held, the federal commerce power is “complete in itself,” includes navigation, and may be exercised within the territorial
jurisdiction of a state when the commerce within the state also affects other states.

3. Key: “The meaning of commerce is not limited to interchange of commodities; it is intercourse.” The power over commerce, including navigation, was one of the major reasons people adopted the Constitution and gave up the Articles of Confederation.”

4. Congressional power is over commerce “among the several states;” not power over the internal workings of any state.

5. “Among” means intermingled with: if interstate commerce is introduced into the interior of a state, then the power of Congress follows that Commerce.

6. Regulation of interstate commerce by a state is not akin to a state’s power of taxation and inspection because the latter are powers clearly retained by the states and are exercised concurrently with similar, federal powers.

7. Should a collision exist between a state law and federal, the federal law is supreme [necessary and proper].

   i. General
      1. In 1887 and the enactment of the Interstate Commerce Act, the commerce clause was relied on as the basis for the affirmative exercise of federal power; this was followed by the Sherman Antitrust act and several other laws
   ii. US v. Darby (Regulating by prohibiting Commerce)
      1. Fair Labor Standards Act prescribed maximum and minimum wages for workers and prohibited interstate shipment of goods made by workers not employed in compliance with the act. D was charged with violating the act.
      2. Held, congress may establish and enforce wage and hour standard for the manufacture of good for interstate commerce.
      3. Key: “The interstate shipment of goods is clearly allowed to be regulated by Congress.”
      4. Federal Power extends to intrastate activities directly affecting interstate commerce. The means here adopted so affect interstate commerce and thus are within Congress’s power to regulate.
   iii. Wickard v. Filburn (Aggregation of Local Activities theory)
      1. D imposed a marketing penalty on a portion of D’s crop grown in excess of his allotment under a 1938 Act. P claimed this was unallowable b/c the crop was only being used on his farm.
      2. Held, Congress may regulate individual home production and use of wheat based on the substantial effect on interstate commerce of the aggregate of such local activity.
      3. The purpose of the Act is to restrict the supply of wheat in order to maintain the price, and the power to regulate commerce includes the power to maintain the price of goods. Commerce among the states in wheat is VERY important.
      4. Home production may be reached by Congress if it exerts “a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.
5. The effect of P’s home production is not trivial, because taken together with many other similarly situated the effect is great

iv. Extension of Wickard: Once congress determines that an activity affects interstate commerce, the court need only examine whether that determination is supported by a rationale basis. [Hodel v. Virginia Surface Mining and Reclamation Association]

v. Heart of Atlanta Motel v. US
1. P refused to rent rooms to blacks, and sought declaratory judgment that the Civil Rights Act was unconstitutional
2. Held, Congress may prohibit racial discrimination by private motels that accept out of state business.
3. Congress may act under the Commerce Clause if the activity regulated is commerce that concerns more than one state and has a real and substantial relation to the national interest.
4. Even thoughte operation of the motel was local, “if it is interstate commerce that feels the pinch, then it does not matter how local the operation that applies the squeeze.”

vi. Katzenbach v. McClung
1. P refused to serve blacks, and less than half the food it received was from out of state.
2. Held, congress may use its commerce power to forbid racial discrimination by a restaurant on the sole ground that slightly under one half of the food it serves originated from out of state.
3. The fact that discrimination in restaurants resulted in sales of fewer interstate goods and that interstate travel was obstructed directly by it shows sufficient connection between the discrimination and the movement of interstate commerce to allow federal intervention.

vii. Perez v. United States
1. P challenged the applicability of interstate commerce to loan sharking an organized crime.
2. Held, congress may use the commerce clause power to define and regulate a class of activity that might include individual acts unconnected with interstate commerce.
3. Congress may properly define and regulate a “class of activities” having an effect on interstate commerce, provided it appropriately considers the “total incidence” of the practice on such commerce. Even purely intrastate activities may affect interstate commerce.

c. Post-Modern Approach (1995 - ) ** See Attached**

i. US v. Lopez
1. Gun Free School Zone Act prohibited any person from “knowingly possessing a firearm” in a school zone. D, a 12th grader, took a concealed gun to school and was convicted under the act.
2. Held, Congress may not prohibit the possession of firearms within a school zone.
3. We have previously noted that the commerce power does have limits
4. Three broad Categories of activity that come within the commerce power:
a. Congress may regulate the channels of interstate commerce.
b. Congress may regulate the instrumentalities of interstate commerce, as well as persons or things in interstate commerce; and
c. Congress may regulate activities that have a substantial relation to interstate commerce, meaning those that substantially affect interstate commerce.

5. Possessing a gun in a school zone does not arise out of a commercial transaction that substantially affects interstate commerce, nor does the act contain a requirement that the possession be any way connected to interstate commerce.

6. Congress claims guns in school results in violent crimes, and this increases the costs on society through insurance rates. Also, the government claims guns disrupt education, which leads to a less productive society, affecting commerce.

7. If Congress’s assumptions were taken, there would be unlimited power to congress. The only way they do that here is to pile up assumption upon assumption

ii. **Morrison v. Olsen**

1. D raped P and made remarks about women. P sued under the Violence against women act, which provided a damage remedy for a victim of gender motivated violence. D claimed it was unconstitutional; US intervene to defend under the Commerce Clause.

2. **Held**, congress may not provide a federal civil remedy for a violent crime on the ground that the aggregate effect of such crimes substantially affected interstate commerce.

3. In **Lopez**, the rationale was that possessing a firearm is a criminal act, not an economic one, and Congress did not show a “substantial impact” on interstate commerce.

4. Congress showed the impact on gender-motivated crimes on victims and families, but used a but-for causal chain to show the impact these crimes would have on interstate commerce; this type of reasoning is invalid, b/c it could be used to regulate anything, even family law.

5. The police power is left to the state; Congress has no authority to regulate non-economic, violent criminal conduct based solely on the conduct’s aggregate effect on interstate commerce.

6. 14th Amendment does allow Congress to enforce deprivations of life, liberty, or property w/o due process; however, this applies only to state action, not private conduct.

iii. **Di(Sou, Ste, Gui, Breyer)**

1. Review of case summaries

   1. the federal commerce power is “complete in itself,” includes navigation, and may be exercised within the territorial jurisdiction of a state when the commerce within the state also affects other states. “The meaning of commerce is not limited to interchange of commodities; it is intercourse.” [Gibbons v. Ogden]
2. Federal Power extends to intrastate activities directly affecting interstate commerce. This includes wages and hour labor restrictions [US v. Darby].

3. Aggregate theory: Local production may be reached by Congress if it exerts “a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect. [Wickard v. Filburn]
   a. Court only needs to find a “rational basis” [Hodel v. Virginia Surface Mining and Reclamation Assoc.]

4. Congress may act under the Commerce Clause if the activity regulated is commerce that concerns more than one state and has a real and substantial relation to the national interest. Even though the operation of the motel was local, “if it is interstate commerce that feels the pinch, then it does not matter how local the operation that applies the squeeze. [Heart of Atlanta Motel v. US]

5. The fact that discrimination in restaurants resulted in sales of fewer interstate goods and that interstate travel was obstructed directly by it shows sufficient connection between the discrimination and the movement of interstate commerce to allow federal intervention. [Katzenbach v. McClung]

6. Congress may properly define and regulate a “class of activities” having an effect on interstate commerce, provided it appropriately considers the “total incidence” of the practice on such commerce. Even purely intrastate activities may affect interstate commerce. [Perez v. US]

7. Possessing a gun in a school zone does not arise out of a commercial transaction that substantially affects interstate commerce, nor does the act contain a requirement that the possession be any way connected to interstate commerce. [US v. Lopez]

8. Congress showed the impact on gender-motivated crimes on victims and families, but used a but-for causal chain to show the impact these crimes would have on interstate commerce; this type of reasoning is invalid, b/c it could be used to regulate anything, even family law. [Morrison v. Olsen]

5. Secondary Sources on the Commerce Power
   a. The Original Meaning of the Commerce Clause, Randy E. Barnett
   b. The Fool on the Hill: Congressional Findings, Constitutional Adjudication and United States v. Lopez, Phillip P. Frickey
   c. Categorical Federalism: Jurisdiction, Gender, and the Globe, Judith Resnick

v. The Spending and Treaty Powers
   1. The Spending Power
      a. General
         i. Art I, § VIII, clause I
            1. Congress has the power “to pay the devts and provide for the common Defence ngeeral Welfare of the United States.”
         b. The Scope of the Power to Spend
            i. The General Welfare Clause is connected to the taxing and spending power.
1. It is a limitation on that power (Congress may spend only for the general welfare) and is not an independent source of power for Congress.

ii. The Rule is: Congress must tax for revenue and not merely regulatory purposes, and then it must spend for the general welfare.

iii. The spending must be for a “national concern” as opposed to a “local” one. However, the SC gives great deference to the determinations of Congress in deciding what is for the “common benefit.”

iv. Congress can only spend for the national, as opposed to the local welfare [US v. Butler]

v. Congress may reduce private employers federal tax obligations by crediting payments only made to federally approved state unemployment plans [Steward Machine Co. v. Davis]

c. Limits on the Federal Spending Power
   i. It must be used in pursuit of “the general welfare”
   ii. Any conditions imposed must be unambiguous, so the states may make knowing choices
   iii. The conditions must be related to the federal interest in particular national programs
   iv. The conditions must not be barred by other independent constitutional provisions.

d. Federal Grants to States
   i. Congress has long promoted federal policy by attaching conditions on the use of funds given to states. A state autonomy limitation on such conditions has been suggested but is only conjectural at this point (Look at National League of Cities). The Court has held that congress can condition such issues to federal objectives

e. Federal influence over state regulation through the spending power
   i. South Dakota v. Dole
      1. P allowed anyone 19 or older to buy beer; Congress said that it would withhold 5% of highway funds from any state that permitted those under 21 to buy alcohol. P sought declaratory judgment that it violated spending power and 21st amendment(repeal of prohibition).
      2. Held, Congress may refuse to provide federal highway funds to states that do not adopt federal age standards for the sale of alcoholic beverages.
      3. The statute relied on in this case relied on the spending power to encourage uniformity in state drinking ages without actually imposing a national drinking age.
      4. Congress clearly has authority to impose conditions on the use of federal funds
      5. The spending power is limited four ways, and must comply with those ways (ABOVE): The statute here is consistent with the first three as it is intended to promote safe interstate travel. The bar that the state suggests prevents Congress from inducing states to engage in otherwise unconstitutional behavior. Because a state may constitutionally raise its drinking age, Congress is not barred from imposing this condition on federal funds.
      6. Di(O’Conner): The Condition established by this statute is not reasonably related to the expenditure of federal funds for
highway purposes; it is only tangentially related to highway safety. If we allow this to go, Congress can interfere in virtually all aspects of state government, merely by citing some effect on interstate travel.

2. The Treaty Power
   a. General
      i. Article II, § II, paragraph II
         1. Grants the President the power to make treaties with foreign nation, provided “two thirds of the senators present concur.”
      ii. In external affairs, not those domestically, the federal government has all the powers that are necessary concomitants of nationality and sovereignty. No distribution of power with the states
      iii. Treaties also are the “Supreme Law of the land” – Supremacy Clause
          1. A treaty between the US and a foreign country takes precedence over a state law on the same issue. [Hauenstein v. Lynham]
   b. Treaty Power as Legislative Power
      i. The Tenth Amendment does not limit the treaty power
         1. Pursuant to a treaty, under the Necessary and Proper Clause, Congress may legislate on matters over which it would otherwise have no power to do so.
   c. The Power to Implement a Treaty
      i. Missouri v. Holland
         1. The Migratory Bird Act implemented a treaty between US and Canada which prevented the killing of migratory birds except as provided by the Secretary of Agriculture. P claims that the act is unconstitutional because it interferes with state’s rights.
         2. Held, an act of Congress implementing a US treaty may create regulations that would be unconstitutional if the Act stood alone.
         3. Tenth amendment is irrelevant, since the power to make treaties is delegated expressly in the Constitution. If the treaty is valid, the statute is too, being necessary and proper; b/c it doesn’t contravene any express words of the Constitution, it is presumed valid.
         4. Since the national interest can only be protected through a treaty, and b/c there is no constitutional restrictions and the national interest requires it, it is valid.
         5. The state’s interest is too transitory to pre-empt federal regulations; especially since it is in pursuance of a treaty.
   d. Further Analysis of the Treaty Power
      i. A treaty can infer upon Congress powers in addition to those granted in Article I, provided that the treaty power may extend only to “proper subjects of negotiation between our government and the governments of other nations.”
      ii. If it is inconsistent with the Constitution, a treaty will fail.
   e. How to analyze the Treaty Power?
      i. Congress may provide legislation pursuant to a treaty that would otherwise be invalid under Congressional power.
      ii. Is the Treaty Valid?
         1. Is it a proper issue to be dealt with by national cooperation?
            a. “It can be protected only by national action in concert with that of another power.”
2. Is it forbidden by “some invisible radiation” from the general terms of the 10th Amendment?
   a. “It is not sufficient to allow the states to do it.”

IV. State “Defenses” – The 10th and 11th Amendments
   a. The 10th Amendment
      i. General
         1. “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.”
      ii. Rise and Fall of State Claims of immunity from federal regulation
          1. US v. California (1936)
             a. Congress can regulate state public activities – state owned railroad
             a. State autonomy defense held sufficient to invalidate the application to state and local governments of a federal law otherwise permissible under the commerce power.
             b. Invalidated Fair Labor Standards Act that extended its minimum wage and maximum hours provisions to all employees of state and local government
             c. Ra: “This statute will impermissibly interfere with the integral government functions of these bodies, displacing...the states authority to structure its government.”
             d. Held: Insofar as the challenged amendments operate directly to displace the states freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I § 8.
          3. Hodel v. Virginia Surface Mining and Reclamation Association
             a. Marshall restates three part test used for national league of cities
                i. There must be a showing that the challenged statute regulates the States as States.
                ii. The federal regulation must address matters that are indisputably attributes of state sovereignty
                iii. It must be apparent that the States compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions
          4. Garcia v. San Antonio Metropolitan Transit Authority
             a. Overruled National league of Cities
             b. The third requirement, that the federal statute impair traditional government functions, is involved here; This standard is unworkable and must be discarded.
                i. The problem is that no distinction that purports to separate out important government functions can be faithful to the role of federalism in a democratic society. Any rule of state immunity that looks to the traditional, necessary, or integral nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes
                ii. States are to experiment with ways to solve problems; traditional functions, etc., are no more important than other functions
             c. Dissent(Rehnquist, O’Conner, others): The decision that federal political officials, invoking the commerce clause, are the sole judges of the limits of their own power is inconsistent wit the fundamental principles of our constitutional system. This case relegates the 10th amendment to nothing in relation to the commerce power
National action has always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.

d. Dissent: The true “essence” of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.

5. **New York v. United States**
   a. Only three states had radioactive disposal sites, and they didn’t want other states using them. Congress passed the Low Level Radioactive Waste Policy Amendment Act, which authorized the states to enter into regional compacts that could restrict the use of their disposal facilities to waste generated within member states. 31 states were not a part of a compact; congress gave them access for 7 more years, and they had to pay to use the disposal sites. States that failed to meet deadlines could lose access to disposal sites. Any state that failed to dispose of all of its waste by 1996 would be liable for that waste and any damages that it incurred.
   
   b. **Held**. Congress may not direct the states to regulate in a particular field or a particular way, using them as implements of regulation.
   
   c. The 10th Amendment states the truism that all is retained by the states which has not been surrendered to the federal government; P claims that D violated its power not by regulating interstate waste (which is fine under the commerce clause), but by directing the states to regulate in this field in a particular way.
   
   d. Congress cannot require state governments to implement federal legislation; they can give incentives, but not if those incentives violate the Constitution.

6. **Printz v. United States**
   a. The federal Brady Handgun Violence Precaution Act required the US Attorney General to create a national system to instantly check the background of prospective handgun purchasers. Pending establishment of the national system, the Act also required the chief law enforcement officer of each local jurisdiction to conduct the background check.
   
   b. **Held**. Congress may not compel state officers directly to enforce a federal regulatory program.
   
   c. Historical texts refer to the ability of the state judges to enforce federal law; and for the federal government to use state officers to execute federal laws, but none imply that this can be done without the consent of the states.
   
   d. The separation of the federal and state governments is one of the Constitution’s structural protections of liberty. The power of the federal government would be augmented immeasurably if it could impress into its service state police officers; also, it is the President’s job to execute laws, not state police officers for the federal government.
   
   e. Congress cannot circumvent *NY v. US* by simply making state officers do the regulations directly.
   
   f. Di(Souter, Breyer, Stevens)

<table>
<thead>
<tr>
<th>Text:</th>
<th>Stevens(minor textual argument): the fact that state officials take a federal oath (CLEO’s take an oath to support the constitution)</th>
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<tr>
<td>Original Intent:</td>
<td>Souter: Looks extremely to the federalist and says that it determines his position. All state officials “will be incorporated” into the Nation’s operation</td>
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<tr>
<td>Scalia simply uses Souter’s quotes to disclaim them Idea of state Sovereignty and other general things</td>
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7. Reno v. Condon
   a. **Held**, drivers personal information gathered by state DMV’s is a “thing in
      interstate commerce” because it is used by insurers, manufacturers, marketers,
      and others engaged in interstate commerce to contact drivers with customized
      solicitations.
   b. The court unanimously held that congress had authority to limit disclosure of this
      information by state authorities.

8. Recap
   a. Congress is allowed to regulate wage and hour labor standards. The third prong
      of national league of cities is no more important than other state functions.
      [[Garcia v. San Antonio Metropolitan Transit Authority]]
   b. Congress cannot tell states how to regulate. They are allowed to use the
      commerce power to regulate things, but they cannot make states follow a certain
      plan in doing so. [[NY v. US]]
   c. Congress cannot compel state actors to do things for regulation purposes. [[Printz
      v. US]]
   d. Drivers license information is a thing in interstate commerce, and Congress
      cannot limit disclosure of this information by state authorities. [[Reno v. Condon]]

b. The 11th Amendment
   i. General
      1. “The Judicial Power of the United States shall not be construed to extend to any suit in
         law or equity, commenced and prosecuted against one of the United States by Citizens of
         another State, or by Citizens or Subjects of any foreign state.”
   ii. Basic rule
      1. The federal (national) courts do not have jurisdiction to hear a lawsuit brought by a
         private individual or corporation against a state. The states retain their “sovereign
         immunity,” which operates to protect them from this kind of suit.
   iii. Development of the Basic Rule
      1. **Chisolm v. Georgia**
         a. Citizen of South Carolina brought a suit against the state of Georgia alleging it
            owed him money on some public bonds he owned.
         b. Held, Georgia could be sued in federal court (diversity jurisdiction) to collect this
            debt.
         c. This caused an uproar, and the states ratified the 11th amendment.
            i. Note: The 11th Amendment stated did not expressly protect a state from
               being sued in federal court by its own citizens, just citizens of another
               state.
      2. **Hans v. Louisiana**
         a. States that the states are protected from suit by their own citizens; still the law
            today, but is heavily criticized.
            i. Scalia thinks it is a good decision (the ardent textualist): “The eleventh
               amendment was important not merely for what it said but for what it
reflected: a consensus doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood backdrop which the Constitution was adopted, and which its jurisdictional provisions didn’t mean to sweep away.”

ii. Seems strange for an ardent textualist (“The constitution is not what we think it ought to mean. It does not, it means what it says.”)

3. This applies to Corporations as well as individuals

iv. Exceptions to the Basic Rule

1. The US may sue states in federal court
2. States may sue each other in federal court, if suing to protect their own interest (not those of individual citizens) (i.e. border dispute)
3. Citizens may sue municipalities in federal court so long as state government is not so closely involved so that it is in effect a suit against a state.
4. Citizens may sue individual state officers who violate a federal law in federal court and get injunctions directing future action in compliance with federal law. He is not allowed to use the states 11th amendment immunity, but is considered a “state actor” for 14th amendment purposes (called a “fictional distinction”)
   a. The suits against state officials may not seek “retroactive” money damages that would cost the state treasury money, but may seek a “prospective injunction” that has the indirect effect of costing state’s money
      i. i.e. segregating schools
5. Citizens may seek monetary relief from individual state officers if no one is to be paid out of the officials own pockets, or out of a “voluntary” indemnification policy bought by the state (i.e. police officer using excessive force)

v. Waiver

1. Congress may waive the states 11th amendment from suit if, and only if:
   a. It passes a law to enforce the 13th, 14th, or 15th amendments; and
   b. It makes its intention to subject states to federal suits crystal clear
2. Congress cannot waive the states immunity when it legislates on any of the other enumerated powers (i.e. commerce clause) except the 13th, 14th, and 15th amendments.
   a. Rationale for this: These amendments represented a “new deal” between the states and federal government, and the states handed over a piece of their inherent sovereignty in ratifying those amendments.
   b. The Current Court holds that this transfer of sovereignty is limited to the subject matter of those Civil War Amendment (equal protection, voting rights, due process).
3. States themselves can consent to being sued in federal court;
   a. By passing a statute saying so for particular kinds of cases,
   b. Or by filing a lawsuit on a case-by-case basis that turns out to have federal issues or counter-claims involved
4. The SC can review state court judgments where the state is a party, and reverse the result on federal law grounds [Cohens v. Virginia]

vi. Alden v. Maine – Extension to Suits in State Courts

1. Kennedy wrote for a five justice majority to hold that the “structure of the Constitution” forbids Congress from passing a law (here, the Fair Labor Standards Act) and giving citizens the right to sue states under the law in the state’s own courts.


1. SC holds that they extend the reach of state sovereign immunity to adjudications with federal administrative agencies: a private cruise ship company could not bring a federal
law complaint before the Federal Maritime Commission against the South Carolina Port Authority.

V. Congressional Power to Enforce Civil Rights
   a. Freedom of Religion
      i. General
         1. The 1st amendment
            a. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”
         2. The Free exercise Clause prohibits Congress from putting restraints on religion other that to time, place, and manner.
         3. The state must be neutral in its relations with groups of religious believers; and the 14th amendment protects an individual from state infringement on his religious rights.
      ii. The Free Exercise Clause
         1. Absolutely prohibits infringement on the freedom to believe. However, action undertaken because of religious beliefs is not absolutely protected, and may be regulated or prohibited by government if there is an important or compelling state interest.
      iii. The Establishment Clause
         1. Ways to interpret the establishment clause
            a. Government must be neutral – it can’t endorse or support specific religion
               i. Issues with this involve ecumenical statements (“under God,” any neutral reference to universal God)
               ii. People say that although there is no support of a particular religion, this is still in support of religion, in violation of the establishment clause
            b. The government cannot establish a particular religion
            c. The government cannot support religion
               i. Tax deductible gifts (both secular and religious institutions receive the benefits of tax deductions)
                  1. There is no doubt these deductions are to support religions (charitable contribution); however, it has been justified thus far by saying that the government must only be neutral
      iv. Laws Discriminating Against religion
         1. Church of Lakumi Babalu Aye v. City of Hialeah
            a. P wanted to open a church in the city of D, and P’s religion involved animal sacrifices. D passed a law prohibiting the killing of animals. The ordinance did not prohibit animal killings in general, but only those that are for religious reasons.
            b. Held, a government may not prohibit certain religious practices if it does no restrict other conduct producing harm of the same sort.
            c. A law burdening religious practices that is neither neutral or of general application must survive the most rigorous of scrutiny. Even if D’s interest was compelling, the ordinances are overbroad or underinclusive b/c they prohibit only religiously motivated conduct
            d. Con(Scalia, Rehnquist): The court should not consider the subjective intention of lawmakers, but simply the effect it had on P.
   v. Neutral Laws Affecting Religion
      1. Sherbert v. Verner
         a. A woman refused to work on Saturday (her Sabbath) and therefore could not receive unemployment benefits in South Carolina, b/c they had passed a law that said if you are offered work and don’t take it, then you can’t get unemployment.
         b. Held, a state may not deny benefits to otherwise eligible recipients who failure to meet all the requirements is based on religious beliefs.
c. In order to deny someone based on a religious belief, there must be a compelling state interest to justify it.

2. Wisconsin v. Yoder
   a. Amish people violate Wisconsin law by not sending their children to school past 8th grade; the valued taught in public high-schools contrasted with their values.
   b. Held, a state must make provisions in its compulsory educations laws for students whose religious beliefs prevent them from attending secondary schools.
   c. Only “essential” state interests not otherwise served can prevail over legitimate claims to the parental direction and religious upbringing of children. Because the state’s interest in requiring the one or two extra years of education is minimal compared with D’s religious interests, D’s interests must prevail.

3. Employment Division v. Smith
   a. In Oregon, it is a crime to use Peyote. P was fired from his job and was unable to collect unemployment benefits, because he was terminated for misconduct. P claims that b/c his use was for religious purposes, not receiving unemployment is in violation of the free exercise of religion.
   b. Held, a state may make criminal certain conduct that is part of a religious organizations rituals
   c. In contrast to Sherbert, the conduct in this case was prohibited by law; Sherbert was merely conditional on receiving benefits.
   d. If prohibiting the exercise of religion is merely an incidental effect of a generally applicable and otherwise valid law, the 1st amendment is not implicated.
   e. This is not in contrast w/Yoder, b/c Yoder dealt w/another constitutional protection, the parents right to direct the education of children.
   f. The compelling interests test SHOULD NOT be applied to a criminal case, because many laws would not satisfy it, and the result would approach anarchy, especially in a society like ours with such a diversity of religious beliefs. The states are free to exempt their drug laws for religious use of peyote, but are not required to.
   g. Co(O’Co, Brennan, etc.): The 1st amendment does not distinguish between laws that are generally applicable and laws that target a particular religious practice; it applies to generally applicable laws that have the effect of significantly burdening a religious practice. A laws that burdens the free exercise of religion must either be essential to accomplish an overriding state interest or be the least restrictive means of doing so.
   h. Di: The state should be forced to make an exemption in this case.

vi. Enforcement issues under 14th Amendment, §5
   1. General Rule
      a. Congress can use § 5 to enforce constitutional norms against the states, however these norms must be the norms defined by the states
   2. City of Boerne v. Flores
      a. In response to Employment Division, Congress passed the Religious Freedom Restoration Act which required the courts to use the Sherbert balancing test in ruling on religious issues. Courts would have to determine if a statute substantially burdened religious practice, and then whether there was a compelling state interest to justify it.
      b. Held, Congress may not impose a rule of constitutional interpretation on the Supreme Court through its enforcement of the 14th Amendment.
      c. Congress does have the power to enforce the constitutional right to free exercise of religion under the 14th amendment; however, this power extends ONLY to
enforcement. Congress does not have the right to change or define what the right to free exercise is.

d. The provisions of the RFRA are so out of proportion to a supposed remedial objective that it cannot be treated as responsive to unconstitutional behavior.

e. Each Branch of Government must respect the constitution, and the judiciary handles cases and controversies, not congress.

f. TO ARGUE THE OTHER WAY ON THIS: It could be argued that since Congress is specifically mentioned in the 14th Amendment, it does have special authority to determine what rights to enforce. It has such authority under the 13th Amendment (slavery repealed).

3. United States v. Morrison

a. The court held that Congress could not in its commerce clause power enforce the civil remedy in the Violence Against Women Act. Most importantly, though, it held that the civil remedy could not be upheld as an exercise of Congress’s remedial power under §5 of the 14th Amendment. The civil remedy in this case was not aimed at proscribing discrimination by state officials, but at individuals.

4. Board of Trustees of the Univ. of Alabama v. Garrett

a. Court held invalid Congress’s attempt to abrogate sovereign immunity for state-employer violations of the Americans with Disabilities act.

b. The Court seems to continue to emphasize that their must be significant findings in order for the state’s to corrupt sovereign immunity.

VI. Constitutional Limits on State Autonomy

a. Pre-emption by Federal Law

i. General

1. Article VI, paragraph 2

a. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

b. The SC has often stated that preemption is primarily a question of the intent of congress

i. The SC is really suggesting whether the existence of the state law is consistent with the general purpose and application of the federal.

2. Three ways to find Pre-emption

a. Express Pre-emption

i. If a Federal Law explicitly says that federal law is exclusive in the area, then state and local laws are deemed pre-empted

b. Implied Pre-emption:

i. Field Pre-emption

1. Rice v. Santa Fe Elevator Corp.

a. The traditional police powers of the states are not superseded unless Congress clearly indicates its intent to do so. This may be shown in one of four ways:

i. A pervasive scheme of regulation

ii. The dominance of the federal interest

iii. The character of the obligations imposed

iv. An inconsistency between the objective of the federal statute and the result produced by the state policy.

i. Conflict Pre-emption
1. Health and Safety
   a. *Florida Lime v. Paul*
      i. California statute barred avocados that didn’t meet the state’s minimum oil content standard. A federal law had a lower standard. The court said this was fine: “this does not seem a likely area for exclusive federal regulation”; federal standards are just the minimum.

2. Duplicative Regulation
   a. *Gade v. National Solid Wastes*
      i. Law that dealt with worker safety and public health was struck down though the federal law dealt with safety only (waste disposal). Conflict pre-emption found since the federal scheme was interpreted to forbid duplicative regulation.

3. General Rules (may be repeating some)
   i. If a Federal Law and a State Law are mutually exclusive, then the state law is deemed pre-empted
      1. If its not possible for someone to simultaneously comply with both the federal and state law, then state law loses
   ii. If the state or local law interferes with achieving a federal goal, the state law is pre-empted
   iii. If Congress evidences a clear intent to pre-empt state and local laws, then state and local laws are deemed pre-empted
      1. Through legislative history, etc.
      2. E.g. Immigration Law – Congress wants federal immigration law to wholly occupy the field
   iv. State’s may not tax or regulate federal government activity
      1. McCollough v. Maryland – State’s cannot tax the US government, or they could regulate it out of existence
      2. State’s cannot regulate the federal government if they put a significant burden on federal activity

3. Cases
      i. The Nuclear Regulatory Commission had federal authority to regulate use of nuclear energy. California passed a law prohibiting certification of nuclear power plants until the State Energy Commission made a finding that a demonstrated technology for permanent disposal of nuclear waste had been approved by the government. P sued for declaratory judgment.
      ii. Held, a state may impose restrictions on an industry even when the federal government also regulates that industry, as long as the state acts for a purpose not pre-empted by Congress.
      iii. The legislation in this case is motivated by a good reason: an economic reason (closing of plants) and a safety reason (prevent leakage).
      iv. The NRC has control over the safety aspects of nuclear generation, but no control over economic issues (whether a plant should be built); thus, if the state’s concern was solely for safety, it would be pre-empted.
      v. Congress clearly intended to promote nuclear power plants, but it has allowed the states to determine, as a matter of economics, what types of power plants should be built. The legislation does not frustrate the intent and purpose of the NRC.
b. Crosby v. National Foreign Trade Council (Foreign Trade Reg’s)
   i. Federal law imposed mandatory and conditional sanctions on Burma. Massachusetts law barred state entities from buying goods or services from companies doing business with Burma. Massachusetts’ law was more strict than the federal law.
   ii. Held, Massachusetts law is invalid b/c it presents “an obstacle to the accomplishment of Congress’s full objectives under the Act.”
   iii. First, examination of legislative history
        1. Congress intended to limit economic pressure on the Burmese government to some extent.
   iv. Also, the state law conflicts with the President’s role to speak as the head of the nation to work out a strategy with foreign nations.
   v. The Massachusetts law had also caused the UE and Japan to file complaints, undermining the President’s “speak as one voice” power again.

   i. Federal law said that some, but not all, 1987 cars had to have certain safety features. P was injured in a car w/o features, and sued in tort against D for negligence in not having a side airbag. A provision in the act stated that “compliance with a federal standard” will not save a company from liability.
   ii. Held, the tort claim here is “pre-empted” by federal law because it does not fit with the objectives and purpose of the statute.
   iii. Court interprets the saving provisions to mean that no defense can be brought up b/c of compliance with the standard. However, this does not bar pre-emption of the claim itself.
   iv. Court also finds congressional intent was to phase in seatbelts and airbags over time with state compliance in buckle-up laws. To force Honda to be sued for following the phase-in guidelines as opposed to going far and above (the public hated seat belts) would be unfair and in conflict with the federal objective.

b. The Dormant Commerce Clause
   i. General
      1. The dormant commerce clause acts as a check on interstate discrimination in commercial laws. Because the federal government has the sole power to regulate interstate commerce, when a state law regulates an area unfairly, and the federal government has laid dormant in regulating this area, then the dormant commerce clause steps in to prevent the unfair practice.
      2. Definitions
         a. Privileges and Immunities clause of Article IV
            i. Article IV, § II: No state shall deprive citizens of other states of the privileges and immunities it accords its own citizens
               1. This is an anti-discrimination provision
         b. The Privileges or Immunities Clause of the 14th amendment
            i. It is always a wrong answer unless the question is about the right to travel
            ii. It has effectively been read out of the constitution
            iii. The right to travel is a fundamental right – and you cannot discriminate against new citizens at the expense of other citizens
   ii. Simple Approach to dormant Commerce Clause questions
      1. Does the State or Local Law discriminate against out of state people?
a. Out of state garbage
   i. Blatantly discriminatory (discussed below)
b. Truck Length
   i. Still discriminated (discussed below)

2. If it does oes not discriminate against out of state citizens?
a. If the law puts a burden on interstate commerce, it violates the dormant commerce clause if:
   i. The burden on interstate commerce outweighs the benefits of the law
      1. Pike Balancing Test (discussed below)
         a. All trucks have curved mud-flaps operating in the state; all other states had straight mud-flaps;
         b. SC said the law put a burden on interstate commerce; either they had to avoid Illinois or stop at the border to put on new mudguards

3. If the law discriminates
   a. If it puts a burden on interstate commerce, it violates the dormant commerce clause unless it is necessary to achieve an important government purpose
      i. There is a strong presumption against state and local laws that discriminate against out of state citizens and put a burden on interstate commerce
      ii. The government has to show that no less discriminatory alternative can achieve the purpose
         1. One Case (more below)
            a. Maine v. Taylor: Maine had a law that prohibited out of state bait fish from coming into the state b/c they would have parasites that would kill endangered species of fish; the SC said this was okay

b. Exceptions
   i. Congressional approval: if they approve it, then it will be upheld even if it violates the dormant commerce clause (Commerce clause no longer dormant)
   ii. The market-participant exception: A state or local government may favor its own citizens in receiving benefits from government programs and in dealing with government owned businesses
      1. Two Examples:
         2. University of California can charge less in tuition to in-state and more to out of state people –the University is a government benefit program
         3. State owned cement factory favored in-state purchased cement over out-of-state purchased cement: since this is literally a government owned and operated business, it could favor in state businesses

4. Violations against the Privileges and Immunities Clause
   a. If a state or local government discriminates against out of state citizens with regard to civil liberty or important economic activities (the ability to earn a living)
      i. There must be discrimination against out of state people
      ii. The discrimination must be with regard to civil liberties or the ability to earn a living
         1. Civil liberties are rarely litigated here
         iii. It is often used on exam when it is used to effect people’s livelihood
1. It does not involve things that are recreation
b. Corporations and aliens can’t invoke this provision
c. The discrimination will be allowed only if it is necessary to achieve an important/substantial government purpose
   i. Law must be the least-discriminatory alternative to achieve the goal

iii. Cases
1. Modern balancing test
   a. Pike v. Bruce Church
      i. If a state has a legitimate local purpose for regulating and the effects on interstate commerce are merely incidental, the regulation will be upheld unless the burden clearly exceeds the local benefits.

2. Environmental Issues
   a. Philadelphia v. New Jersey
      i. New Jersey passed a law preventing importation of waste into their landfills to protect the public health, welfare, and safety of its citizens
      ii. Held, a state may not prohibit importation of environmentally substances solely b/c of their place of origin.
      iii. D’s rationale may be legitimate, but the evils of protectionism can reside in the legislative means used as well as the legislative ends sought.
      iv. This facially discriminatory law requires out-of-state commercial interests to carry the burden of conserving D’s remaining landfill space in an attempt to isolate itself from a problem shared by all.
   b. Maine v. Taylor
      i. Law that banned the importation of out-of-state baitfish is upheld and not in violation of dormant commerce clause.
      ii. The ban had a legitimate environmental purpose stemming from uncertainty about possible ecological effects on the possible presence of parasites and nonnative species in shipments of out-of-state baitfish, and the purpose could not be served in non-discriminatory ways.
   c. Chemical Waste Management v. Hunt
      i. Facially discriminatory fees (and taxes) levied on out of state hazardous waste but not on in-state waste violate the dormant commerce clause.
   d. Oregon Waste Systems v. Dept. of Environmental quality
      i. Disposal fees that differentiate between in-state and out-of-state waste are facially discriminatory

3. Regulation of Transportation
   a. Southern Pacific Railroad v. Arizona
      i. Arizona Law set limits on how many railroad cars could be used on the track. P claims that the law unconstitutionally burdens interstate commerce.
      ii. Held, in balancing the effect of a state regulation on interstate commerce against the state’s safety and welfare interests, the court may consider the efficacy of the regulation in furthering the state’s interest.
      iii. Constitutional doctrine mandates the court, and not the state legislature, is the final arbiter of competing state and national interests under the commerce clause.
      iv. We need national uniform legislation on this subject – not local laws.
      v. Upon review of the record it appears that the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematic as not to outweigh the national interest in keeping interstate commerce free from interference.
b. **Kassel v. Consolidated Freightways**
   i. P challenged an Iowa statute that prohibited the use of 65-foot double trailers on Iowa highways (with certain exceptions). D defended the law as a reasonable safety measure. The lower courts said the regulation was unconstitutional because it seriously impeded interstate commerce while providing only slight, if any, safety.
   ii. Held, the courts may examine evidence to determine whether a state’s purported interest in safety is real and substantial enough to justify applying police power to burden interstate commerce.
      1. A state can’t simply win a commerce clause case by invoking health and safety issues. The court has to balance the state’s interest in health and safety against the federal interest in free interstate commerce.
      2. P has demonstrated that D’s law substantially burdens interstate commerce. Therefore, it is unconstitutional.
   iii. Dissent: State’s law is rationally related to its policy objectives and they should not be forced to lower their standards for trucks simply because the state’s around them have lowered theirs.

4. **The Market Participant Exception**
   a. **South Central Timber v. Wunnice**
      i. D offered to sell its timber, but only if it was processed within the state before being exported. In return, the price for the timber was significantly reduced. P normally sold unprocessed logs to Japan, and sought an injunction claiming that this violated the dormant commerce clause. The court of appeals denied the injunction, concluding that a similar federal policy for timber taken from federal land in Alaska constituted implicit congressional authorization for the state plan.
      ii. Held, when a state sells its own natural resources, in may not impose post-sale obligations on the purchaser.
      iii. Congress May authorize state regulation of commerce. Here, there was no indication that Congress intended to give such power to Alaska, and Congressional consent must be “unmistakably clear.”
      iv. Simply because a federal program is similar to a state’s program is insufficient evidence that the state’s action was authorized by Congress.
      v. This case involves three elements not present in Reeves: foreign commerce is restrained, the state is selling a natural resources, and the state imposes restrictions on resale; b/c of this, close scrutiny is required.
      vi. The market participant doctrine must be limited to allowing the state to impose burdens on commerce inside the market which it participates; Here, Alaska imposed burdens on markets outside that which it participates. Alaska’s program interferes with foreign commerce.
      vii. Di(Rehn, O’Co): The majority is acting as if Alaska is a market participant. The state is merely paying timber purchasers to hire Alaska residents to process the timber, which it could do in a number of ways. It is unduly formalistic to hold that this method violates the Commerce Clause.

VII. **Third Sovereignty – Interaction of Native American Tribes with National and State Authority**
   a. **General**
      i. It is a developing area of law
         1. the gaming law (recently)
      ii. We have an equal protection clause, but we want to respect peoples backgrounds
iii. Morton v. Mincarri, 417 US 535
   1. SC says that it is okay to treat Native Americans differently
b. Historically (how did we get to the point that tribes are treated differently)
   i. British Government dealt with the tribes differently
      1. Dealt with tribes by treaty
         a. As if two separate nations were dealing with each other
   ii. In terms of law, the tribes were treated as separate sovereigns,
      1. Tribal members historically were not treated as US citizens, but as citizens of different tribes
         a. International law
   2. The majority of America had ruined the existence of the Native American tribes, and then they decided that they needed to do something to protect what’s left
c. General Principles
   i. The US government is supreme over the states in how the states treat Native American tribes
   ii. The tribes are a domestic dependent sovereign
   iii. The tribes are not equal sovereigns, and if the US wanted to, they could most likely diminish or hinder them
d. Attributes of Tribal Sovereignty
   i. Power
      1. Most extreme exercise of power is criminal prosecution
         a. Native American v. Native American crime on the reservation
            i. Tribal officers ask as prosecutors and tribal courts adjudicate the crime
            ii. This would go either to US federal court or tribal court – state courts cannot get involved
         b. Native American v. Native American not on reservation
            i. More likely will end up in US federal court
         c. Native American v. South Dakota Resident on or off reservation
            i. Only US federal court can hear this case
         d. Two non tribal members on reservation
            i. State court exercises jurisdiction
   ii. Tribes are immune to taxation
      1. However, regarding taxation of non-Native American’s who own land on a reservation, the cases are all over the board
iii. Immunity
   1. Indian tribes enjoy sovereign immunity from civil suits on contracts whether those contracts involve governmental or commercial activities and whether they were made on or off of the reservation.
   2. This is federal law, and congress can limit it
e. Cases
   i. Kiowa Tribe v. Manufacturing Technologies
      1. Tribe’s industrial development commission agreed to buy from respondent certain stock issued by a third party, and signed a promissory note for $285,000 plus interest. The tribe defaulted on the note.
      2. Held, Indian tribes enjoy sovereign immunity from civil suits on contracts whether those contracts involve governmental or commercial activities and whether they were made on or off of the reservation.
      3. A tribe is subject to suit only where congress has authorized the suit of the tribe has waived its immunity. Neither of these has happened here.
      4. How to deal with Indian tribes is a matter of Federal Law and is not to be usurped by state law. This court chooses to adhere to its earlier decisions in deference to Congress,
who can pass a law that reverses it, and may wish to exercise its authority to limit tribal immunity through explicit legislation

5. Dissent(Stevens, Thomas, Guinsberg):
   a. (1) The Court should not extend a judge-made doctrine (sovereign immunity) to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.
   b. The sovereign’s claim to immunity in the courts of a second sovereign, however, normally depends on the second sovereign’s law. Therefore, the Indian tribes immunity in state court should depend on the state’s law. At most, the precedent cases should only extend to federal cases in which the United States is litigating on behalf of a tribe. In other cases, we have made it clear that state’s have a governing over tribal groups off of tribal land. We also recognize that state court’s lack jurisdiction to try intra-tribal controversies.
   c. The reasons that undermine our strong presumption against construing federal statutes to pre-empt state law, apply with added force to a judge made doctrine.
      (2) The court has made law here, federal common law, and not really deferred to Congress. (3) The law is unjust; this is especially so with regard to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity.

ii. Rice v. Cayatano
   1. Citizens of Hawaii brought §1983 action against state officials, challenging the eligibility requirement for voting for trustees for Office of Hawaiian Affairs. The OHA administers programs designed for the benefit of “native Hawaiians” and “Hawaiians.” Native Hawaiians are those “not less than one-half part of races inhabiting the islands before 1778, and Hawaiians as those “descendants of the peoples inhabiting the Hawaiian Islands in 1778.” The trustees for the OHA are chosen in a statewide election in which only “Hawaiians” may vote. TC determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the US and Indian tribes.
   2. Held, a denial of P’s right to vote based on racial qualifications violates the 15th Amendment.
   3. The National Government and States may not deny or abridge the right to vote based on account of race. Racial discriminations is that which “singles out identifiable classes of persons solely because of their ancestry or ethnic characterizations.” This demeans a person’s dignity and worth to be judged by ancestry as opposed to their character.
   4. The state’s three defenses are poor. (1) Congress may not authorize a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. (2) Compliance with the 14th Amendments one-person, one-vote rule does not excuse non-compliance with the 15th Amendment
   5. Dissent(Stevens, O’Connor): (1) The OHA is charged with handling a vast amount of land held for native Hawaiians. The 1978 laws passed by Hawaii reflect an honest and sincere attempt to rectify the wrongs of the past, and the betterment of the condition of native Hawaiians. (2)(a) The federal Government has wide latitude to carry out its relationship with native and aboriginal people. (b) Precedent of This court shows that Native Americans have been singled out, as they are in this case, for special treatment, treaties, and funding. (c) These people are just like Native Americans: “In light of this precedent, it is a painful irony indeed to conclude that Native Hawaiians are not entitled to special benefits designed to restore a measure native governance because they currently lack any vestigal native government – a possibility of which history and the actions of this Nation have deprived them. (3) This scheme also “rationally futhers the purpose identified by the state.” (4) We should make a wider distinction between ancestry and race; sure, ancestry can be a proxy for race, but in this case it is not.
VIII. Presidential Power
a. General
   i. Article II, § II: Appointment and removal of officers
   ii. Article II, § I: All legislative Power is Vested in the President
b. Appointment of Officers
   i. “all ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United states, whose appointments are not herein otherwise provided for…”
   ii. Appointment of Executive Officers
   iii. Appointment of the Independent Counsel
c. Cases
   i. Buckley v. Valeo p. 369
      1. The Federal Election Campaign Act allowed for a majority of the FEC members to be elected by the President pro tempore of the senate and the Speaker of the House. The court was given “direct and wideranging enforcement power such as instituting civil actions against violations of the act as well as extensive rulemaking and adjudicative powers.
      2. Held, powers such as these can only be executed by “Officers of the United States.”
      3. TEST: “Any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by the appointment clause.”
      4. Congress is allowed to invest appointment of “inferior officers” in “Courts of Law,” “Heads of Departments.” The test is whether the officer is one of these two, their functions, etc.
d. Removal of Officers
   i. The Appointments clause is silent as to the removal of executive appointees from office.
      1. The only explicit provision is impeachment
      2. The President can probably remove high level, purely executive officers at will, without any interference from Congress.
   ii. However, after Morrison, it appears that Congress may provide statutory limitations on the President’s power to remove all other executive appointees.
   iii. Cases
      1. Bowsher v. Synar
         a. The Balanced Budget Act of 1985 was designed to reduce the federal deficit to zero over a period of years. Automatic reductions in federal spending were to take place in any fiscal year for which the deficit exceeded the statutory target. The reductions would take effect after two offices calculated the necessary reductions. These offices then reported their findings to the Comptroller General, then the President was required to issue a “sequestration order” mandating the Comptroller Generals conclusions. This would become effective unless Congress reduced spending by legislation. There was also a method where a joint congressional resolution would become a sequestration order when the President signed it.
         b. Held, Congress may not assign to the Comptroller General the function of determining which accounts of the federal budget must be cut to meet deficit targets.
         c. The Constitution allows congress a role in appointing executive officers, but it does not give them a role in supervising those officers. Although congress may limit the President’s powers of removal, it cannot reserve for itself the removal power. Otherwise, Congress would have control over the execution of laws in violation of separation of powers.
         d. Congress cannot grant to an officer under its control the power to execute laws.
e. Presidential Legislative Power
   i. Article II, § III
      1. The President has power to report to Congress on the state of the Union and to propose legislation he deems necessary and expedient.
   ii. Delegation by Congress
      1. Congress May also Delegate Powers to the President, as long as the Delegation is pursuant to reasonably defined standards
   iii. The Veto Power
      1. Article I, § VII: President has the power to veto any act of Congress. However, Congress may override a presidential veto by a two-thirds vote of both houses
   iv. Treaties
      1. The president can make treaties “by and with the advice and consent of the Senate, provided tw-thirds of the Senators present concur.
         a. Some treaties require legislation to be passed in order to effectuate them.
      2. When a treaty conflicts with an act of Congress, the last in time prevails.
      3. When a treaty conflicts with the Constitution, it is void
   v. Executive Agreements
      1. This is not expressly provided in the Constitution
      2. The President has the power to enter into agreements with the heads of other states. These agreements can be on any subject as long as they do not violate the constitution. They do not require the advice and consent of the senate.
      3. Executive Agreements do not prevail over treaties, but they do prevail over conflicting state laws. [Dames and Moore v. Regan]

f. Presidential Power in Wartime
   i. General
      1. Article II, § II
      2. Although the President lacks the power to declare or initiate a “formal” war, the President has extensive military powers
         a. He is the commander in chief of the armed forces and militia in actual hostilities against the United States without a congressional declaration of war
         b. President has the power to establish military governments in occupied territories, including military tribunals
   ii. Current Issues – Applying the War Power’s Resolution of 1973 to the War on Terrorism
      1. SEE ATTACHED SHEET
   iii. Cases
      1. Youngstown Sheet and Tube (See Attached)
         a. The steelworkers, after prolonged negotiations, went on a strike during the Korean War. President Truman ordered D, secretary of commerce, to seize the steel mills and keep them running. P challenged the seizure as unconstitutional (not an act of Congress). Congress had already passed the Taft-Hartley Act, giving the President authority to seek an injunction against such strikes, but rejected an amendment permitting government seizures.
         b. Held, a President may NOT, acting under the aggregate of his constitutional powers, exercise a lawmaking power independent of Congress in order to protect serious national interests.
         c. The President’s power must stem from an act of Congress or from the Constitution itself. Congress already rejected this in denying its amendment; the Constitution allows the President to be commander-in-chief, but this act is too far removed from the “Theater of War.” His executive power is inapplicable since there is no law to execute. Such Presidential Power of the lawmaking is unauthorized and invalid.
d. Know JUSTICE JACKSON’S three Categories of Presidential power.

2. **Dames & Moore v. Regan**
   a. American Hostages were taken in Iran, and President Carter declared a national emergency and froze all Iranian assets in the US. P sued Iranian D’s on $3.5 Million in Iranian assets. After institution of the suit, the US agreed, through Algeria, to nullify all suits against Iranian D’s and submit them to binding arbitration. This was implemented by executive order. Thereafter, P won the suit against D’s and tried to enforce the judgment on property owned by D’s. The DC stayed the proceedings. P then sued D, the Treasurer Secretary, saying that the President had overstepped his constitutional limits by agreement with Iran and the implementation of the order.
   b. **Held**, the President may, in response to a national emergency, suspend outstanding claims in American Courts by executive order.
   c. Following J. Jackson from Youngstown: “Executive power is closely related to congressional action; executive power is greatest when exercised pursuant to congressional authorization and weakest when exercised in contravention of the will of Congress.
   d. A congressional act permits the president to freeze assets to serve as “bargaining chips”. The President in this case acted pursuant to statutory authority.
   e. Other Congressional acts taken together seem to indicate congressional approval for the President’s actions.

3. **Handouts**
   a. Applying the War Powers Resolution to the War on Terrorism
   b. War Powers Resolution of 1973

**g. Congressional Encroachments on Presidential Authority**

   i. **General**

      1. **Delegation of Power**
         a. Congress has broad discretion to delegate its legislative power to executive officers and or administrative agencies, and even delegation of rulemaking power to the courts has been upheld [Mistretta v. United States, infra]

      2. **Limitations on Delegation**
         a. The power must not be uniquely delegated to congress
            i. Impeachment
            ii. Declaration of War
         b. Delegation must include intelligible standards for the delegate to follow.
            i. Nearly everything has been considered an intelligible standard
         c. Congress cannot institute a legislative veto without following bi-cameral constitutional procedures. [INS v. Chadha]
         d. Congress cannot give itself the power to remove an officer of the executive branch by any means other than impeachment. [Bowsher v. Synar]
         e. Congress cannot give a government employee who is subject to removal by congress (other than impeachment) purely executive powers. [Bowsher v. Synar]
         f. Congress may delegate its authority to enact regulations, the violation of which are crimes, but prosecution for such violations must be left to the executive and judicial branches. [US v. Grimaud]
            i. Agencies can enact civil penalties though.
         g. If the delegate interferes with the exercise of a fundamental liberty or right, the burden is on the delegate to show that she has the power to prevent the exercise of the right and her decision was in furtherance of that particular policy. [Kent v. Dulles]
ii. Cases

1. **INS v. Chadha**
   a. P was an East Indian who entered the US on a student visa. After his visa expired, the INS held a deportation hearing. The judge suspended P’s deportation and sent a report to Congress as required by the Immigration and Naturalization Act. Under the act, either house of congress could veto a suspension or deportation. The house unilaterally voted to deport P.
   b. **Held**, congress may not employ the legislative veto device to oversee delegations of its constitutional authority to the executive branch.
   c. Although this case may be political it is a also a separation of powers constitutional issue.
   d. The bicameral nature of the Congress in the Constitution says that all bills must be passed by both houses of congress and signed by the President. This is to ensure liberty through the separation of powers.
   e. There are only four instances in the Constitution in which only one house of congress can act alone: Impeachment, Trial after impeachment, Ratification of Treaties, and Confirmation of Presidential Appointment. The legislative veto is not enumerated.
   f. Although the legislative veto is efficient, it is unconstitutional. The Constitution may not be eroded for convenience.
   g. Dissent(White): The legislative veto is a necessary instrument for Congress, so they don’t have to choose between no delegation (and hence probably no lawmaking on the issue) and abdication of the lawmaking function to the executive branch.

2. **Morrison v. Olson**
   a. Ethics in Government Act of 1978 Allows for Congress to appoint an “independent counsel” to investigate and prosecute specified government officials for violations of federal criminal law. The Att. General first conducts an investigation, then reports to the Special Division (a court). The Special Division then appoints the counsel and defines the counsel’s prosecutorial jurisdiction. Independent Counsel must comply with department of justice policies, and can be removed “for good cause” by the Att. General. Either the Special Division or the Independent Counsel can say when the task is completed. Certain congressional committees have oversight jurisdiction regarding the independent counsel’s conduct.
   b. **Held**, Congress may provide for the judicial appointment of independent counsel for purposes of investigating and prosecuting federal criminal offenses.
   c. Two classes of officers under the appointment clause:
      i. Principle officers – Selected by the President with the Advice and Consent of the Senate
      ii. Inferior Officers – Congress may allow to be appointed by the President alone, by the heads of departments, or by the judiciary.
   d. This does not violate separation of powers.

3. **Mistretta v. United States**
   a. Congress created a sentencing commission described as “an independent division in the judicial branch of the US” to implement sentencing guidelines. All seven members are appointed by the President with the Advice and Consent of the Senate, and three must be federal judges. The commission must report to Congress annually on the operation of the guidelines.
   b. **Held**, Congress may create an independent judicial commission to establish sentencing guidelines that are binding on the federal courts.
c. Congress must delegate according to an “intelligible principle” for which the delegate should follow.
d. There is no separation of powers problem as long as Congress has not given the Commission powers that (i) are more appropriately performed by the other branches or (ii) that undermine the integrity of the judiciary.
e. There is a “twilight area” in which the separate branches of government merge. Judicial rulemaking is in this area. Judiciary already makes the FRCP. This delegation furthers the function of the judiciary.
f. Sentencing guidelines are clearly not more properly performed by another branch. The commission does not expand the powers of the judiciary, which has long been responsible for sentencing.
g. The Constitution does not specifically prohibit judges from serving on independent commissions. The power of the President to appoint and remove Commission members does not affect a federal judge’s status as a judge and therefore presents no risk of compromising the impartiality of judges.
h. Di(Scalia): The constitution says that only Congress can make laws. The Commission here is making laws, since a judge that disobeys them will be overruled. This is like a “junior-varsity Congress.”


h. Impermissible Delegation of Legislative Power
   i. The legislative Veto
      1. General
         a. The legislative Veto allows for the Congress to give to the Executive Powers which it could then veto.
      2. Cases
         a. INS v. Chadha
            i. SEE ATTACHED
   ii. The Line-Item Veto
      1. General
         a. The veto power in the Constitution allows the President only to approve or reject a bill in toto; he cannot cancel part and approve other parts
         b. Rationale: The President’s veto power does not allow him to amend or repeal laws passed by Congress
      2. Cases
         a. Clinton v. New York
            i. The line-item veto act allowed the President to cancel three-types of provisions, including any item of new direct spending or any limited tax benefit. Congress may render the cancellation void by passing a disapproval bill. Clinton removed two provisions which were proper under the act, one that waived the government’s right to recoup New York City taxes, and the other that gave tax preferences to food refiners.
            ii. Held, Congress may not grant the President a line item veto that allows the President to cancel legislation after it is duly enacted and signed.
            iii. In the Constitution, the President can return a complete, unsigned bill to Congress. Under the Act, the President can return an incomplete, signed bill. These are important differences.
            iv. A President may either approve all parts of a bill or reject it completely.
            v. Congress cannot alter the Constitutional provisions without an amendment.
            vi. Di(Breyer, O’Connor, Scalia): A cancellation under the Act leaves the statutes as they were originally written, intact. In passing the law, the
President neither repeals nor amends anything. This does not implicate the separation of powers b/c Congress retains the power both to disapprove a cancellation and to include in any bill a provision that says the Act will not apply.

i. Permissible Delegation of Legislative Power
   i. Handouts

IX. Presidential Privileges and Immunities and Impeachment
a. Privileges and Immunities
   i. General
      1. The Executive Privilege is not a constitutional power, but an inherent privilege necessary to protect the confidentiality of Presidential Communications
      2. What is privileged:
         a. Presidential documents and conversations are “presumptively privileged”
            i. However, the privilege must yield to the need for such material as evidence in a criminal case to which they are relevant and otherwise admissible. This determination is made by a trial judge after hearing evidence.
         b. National Security Secrets
            i. Military, diplomatic, or sensitive national security secrets are given great deference by the court.
         c. Criminal Proceedings
            i. In criminal proceedings, presidential communiqués will be available to the prosecution, where a need for such information is demonstrated. [United States v. Nixon]
         d. Screening Papers and Recordings of Former President
            i. A federal statute requiring the Administrator of General Services to screen the presidential papers is valid, not withstanding the privilege. [Nixon v. Administrator of General Services]
         e. Screening by Judge in Chambers
            i. The court will determine in an in-camera inspection which communications are protected and which are subject to disclosure
   3. Executive Immunity
      a. The President has absolute immunity from civil damages based on any action that the President took within his official responsibilities. [Nixon v. Fitzgerald].
      b. However, the President does not have immunity from private suits in federal court based on conduct alleged to have taken place before taking office. [Clinton v. Jones]
      c. Rationale: The immunity is intended only to enable the President to perform his “designated functions” without fear of personal liability.
   4. Diagram on Executive Immunity

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<th>Can the President Be Sued?</th>
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<td>While President</td>
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<td>Criminal: No</td>
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(Though not criminal charges have never been brought, such would cripple the presidency.)
ii. Cases

1. **Nixon v. Fitzgerald**
   a. This action was brought by a whistleblower who charged violation of his 1st Amendment and statutory rights when he lost his job with the Defense Department.
   b. **Held,** absent explicit affirmative action by Congress, the President is absolutely immune from civil liability for his official acts.
   c. The Court stated that absolute presidential immunity is a functionally mandated incident of the President’s office that is rooted in the doctrine of separation of powers.

2. **US v. Nixon**
   a. The Special Prosecutor, acting for the US, sought and received a subpoena ordering D to produce various tapes and other records relating to Presidential conversations and meetings.
   b. **Held,** executive immunity does not give the President and absolute, unqualified general privilege of immunity from judicial process under all circumstances.
   c. The doctrine of separation of powers does not preclude judicial review of a President’s claim of privilege, because it is the duty of the courts to say what the law is with respect to that claim of privilege.
   d. The President’s need for and the public interest in the confidentiality of communications is accorded great deference. However, absent a need to protect military, diplomatic, or sensitive national secrets, in camera inspection of presidential communications will not significantly diminish the interest in confidentiality. *Legitimate Judicial Need will therefore outweigh a blanket presidential privilege.*
   e. Apply a Balancing Test to the interests involved to see whether the presidential privilege is outweighed by another concern.

3. **Clinton v. Jones**
   a. P claimed that D sexually harassed her before he took office. P did not file the suit until D was sitting as President. D hoped to have the motion stayed until after his presidency, so that he didn’t have to go through the trial in office.
   b. **Held,** a claim by a private citizen against the President, based on actions allegedly taken before his term began, does not have to be deferred until the expiration of the President’s term of office.
   c. We give people immunity to protect their interests, so that they can perform their designated functions without fear of personal liability for a particular decision.
   d. The President is not above the law, but is amenable to them in his private character as a citizen, and in his public character by impeachment.
   e. Regardless of the outcome of this case, it will not curtail the scope of the official powers of the Executive Branch.
   f. Simply because the President’s time will be burdened does not necessitate this action being stayed.
   g. P has a strong interest in bringing the case to trial; such a long delay would increase the risk of prejudice to P resulting from the loss of evidence, impaired memory, or perhaps even the death of a party. If greater protection of the President becomes necessary, Congress may legislate for it.
   h. **Con(Breyer):** The TC must schedule proceedings so as to avoid significant interference with the President’s ongoing discharge of his official responsibilities.

b. Impeachment
i. Person’s Subject to Impeachment
   1. The President, Vice President, and all civil officers of the US are subject to impeachment.

ii. Grounds
   1. The grounds listed in the Constitution for impeachment are treason, bribery, and other “high crimes and misdemeanors”
   2. Clearly, this is difficult to distinguish (in-class debate) – it is clear, however, that the high crimes or high misdemeanors or high (crimes ands misdemeanors) must be in line with the enumerated offenses

iii. Process
   1. A majority vote in the House is necessary to invoke the charges of impeachment. A two-thirds vote in the Senate is necessary to convict.

iv. Cases
   c. Pardon Power
      i. General
         1. Article II, Clause VI
            a. “He shall have the power to grant reprieves and Pardons for Offenses against the United States, except in cases of impeachment.”
         2. Limitations
            a. Cannot pardon himself for impeachment
            b. Pardonable offenses must be against the United States
               i. No impeachment, and no pardons for things against the states
            c. The pardon can come at any time
         3. Goals
            a. Error correction
            b. Reform because the criminal may have changed
            c. Closure or national healing (Nixon, Vietnam draft-evaders
            d. Mercy
            e. Justice
         4. Pardons can only be granted for federal crimes, with a few exceptions

ii. Reading: *Pardon for Good and Sufficient Reason*

X. End of Semester (Civil Liberties)
   a. Handout: The War on Terrorism and Civil Liberties
   b. Cases
      i. Korematzu v. United States (Japanese Internment Camps)
      ii. North Jersey Media Group v. Ashcroft (Press not allowed in Terrorism Hearings)
      iii. Detroit Free Press v. Ashcroft (Press not allowed in Terrorism Hearings)
APPLYING THE WAR POWERS RESOLUTION TO THE WAR ON TERRORISM (BREAKDOWN)

The sources of Presidential Power
- Basis for analysis
  - Overview of the Resolution of 1973
  - Specific Statutory Authorization (S.J. Res 23)
  - “The president’s authority to conduct the war against terrorism is recognized by §2 of the War Powers Resolution. Congress has specifically expressed its support for the use of Armed Forces, and the US has suffered an attack.
  - There is constitutional power also.
- Historical President’s have used it without advice and consent of Senate
  - Truman – Korea
  - Kennedy – Cuba
  - Kennedy and Johnson – Vietnam
  - Nixon – Laos and Cambodia (Vietnam expansion)
  - Ford, Carter, Reagan, and Bush
  - Clinton – Haiti and Bosnia
- Conclusion
  - There is a resolution, there is a constitutional guarantee, and there is a senate resolution which has been complied with, and its historically just.

DOES PRESIDENT BUSH HAVE THE CONSTITUTIONAL AUTHORITY TO COMMIT THE COUNTRY TO WAR?

- First, although there are statutes, the Constitution still trumps a statute.
- Framers intent
  - This was allowed in England, and if framers wanted it, they would have allowed it; but they rejected it in full
  - The purpose of the framer’s was to let the people who were paying for war decide whether to go or not. Simply because Clinton and Truman violated the Constitution does not mean it was correct.
- Purse and the Sword
  - People who are paying for war should decide whether to go – Thomas Jefferson
- Analysis of Resolutions
  - The Iraq resolution in 1991 cannot possibly used, because that would allow some of the authority to fall under the Security Council
  - The recent regulation clearly dealt with Afghanistan. This would also allow the President to go to war any time he felt there was a “link” with terrorism.
- Consultation with Congress does not cure the problem; a statutory authorization would.
Commerce Clause Analysis


Majority Justices: Rehnquist, Scalia, Thomas, O’Conner, Kennedy
Minority Justices: Stevens, Souter, Guinsberg, Breyer

Majority Opinion:

1. “The Act neither regulates commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce [among] the several states.

2. Historical definitions of commerce:
   a. Originally
      i. Marshall (Gibbons v. Ogden): “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. I describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”
      ii. “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of the state.”
   b. Next 100 years
      i. Court focused less on the extent of Congress’s power, but more on the Commerce Clause limiting state legislation that discriminated against interstate commerce (Dormant)
         1. Activities such as “production,” “manufacturing,” and “mining” were within the province of state governments, and beyond the power of Congress.
      ii. Court simultaneously held that where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.
      iii. Therefore, ultimately the court determined that “activities that affected interstate commerce directly were within Congress’ power; activities that affected interstate commerce indirectly were beyond Congress’s reach.”
   c. Further Cases that helped define the overarching principle
      i. NLRB v. Jones & Laughlin Steel
      ii. US v. Darby
      iii. Wickard v. Filburn
         1. “Even if appellee’s activity be local and though it may not be regarded as commerce (growing wheat), it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect’.”
      iv. Jones & Laughlin Steel
      v. “The Court since Jones and Laughlin has undertaken to decide whether a rational basis existed for concluding that a regulated Activity sufficiently affected interstate commerce.” [Heart of America Motel, Wirtz]

3. Congress May regulate Three Broad Categories:
   a. Congress may regulate the use of channels of interstate commerce [Darby, Heart of America Motel]
   b. Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities [Shreveport Rate Cases]
   c. Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [Jones & Laughlin Steel]
   d. This regulation is not part of the first or second, but only the third

4. First, there is no Economic Activity
a. The pattern in all of the previous cases shows that “where economic activity substantially affects interstate commerce, legislation regulating the activity will be sustained.”

(5) Second, this statute contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.

a. Congressional Findings are lacking: “We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. However, to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.”

(6) Third, if we allowed this, it would allow congress to regulate family law and criminal law, essentially state functions.

a. 153- what this regulation would lead to, the categorical federalism question.

(7) “The possession of a gun in a local school zone is in no sense and economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”

(8) We will not pile inference upon inference to reach interstate commerce, letting the federal government into traditional state areas of what is “truly local” and “truly national.”

Concurrence: O’Connor and Kennedy

(1) First, the court today invokes the imprecision of content-based boundaries [such as the manufacture-commerce distinction] used without more to define the limits of Commerce Clause

(2) Second, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.

(3) There MUST be a distinction between the state and federal governments, for this tension promotes and sustains federalism, and thus liberty. Citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.

a. If these blur, there will be no way to determine political liability and responsibility.

(4) It is the role of the court to intervene when one branch of government has tipped the scales too far

Concurrence: Thomas

(1) I write separately to observe the original meaning of “commerce.”

a. The “substantial affect” test is not what commerce should mean

b. They did not mean agriculture and manufacturing

c. Overall, we should temper our Commerce Clause jurisprudence to avoid ensnaring behavior under overbroad definitions of things that encompass areas congress can’t regulate.

Dissent: Breyer, Stevens, Souter, Ginsburg

(1) The power to regulate commerce among the several states encompasses those local activities which, in the aggregate affect interstate commerce

a. To determine this, the court must consider the effect of an aggregation of acts throughout the country.

(2) The court should give Congress leeway both b/c the constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely that a court to make with accuracy

a. Therefore, we should stay with the “rational basis analysis”

(3) In this case, there is a rational basis

a. Affect on education

b. Affect on communities w/o well-educated workers, and communities whose members must take low paying jobs

(4) The majorities holding has three major legal problems:

a. First, the majority’s holding uns contrary to modern SC cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence.
b. Second, there is no distinction in previous cases between “economic” and “non-economic” activity
c. Third, it creates legal uncertainty regarding the Commerce Clause b/c we have broken with a serious line of precedent.

Souter: We are looking backwards, and we should not be doing so; the distinction between what is “commercial” and what is “non-commercial” is similar to the previously difficult distinction between what is “direct” and “indirect” in affecting interstate commerce.

Stevens: The possession of guns is quite seriously a commercial transaction. Congress should be able to limit its marketplace.
THE FOOL ON THE HILL: CONGRESSIONAL FINDINGS, CONSTITUTIONAL ADJUDICATION, AN UNITED STATES V. LOPES
Phillip P. Frickey

(1) SC quote: “In the tension between federal and state power lies the promise of liberty.”
(2) Kennedy and O’Connor’s opinion more clearly indicated that the noneconomic nature of the regulation was crucial to the Court’s rigorous inquiry about effects on interstate commerce.
(3) Surely, at best the absence of Congressional Findings deprives a statute of the benefit of some extra leeway.
(4) “The message of Lopez and [another recent equal protection case] is that, the lesson of the New Deal is that economic regulation is not a matter for serious judicial second guessing, but that other measures seriously invading personal or structural values can be subjected to meaningful judicial review.”

CATEGORICAL FEDERALISM: JURISDICTION, GENDER, AND THE GLOBE
Judith Resnik

(1) Categorical federalism first assumes that a particular rule of law regulates a single aspect of human action: laws are described as about “family,” “crime,” or “civil rights” as if laws were univocal and human interaction similarly one-dimensional.
(2) Second, Categorical federalism relies on such identification to locate power in the federal or state government and then uses the identification to explain why power to regulate resides in one or the other.
(3) Third, Categorical federalism has a presumption of exclusive control (clearly state/federal)
(4) Physical boundaries become obsolete with an increase in technology, and some areas should be regulated by a national body; even in Morrison, 36 states filed briefs, but the court said that the national government couldn’t regulate
(5) The distinction between what is “truly local” and “truly national”(Rehnquist, Morrison) is not only elusive but increasingly inaccurate.
(6) Areas such as criminal law and family life have been legislated by Congress
   a. Mann Act, Paying Child Support across state lines, as well as areas involving pensions, bankruptcy, tax, and immigration – have all dealt with family issues
(7) The analysis should be more like pre-emption, and both laws should co-exist in regulating the area.
(8) Both housework and wageworking by women facilitate the economy.
(9) We should not use federal and state categorical boxes, because already these boxes are made of plastic, and stretch far beyond their original capacity.

THE ORIGINAL MEANING OF THE COMMERCE CLAUSE
Randy E. Barnett

(1) General
   a. Original Intention Originalism: The framers as command givers
   b. Original Meaning Originalism: The legitimacy of the original commands themselves and the fact that these commands were made in writing.
(2) Sources
   a. Text
   b. Contemporary Dictionaries
   c. Constitutional Convention
   d. The Federalist Papers
   e. Ratification Conventions
(3) Commerce
   a. Should be limited to “trade or exchange of goods” and not manufacturing, agriculture, etc.
(4) Among the Several States
a. Might be limited to commerce that takes place between the states (or the people of different states), as opposed to commerce that occurs between persons of the same state.

(5) To regulate
a. Should be limited to “to make regular,” which would subject a particular type of commerce to a rule and would exclude, for example, any prohibition on trade as an end in itself. . .”

**Book Notes**

Ask: “Is there some reason the federal government should not do this, some reason why we cannot leave the matter to the states” – Ragan

Why state’s should regulate?
- They might be though better to deal with problems that vary greatly geographically, by tailoring policies to fit locally varying circumstances
- They might also be thought better able to accommodate diverse preferences and ideologies, enabling citizens to “vote with their feet” and choose the local most suitable to them.
- They can act as a local laboratory without affecting the other states.

Why centralization would be more effective
- If there is reason to believe that local variations will be undesirable or ineffective
- National regulation might be defended where it is feared that individual states will allow the imposition of negative externalities (pollution) on other states
- Only the national government might have the incentive to provide public goods (i.e. defense) whose benefits could not be completely captured by any single state.
- National regulation might be desirable to insure against catastrophes that are geographically random and to redistribute income among the populations of different states.
- Might also be better to deal when problems of coordination would encourage a race to the bottom (i.e. wages and child labor)
- Is better to control the oppressive effects of faction and the tyranny of the majority
  o Federalist #10: “Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”

Majority Justices: Rehnquist, Scalia, Thomas, Kennedy, O’Connor
Minority Justices: Ginsberg, Souter, Stevens, Breyer

Majority Opinion:
(1) In Lopez we found three principles:
   a. This was a criminal statute which had no effect on economic enterprise
   b. There was no jurisdictional element that would limit its reach
   c. There were no formal findings
(2) Gender Motivated Crimes are not, in any sense of the phrase, economic activity
   a. Congress can only regulate intrastate activity only where that activity is economic in nature.
(3) The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.
(4) If accepted, the petitioners reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.
(5) Furthermore, it would not stop at regulating violence, but would be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant

Concurrence: Thomas
(1) We must escape the aggregated effects test; the orginal meaning is not reflected in our jurisprudence, and until we fix that Congress will continue to appropriate state police power under the guise of regulating commerce.

Minority: Souter, Stevens, Ginsburg, Breyer
(1) The Courts should only review whether a “rational basis” exists.
(2) The legislative record is firmly established
(3) We have previously followed a substantial affects test, and it should be followed now
   a. “Extends to all activity, when aggregated, that has a substantial effect on interstate commerce.”
(4) “History has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.”
(5) Garcia held that the notion of “traditional government functions” was incoherent.
(6) The states recognized that they failed to deal adequately with Gender motivated crimes, and 36-1 in amicus curae in favor of the law should say that states shouldn’t be forced to deal with that which they don’t believe they can handle.

Minority: Breyer
(1) This “economic/non-economic” distinction is not easy to apply
(2) Since judges cannot change the world, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.
YOUNGSTOWN SHEET & TUBE Co. v. SAWYER  
(1952)

In the midst of a war crisis, President Truman ordered the steel mills to be seized and operated by the Secretary of Commerce (Sawyer)

The Mill Owner contends that the President’s order amounts to lawmakership, which is uniquely legislative. The President claims that he had the power based on a composition of his powers under the constitution, and from former President’s.

Majority:
(1) The President’s power must stem from the Constitution or an act of congress.
   a. In the Present Case there was no act of Congress
   b. Constitution: “The executive Power shall be vested in the President,” “He shall take Care that the laws be faithfully executed,” and “he shall be Commander in Chief of the Army and Navy.”
      i. These are not sufficient to grant the president power.
(2) We cannot with faithfulness to our constitutional system hold that the Commander in Chief has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.
(3) The President’s Power to see that the laws are faithfully executed refutes his ability as a lawmaker.
(4) “The Power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws, those regulating the relationships between employers and employees, etc.
(5) The founders of the nation entrusted the lawmakership to the Congress alone in both good and bad times.

Concurrence (Jackson):
(1) There are three categories to which Presidential actions can fall:
   a. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that congress can delegate.
   b. When the President acts in absence of either congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilights in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, Congressional inertia, indifference, or acquiescence may sometimes enable, if not invite, measures on independent presidential responsibilities.
      i. Congress has not left seizure of property an open matter, but has covered it by three statutory policies inconsistent with this seizure.
   c. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.
      i. In the present case, the three bases given by the Government do not suffice.
         1. The fact that the President is Commander in Chief of Society clearly limits him from being Commander in Chief of Society. He has no monopoly of war powers, whatever they are.
(2) Because of the president’s prestige and influence on public opinion, his power will sometimes go unchecked by congressmen. However, this necessitates the court to keep the constitutional provisions of separation of powers in order.
(3) Congress alone has the power to legislate for emergencies.

Notes:
(1) One of the chief justifications for separating national powers, as with the vertical separation of powers under federalism is to preserve individual liberties.
JUDICIAL BREAKDOWN

Spending and Treaty Powers:
South Dakota v. Dole:
- REHNQUIST (Majority)
- O’CONNOR: Wants a very strict relation between the condition proposed and the purpose of the federal program. Thinks the court is being too lax.

10th Amendment
Garcia v. San Antonio Metro Transit Authority
- Both O’CONNOR and REHNQUIST dissented: “The true essence of federalism is that the states as STATES have legitimate interests which the National Government is bound to respect even though its laws are supreme.
- O’CONNOR’s dissent seems to put a severe emphasis on keeping state’s rights

New York v. United States
- O’CONNOR (Majority)
- STEVENS (Dissent): “I see no reason why the federal government may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive waste.”

Printz v. United States
- SCALIA, O’CONNOR, THOMAS, REHNQUIST, KENNEDY (majority and concurrences)
- STEVENS, SOUTER, GINSBURG, BREYER (Dissent): Souter refers to the federalist. Stevens and others join in completely saying that the Federal government has the power to regulate individuals.
- O’Connors Concurrence: The court appropriately refrains from deciding whether other purely ministerial reporting requirements impose by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid
  - E.g. Requirements that state and local law enforcement agencies report cases of missing children to the Department of Justice. The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.
“Convenience and Efficiency are not the primary objectives – or the hallmarks – of democratic
government and our inquiry is sharpened rather than blunted by the fact that congressional veto
provisions are appearing with increasing frequency…”
- Framers intended that all lawmaking function pass both houses and then go to President.
- The framers decided that the legislative procedure be finely wrought and exhaustive
- Must consider whether Congress’s action contains an issue that is sufficiently legislative in character.
  - The House, by instituting a veto, had the legal effect of “altering the legal rights, duties and
    relations of persons, including the Attorney General, the Executive Branch officials and Chadha,
    all outside the legislative branch.”
    ▪ Therefore, it is legislative in character
- When Congress makes the choice to delegate, it must delegate with precision. Congress can only
  implement policy in one way: bicameral passage and presentment by president
- There are only four times one house may act alone, and this is not one of them.

Powell’s Concurrence:
- This is a judicial function and should be struck down on separation of powers grounds. Congress is
  acting retroactively and this is a problem; this is not prospective like a legislative function and should be
  struck down on those grounds.

White’s Dissent:
Justice White, in dissent, urged that attention to the functional importance of the veto demanded a more circumspect
approach that would allow a more flexible interpretation of the Constitution's language. Yet a reading of his dissenting
opinion is instructive in part because it demonstrates how difficult it is to read the language more flexibly in this particular
case. The pure constitutional logic to which the majority pointed is very difficult to overcome. Essentially, the dissent
agreed that to legitimate the veto the Court would have to stretch the Constitution's language, but Justice White argued
that its language [*791] has been stretched equally far in other analogous instances. The analogies he offered, however,
did not persuade the Court.

First, if Congress can delegate a form of legislative power to the executive, Justice White asked, why can it not delegate
a form of legislative power to some of its own members? This question, however, does not answer itself. The type of
legislative power that Congress has delegated to the executive is the power to make rules, and rulemaking is often an
integral part of administering just as it is an integral part of judging. Thus, one does not depart far from the Constitution's
letter in stating that the Constitution, in granting administrative powers to judges allows them, at least in some instances,
to make rules. So, this example does not readily justify the greater departure from the Constitution's letter that would be
necessary to allow a part of Congress to legislate on its own.

Similarly, the dissent points to cases that have upheld congressional delegation of legislative-like powers to private
groups. The legislative veto, however, involves a delegation to those who will act in their official capacities as members
of Congress; in that capacity they can possess only those powers bestowed upon them by article I. The question of how,
say, one House could exercise legislative power in the face of express bicameral and presentation requirements then
seems to arise in a context different enough to make the private group analogy less compelling.

Finally, the dissent noted that the one-House veto carries out the Constitution's spirit, for it means that executive action
would take effect only if the Executive and both Houses of Congress approved it. The executive action might be viewed
as an executive proposal to the Congress, later enacted by the silence of both Houses. Yet, to analogize silence to
legislating goes rather far. If one takes the analogy literally (if, for example, one would still require the President to act
pursuant only to constitutionally, and thus congressionally, delegated authority) one destroys the analogy's power. If the
President can act only along express constitutional paths, how can Congress act differently? Why is it any more
reasonable to view silence as the legislative approval of an executive act taken pursuant to statutorily delegated authority
than to view it as a grant of appropriate legislative authority? In both cases, silence seems quite far removed from the Constitution's paths of bicameralism and presentation to the President. 47

Legislative Veto Substitute

... The Supreme Court, in INS v. Chadha, held the legislative veto unconstitutional. ... Moreover, if my basic view of the Chadha opinion is correct, it should be possible to come closer -- to develop a veto substitute that satisfies the literal wording of the Constitution's bicameral and presentation clauses while it more nearly approximates the compromise functions of the legislative veto. ... That fast track rule would provide: 1) when an executive branch agency enacts a regulation (or takes other action) subject to a special confirmatory law requirement, a bill embodying that special confirmatory law shall be introduced automatically (say, under the name of the Majority Leader, as sponsoring Senator); 2) the bill will be held at the desk, and not referred to committee; 3) the bill will be neither debatable nor amendable; it cannot be tabled or subjected to filibuster, etc.; and 4) the Senate will vote upon the bill, up or down, within sixty days of its introduction. ... Under these circumstances, a broad congressional delegation of power to the agency coupled with a veto that allows Congress subsequently to review actions that turn out to have political importance appears to be a plausible compromise with the needs of the administrative state. ...
Vertical Separation of Powers

National Powers and Local Activities
- McCollough v. Maryland

Commerce Power
- NLRB v. Jones and Laughlin Steel
- US v. Darby
- US v. Lopez
- US v. Morrison

State Autonomy, Federalism and the 10th and 11th Amendment
- National League of Cities v. Usery
- Garcia v. San Antonio Metropolitan Transit Authority
- New York v. United States
- Printz v. United States

Federalism based restraints on other national powers
- Spending Power
  - South Dakota v. Dole
- War Power
  - Missouri v. Holland [Migratory Bird Act Treaty power]
  - Modern Issues including the War Powers act, etc.

Horizontal Separation of Powers

Executive encroachment on Legislative Powers
- Youngstown Sheet & Tube v. Sawyer
  - Executive Authority to make National Domestic Policies
  - Executive Authority over Foreign and Military Affairs
    - Dames & Moore v. Regan

Congressional Encroachments on Executive Powers
- INS v. Chadha
- Clinton v. New York
  - Congressional Control over Executive Officers
    - Buckley v. Valeo
    - Bowsher v. Synar
    - P. 375 Cases- Humphrey’s executor v. United States
    - Morrison v. Olsen
    - Mistretta v. United States

Executive Privilege and Immunities
- US v. Nixon
- Clinton v. Jones