Constitutional Law Outline

Counter - Majoritarian (against democracy/majority) difficulty
- Federal judges are appointed for life (can’t be fired)
  - Can make decisions that are against the majority opinion in the country
  - We’re a democracy, but there are zones of decision making that the Supreme Court judges can control
    - judicial review of what Congress (elected) does
    - though Congress can then amend the Constitution…only done 4 times in history
  - But problems with them running….raising money, etc
- Court seems inherently counter majoritarian….But are there democratic influences on the court?
  - Appointed by someone who is elected and approved by the Senate
  - But even once appointed, their opinions do change and shift with society

Introduction to interpretive methodologies
- Debate over Constitutional Interpretation (how much discretion judges should have in interpreting the constitution)
  - Interpretivism
    - When courts engage in judicial review, their only legitimate task is to interpret the Constitution…follow the text
    - Most follow some type of interpretivism
      - Textualism
        - Least judicial interpretivism….Only consult the words themselves
          - Can work…President’s term is 4 years, but
        - Often problematic
          - Some clauses are so vague and open-textured, it’s impossible to construe them without consulting other sources
          - EX: privileges and immunities, cruel and unusual punishments, equal protection
        - Can lead to illogical or absurd results, contrary to the intent of the framers and thus doesn’t work as an across the board approach
      - Originalism
        - A court may look to the text of the document and when the text is unclear to the original intent of the constitutional Framers as well
        - The power of judicial review may be invoked only if it’s absolutely clear from the text of the Constitution or from the Framers’ intent that the specific practice is unconstitutional
        - General principle originalist
          - Apply general principle that Framer’s sought
            - Protect radio because framer’s sought free speech
        - Strict/specific orginalist
          - look at word, then words around it, then sentence, then paragraph, etc (concentric circles)
          - don’t protect radio under free speech since there was no such thing back then
        - Problems
          - How do we ascertain the intent of others?
          - Many of the issues that arise in the courts weren’t’ ever discussed by the Federal Convention, so there’s no original intent…thus the Constitution would be a static document unable to deal with contemporary issues
      - Nonorginalism
        - Most judicial interpretivism….virtually unfettered discretion in construing the Constitution…though they still seek to interpret some provision of the Constitution
• Judges may interpret the Constitution in light of all potentially relevant sources, including precedent, history and tradition, logic, natural law, moral philosophy, political theory, and social policy
• Problems
  o Charged with being undemocratic
    ▪ Follows view of judges, not necessarily the people
    ▪ Possible for judges to reduce the scope of individual liberty
• Approaching consensus among originalism and nonoriginalism
  • “Sophisticated originalists” seek to implement the general principles or concepts the Framers endorsed
    o Ask if the Framers were alive today, how would they apply a particular provision?
o Techniques of Constitutional Interpretation (in order of importance)
  ▪ Constitutional Text
    • Examination of the text/words
  ▪ Precedent
    • Doctrine of stare decisis
      o Reason not to retreat from a prior ruling or basis for extending an earlier constitutional ruling
      o Only to their own rulings, not lower court rulings
  ▪ Original intent
    • Words + what the framer’s thought the words meant
    • Intent of those that drafted the provision…look at debates and Federalist papers
  ▪ History and tradition
    • History…indirect way of determining framer’s intent
    • Helps decide if certain conduct deserves constitutional protection because it’s part of an established American tradition…helps us know what kind of stuff this was meant to deal with
  ▪ Political theory
    • Among others…look to principles of our democratic system
  ▪ Constitutional Structure
    • Court has derived meaning from the structure of the Constitution itself
    • Two principles that have been used for interpretation:
      o Three branches of government
      o Federalism (division of power between federal government and states)
  ▪ Fairness and justice
    • Look to these principles
  ▪ Social Policy
    • What they consider good/sound social policy
- Noninterpretivism
  o Courts aren’t limited to interpreting the words of the Constitution, but can enforce unwritten norms and look to natural law or moral philosophy without tying or tracing them to any specific provision of the document’s text
  o Demised because there was no tie to the written constitution
    ▪ In conflict with the idea of a written constitution
    ▪ Follow judges notions of morality, ethics, or social policy
    ▪ Thus judicial review would be discordant and incoherent as each judge would follow his own morality

History of the Constitution and of Judicial Review
- The Role of the Supreme Court in the Constitutional Order
  o Articles of Confederation (1781) were adopted to ensure some unification of the states regarding common foreign and domestic problems, but the overriding understanding was that the states would remain sovereign.
    ▪ But there was no unifying, legal authority amongst the colonies…the confederation possessed no independent power of its own, but relied for its success on the acquiescence of its member states
    ▪ No power to tax, no power to regulate commerce and no executive branch, and no national judicial authority
Congress had limited power to enact laws, but no means of enforcing them.

As problems arose (especially economic and foreign), the framers met and created the constitution...inflation/had to borrow money, no consistent foreign policy.

Thoughts of the framers

- **Antifederalists**
  - Opponents of the constitution and the framers
    - Thought it removed people from the political process, created a powerful and remote national government and emphasized commerce.
    - Relied on civic virtue....willingness of citizens to subordinate their private interests for the general good
      - Politics was of self-rule...of selecting the values that ought to control public and private life
    - Model for government was the town meeting
      - Lots of active political participation
    - Anti large national government
      - Thought it would undermine the citizenry willingness to subordinate their private interests to the public good
      - Wanted to avoid extreme disparities in wealth, education, and power
        - Thought commerce was a threat to the principles underlying the Revolution for it gave rise to ambition and avarice and thus dissolution of communal bonds
  - Thoughts of commerce as a threat to the principles underlying the Revolution

- **Federalists**...enable the government to control the governed and then oblige it to control itself: checks and balances
  - Welcomed rather than feared heterogeneity and understood that self-interest would often be a motivating force for political actors.
  - Control of factions whether a majority or not (and thus public good won’t be disregarded)
    - They will always exist because people have different opinions and interests...thus they can’t be removed, but can be controlled
      - Main source of factions is due to unequal distribution of property
    - Goal: secure the public good and private rights against the danger of a majority faction, but at the same time preserve the spirit and form of popular government
      - Accomplished through reps...enough to guard against the cabals of a few, but small enough to guard against the confusion of a multitude...allows views to be refined by passing through a chosen body whose wisdom and patriotism will lead them
        - Larger union makes it less likely that a majority of the whole will have a common motive to invade the rights of other citizens
  - Thought representation was an opportunity for achieving governance by officials devoted to a public good distinct from the struggle of private interests...and thus favored long length of service and large election districts...opposite of anti-federalist
    - Educated elite...filtered policy
  - Thought the different govs (federal v. state...branch v. branch) would control each other and at the same time each will be controlled by itself
    - Helps prevent factions and self-interested representation...they are accountable to the public
  - Favored lengthy deliberation and government inaction
    - This may be associated with a desire to protect private property
  - **Ultimate goal of these divisions of power:**
    - Liberty

- Dahl...What the Constitution Gets Wrong
  - No other country has adopted our method
  - Only 3/5 of slaves were counted
  - Electoral college
    - Each popular vote doesn’t count
- Winner take all
  - Composition of the Senate
    - Formed by threats of treason and war
    - Senate has killed many bills supported by the president, people, and the House
    - 22 of the smallest state = 12% of the population = 44% of the Senate
    - Amendments…13 smallest states = 5% of the population = enough to block votes
  - Ruger
    - 20 out of the 50 states and 10-15% of the population is all that is needed to block legislation due to the filibuster rule

Authority of the Supreme Court to interpret the Constitution and invalidate unconstitional acts by other branches of the Government

- Marbury v. Madison – PP doesn’t get his nomination delivered and DD decides not to deliver them
  - Marbury used textual support...Article III, §2 (judicial power over cases arising under the Constitution and Article VI, cl. 3 (judges must support Constitution...though all branches must do this)...used Framer’s intent (in the Federalist Papers)
  - Court said PP had a legal right to the commission
    - Once signed and sealed (delivery was ministerial)
  - The laws of the country afford him a remedy...Court can order the Executive to give it as long as it’s an individual right (if it’d been national…the subject would be political and court can’t rule)
    - can’t say there’s no remedy for a violation of individually legal vested right
  - However, found Supreme Court did not have original jurisdiction of the case according to the Constitution and their powers could not be expanded by Congress...(Marbury didn’t follow right procedure by filing with Supreme Court)...dismissed the case for lack of jurisdiction
    - Judiciary Act gave Supreme Court to take original jurisdiction over the right to issue writs of mandamus, but this is at odds with Constitution...not one of the cases it can hear in original jurisdiction under Article III, §2, but only one that can be heard on appeal
    - When there is a conflict between the Constitution and a federal or state law, the Constitution is the supreme law of the land (article VI) and the Court has the authority (and duty) to declare the statute unconstitutional and refuse to enforce it
      - Laws repugnant to the constitution are void and courts as well as other departments are bound by the Constitution
  - Horizontal Review
    - It is the job of the Court (not legislature) to interpret and decide the laws of the United States
      - Power of judicial review (not stated explicitly in Constitution)
        - Right to declare act of congress unconstitutional
        - Court has power of mandamus over executive...power to tell someone (an official) to do something

- Cooper v. Aaron – desegregating Alabama schools, which governor opposed
  - State must follow the Constitution and it is the duty of the courts to say what the law is
    - Wanted them to follow Brown v. Board even though they were not a party to the suit
      - They had established a principle, which all were now to comply with
    - Court basically equated its interpretation of the Constitution as the Constitution itself

Scope of the Supreme Court’s authority to Review State Court Judgments

- Vertical Review
  - Power of the Supreme Court to review state court judgments in case that raise federal constitutional issues
  - May determine whether a state court has reached a decision that isn’t in conformity with the Constitution

- Martin v. Hunter’s Lessee – DD claimed title to land taken by state and given to him...PP claimed land was protected by national treaties (Supreme court gave to PP over state court’s ruling/objection)
- **Vertical Review**
  - Defended the legitimacy of Supreme Court Review of state court judgments in civil cases which rest on interpretations of federal law (but only federal law, can’t hear a case of state law/claim)
    - **State Courts** aren’t sovereign…must follow Constitution
    - Gives uniform results among the states in interpreting the Constitution
      - Prevents different courts interpreting laws in different ways
    - Supreme Court has final authority over matters involving constitution
  - Can’t do textual analysis…constitution is silent on this issue
    - Thus argument is very policy oriented….logical
  - **Cohens v. Virginia** – PPs sold lottery tickets in violation of VA law, but claimed they were immune from state law in selling congressionally authorized tickets….issue was whether Supreme Court could review such state judgments?
    - Court sustained jurisdiction to review the validity of state laws in criminal proceedings
    - Here, especially since state is a party and Supreme Court has original jurisdiction according to the Constitution….Article III, §2

- **Exception to Federal Review of State Interpretation of Federal Law**
  - Independent and adequate state grounds doctrine
    - If the court would come to the same result in two different ways/a state court’s judgment rests on two alternative grounds – one state and one federal – the Supreme Court is unable to review the state ground of decision if it rests on independent and adequate state grounds
      - An adequate state ground fully sustains the result and does not violate/conflict with the US constitution, federal statute, or federal treaty
      - The state court’s interpretation must be “independent” of federal law…can’t be based on the state court’s understanding of federal law (the state court cannot use a federal standard).
      - Ex: MASS supreme court invoking Mass constitution over same-sex marriages….based on state constitution’s equal protection clause…have to treat same-sex marriages…state constitution, not federal
  - Federal right – minimum requirement
    - State can add to those rights

EX: PP sues over discrimination….federal law, federal constitution
- was she discriminated?

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<td>Supreme Court would not hear…if Missouri law is independent state ground, court won’t hear it</td>
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- **Reason court my grant certiorari**
  - First, issue must be one of federal law
    - Circuit split…shallow split…1 to 1
    - Conflict between the highest courts of two states
    - Important questions not yet resolved by the Supreme Court

- **Limitations on Judicial Power, Operation of the U.S. Supreme Court**
  - Idea that some constitutional issues are political and thus nonjusticiable (matters that would take a federal court beyond the sphere of activity commonly associated with judging)
Requirements of justiciability (procedural obstacles that a PP must overcome)

- Political question doctrine
  - Holds that certain constitutional issues are deemed off limits to the federal judiciary and thus enforcement is dependent on the executive and legislative branches
  
  - **Textual commitment of question to another branch**
    - Does the Constitution (based on text, history, precedent, and policy) explicitly give the power to another branch
    - Ex: impeachment
  
  - **Lack of judicially manageable standards for resolution**
    - No manageable standards to guide the judiciary in deciding the issue
      - How can they come up with a workable standard they can use later?
      - Don’t want to rule on a political issue
        - Ex: whether or not welfare reform is a good idea
  
- **Two go together...are often merged**

  - Advisory opinion
    - Courts can’t issue an opinion based on a abstract or hypothetical question
    - There must be an actual case/controversy that Is capable of judicial resolution
  
  - Standing...who...Lujan
    - Injury in fact
    - Causation
    - Redressability
    - No taxpayer standing...it’s a generalized claim that the government must comply with the law
      - Exception: if the allegation is that it violates the establishment clause (religion)
  
  - Mootness...when
    - If events occurring after the filing have deprived the litigant of an ongoing stake in the controversy
  
  - Ripeness...when
    - Not sufficiently concrete
  
  - 11th Amendment...who
    - bars certain types of suits against states

- Where
  - Don’t really deal with proper venue...civ pro...but it can kill a case

- What ...Nixon
  - Issues are justiciable (policy question)
  - Are federal issues, but not justiciable
  - Just won’t let them be adjudicated in federal court
    - Examples: impeachment, nominations, conduct of foreign policies
      - Who has checks: congress has powers over these areas
        - Though house and senate are split and thus you need both parties approval and need super majority
      - Exception: if the allegation is that it violates the establishment clause (religion)
  
- Nixon v. United States – Chief judge, convicted of making false statements before a federal grand jury. For impeachment, Senate tries and 2/3 must vote out. Senate had an impeachment rule where a committee of senators received evidence and testimony and presented it to whole senate. PP tried to argue that the Senate rule violated the constitutional grant to authority to the Senate to try all impeachments bc it prohibited the whole senate from taking part in the hearing.
  - Supreme court found the controversy nonjusticiable bc there was a textually demonstrable constitutional commitment of the issue to a coordinate political department
- Constitution says “senate shall have the sole power to try”...just given to senate
  - Also, follows framer’s intent
    - Thought about giving power to judiciary, but decided not to
    - The clause sets out the express limitations on judiciary, not give them final power
  - PPs will likely have a criminal trial...ensures checks and balances (legislature checks judicial)
    (legislature is checked bc power is divided btwn senate and house and need supermajority of senate to impeach)
  - Also difficult to fashion relief...it could set aside judgment, but could it reinstate member? And what if it’s president...takes time for judicial power to run its course

- **Standing** (and reasons)
  - Federal courts scrutinize the parties bringing suit to ensure that they have a concrete and particularized interest in the case
    - **Bare minimum article III requires**
      - **Injury in fact** - One must show that he personally has suffered some actual or threatened injury as a result of illegal conduct of defendant
      - **Casual connection**: The injury fairly can be traced to the challenged action of the defendant (casual connection btwn injury and conduct complained of...but/for test)
      - Redressability: Relief requested must be designed to alleviate the injury caused by DD’s conduct
      - **Prudential requirements**...optional criteria...not required by Constitution, but by court
        - No 3rd party standing
          - Can’t raise the rights of absent or hypothetical parties
        - No generalized grievance
        - PP in zone of interest
  - Want triage...limited cases...since they hear so few cases, might as well be real, rather than hypothetical cases...at core it must be a case they are deciding, but they can stray in their opinions
  - Limits on judicial power over other branches
  - **Lujan v. Defenders of Wildlife** – the Interior Department interpreted the Endangered Species Act as applicable only to actions by federal agencies within the US or on the high seas. PPs wanted it as interpreted to actions taken in foreign nations. (ie not build dams)... gives every citizen right to sue (private right of action)
    - Court found that the PPs didn’t make the requisite demonstration of injury and redressability (ability of the court to do something)
      - No imminent injury since they have no concrete plans to see the animals...no factual showing of perceptible harm...threatened injury may have sufficed if the injury was less speculative or remote
      - Pulling out their funding doesn’t mean the projects will not continue

- **Timing of lawsuits**
  - Too late...mootness
    - Litigants have standing to sue at the outset of the litigation, problems arise from events occurring after the lawsuit has gotten under way – changes in the facts or law – that allegedly deprived the litigants of the necessary stake in the outcome
      - Dispute is not active during the entire course of litigation
    - Exceptions
      - Continuing harm to PP
      - Likelihood of future reoccurrences of part harm
      - Probability that some of the cases are capable of repetition, yet evading review
    - Pregnancy...cases that consistently occur but evade review
  - Too early...not ripe
    - Seeks to prevent premature adjudication, it involves situations where the dispute is insufficiently developed and is instead too remote or speculative to warrant judicial action
• Court won’t give advisory opinions, since the debate isn’t going on yet
  ▪ Example: act prohibiting federal executive branch employees from taking part in managing campaigns….claimed there were people who wanted to do so and sought a declaratory judgment finding it unconstitutional….need to show that the act was violated, not that they desired to do so

The Affirmative Powers of the Federal Government
- The Federal Government can only exercise those powers granted to it by the Constitution, which are described in Article I, §8
  ▪ Thus every exercise of national authority must be linked to a constitutionally granted power
  ▪ Powers not granted to the national government are, reserved to the States respectively, or to the people – Tenth Amendment
- Reasons for federalism and having different pockets of power?
  ▪ individuals have more control
  ▪ experimentation
    ▪ if it works in one state, others can try it
  ▪ more accountability
  ▪ people’s views are diverse by region…more local control
    ▪ thus the more we give states to decide their own rules, overall more people are happy with what they do
  ▪ The Necessary and Proper Clause…Article I, §8
    ▪ To make all Laws which shall be necessary and proper for carrying into Execution the Forgoing Powers, and all other Powers vested by this Constitution in the Government of the US, or in any Department or Officer thereof
  ▪ McCulloch v. Maryland – DD tried to charge any banks operating in the state without authority from the state (chartered by the US gov). Chartering a bank is not expressly delegated to Congress.
    ▪ Though not explicitly, it’s implied in the Constitution and ancillary to one of the powers listed in the Constitution (as long as it doesn’t conflict with specific constitutional prohibitions)
      ▪ The gov. which has a right to do an act and has imposed on it the duty of performing that act must be allowed to select the means in order to effect an objective interested to the gov. (lay and collect taxes, borrow money, regulate commerce, declare and conduct war, raise and support armies).
    ▪ Implied through Enumeration of powers…make all laws which shall be necessary and proper
      ▪ Necessary only means convenient or useful or rationally related…not absolute physical necessity…the only option
    ▪ The constitution and the laws made in pursuance are supreme and control the constitution and laws of the states
      ▪ States don’t have the power, by tax or otherwise, to interfere, retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

Commerce Clause
- Article 1, Section 8
  ▪ Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes
  ▪ Exclusive power of Congress to regulate commerce among the several states
    ▪ Regulate any commerce that has interstate effects
  ▪ Includes any activity involved in the commercial exchange of goods and services occurring in more than one state
- Factors to consider when determining if federal government can regulate
  ▪ Internet…data travels in interstate commerce…like an instrumentality…like a train in the past…commercial transaction with it
o **Channels of I.C. (Darby, Heart of Atlanta))…not substantial affect**
  - Physically being in the channels of interstate commerce
  - Applies to even non-economic activity that’s in the channels of interstate commerce (Mann Act – someone having an affair)
  - Don’t have to stand at border and seize right there
  - Any item that gets carried along in the channels
  - Any goods, people (Mann Act)
  - Darby
    - Once something is in the stream of commerce/crosses a state border, it’s always subject to federal laws for it’s life…here there’s an intention to export

o **Instrumentalities of I.C.**
  - Only applies to trains, planes, etc.
  - Probably internet and cell phones
  - Thing that facilitate/are engaged in interstate commerce

o **Substantial effect on/relation to interstate commerce**
  - **Lopez**
  - The affecting commerce rationale
  - If not commercial, must be an obvious connection…economic
  - If commercial, can be direct or indirect…Wickard

- **1887 – 1937**
  o Commerce was one stage of business distinct from earlier phases, such as mining, manufacturing, or production…EC Knight and Carter Coal Co….these are left to the states under the 10th amendment
    - Held this when considering federal economic regulations
    - Least likely to adhere to this when concerned with federal morals regulation
  o There must be a direct effect on interstate commerce
    - Shreveport Rail case
      - Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce

o **Gibbons v. Ogden** – DD was given exclusive license by NY to operate steamboat btwn NY and NJ…tried to stop PP from operating his license given by the federal government btwn NY and NJ
  - Subject of NY legislation is commerce and congress has exclusive authority to regulate commerce that concerns more than one state (supremacy clause)
    - Federal law trumps state law
    - (Back then commerce was just buying and selling)
  - Marshall…commerce is undoubtly (more than buying and selling), but intercourse btwn the states
    - more broad than just exchange of goods
    - reads cases more broadly…favors more national power
    - Just doesn’t touch something completely internal…even if it partially “effects” interstate commerce…that’s enough

o **United States v. E.C. Knight Co.** – DD acquired control of 98% of the nation’s sugar refining capacity
  - Under the commerce clause, Congress couldn’t reach a monopoly in manufacture
  - Manufacture is a local activity, which doesn’t equal commerce…it’s indirect/not direct effect
  - Court suggested that agriculture, mining, and production in all forms came within this exclusive enclave since they all involved local activities that preceded interstate commerce
    - This was true regardless of their potential interstate effects

o **Houston E. & W. Ry. Co v United States** – Shreveport Rate Case - RRs had lower rates btwn cities in TX than btwn TX and Louisiana…imposed intrastate rail rates that discriminated against interstate commerce
  - Court sustained a federal statute prohibiting a railroad from charging a higher rate for interstate services than was charged for similar intrastate services
  - There’s congressional authority to reach intrastate rail rates that discriminated against/affected interstate railroad traffic
Certain things so intimately connected/so substantially related to interstate commerce, they become agents of interstate commerce
- Ultimate objective: protect interstate commerce
- Agencies and instrumentalities of commerce can be regulated

- **Champion v. Ames** – man shipped imported lottery tickets from TX to CA in defiance of the federal lottery act, which prohibited importing, mailing, or interstate transporting of lottery tickets
  - Since the tickets are subject of traffic, they are subjects/channels of commerce…stream of commerce theory
  - Gov. stops it from being in interstate commerce
  - If gov thinks it’s immoral, they can pass a criminal law against it

- **Hipolite Egg Co. v. United States** – rotten eggs were shipped from one state to another and eggs were confiscated under the food and drug act bc the label failed to disclose they contained harmful ingredient
  - Once it travels btwn states, the item is fair game and subject to federal legislation
  - Outlaws of commerce may be seized wherever found (doesn’t have to be at the border)

- **Hoke v. United States** – Mann act prohibited transportation of women in interstate commerce for immoral purposes….prostitution
  - Congress has power over transportation among the States and may adopt not only means necessary, but also convenient to its exercise and the means may have the quality of police regulations

- **OVERRULED…Hammer v. Dagenhart** – Congress barred the transportation of products produced through child labor
  - Act doesn’t seek to regulate transportation (the goods themselves are harmless), but aims to standardize the ages at which children may be employed
  - Drew categorical distinction….manufacturing isn’t commerce
    - Production of articles intended for interstate commerce is a matter of local regulation
  - Defer to congress on this…they can rule on it

- **Carter v. Carter Coal Co.** – Act to regulate of max hours and min wages in coal mines…coal would be shipped nationwide
  - It is production (a purely local activity even though it’ll be shipped across state), not commerce
  - Employer/employee relationship which doesn’t directly affect interstate commerce

- **Schechter Poultry Corp. v. United States** – PP charged with violated wage and hour provisions of NY Code…PP bought and sold only in NY
  - Activities local in their immediacy don’t become interstate and national because of distant repercussions
    - Not within stream of commerce
    - Any effect was much too indirect

- **Modern Trend 1937-1995**
  - Expansively defined the scope of Congress’s commerce power
  - Theories upon which a commerce-based regulation may be premised
    - Substantial economic effect
    - Cumulative effect
      - Doesn’t matter if it’s direct or indirect

- **United States v. Darby** – federal statute which prohibited the shipment in interstate commerce of certain products manufactured by employees who earned less than the min wage or worked more than the max hours. Statute also prohibited the employment of workers, at other than the prescribed wages and hours, in the production of goods intended to be shipped in interstate commerce
  - Although manufacture is not itself interstate commerce the shipment of the goods is such commerce and the prohibition of such shipment by Congress is a regulation of commerce
    - Extends to activities inside the state that substantially affect interstate commerce
  - Act is directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as unfair
- Rights of Congress include prohibiting transportation of noxious articles, stolen articles, kidnapped persons, convict-made goods, intoxicating liquor or articles it conceives are injurious to the public health, morals, or welfare
- overrules Hamer v. Dagenhart

- Wickard v. Filburn - farmer grew more than his allowance of wheat for his own consumption and was penalized under the Agricultural Adjustment Act
  - Even if DD’s activity if local and not regarded as commerce, it involves an economic activity and may still be reached by Congress if it exerts a **substantial economic effect on interstate commerce** whether direct or indirect
  - Though DD’s contribution to the demand for the wheat may be trivial, his contribution taken together with others similarly situated, is far from trivial...**substantial effect** on price and mkt conditions

- Heart of Atlanta Motel v. United States – motel wouldn’t rent to African Americans, 75% of occupancy came from out-of-state guests
  - Racial discrimination by motels affects commerce and the means selected to eliminate the evils are reasonable and appropriate
    - Doesn’t matter how local if interstate commerce feels the pinch
  - There’s evidence of the burdens that discrimination by race place upon interstate commerce
    - Discourages travel on the part of a substantial portion of the Negro community
  - **Right to control activities (no matter how local) which might have a substantial and harmful effect upon commerce...aggregate effect...if all did this**
  - If railroads and barges affect interstate commerce, so does hotel...can put in same category

- Katzenbach v. Mcclung – barbecue had only a take-out service for African Americans, 46% of meat was bought by a local supplier, who purchased it from out of state
  - Substantial portion of food has moved in commerce
  - Discrimination in restaurants has a direct and highly restrictive effect upon interstate travel by Negros...aggregation effect...if all did this
  - They spend less in restaurants compared to similarly situated whites
  - Congress’s power under the commerce clause is broad and sweeping
  - Also furthers a social purpose

- Perez v. United States – PP lent money to a butcher shop owner and threatened violence when the butches couldn’t pay
  - Though loan-sharking is purely local here, it may affect interstate activities
    - Regulation of intrastate traffic is necessary or appropriate to the effective regulation of interstate traffic...there’s a substantial relationship between the intrastate and interstate activities to permit Congress to regulate the former in order to more effectively regulate the latter
    - It is a national problem.....cumulative effect rationale
    - Allows them to control criminal activity

- ***United States v. Lopez*** – Act that made it a federal offense for one to possess a firearm in a school zone...didn’t say it was a gun that moved in interstate commerce
  - Renquist
    - Gibbons
      - It’s commerce that concerns more states than one...not the case here
    - NLRB v. Jones & Laughlin Steel
      - Departed from the distinction between direct and indirect effects on interstate commerce
      - Those activities that have a close and substantial relation to interstate commerce that their control is essential and appropriate to protect that commerce from burdens or obstruction are within Congress’ power to regulate
  - Darby (min/max wage)
Power of Congress isn’t confined to regulation of commerce among the states
Extends to activities intrastate which so affect interstate commerce as to make
regulation to them appropriate means to the attainment of a legitimate end

- **Wickard**
  - Even if PP’s activity be local and though it may not be regarded as commerce, it may
    still be reached by Congress if it exerts a substantial economic effect on interstate
    commerce

- **Heart of Atlanta**
  - Need a rational basis for concluding that a regulated activity sufficiently affects
    interstate commerce
  - Congress may regulate the channels, instrumentalities, and those having a substantial
    relation/substantially affects interstate commerce
    - Possession of a gun isn’t an economic activity that might through repetition
      substantially affect any sort of interstate commerce (it must be economic activity that
      substantially affects interstate commerce)
  - Since it’s beyond Congress’s commerce power, the federal statute was invalidated
  - Also, a traditional domain of the states…otherwise nothing Federal gov. can’t regulate

    - Kennedy and O’Connor…concurring
      - Were the federal government to take over the regulation of entire areas of traditional state
        concern, areas having nothing to do with the regulation of commercial activity, the boundaries
        between the spheres of federal and state authority would blur and political responsibility
        would become illusory

    - Breyer…dissenting
      - Case is nonjusticiable

- **United States v. Morrison** – Act provides a federal civil remedy for victim of gender motivated crime (i.e. rape)…doesn’t make it a crime, but changes remedy (can go to federal court for state violation)

  - Renquist
    - Gender motivated crimes aren’t economic or part of a larger economic regulatory scheme
    - Doesn’t matter if there’s proof that there’s a substantial effect on interstate commerce
    - Must pile inference upon inference
    - Otherwise, every violent crime could be regulated because it affects interstate commerce (but
      it’s a state’s police power that has the right…it’s been traditionally left to the states)
    - In our nation’s history our case have upheld Commerce Clause regulation of intrastate activity
      only where that activity is economic in nature
    - Need a jurisdictional element

- **Lopez and Morrison**
  - Four factors to be weighed in determining if an activity has a substantial affect on interstate commerce
    - Whether the regulation is economic or non-economic (necessary)
      - If economic, it must have a substantial impact on interstate commerce
    - Whether the law contains a jurisdictional element
      - Requires that the activity be involved in interstate commerce
      - Can be through aggregation
    - Legislative findings
    - Direct linkage between the activity and interstate commerce

- **Spending and Treaty Powers**
  - Article 1, section 8
    - Congress may lay and collect Taxes, duties, Imposts and Excises, to apply the Debts and provide for
      the common Defense and general Welfare of the United States (power to tax and spend whenever its
      beneficial to the common defense or general welfare of the nation)
South Dakota v. Dole – statute that withholds 5% of federal highway funds to any states that allow purchase of possession of alcohol to those under 21

- Although Congress can’t regulate drinking age directly, they may attach conditions on the receipt of federal funds to further broad policy objectives

  Limitations
  - Must be in pursuit of the general welfare
    - Thus regulating private individual wouldn’t work
  - Must not be ambiguous…enable the states to exercise their choice knowingly, cognizant of the consequences of their participation
  - Must be related to the federal interest in particular national projects or programs
    - Germane to the spending (there must be a relationship)
  - Can’t be coercive
  - Other constitutional provisions may bar
    - Ex: if it affects certain individual rights

- Here, it ensures safe interstate travel

Missouri v. Holland – President created a treaty, which resulted in the federal Act prohibited killing, capturing, or selling certain migratory birds, so that protectors of our forest and our crops weren’t destroyed

- Article II, § 2 - President has right to create a treaty under the authority of the US (constitution)
  - A valid treaty takes precedence over contrary state laws
- Court held that the treaty in question doesn’t contravene any prohibitory words to be found in the Constitution
- A national interest is involved and can only be protected by national action in concert with that of another power
- The treaty power, and power to enact legislation necessary and proper to carrying out treaties are delegated to the federal government
  - Thus a valid exercise of the treaty power can’t by definition transgress the limits of the Tenth Amendment
  - It’s valid if the President made it and Congress approved it And
  - Subject matter is appropriate…if it has potential international ramifications and of international concern
- President and Congress is given broad leeway in determining whether a matter is of sufficient national interest and international concern to warrant a treaty on the subject

External Limits on the Commerce Power: State Autonomy, Federalism, and the Tenth and Eleventh Amendments

- 10th Amendment
  - 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
  - Makes some state activities immune from federal regulation, even though it is otherwise related to commerce

  Test
  - Is it within the Commerce Clause?
    - If yes, is it regulating a state or local government?
      - If yes, does it violate the principle of federalism as embodied in the 10th amendment?

National League of Cities v. Usery – extended min wage and max hour provisions to all employees of state and local governments

- Court confirmed the vitality of federalism as a check on national power
- Found it would interfere with integral gov. functions, altering the State’s abilities to structure employer-employee relationships (i.e. fire, police, sanitation, parks…areas of state function)
  - Congress violates the 10th amendment in attempting to regulate states regarding their activities that have traditionally been performed at the state level or are core state functions

  Three part test:
  - Show that the challenged statute regulates states as states
  - Federal regulation must address matters that are indisputably attributes of state sovereignty
• 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
  ▪ Large 10th amendment protection
  ▪ Overruled by Garcia

  Garcia v. San Antonio Metropolitan Transit Authority – should min wage and overtime requirements apply to a state owned municipal transit authority...Fair labor standards act
  ▪ Essentially leaves congressional regulation of state activities to the political, not judicial process
    • Thus congress should make the necessary judgments about the scope of any intrusion on state sovereignty
    • From the perspective of the judiciary, neither the principle of federalism nor the text of the Tenth Amendment would trump the otherwise legitimate exercise of national power
    • Thus being a state doesn’t matter and they are treated like a private entity
  ▪ A rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is integral or traditional is unworkable
  ▪ This doesn’t mean there are no limits, rather limitation of federal authority is inherent in the delegated nature of Congress’ Article I powers and structure of federal government itself
    • 2 electors, electing the President, etc
    ▪ No protection for States due to 10th amendment
    • This changes/is cut back with later cases

  New York v. United States – Act required states to provide for disposal of radioactive waste generated within their borders...forced them to make a policy
  ▪ Congress can regulate interstate waste, but it’s method is unconstitutional
    • Congress can preempt the states from the field by directly regulating the private activity or entice the states with a monetary incentive
    • However, this crossed the line between encouragement and coercion
      ▪ Forced the states to regulate a certain area
        ▪ They can’t compel a state to enact or enforce a particular law or type of law
        ▪ States were being treated as administrative agents of the federal government, commandeered into federal service.
    • But can’t do this:
      ▪ Take title provision – state that failed to provide for the disposal of all internally generated waste would be required to take title and possession of the waste and liable for any damages connected to the waste
        ▪ Can’t commander the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program
        ▪ Can’t force state government to implement legislation enacted by Congress
        • Transparency and accountability are important so federal/state legislatures don’t blame each other
    ▪ Some protection for states due to 10th Amendment

  Printz v. United States – Brady Handgun ... gun control act that made a chief law enforcement officer (CLEO) determine in 5 days whether possession of a gun would violate the law and notify dealer...required research...only until system was up and running
  ▪ Can’t direct/commander state officials (executive) in the administration of a federally enacted regulatory scheme (even ministerial)
    • Two centuries of avoidance of this scheme
    • Can’t press states into service...need their consent
    • Costs states money
  ▪ Text: doesn’t answer
  ▪ History: allows commandeering of judges, and separates from legislature, but doesn’t say particularly
  ▪ Federalism
    • Would reshape balance of power if allowed: President’s job to see that laws are faithfully executed, not Congress (can’t have control of state officers)
Early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions

- **Reno v. Condon** – federal law limiting commercial vending of personal data by the states…state wanted to sell personal info that the DMV collected from drivers
  - It does not force the states to enact or implement a federal regulatory policy
    - It’s a prohibitive act, not an affirmative obligation
      - Can say do not do this….but not do this
  - Info is a thing of interstate commerce and sold to those outside the state…stream of commerce
    - It regulates all supplies to the market including private parties, and thus regulates the state as the owner of that thing/supplier to the mkt

- **11th Amendment**…Ruger Handout
  - The judicial power of the US shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens (of another State (replaced with any state), or by Citizens or Subjects of any Foreign State
  - Exceptions:
    - United States may sue states in federal court
    - States may sue other states in federal court, if suing to protect their own interests (border dispute)
    - Suits in which the Supreme Court is reviewing the decision of a state court
    - Citizens may sue municipalities in federal court so long as the state government in no so closely involved so that it is in effect a suit against the state
      - Can bring suit against political subdivisions even though such entities exercise a slice of state power
    - Citizens may sue individual state officers who violate federal law in federal court and get injunctions directing future action in compliance with federal law (when the official acts contrary to federal law). Described as a “fictional distinction” (is considered a state actor for purposes of establishing a 14th amendment violation).
      - Must sue a named state official and sue them in official and unofficial capacity
        - Suits against state officers 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 the state money (ex: order to desegregate schools)
        - Citizens may seek monetary relief from individual state officers if money is to be paid out of the officials’ own pocket, or out of a voluntary indemnification policy brought by the state (ex: money damages against state police officers who use excessive force)
  - **Waiver**
    - Congress may “waive” the States’ 11th Amendment from suit if and only if:
      - If passes a law to enforce the 13th, 14th, or 15th Amendment
      - It makes its intention to subject states to federal suits crystal clear
      - Ex: Title VII
  - **Hans v. Louisiana**
    - Interpreted the structure of the Constitution and the historical understanding to be that States were immune from federal court lawsuits brought by their own citizens
      - Citizens can’t sue any state, even their own
  - **Seminole Tribe of Florida v. Florida** – Act that allowed gaming activities only with an agreement amongst the tribes and the state where the gaming is to take place
    - Even though Article I gives Congress full authority to “regulate commerce with the Indian tribes” Congress can’t allow a tribe to sue a state in federal court
      - Can’t use its Commerce Clause authority to force the states to defend private suits in federal courts
    - The only way Congress can waive the state’s 11th Amendment from suit is if it passes a law to enforce the 13th, 14th or 15th amendments and makes it’s intention to subject states to federal suits clear
- **Alden v. Maine** – employees of the state tried to sue state for violating the federal Fair Labor Standards Act
  - Structure of the Constitution forbids Congress from passing a law and giving citizens the right to sue states under the law in the states’ own courts
  - Immunity from suit in federal court extends to immunity from suit in state court even if it’s based on a federal right
  - US could have brought suit, though

- **Federal Maritime Commission v. South Carolina State Ports Authority** -
  - A private cruise ship company can’t bring a federal law complaint before the Federal Maritime commission against a South Carolina port authority
  - State has sovereign immunity to adjudications within federal administrative agencies

**Chapter Ten: Post-Civil War Amendments**

**14th Amendment**
- applies to cities and states (gap for private industries…that’s why we use commerce clause)
- comes into play with 10th and 11th amendment
- Federalism and separation of powers issue
- Can commander here, since the 10th and 11th Amendments don’t apply

- **United States v. Morrison** – Statute provided a federal remedy for the victims of gender-motivated violence.
  - PP’s second argument was that it should be upheld as an exercise of Congress’s remedial power under §5 of the 14th Amendment.
    - Fourteenth Amendment only prohibits state action
      - Can’t reach private activity
      - Congress’s can’t use it’s §5 powers to give one a federal cause of action
    - In addition, there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end
      - Here the legislation is directed at individuals who practiced gender violence, not a state or state actor

- **Kimel v. Florida Board of Regents** -
  - Held that Congress exceeded its 14th Amendment authority in allowing state employees to sue the states for damages for violations of the Age Discrimination in Employment Act (ADEA)
    - The Equal Protection Clause doesn’t prohibit a state from discriminating on the basis of age as long as there’s some rational basis for doing so
  - It failed the congruence and proportionality test
    - Requirements that the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act
    - States weren’t major violators of equal protection when they discriminated on the basis of age, so making the states obey the ADEA as a means of combating equal protection violations wasn’t a congruent and proportional response to an equal protection problem

- **Board of Trustees of the University of Alabama v. Garrett** – Congress provided a money-damages remedy against state employers for discrimination based on a non-suspect classification. They prohibited employers from discriminating against a qualified individual on account of disability and required them to make reasonable accommodations
  - State’s aren’t required by the 14th Amendment to make special accommodations for the disabled (a non-suspect class), so long as their actions towards such individuals are rational
  - Discrimination wasn’t sufficiently pervasive to support this drastic a remedy
  - Congruence and proportionality test
    - Congress must identify a pattern of state violations of a judicially recognized constitutional right, create a statute that’s plainly designed to ameliorate the violation of those rights, and devise a remedy that’s tailored to the demonstrated pattern of state-induced constitutional violations
The rule that Congress puts under §5 must be almost exactly the same that the Supreme Court put in a case…can’t impose a different rule

- Show that it fits past problematic behavior

- City of Boerne v. Flores – Congress enacted the Religious Freedom Restoration Act (RFRA). No one at any level of government can substantially infringe on one’s exercise of religion
  - Kennedy
    - Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if it intrudes into legislative spheres of autonomy previously reserved to the States…But this is not unlimited
    - Congress can’t expand rights under §5, but only protect a constitutional act
    - There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end
      - Can’t be understood as responsive to, or designed to prevent, unconstitutional behavior
      - It’s sweeping coverage ensures intrusion at every level of government, displacing laws and prohibiting official actions of almost every description
      - It’s reach and scope are far
      - Must adopt the least restrictive means of furthering its interest
  - Congress bears a very high burden to show state constitutional violations and even then Congress is limited to remedial measures that are extremely tightly fitted to the violation that’s been established

Chapter Five: Federal Limits on State Power

Preemption of State Authority
- Supremacy Clause…Article VI, paragraph 2 overrides the state law
- Preemption doctrine mandates that valid federal law supplements or supersedes state law that is inconsistent with the specific terms or overall objectives of the federal law
- Types of preemption (when federal law preempts state law)
  - Express preemption
    - Only issue is whether a state statute falls within the area preempted
    - Can’t have a state standard/law that’s different from the federal standard
    - Congress explicitly reserved this for themselves
    - Savings clause is an exception…Congress will specify that it doesn’t overtake the state’s right
  - Field preemption
    - Requires a clear showing that Congress meant to occupy a field traditionally occupied by States
      - Look at legislative intent
      - Clear and manifest intention is shown by:
        - Scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it
        - Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject
      - Savings clause will come into effect unless there is frustration of agency purpose and conflict with a federal standard
  - Conflict preemption
    - Where compliance with both federal and state regulations is a physical impossibility
    - State law creates an obstacles to the accomplishment and execution of the full purposes and objectives of Congress
      - Frustration of purpose
        - Federal government in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.
Identify the federal objective and then determine the extent to which state law interferes with the realization of that objective.

Savings clause will come into effect unless there is frustration of agency purpose and conflict with a federal standard.

- Existence of the savings clause doesn’t trump the preemption doctrine, where it’s clear the federal government has considered a given regulatory issue and chosen a course of action, there’s preemption…frustration of purpose…Geir

- **Crosby v. National Foreign Trade Council** – MA law barring state entities from buying goods or services from companies doing business with Burma…more restrictive than US law
  - Conflict preemption…Frustration of purpose…want things to be uniform
    - Court found that MA’s more stringent and inflexible provisions presented an obstacle to the accomplishment of Congress’s full objectives under the federal Act
    - Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The state statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions…fact of a common end hardly neutralizes conflicting means
    - Act undermines the President’s capacity in this instance for effective diplomacy

- **Geier v. American Honda Motor Co., Inc** – federal regulation permits car manufacturers to consider a range of options regarding the installation of passive restraint systems in new cars (air bags, seat belts, etc). State law however mandates air bags. Gives manufacturers flexible options so they create better technology and establish consumer acceptance of passive restraint systems
  - Though the two are not physically impossible, but it’s a conflict preemption
    - It interferes with the federal objective
    - Intent to preempt would be inferred from the conflict between state law and federal objectives (won’t go for better technology or create new systems)
  - Preemption can be inferred from an administrative agency

**State Regulation and the Dormant Commerce Clause**

- Article I, § 10…only specific section saying what a state can do

- Commerce Clause….court has construed it as a grant of power to the national government and as a limitation on the power of the states

- Where the court invalidates some protectionist state legislation, even in the absence of congressional preemption
  - Judges imposing restrictions/values that Congress didn’t because it violates the (dormant) commerce clause

- State laws that protect local economic interests at the expense of out-of-state interests are said to impair both the political and the economic vision of the framers
  - Among the many values to be read out of the Constitution, the framers wanted to create a federal free trade zone
  - Consumers should have benefit of free competition

- Court has consistently rebuffed attempts of states to advance their own commercial interest by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety

- Categories:
  - Express/facial discrimination
    - Draws a line right in statute between instate and out of state products
    - Usually per se invalid
  - Discrimination in effect
    - Deals with protectionism, which isn’t allowed
    - Hawaii only allowed sale of rum that used a specific type of plant (only found in Hawaii and used by local producers)
    - Couldn’t announce Washington State apples…just gov approved
  - Non-discrimination, but an undue burden
- The state was to limit size of trailers in states...would place a large burden on any company sending trucks through the state
- not protectionist/discriminatory, but regulation is to burdensome on the national economy
  - Exception for when the state is a market participant
    - State sells stuff itself...quasi-business
    - State university with tuition differentials

- Questions/Inquires to consider:
  - Is the law rationally related to a legitimate state purpose?
    - The law must have a legitimate purpose or goal (usually not a problem) and the means chosen by the state must be reasonably adapted to attaining that end.
    - **Philadelphia and Maine**
      - Does the law have the practical effect of regulating out-of-state transactions?
      - If the law discriminates against interstate or foreign commerce, does it represent the least discriminatory means for the state to achieve its purpose?
        - **Chemical Waste management and Maine and Philadelphia**
          - Are the burdens the law places on interstate or foreign commerce clearly excessive in relation to the benefits which the law affords the state?
            - **Southern Pacific and Bibb**
              - Does the law represent the least burdensome means for the state to achieve its goal?

- **Philadelphia v. New Jersey** – NJ law that prohibited the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of this state”
  - Found unconstitutional because it discriminated against interstate commerce...protectionist measure
  - Balancing test
    - Court has reflected an alertness to the evils of economic isolation and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people
      - Both facially and in its plain effect, the law violates this principle of nondiscrimination
      - A state may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders
      - There was no claim here that the very movement of waste into or through NJ endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible
      - Not like legal quarantine laws
        - Didn’t outlaw all trash
          - Outside trash doesn’t harm instate trash

- **Maine v. Taylor** – court upheld a law banning the importation of out-of-state baitfish
  - Ban had legit 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 that purpose couldn’t be adequately served in nondiscriminatory ways
  - Discriminatory laws may be upheld only if they serve a legitimate purpose that can’t be served as well by available non-discriminatory means

- **Chemical Waste Management, Inc. v. Hunt** – AL law imposed a hazardous waste disposal fee upon hazardous wastes generated outside AL and disposed of at a AL commercial facility, but not a fee on wastes whose source is AL
  - Facial discrimination
    - Doesn’t matter that it compensates for taxes that in-state businesses must pay
    - State had less discriminatory alternatives for reducing the volume of hazardous waste
      - Ex: higher fees or quantity limits applicable to all waste disposed of in AK, regardless of its origin

- **Oregon Waste Systems, Inc. v. Department of Environmental Quality** – imposed a different surcharge on the disposal of identical solid waste generated in-state and out-of state
  - Facially discriminatory and thus subject to the strictest scrutiny or a virtually per se rule of invalidity
Argued that they were just trying to spread the costs, since local businesses pay other general taxes that cover cost...state said it was a compensating sales tax
  - Plausible and good argument, but court said it’s too general to work
  - Wasn’t specific and precise enough to meet safe harbor
    - Safe harbor – compensating use taxes
    - Only if calculated exactly correctly...can’t profit off it
    - EX: you impose a sales tax on goods bought in state (2%). A company buys in state and then goes out of state where there’s no tax. This creates an incentive to shop out of state...so state charges a 2% import tax on goods bought out of state. Prima facie, this looks like facial discrimination, but it isn’t
      - Tax imports for charges you make on in-state products

- **West Lynn Creamery, Inc. v. Healy** – MA law that imposed an assessment on all sales of milk to MA retailers, but rebated all proceeds from this assessment to MA dairy farmers
  - Handicaps out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States
  - Avowed purpose and undisputed effect are to enable higher cost MA dairy farmers to compete with lower cost dairy farmers in other states
  - While a subsidy to businesses in state from general revenues is ok and equal taxes are okay, the two together aren’t okay
    - So if it came out of general revenue later, it’s okay

- **General Motors Corp. v. Tracy** – OH imposed general sales and use taxes on natural gas purchases from all sellers, whether in-state or out-of-state that didn’t meet its statutory definition of a natural gas company
  - Court found this constitutional because the two types of entities effectively competed in separate markets
  - Discriminates types of utilities, not btwn in-state and out-of-state

- **Camps Newfound/Owatonna, Inc. v. Town of Harrison** – Maine statute provided a property tax exemption to charities incorporated in the state, but denied the full exemption to any institution conducted or operated principally for the benefit of person who aren’t Maine residents
  - Maine law expressly distinguishes btwn entities that serve a principally interstate clientele and those that primarily serve an intrastate market
  - Non-profits are treated the same

**Facially Neutral Laws and Pike Balancing**
- A law that’s neither discriminatory nor protectionist, however, may still be reviewed and possibly struck down under the Court’s residual balancing test
- The Pike balancing test asks whether the burden on interstate commerce outweighs benefit to the regulating state
  - If the state law regulates evenhandedly, serves a legitimate purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on IC is clearly excessive in relation to the putative benefits

- **South Carolina State Highway Department v. Barnwell Bros.** – prohibited the use on state highways of trucks that were over 90 inches wide or had a gross weight over 20,000 lbs...about 85-90% of trucks exceeded these limits
  - The power of Congress doesn’t curtail a state from taking measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate
    - Safety concerns carry a strong presumption of validity and if there are alternative ways to solve a problem, the Court will not determine which is best to achieve a valid state objective
  - Use of state highways is of peculiarly local concern
  - Fact that it affects those interstate and intrastate in large number is a safeguard against their abuse
  - Nondiscriminatory and relates to a safety concern...didn’t really talk about burden on interstate commerce
  - Overruled

- **Southern Pacific v. Arizona** – prohibited operating railroad trains of more than 14 passenger or 70 freight car
  - National uniformity in the regulation adopted, such as only Congress can proscribe, is practically indispensable to the operation of an efficient and a economical national railway system
This imposes a serious burden on interstate commerce…practical effect of the regulation is to control train operations beyond the boundaries of the state
  ▪ Prevents the free flow of commerce by delaying it and substantially increasing its cost and impairing its efficiency
  ▪ It has no reasonable relation to safety and may even increase it

- **Bibb v. Navajo Freight Lines, Inc.** – IL law required contour mudguards on trucks and trailers operating on IL highways
  o Pike test
    ▪ Legislates evenhandedly, slight safety point, but huge burden on commerce
    ▪ Look at scientific studies, what experts said
    ▪ Brennan…actual intent…can’t be irrational in light of its purpose
  o Found it to be a massive burden on interstate commerce…not just cost, but would have to shift cargo to the appropriate vehicle once across state lines
  o Passes the permissible limits even for safety regulations

- **Kassel v. Consolidated Freightways Corp.** – Iowa statute that prohibited the use of a double truck
  o The total effect of the law as a safety measure in reducing accidents and casualties is so slight and problematic that it doesn’t outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it
  o Pike test
    ▪ Disproportionate affect on out-of-state residents and business, so less deference is due
    ▪ Further the purpose so marginally and interferes with commerce so substantially, as to be invalid under the commerce clause
    ▪ No real state benefit…otherwise might give deference to it
  o Adds huge expense and increases inefficiency
  o Also, gave exemptions that would help in-staters, but not out-of-staters

**The Market Participant Exception to the Dormant Commerce Clause**
- Ok when the state functioned not as a regulator of the market, but rather as a market participant
- EX: where the state itself produced goods for commerce or where it engaged in a program of subsidies or other economic incentives to aid in-state businesses

- **South-Central Timber Development, Inc. v. Wunnick** – DD wanted to take lumber to Alaska, but Alaska required that a purchased of state-owned timber would have to partially process the timber in Alaska before it was shipped out of the state….imposes conditions downstream in the timber-processing mkt
  o The limit of the market participant doctrine must be that it allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further
    ▪ The State may not impose conditions, whether by statute, regulation, or contract that have a substantial regulatory effect outside of that particular market
    ▪ It can choose to sell to whom it wants, but can’t impose any terms it might desire
  o It restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity
  o Also, foreign commerce is burdened by the restriction
    ▪ Restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny…for it’s crucial to the efficient execution of the Nation’s foreign policy that the Federal Government speak with one voice when regulating commercial relations with foreign governments
  o Economic Protectionism isn’t allowed
  o **White v. Massachusetts Council of Construction Employers, Inc.** – required all construction projects funded in whole or in part by city funds to be performed by a work force of at least 50% city residents…so contractors had to hire in-state people
    ▪ Everyone affected by the order was, in a substantial sense, working for the city…so it was okay

**Chapter Six: Separation of Powers**
- **Consider**
  - **Text**
    - Chadha
    - State of the union address
    - Something given to other branches
      - Impeachment, pardons, treaty negotiations
  - **Whether it shifts the balance of power/encroaches**
    - Even if text says it’s okay, we don’t want a shift
    - Breyer…line item veto
    - Transparency
    - Scalia
      - Dissent…getting stronger
      - It encroaches

- One of the great fears was that the authority of the new government might be abused by those who would handle the reins of power
  - Therefore, the Founders sought to structure the national government in such a way that not one person or group would be able to exercise too much authority
  - Thus, the Constitution apportions or divides the powers of the national government among three different branches

- Separation of powers issues arise when it’s claimed that one branch of government has usurped or encroached upon the function of another branch

- Although the term separation of powers doesn’t appear in the Constitution, the term separation of powers principle is reflected in the very structure of the federal Constitution
  - Article I…legislative powers, Article II…executive power, Article III…judicial power

**Executive Encroachment on Legislative Powers**

- **Article II, § 2** vests executive power in the President…though it’s vague and doesn’t say what President can actually do
  - He has foreign affairs power…commander in chief, take care that laws are faithfully executed
    - But Congress has right to raise armies, maintain a navy, and declare war
  - Look at the problems both textually and in functional terms
  - As things are evolving, power is tilting in favor of the President

- **Youngstown Sheet & Tube Co. v. Sawyer** - steel seizure case….Pres ordered seizure of nation’s steel mills bc workers were going to strike and Pres thought it’d jeopardize our national defense (acting as commander in chief)
  - Justice Black…textual/formalist
    - President’s order amounts to lawmaking, a legislative function which the Constitution confided to Congress, not the President
    - Government can do this, but not President alone
    - The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself
      - No act of Congress or statute that gives Pres power to take property as he did here
    - Order can’t be properly sustained as an exercise of the Pres’s military power as Commander in Chief of the Armed Forces
      - This is for the nation’s lawmakers, not for its military authorities
  - Justice Frankfurter…custom/practice
    - Congress didn’t give Pres this power and so he doesn’t have it
    - That the framework has consistently operated fairly establishes that it has operated according to its true nature
  - Justice Jackson…functionalism
    - **Max Pres authority**: when he acts pursuant to an express or implied authorization of Congress – includes all his power + all that congress can delegate
      - If the act is held unconstitutional, it means the federal government as a whole lacks power
      - A seizure executed by the Pres pursuant to an Act of Congress would be supported by the widest latitude of judicial interpretation
Twilight zone: when he acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there’s a zone of twilight in which he can Congress may have concurrent authority or which distribution is uncertain.

- Thus, congressional inertia or indifference may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility
- The test of power is likely to depend on the imperatives of events rather than on abstract theories of law

Least Power: when the Pres takes measures incompatible with the expressed or implied will of Congress, his power it at its lowest, for then he can rely only upon his own constitutional powers – any constitutional powers of Congress over the matter

- Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.
- Presidential claim to a power must be scrutinized with caution, for what’s at stake is the equilibrium established by our constitutional system
- Since Congress had considered giving the President this power and decided against it, Truman’s course of action was incompatible with the expressed or implied will of Congress

Here, Congress did create statutes on seizure of property, but they are inconsistent with this case…thus twilight doesn’t apply

- Thus the seizure of such industries must only be within his powers and beyond the control of Congress…not the case

Dames & Moore v. Regan – an executive agreement that the nationals of each country (US and Iran) would settle claims against another through binding arbitratation. PPs however filed suit against the Iranian government

- While Congress has never explicitly delegated to the President the power to suspend such claims, it had implicitly authorized that practice by a long history of acquiescing in similar presidential conduct + the fact that such a settlement was a necessary incident to the resolution of a major foreign policy dispute

- President has broad discretion when responding to the hostile acts of foreign sovereigns

- Prior cases recognized that the President has some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate

Executive Authority Over Foreign and Military Affairs

- War Powers Act
  - Handout
  - Still in effect, though Presidents deny it’s Constitutional
  - Court hasn’t heard it
  - Congress could control through money and impeachment
  - Pg. 225 case

Congressional Encroachments on Executive Power

- Ways for Congress to control the actions of a greatly expanded executive branch
  - Nondelegation doctrine
    - Be very specific and limiting in the delegation power to agencies, so that their rulemaking power will in turn be limited

- INS v. Chadha – Act allowed one House of Congress to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General to allow a particular alien to remain in the US…Chadha was allowed to stay by AG, but House said no
  - Burger…formalist/textual approach
    - House action was unconstitutional as a violation of separation of powers
      - H+S+P = law OR
      - H2/3 + S2/3 = law
        - Presentment powers…didn’t have presidential approval OR
        - Bicameralism requirement…Article I, Sections 1, 7 (need both)
          - Framers didn’t intend to authorize either member of Congress to act alone and outside its proscribed bimetallic legislative role
Congress decided to delegate its authority to the executive branch and must abide by its delegation
- Can’t keep some power to itself
- Can’t delegate with strings attached
- Though can have oversight powers…the budget
- Powell
  - Unconstitutional because it was Congress using judicial power, not legislating (don’t set stds, but judge)...trying to add to their powers
  - It’s the exercise of unchecked power at the expense of individual rights (not subject to review by courts or President)

- Things that don’t have to be bicameralism…that are unicameral
  - Impeachment
    - House brings the proceeding/formal indictment, Senate (2/3) tries/convicts
  - Treaties…Senate (2/3)
  - Appointments/judicial confirmations….Senate
    - Judiciary committee sets the calendar
    - This can be filibustered too
  - Public hearings…subpoena…investigation power…Senate

**Congressional Control over Executive Officers**
- Appointments Clause…2 ways to appoint executive officials…**Article II, section II**
  - Congress can dole it out, but Congress can’t appoint officers themselves...can pass the statute, but can’t decide the official who’ll oversee it
    - Congress may vest appointment power of inferior officers in 1)courts of law, 2) heads of departments, 3) in the President alone
  - Pres has power with Senate consent to appoint 1)ambassadors, 2)public ministers 3)judges of the Supreme Court 4)and all other officers of the United States

- Removal authority
  - Appointments Clause is silent as to removal of executive appointees from office
  - Only text is impeachment clause
    - H brings the action and S tries and that’s how they’d be removed….for high crimes and misdemeanors
    - One who hires you isn’t the one that’ll fire you

- **Bowsher v. Snyar** – Comptroller General (picked by Pres) was only removable by impeachment or by a Joint Resolution of Congress (which is subject to presidential veto). His job was to make conclusions about the required budget reductions to the President and the President was to put them into effect….he gets to decide what to cut = executive power
  - Burger
    - Congress can’t reserve a right to remove comptroller general by joint resolution, for comptroller general is an officer performing executive functions
      - Congress is categorically barred from participating in the removal of officials located outside the legislative branch except by impeachment
    - The Act was held unconstitutional because it imposed executive functions on the Comptroller General – functions that can’t be constitutionally exercised by an officer removable by Congress
      - To permit execution of the laws to be vested in an officer answerable only to Congress, would, in practical terms, reserve in Congress control over the execution of the laws…this is not given to Congress by the Constitution and thus Congress can’t grant to an officer under its control what it doesn’t possess
  - Stevens
    - Comptroller General isn’t employing executive powers, but is an agent of Congress
      - Congress can’t exercise its power to formulate national policy by delegating the power to an individual agent of the Congress such as the Comptroller General
        - Legislative power isn’t followed by the bicarmelism process
- **Morrison v. Olson** – 1978 Act authorized the appointment (AG tells of need to Special Division, who then appoints) an independent counsel to investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal criminal laws…AG could remove for good cause
  - The independent counselor is an inferior officer
    - Temporary position
    - Inferior in rank to AG
    - Duties limited under the act
  - Even though the independent counsel’s duties are executive, this case doesn’t pose a danger of congressional usurpation of Executive Branch functions
    - Pres’s power isn’t limited because the AG can remove for good cause
      - Congressionally imposed restrictions on the grounds for removing executive officers are valid unless the nature of the position makes it essential to the President’s proper execution of his Articles II powers that the officer be removable at will
    - Congress’s role is very limited…removal power is only in the hands of the executive
  - Scalia
    - Close look shows that it changes the equilibrium of power
    - Replaces clear text with a balancing test
      - Opens the door on the President’s removal power

<table>
<thead>
<tr>
<th>Congress</th>
<th>President</th>
<th>Courts</th>
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<tbody>
<tr>
<td>- Ethics in Government Statute passed</td>
<td>- Attorney general has to make request to start process...goes to Court and they appoint</td>
<td>- Chief justice empanels three judges who serve as special panel in DC circuit</td>
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<tr>
<td>- Sunset Clause</td>
<td>- Pres can then fire independent counsel for good cause</td>
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<tr>
<td>- No independent counsel anymore...limited duration of their own enactment</td>
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- **Mistretta v. United States** – Congress created a sentencing commission to set federal guidelines (executive function) for criminal sentences. Commission was an independent commission in the judicial branch consisting of members appointed by the President with the advice and consent of the Senate. Members were removable from the Commission by the President for good cause
  - Blackmun
    - While Congress must lay down an intelligible principle to guide an agency exercising the congressionally delegated power, Congress’s delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements
  - Framer’s rejected the notion that the three Branches must be entirely separate and distinct…it’s a flexible understanding…Justice Jackson in Youngstown
    - Madison’s teaching that the greatest security against tyranny lies not in a hermetic division between the Branches, but in a carefully crafted system of checks and balances
    - Have invalidated attempts by Congress to exercise the responsibilities of other Branches (Bowsher) or reassign powers vested by the Constitution in either the Judicial or Executive Branch (Chadha)
  - However, by the same token, they have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment (Morrison)
  - Followed the functional and flexible approach of Morrison rather than the more formalistic analysis of Bowsher and Chadha
    - Functional…allowing innovation, having judges make laws
    - Formalist…text, line item veto, chadha

**Impermissible Delegation of Legislative Power**
- **Clinton v. New York** – line item veto….he vetoed allowing NY to keep certain funds it would otherwise have had to repay to the federal gov. under Medicare. Instead of approving or rejecting measures as a whole, the President could cancel in whole any dollar amount of discretionary budget authority, any item of new direct spending, any limited tax benefit…the statutory cancellation occurs after the bill becomes a law
  - Originalist/textualist argument
  - Constitutional silence = express prohibition
    - Don’t want truncated versions of the bill, but statutes that are single, finely wrought, and exhaustively considered…§Article I, §7
  - If the line item veto was valid, it gives President the authority to create a different law…one whose text wasn’t voted on by either House of Congress or presented to the President for signature
  - President would have unilateral power to change the text of duly enacted statutes
  - Kennedy…enhances the power of the President beyond what the Framers would’ve endorsed

- **Buckley v. Valeo** – federal election commission members were appointed by Congressional members
  - Any appointee exercising significant authority pursuant to the laws of the United States is an office of the US and must, therefore, be appointed in the manner prescribed by the Appointments Clause
  - Thus an agency with congressionally named personnel could only exercise those powers that Congress might delegate to one of its own committees

### Permissible Delegation of Legislative Power to Executive Branch Agencies

- **Whitman v. American Trucking Associations, Inc.** – Clean Air Act gave authority to the head of the EPA to set air quality standards at a level “requisite to protect public health”
  - Article I, §1 gives all legislative powers to Congress
    - Given a functional rather than a literal reading
    - To confer decision making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform
  - Court has rarely (twice) felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law
  - A certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action
  - Court’s tolerant attitude delegation of lawmaking authority reflects a flexible and pragmatic view of separation of powers
  - Congress can delegate power to executive agencies as long as it gives an intelligible principle to guide the agency

### Executive Privilege and Immunities

- Implicit in Constitution
  - Balance of power and the independence of the Executive within its own sphere
- Privileges goes to information (testimony, documents, tapes)
  - don’t have to share
- Immunities attaches with the person/office ….only last as long as you are in that office

- Privileges
  - Based on the belief that communication should be open and free btwn parties in certain relationships
  - Attorney-client
  - Spousal privilege…can also be an immunity
    - Only attaches to what she said…can still ask where she was, if she had a gun
    - Crime….communication….marriage…..subpoena
  - Clergy
  - Psychiatrist - patient
  - Medical records – confidential
  - Remains forever (but maybe not if person dies)

- **United States v. Nixon** – subpoena directed the President to produce certain tap recordings and documents relating to conversations with aides and advisors
There are several purposes for executive privilege:

- Allowing the president to speak candidly on difficult issues with his confidants
- Protecting national security

Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

- Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.
- The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.

Balancing test...presumptively privileged

- Weight the importance of the general privilege of confidentiality of Presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.
- It is justiciable...for the court to decide.

- Marbury...writ of mandamus

**Clinton v. Jones** – private citizen wanted to recover damages for actions taken before Presidential term.

- Rationale for affording certain public servants immunity from suits for money damages (civil damages) arising out of their official capacity is inapplicable to unofficial conduct.
  - Immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.
  - Don’t want to render the President unduly cautious in the discharge of his official duties.
  - Thus, there’s no immunity for unofficial conduct...the sphere of protected action must be related closely to the immunity’s justifying purpose.
  - Won’t recognize a general immunity, but if President wants to tell us how it might undermine his presidency we might reconsider.

- Breyer
  - To obtain a postponement, the President must bear the burden of establishing its need.

- There is, however, absolute immunity fro damages liability for official actions.

<table>
<thead>
<tr>
<th>Before office</th>
<th>While in office</th>
<th>After leaves office</th>
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<tbody>
<tr>
<td><strong>Criminal</strong></td>
<td></td>
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<tr>
<td>Act + indictment = no immunity</td>
<td>Act and discovered while in office, thus indicted in office = ?...time and energy rationale...maybe indicted, but secret until he leaves office - the prosecution should be barred until they are removed from office</td>
<td>If act happened in office, but was indicted after, that’s fine…A2</td>
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<tr>
<td><strong>Civil</strong></td>
<td></td>
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<tr>
<td>Act lawsuit...unofficial action, but sued while in office...Clinton...time and energy concerns still matter</td>
<td>Decision (official)...no suit, total/absolute immunity (Nixon v. Fitzgerald) - Why? - Time and energy needed to defend lawsuits... - don’t want him distracted OR - undistorted decisionmaking... - don’t want him to be worried about the threat of</td>
<td>What if the decision is made while in office, but the lawsuit is filed after he leaves office? - Can’t be sued - Absolute immunity</td>
</tr>
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lawsuits (firing an employee, changing medicare)…decision distortion
Clinton v. Jones may come out the same here…if it happened while in office…though not an official action

- Article II
  o Pres shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors
  o Some procedure…how it’s tried…etc
    ▪ So what kind of things might be covered?
      • Pure textualist….misdemeanors – jaywalking
      • See what high modifies
      • What the framer’s intent was
        o What the early drafts said….can see where they were going
  - Are there things that are so egregious that it would rise to the level of impeachment even though it doesn’t fit a high crime or misdemeanor?
    o Clinton….criminal act of perjury…but not good enough for impeachment
  - Pardon power…no real limits…once it’s given, it can’t be retracted
    o No real substantive or procedural restrictions
    o Ford did this for Nixon
      ▪ Didn’t have to give a real reason
    o Pardon before indictment
      ▪ Usually….indictment…trial/plea….appeal….Supreme Court….prison…..pardon
    o 60% plus pardons are after release
      ▪ least politically costly to president
    o Richt…never was tried….lived in Switzerland
    o What reasons do you look for in pardoning?
      ▪ Innocence
      ▪ Individual fairness….law changed after them
      ▪ Political favoritism….not really approved
      ▪ Guilty, but sentence too harsh
      ▪ Mercy

  
  
  Review

  - For every federal government action, see where in the text of the constitution is it justified
    o Probably in Article 1,§ 8
    o Values from articles of confederation and Constitution
      ▪ Printz…federalist papers
    o Regulate commerce among the states
      ▪ Morrison, Lopez
      ▪ Expansion during new deal
        • Wickard
      ▪ For 4/5 decades not explicit judicial review of what Congress wanted to do with the power…that changed with Lopez
    o 10th Amendment
    o 11th Amendment…just know nuts and bolts
      ▪ extra defenses when it’s a state against federal authority
      ▪ Apply even when some behavior is within the reach of Congress…special immunities
This current court has shown more for interest in policing this boundary
- There are also restraints on states
  - Dormant Commerce Clause
    - Know three categories
- Senators and Pres chosen in a state-by-state basis
- Theoretical…how strong should the federal power be
- Read constitution
  - Read text
  - Structural arguments…in separation of powers context
  - Draw on originalist arguments
  - 11th amendment
    - textual…I can sue Missouri just not another citizen
    - legislative intent/originalism…can’t sue any state
    - just/fair
    - tradition…Frankfurter in Youngstown
    - Stare decisis
- **Youngstown**
  - Presidential authority and for general methodologies for interpreting the Constitution
- Judicial power…can review executive and Congressional power…Marbury
  - But there are limits…political question doctrine
  - Must wait for the case come to them…standing, ripe, not moot
- Special privileges President has
- **Article 2**
  - Primary goal of Constitution according to framers….preservation of liberty
    - Morrison and Lopez
    - Kennedy v. Breyer
- How much authority does the President have to conduct actions solely?
  - Youngstown
  - Sources of authority in article I and II…how power is allocated
  - War powers resolution…still debates
  - Dames v. Moore
  - Values to support one or the other
- Treaty, statutes, and executive agreements endorsed by statutes have the same power
  - Take the most recent one first

3 questions
- first 2 are issue spotters/hypothetical
- both questions start with statute….look carefully at it
- cover both sides…look at both sides, but take a position on it
- last question is an essay…talk about themes
  - persuade…but maybe occasionally bring in opposite view