I. Introduction
   A. Supremacy of the Constitution
      1. Constitution = supreme law of the land – trumps any statute, law, regulations, etc.
      2. Supremacy = structure of system of higher law: Constitution = higher law
         a. In a hierarchical sense, because to the extent that there is an unworkable conflict btw the Constitution and federal statutes, the Constitution trumps
   B. Permanency and Amendment of the Constitution
      1. If you are going to have something that is higher law than statutes, it needs to be more permanent than the statutes
         a. Otherwise if the Constitution could change as easily as statutes, there would be no real protection of higher law
         b. ➔ to amend to the Constitution, a super majority is required
         c. This serves the purpose of making the Constitution more difficult to change than statutes
         d. Conversely, can’t have a sustainable Constitution without an amendment procedure
   C. Things to note about the Constitution
      1. Things to note about the Constitution:
         a. Vague – no definitions
         b. Specific – example: in presidential election procedure
         c. Short
         d. No definitional section
   D. Theme of Course:
      1. What can gov’t do (power questions; substantive)
      2. How can gov’t do things (process questions; procedural)

II. Interpretative Methodologies
   A. Counter-majoritarian nature of judicial review
      1. A near monopoly of constitutional interpretation is done by federal judges who are appointed to positions for a life term who are insulated from democratic/majority influence
      2. This is at odds with the democratic values of our country
      3. Response:
         a. Judges are appointed by a democratically elected executive (President) who must be confirmed by the democratically elected Senate
   B. Interpretivism v. Noninterpretivism
      1. Nearly everyone has excepted Interpretivism
         a. The Constitution is the starting point for any interpretation
            i. Look at tradition, the text of the Constitution, the intent of the framers, and precedent
         b. Refuses to look only at philosophy, morality, or justice…
   C. Different modes of interpretation
      1. Textualism
Constitutional Law - Outline

2. **Originalism**
   a. Text + intent of framers + history that defined the words used
   b. Original intent v. original meaning:
      i. Original intent – the meaning of a word in the minds of the Framers
      ii. Original meaning – the meaning of a word as used by most literate Americans at the time, not just the Framers
   c. Dichotomy btw general principle v. strict specific
      i. General principle – argue that there are general principles such as liberty, property, etc…
      ii. Strict specific – only extends to specific principles such as 1st Amend protects speech, therefore does not extend to radio, etc…

3. **Nonoriginalism**
   a. Text + intent of framers + history that defined the words used + all potentially relevant sources

D. What judges actually look at:
   [1] Text
      a. all judges start with the text
   [2] Precedent and stare decisis of Supreme Court cases
   [3] History
      a. Originalism – be faithful to the deal the Framers made
   [4] History
      a. Tradition – build on and not lightly depart from the gradually evolving history, similar to common law thinking, conservative b/c not departing significantly from what has happened over the past 200 years, argument that the tradition has been around for a period of time and within that period had not been challenged at unconstitutional
   [5] Political theory (never the main reason, but still influential)
a. ideas of justice and fairness
b. policy
c. economic efficiency

E. The real question is where on the spectrum an interpreter lies:

-----Textualism----------Originalism-------------Nonoriginalism-----

1. How far a judge will deviate from the history and intent of the Framers

III. History of the Constitution
A. First Congress (1789-1792)
   1. Many of the Framers were also in that first Congress
      a. Most judges have given special influence to the laws, etc… from that Congress
      b. Conversely, the Framers were also politicians and therefore, they may have said some things they needed to say, politically, but did not mean/intend

B. Articles of Confederation
   1. Drafted (1787) to deal with the political and power vacuum resulting from the Revolution AND the development of multiple, divergent State Constitutions
   2. Underlying understanding that the states would remain sovereign
   3. Conspicuous gaps:
      a. No federal power to tax; and thus limited ability to spend
      b. No federal power to regulate commerce
      c. No executive authority
      d. No general national judicial authority
         i. Feeling at the time that a judicial branch was not needed b/c the politicians would be aware of the “constitutionality” of rules and laws and therefore, a judiciary would be unnecessary; and each state had a state supreme court which could enforce the Articles of Confederation
      e. No bill of rights
   4. Problems:
      a. Failure of the states to abide by their obligations to the Confederation
      b. No means for collecting revenue to pay for the needs of the Confederation (pivotal problem)
      c. Inflation – states printing own money; states not forcing people to honor their debts
      d. No uniform foreign policy; many states were making their own deals and foreign policy

C. Constitution:
   1. Framers were given a limited charge - to assess the situation of the states as confederated and devise ways to make the federal government adequate to address the exigencies of the Union
   2. Instead, the framers drafted a completely new document; instead of trying to reform the Articles of Federation
3. Major changes
   a. Creation of an executive branch
   b. Gave Congress the powers to tax and regulate commerce
   c. Creation of a federal judiciary
   d. Granted Congress the authority to make “all laws necessary and proper” to effectuate its enumerated powers

4. Antifederalist argument against the Constitution:
   a. Betrayal of the principles underlying the Revolution; principles of republicanism
   b. Undermine the system of decentralization on which true liberty depended
   c. Dramatic expansion in the powers of the national, remote government
   d. Removed people from the political process
   e. Placed a new emphasis on commerce

5. Division of power
   a. Madisonian thinking
      i. Shift power away from the people b/c don’t trust the people
      ii. But also don’t/aren’t willing to trust the gov’t
      iii. break the power into chunks and make in the interests of each branch of gov’t to control or limit the ambition of other branches of gov’t
   b. Motivation of this division of power and bureaucracy =
      i. Fear that government is corrosive to liberty and freedom

   ![Diagram of Vertical and Horizontal Review](Diagram)

6. “Undemocratic” or counter-majoritarian features of the Constitution:
   a. Electoral College
      i. # of electors = House of Reps members + 2 Senators
   b. Senate
      i. Equal representation for each state, regardless of population
   c. Amending the Constitution done by the States, not by popular vote

IV. Supreme Court Authority
   A. Supreme Court was intended to enforce the lines of division of the Constitution
1. Secure areas marked off from politics and revision
2. These boundaries were to be unrevisable by electoral majorities

B. Judicial review would ensure the supremacy of the Constitution
1. Embodying the will of the sovereign public against temporary majorities

C. Rule for vague statutes = if a statute is vague, read it to be Constitutional

D. Horizontal Review
1. Conflict w/in branches of federal government
2. The Constitution controls in a conflict btw the Constitution and a statute (Marbury v. Madison)
3. Because the Constitution is the fundamental/permanent law a statute cannot control the Constitution; otherwise the Constitution would just be another statute; this is unacceptable, therefore, the Constitution trumps a statute
4. HELD: judicial branch can assert power over the Executive via a writ of mandamus and assert power over the Legislative branch by asserting the supremacy of the Constitution over legislative enactments (supremacy clause)

E. Vertical Review
1. Conflict btw federal and state government
2. US Supreme Court authority to review State court judgments (Martin v. Hunter’s Lessee)
   a. Themes in Martin v. Hunter’s Lessee
      i. Both state and federal courts interpret federal law
   b. Obligation and authority of state courts to heed the “supreme” law
   c. Complex interrelations btw state and federal judiciaries in a system which apportions the function of interpreting federal, including constitutional, law among the judicial structures of separate state and federal governments (federalism)
3. Support:
   a. S. Ct. had exercised such power for years – settled expectations
   b. Articles III and VI of the Constitution
   c. Expectation of S. Ct. review of state court judgments ran through the Constitutional Convention debates
   d. Supremacy Clause of Article VI contemplated that federal questions could initially arise in state as well as federal courts and therefore, assumed that the S. Ct. could review to assure necessary uniformity and federal supremacy
   e. Federal review of state judgment on issues relating to federal law will not impair state sovereignty any more than the Constitution impairs state sovereignty in other ways
   f. The absolute right of decision, in the last resort, must rest somewhere; no reason that place should not be the US S. Ct.
   g. Uniform decisions throughout the US on issues within the purview of the Constitution
h. State judges are not insulated from political pressures of the people and the legislature because they serve at the please of both (via votes and money) and therefore, may not be as independent as federal judges

4. “The judicial [power of review] extends to all cases arising under the constitution of a law of the United States, whoever may be the parties.” (Cohens v. Virginia)

F. Horizontal and Vertical Review, together
1. Marbury and Martin’s Lessee = proposition that any federal issue can be heard by the federal courts, whether rising from state or federal lower courts, AND the federal courts (US S. Ct.) is the supreme arbiter of those disputes

G. Recusal RULE = a financial interest in the outcome of the case demands recusal

V. Limitations on Judicial Authority

A. Adequate and independent state ground doctrine = federal courts have absolutely no power to interfere in the manner in which a state courts interprets state law, when the interpretation has no bearing on federal law
1. Example = US S. Ct. has no power over MA S. Ct. ruling on gay marriage

B. Passive Judiciary
1. Modern US S. Ct. limits the number of cases it hears (~ 80/year)
2. Factors the US S. Ct. uses to determine if it will grant cert.?
   a. Federal question
   b. Circuit split (and States split)
      i. Serve interest of uniformity
      ii. 1:1 Split = “shallow split”; encourages the US S. Ct. to wait
      iii. 8:1 Split = “lopsided split”; if it is that lopsided, you can infer that the 1 may just be wrong, also the 1 circuit may fix itself on its own
      iv. 4:4 Split = good indication that cert. will be granted
   c. Sheer/Raw importance (Bush v. Gore)
   d. “Fact bound” this particular case is so bound by the particular facts, spending time on this case will not have great significance for the judiciary in general
3. DIG = dismissed for improvident granting = US S. Ct. admits it made a mistake in granting cert. and dismisses

C. Political Question
1. The US S. Ct. has no power to review political question, even though the issue would fall w/in the court’s jurisdiction
   a. Political question = “Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive…” Marbury v. Madison
2. Some matters are textually or structurally committed to the unreviewable discretion of the political branches
3. Some otherwise legal questions ought to be avoided to prevent judicial embarrassment
4. **Test for justiciability (political question)** =
   a. Clear textual commitment of the question to another branch
      • If Yes, political question, courts must stay away (Nixon v. US)
   b. Lack of judicially manageable standards for resolution
      • If Yes, political question, courts must stay away
         o i.e. committing/removing troops from war/battle/etc
   NB Often these two prongs (textual commitment and manageable standards) are applied together

D. **Standing**
   1. To bring a lawsuit, a pl. must have a concrete and particularized interest in the case
   2. US Supreme Court will not make advisory or hypothetical opinions
      a. Difficult to normalize with dicta; but dicta comes from a valid case and dicta is not binding, therefore the problem of dicta is ameliorated

**Constitutional Standing Requirements** (Christian College):
   ▪ Theses are the big 3 that are required for constitutional standing as required by the Constitution in Art. III
      o 1. Concrete injury in fact
         ▪ Already have injury OR imminent and definite injury that is virtually certain to occur
      o 2. Traceable to def.’s conduct
         ▪ Pl. must show he personally suffered some actual or threatened injury as a result of def.’s conduct; similar to proximate cause
      o 3. Redressable by a court
         ▪ The injury is likely to be redressed by a favorable decision

**Prudential Standing Requirements**:
   ▪ These are additional grounds upon which a court can deny a case for lack of standing; absence of any of these 3 is not unconstitutional
      o 4. No 3d party standing
         ▪ The pl. generally must assert his own legal rights and interests
         ▪ Claim cannot rest on legal rights of third-parties
      o 5. No “generalized grievance”
         ▪ Court will not adjudicate abstract questions of wide public significance or generalized grievances
         ▪ Specifically: no taxpayer standing = being a taxpayer whose $ is being spent in an unconstitutional way has no standing; requires concrete injury
            • Exception: Establishment Clause suit – gov’t shouldn’t spend a lot of money to further a religious group
      o 6. Pl. must be in “zone of interest”
         ▪ Pl.’s complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question

E. **Ripeness**
   <--------not ripe (too early)--------dispute------------moot (too late)-------->
   1. Court will (typically) dismiss a case as not ripe if the pl. have not pursued all other dispute resolution; i.e. administrative resolution
F. Mootness
1. If the behavior forming the center of the dispute ends, case becomes moot
2. Except:
   a. “Capable of repetition, yet evading review”
      i. i.e. Abortion – b/c the human gestation period is too short to fit within the period of time needed for legal resolution btw pregnancy and birth
   b. A def.’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice
      i. Except: moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur

VI. Federalism
A. = Separation of Powers – dividing/balancing power btw state and federal gov’t
   1. ⇒ 2 layers of sovereignty
      a. Outer layer of superior sovereignty – federal
      b. Inner layers of interior/inferior sovereignty – states
   2. Sovereignty = raw power = power to set the rules by which all actors must behave
B. Reasons for having 2 competing sovereignties: Federal-State
   1. More accountability in smaller units
   2. Diversity of views
   3. Utilitarian argument
      a. If people’s preferences differ around the country, divided sovereignty allows a greater happiness level because each smaller sub-unit can make its own laws
      b. Problem = entrenched minority rights get continually screwed (i.e. Blacks and Jim Crow laws)
   4. Allows legislative experimentation w/o threatening the entire country
   5. Provides dichotomy/discussion of states rights v. federal rights that is good for federalism
C. Government of Enumerated Powers (McCulloch)
   1. The Constitution enumerated limited powers the federal gov’t
      a. Art. 1, § 8, et. al.
   2. Left the remainder of power to the states
D. The federal gov’t can exercise its power over anyone – person, corporation, gov’t, et al.
   1. Most behavior in the US can be regulated by the federal gov’t

VII. Affirmative Powers of the Federal Government
A. Necessary and Proper Clause
   1. In the exercise of constitutional power, Congress may use “necessary and proper” means to achieve a constitutional end
a. McCulloch v. Maryland – controversy over 2d National Bank of the US and did the Federal Gov’t have the power to create such a bank?

b. If Congress has the constitutional power to achieve an end, enumerated power, (Art. I, § 8, et. al.), then the Necessary and Proper clause gives Congress the ability to choose the means to effectuate that end
   i. Not a blank check, the means must be linked to the ends

B. Commerce Clause
   - Most federal power here b/c of the expansive definition/test
   1. Congress may regulate:, under its Commerce power, TEST: (Lopez)
      [1] The use of the channels of interstate commerce (egg case)
      [2] The instrumentalities or persons or things of interstate commerce (planes, RR, etc.)
      [3] Regulate [economic] activities w/ substantial effects on interstate commerce (“effects test”)
         • Allows aggregation
         • Allows indirect effect
         • Economic activity counts, though perhaps not commercial (anything that is economic (still don’t have a test what is economic) applies)
   2. Rule of Thumb for Commerce Clause power
      a. Restrict Commerce Clause when it infringes on other specific rights granted by the Constitution
   3. Historical Development of Commerce Clause
      a. Gibbons v. Ogden – NY steamboats
         i. “Government…action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; BUT NOT to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”
         ii. Opened door for:
            A. “indirect effects” on other states
            B. Allowing the Federal Gov’t to regulate commerce even before it crosses a state line
            C. Allowing the Federal Gov’t to regulate commerce even after it has entered its last state
      b. Shreveport RR – RR monopoly in TX fixing prices
         i. HELD: there are certain things that are so connected to interstate commerce, so important (RR, airlines, etc…) the federal gov’t can exert regulatory authority even when the operation of that instrumentality is exclusively in one state
         ii. Agencies and instrumentalities of commerce can be regulated
c. Lottery Tickets case – mail tickets to other states
   i. HELD: If you put something into the channels of interstate commerce, that is a part of interstate commerce, federal jurisdiction attaches

d. Rotten eggs case – eggs shipped interstate
   i. Requires an interstate nexus
   ii. HELD: once something is traveling in interstate commerce, the object is branded/fair game for federal regulation

e. Man Act – Federal prohibition of taking women across state lines for immoral purposes
   i. HELD: the objects of interstate commerce, in this case women, once traveling in interstate commerce, the object is branded fair game for federal regulation, wherever the object is found
   ii. → outlaws of commerce can be seized wherever found

f. Hammer v. Dagenhart – child labor in manufacturing
   i. HELD: manufacturing is not commerce, therefore the federal gov’t have no power to regulate (working conditions)
   ii. Rationale = categorical differentiation of commerce and manufacturing

g. New Deal
   i. S. Ct. relaxed restrictions on Congressional Commerce Clause Authority
   ii. The US S. Ct. has upheld EVERY Commerce Clause challenge from Darby in the 1940s to Lopez in 1995
      A. Commerce Clause = blank check to Congress

h. United States v. Darby – similar child labor case as Dagenhart
   i. S. Ct. shifted its interpretation → expanded federal power
   ii. HELD: An activity occurring entirely within a state, but have effects on interstate commerce CAN STILL BE regulated by the federal government under the Commerce Clause

i. Wickard v. Filburn – backyard wheat
   i. HELD: Federal Gov’t can regulate behavior that has a substantial economic effect on interstate commerce
   ii. Allowed aggregation of similarly situated actors
   iii. Disregarded indirect/direct effect
   iv. Real concern = the substantial economic effect

j. Congress used commerce clause for moral policies/civil rights
   i. 1954 – Brown v. Board of Education = separate is not equal; beginning of desegregation
   ii. 1964 – Civil Rights Act = legislative solution to slow desegregation
   iii. Both passed under the Commerce Clause authority of the Constitution
k. Hodel v. Virginia Surface Mining – Black person wanted to get a room at a whites only hotel
   i. HELD: the ability to obtain lodging is necessary to interstate travel, interstate travel is directly affected interstate commerce, therefore Commerce Clause can regulate lodging
   ii. hotel can be lumped in with the instrumentalities of interstate commerce, such as trains, planes

l. White’s only BBQ restaurant
   i. Bigger test of the commerce clause because most of the people were intrastate, most of the food was intrastate
   ii. HELD: Under Wickard justifications of crowding out and aggregation, Congress could use Commerce Clause could regulate segregation in restaurants
   iii. Also, strong public policy argument for anti-discrimination legislation the Court was looking for a doctrinal solution of upholding federal civil rights regulations

   i. 1st Commerce Clause exercise invalidated since New Deal
   ii. This S. Ct. has put some teeth into the Commerce Clause creating some limits on Congressional power
   iii. Laid out 3 part Test for Commerce Clause
   iv. Invalidated this law for failure of 3d prong of Test
   v. Because:
      A. Preserve separation of powers
         1. Certain areas exclusively in State’s power
         2. Separate sovereigns = more liberty
      B. Needed some limitation on Commerce Power

   i. Invalidated the law for failure of 3d prong – insufficient effects on interstate commerce

C. Spending Powers
   1. Congress can use the Spending Power to achieve objectives NOT w/in the enumerated powers by conditioning federal funds on state action (South Dakota v. Dole – conditioning of federal highway funds on drinking age)
   2. Limitations:
      a. In pursuit of “the general welfare”
         i. Courts should be deferential to Congress’ determination of what serves general public purposes/welfare
      b. Clear statement of the funding condition
      c. Conditions must be related “to the federal interest
      d. No other constitutional bar to the conditional grant of federal funds
      e. No coercion of the states
3. This is strange b/c Congress has a massive potential to control the States and regulate things that it otherwise has no power to regulate; doesn’t square with gov’t of enumerated powers – McCulloch

D. Treaty Powers
1. Unimportant for a long time b/c Congress could do anything it wanted under the Commerce Clause
2. But, now Commerce Clause is limited, treaty power has more importance
3. A treaty trumps all laws other than the Constitution, b/c a treaty is the supreme law of the land, according to Art. VI (Missouri v. Holland)
4. A treaty cannot contravene any prohibitory words found in the Constitution (Missouri v. Holland)
   a. But, if there is sufficient necessity, the treaty power may trump

E. War Powers
1. Power “to remedy the evils … arisen from [the war and its progress]”
2. War Power continues for the duration of the emergency
   a. The courts will trust the Congress not to abuse the power
3. Does not necessarily end with the cessation of hostilities (Woods v. Cloyd & Miller Co.)
4. Youngstown
   a. Truman nationalizes steel mills
   b. Black Opinion (majority)
      1. No inherent Art. II presidential authority to nationalize, that power rests in Congress
         a. Thus Congress must authorize or delegate for President or executive agency to have this power
      2. Thus Congress b/c did not, this was not grounded in an Constitutional power and the action was unconstitutional (seizing the steel mills is constitutional, but how it is done must also be constitutional)
   c. Frankfurter Concurrence
      1. More pragmatic and flexible; not bound to the text
      2. Custom and past practice dictate this is a congressional prerogative
      3. Since Congress did not act that means no authorization was given to the president to act
      4. Framework has consistently operated that this power rests in Congress, thus that can be inferred as how the Constitution was supposed to work and that is what we should follow
   d. Jackson Concurrence
      1. Another Functional/Pragmatic opinion concerned with the expanse of executive power (very worldly)
      2. Recognizes shift in presidency to the modern presidency
      3. Practice will conform dispersed powers into workable government should let the different branches work together as they know/have learned how

5. War Powers Resolution
a. Procedurally correct, but is it substantially valid?
b. §2 (c)\(\rightarrow\) situations where deployment by President is limited
   i. declaration of war
   ii. specific statutory authorization
   iii. national emergency created by attack upon the US or its armed forces (does not include pre-emptive attacks)
c. 60 days to acquire permission after hostilities have been entered
   i. Is this necessary? Does it overly limit
   ii. Can’t congress just cut off funds?
   iii. Wouldn’t politics preclude that action?

F. Taxing Power
G. Civil Rights Enforcement Powers
H. § 5 of 14th Amendment
   1. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”
   2. 14th Amend. covers: Due process, public debt, etc.
   3. Very powerful vehicle to regulate states as states; see infra

NB Most/all of the cases drawing limits on federal power happened pre-September 11, 2001
   • Many people now think that the S. Ct. will not be as aggressive to regulate Congressional power in the post-September 11, 2001 environment

VIII. State “Defenses”
A. 10th Amendment
   1. “The powers not delegated to the US by the Constitution, nor prohibited by it to the States, are reserved to the States…or to the people.”
      a. This is just a restatement/reconfirmation of the enumerated powers idea from Art. I, § 8; 10th Amendment is merely a “truism”
   2. 10th Amendment = trump card
      a. That particular areas cannot be subject to federal power, even though regulation of such an area is within the reach of the Commerce Clause, the federal power cannot control because it is a state issue regulated by a state actor
   3. Current interpretation of the 10th Amendment NOT from the text; instead, mostly judge-made law/doctrine
      a. Compromise btw a Thomas position that would take commerce back to the 1790s meaning of commerce and the Brennan position that there should be no control of the Commerce Power by the judiciary (leave oversight to the Senate, which is state controlled)
   4. General 10th Amendment Inquiry/Challenge
      a. Is the new power within Commerce?
      b. Is the new power a regulation of a state or local gov’t?
      c. If yes, does it violate 10th Amendment?
   5. Historical Development of 10th Amendment Law
      a. Post New Deal – No enforcement: no limits
      b. 1976 – National League of Cities: limits
i. HELD: Congress cannot legislate core state functions
   A. Difficult to determine what are core state functions

c. 1985 – *Garcia*: **no limits**
i. HELD: No more 10th Amendment enforcement, leave all
   the protection to the political process; explicit overruling of
   National League of Cities

i. returned to a 10th Amendment enforcement w/ some teeth
   ii. HELD: **Federal Gov’t (Congress and Executive) cannot
        commandeer State legislative functions**

e. 1997 – *Printz v. United States*: **some more limits**
i. HELD: **Federal Gov’t (Congress and Executive) cannot
        commandeer State executive functions**

6. 10th Amendment Status Today

[1] Federal Gov’t (Congress and executive) **cannot** commander state
    legislative power; to force the state to pass a law (*New York v. United
    States*)

[2] Federal Gov’t (Congress and executive) **cannot**, actively, commander state
    executive power; to enforce federal laws (*Printz v. United States* modified
    by Condon)
    - Passive prohibition is now OK, under Condon

[3] Federal Gov’t (Congress and executive) **can** commander state judicial
    power (Art. VI, 2 cl.; see also *Testa v. Katt*)

[4] Judiciary **can** commandeer state executive power (*Miranda warning from
    *Miranda v. Arizona*)

B. 11th Amendment

1. Restricts federal control on state authority
2. Basically says that, because of state sovereign immunity, states cannot be
   sued in federal court by anyone
3. Exceptions
   a. The US may sue States in federal court
   b. States may sue other States in federal court
   c. Citizens may sue municipalities in federal courts (most of the time)
   d. Citizens may sue individual state officers in federal court only for
      a “prospective” injunction
   e. The US S. Ct. can review state court judgments where the state is a
      party, and reverse the result on federal law grounds (*Cohens v. Virginia*)
4. Waiver
   a. Congress may “waive” States’ 11th Amendment protection from
      suit if and only if:
      i. it passes a law to enforce the 13, 14, or 15th Amendment
      ii. it makes its intention to subject states to federal suits crystal
          clear
b. States can consent to suit in federal court by passing a state statute or on a case-by-case basis by the state itself filing a lawsuit that turns out to have federal issues and/or counterclaims involved

IX. Congressional Power to Enforce Civil Rights
A. The 13th, 14th, and 15th Amendments are interpreted as a “new deal” between the states and the federal government
   1. In the aftermath of the Civil War, the states handed over a piece of their inherent sovereignty by ratifying those amendments
   2. The current U.S. S. Ct. holds that this transfer of sovereignty is limited to the subject matter of those Civil War Amendments (equal protection, voting rights, due process)
B. 14th Amendment
   1. 14th Amendment is a very powerful vehicle to regulate states as states
   2. Paradigmatic case for § 5 14th Amendment = Katzenback
      a. Voting Rights Act of 1965 – embodied principle of one person, one vote, drawing electoral boundaries
      b. Act explicitly enforced 14th Amendment of equal protection in voting rights to stop States from preventing voters from voting
      c. Congress probably couldn’t have done this under Commerce Clause, b/c no connection to interstate commerce
   3. S. Ct. has said Congress can “enforce” the substance of a rule (§ 5 of 14th Amendment), as decided by the S. Ct., to provide a remedy
   4. Congress MAY NOT define the substance
      a. S. Ct. defines the substance
      b. Congress “enforces”
   5. Congress CAN remedy unconstitutional actions and measures but CANNOT make substantive changes to the governing law (City of Boerne v. Flores)

X. Federal Preemption
A. Generally
   1. Deals with conflicts between state and federal law/sovereignty
   2. When an area under regulation can be brought under the power of the federal gov’t, federal laws supersedes state law
   3. Underlying power comes from Supremacy Clause
      a. Federal Constitution and Congressional laws are the supreme law of the land
B. Fundamental issue of federalism
   1. Most actions are subject to regulation by 2, separate sovereigns (state & federal)
   2. Federalism values:
      a. Variation (local, regional)
      b. Experimentation (states as “laboratories”) v. Nat’l uniformity
      c. Protect state sovereignty
C. Historical Roots of Preemption
1. **Gibbons v. Ogden** held that when the federal gov’t regulates an area, that does not necessarily exclude the states \( \Rightarrow \) need for preemption
   a. Had the decision had gone the other way and led to an “either/or” federal v. state authority, the commerce clause would be much smaller and there would be the problem of abrogating state authority

D. How preemption works:
   1. US law = X, State law \( \Rightarrow \) Y
   2. If X and Y can co-exist, let them co-exist
   3. If X and Y cannot co-exist, X (federal law controls, state law is preempted)

E. Dormant Commerce Clause is the other side of the coin of preemption
   1. Preemption controls when Congress has acted
   2. Dormant Commerce Clause controls when Congress has not acted

F. 3 types of preemption
   - Not necessarily mutually exclusive
   1. Express Preemption
      a. = Federal gov’t express states that federal law controls and states may not deviate
         i. Example = Preemption Clause in **Geier v. American Honda**
            A. “no [state may establish a]…standard…not identical”
            B. **Geier** – unelected, administrative agency’s unclear consideration and decision not to require airbags preempted state law requiring airbags and state tort suits claiming that failure to install an airbag = not reasonable precaution
               1. Very strong preemption case
         b. Difficulty = preemption clauses can be ambiguous in application
         c. Can eminent from: treaty, Executive through regulation or executive order
         d. Business likes preemption clause because the business only needs to follow one rule; and federal regulations are typically more pro-business
         e. Another type = savings clause \( \Rightarrow \) says that “nothing in this statute shall affect tort suits…”
            i. Attempt to strike a compromise btw federal regulation and uniformity and preserve state authority
   2. Field preemption (Implied occupation)
      a. = Congress must manifests a clear purpose to occupy a field (**Rice v. Santa Fe Elevator Corp**)
   3. Conflict preemption
      a. = Implies state and federal regulations point in different directions
      b. 2 types:
         [1] Impossibility
A. = situation where “compliance with both federal and state regulations is a physical impossibility” (Florida Lime v. Paul)
B. by definition an actor must violate either the state OR the federal standard

[2] “Frustrating the objective”
A. Can’t say for sure that it is impossible for an actor to comply with both state and federal regulations
B. Look to intent of the federal law and determine if the state law and its intent disturb the federal intent too much → if yes, federal law preempts state law
C. Example = Crosby v. Nat’l Foreign Trade Council = MA law about not buying from Burma

4. Foreign Affairs Preemption
a. Crosby→ MA frustrating Congress’ and President’s foreign policy goals but state not barred expressly, therefore conflict preemption problem (frustrating the purpose)
b. Congress can expressly preempt
c. Crosby v NTFC
i. Facts: Court unanimously struck down a Mass law barring state entities from doing business with companies from Burma
ii. Holding: The Mass law’s more stringent and inflexible provisions presented “an obstacle to the accomplishment of Congress’ full objectives under the federal Act” that is to give the President capacity for effective diplomacy and intended his voice to be the unobscured or contradicted voice of the country in relation to a foreign problem.
iii. Rationale: Examining the legislative history allowed the court to determine that the state law undermined the intended purpose and natural effect of provisions in the federal law. A common end does not neutralize conflicting means. The state act undermines the President’s capacity for effective foreign diplomacy in that they complicate discussion and compromise the President’s ability to speak with one voice for the entire nation in dealing with foreign governments. The President’s power to persuade rests with his ability to bargain with entrance to the entire national economy without exception of enclaves fenced off by inconsistent localities.
iv. Could have struck this down under Dormant Foreign Comm. Clause→ even when Congress has not exercised regulation, states barred from regulating foreign trade because too important for country to speak with one voice

XI. Dormant Commerce Clause
A. Generally
   1. S. Ct. doctrine that takes powers away from the states
   2. Restricts states from passing certain law EVEN when the federal gov’t hasn’t done anything
   3. Commerce power is not exclusively federal; as long as states’ regulations don’t conflict with federal law, no preemption, but: DCC
   4. Congress can affirmatively act and violate/abrogate the Dormant Commerce Clause in a particular area
      a. b/c the DCC only applies in the absence of federal legislation
   5. DCC issues apply w/ equal or greater force to foreign commerce powers

B. Dormant Commerce Clause – 3 types
   1. Express or facial discrimination
      a. = an obvious distinction btw different states’ goods
      b. Usually per se invalid (strong presumption of invalidity)
      c. Exception:
         i. States can subsidize discriminately out of general revenues
         ii. Quarantine laws are okay
         iii. Compensating use taxes = Safe harbor
            A. States can use compensating use taxes to equalize the tax burdens on goods that differ across different states
            B. Law must be specific & pass strict scrutiny test
            C. Validity relies on precise accounting to prove/show the differential taxes are merely a result of compensatory taxes
            D. Compensatory taxes MUST be exactly the same (even a few tenths of a percentage points can show preferential treatment to instate firms and are invalid)
      d. Philadelphia v. New Jersey, (US S. Ct. 1978) – NJ law that is an absolute bar to the importation of out-of-state trash = invalid
   2. Discrimination in effect
      a. = state statute not discriminatory on its face, but effect of the law is clearly discriminatory
      b. Usually per se invalid
   3. Non-discriminatory but “undue burden” on interstate commerce
      a. Example = Iowa regulation on length of trucks
      b. Subject state law to a (Pike) balancing test to determine if the state regulation unduly burdens interstate commerce
      c. Pike balancing:
         i. If state law:
            1) regulates evenhandedly;
            2) to serve legitimate purpose; and
            3) affects interstate commerce only incidentally
            then →
uphold the law UNLESS the burden on interstate commerce is clearly excessive to local benefits (explicit judicial weighing/balancing of the interests)

otherwise → state law is invalid
d. “states can regulate commerce some, but not too much”

4. 

**Exception** = State as a “market-participant”

a. DCC doesn’t affect a state when that state is in the business of selling something itself (State as market-participant as opposed to state as regulator)

b. Here a State can favor its own citizens, can discriminate

c. Twist – a state would be safer saying it would buy from MO and not IL, than saying buying only from MO, because of Crosby (invalidating MA ban on Burma goods) and foreign effects


i. State can only regulate first-order privity interactions

XII. General description of three branches of government

A. Legislative

1. **General applicability** – laws apply to everyone

   a. Exception:

      i. Private bills

   b. Prohibition in Constitution against Bills of Attainder

      i. Bill of Attainder = statute that [1] applies to specific person or group of persons [2] in a very negative way – i.e. makes their behavior criminal;

      A. must have negative result – criminal conviction

      B. Norm that we do not allow Congress to single out an individual and then punish

2. **Democratic accountability**

   a. Congress is constituted a group of regularly elected representatives

3. **Prospective application**

   a. No ex post facto law – no change of the law after the fact

   b. Exceptions:

      i. Solution to protracted litigation may be retroactive

      ii. Some legislation can be ex post facto

      A. The portion of the Constitution that says Congress shall not pass any ex post facto has been interpreted to apply only for criminal results, thus allowing civil, regulatory laws with retroactive results

4. **Procedural limitations**

   a. Must follow bicameralism
B. Executive

1. Difficult to define b/c it manifests in so many different ways
2. “Enforce” laws
   a. police, prosecutors
3. Discretion
4. Very limited procedural limitations
5. Modern executive branch does a lot of ~legislative or ~judicial things
   a. agency regulations = ~legislative
   b. ALJ = administrative law judge over 2000 judges (compare with ~800 Art. III federal judges) = ~judicial

C. Judicial

1. Individualized
   a. looks at factual specifics
2. Degree of impartiality
3. Procedural limitations
   a. Must follow rules of law
   b. Can only hear and adjudicate cases with standing, ripeness, etc.

XIII. The Powers of the President

A. Art. II – is the controlling § of the Constitution dealing with the Executive/Pres.
   1. Probably the most vague article of the Constitution ➔ less text to guide executive power
   2. Because of political question doctrine, the Judicial branch often stays out these kind of cases ➔ Lot less case law than there otherwise would be ➔ Not constrained by case law here
   3. Thus, the guiding principles are more vague and more policy driven

B. Every bit of power the Executive can have must come from 1 of 2 sources:
   [2] From Congress = delegation of Art. I power
      a. Congress can choose how much power to delegate
      b. Most of President’s power comes from Congress

C. Different “ways” to view/interpret Executive power (Youngstown)
   1. Textualist, formalist
      a. Look to the text to see if the Pres. has the power
   2. Custom, practical
      a. Look at the way things have developed in the history since the founding
      b. “The way the framework has consistently operated fairly establishes that it has operated according to its true nature.”
      c. Problem with this type of interpretation = protection of minority, civil rights b/c if in the past we have had the “tyranny of the majority” that does not mean that is the way the structure was designed to operate
   3. Functionalist, ~ anti-formalist
      a. Tripartite analysis of presidential authority
         i. Powers are interactive and relational
To evaluate the power of the President, must also consider the power of the Congress; and vice versa

[1] When President acts with Congressional approval = max pres. power
[2] When President acts with Congressional silence = twilight zone
  i. Hard to tell what the President has the power to do
  ii. Failure of Congress to specifically delegate authority does not, “especially [in] the areas of foreign policy and national security,” imply “congressional disapproval” (Dames & Moore v. Regan)
  i. Doesn’t mean no power, b/c if the President has Constitutional power he can act, just means no Congressional power

XIV. Congressional Encroachment on the Power of the Pres./Delegation of power to Pres.

A. Delegation of power, generally
  1. Congress can be exceeding broad in its delegation of power
  2. Congress can be very specific in its delegation of power
  3. Thus Congress has huge discretion in how much power to delegate

B. Test for constitutionality of delegation (Morrison v. Olson)
  [1] Is there a specific textual provision in the Constitution preventing the delegation?
     - If yes, unconstitutional
     - If no, go to [2]
  [2] Does this law “work an encroachment on the other branches?”
     - If yes, unconstitutional
     - If no, constitutional

C. Delegation doctrine
  1. Delegation must contain an “intelligible principle”
     a. Functionally, courts almost never invalidate a delegation for being too broad
     b. “no teeth” in “intelligible principle” standard
     c. “as it wishes” is insufficient
     d. “in the public interest” is OK
  2. Only types of delegation that would be struck down now:
     a. Power to write statutes
     b. Delegation with no principle
        i. Almost any principle is sufficient, so only applies if there is no principle
  3. Leads to and Consequence of “administrative state”
     a. Congress often “passes the buck” to the executive branch by delegating law making authority to administrative agencies
        i. Rationale:
           A. Political science – costs, tactical, pass the buck
           B. Competency – FDA, Nuclear energy, EPA

D. Only 1 way for Congress to delegate power (INS v. Chadha):
1. \( H + S + P = \text{law} \)
   a. Bicameralism and Presentment OR Bicameralism and Override
   b. Art. I, § I

2. Congress MUST abide by its delegation of authority UNTIL that delegation is legislatively altered or revoked

3. Because convenience and efficiency are not the primary objectives of the federal gov’t, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of gov’t, standing alone, will not save it if it is contrary to the Constitution

E. Forms of “law”

1. Bill
   a. \( H + S \) (bicameralism - majority) + P (presentment) = law
   b. Most common

2. Joint Resolution
   a. Exactly same process as a bill
   b. Functionally the same as a bill, perhaps a little different procedure

3. Concurrent Resolution
   a. H + S
   b. No P involvement
   c. No binding force as law outside of Congress

4. Used:
   a. In purely advisory situations
      i. i.e. what Congress thinks the Constitution says
   b. Bind only the Congress itself
      i. i.e. spending limits on budget process; Committee system
      ii. only binds the members of Congress
         A. Internal administrative procedures

5. Simple Resolution
   a. just the House OR just the Senate
   b. Internal rules
      i. i.e. Senate filibuster (no limit on debate, need 60% vote for cloture)

F. Impermissible Delegation of Legislative Power

1. Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws, except by impeachment (Bowsher)
   a. Congress may delegate power, but it may not attach string to that delegation

2. 2 modes of analysis to determine if a delegation of power is impermissible (Bowsher)
   a. Does the delegation violate a specific textual prohibition?
      i. Presentment clause, Appointment power, etc
      ii. If yes, impermissible; If no, go to (b)
   b. Does the delegation work an unlawful shift in the balance of power/encroachment upon another branch of gov’t?
i. If yes (reshuffling gives undue power to one branch over another – disrupts horizontal separation of powers), impermissible; If no, permissible

G. Permissible Delegation of Legislative Power
   1. Broad
   2. Must conform to Art. I, § 1 – bicameralism and presentment or override
   3. Must contain an “intelligible principle”

H. Examples of unicameral power:
   1. Impeachment
      a. House bring charges = impeach
         i. impeach ~ indict; impeach ≠ oust
      b. Senate “try” (tries) the impeachment
         i. Requires supermajority = 2/3
   2. Treaty
      a. Senate alone ratifies
         i. Requires supermajority = 2/3
   3. Appointments
      a. Senate alone confirms appointments
         i. Requires simple majority = 51%, subject to filibuster, so effective requires 60%
      b. Appointments Clause
         i. Art. II, § 2 = Pres. has the power…with Senate consent to appoint:
            a) ambassadors
            b) public ministers
            c) judges of the Supreme Court
            d) all other Officers of the US
         ii. but Congress may vest by law appointment of inferior Officers in:
            a) President alone
            b) Court of Law
            b) Heads of Departments
         iii. President must initiate, Senate must ratify
         iv. Of all these choices, no where can Congress appoint an officer itself
      c. Removal Clause
         i. Only text to help us is Impeachment Clause (silent to all other procedures for removal)
            A. “high crimes and misdemeanors”
            B. Rare, high standards, difficult to get/show
            C. What about removal for something less?
               1. Inefficiency, malfeasance, neglect of duty (Bowsher)
         ii. Underlying value = checks and balances
         iii. Generally, the person to who can remove another, has a strong influence of that person
4. Hearings  
   a. Subpoena power, get documents, hear testimony

H. President’s removal power over independent agencies  
   1. The President, as head of the executive branches, has the power to control  
      the federal administrative agencies – b/c they are executive enforcement  
      powers
   2. But, President cannot remove a member of an independent regulatory  
      agency in defiance of restrictions in the statutory framework

I. Independent Prosecutor (Morrison)  
   1. B/c the President is the head of the executive branch the Attorney General  
      serves both underneath and at the pleasure of the President there is  
      concern about the independent investigatory check on the President
   2. Therefore, Congress provided for an Independent Prosecutor in certain  
      circumstances
   3. HELD, constitutional b/c Congress is not attempting to increase its own  
      powers at the expense of the Ex. Branch
      a. Specifically, the Independent Counsel may be terminated for  
         “good cause” by the President through an order to the AG

J. Interbranch appointment is allowed  
   1. Appointment/supervision by the courts is OK, explicitly announced in  
      Art. 2, § 2

K. Line Item Veto (Clinton v. New York)  
   1. There is no provision in the Constitution authorizing the President to  
      enact, amend, or to repeal statutes; even though he may initiate and  
      influence legislative proposals
   2. Powerful reasons for construing this Constitutional silence on the subject  
      of unilateral Presidential action that either repeals or amends parts of duly  
      enacted statutes as equal to an express prohibition
   3. Problem = the President’s exercise LIV amends law AFTER (H + S + P)  
      becoming law WITHOUT the “finely wrought” procedure designed by the  
      framers. Thus, the President, effectively has the unilateral power to change  
      the text of duly enacted statutes.
   4. This is bad b/c when a President cancels an item of new direct spending or  
      a limited tax benefit he is rejecting the policy judgment made by Congress  
      and inserting his own policy judgment.
   5. These cancellations are the functional equivalent of partial repeals of an  
      act of Congress. This repeal fails to satisfy the procedure for lawmaking  
      set forth by Art. 1 §7
   6. Line Item Veto Act is ultimately invalid b/c otherwise it would authorize  
      the President to create a different law—one whose text was not voted on  
      by either House of Congress or presented to the President for signature. A  
      bill with part of it lined out it surely is not a document that may “become a  
      law” pursuant to the procedures designed in Art. 1 §7
   7. Though a delegation may be convenient or “desirable” does not mean we  
      will ignore the Constitution – outer limit of functionalism
XV. Presidential Privileges and Immunities

A. Privilege attaches to the information (documents, testimony)
   1. Zone of protection attaches to testimony, documents, etc. - information itself is protected
   2. Tension btw underlying value/norm of encouraging free and open conversation and sharing of information between certain people and special zones of secrecy covered by privilege
   3. Because of this underlying value we are willing to accept privileges even though privileges are hostile to one of the central goals of our justice system (bring out as many facts as possible in search of truth)
   4. Privilege remains even after the person steps out of the office b/c the protection attaches to the act
   5. Exists to prevent “chilling” of speech – especially in private discussions with the President
   6. Hierarchy of privilege protection:
      a. Absolute immune from process
      b. Absolute privileged
      c. Presumptively privileged
      d. Never privileged
   7. United States v. Nixon – HELD the executive does not get an “absolute privilege” but the executive privilege remains strong ~ presumptively privileged v. the demands of a criminal trial
   8. In the future, executive privilege may be strongly upheld if the executive asserts a special reason for the privilege (i.e. national security concerns)
   9. RULE, no absolute privilege for executive, but there is a presumptive privilege and this presumption can be ratcheted up if the executive asserts a special reason for the privilege (i.e. national security)

B. Immunity attaches to the person (office, official acts, omissions, refusals)
   1. The person himself is protected, while in office
   2. Tension btw the norm that people are held accountable for their actions and immunity (that a person has a personal defense “cloak”)
   3. Not absolute
   4. Even with everything we say about presidential immunity, the immunity attaches to the office
      a. As soon as the person steps out of the office, immunity dissolves
   5. RULE = the President enjoys TOTAL/ABSOLUTE IMMUNITY from civil prosecution regarding official acts/decisions made in his official capacity while in office
      a. Rationale:
         [1] Avoid decision distortion
         [2] Conserve time, energy, and resources

XVI. Impeachment of the President

A. Impeachment, generally
   1. Decision to impeach and the criteria for conviction of impeachment is the quintessential political question
2. Completely committed to Congress’s discretion
3. The only thing Congress can do when they impeach is throw the person out of office,
4. Double jeopardy does not attach, the ex-president can certainly be prosecuted (Art. I, § 4)
5. Art. II, § 4 – “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

B. Impeachment procedure
1. Impeachment ~ indictment, done by House of Representatives
2. Trial carried out by Senate, requires supermajority, Chief Justice presides over the trial, Senate can run the procedure as they want

C. Impeachment substance
1. “Treason, Bribery, or other High Crimes and Misdemeanors”
2. No judicial meaning given to these words
3. All substantive meaning comes from Senate, public, Constitution

XVII. Presidential Pardon Power
A. Pardon Power, generally
1. Absolutely untouchable by the courts
   a. No pardon can be revoked OR reviewed
   b. No court can ever order the executive to give a pardon
   c. once given, a pardon is absolute
2. Completely committed to the President’s/executive discretion

B. How pardon works:
1. President is procedurally unrestrained
   a. Can be granted after all appeals are exhausted
      i. 70-80% occur after release from prison
   b. Can be granted before the indictment – blanket “get out of jail free” card (Ford’s pardon of Nixon)
   c. Can be granted at any time in between
2. President is not required to give a reason/rationale
3. The large majority of Presidential pardons are given after the convict has served their time
   a. Reason = lowest political cost – not letting a person out of jail…
4. Ideally, reasons for pardon:
   a. Individual fairness (what the US S. Ct. describes as “mere error correction”)
   b. Innocence
   c. Political function
   d. Guilty, but sentenced too harshly
   e. Mercy
XVIII. Review – Themes of the class

- Although individual liberty is always in the background, the paradigm of this class deals with government power – how the constitution divides up and limits that power
- Horizontal v. Vertical Separation of Power
- Vertical Separation of Powers
  - Division btw national and state gov’t
  - Restraints on federal gov’t = National gov’t is one of enumerated power – every federal action must be justified with a specific grant of power from the text of the Constitution
    - Art. I, § 8 – affirmative powers of Congress
      - Precisely because those powers are fairly specific, we look to:
        - Commerce Clause
          - Great deal of the weight of the modern gov’t rest here
          - Know Lopez and Morrison very well for modern commerce clause
          - But, historically, know where things started, New Deal expansion, long period (40-50 yrs) of no/very limited Judicial review, Lopez and Morrison
          - Lopez – 3d prong is the most important
            - Use aggregation (Wickard)
          - Darby – if a good crosses state lines (interstate commerce), it is subject to federal control
            - Interstate components is sufficient
            - If a good is going to move in interstate commerce, you can (probably) regulate it before it does
            - Once a good moves in interstate commerce, it is subject to federal jurisdiction for the rest of its life
    - 10th Amendment/11th Amendment
      - When the regulated party is a state gov’t, there might be extra “defenses” to federal exercise of power
      - Apply even when some kind of behavior is within the reach of Congress (if Congress tried to regulate a private business this way it would be ok)
      - Special shield that even though it is within Congress’s power, Congress cannot regulate the state because the state is a state
        - This US S. Ct., from 1992, has shown more interest in policing this boundary more than any other historical court
          - Kennedy, O’Connor, Scalia, Rehnquist, and Thomas
    - Restraints on states
      - Dormant Commerce Clause
        - Rules of 3 kinds of categories
          - Facial discrimination
          - Discriminatory in effect
          - Balancing test for inter-state commerce
    - Think about the ways the constitutional structure itself embodies the idea of federalism
      - State by state power
• 2 senators from each state
• President elected on the basis of states (electoral college)
  o Skim the Constitution
    ▪ Know where things are
    ▪ Think about interpretive and argumentative techniques
  • Textualist
  • Originalist (original intent)
    o Explicit conflict btw Textualism and Originalism = 11th Amendment and citizens’ rights to sue states
  • Use of history
    o One point of time at founding as snapshot
    o Look to continuum of time from founding to now
      ▪ Custom
  • Justice, fairness
  • Stare decisis
• Horizontal Separation of Power within/between the Federal gov’t
  o Primary goal = preservation of liberty against tyranny
  o Big question = do the particular powers and limitations meet this primary goal?
  o [1] Judicial power
    ▪ Marbury v. Madison
    ▪ Power of federal courts over the other 2 branches
      o Not a foregone conclusion then
    ▪ Judicial review
    ▪ Vast judicial power
    ▪ But limits on judicial power
      ▪ Procedural limitations
        o Must wait for a particular case
          ▪ In controversy
          ▪ Standing
          ▪ Ripe and not moot
        o No advisory opinions
      ▪ Substantial limitations
        o Political questions
          ▪ Implicit and explicit debate on the scope of US S. Ct. power
            ▪ “Who are we, the S. Ct., to set these lines?”
            ▪ Judicial “activism” v. judicial deference to the political branches
  o [2] Executive power
    ▪ Very limited procedural limitations
    ▪ No analogue to Art. I, § 7 for the President
    ▪ Art. II is much more vague
    ▪ Special privileges and immunities
  o [3] Congress
• Generally, Youngstown = good example of looking at examining power, good summary of Presidential power