I. ANATOMY OF THE CONSTITUTION
   a. Article I: powers of the legislative branch
   b. Article II: powers of the executive branch
   c. Article III: powers of the judicial branch
   d. Article IV: powers of the states
   e. Article V: process for amendments
   f. Article VI: constitutional supremacy; bars religious test for holding any office
   g. Article VII: ratification

II. HISTORICAL CONTEXT
   a. Articles of Confederation (ratified 1781)
      i. Created alliance between 13 colonies
      ii. States retained sovereignty like independent nations bound by treaties
      iii. Established Congress with limited powers to enact laws but no means of enforcing them—relied on voluntary cooperation of states
      iv. No judicial or executive branch
   b. State governments
      i. States that originally vested most power in legislature found that popular-elected government easily abused power → enhanced judicial and executive branches
      ii. Many elected to state office were corrupt and incompetent
   c. Constitutional Convention (1787)
      i. Members of Congress elected from larger geographic areas than state legislators → need to appeal to broader, less parochial concerns; more difficult to constitute a majority in Congress
      ii. People directly elected neither Senate nor President
         1. Article I, §3: senators chosen by state legislators
         2. Article II, §1: electoral college selected President

II. JUDICIAL REVIEW
   a. MARBURY V. MADISON (1803), p. 3: federal judiciary may review the constitutionality of actions taken by the legislative and executive branches of the national government
      i. Feb 13, 1801: Jefferson elected president
      ii. Feb 27, 1801: Federalist Congress passes Circuit Court Act creating 42 new federal judgeships
      iii. March 2, 1801: Adams nominates 42 new federal judges, including Marbury
      iv. March 3, 1801 (Adams’ last day in office)
         1. Senate confirms all 42 nominations in the morning
         2. Adams signs 42 commission documents for new judges
         3. Sec of State Marshall signs commissions and adds U.S. seal
         4. Marshall does not deliver all of them to the nominees by the end of the day—Marbury’s is on of those not delivered
         5. Undelivered commissions sit on Sec of State’s desk
      v. March 4, 1801: New Sec of State Madison sees undelivered commissions and decides not to deliver them
         1. Article III, §2, cl. 2 (Exceptions Clause) allows Congress to remove cases entirely from the Ct’s appellate jurisdiction but does not permit cases to be moved from the appellate to the original jurisdiction category
2. Framers would not have bothered to define SC’s original and appellate jurisdiction if these categories were subject to alteration at the will of Congress

3. **Article VI, cl. 3 (Oath Clause):** judges take oath to support Constitution
   a. would violate oath if it were to honor unconstitutional law
   b. COUNTERARGUMENT: all branches take oath, implying each branch is responsible for monitoring its own actions as constitutional

4. **Article VI, cl. 2 (Supremacy Clause):** “in Pursuance” suggests state judges may decide whether or not a federal statute is constitutional → Framers would not intend to give state judges more power than SC

b. **COOPER V. AARON** (1958), p. 24: SC is ultimate/supreme interpreter of the Constitution; even those not parties of a case are bound to Ct’s interpretation of Equal Protection Clause
   i. Ark. Governor and other state officials refusal to comply with *Brown v. Board*
   ii. District ct granted board’s postponement of deseg program because of “chaos, bedlam and turmoil”
   iii. Ct of App. reversed, SC affirmed.
   iv. Dictum response to state officials who claimed they were not bound by SC decision

1. **Article VI (Supremacy Clause):** makes Constitution “supreme Law of the Land”
2. *Marbury v. Madison* est judiciary’s duty to say what the law is
3. SC’s interpretation of 14th Amendment in *Brown* is supreme law of the land and **Article VI** makes it binding to the state

v. Commentary on Cooper
   1. wrongly expanded/interpreted *Marbury*
   2. SC cases are only binding to the parties in the case and the executive branch for whatever enforcement is necessary
   3. If SC is supreme law for the land like Constitution, then it would not be able to change its mind and turnover precedent

III. **SUPREME COURT AUTHORITY OVER STATE COURTS**

a. **MARTIN V. HUNTER’S LESSEE** (1816), p. 68: defended legitimacy of SC review of state court judgments resting on interpretations of federal law
   i. Property dispute in Virginia
   ii. Fairfax devised land to Martin; Hunter acquired land from Virginia land grant
   iii. (Story) SC ruled in favor of Martin, rejected the highest Virginia ct’s challenge to the constitutionality of §25 of the Judiciary Act of 1789

   1. **Article III, §1:** Constitution created SC but left it up to Congress to create inferior courts; thus, Framers knew there may not be any lower federal courts, SC’s appellate jurisdiction in cases arising under Constitution might extend to cases decided by state courts
   2. **Article VI (Supremacy Clause):** state judges may not abide by Supremacy Clause b/c of competing state interests, etc.; need SC appellate review to harmonize different interpretations, etc.

b. **COHENS V. VIRGINIA** (1821), p. 71: SC sustained its jurisdiction to review the validity of state laws in criminal proceedings
   i. Conviction of Cohen brothers in Norfolk court for selling D.C. lottery tickets in violation of Virginia laws
   ii. (Marshall) SC held that congressionally authorized lottery tickets did not provide immunity from state laws
1. **Article III, §2**: gives SC appellate jurisdiction in all cases arising under the Constitution, laws, or treaties of the United States, regardless if who the parties are
2. state ct judges could not be trusted to honor Supremacy Clause

c. **The Federalist Papers**—SC could review the state court decisions involving federal constitutional issues
d. **Adequate and Independent State Grounds Doctrine**: As powerful as it is in the area of federal law, the United States Supreme Ct has absolutely no power over state law and state courts

**IV. LIMITATIONS ON JUDICIAL POWER**

a. **Political Question Doctrine**: some constitutional issues are “political” and thus nonjusticiable
   
i. **Questions**
   1. Does the issue implicate the separation of powers? (*may* indicate applicability of doctrine, not necessary)
   2. Does the Constitution commit resolution of this issue to either the President or Congress? (focus on how the Constitution resolves the conflict b/t branches)

   ii. **Strands**
   1. Marshall: some matters are textually or structurally committed to the unreviewable discretion of the political branches, and that some otherwise legal questions ought to be avoided to prevent judicial embarrassment
   2. “Textually demonstrable constitutional commitment of the issue to a coordinate political department” (*Baker v. Carr*) (Constitutional)
   3. perception of “a lack of judicially discoverable and manageable standards for resolving an issue” (*Baker v. Carr*) (Constitutional and Prudential)
   4. Resolution of issues ought to be avoided where they are too controversial or could produce enforcement problems or other institutional difficulties (Prudential)

iii. **Nixon v. United States** (1993), p. 39: Senate’s trial of an impeach official is nonjusticiable b/c Article I committed entire impeachment process to House and Senate
   1. Nixon was Chief Judge of Southern District of Mississippi and was convicted by a jury on two counts of making false statements to a grand jury investigating if he accepted money to halt a prosecution of a local businessman's son
   2. Senate invoked Senate Impeachment Rule XI to appoint a committee of senators to "receive evidence and take testimony" and the Senate convicted him after hearing the committee's recommendations and three hours of oral arguments
   3. (Rehnquist) A supremacy issue involving the **Impeachment Trial Clause** of **Article I, § 3 cl. 6** and Senate Impeachment Rule XI is nonjusticiable
      a. textually demonstrable constitutional commitment of the issue to the Senate; impeachment is the legislature’s only check on the judicial branch
      b. a lack of judicially discoverable and manageable standards for resolution
4. (White, concurring) disagrees with nonjusticiability aspect but agrees with decision because Senate fulfilled constitutional obligation to try Nixon
   a. textual reading of Constitution—“sole” emphasizes that only Senate has power to judge impeachment process and only House can bring articles of impeachment
   b. Rule XI compatible w Constitution’s command that Senate try all cases
5. (Souter, Concurring) this case is nonjusticiability but judicial review may be necessary if Senate acted in a way that seriously threatened the integrity of its decision

iv. **Powell v. McCormack** (1969), p. 37: Political question doctrine does not bar federal courts from deciding case concerning Congress’s power to determine its membership when the text of the Constitution does not specifically commit the issue in the case to Congressional resolution
   1. ruled that Article I, §5 was “at most a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution”
   2. possible political question does not justify court avoiding constitutional duty to interpret House’s right to not seat an elected representative

v. **Goldwater v. Carter** (1979), p. 37: Senate’s role in the termination of treaties is a nonjusticiable political question

b. Case and Controversy Requirements
   i. STANDING
      1. **Article III** *(Lujan)*
         a. Concrete *injury in fact*
         b. Traceable to defendant’s conduct *(causation)*
         c. Redressable by court
      2. No 3rd pty standing: cannot raise the rights of absent or hypothetical parties in challenging the legality of government action
      3. No “generalized grievance”
         a. Cannot claim if only injury is shared harm experienced by all citizens and taxpayers where govt fails to comply w the Constitution or laws
         b. EXCEPTION: unless the plaintiff can show that the challenged govt action caused him or her to suffer particularized injury
      4. Plaintiff must be in “zone of interest”
         a. Interest P seeks must come with in the zone of interests protected by the law on which P’s claim rests
         b. Arises when P challenges govt action under federal regulatory scheme that does not directly regulate the P’s own conduct
      5. Court cannot issue advisory or hypothetical opinions
   ii. MOOTNESS—staleness of a lawsuit
      1. if issue is bad conduct and conduct changes, issues is moot
      2. exception: cases capable of repetition but evade review (ie, abortion)
   iii. RIPENESS—prematurity of a lawsuit
      1. law has been applied to someone
      2. if challenging action of federal agency, has gone through internal dispute process
1. Endangered Species Act (ESA) authorized any person to sue any administrative agency for violation of it
2. DOW brought suit against Secretary of Interior for regulations that applied ESA only to projects in U.S. or on the high seas, not overseas
3. (Scalia) DOW did not satisfy injury requirement for standing
   a. not directly harmed by present interpretation of ESA; mere visits to overseas projects or observation of endangered species overseas does not = standing
   b. Ct’s injunction unlikely to redress the issue since American aid to projects small % of projects
   c. Congress cannot grant individuals right to sue govt on basis of general public interest; must show concrete injury
4. (Blackmun, dissenting) DOW raise genuine factual issues of injury and redressability; Ct should defer to Congressional legislative mandates on executive agencies

V. AFFIRMATIVE POWERS OF FEDERAL GOVT (Article I, §8)

a. Necessary and Proper Clause, Article I, § 8, last clause
   i. Grants Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
   ii. McCulloch v. Maryland (1819), p. 86: National govt may act only pursuant to an enumerated power
      1. Constitutionality of a state law that taxed the activities of federal bank
      2. No specific constitutional grant of power to charter a bank or corporation
      3. SC (Marshall): upheld Congress’ authority to charter bank
         a. Structural Argument
            i. Constitution created system of govt designed to address problems of national concern
            ii. Congressional authority included means to execute enumerated powers
            iii. “The power being given, it is in the interest of the nation to facilitate its execution.”
   b. Textual Argument: Necessary and Proper Clause
      i. “To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.” (necessary ≠ absolutely necessary)
      ii. clause intended to provide Congress means to adapt to changing “crises of human affairs”

b. Commerce Clause, Article I, §8, cl. 3
   i. “The Congress shall have Power...To regulate Commerce with foreign Nationals, and among the several States, and with the Indian Tribes.”
      1. Use of channels of interstate commerce (goods and services)
      2. Instrumentalities of interstate commerce (ie, railroads, airlines, trucking co.)
      3. Economic activity that has a substantial relationship w interstate commerce or that substantially affects that commerce
   ii. History
1. *Gibbons v. Ogden* (1824), p. 120: Congress may regulate commerce that affects more than one state
   a. (Marshall): Ogden’s claim under NY’s monopoly law was barred because of the federal statute which Gibbons was authorized to engage in the coastal trade
      i. “America understands and has uniformly understood, the word ‘commerce’ to comprehend navigation.”
      ii. Cannot regulate commerce completely internal but “among” states

2. *The Lottery Case* (1903): Congress may prohibit the interstate shipment of items adjudged to be evil or pestilent in order to protect commerce concerning all states
   a. Federal Lottery Act prohibited interstate shipment of lottery tickets

3. *United States v. Darby* (1941), p. 140: Congress may exclude any article from interstate commerce, in judgment that they are injurious to the public health, morals or welfare
   a. Ga. Lumber co. violated federal minimum wage/max hours law; claimed fed law cannot set standards
   b. (Stone) Permitted regulation of (1) interstate shipment of goods, and (2) wages and hours for employees who produced goods intended to be shipped in interstate commerce
      i. “The power of Congress over interstate commerce [can] neither be enlarged nor diminished by the exercise or non-exercise of state power.”
      ii. Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.”
      iii. “[The] power of Congress [over] interstate commerce extends to activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.”

4. *Wickard v. Filburn* (1942), p. 142: Congress’ commerce authority extends to all activities having a substantial effect on interstate commerce, including those that do not have such a substantial effect individually, but do when judged by their national aggregate effects
   a. Wickard exceeded quota for wheat production, the excess used for his own consumption
   b. Agricultural Adjustment Act of 1938 gave govt authority to set production quotas for agricultural commodities
   c. (Jackson) Act is within commerce powers
      i. if all farmers exceed quota, greater supply of wheat → lower prices → less sales → less economic activity
      ii. consumption has market effect

   a. Federal law prohibited “extortionate credit transactions”—loansharking enforced by threats of violence
   b. (Douglas): upheld federal law
      i. extortionate credit transactions, though purely intrastate in character, affect interstate commerce
ii. apparent link between local loan sharking and national organized crime
c. (Stewart, dissenting): statute unconstitutional
   i. no rational distinction between loan sharking and other local crime
   ii. definition and prosecution of local, intrastate crime reserved for states under Ninth and Tenth Amendments

6. **Heart of Atlanta Motel v. United States** (1964), p. 146: Congress may regulate local activities that could reasonably be seen as exerting a substantial and harmful effect upon interstate commerce
   a. CR Act of ’64: unlawful for “any inn, hotel, motel, or other establishment which provides lodging for transient guests” to discriminate on the basis of race, color, religion, or national origin
   b. Atlanta motel wished to continue not renting rooms to A-A
   c. (Clark): Motel must abide by Civil Rights Act of 1964 and rent rooms to African-Americans
      i. abundant evidence and testimony that discrimination affects interstate travel
      ii. test: “whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest”
      iii. “The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”

7. **Katzenbach v. McClung** (1964), p. 146: Congress’ commerce authority extends to any public commercial establishment selling goods that have moved in interstate commerce and/or serving interstate travelers
   a. Ollie’s Barbecue family restaurant in Alabama located 11 blocks from interstate highway, received $70,000 worth of food from local supplier who purchased it out of state
   b. (Clark): discrimination at the restaurant affected interstate commerce
      i. Congressional record included abundant testimony supporting connection between interstate commerce and racial discrimination in restaurants
      ii. Act only extends coverage to restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce
   c. (Black, concurring): isolated and remote lunchroom which sells only to local people and buys almost all of its supplies in the locality may be beyond the reach of Congress
      iii. **United States v. Lopez** (1995), p. 149: Congress may only regulate activity that substantially affects interstate commerce
         1. Gun-Free School Zones Act of 1990: federal offense for any individual to knowingly possess a firearm at a place in a school zone
2. Govt argument: possession → violent crime → functioning of national economy: (1) insurance (2) less travel to places believed to be unsafe (3) violent crimes in schools reduces education, who are thus less economically-productive

3. 5-4 (Rehnquist): Act exceeds Congress’ interstate commerce authority
   a. govt’s argument would give Congress limitless powers
   b. Must be an economic activity
      i. test
         1. activity itself is economic in nature OR
         2. regulation must be “an essential part of a larger regulation of economic activity”
      ii. possession of firearm in a school zone does not involve economic activity
      iii. criminal statute by its nature has nothing to do w “commerce” or economic enterprise
   c. Congress may regulate 3 categories (151)
      i. The use of the channels of interstate commerce (highways, air traffic, waterways)
      ii. The instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities (people, machines, “things,” used to carry out commerce)
      iii. Activities having a substantial relation to interstate commerce, considering...
         1. Whether or not statute has “express jurisdictional element” limiting the measure’s reach to activities having an explicit connection to interstate commerce
         2. “express congressional findings” concerning the effects of the regulated activity on interstate commerce
   d. must maintain enumerated power structure of the Constitution, distinction between national and local powers

4. (Kennedy, concurring): “necessary though limited holding”
   a. sanctity of federalism: separation between federal and state governments allow citizens to hold each accountable
   b. Congress retains power to “regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”

5. (Thomas, concurring): originalist interpretation that even “substantially affects” test goes beyond intent of Framers

6. (Breyer, dissenting):
   a. Congress has power to regulate activities that “significantly affect interstate commerce” (citing Ogden, Wickard)
   b. Cumulative effect of similar instances, not single act (citing Wickard)
   c. Issue is not affect on commerce but whether or not Congress has “rational basis” for concluding so
      i. “As long as one views the commerce connection, not as a ‘technical legal conception,’ but as ‘a practical one,’ the answer to this question must be yes.”
ii. Congressional reports and studies (although not present here, are readily available)

d. rejection of majority opinion
   i. contrary to SC cases that uphold commerce connections that are less significant than effect of school violence
   ii. distinction between “commercial” and “noncommercial transactions” would disregard actual effects of the activity in question upon interstate commerce
   iii. contrary to case law

   1. how the factual findings of Congress can be responsive to judicial concerns
   2. if we are ultimately left with Lopez alone, I fear that the Rehnquist Court has again subjected itself to the criticism that the values it promotes are formalist rather than humanitarian, selectively countermajoritarian, and "reflect an overall constitutional vision that is strikingly old-fashioned."

   1. rape victim brought suit against two students at state-run university under federal Violence Against Women Act of 1994
   2. widespread sentiments that victims could not get redress
   4. Distinguishable from Lopez
      a. More statistical research
      b. Closer connection to interstate commerce—health care, insurance, cost of women who can’t work
      c. Evidence that state justice system inadequate
      d. Not changing law, only remedies available
   5. 5-4 (Rehnquist): Violence against women does not substantially affect interstate commerce
      a. Gender-motivated crimes of violence are not economic activities
      b. No jurisdictional element est federal cause of action under regulation of interstate commerce
      c. Congressional findings are not enough—would give Congress power to regulate any crime as long as its national impact affected employment, production, transit, etc.
      d. Regulation and punishment of violent crime not involving interstate commerce is State power, as intended by Framers
   6. (Thomas, concurring): “[U]ntil this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.”
   7. (Souter, dissenting):
      a. Congress has power to legislate based on aggregate substantial effect
      b. Congressional findings indicate effects of violence against women on interstate commerce

9
c. Findings more voluminous than Civil Rights Acts
d. Contrary to case law


1. examined every appearance of the word "commerce" in the records of the Constitutional Convention, the ratification debates, and the Federalist Papers, Professor Barnett finds no surviving example of this term being used in this broader sense
2. according to the original meaning of the Commerce Clause, Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade
3. counter argument is that "commerce" means "gainful activity"

c. Spending and Treaty Powers
i. SPENDING, Article I, 8: grants Congress power “to lay and collect Taxes…to pay Debts and provide for the common Defence and general Welfare of the United States”

1. *SOUTH DAKOTA V. DOLE* (1987), p. 219: Congress may attach conditions to receipt of federal funds, even if objectives not within enumerate powers of Article I

   a. SD challenging fed statute that allows govt to withhold 5% of highway funds otherwise payable to states if they allow persons under 21 to purchase alcohol
   b. SD argues violation of congressional spending powers & 21st amendment
   c. (Rehnquist): Although Congress may not directly regulate drinking age, can further policy objective through conditional receipt of federal funds
      i. Does not decide on 21st Amendment
      ii. **Limits on spending power**
         1. Must be in pursuit of “the general welfare” (cts should defer to Congress’ judgment)
         2. Do so unambiguously, States know consequences of participation
         3. May be illegitimate if unrelated to federal interest in particular national projects or programs
   iii. 10th amendment limit on Congressional regulation of state affairs does not apply to federal grants
   iv. not coercing by withholding a relatively small percentage of certain fed highway funds
   v. remains State’s prerogative to enact what it wants
   vi. does not induce states to engage in unconstitutional activities

   d. (O’Connor, dissenting): minimum drinking age is not sufficiently related to interstate highways construction to condition funds
ii. **TREATY, Article II, §2**: President shall have the power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur”
   1. treaty constitutes “supreme Law of the Land,” preempts all state laws inconsistent w treaty (Article VI)
   2. self-executing: establishes enforceable domestic law without any further action by Congress (ie establishes a right)
   3. non-self-executing: requires legislative implementation before its provisions can be of any effect as domestic law (ie requires appropriation of money or criminalization of specified conduct)

4. **MISSOURI V. HOLLAND** (1920), p. 226: **Power to ratify treaties is in effect an enumerated legislative power that may be exercised without reference to other congressional grants of power**
   a. U.S. entered into treaty w GB to protect annual migration of certain bird species that traversed parts of Canada and U.S., closing hunting seasons and certain other protections
   b. Congress enacted Migratory Bird Treaty Act to implement treaty
   c. MO argued violation of 10th Amendment
   d. (Holmes): Act was necessary and proper means to implement treaty as long as treaty itself passed constitutional muster
      i. 10th Amendment does not bar implementation of treaty
      ii. Treaty power and power to enact legislation necessary and proper to carry out treaties delegated to fed govt
      iii. Transient nature of birds could only be protected by national action

VI. **STATE DEFENSES**
   a. Whether a state’s activities, even though they otherwise relate to commerce, are nevertheless immune from federal regulation, because of external limits stemming from the structural postulates implicit in the federal scheme and reflected in the Tenth and Eleventh Amendments
   b. **10th Amendment**: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.”
      i. Cannot regulate states as states
      ii. Unlike Commerce Clause cases, action is definitely within Congress’ reach
   c. SC denied state immunity from federal regulation of economic activities during the New Deal until 1970s
      i. **UNITED STATES V. CALIFORNIA** (1936), p. 172: (Stone) upheld penalty imposed on state-owned RR for violation of Federal Safety Appliance Act because “The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.”
      ii. **NEW YORK V. UNITED STATES** (1946), p. 172: **Congress has power to tax states**
         1. (Frankfurter) upheld application of federal tax to State of NY’s sale of bottled mineral water from state-owned springs
            a. Congress has power to tax as long as not on something uniquely capable of being earned only by a state
            b. No less reach than power to regulate commerce
         2. (Stone, concurring): Congress many not tax every class of property and activities of States as it does individuals because would interfere unduly with the State’s performance of its sovereign functions of government
3. (Douglas, dissenting): NY using natural resource → exercising its power of sovereignty; should not have to pay for privilege of exercising inherent power
d. **NATIONAL LEAGUE OF CITIES v. USERY** (1976), p. 173: 10th Amendment barred Congress from making federal minimum-wage and overtime rules applicable to state and municipal employees
   i. Fair Labor Standards Act: extended min wage and max hour provisions to all employees of state and local govt
   ii. 5-4 (Rehnquist): Amendments to Act regarding min wage and max hours “impermissibly interfere with the integral govt functions” of state and local govt
      1. Traditional State authority → without it, little left of states’ separate and independent existence
      2. impair States’ “ability to function effectively in a federal system” → contrary to federal system in Constitution
   3. 3-pt test
      a. Challenged statute regulates the “States as States”
      b. Must address matters that are indisputably attributes of state sovereignty
      c. 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
   iii. (Blackmun, concurring): need balanced approach permitting fed regulation “in areas such as environmental protection, where the federal interest is demonstrably grater and where state facility compliance with imposed fed stds would be essential
   iv. (Brennan, dissent): majority disregards that “the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process”
e. **GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY** (1985), p. 175: If Congress’ regulation of state pursuant Commerce Clause would be valid if applied to private party, also valid as to the state; overruled National League of Cities
   i. Subjection of municipal transit authority to the minimum-wage and max hour requirements of Fair Labor Standards Act
   ii. 5-4 (Blackmun): aftermath of National League of Cities demonstrated Court unable to define scope of the protected governmental function
      1. aside from delegated nature of Article I powers, structure of govt itself ensures role of States in federal system → protected by political process
      2. State has influence over Senate, House, and Presidency
   iii. (Powell, dissenting): “The States’ role in our system of government is a matter of constitutional law, not of legislative grace.”
      1. doubted existence of meaningful political safeguards of states’ interests
      2. 17th Amendment provided for direct election of Senators
      3. Congress more responsive to national constituencies
      4. Nation (even world) as whole is more interconnected than when Constitution drafted; Congress still responsive to individual citizens, the cornerstone of democracy
   iv. (O’Connor, dissenting): “The true ‘essence’ of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.”
f. **NEW YORK V. UNITED STATES** (1992), p. 179: Federal govt may not “commandeer” a state to enact or enforce a particular law or type of law

i. Low-Level Radioactive Waste Policy Amendments Act of 1985 provided 3 “incentives” for states to comply

   1. **Monetary**: states can impose surcharge on waste received from other states; portion redistributed to states achieving milestones in developing waste sites
   2. **Access**: states could gradually increase the cost of access to their sites and then deny access altogether to states that did not meet fed deadlines
   3. **Take title**: if failed to provide for disposal of all internally generated waste by particular date, state required to take title to and possession of waste and become liable for all damages suffered by the waste’s generator or owner as a result of the state’s failure to take possession

ii. (O’Connor): Take title provision unconstitutional

   1. Congress may not simply “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”
      a. Taking title option is so onerous that it’s not a real option → coercion
      b. Distinguishable from *Garcia*: direct coercion v. enticement
   2. Commerce Clause allows Congress to regulate interstate commerce directly, not state governments’ regulation of interstate commerce.
   3. Federal officials who devise programs are insulated from electoral ramifications/not held accountable, lacks transparency → govt works best in a democracy where voters know which reps enact policies they don’t like; you want the one doing the action to be voted in
   4. “The Constitution’s division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment.”

iii. (White, dissenting): Congress not coercing states

   1. result of legislative collaboration between Congress and states
   2. lack of intervention would allow NY to bully other states into accepting its waste; not unconstitutional for fed govt to act as referee among states
   3. lack of disposal sites is a national problem

g. **PRINTZ V. UNITED STATES** (1997), p. 186: Under Commerce Clause, Congress may only regulate individual private entities on their sale of guns; Court cannot actively commandeer state executives (can commandeer state judges!!)

i. Whether or not the Brady Handgun Violence Prevention Act violates Constitution by commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers

ii. Govt distinguishes from *New York* on basis that it does not require execs to make policy, only enforce

iii. 5-4 (Scalia): Congress cannot enforce federal regulation by directly directing State officers

   1. historical understanding and practice
      a. absence of early statutes imposing obligations on states’ executives and presence of many statutes allowing imposition on state judges → assumed absence of power to do so
      b. Federalist No. 44 enumerated state executive officers’ responsibility regarding federal officials’ elections; would’ve
mentioned responsibility to execute federal laws if that was the intention
c. Executive-comomdeering statutes absent in recent history as well; involvement of state and local officials usually connected w conditions upon grant of federal funding, rather than forced administration of federal program

2. Constitutional text creating system of “dual sovereignty”
   a. Article IV, §3: prohibition of any involuntary reduction or combination of State’s territory
   b. Article III, §2: Judicial Power Clause
   c. Article IV, §2: Privileges and Immunities Clause
   d. Article V: Amendment provision requiring ¾ of States to amend
   e. Article IV, §4: Guarantee Clause
   f. Article I, §8 & 10th Amendment: unenumerated Congressional powers reserved for states

3. Jurisprudence of Court
   a. exec action that has absolutely no policymaking component is rare
   b. undermines independent and autonomous political entities
   c. states forced to take blame for burdensomeness and defects

iv. (Stevens, dissenting): State officials do not receive 10th amendment immunity from obligations that may be imposed on ordinary citizens
   1. if can’t impose on state govt, would have to create larger fed govt to enforce ➔ which is what Federalists did not want to occur

h. 11th Amendment: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”
   i. Basic Rule: The federal (national) courts do not have jurisdiction to hear a lawsuit brought by a private individual or corporation against a state. The states retain their “sovereign immunity,” which operates to protect them form this kind of suit.
   ii. Exceptions to Basic Rule
      1. U.S. may sue states in federal court
      2. States may sue other states in federal court, if suing to protect their own interests (not those of individual citizens) (e.g. border disputes)
      3. Citizens may sue municipalities in federal court so long as state govt is not so closely involved that it is in effect a suit against the state
      4. Citizens may sue individual state officers who violate federal law in federal ct and get injunctions directing future action in compliance w federal law
         a. Individual officers does not qualify for state’s 11th amendment immunity
         b. Individual officer is “state actor” for purposes of est 14th Amendment violation
      5. Suits against state officials may not seek retroactive money damages that would cost the state treasury money but may see prospective injunction that has the indirect effect of costing the state money (i.e. deseg schools)
      6. Citizens may seek monetary relief from individual state officers if money is to be paid out of officials’ own pocket or out of “voluntary” indemnification policy bought by the state (ie suit for money damages against state police officer who uses excessive force)
iii. Congress may waive States’ 11th Amendment immunity from suit, only if
   1. it passes a law to enforce the 13th, 14th, or 15th Amendments; and
   2. it makes its intention clear to subject states to federal suits crystal clear


VII. CONGRESSIONAL POWER TO ENFORCE CIVIL RIGHTS

a. **14th Amendment** (enacted 1868):
   i. §1: No State shall make or enforce any law which shall abridge the privileges or
      immunities of citizens of the United States; nor shall any State deprive any
      person of life, liberty, or property, without due process of law; nor deny to any
      person within its jurisdiction the equal protection of the laws.
   ii. § 5: The Congress shall have power to enforce, by appropriate legislation, the
        provisions of this article.
   iii. States and cities subject to regulation
   iv. Private citizens and individuals not subject to regulation
   v. States don’t have same 10th and 11th Amendment defenses that they would under
      Commerce Clause if Congress is using amendment correctly to regulate equal
      protection

   regulate State or state actors, but it cannot regulate individuals.
   i. Rehnquist: Violence Against Women Act of 1994 exceeds Congress’ 14th
      Amendment power
      1. limitations necessary to prevent 14th Amendment from destroying
         Framers’ balance between federal and state govt
      2. §5 power must have “congruence and proportionality between the injury
         to be prevented or remedied and the means adopted to that end”
   ii. Breyer (dissenting): Congress has authority under both Commerce Clause and §5
       of 14th Amendment
       1. Congress is remedying shortcomings of state actors who fail to provide
          adequate (or any) state remedy for women injured in gender-motivated
          violence
       2. restrictions upon private actors already prohibited by state laws
       3. report of at least 21 states with constitutional violations constitutes
          national problem

   Amendment protection requires a history and pattern of unconstitutional
   discrimination

VIII. FEDERAL PREEMPTION

a. **Article VI, cl. 2** (Supremacy Clause): “This Constitutional, and the Laws of the United
   States which shall be made in Pursuance thereof…shall be the supreme Law of the Land;
   and the Judges in every State shall be bound thereby, any Thing in the Constitution or
   Laws of any State to the Contrary notwithstanding.”

b. Preemption based on expressed and inferred congressional intent; Article VI (not
   delegated power) overrides state law

c. **Express Preemption**: when Congress explicitly describes the extent to which a federal
   enactment preempts state law

d. **Field Preemption**: if a state law operates within a field of law that Congress intends the
   federal government to occupy exclusively, the state law will be preempted
   i. **Broad federal coverage of area**: more likely to find preemption than areas where
      federal coverage is less comprehensive
ii. Field traditionally left to states (ie, health and safety regulations): less likely to be found subject to federal preemption
   1. **RICE V. SANTA FE ELEVATOR CORP.** (1947), p. 319: “Historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”
      a. Fed reg so pervasive that reasonable to infer Congressional intent to preempt
      b. Area where fed interest so dominant that fed system assumed to preclude enforcement of state laws on the subject
   2. See **GADE** below

iii. National matters (ie, bankruptcy, patent and trademark, admiralty, immigration): traditionally left to federal control → normally federal preempted

iv. Effect of federal agency: Congress created federal agency and given broad regulatory powers in subject area → evidence of Congressional intent for preemption
   1. **PACIFIC GAS & ELECTRIC CO. V. STATE ENERGY COMM’N** (1983), p. 314: states may regulate aspects of a field not covered by federal licensing/regulation
      a. Nuclear Regulatory Commission (NRC) licenses and inspects all nuclear power plants for safety
      b. Cal. law: new nuclear plants in the state must have adequate storage facilities and means of disposal for that waste
      c. Utility claims Congress preempted entire field of nuclear regulation
      d. (White): Cal.’s regulation is valid
         i. NRC set up for safety issues
         ii. Cal. statute aimed at economic problems of storing and disposing of waste
         iii. No conflict and simultaneous compliance is possible
         iv. Suggests Cal. may not prohibit construction of nuclear power plants for safety motivations

e. **Conflict Preemption**: when state law clashes with federal law by imposing inconsistent obligations on affected parties or by interfering with the objectives of a federal scheme; conflicting provisions of state law preempted
   i. **Physical impossibility**: compliance w one violates the other
      1. **FLORIDA LIME & AVOCADO GROWERS, INC. V. PAUL** (1963), p. 320: Conflict preemption is where “compliance with both federal and state regulations is a physical impossibility.”
         a. Avocados certified as mature under federal regulations but containing less than the minimum Cal. oil content
         b. (Brennan): no actual conflict between two regulations
            i. no physical impossibility
            ii. “maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation”
            iii. federal law concerned with minimum rather than uniform standards
         c. (White, dissenting): viewed fed scheme as a “comprehensive regulatory program” and insisted that Cal.’s interest was identical to the federal one
2. *Gade v. National Solid Wastes Management Ass’n* (1992), p. 320: Federal regulations may forbid duplicative regulation even if the state regulation has multiple aims
   a. Illinois provisions for licensing workers who handle hazardous waste aimed at worker safety and public health
   b. federal Occupational Safety and Health Administration regulations aimed only at worker safety
   c. (O’Connor): conflict preemption b/c read fed regulation to forbid duplicative regulation
   d. (Souter, dissenting): objected to departure from the presumption that historic state powers may not be superceded without a clear showing of congressional intent

ii. **Frustrating the objective:** creates an obstacle to the accomplishment and execution of full purposes and objectives of Congress
   1. identify federal objective
   2. determine the extent to which state law interferes, if at all, with the realization of that objective

3. *Hines v. Davidowitz* (1941), p. 319: “[Where] the 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.”

   1. Mass. law barring state entities from buying goods or services from companies doing business w Burma
   2. Federal law imposing mandatory and conditional sanctions on Burma
   3. 9-0 (Souter): Federal preempts Mass’ more stringent and inflexible law because it presented “an obstacle to the accomplishment of Congress’ full objectives under the federal Act.”
      a. Undermines Act’s provision allowing President to control economic sanctions against Bruma
      b. Undermines Act’s delegation to President to processed diplomatically in developing a comprehensive, multilateral strategy towards Bruma
         i. compromises President’s capacity to speak for the nation with one voice
         ii. caused complaints against U.S. at WTO
      c. Conflicts in its limitation of sanctions solely to United States persons and new investment
      d. “The fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision.”
      e. Inconsistency of sanctions undermines congressional “calibration of force”
4. (Scalia, concurring): objected to majority’s reliance on “unreliable legislative history” to construe statute whose meaning and effects were “perfectly obvious”

iv. **GEIER V. AMERICAN HONDA MOTOR CO., INC (2000): Congressional goals override state laws even if both are not physically impossible**
   1. injured motorist brought suit against manufacturer for not installing air bag, as state law requires
   2. federal regulation permits manufacturers to consider a variety of passive restraint options in order to promote innovation that may lower costs, overcome technical safety problems, encourage technical development, and establish consumer acceptance of passive restraint systems
   3. 5-4 (Breyer): state law frustrates federal objectives for flexibility
      a. not physically impossible to comply with both laws
      b. DOT integrated flexibility based on experience with seat belt regulations that were too rigid in the public’s view
      c. Airbags expensive, have safety concerns ➔ not only way to comply with safety standards
      d. suit stands an obstacle to the accomplishment and execution of federal objectives

4. (Stevens, dissenting): Court overextends preemption doctrine and infringes on states’ right to govern common law tort actions
   a. “The Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States.”
   b. Tort law historically within States’ scope of police powers

IX. **DORMANT COMMERCE CLAUSE**
   a. Even in the absence of congressional preemption, Court invalidates some “protectionist” state legislation based on negative implications of Commerce and Supremacy Clauses
   b. Text of Constitution nowhere expressly limits state power to regulate **interstate** commerce, nor imposes any explicit barrier to state protectionism or discrimination against trade
      i. **Historical basis:** Framers viewed destructive trade wars among states as major problem under Articles of Confederation
         1. each state would legislate to its own interests
         2. threatened peace and safety of Union, vision of unity
      ii. **Federal structure:** necessity of centralized interstate commerce regulation evident by adamant preservation of state’s rights for internal affairs
      iii. **Social welfare:** free trade across state lines more likely to bring national prosperity
      iv. **Representation reinforcement:** courts needed to protect interests that will be systematically disadvantaged (ie, racial minorities under 14th Amend) ➔ out-of-state interests unrepresented in state processes
         1. out-of-state interests are free to lobby and donate campaign funds to in-state political representatives; however, in-state citizens are the ones who ultimately hold reps accountable through elections
   c. **Express/Facial Discrimination:** Almost always invalidate overt “discrimination” against out-of-state interests
      i. **PHILADELPHIA V. NEW JERSEY (1978), p. 246:** Overtly discriminatory statutes are invalid even when motives are not clearly protectionist
         1. In response to NY and Pa. cities using NJ landfills, NJ statute prohibited importing of most solid or liquid waste into the state
2. 7-2 (Stewart): Statute unconstitutional protectionist measure  
   a. did not decide whether or not statute was intended to protect state’s environment and inhabitants’ health and safety (NJ’s contention) or to stabilize cost of waste disposal for NJ residents at the expense of out-of-state interests (P’s claim)  
   b. motivation behind statute irrelevant since NJ used discriminatory method to further objective: “The evil of protectionism can reside in legislative means as well as legislative ends.”  
   c. Distinguishes from quarantine laws (generally upheld) because mere movement of waste does not cause harm (as noxious articles do)

3. (Rehnquist, dissenting): Quarantine laws not distinguishable and statute justified by health and safety problems of waste posed on its citizens ii. **MAINE V. TAYLOR** (1986), p. 251: Discriminatory laws may be upheld only if they serve a “legitimate local purpose” that could not be served by nondiscriminatory means  
   1. statute banned importation of out-of-state baitfish  
   2. 8-1 (Blackmun): ban had legitimate environmental purpose in possible ecological effects of possible parasites and nonnative species

iii. **CHEMICAL WASTE MANAGEMENT, INC. V. HUNT** (1992), p. 252: States may not impose facially discriminatory taxes and fees if there are less discriminatory alternatives  
   1. Alabama law imposed hazardous waste disposal fees on wastes generated outside Alabama; identical wastes in Alabama not fined  
   2. 8-1 (White): invalidated because of less discriminatory alternatives and lack of disparity in cost to Alabama for in-state and out of state waste (thus, distinguishable from Maine)

iv. **OREGON WASTE SYSTEMS, INC. V. DEPARTMENT OF ENVIRONMENTAL QUALITY** (1994), p. 252: Differential fees are facially discriminatory and subject to “strictest scrutiny” or “virtually per se rule of invalidity”  
   1. Ore. Imposed $2.25 per ton surcharge on out-of-state solid waste and $0.85 charge on identical in-state waste  
   2. 7-2 (Thomas): differential fee not equivalent to in-state tax  
      a. facially discriminatory tax that is rough equivalent of “identifiable and substantially similar” tax on in-state is valid  
      b. Ore. tax clearly did not pertain to substantially equivalent economic events

3. (Rehnquist, dissent): Oregon businesses alone have to pay for related costs: landfill sitting, landfill clean-up, insurance to cover environmental accidents, and transportation improvement costs  
   d. **Discrimination in Effect**: Even in absence of overt discrimination, invalidate laws that favor local economic interests at the expense of out-of-state competitors; finding of “protectionism” $\rightarrow$ invalidation  
   e. **Non discriminatory but Undue Burden**: facially neutral laws that unduly burden interstate commerce, applying a balancing approach  
      i. **PIKE V. BRUCE CHURCH, INC.** (1970), p. 245: IF state law (1) regulates evenhandedly, (2) serves legit purposes and (3) affects IC only incidentally, THEN will be upheld unless burden on IC is clearly excessive in relation to local benefits  
         1. dependant on nature of the local interest involved AND  
         2. whether it could be promoted as well w a lesser impact in interstate com.
3. Statute required Arizona-grown cantaloupes to advertise Arizona origin
4. Church grew high quality cantaloupes in Arizona but packed in California and not identified as Arizona grown
5. Compliance w statute would require $200,000 capital to pack $700,000 crop
6. (Stewart): State’s interest for labeling cantaloupes cannot constitutionally justify cost for packing plant
   a. statute does not promote safety or protect consumers from unfit goods
   b. Church not using Arizona name on inferior product
   c. questionably facial discrimination because requiring business operations to be performed in state when cheaper elsewhere

ii. *SOUTH CAROLINA STATE HIGHWAY DEPARTMENT v. BARNWELL BROS* (1938), p. 277: *Regulation of state highways are of local concern*
   1. Statute prohibited use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 lbs
   2. (Stone): upheld statute
      a. unlike railroads, local highways are built, owned, and maintained by local govt
      b. as long as state legislature acted within its power and was reasonable → valid

iii. *SOUTHERN PACIFIC CO. v. ARIZONA* (1934), p. 278: *Railways are not local and statutes are invalid if burden placed on interstate commerce outweighs in-state benefits*
   1. Arizona limited length of trains that could operate in state → interstate commerce trains had to be broken up into shorter trains before entering Az.
   2. record showed that statute increased rather than decreased no. of accidents since increased no. of trains operated in the state when broken up
   3. (Stone): Safety benefits to Ariz. dubious in comparison to burden on interstate commerce
   4. (Black, dissenting): balancing safety and economic considerations in this case is for legislature, not judiciary

   1. Iowa statute prohibited 65-ft trucks, which were permitted in many surrounding states
   2. (Powell): state failed to present evidence that 65-ft less safe than 55-ft → state’s safety interest is illusory and cannot substantially burden interstate commerce
   3. (Rehnquist, dissenting): intruding on fundamental State right to regulate safety for its citizens
   4. 5 justices rejected balancing test; as long as benefits to state in health and safety cases are not trivial or illusory, statutes upheld

   1. Illinois law make it mandatory that every truck in the state had to have contour mudguards
   2. Conflicted w Ark. Law that required straight mudguards and forbidding contoured ones; at least 45 states authorized use of straight ones
3. (Douglas): Illinois requirement invalid
   a. massive showing of burden on IC
   b. Not much of a safety gain (doesn’t serve legit purpose) and affects IC

f. Scalia and Thomas: discrimination is only acceptable justification for invalidating; balancing test usurps power belonging to Congress

g. EXCEPTION: when state is a market participant (selling things in the market, can favor their own citizens over others; ie state universities)
   i. SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. V. WUNNICKE (1984), p. 301:
      State cannot, by neither contract nor statute, regulate downstream market of product
      1. Alaska required those buying timber from the state to process it in Alaska before exporting (usually abroad to Japan)
      2. (White): Market participant doctrine did not apply, violated Commerce Clause
         a. market participant doctrine only applicable where state’s terms limited to particular market (timber market) in which state is participating → not downstream regulation affecting other market (processing market)
         b. restricting post-purchase activity rather than just the purchase

3. (Rehnquist, dissenting): not distinguishable from White—Alaska merely paying buyer of the timber indirectly, by means of reduced price, to hire Alaska residents to process the timber; could do so with other legal means (ie have logs processed before entering market)

4. WHITE V. MASS. COUNCIL OF CONSTRUCTION EMPLOYERS, INC. (cited in South-Central Timber)
   a. Boston buying construction services from companies that must have 50% Boston residents as employees
   b. Everyone involved was essentially “working for the city,” thus it was upheld
   c. Inconsistency between this case and South-Central

X. SEPARATION OF POWERS—POWERS OF THE PRESIDENT AND CONGRESS

a. Two-step analysis
   i. look to see if there’s anything the text that would seem to forbid the arrangement (Chada, Clinton v. New York)
   ii. to be upheld, also have to “balance” power of governmental structure
      1. Federalist Papers—protect from encroachment so that they’re pushed around by other branches
      2. Original conception of balance of power

b. Formalist v. Pragmatic School (White, Breyer, Rehnquist in Morrison v. Olsen)

c. Article II and case law for executive powers is vague

d. Unlike federalism cases, no stark ideological split for exec power cases

e. Power in Wartime
   i. Presidential Power—conduct war
      1. Article II, §2: “The President shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States…”
         a. at the time of drafting the Constitution, all knew Washington was going to be first president and he was head of the military
2. **Article II, §3**: “He shall take care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”

ii. Congressional war power—declaration

1. **Article I, §8, cl. 11**: “To declare War…”
2. **Article I, §8, cl. 12-15**: “To raise and support Armies…To provide and maintain a Navy; To make rules for the Government and Regulation of the land and naval Forces; To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions; To provide from organizing, arming, and disciplining, the Militia…”

iii. *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER* (1952), p. 333: The President may not seize private property (legislate via Executive Order) amidst a domestic dispute that may affect wartime supplies

1. To avert wartime steel strike, Truman directed secretary of commerce to seize and operate nation’s steel mills
2. (Black): President did not have power to issue order
   a. “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”
      i. This is strict, rigid textualist interpretation of executive power not adopted by most
   b. Congress had refused to adopt seizure method for resolving labor disputes by rejecting amendment to Taft-Hartley Act that would’ve granted such governmental authority
   c. Not within Constitutional war powers because Congress, not military authorities, should resolve labor disputes
   d. Constitution proscribes lawmakership power to Congress, not President or military
3. (Frankfurter, concurring): principle of separation of powers are more flexible than Black’s opinion
   a. “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”
   b. Justification for seizure does not amount to executive construction of the Constitution necessary to justify action
4. (Jackson, concurring): cannot limit governing to text of Constitution
   a. “The actual art of governing under our Constitution does not and cannot conform to judicial definition of the power of any of its branches based on isolated clauses or even single Articles torn from context.”
   b. “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”
   c. “The Constitution does not disclose the measure of the actual controls wielded by the modern presidential [office].”
   d. **3-prong test for Presidential actions**
      i. Pursuant an express or implied authorization of Congress
         1. authority at its max $\Rightarrow$ all his own power + all that Congress may delegate
         2. if unconstitutional, means the Fed Govt as a undivided whole lacks power
      ii. Absence of congressional grant or denial of authority
1. rely on independent powers
2. “zone of twilight” in which he and Congress may have concurrent authority, dependent on “the imperatives of events and contemporary imponderables rather than on abstract theories of law”

iii. **Incompatible with the expressed or implied will of Congress**
1. power at lowest
2. rely on own constitutional powers minus constitutional powers of Congress over the matter
3. cts can sustain presidential power only by disabling Congressional power
4. scrutinized w caution to maintain Constitutional equilibrium
e. can only sustain Truman’s actions by holding seizures within his powers and beyond Congress’

5. (Vinson, dissenting): must consider context in which presidential powers exercised
   a. National emergency justified swift presidential action that may be approved or rejected later by Congress
   b. Will have nothing left to deal with if waited for Congress
   c. Constitutional justification—“take Care that the Laws be faithfully executed”

f. **Congressional Encroachment on Presidential Authority**
   i. **INS v. Chada** (1983), p. 353: Congress may not interfere with actions of officers of the United States by any means short of legislation, satisfying Presentment Clause (Article I, §7, cl. 2) and bicameral passage
   1. Immigration and Nationality Act delegated AG power to suspend deportation of alien if met specified conditions and would lead to “extreme hardship” if deported; one house of Congress could veto AG
   2. Chada was student who overstayed student visa
   3. (Burger): one-house veto unconstitutional
      a. efficiency and convenience cannot justify Congressional veto
      b. violation of Presentment Clause (Art. 7, §7, cl. 2)
         i. original intent—records of Constitutional Convention indicate presentment requirement uniformly accepted by Framers
         ii. lawmaking intended to be shared by both Houses and President
      c. violation of bicameral requirement (Art. 1, §§1, 7)
         i. no law can take effect without concurrence of both houses
         ii. ensures full study and debate in separate settings
      d. veto amounts to legislative act because “had the purpose and effect of altering the legal rights, duties and relations of persons”
      e. action altered Chada’s status
   4. (White, dissenting): legislative veto necessary in order for Congress to delegate necessary authority to executive and independent agencies
      a. not inconsistent w separation of powers principles
b. did not violate bicameralism and presentment clauses because act was in pursuant a duly enacted law, not new legislation

ii. Article II, §2: Appointment Clause
1. P has power, w Senate consent, to appoint
   a. Ambassadors
   b. public ministers
   c. judges of Supreme Court
   d. and all other officers of United States
2. Congress may by law vest appt of inferior officers, as they think proper in
   e. Courts of law
   f. Heads of department
   g. President alone

2. Congress can transfer power of appointment, but Congress itself cannot appoint executive officials

iii. BOWSHER V. SYNAR (1986), p. 370: Congress may not reserve to itself the power to remove an executive officer; retention of right to remove officer converts that officer to an agent of Congress
1. Balanced Budget and Emergency Deficit Control Act of 1985: Congress gave Comptroller General power to tell budget cuts to President, who was required to issue an order putting into effect the cuts unless Congress met deficit goal in other way within specified time
2. issue: participation of Comptroller General (head of GAO) in process and direct congressional involvement in removal of CG
3. CG’s office created by Budget and Accounting Act of 1921
   a. selected by P from list of 3 nominees submitted by presiding officers of House and Senate
   b. removable only by impeachment or Joint Resolution of Congress (subject to P’s veto) on the reasons specified in 1921 Act
      i. “inefficiency”
      ii. “neglect of duty”
      iii. “malfeasance”
4. (Burger): BBEDC Act unconstitutional
   a. “Congress cannot reserve for itself the power of removal of an officer charged w the execution of laws except by impeachment.” Æ would be give congressional control over execution of laws
   b. Congress’ ability to remove CG for “malfeasance” and other vague reasons is contrary to original intent for strict impeachment
      i. CG serves at the will of Congress
      ii. Constitution only allows removal by impeachment for “Treason, Bribery, or other high Crimes and Misdemeanors.” (Article II, §4)
      iii. Threatens separation of power
   c. Congress consistently viewed CG as officer of legislative branch
   d. CG’s responsibilities under Act were “execution” of the law, required interpretation
   e. Congress retained control of execution of Act by placing power in officer subject to removal only by itself Æ intruded on executive function
Convenience and efficiency not primary objectives of democratic govt

5.  (White, dissenting): Focuses on practical results—CG’s method of removal has little practical significance and presents no substantial threat to separation of powers
   a.  Majority to formalistic
   b.  Determining level of spending is a legislative, not executive, duty
   c.  CG is not appointed but Congress but officer of U.S. appted by President w advice and consent of Senate
   d.  CG can only be removed for specified reasons
   e.  Removal requires joint resolution that must be passed by both houses and signed by President, satisfying bicameral and presentment requirement in Chada
   f.  Removal provision does not encroach or aggrandize one branch at the expense of another

iv.  *Myers v. United States* (1926), p. 375: President has exclusive control over removal of executive personnel
v.  *Humphrey's Executor v. United States* (1953), p. 375: Meyers limited to “purely executive officers” and President could not remove a member of an independent regulatory agency
vi.  *Morrison v. Olson* (1988), p. 376: Congress may limit the President’s right to remove a purely executive officer, so long as removal restrictions are not “of such a nature that they impede the President’s ability to perform his constitutional duty.”

1.  Ethics in Government Act of 1978:
   a.  Special Division of U.S. Ct of App. for D.C. appoints independent counsel and defines counsel’s prosecutorial jurisdiction
   b.  Independent counsel had “full power and independent authority to exercise all investigative and prosecutorial functions and powers” of the DOJ
   c.  AG may remove IC for “good cause”

2.  Appellees moved to squash subpoenas issued by independent counsel (Morrison), alleging Act unconstitutional
3.  (Rehnquist): upheld Act
   a.  did not violate Appt Clause because IC was “inferior” and “temporary” ➔ not a Presidential appointee
   b.  relied on Appt Clause to justify Congress’ ability to vest appt power to other courts; interbranch appointments ok
   c.  no conflict w Article III because “temporary” position which nature and duties will vary by facts; may vest power to define scope of office in Court
   d.  although functions served by officials not irrelevant, more important question is whether removal impedes P’s ability to perform constitutional duty
   e.  “good cause” removal provision does not impermissibly burden P’s power to control IC b/c can still check IC via AG’s termination
      i.  AG is not President's puppet
      ii.  Kenneth Starr went unchecked
f. Does not violate separation of powers
   i. Congress not in danger of usurping executive functions
      b/c roll limited to receiving reports and oversight of IC’s
      activities
   ii. No judicial usurpation because ct has no power to
      supervise or control activities of counsel after
      appointment and definition of jurisdiction

4. (Scalia, dissenting):
   a. separation of powers
      i. “The allocation of power among Congress, the President
         and the courts in such fashion as to preserve the
         equilibrium the Constitution sought to establish—so that
         ‘a gradual concentration of the several powers in the
         same department, can effectively be resisted.”
      ii. “The purpose of the separation and equilibrium of
         powers in general, and of the unitary Executive in
         particular, was not merely to assure effective
         government but to preserve individual freedom.”
         (questioning fairness afforded to offices covered by IC’s
         authority for investigation)
   b. Article II, §1, cl. 1: “The executive Power shall be vested in the
      President of the United States.”
      i. Interprets as ALL exec power, not some
      ii. Statute limits P’s control/power
   c. Constitutional text does not allow for “balancing test” for P’s
      power
   d. Not “inferior” officer because not subordinate to another officer
      → requires presidential appt w advice and consent of Senate
   e. Unfair prosecution and investigation leaves P open to political
      damage

5. Restraints on agencies come through Congress’ oversight and funding
   powers AND the rules dictated by APA

    legislative powers to judicial branch when judgment of matter has been
    and remains in Judicial Branch if no other branch is more appropriate and
    no provision of the law threatens the institutional integrity of the JB.
    1. U.S. Sentencing Commission
       a. consisted of 7 voting members appointed by President w advice
          and consent of Senate, at least 3 must be federal judges selected
          from 6 recommendations to the President by U.S. Judicial
          Conference
       b. removable by President for “good cause”
       c. est mandatory ranges of permissible sentences for different
          offenses that federal judges would have to apply in sentencing,
          unless downward departures were justified by substantial
          explanation
    2. (Blackmun): upheld Commission
       a. does not grant excessive legislative discretion
          i. meets principle that Congress must lay down an
             ‘intelligible principle’ to guide the agency exercising the
             congressionally delegated power
ii. complex society → necessary for Congress to delegate
b. separation of powers principle
   i. Framers rejected complete separation of branches
   ii. “The greatest tyranny [lies] not in a hermetic division between the Branches, but in a carefully crafted system of checked and balance power within each Branch.”
iii. 2-prong test
   1. Judicial Branch neither assigned nor allowed tasks that are more appropriately accomplished by other branches, AND
   2. no provision of law impermissibly threatens the institutional integrity of the Judicial Branch
iv. some judicial rulemaking falls within a “twilight area”
   1. does not violate separation of powers b/c
   2. “substantive judgment” in the field of sentencing has been and remains in Judicial branch
v. judicial participation does not undermine impartiality of Judicial Branch → does not “impermissibly interfere” w functioning of Judiciary
   1. separation of powers does not prohibit Article III judges from sitting on commissions; only prohibited if it undermines integrity of JB
   2. service not based on status or authority but appt of P
   3. using administrative power from enabling legislation, not judicial power
   4. not in danger of having constitutionally significant practical effect on Judiciary
vi. P’s appt will not have undue influence over judges—no one will judge to get appt to Commission
3. (Scalia, dissenting): “The power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.”
   a. Critical of the “regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather it is a prescribed structure, a framework, for the conduct of government.”
   b. Allege creating new branch altogether
viii. Delegation to Administrative Agencies
1. Article I, §8
   a. requisite to protect public health—EPA regulations
   b. safe and effective—FDA
   c. promote fair competition—FTC
   d. grant license in the public interest—FCC
2. Congress have control over agencies through oversight hearings, disbandment, etc.
3. Only invalid delegation would have to be either
   a. delegating writing of STATUTES OR
b. delegating to agency w literally no principle
ix. **Whitman v. American Trucking Associations, Inc.** (2001), Handout:
Congress can delegate powers to subsidiary agencies so long as it gives an
intelligible principle to guide exercise of the delegated authority
1. **Clean Air Act**: delegated authority to head of EPA to set air quality std
   at level “requisite to protect the public health”
2. Industry plaintiffs argued impermissible delegation of legislative power
3. **Article I, §1**: vests all legislative powers in Congress; no textual
   justification of delegation
4. (Scalia):
   a. requisite for Congressional conferral of decisionmaking
      authority upon agencies—“lay down by legislative act an
      intelligible principle to which the person or body authorized to
      [act] is directed to conform.”
   b. Requisite almost always met unless absolutely no guidance or
      standard
   c. Limitations posed are similar to those delegated to other
      agencies
XI. **Presidential Privileges, Immunities, Impeachment & Pardons**
a. Privileges are not constitutionally based and pervade across all types of cases and act to
   preserve and facilitate trust, candor, relationships and honesty in a utilitarian and
   instrumentalist way that is "in derogation of the search for truth"
   i. Similar to the 5th Amendment privilege against self-incrimination, the
      presidential privilege is based on legal aesthetics
      1. Although Nixon had immunity from prosecution while in office and a
         qualified executive privilege existed for specific and sensitive issues,
         Nixon had no absolute privilege and was not entitled to a qualified
         privilege based on a broad claim of public interest to protect subpoenaed
         audio tapes and documents
      2. Privilege does exist for any policy discussion that exists due to a
         qualified Article II duty of the President
      3. Privilege may exist for sensitive documents such as those relating to
         foreign affairs, military activities, diplomatic activities or other national
         security interests
   iii. Cheney v. GAO
   iv. Clinton Secret Service absolute executive privilege denied due to no
       policymaking ability
b. "Immunity is a derogation of the search for justice and accountability"
   i. Immunity From a Civil Suit Arising From Actions While Not in Office
      1. **Clinton v. Jones** (1997) (Stevens)
         a. There are no instrumental concerns (ensure that president is not
            burdened while making executive decisions) requiring courts to
defer the civil liability of a president for unofficial activities
            prior to his presidential term until the term ends and immunities
            are grounded in "the nature of the function performed, not the
            identity of the performing actor"
   ii. Immunity From a Civil Suit Arising From "Official" Actions While in Office
         a. Absent explicit affirmative action by congress, a president is
            absolutely immune from civil damages liability because judges
and prosecutors have absolute immunity and it is even more important to ensure that the president is not burdened when acting, making policy decisions and fulfilling his presidential duty.

c. Impeachment
   i. Andrew Johnson – 1868
   iii. Bill Clinton – 1998
      1. Argued the definition of "high crimes and misdemeanors" on two grounds:
         a. Impeachment did not apply to private matters and Clinton was not acting within the discharge of his official duties
         b. Acts are not criminal

d. Pardons
   i. Unreviewable to preserve finality, allow for reformation of a criminal, correct an error of the courts, reflect mercy

**Dormant v Field Preemption**
Has Congress legislated in the area?
Yes → preemption question
No → dormant commerce question