

# Constitutional Law I Outline

## Overarching Question in all ConLaw analysis:

Does the government actor in question have Constitutional authority to take this action?

(Related question: If it's not provided for in the Constitution, always ask the flip-side: Is it prohibited?)

## I. Judicial Power ..... § Judicial Power

A. **Judicial Review** (Not a power enumerated in the Constitution. *Marbury* finds this power.)

### 1. Constitutional Source of Judicial Authority

#### a. **Å3, §1: The Judicial Branch**

(1) “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.”

#### b. **Å3, §2: Judicial Power**

(1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of

different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme [sic] Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme [sic] Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**c. Å3, §2: The Judicial Power Shall Extend to:**

**(1) All cases in Law & Equity arising under:**

**(a)** The Constitution;

**(b)** Laws;

I. This enables the Federal Courts to hear state law cases and adjudicate based on the state law in Federal Courts.

**(c)** Treaties.

**(2) All cases affecting:**

**(a)** Ambassadors;

**(b)** Public Ministers;

**(c)** Consuls.

**(3) Controversies:**

**(a)** To which the U.S. shall be a party;

**(b)** Between two or more states;

**(c)** Between citizens of the same state claiming land under grants of different states;

- (d) Between citizens of different states (diversity jurisdiction);
- (e) Between a state and citizens of another state;
  - I. **Æ11** Makes this a one-way provision: State as π v. Citizen as Δ ONLY.
  - II. Citizens may not sue in Federal Court another state.
- (f) Between a state, or its citizens, and foreign states and their citizens.

## 2. **Marbury v. Madison: Birth of Judicial Review**

### a. **History**

(1) **Winning by Losing:** Power to “Say what the Law is.”

*Marbury* was brilliant in that it was “winning by losing.” By ruling that it didn’t have the jurisdiction to rule on *Marbury* (that Congress could not add to the court’s duties/powers) it rules that it has a much higher power to review legislation and executive actions for legality - **the power to say what the law is.**

(2) **Judicial Review Defined:** The power of the Supreme Court (& Appellate Courts, generally) to decide & interpret the Constitutionality of federal, state, and local laws as well as Executive actions.

(a) **State Judicial Review:** Judicial Review in the states is not granted from the Federal Constitution; it either comes from State Constitutions or from State Statutes.

### b. **Rules from Marbury:**

(1) **Ω1:** Wherever there is a legal right there must be a legal remedy available to citizens.

(2) **Ω2:** The Constitution is a set of limitations and enumerated power and therefore is inviolable.

(3) **Ω3:** Where laws passed conflict with the Constitution, they are void and not laws at all.

(4) **Ω4:** The courts are obligated to review the Constitutionality of laws and have the power to invalidate them when in conflict with the Constitution.

(5) **Ω5:** The courts can rule on executive actions that are legal duties; those things that are specified the executive must do in the Constitution.

(a) As opposed to discretionary actions which the court cannot rule on. If the discretionary actions of the President are not liked, the people have electoral review for these kinds of actions.

(6) **Ω6 (from *Cohens v. Virginia*):** Criminal Δs can seek Supreme Court Review when they claimed their conviction violated the Constitution.

### 3. Constitutional Interpretation

#### a. In General:

(1) We interpret the meaning of a text and then construct legal rules to help us apply the text to concrete fact situations. Interpretation involves ascertaining the meaning of words; construction refers to deciding their legal effect.

(a) **Finding Meaning:** 3 Kinds in analyzing the law:

I. **Linguistic:** What a word or law means (in the semantic sense; what do the words mean?).

II. **Teleological:** What is the purpose of the law?

III. **Applicative:** How does it affect my client?

(b) **Key Question in Constitutional Analysis:**

I. If it's not provided for in the Constitution, always ask the flip-side: Is it prohibited?

b. **Interpretation:** The activity of discerning the linguistic meaning (or semantic content) of a legal text.

(1) **Criteria (Sources) Courts Use in Interpreting the Constitution:**

(a) **Text:** Usage, grammar, legal norms of how words are used by lawyers, dictionaries.

(b) **Context:** Structure, where it is in the Constitution.

(c) **Drafting History** of the Constitution.

(d) **Purpose of the Provision** being considered (Intent).

(e) **Precedent.**

(f) **Consequences:** What happens if the court decides one way or another?

(2) **Reason ConLaw focuses on Interpretation:**

(a) Skewed sample of appellate decisions; very few cases ever go to court and only questions that have good arguments on both sides are those that end up at the Supreme Court.

(b) Some parts of the Constitution leave much unspoken which require the Court to choose what the rule is.

(c) Much of the Constitution is written in broad language, which is inherently ambiguous.

(d) The values of the Constitution (liberty, security, stability, equality, change when needed) are disparate values that often clash with one another in any given case. (E.G. Can't have perfect liberty and perfect security.)

(e) The Constitution doesn't contain any rules on how to interpret it. Even if it did, those would be interpreted as well.

c. **Construction:** The activity of determining the legal effect (or legal content) of a legal text.

(1) **Clear Statement  $\Omega$ :** Big ideas are plain to see in a Constitution. So interpretations by lawyers that argue for big ideas that are NOT plainly there are usually found not to be there.

(2) **Constitutions are Written in General Terms:** General Terms are used in the Constitution to avoid the problem of statutory specificity. Constitutions are not be interpreted like it's a statute. It should be interpreted as the law to establish the broad outlines of government power and structure. This enables it to be flexible and long-lived. If it were written like a statute, every time the Congress needed to do something

NOT specified, they would have to amend the document and that would make it unwieldy from a practical standpoint.

## B. Checks on Judicial Review

### 1. Congressional Power to Regulate Appellate Jurisdiction of the Supreme Court

#### a. Limits on Judicial Power (from interpretations in holdings on Å3):

- (1) **No Advisory Opinions:** There must be an actual case or controversy which puts the  $\pi$  and  $\Delta$  in adverse position to one another; without this the court cannot shed light on the issues in dispute. (*Hayburn's Case.*)
- (2)  $\pi$  must have standing.
- (3) Federal Courts exist solely to decide on the rights of individuals; Constitutional issues are decided only in that context. (*Marbury.*)

#### b. Limits on Congress from Interfering with Judicial Power

(Separation of Powers limits):

- (1) **CAN'T ADD** to the Supreme Court's original jurisdiction; (*Marbury*)
- (2) **CAN'T SUBTRACT** from Appellate Jurisdiction; (*McCardle*)
  - (a) Congress's power to regulate the Appellate Jurisdiction of the Supreme Court is unclear with regard to the "exceptions and regulations" phrase in Å3, §2. The cases are divided on what this phrase means and what it enables Congress to do with the court's Appellate Jurisdiction.
- (3) Cannot breach Separation of Powers. (*Klein, Plaut*)
  - (a) Congress makes standards. The courts make judgments.

### 2. Justiciability & Standing

- a. **Justiciability:** The limits upon legal issues over what can be heard in Federal Courts. **Is there (1) an actual dispute (2) Capable of being decided by a court?** In principle, the

Supreme Court tries as much as possible to avoid ruling on Constitutional questions when it can and will find other ways to resolve cases before it other than ruling on Constitutional issues.

**(1) Kinds of Justiciability:**

- (a) Constitutional Justiciability:** Right to hear certain cases guaranteed by the Constitution; **NOT** revocable by Congress.
- (b) Prudential Justiciability:** Right to hear cases based on prudent judicial administration; can be revocable by Congress.

**(2) Requirements for a Federal Court to have a Justiciable Case** (ALL must be met for case to be heard):

- (a) Standing:** The legal right to initiate a lawsuit.  
Considered the most important justiciability requirement. Does the  $\pi$  have a “personal stake” in the justiciable controversy? Each claim by a  $\pi$  requires valid Standing. The elements of Standing (the “irreducible constitutional minimum” for standing from *McConnell v. FEC*, *Lujan v. Defenders of Wildlife*):
  - I. Injury:**  $\pi$  must allege they have suffered or will imminently suffer injury; (constitutional)
  - II. Causation:**  $\pi$  must allege that the injury is traceable to the  $\Delta$ ’s conduct; (constitutional)
  - III. Redressability:**  $\pi$  must allege that a favorable Federal Court decision is likely to redress the injury; (constitutional)
  - IV. Third-Party Prohibition:**  $\pi$  cannot raise the claims of third parties not before the court; (prudential)
    - A. Exception:** If the relationship between the third-party and the  $\pi$  is substantially close;
    - B. Exception:** The likelihood that the third party can sue on its own behalf (for the same claim);

**V. Generalized Grievances Prohibition (aka Taxpayer Prohibition):** π may not sue as a citizen or taxpayer

who shares a grievance in common with all other citizens or taxpayers for generalized grievances (*Frothingham*). (prudential)

**A. Exception:** π may challenge government expenditures that violate the Establishment Clause of the 1st Amendment which prohibits the establishment of religion (*Flast v. Cohen*).

**(b) Ripeness:** Overlaps somewhat with Standing's Injury Requirement, because to be Ripe, an injury must have occurred or will imminently occur;

I. When may a party seek pre-enforcement review of a statute or regulation? (challenge the legality of a law);

II. When may a court hear a request for Declaratory Judgment?

**III. Purpose:** The purpose of Ripeness/Declaratory Judgment is so that individuals do not have to obey unconstitutional laws or are forced to violate them in order to challenge them in court.

**(c) Mootness:** If further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law.

**(3) The Political Question Doctrine:** Some alleged Constitutional violations are inappropriate for judicial review because they are "political questions" left to the other branches of government to interpret and enforce (Note: *Marbury v. Madison* was the first case to deal with this issue). Grounded in the Separation of Powers. *Baker v. Carr* provides the criteria for what falls into this category of non-justiciability (first two are considered the most important):



- (a) **Separation of Powers:** A textually demonstrable constitutional commitment of the issue to a coordinate political department (*Marbury v. Madison*)
- (b) **No Standards:** A lack of judicially discoverable and manageable standards for resolving it (in other words, a signal that it's a political question and nonjusticiable is that courts can't find a rule/standard to resolve it);
- (c) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- (d) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government;
- (e) An unusual need for unquestioning adherence to a political decision already made;
- (f) **Foreign Relations** is an explicit area of Executive power that is **always** political in nature.

**b. Note:** In looking for Causation under standing, this is not about the kind of causation you'd see in Tort (proximate cause or but-for cause).

**c. Note:** Keep in mind for these analyses (Justiciability Doctrines) are being done in the pleading phase, not after a harm has occurred (as is the case in a tort case). The courts have to take "the allegations as stated as true" to rule on the pleadings.

**d. Note:** The meaning of a Supreme Court ruling depends largely on how courts in the future apply the ruling.

### 3. **Sovereign Immunity of States**

- a. Immunity applies to Private Federal Lawsuits against states;
  - (1) NOT immune to suits brought by the Federal Govt. against a state.
  - (2) NOT immune to suits brought by citizens of states against a state for **violations of Federal Law (Federal Questions)**.

(again, only Private, Common-Law suits were barred by Æ11);

(a) *Hans*, however, stands for the principle that unconsenting states may not be sued in Federal Court for any reason, with some exceptions:

- I. Suits brought by the U.S.;
- II. Suits brought by another state;
- III. Suits in which the Supreme Court is reviewing a state court decision;
- IV. Suits against a political sub-division of a state;
- V. Suits where Congress has abrogated states' Æ11 immunity.

b. "Sovereign Immunity" appears nowhere in the Constitution; interpretation of the limits on Judicial Power create it.

c. **General Sovereign Immunity Ω:** Congress may make laws permitting federal suits against states only if authorized by the 14th Amendment's §5 power; otherwise, the 11th Amendment's Sovereign Immunity provision is a bar to suit. *Seminole Tribe of Florida v. Florida*

d. **Æ11:**

(1) "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."

(a) Æ11 does not say that citizens cannot sue their *own* states. But the ruling in *Hans v. Louisiana* addressed this apparent exception and forbade that as well (outlier case, but still followed). *Fitzpatrick*, however, changes the holding in *Hans*, because of Æ14 state sovereignty limitations.

(b) **Can't Sue States in State Court for violating Federal Law:** State sovereign immunity under the 11th

Amendment prevents a non-consenting state from being sued in state court for violations of federal law. Must sue in Federal Court if a remedy is allowed by Federal Law.

*Alden v. Maine.*

- (c) **Semi-Exception:** You can sue State Officials for **injunctive relief only** (not money damages) in Federal Court by private citizens. *Ex Parte Young*

e. **Æ14:**

- (1) In relation to Sovereign Immunity, the operative clause is §5 which states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

- (a) This §5 provision creates the basic rule: **Congress may authorize suits against States.**

I. **Power of *Fitzpatrick*:** Congress has the power under the Fourteenth Amendment to abrogate sovereign immunity of states, because the Fourteenth Amendment was enacted specifically to limit the power of the states, with the purpose of enforcing civil rights guarantees against them.

## II. **Legislative Power** ..... § **Legislative Power**

### A. **Two key Questions on the Constitutionality of any act of Congress:**

1. **Authority:** Does Congress have authority under the Constitution to legislate?
2. **Interaction:** If so, does the law violate another Constitutional provision or doctrine, such as by infringing Separation of Powers or interfering with individual liberties?

### B. **Sources of Congressional Power**

#### 1. **Å1: Enumerated Powers & Limitations**

##### a. **Principle of Å1:**

- (1) The Article establishes the powers of and limitations on the Congress, consisting of a House of Representatives

composed of Representatives, with each state gaining or losing representation in proportion to its population, and a Senate, composed of two Senators from each state. The article details the manner of election and qualifications of members of each House. It outlines legislative procedure and enumerates the powers vested in the legislative branch. Finally, it establishes limits on the powers of both Congress and the states. There are 10 sections Article I.

(2) **Principle of Å1:** Congress may act **ONLY IF** there is express (enumerated) or implied authority in the Constitution, whereas states may act unless the Constitution prohibits the action. (The 10th Amendment restates this concept.)

(3) **McCulloch v. Maryland:** Most important case outside of *Marbury*. Defines scope of Congress' powers and delineates the relationship between the federal government and the states (as noted below in b, c, d, e and the Implied Powers section). The ruling established the principle of implied powers through a broad interpretation of the U.S. Constitution, giving Congress an expanded role in governing the nation. The decision also reinforced the supremacy of federal law over state law when the two conflict. The landmark ruling became the basis for key Court decisions throughout the nineteenth and twentieth centuries supporting congressional activities.

**b. Check on Å1 Power:**

(1) **Æ10:** "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."

(2) **Principle of Æ10 + Å1:** "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty

reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” Explained well by Justice O’Connor in *New York v. U.S.*

- (3) **Æ10 Debate:** Some claim Æ10 is merely a tautology. In this vision, it lacks importance. Other claim is it very important and functions to protect state sovereignty and rights.

c. **Å6, Cl. 2: Supremacy Clause:**

- (1) “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority to the contrary notwithstanding.”
- (2) **Supreme Law:** Federal government’s laws and treaties are the “Supreme Law of the Land”. Why?
- (3) **Because Constitution is Supreme Source:** States are and State Law is inferior to the Federal Government. From a Constitutional theoretical perspective, this is because the Constitution establishes a power of ALL the citizens of ALL the states, and it’s not possible to let a minority of individuals (a state) to direct or order the Federal Government to do something because it is the majority and operates on behalf of all citizens.
- (4) **Perpetual Tension with States:** Individual States deserve the most careful protection of their power; in addition, the national government’s power needs to be protected to enable it to deal with national problems. This creates a perpetual tension, which is a byproduct, of the Constitution’s construction and deliberately divided power.

d. **Å1, §8, Cl. 1: Taxing & Spending Clause:**

- (1) “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United

States; but all Duties, Imposts and Excises shall be uniform throughout the United States”

(2) **Principle:** To enable the Federal Government the ability to tax & spend; to also correct what nearly destroyed the Confederation - no mechanism to raise money to provide for the national government.

(3) **Court View:** Congress has broad authority to tax and spend for the general welfare; a broad, free-standing power of Congress.

(4) **Using Taxing & Spending Power to compel states non-coercively to enact law:**

(a) **Key Case: *South Dakota v. Dole, 1987:*** Non-coercive financial incentives by Congress to compel states to enact laws are a constitutional exercise of the taxing and spending power as long as the states can freely choose to accept or reject them. **Conditions to determine constitutionality of a spending power enactment:**

- I. The exercise of the spending power must be in pursuit of “the general welfare”;
- II. Congress in conditioning the states’ receipt of federal funds, it must do so unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences of their action;
- III. Conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.
- IV. **Note:** No spending clause case has ever been affirmed by the court as “illegitimate” or “coercive” to date.

e. **Å1, §8, Cl. 18: Necessary & Proper Clause:**

(1) “The Congress shall have 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.”

(2) **Principle:** The “Implementation Authority” of Congressional power granted by the Constitution. Necessary means in the Constitutional context “required”.

(a) **Connection to a Constitutional Power:** Laws made under this clause must LINK back to an enumerated power; see below.

(3) ***United States v. Comstock*:** The scope of the Necessary and Proper Clause is such that, if the end is legitimate, if it is within the scope of the Constitution, and if all means are appropriate, which are plainly adapted to that end and are not prohibited, but are consistent with the letter and spirit of the Constitution, the federal statute is constitutional.

(a) **Laws Must Link Back to an Enumerated Power:** The court confines the Necessary & Proper Clause to a demonstrable connection to an Enumerated Power of Congress. A chain of actions, laws, and/or administrative rules needs to be connected back to an enumerated power to be valid (notably, an individual “link” may be unconstitutional, but if the initial action is tied to an enumerated power, then it is constitutional).

(b) **Example chain:** Make Post Office > Criminalize theft of Mail > Est. Prisons for Thieves > Create Prison Administration & Rules > Duty of Care for Prisoners and Public Upon Release

I. First step is an enumerated power, rest are concomitant and grow from the Necessary & Proper Clause enactment authority granted Congress by the clause.

## 2. Implied Powers

a. **Laws & Regulations to Carry Out Enumerated Powers:**

- (1) **Principle:** By virtue of stated powers like “to levy taxes”, “coin money”, “raise and support armies”, et al., the enforcement and implementation actions necessary to make those functions possible are thus “implied” powers that Congress has authority to create law to enforce these functions. These are the enforcement authority for actions like Chartering Banks which is not expressly stated in Å1. Congress isn’t merely limited to do things that are explicitly stated; Congress can do things that are implied by the powers it has enumerated to it.
- (2) **Implied Powers Ω:** If there is an implied, but unstated, power, Congress may exercise it.
- (3) ***McCulloch v. Maryland:***
  - (a) The Constitution grants to Congress implied powers for implementing the Constitution’s express powers, in order to create a functional national government.
  - (b) State action may **not** impede valid constitutional exercises of power by the Federal government.

## C. **Commerce Clause Authority: The Vast Power of Federal Authority via Commerce**

- 1. **Key questions for determining Constitutionality of Commerce Clause issues:**
  - a. What is “commerce”?
  - b. What does “among the several states” mean?
  - c. Does the 10th ÅE limit Congress? (Idea is that the 10th ÅE strictly limits federal intrusion into state sovereignty.)
- 2. **Source of Authority: Å1, §8, Cl. 3:**
  - a. **Text:**
    - (1) “The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;”
    - (2) Commerce Clause issues are the most litigated Constitutional Law issues of any kind.



**(3) Multiple Uses:** Used to regulate many parts of national life that appear on their face not to be commerce:

- (a)** Environmental laws;
- (b)** Civil Rights laws;
- (c)** Criminal Statutes; et al.

**(4) Key Questions for Constitutional Interpretation:**

- (a)** What is “commerce”?
- (b)** What does “among the several states” mean?
- (c)** Does the 10th AE limit Congress?

**b. 2 Functions:**

- (1) Purpose:** To prevent individual states from erecting trade barriers to interstate and foreign trade; to create a common market.
- (2) Commerce Clause as Positive Law.** Authorizing Congress to take positive action.
- (3) Dormant Commerce Clause as negative law.** To limit state and local regulation in a negative sense. (See below: *Const. v. States*)

**3. Checks on Commerce Authority: The Economic Liberties**

**a. Constitutional Right to Enter & Enforce K:**

- (1) A1, §10, Cl. 1: Contracts Clause:** “No state shall pass any law impairing the obligation of contracts”
- (2) Principle:** The Contract Clause prohibits states from enacting any law that retroactively impairs contract rights. The Contract Clause applies only to state legislation, not court decisions.
  - (a) Reason for Enactment:** To prevent “private relief” bills that states did frequently in the Confederation.
  - (b) Bankruptcy:** This is why Bankruptcy is also a Federal Filing; although by Congressional statute, states often supplement with state provisions making each state’s procedures different.

**b. To pursue a Trade or Profession: Å6, §6, Cl. 1: Privileges & Immunities Clause**

(1) “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

(2) **Principles:** From *Toomer v. Witsell*.

(a) To fuse the several states into a single nation;

(b) To ensure that a citizen from State A who ventures into State B enjoys the same privileges which the citizens of State B enjoy.

(3) **Discrimination can be Allowed:** The P&I Clause does NOT bar all forms of discrimination against citizens of other states. It is only triggered if the discrimination affects a right that is “fundamental”.

(a) **Exception:** If the state can demonstrate a “substantial reason” for the discrimination, it may be allowed.

(4) Unlike the Dormant Commerce Clause, there is **no market participant exception to the Privileges and Immunities Clause**. That means that even when a state is acting as a producer or supplier for a marketable good or service, the Privileges and Immunities Clause may prevent it from discriminating against non-residents

**c. To acquire, possess, and convey property:**

(1) **Æ5, Æ14: Due Process Principle:** These rights are derived from the 5th and 14th Æ protecting property from being taken without Due Process of Law (14th) and Just Compensation (5th).

**4. Evolution of Commerce Authority: Four Eras of Court Rulings**

**a. Nascent Period: 1791 - 1890**

(1) Broadly defined Commerce Power but minimally used, rarely ruled on.

- (2) This era is not a focus of most of the discussion of the Commerce Clause. *Lochner* Era forward is.
- (3) **Key Case from Era:** *Gibbons v. Ogden*:
  - (a) **Ω:** Congress' power to regulate interstate commerce does not stop at the external boundary line of the state. Congress' power to regulate within its sphere is exclusive. (This rule invalidated a claim that commerce only within the borders of a state is beyond Congress' control.)

**b. ~~Æ~~10 & *Lochner* Era: 1890 - 1937**

- (1) Narrowly defined Commerce Power and used the 10th Amendment as a limitation (and the Contracts Clause as well, *Lochner*). Broke spheres of commerce into distinctly state and federal preserves that should not and did not interact.
- (2) **~~Æ~~10:** "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."
  - (a) The Rational-Basis Era Court dismisses the 10th Amendment as a Tautology: From *Darby*, "The amendment states but a truism that all is retained which has not been surrendered." Commerce to the court was "surrendered" in the Constitution to Congress.
- (3) ***Lochner* Era, 1905 - 1937:** Intense Judicial review of regulatory acts of legislatures strongly defending extreme laissez-faire economic policies. Substantive Due Process cases noted below are part of this era; largely about Economic Liberties as paramount and trumping regulation.
  - (a) **Substantive Due Process:** Whether the government has an adequate reason for taking away a person's life, liberty, or property. This was the Review Standard prior to 1937 the court used to invalidate many Commerce Clause cases.

**I. Stream of Commerce Test :** Congress could only regulate those things in the stream of interstate commerce (not production within a state, wage and hour laws, et al.)

**II. Direct Effects Test:** Only commerce that directly affected interstate commerce was within Congress' power.

**(b) Procedural Due Process:** Procedures that the government must follow when it takes away a person's life, liberty, or property.

**(4) Key Case: *Lochner v. New York*.** The 1897 Labor Law limiting the hours that an employee in a biscuit, bread, or cake bakery or confectionery establishment may work is an abridgment to their liberty of contract and a violation of due process. Overruled later.

**(a)** Key in outlining reasoning to use due process to defend freedom of contract and interference with that freedom makes regulatory laws unconstitutional.

**(5) Key Case: *Hammer v. Dagenhart*:** The power of Congress to regulate commerce does not include the power to regulate the **production of goods** intended for commerce (even if made with child labor). Overruled later by *Darby*.

**c. Rational-Basis Era: 1937 - 1990**

**(1)** Expansively defined the scope of the commerce power and refused to apply the 10th Amendment as a limitation.

**(2) Any Impact on Interstate Commerce is Legislatable:**

The result of *NLRB v. Jones*, *US v Darby*, & *Wickard v. Filburn*, was the any economic function in the economy that has a **substantial effect** on interstate commerce can be regulated by Congress. Distinctions between production and mining no longer matter in Post-Lochnerian view of the Commerce Clause.

- (3) **“Commerce Among the States”** defined broadly to regulate civil rights, commercial regulation, and criminal laws for national effect.
- (4) **Rational Basis Analysis:** Review standard in the post-1937 court that presumed Congressional acts to regulate activity based on the Commerce Clause were constitutional as long as **the laws had a Rational Basis connecting them to commerce.**
- (a) **Rational Basis:** The court merely needs to find a rational basis exists for a substantial effect on commerce. Under this standard, “commerce” is defined widely to include production, selling, etc.; which the previous court viewed as separate activities. Test for Rational Basis is: The Substantial Effects Test.
- (b) **The Substantial Effects Test:** Reached through the Necessary & Proper Clause. This is what allows sales within states, and production to be included in the scope of the commerce clause.
- I. If an activity has a “substantial effect” on Commerce, there is a rational basis for which Congress may act and thus the enactment will be constitutional. This test is an “effects based” test which INCLUDES potential effects not yet realized. In *Wickard v. Filburn*, even though the individual farmer at issue had little impact individually, all farmers doing what he would do would have a substantial effect and that is enough to enable Congress to reach him in terms of regulation.
- (c) **Three areas that the Commerce Clause is recognized by the court to have power to regulate in:**
- I. **Channels:** The things that commerce moves along from point to point; roads, railroads, (the internet?).
- II. **Instrumentalities:** The things that travel on and in the channels to move goods and services.

**III. Activities Substantially Related to Commerce:** Use the substantial effects test to determine. *Lopez* changes ‘activities’ to ‘economic activities’ which substantially limits the reach of the Commerce Clause power.

**(d) Police Power:** Whether Federal or State, this is the power to regulate (enforce criminal, health, property, and other law).

**(e) Dismissal of 10th:** “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. The Rational-Basis Era Court dismisses the 10th**

**Amendment as a Tautology:** From *Darby*, “The amendment states but a truism that all is retained which has not been surrendered.” Commerce to the court was “surrendered” in the Constitution to Congress.

**II. Test for 10th Amendment Violation:** A federal law must regulate the “states as states” and address matters that are indisputably attributes of state sovereignty for the 10th Amendment to apply.

**d. New Conservative Era: 1990 - Present**

**(1)** Still broad conception of Commerce Clause power but narrowed by using the 10th Amendment as a limitation.

**(2) Key Case: *United States v. Lopez*:** The power of Congress to regulate activities extends only to those activities that substantially affect interstate commerce. The Act neither regulates commercial activity, nor contains a requirement that the possession be connected in any way to interstate commerce.

**(a) The three categories that Congress can regulate under the Commerce Clause:**

**I. 1. Channels:** The things that commerce moves along from point to point; roads, railroads, (the internet?).

**II. Instrumentalities:** The things that travel on and in the channels to move goods and services.

**III. (Economic) Activities Substantially Related to**

**Commerce:** This is the Substantial Effects Test; the economic activity must substantially affect interstate commerce to be subject to Congress's power under the Commerce Clause. This adds the idea that **the activity must be "economic" activity** in determining the effect of the Substantial Effects Test.

**A. No Factors for this Test:** The reason is that Congress is given the power to determine what it feels is a substantial effect on commerce. No court has questioned whether the effect on commerce was significant enough; it's simply ruled on whether the activity itself was or was not 'commerce' or 'economic activity.'

**IV. Strong Dissent by Breyer:** We should not be going back to make distinctions between kinds of activities that Congress can regulate in the cases *pre-Wickard*. By divorcing the "effect" on the economy from the "activity" causing the effect, the new **"economic activity effects test"** creates dangerous ambiguities for Congressional regulation as in the cases pre-1937. For example, how should Congress address illicit drugs? As a criminal matter outside of its reach? Or as an economic commodity subject to commerce clause regulation?

**(3) Key Case: *New York v. United States*:** Congress does not have the power to force states to implement regulations.

Policy: Proposed regulation “commandeers” the legislative process of the states and therefore the policy implication is that it removes electoral accountability for regulation within the state. (Substantive reference to the 10th Amendment as reasoning for the this rule.) Sometimes called **the “Anti-Commandeering Principle”**.

### III. Executive Power ..... § Executive Power

#### A. Sources of Executive Power

##### 1. Å2, §3: Enumerated Power

###### a. Duty:

(1) The President must “take care that the laws be faithfully executed”...the Constitution, thus, imposes a duty on the President; it not an option to enforce the laws, it’s a duty.

###### (2) Specific powers:

(a) To make treaties; (with advice and consent of the Senate and 2/3 vote of the Senate)

(b) Commander-in-Chief of the armed forces;

(c) Appointments to the Supreme Court;

(d) Appointments of Department heads; Ambassadors, Federal Judges, and other officials; (with advice and consent of the Senate);

(e) Execution of the Laws of Congress.

###### b. Domestic Authority

(1) **Appointment Power:** Article II, §2 provides the President the power to appoint government officials, ambassadors, and **department heads** with Confirmation by the Senate.

(a) Additionally, it specifies that Congress can, by law, enable the President **to appoint subordinate officials** (“inferior officers”; usually non-department heads or officers who can be removed by a higher official) without Senatorial consent.

(b) **Constitutional Issue:** What constitutes an “inferior official” for the purposes of court challenges?



I. Inferior Officers identifying factors (*from Alexia Morrison v. Theodore Olsen, 1988*):

A. Those officers who can removed from office by a higher official in their respective executive department.

B. Perform limited duties.

(c) **Separation of Powers Issue:** Congress may NOT write laws granting itself power to appoint executive officials. Article II reserves that power exclusively to the President. It can however, grant to the President or heads of his departments the power to appoint inferior officers on their own, without Senatorial Consent.

(2) **Removal Power:** There is no provision in the Constitution regarding the power of the President to remove executive branch officials.

(a) Legal tradition is that the President can remove any official. Congress may limit removal only in the cases where the office requires independence from the President (Attorney General, e.g.) or only limits removal by requiring a “good cause” to be shown, but does not “prohibit” the President.

I. **Key Case: *Myers v. United States, 1926*:**

The President has the exclusive power to remove executive branch officials, and does not need the approval of the Senate or any other legislative body.

(b) **Limit on Removal Power: *Humphrey’s Executor v.***

***United States, 1935*:** The President’s absolute power of removal over government officials is restricted to those whose positions are units of, and subordinate to, the executive department. This removal power does not extend to officials in quasi-legislative or quasi-judicial agencies, such as administrative bodies

created by Congress to carry out a statute's legislative policies (like the GAO or Office of Management & Budget).

**(3) Administrative Power:**

- (a) Suggestion Legislation to Congress:** The President may suggest legislation be adopted by the Congress.
- (b) Rule Making - Executive Law Making Authority:** The president, as head of the bureaucracy, has tremendous authority over making rules to implement and execute Congressional enactments.

**I. Checks on Administrative Power:**

**A. DEAD: The Non-Delegation Doctrine of**

**Congress:** A check on administrative agencies of the executive. The principle that Congress cannot delegate its legislative power to administrative agencies. Eventually the courts made this doctrine effectively inert by simply not overruling Congressional delegations of power in legislation. The case law that establish and reiterate the principle have never been explicitly overruled; *Whitman* gave the rationale for how delegations of power can exist without violating the doctrine based on the “intelligible principle” test.

- B. The Intelligible Principle Test, *Whitman* 2001, killer of Non-Delegation Doctrine:** When Congress conveys decision-making authority upon executive agencies, it must lay down an “intelligible principle” to which the person or body authorized to act is directed to conform; else it will violate the Non-Delegation Doctrine. (Easy test to meet; never has a case found an Intelligible Principle missing.)

**C.** The problem of administrative agencies having legislative, executive, and judicial power all in one location still exists. How to check this accumulation of power in one administrative agency is a continuing problem.

**D. DEAD: Legislative Veto of Administrative**

**Actions/Rules:** In the 1930s, Congress would write into statutes provisions that would let a single house or committee in Congress issue a resolution without enacting a law to reverse an action or rule created by an administrative agency. This was designed to check administrative agency power or overreach. Now dead.

**1. Dead Doctrine:** Declared Unconstitutional by *Immigration & Naturalization Service v. Jagdish Rai Chadha*.

**2. Excellent dissent in Chadha, Problems It**

**Created:** It has been a central mechanism of keeping the executive and independent agencies accountable to Congress. Congress will now have to either make laws in incredible detail or give a general principle and hope the agency does what they expected.

**c. Foreign Policy Authority**

**(1)** There are very few decisions on these Constitutional issues.

**(a)** Most often they are declared non-justiciable political questions.

**(2) Key Questions:**

**(a)** Are foreign and domestic policy different under the Constitution? (Yes, Congress has wider berth and power.)

**(b)** Does the President have more inherent power in foreign policy? (Yes. Esp. as Head of State for the nation.)

- (c) What limits exist on the President's conduct of agreements with foreign nations that are not officially treaties? (These "negotiations" bind the U.S. just like a treaty and have the same effect, but they have not yet been disputed or ruled on by the courts.)
- (d) How is the War Power authority allocated (Congress declares war, President executes under the Constitution)?

**(3) Key Cases:**

**(a) Power to assume some Legislative Power in Foreign Affairs:**

**I. *United States v. Curtiss-Wright Export Corp.*, 1936:**

Delegation of certain legislative powers to the President can be constitutional when necessary to govern foreign affairs. The parameters of the constitutionality of the President's legislative power differ when external, rather than internal, affairs are at stake. As the sole federal representative in the field of international affairs, the President does not require a congressional act to establish legislative authority in foreign relations.

**(b) Prohibition to Suspend Habeas Corpus in U.S. controlled Foreign Territory:**

**I. *Boumediene v. Bush*, 2008:** Prisoners, held in U.S.-controlled territory (whether foreign or not) have a right to the writ of habeas corpus under the United States Constitution and that the Military Commissions Act (MCA) was an unconstitutional suspension of that right. To permit the suspension of *habeas corpus* in foreign territory but controlled by the U.S. (*de facto* as opposed to *de jure* sovereignty) is a violation of not only the suspension clause, but a violation of the separation of powers by giving the

judicial function to the executive in violation of the Constitution.

**d. Congressional Authority to Increase Executive Power:**

(1) Limited by Constitution (Enumerated Powers Only):

(a) To increase Presidential power the Constitution must be amended.

(b) **Key Case: *Clinton v. New York (Line Item Veto Case)*, 1998:** The Line Item Veto steps outside of what is permitted for the president to do in relation to legislation (the process effectively permits the president to amend legislation by subtracting provisions; violation of enumerated powers).

**2. Inherent Powers:** When can the executive act without express constitutional or statutory authorization?

**a. Executive Privilege:** The unenumerated, inferred authority of presidents to keep secret conversations and documentation deemed necessary to receive candid advice from officers and advisors or execute their role as President.

**b. The Test for Implied Presidential Authority - The Justice Jackson Boxes:**

(1) From *Youngstown Sheet & Tube Co. v. Sawyer*, 1952:  
The President's power, if any, to issue an order must stem from an act of Congress or the United States Constitution.

(2) **Jackson's Boxes:**

(a) **P > C** If the President acts pursuant to an express or implied authorization of Congress, the court will give the most deference to the President.

(b) **P > C~** If the President acts in absence of congressional act or grant of authority (they're silent), the court's scrutiny is unknown. Case by case.

(c) **P > <C** If the President acts against the express or implied will of Congress, the court will give severe scrutiny to the president's assertion; the ONLY way

the Presidential action can be sustained in such cases is by finding that Congress is somehow prohibited or disabled from acting.

**c. Limiting President's Implied Presidential authority - Only One Case:**

- (1) ***United States v. Richard M. Nixon, President of the United States, 1974, p. 329:*** For the first time, limits executive privilege. Conversations between the President and his advisors are generally privileged, but that privilege is not absolute. The president's "**generalized interest**" in confidentiality cannot prevail over the fundamental demands of due process of law in a criminal proceeding. ("**Specified interest**" in confidentiality would be around military or diplomatic secrets. The court may allow those to trump criminal proceedings.)

**3. Checks on Executive Power: Separation of Powers**

**a. Formal Checks:**

- (1) **Habeas Corpus:** Detention of Foreigners - (see *Hamdi* and *Boumedienne*).
- (a) *Habeas Corpus* under the Suspension Clause, Article I, § 9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
- (b) This means that Habeas Corpus applies to both Civil and Criminal courts and military tribunals for soldiers or foreigners.
- (2) **Impeachment:** Å2, §4 Provides that Congress may impeach the President and be tried and judged in the Senate.
- (3) **War Powers Act:** Designed to address what constitutes a declaration of war and when the president may use American troops in warfare without Congressional approval.

- (a) **Issue:** President sends troops in capacity as commander-in-chief, but Congress has not declared war. Is this legal?
- (b) The constitutionality of this act has never been tested; **likely it never will be for lack of justiciability as a political question.**

**b. Informal Checks:**

- (1) **Budget Process:** Congress, via the budget process, can defund executive priorities, reshape the bureaucracy, and all kinds of things to change behavior or policy in the executive.
- (2) **Public Opinion:** Self-explanatory.

**c. Legal Ambiguity: Suing the President** (specifically, rather than as a named party to suits not requiring his presence)

- (1) **Official Acts:** The president has absolute immunity from civil suits for all official actions while in office; does not apply to criminal suits which has never been tested. (*Nixon v. Fitzgerald*) Official Actions = Actions only the president can take as President.
- (2) **Unofficial Acts:** The president has no immunity from civil suits for acts that occur before a president takes office. (*Clinton v. Jones*)
- (3) **Criminal Prosecution?:** No case has addressed whether a sitting President can be criminally prosecuted.
- (4) **Key Cases:**

(a) ***Richard Nixon v. A. Ernest Fitzgerald, 1982:*** The President of the United States is absolutely immune from damages liability predicated on his official acts. This immunity extends to actions within the outer perimeter of official responsibility. (This holding is breathtakingly broad and is not the incremental holding common law typically exhibits.)

**I. Dissent:** Is excellent. The Court's decision makes the President immune, regardless of the damage he

inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose. Absolute immunity places the President above the law. The separation of powers doctrine is not violated by subjecting the President and/or his actions to judicial scrutiny.

(b) ***William Jefferson Clinton v. Paula Corbin Jones*, 1997, p. 423:** There is no constitutional immunity for lawsuits growing out of non-official conduct that occurred before the President took office. There is no history of such suits so monopolizing the President's time as to make it impossible for him to carry out his constitutional duties.

d. **Dead Doctrines:**

(1) **Non-Delegation Doctrine:** See above under **Administrative Power.**

(2) **Legislative Veto:** See above under **Administrative Power.**

IV. **Constitutional Supremacy v. State Laws ..... §**  
**Constitutional Supremacy v. State Laws**

A. **Enumerated Powers for Each Branch of Government**

1. **Å1, §8:** Idea that each coordinate branch **ONLY** has the powers granted it in the Constitution. Beyond that, the States should be able to act. Maybe some 10th Amendment here too?

B. **Preemption of State Laws:** What states normally could do, but Congress preempts with law, regulation.

1. **Å6, Cl. 2: Supremacy Clause: (As noted above)**

a. **Preemption Source:** Article VI of the Constitution contains the "Supremacy Clause": The Constitution and laws & treaties made pursuant to it are the supreme law of the land.

b. **Federal Law Supreme:** Where Federal and State law come into conflict, the Federal Law controls and state law is invalidated (both state common law and statutory law).



**(1) Including Federal Regulations:** This includes federal regulations adopted pursuant to a federal law; federal regulations can also preempt state law, but statutes are more likely to preempt and regulations are less likely to be found to preempt.

**c. Key question:** Does a particular state or local law get preempted by a specific Federal Law?

**(1) Court's Default Posture:** Congressional intent to preempt must be clear to avoid the invalidation of state & local laws for reasons of federalism. (Although, the current conservative court has been prone to find federal preemption more often than not.)

**d. Express Preemption:** A federal law expressly preempts state/local law by saying so.

**e. Implied Preemption:** Preemption is implied by a clear congressional intent to preempt state or local law. There are two types of this:

**(1) Field Preemption:** The federal scheme of regulation is so pervasive as to make reasonable the inference that Congress left no room for state supplementation of the law. In other words, the federal law was intended to occupy the entire "field" of the subject regulated.

**(a) Example area of law: Immigration.** Since the federal government has exclusive authority in dealing with foreign nations, regulation in this area is preempted. Also, the Court almost always preempts anything even remotely touching on foreign policy. Federal regulations in an area are unlikely to be found by a court to confer field preemption in a case.

**(b) Factors for Field Preemption:**

**I.** Is it an area where the federal government has traditionally played a unique role?

- II. Has congress expressed an intent in text or legislative history to have federal law be exclusive in the area/ field?
  - III. Would allowing state and local law in the field interfere with comprehensive federal regulatory efforts?
  - IV. Is there an important state or local interest served by the law?
- (2) **Conflict Preemption:** Compliance with both a federal and state law is a physical impossibility; state law is then invalidated.
- (a) **Problem:** Determining whether there is a conflict between federal and state law.
  - (b) **Non-Conflicts:** In many cases, a federal law will set a minimum standard. This becomes a floor and states can then add higher more stringent standards above the floor and avoid a conflict while still exerting their lawmaking authority.
- f. **Impeding Achievement of Federal Objectives:** Where state and federal law do not conflict, Congress has not expressly preempted, but state law stands as an obstacle to the achievement and execution of the full purposes and objectives of a federal objective in a federal law.
- (1) **Problem:** What is the federal objective(s) that may be impeded? If not identified in the law expressly, this is an interpretation issue for the court.
- g. **Taxation & Regulation Limitation:** States cannot tax or regulate federal activities. This is because of the Supremacy Clause of Article VI; the federal government is supreme and states cannot govern or limit it (*McCulloch v. Maryland*). This preemption is unique because it does not look to the intent of Congress.
2. **Dormant Commerce Clause:** (Technically Not Preemption; Negative expression of the Commerce Clause // Unlike

preemption, States simply CANNOT do the things that violate this doctrine.)

- a. **Test:** “An Undue burden on Interstate Commerce”.
  - (1) **Source:** Inferred from Å1, §8 “to regulate commerce among the states.” Entirely judge-made law.
- b. **Policy:** The Dormant Commerce Clause exists because the framers intended to prevent state laws that interfered with interstate commerce. Prior to the Constitution this caused many problems and many framers thought it could even lead to war among the states. Second, the economy is better off if state and local laws that impede interstate commerce are invalidated; avoidance of “economic protectionism between and among the states.”
- c. **Police Powers Distinction:** Justice Marshall distinguished between state exercise of the police power in relation to commerce (inspections, health & safety, et al.) and laws directly interfering with commerce. **Police Power laws are, in most cases, constitutional** even though they may affect interstate commerce substantially. This does, of course, create a substantial interpretative puzzle for courts in articulating what are rightful police power laws and those that run afoul of interstate commerce.
- d. **Analysis - The “Balancing Test”:**
  - (1) **The Balancing Test:** This modern test seeks to balance the benefits of a law against the burdens that it imposes on interstate commerce;. Analysis is Fact Dependent; the Court weighs the burdens on commerce versus the benefits afforded by the law.
  - (2) **Who can sue under the Dormant Commerce Clause:** anyone. Corporations, citizens, aliens, anyone. Unlike under Privileges and Immunities.

- (3) **Starting question:** Does state or local law discriminate against out-of-staters or does it treat out-of-state and in-state parties alike?
- (4) **How is it determined whether a law is discriminatory?**  
Criteria: The law is discriminatory against out-of-staters.
  - (a) **Facially Discriminatory:** The law in its terms clearly distinguishes between in-staters and out-of-staters.
  - (b) **Facially Neutral:** The law makes no distinction, but may be discriminatory in purpose and effect. (Such discriminatory effect = economic protectionism.)
- (5) **Discriminatory Laws:** What is the analysis for laws that are discriminatory?
  - (a) **Standard of Review for Discriminatory Laws:** Strict Scrutiny.
  - (b) Burden now on the State to prove an exception should be granted.
    - I. Police Powers Exception:** If the State can demonstrate a vital state interest that justifies a burden on interstate commerce by showing: a) local benefits flowing from the statute, b) legitimate local purpose (necessary), and c) the unavailability of nondiscriminatory alternatives d) that it is the least restrictive means to achieve a non-protectionist purpose. This exception is very, very rare. (*Carbone, Maine v. Taylor*)
- (6) **Non-Discriminatory Laws:** What is the analysis for laws that are not discriminatory?
  - (a) **Standard of Review:** A lower level of scrutiny.
  - (b) Non-discriminatory laws are upheld as long as the benefits to the government outweigh the burdens on interstate commerce.

e. **Exceptions:**

- (1) **Congressional Approval:** Laws that normally would violate the Dormant Commerce Clause are permissible if Congress has explicitly approved them.
- (a) This exception has happened most frequently in the regulation of the insurance industry.
  - (b) Congressional Action means the Commerce Clause is no longer dormant. If Congress has permitted state regulation it otherwise wouldn't enjoy, then the question may become one of Commerce Clause analysis. This is just to remind you not to forget that part.

- (2) **Market Participation Exception:** (Applied Narrowly to preserve the Dormant Commerce Clause.) If the state is acting as a participant in the market (such as with a State-owned business) and not as a regulator, the Dormant Commerce Clause does not apply and discrimination against out-of-staters in its business is permissible.

(*Reeves*)

- (a) **Exception:** Although state-owned businesses may favor in-state purchasers, they may not attach conditions to the sale of products that will burden interstate commerce.

(*South-Central Timber Development*)

- (b) **Policy Against & For:** Many legal theorists believe the Dormant Commerce Clause forbids this exception. Many others, however, argue that this exception permits states' citizens to recoup the benefits of the taxes they pay; to retain public benefits for its public investment.

3. Å4, §2, Cl. 1: **Privileges & Immunities Clause: (not on exam)**

- a. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

- b. **Principles:** From *Toomer v. Witsell*.

- (1) To fuse the several states into a single nation;

- (2) To ensure that a citizen from State A who ventures into State B enjoys the same privileges which the citizens of State B enjoy.
- c. **Discrimination can be Allowed:** The P&I Clause does NOT bar all forms of discrimination against citizens of other states. It is only triggered if the discrimination affects a right that is “fundamental”.
  - (1) **Exception:** If the state can demonstrate a “substantial reason” for the discrimination, it may be allowed.
- d. Unlike the Dormant Commerce Clause, there is **no market participant exception to the Privileges and Immunities Clause**. That means that even when a state is acting as a producer or supplier for a marketable good or service, the Privileges and Immunities Clause may prevent it from discriminating against non-residents
- 4. **Æ14, §1: Equal Protection Clause: (not on exam)**
  - a. “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.”
  - b. **Equal Protection Clause applies** only to “natural persons”; i.e. human beings, not “legal persons” like corporations.
  - c. **Alternative to Privileges and Immunities:** Is a viable alternative to challenging the Dormant Commerce Clause on grounds other than Privileges and Immunities.

**Abbreviation Key:**

**Å = Article** (Shift+Option+A)

**Æ = Amendment** (Shift+Option+')

**Ω = Rules** (Option+Z)

**$\pi$  = Plaintiff** (Option+P)

**$\Delta$  = Defendant** (Option+J)