**US Constitutional Law I**

**Professor Varol — Spring 2017**

1. **Introduction to the US Constitution**
   1. The Parchment Barriers Problem
      1. Problem
         1. “The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”  
            — James Madison, Federalist No. 48 (1788)
         2. “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”   
            — James Madison, Federalist No. 51 (1788)
      2. Solution
         1. “Ambition must be made to counteract ambition.”  
            — James Madison, Federalist No. 51 (1788)  
            • Institutions can police one another better than paper can
         2. “It should be the responsibility of the Court to…remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.” — NFIB v. Sebelius (US 2012) (Scalia, J., dissenting)
         3. Separation of Powers/Federalism (vertical sep. of powers), Checks & Balances
   2. Amendment Process
      1. Proposal
         1. Two-thirds vote of both houses of Congress or
         2. Two-thirds of the states call for a constitutional convention
      2. Ratification — Three-fourths of the States
   3. Authority of the Constitution
      1. Article VI: **The Supremacy Clause** — “This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.” — “It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.”
      2. “The judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.”
   4. Sources of Constitutional Meaning
      1. Precedent: how the Court has previously interpreted
         1. *Stare decisis*
            1. vertical: lower courts are bound by the rulings and interpretations of higher courts (rigid — binding)
            2. horizontal: Supreme Court stays consistent with itself — if circuit court hasn’t ruled on a particular issue, typically persuaded to follow sister circuits
         2. Analogize/Distinguish between cases to determine whether or a not a court is bound by precedent of another case
      2. Primary Principles of Constitutional Interpretation
         1. Originalism: seeking to uncover its meaning at the time of its adoption — originalism envisions a constitution that adopts permanent, not evolving, values.
            1. Original intent: What did the constitutional framers *intend* when they wrote the original Constitution?
            2. Original meaning (Originalism 2.0): What is the objective *meaning* that a reasonable observer would have assigned to the constitutional provision when it was enacted?  
               • Sources: Text, contemporary dictionaries, contemporary cases, evidence of usage in the Constitutional Convention and the state ratification conventions, the Federalist Papers, etc.
         2. Living Constitutionalism: envisions a constitution that evolves over time to meet the changing norms and needs of a modern society (*Obergefell* — public policy)
         3. Textualism: interpret what the words themselves mean in relation to those around them — makes phrases like “due process” and “equal protection” difficult
      3. Other sources: text, history, purpose, consequences, national ethos
2. **Judicial Power**
   1. Overview of the Judiciary
      1. Article III
         1. Section 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.”
         2. Section 2
            1. Clause 1: Jurisdiction of the federal courts — “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.”
         3. US Supreme Court — discretionary jurisdiction on appeals from appellate courts
            1. Most common method: Petition for Writ of Certiorari
            2. The appealing (losing) party is called the “petitioner,” while the responding (winning) party is called the “respondent.”
   2. Judicial Review
      1. *Marbury v. Madison* — quintessential groundwork for Court’s Power of review — when review is allowed under Article III, the Court has self-imposed “prudential” limits to its jurisdiction (see Tests section)
         1. Discretionary actions: “cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.” — not in Constitution
         2. Non-discretionary actions: “But where a specific duty has been assigned by law, and individual rights depend on the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.” — clearly in Constitution \*\*this is the case here
         3. Q3: If they do afford him a remedy, is it a mandamus issuing from this court?
            1. The power of the court: Can a mandamus issue from this Court?

Judiciary Act of 1789: The Supreme Court may “issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the US.”   
• The Court *does* have original jurisdiction

Article III, Section 2, Clause 2

Original jurisdiction: “In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.”   
• The Court *does not* have original jurisdiction in this case

Appellate jurisdiction: “In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”

* + - * 1. Conclusion:Judiciary Act of 1789 is unconstitutional

**major takeaway: the Supreme Court has the right to strike a law down as unconstitutional**

* + - 1. Combined with *Stuart v. Laird* = “transition to democracy”
         1. declared abolition of courts constitutional — gave Congress the ability to “rearrange” the court system and made circuit riding optional
         2. judiciary gave power to Congress to regulate it, then in *Marbury v. Madison* it gave itself the power to regulate Congress
    1. Arguments for Judicial Review
       1. The nature of a written constitution: “fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”
       2. The nature of the judicial function: it is the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”
       3. The “arising under” jurisdiction
          1. “The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into?”
       4. Restrictions on Congress — who else would deem something unconstitutional?
       5. Judges’ oath to support the Constitution
  1. Checks on Judicial Power
     1. Advisory Opinions
        1. 1793 Letter from Jefferson to the U.S. Supreme Court — the Constitution places the explicit authority for the President to ask the heads of departments for advice
        2. Federal courts may rule on legal issues only in resolving an actual dispute.
     2. Standing: jurisdictional issue — does a party have the right to bring a case
        1. Three constitutional requirements:
           1. **Injury-in-fact:** an invasion of a legally protected interest which is

concrete and particularized and

actual or imminent, not conjectural or hypothetical

* + - * 1. **Causation or traceability:** “The injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”
        2. **Redressability:** “It must be likely, as opposed to merely speculative, that the injury will be redressable by a favorable decision.”
        3. The defendant’s action/inaction must **cause** the **injury-in-fact**, which must be likely to be **redressed** by the requested relief
      1. Example: *Lujan v. Defenders of Wildlife*
         1. Injury-in-fact: “plaintiff himself must be among the injured” — better case if they had plane tickets, life interest in animals, etc.
         2. Causation: Did the funding cause the project to go through
         3. Redressability: “[T]his would not remedy respondents’ alleged injury unless the funding agencies were bound by the Secretary’s regulation, which is very much an open question.”
         4. Outcome: lacked standing because plaintiffs were not directly injured, can’t prove the cut in funding would stop the project altogether
      2. Example: *Massachusetts v. EPA*
         1. Injury-in-fact: The loss of Massachusetts’s coastal land — particularized and imminent?
         2. Causation: The EPA’s failure to promulgate emissions standards for new motor vehicles.
         3. Redressability: An injunction requiring EPA to issue emission standards for new motor vehicles.
         4. Outcome: Court uses similar reasoning to come to the opposite conclusion — decides for MA — distinguished from *Lujan* because it is a sovereign state, not a citizen suit.
      3. Example: *Clapper v. Amnesty International*
         1. Injury-in-fact:

The plaintiffs’ communications will be acquired under Section 1881a at some point in the future, which is a future injury.

The plaintiffs took costly and burdensome measures to protect against the risk of surveillance, which is a present injury.

* + - * 1. Causation: Surveillance by government under Section 1881a
        2. Redressability: injunction against Section 1881a-authorized surveillance.
        3. Outcome: lacked standing because chain of events does not make injury imminent, money spent was on their own accord, requested relief would not help the issue because they are still subject to all other surveillance
      1. Example: *US v. Windsor*
         1. Unnecessary to determine whether or not BLAG had standing to challenge DOMA in this case — even though US agreed with the unconstitutionality of DOMA, they had $ at stake and had standing & BLAG presented the constitutional issue (permissive intervention\*\*)
         2. Article III standing determined by 3 factors
         3. Prudential standing: self-imposed limit for a controversial question because the judiciary does not feel they have the power to decide — here parties were not adversarial because they agreed on the issue, but then concluded they did have standing because they did not agree on the remedy.
      2. Goals of standing: Adversary presentation, Concreteness of legal issues, Judicial restraint/Separation of Powers
    1. Political Question Doctrine
       1. “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”  
          — Marbury v. Madison (US 1803)
       2. Distinguish from political *cases*
       3. Example: *Nixon v. US*
          1. Issue: Senate appointed a committee to create a report of findings regarding the impeachment of Nixon — Nixon claims this violates the constitutional grant of authority to the Senate to “try” all impeachments because it prohibits the entire Senate from taking part in the trial and evidentiary hearings.
          2. Ruled nonjusticiable because of the political question doctrine for:

A textually demonstrable constitutional commitment of the issue to a coordinate political department is present

If a there is a lack of judicially discoverable and manageable standards for resolving the controversy — A lack of judicially manageable standards may strengthen a conclusion that there is a textually demonstrable commitment — “try” is an ambiguous word here, Court dismisses

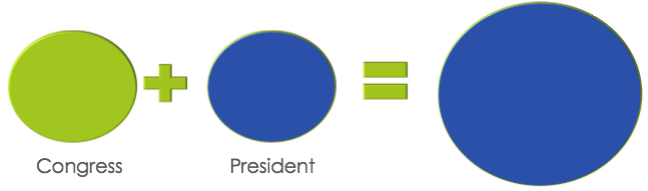
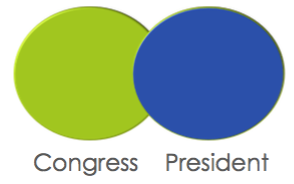
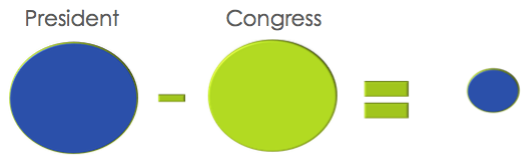
* + 1. Other Limitations
       1. Mootness: too late to bring suit
          1. Subsequent to the filing of the case end the controversy = moot.
          2. Exception # 1:“Capable of repetition” (Roe v. Wade (1973))
          3. Exception # 2:A case is not moot if the defendant voluntarily stops the complained-of behavior but is free to return to it any time.
       2. Ripeness: sued too soon — can’t sue based on hypothetical possibility
          1. Example: *Goldwater v. Carter* — must actually reach a Constitutional impass before bringing the issue to Court
  1. The Eleventh Amendment
     1. Chisholm (citizen of South Carolina) v. Georgia (1793)
        1. The judicial power of the United States extends “to controversies . . . between a state and citizens of another state.” Article III, Section 2.
     2. Eleventh Amendment adopted in response to Chisholm v. Georgia:
        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.”
     3. Hans (citizen of Louisiana) v. Louisiana
        1. **major takeaway:** The sovereign is immune from suit absent its consent; individuals/state institutions/local governments do not have this immunity

1. **Legislative Power**
   1. Article I Section 1: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”
      1. Congress has no power to act unless authorized by the Constitution
      2. Congress’s powers = few and defined — States’ powers = numerous and indefinite  
         • Amendment X: Powers not delegated to the US by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
      3. Section 8 lists the major grants of authority: “The Congress shall have power . . .”
      4. Enumerated powers: Powers expressly given to Congress by the Constitution
      5. Implied/Incidental powers: No phrase that excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”
   2. Clause 18: **Necessary and Proper Clause** — gives Congress the power to make “all laws which shall be *necessary**and proper* for carrying into execution the foregoing powers, and all other powers vested by the constitution, in the government of the US.”
      1. *McCulloch v. Maryland*
         1. Does Congress have the constitutional authority to incorporate a bank? If yes, does Maryland have the authority to tax that bank?
         2. Enumerated Powers: “Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.”
         3. Implied/Incidental powers: develops test for “necessary and proper”
            1. Textual argument

The Constitution: ”**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.” U.S. Const. amend. X.

The Articles of Confederation: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is **not by this Confederation expressly delegated to the United States**, in Congress assembled.”

* + - * 1. Practical/Structural Argument: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”
      1. Necessary and Proper Clause: the test for “necessary” (see tests section VI)
    1. *US v. Comstock* — child porn cases sending criminals to mental health clinic
       1. Passes test for 5 reasons: (1) The breadth of the Necessary and Proper Clause (2) Long history of federal involvement (3) Sound reasons for the statute’s enactment (4) The statute’s accommodation of state interests (5) The statute’s narrow scope.
       2. “Building Block” Theory — Congress can establish/define crime — this gives the implicit authority to establish a punishment (prison) — this give implicit authority to regulate that prison
          1. Concurrence: this can lead to a slippery slope — be sure to watch the strength of the “blocks” used.
  1. Clause 3: **Commerce Clause** — “To regulate commerce with foreign nations, and among the several states and with the Indian tribes.”
     1. Two aspects: affirmative and dormant
     2. Two primary aims: economic & political unity
     3. *Gibbons v. Ogden* — Steamboat Case
        1. “Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”
        2. Limits:
           1. The Commerce Clause covers only “commerce which concerns   
              more states than one.”
           2. It excludes “the exclusively internal commerce of a State.”
        3. The acts of NY must comply to law of Congress — supremacy clause
     4. *Champion v. Ames* — Lottery Case
        1. **Major takeaway:** the power to regulate includes the power to prohibit
        2. same limits maintained — only commerce that involves several states
        3. dissent argues that Congress can’t regulate things for moral reasons — majority says reasoning behind any regulation is irrelevant
     5. *Hammer v. Dagenhart* — Child Labor Case
        1. Law prohibiting the interstate shipment of goods produced by child labor deemed unconstitutional while still upholding pervious decisions
        2. Production was not commerce, and thus outside the power of Congress to regulate and the regulation of production was reserved by the 10th to the states.
        3. Distinguished by saying in cases such as the Lottery Case (Hammer), Intoxicating Liquors (Clark Distilling), Impure Foods & Drugs (Hipolite), etc., the use of interstate transportation was necessary to the accomplishment of harmful results — here the harmful action had already taken place, interstate commerce had nothing to do with it.
     6. *US v. Darby* — regulating commerce of items that did not follow prescribed wages and hours of workers
        1. Overrules *Hammer v. Dagenhart*
        2. “[W]hile manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce.”
        3. “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”
        4. Congress acted with proper authority in outlawing substandard labor conditions since they have a significant impact on interstate commerce.
     7. *Wickard v. Filburn* — farmer wheat production
        1. aggregation doctrine
        2. “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature be reached by Congress if ***it exerts a substantial economic effect on interstate commerce***, **and this irrespective of** whether such effect is what might at some earlier time have been defined as direct or indirect.”
     8. The Civil Rights Act of 1964 prohibits discrimination on the basis of race in any “place of public accommodation,” which is defined to include, among other things, motels and restaurants if their “operations affect commerce.”
        1. *Heart of Atlanta Motel* (1964), the Court upholds the statute as applied to a motel that refused to rent rooms to African- Americans.
        2. In *Katzenbach v. McClung* (1964), the Court upholds the application of the Civil Rights Act to Ollie’s Barbecue, a family-owned restaurant in Birmingham, Alabama, even absent evidence that interstate travelers use the restaurant — meat from restaurant shipped from out of state, would sell more meat
     9. *US v. Lopez* — No Gun School Zone Case
        1. **Rational basis.** Whether “Congress could rationallyhave concluded that [the regulated activity] substantially affects interstate commerce.” (legislative findings)
        2. Failed substantial effects test because (1) not regulating an economic activity, (2) no jurisdictional elements, and (3) no legislative findings
        3. *US v. Morrison* clarifies the relationship between the factors in the *Lopez* decision — “Lopez is not just a sport” — *Morrison* & *Lopez* are non-economic statutes
           1. “Economics refers to the production, distribution, and consumption of commodities.” — this was a domestic violence statute = noneconomic
     10. *Gonzales v. Raich* — CA medical marajuana seizure case
         1. **Facial challenge:** seeks to invalidate a statute in its entirety because the   
            statute is unconstitutional in all of its applications.
         2. **As-applied:** challenge seeks to invalidate a particular application of the statute, while leaving the remaining applications of the statute intact.
         3. Category 3 of *Lopez* — substantial effect
         4. Analogized to Wickard — commodities that are homegrown and not for sale
     11. *NFIB v. Sebelius* — Obamacare case
         1. Government’s argument: “Failure to purchase insurance has a substantial and deleterious effect on interstate commerce by creating the cost-shifting problem.”
            1. Precedent: distinguished from Wickard: difference between *prohibiting* and existing activity and *mandating* a non-existent activity
            2. History: “The Framers gave Congress the power to *regulate* commerce, not to *compel* it.” — activity v. inactivity distinction is important
            3. Ruled unauthorized under the commerce clause and the N&P, but authorized under the taxing & spending clause
         2. **Major takeaway:** N&P clause only works **in addition to another authorized power** — Congress cannot create the situation that makes something “necessary and proper”  
            • “Each of our prior cases upholding laws under [the N&P Clause] involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”
  2. Clause 1: **Taxing and Spending Clause** — “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.”
     1. Three **important components** of the spending power:
        1. Congress can tax and spend for the general welfare of the US
        2. Congress can enact a tax on an activity that it otherwise could not authorize, forbid, or control.
        3. Congress can offer funds to the States and may condition those offers on compliance with specified conditions, which may in turn induce the states to adopt policies that the Congress could not directly impose.
     2. *South Dakota v. Dole* — 5% of highway taxes case
        1. 5 prong test for constitutionality of taxing & spending
     3. *NFIB v. Sebelius* — Obamacare case
        1. Scope of the condition: “Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”
        2. “Relatively mild encouragement” (*Dole*) v. “Gun to the head” (*NFIB*)
        3. does not satisfy prong 5 of the test (see tests below)
  3. The Treaty Power
     1. Constitutional Text
        1. “[The President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” Article II, Section 2, Clause 2 — implementing treaties
        2. “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”  
           Article VI, Clause 2 — treaties = law under the Constitution
     2. *Missouri v. Holland* — migratory birds treaty case
        1. Migratory birds are the possession of no one — the only way laws on such species can be effectively created is through national legislature and international treaties — national interest in protecting the wildlife could be protected only by national action.
           1. “If the treaty is valid, there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.”
        2. Exception: The treaty cannot “contravene any prohibitory words to be found in the Constitution.”
  4. The Tenth Amendment
     1. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
     2. Cases like *Darby* interpreted this as a truism — *Usery* (1976)case changed this (said federal min wage & max working hours could not apply to state workers — “traditional government functions” test), this overruled *Maryland v. Wirty* (1968)— Court changed its mind again in *Garcia* (1985)
     3. *Garcia v. SAMTA* — fed min wage and max working hours applied to state gvmt workers — Garcia brought suit for overtime pay, SAMTA claimed “government function” therefore exempt from federal control
        1. Overruled *National League of Cities v. Usery*
        2. The “traditional government functions” test is unworkable.
        3. The Court found nothing in the FLS Act or overtime pay provisions that imposed on state sovereignty
        4. New Rule: The tenth amendment poses no explicit bar — as long as Congress is working under one of its explicit powers — the tenths amendment doesn’t apply to show how far they are allowed to use this power
     4. *Printz v. US* — local officers performing checks on handguns
        1. There are limits on Congress even when acting pursuant to its given powers
        2. Anti-comandeering principle: “The federal government may not compel the states to **enact or administer** a federal regulatory program.”
        3. Federalism concerns: federal government cannot force law enforcement officers of the states to be their agents
        4. Accountability (Justice Stevens): Congressmen are elected by the people of the states — unrealistic to think they would ignore state sovereignty concerns
        5. *Reno v. Cordon* distinguished from *Printz* — statute made it unlawful to disclose info on drivers licenses to private parties — distinguished because it did not require law enforcement officials to do anything & it applies even-handedly to states and individuals
           1. does not violate anti-comandeering principle
  5. The Civil War Amendments
     1. Text
        1. Thirteenth (1856) prohibits slavery & “badges or incidents of slavery”
        2. Fourteenth (1868) prohibits the states, among other things, from denying to any person within their jurisdiction the equal protection of the laws. — narrower than the 13th in that it cannot reach individuals, but broader in the sense that it is not limited to race (attempted to use in *Morrison* for this reason)
        3. Fifteenth (1870) prohibits a state from denying the right to vote based on race
        4. \*\*all include a provision allowing Congress to enforce by “appropriate legislation”
     2. The Civil Rights Cases
        1. Fourteenth didn’t work because language says “states” and the Civil Rights Act was an attempt to regulate individual actions of discrimination
        2. Thirteenth didn’t work because “Mere discriminations on account of race or color [are] not regarded as badges of slavery.”
     3. *Jones v. Alfred H Mayer Co.* — challenges Civil Rights Act of 1866 (42 U.S.C. 1982) that prohibits discrimination in selling and leasing property.
        1. “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”
        2. Rational basis test: “Nor can we say that the determination Congress has made is an irrational one.” — Congress wrote “badges and incidents of slavery” and therefore has the power to define what that means within reason
     4. *City of Boerne v. Flores* — RFRA case
        1. Generally applicable laws can be constitutionally applied to religious practices under the Free Exercise Clause.
        2. Congress can pass laws such as RFRA under the Fourteenth to tell states to enforce something, but cannot mandate how they enforce it
           1. RFRA prohibits federal and state governments from “substantially burdening” a person’s exercise of religion, unless the law is the least restrictive means of furthering a compelling government interest.
        3. Congress has the power to *enforce* the Fourteenth Amendment, but lacks the power to decree the *substance* of Fourteenth Amendment rights and interpret the Fourteenth Amendment in a way that *disagrees* with the Supreme Court.
           1. “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”
        4. **The test:** Under the Fourteenth Amendment, Congress can prevent or remedy an actual constitutional violation by a state as long as the legislation is congruent and proportional, in terms of its scope and duration, to the constitutional violation.
           1. Congress not limited to prohibiting/punishing, they may also engage in preventative & remedial measures, but these measures must be congruent & proportional to actual violations
           2. “RFRA is so out of proportion to a supposed remedial or preventive objective that it cannot be understood as responsive to, or design to prevent, unconstitutional behavior.”
           3. Congress “created” the ability to be exempt from generally applicable laws
           4. Case here involved an even-handedly applied zoning ordinance — did not single out any religion(s) & had a purpose entirely unrelated to any discrimination.

1. **Other Federalism Limitations in the Constitution**
   1. Dormant Commerce Clause
      1. The Commerce Clause by itself, without any action by Congress, can preclude some state action.
      2. Imposes limits only on state and local governments, not the federal government
      3. *Philadelphia v. NJ* — NJ statute prohibiting importation of waste from out-of-state
         1. discriminatory state laws v. non-discriminatory
            1. statute doesn’t discriminate against interstate commerce, but only imposes incidental effects on interstate commerce, it will be upheld unless the burden imposed is “clearly excessive” in relation to the local benefits (*Pike* test)
         2. Protectionism measures can be unconstitutional in their means as well as their ends — cannot discriminate against out-of-state products if there is no reason for this discrimination other than their origin
      4. *Dean Milk Co. v. Madison* — pasteurization of milk within 5 miles
         1. Are reasonable, nondiscriminatory, and adequate alternatives available for achieving the same legislative purpose? (this case: Madison could send its own officials out, depend of US public health services standards, etc.)
      5. *Hunt v. Washington State* — apple labeling case
         1. law is facially neutral, but has a discriminatory purpose of effect
            1. are reasonable alternatives available? yes, therefore statute is invalid
      6. *West Lynn Creamery v. Healy* — assessment charged on all milk sold by dealers to MA retailed & is then distributed to MA dairy farmers
         1. Discriminatory? Yes, “The pricing order in this case is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, MA] not only assists local farmers, but burdens interstate commerce.”
         2. Can’t “benefit in-state economic interests by burdening out-of-state competitors.”
      7. *Minnesota v. Clover Leaf* — can’t sell milk in certain containers
         1. Example of Pike Balancing test: passes, applied even-handedly and achieves the state’s goal of helping to eliminate plastic waste, not “clearly excessive.”
      8. Market Participation Doctrine
         1. Exception to Dormant Commerce Clause when the state is acting as a market participant rather than a market regulator — treated as private business
2. **Executive Power**
   1. Article II
      1. Vests “the executive power” in a “President of the United States.” — “[H]e shall take care that the laws be faithfully executed.”
      2. Section 2: lists the major grants of authority
         1. Clause 1: “The President shall be Commander in Chief of the Army and Navy of the United States . . . .”
         2. Clause 2: Appointments Clause
      3. Section 3: “He shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.”
   2. Non-delegation Doctrine
      1. The Constitution vests legislative authority in Congress, and Congress cannot delegate that authority to the President in a manner that gives him unfettered discretion.
      2. *US v. Curtiss-Wright* — selling of arms is under commerce clause = Congress’s power that they have delegated to the president, Court says this is ok because does not give him “unfettered discretion.”
         1. Presidential v. Legislative authority — reason that president has more knowledge on the state of foreign countries, has intelligence regarding private issues the whole senate doesn’t know about, & president is the sole representative of the US in foreign relations — best known for these statements on broad executive authority regarding foreign affairs
   3. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case)
      1. Main arguments:
         1. Commander-in-Chief Clause: “The President shall be Commander in Chief of the Army and Navy of the United States” — this was during a time of war with intent to make sure war funding and efforts would be okay
            1. Majority: Taking possession of private property to prevent labor disputes “is a job for the Nation’s lawmakers, not for its military authorities.”
         2. Take Care Clause “[H]e shall take Care that the Laws be faithfully executed.”
            1. Majority: “[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”
         3. Majority opinion written by Justice Black — seen as “formalistic” and draws bright-line rules based on text — Justice Jackson’s concurrence has become the law, seen as more functional
      2. Three Categories (Jackson’s concurrence)
         1. President acting pursuant to and express or implied authorization of power from Congress —authority is at maximum
         2. President acting in absence of either grant or denial or authority from Congress — relying on independent powers subject to checks & balances
         3. President acting incompatibly with the expressed or implied will of Congress — can rely only on his own constitutional authority minus anything given to Congress — power at it’s weakest/most strict limitations/“lowest ebb” \*\*this is the case here\*\*
         4. Note: cat. 1 does not necessarily make something constitutional, cat. 3 does not necessarily make it unconstitutional.
   4. Wars & Emergencies
      1. Constitutional Text
         1. President is Commander-in-Chief of the army and navy and of the militia, when called into national service.
         2. Congress has the power to:
            1. Declare war
            2. Grant letters of marque and reprisal, and make rules concerning captures on land and water.
            3. Raise and support armies
            4. Provide and maintain a navy
            5. Make rules for the government and regulation of the land and naval forces
            6. Provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions
            7. Provide for organizing, arming, and disciplining the militia
         3. Congress provided with far more power due to the framer’s distrust of the President/putting too much power in one person’s hands.
         4. Balance with need for “sole organ”/“one voice” argument for executive power
      2. Hamilton v. Madison
         1. Hamilton: The first sentence of Article II, which declares that “the executive power shall be vested in a President” is a general grant of power, which includes control over foreign affairs.  
            • The constitutional powers granted to Congress over foreign affairs are “exceptions” from the general grant of executive power to the President and must be construed narrowly.
         2. Madison: The direction of foreign policy is a legislative function.  
            • “War is in fact the true nurse of executive aggrandizement.”
         3. Historical practice favors Hamilton’s interpretation
      3. *The Prize Cases* — Lincoln created naval blockade and seized ships when the confederacy initiated attack on the north
         1. Congress’s power to officially declare war, but President has freedom and a duty to act to respond to an attack — no time to wait for Congress’s approval
         2. Initiation of war
            1. The President “has no power to initiate or declare a war either against a foreign nation or a domestic State.”
            2. “Congress alone has the power to declare a national or foreign war.”
         3. Responding to attacks
            1. If somebody else initiatives a war, then “the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”
            2. President has the power to define what an “attack” is
         4. Dissent: agree with majority that Congress’s Acts did confirm President’s power to do what he did, but can’t retroactively approve anything — would approve moving forward
      4. *Ex Parte Quirin* — filed a habeas corpus to contest the right to a civil trial instead of a trial in front of a military tribunal — is a presidential order, which creates a military tribunal to try war crimes committed by war criminals/enemy belligerent’s instead of trying these cases in a civil court is constitutional? Yes
         1. Jackson Category #1 (Presidential Action PLUS Congressional Authorization) “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”
         2. Congress has the power to “define and punish ... Offenses against the Law of Nations.” Article I, Sec. 8, Cl. 10.
         3. “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.”
      5. *Zivotofsky v. Kerry* — Jerusalem or Israel on passport
         1. Category 3 of Jackson categories — does not necessarily make something unconstitutional
         2. President’s powers: “The President shall receive ambassadors and other public ministers.” Art II, sec. 3. v. Congress’s powers: Congress is authorized to “establish a uniform rule of naturalization.” Art I, sec. 8.
         3. Being in category 3 does not necessarily make something unconstitutional
   5. The Unitary Executive
      1. Background
         1. Concept: the idea that the “executive power” (whatever it is) resides in the President alone and cannot be divested from him.
         2. Issues arise mainly in the context of legislative restrictions on appointments and removals to/from positions in the government
            1. President must be able to trust and effectively work with those around him, therefore he should decide who they are
            2. Counterargument: those in these positions should not feel like they are exclusively within the President’s mercy
         3. Not uncommon for statutes creating agencies and specifying their officers to have limits on who the President may appoint
      2. Appointments
         1. “The President, with the advice and consent of the Senate, “shall appoint . . . officers of the United States . . .” (referencing “principle” officers)  
            — U.S. Const., art. II, sec. 2, cl. 2.
         2. Principle v. Inferior Officers
            1. Principle officers = those who work directly below the president (ex: AG)
            2. Appointments clause does not apply to mere employees or “inferior officers”
            3. Inferior officers are “officers whose work is directed and supervised at some level” by principal officers — *Edmond v. US*

Congress can vest the appointments of inferior officers“in the President alone, in the Courts of Law, or in the Heads of Departments.”

* + 1. Removal
       1. No specific constitutional text regarding the process of removal other than Congress’s impeachment power
          1. History says the impeachment power meant to be an extraordinary power to be exercised in rare circumstances, not simply to manage the executive and judicial branches
       2. *Myers v. US*: President Woodrow Wilson fires a postmaster — law provides that Postmasters “shall be appointed and may be removed by the President with the advice and consent of the Senate” — postmaster sued for his salary
          1. Rule: Act unconstitutionally restricts the president’s executive power of removal — The President has the exclusive power to remove executive officers without congressional interference.
          2. Reasoning: With the Act, Congress was attempting to expand its own powers regarding appointments and removal = not cool

“Purely executive” officials — president needs to be able to choose who he works with

His duty to uphold the Constitution and go about the faithful execution of laws will not allow him to use these people at his mercy

Duty to faithfully execute the laws — uses subordinates to accomplish this = must be able to select who these people are

“…in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible…”

* + - * 1. Dissent: this is against the theory of check & balances — Congress created these positions, why don’t they get any say in who fills them?
        2. Note: important for its interpretation of the President’s removal authority and the basis for it as well as its imposition of limitations of Congress’s powers
      1. *Humphrey’s Executor v. US*: When Humphrey refused to resign, Roosevelt fired him because of his policy positions — Under the Federal Trade Commission Act, the president can remove a commissioner for “inefficiency, neglect of duty, or malfeasance in office.”
         1. Rule: “Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend on the character of the office”

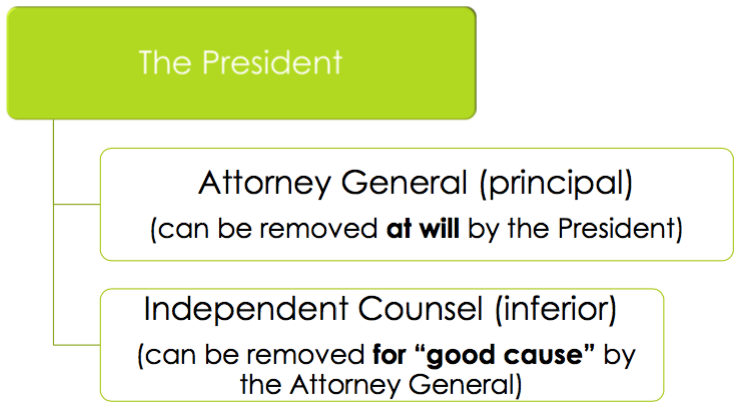
“The power of the President alone to make the removal is confined purely to executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made . . . except for one or more of the causes named in the applicable statute.”

* + - * 1. Distinguished from Myers

This imposes a check, not trying to expand Congress’s powers

Myers was “purely executive” here “quasi-legislative”/“quasi-judicial”

* + - * 1. Allowing the president to fire people based on their policy views undermines neutrality — creates issue of these officers being at the president’s mercy — FTC is to be nonpartisan and act with entire impartiality

“One who holds his office during the pleasure of another cannot be depended upon to maintain as attitude of independence against the latter’s will.”

* + - 1. *Morrison v. Olson*: The Ethics in Government Act created a special court and empowered the AG to recommend to that court the appointment of an "independent counsel" — The Act provides that the IC can be removed from office only by impeachment or by personal action of the AG “for good cause.”
         1. Rule: Whether the removal restrictions impede the president’s ability to perform his constitutional duty — functions of the officials to be viewed in that light
         2. Reasoning: The “good cause” removal provision in isolation does not interfere with executive authority. There is no need for the President to have the power to terminate the IC at will in order to perform executive Branch duties. The executive retains authority to remove the counsel through the Attorney General for good cause.

The IC is “clearly executive” in light of four factors:

Subject to removal by a higher executive branch official, but someone below the president (the AG) = inferior

Authorized only to perform certain limited duties

Jurisdiction limited to what is granted to her by the Special Division

Tenure was limited to accomplishing the particular task she was assigned, making her appointment temporary

* + - * 1. Dissent (Scalia): The framers of the constitution intentionally vested all of the executive power in the president. The majority has replaced a constitutional requirement with an unprincipled “balancing test” having no guidance.
    1. Structural Issues
       1. *INS v. Chada*: A deportation hearing was held, and the IJ ordered that Chadha’s deportation be suspended — suspension was reported to Congress, as required by the Act, and the HoR unilaterally vetoed the suspension
          1. Main Issues:

Bicameralism: Article I, Section 1 provides that legislative power is vested in a Senate *and* House of Representatives.

Presentment: Art I, Sec 7 provides that every bill that passes Congress must be presented & approved by the President (unless veto overridden).

Because these are both constitutional requirements, the one-house veto is under attack in *Chada* for breaking both

* + - * 1. Rule: one house vetoes (lacks bicameralism and presentment) and two house vetoes (lacks presentment) of executive action are unconstitutional
        2. Reasoning: Congress concedes without the provision in the Act, there is no other grant of power allowing them to do this

When the framer’s wanted to give special one-house powers, they did so specifically and unambiguously (p. 489 in casebook)

None given authorize what is challenged here — Congressional authority is not to be implied

Congress must abide by what is delegated to them until that delegation is legislatively altered or revoked

* + - * 1. White’s dissent seen as more functional

Basing the judgement on the Presentment Clauses will invalidate every Congressional use of the veto power which has been included in hundreds of statutes since the 1930s

This case should be decided on narrower ground: The power to override the AG = judicial power that could not be exercised by a legislative body.

* + - 1. *Clinton v. NY*: Clinton exercised authority under the Line Item Veto Act to cancel one provision in one act and two provisions of another.
         1. The Line Item Veto Act: The President may prevent any tax or spending provision in a federal law from having force or effect if he determines…
         2. Rule: Line Item Veto Act = unconstitutional
         3. Reasoning: “…the President has amended an Act of Congress by repealing a portion of it. Repeal of statutes, no less than enactment, must conform with Art. I [bicameralism & presentment]. There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”

Powers in the Act are not authorized by the Constitution because it authorizes the President to create a different law than the one properly enacted

“Finely wrought” procedure of the Constitution — can’t change Constitutional procedure without changing the Constitution

Other issue: would bind future Congresses to this — if they ever tried to repeal it, the president would just veto it

* + - 1. Both of these cases are examples of:
         1. how something can be in Jackson category 1 and still be unconstitutional
         2. the court striking down structural solutions the executive & legislative have tried to create
    1. Executive Privileges and Immunities
       1. Text
          1. There are no direct provisions in the Constitution regarding privileges/immunities
          2. Court infers them from constitutional text & structure
       2. *United States v. Nixon*: Five men were caught breaking in to the DNC — Nixon named “unindicted co-conspirator.” — investigator subpoenaed the tape recordings of conversations involving the President and his advisers regarding the scandal — The President’s counsel moved to quash the subpoena citing Article II of the Constitution and its grant of privilege to the President.
          1. Rule: Executive privilege is not absolute

“The generalized assertion of [executive] privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”

(“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without, more, can sustain an absolute, unqualified [privilege].”).

* + - * 1. Reasoning: Should balance privilege concerns with 5th and 6th amendment rights to criminal trial as well as the fair administration of criminal justice

The executive privilege has constitutional underpinnings. (“Nowhere in the Constitution is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

* + - 1. *Nixon v. Fitzgerald*: Fitzgerald was a pilot in the armed forces who was fired, an action for which President Nixon took responsibility. — President’s counsel argued that the President could not be sued while in office, essentially claiming that executive privilege was absolute
         1. Absolute v. Qualified Immunity

Absolute immunity precludes all civil suits arising from the exercise of the officer’s official authorities.

Qualified immunity allows civil suits only where the officer violated clearly established statutory or constitutional rights.

* + - * 1. Rule: “In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the outer perimeter of his official responsibility.”

Given absolute immunity here — does this align with the prior case?

* + - * 1. Reasoning: If any person could bring suit against the President while in office, the President would operate in constant fear of personal suit, which is impractical for the office. His immunity to suit, therefore, must be absolute.
        2. Note: this applies only to civil suits, not criminal and only to the president, not his subordinates
      1. *Cinton v. Jones*: Jones sued President Clinton for actions that occurred when he was governor — Jones claimed that her continued rejection of Clinton's advances ultimately resulted in punishment by her state supervisors.
         1. Rule: A civil suit against a president should not be dismissed if it is based on unofficial conduct that occurred before the president took office.

Privilege does not grant a sitting President immunity from civil litigation except under highly unusual circumstances.

* + - * 1. This applies to civil suits — question of criminal suits still remains

1. **Tests**
   1. **Standing** (*Lujan, Mass v. EPA*)
      1. What is the injury-in-fact?
         1. Is the injury-in-fact sufficiently particularized and imminent?
      2. What is the action/inaction being challenged?
         1. Has that action/inaction caused the injury-in-fact?
      3. What is the requested relief?
         1. Will the requested relief redress the injury-in-fact?
   2. **Political Question Doctrine** (*Marbury v. Madison*) — balancing test
      1. Textual Criterion
         1. Constitutional commitment of the issue to a coordinate political department
      2. Functional Criteria (focuses on the courts’ institutional capacity)
         1. “Lack of judicially discoverable and manageable standards for resolving it.”
         2. “The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”
      3. Prudential Criteria (focuses on the decision’s institutional consequences)
         1. “Impossibility of a court’s undertaking independent resolution without   
            expressing lack of the respect due coordinate branches of government”
         2. “Unusual need for unquestioning adherence to a political decision already made.”
         3. “Potentiality of embarrassment from multifarious pronouncements by various departments on one question.”
      4. Most courts consider the first 2 the most important\*\*
   3. **“Necessary” under the Necessary & Proper Clause** (*McCulloch v. Maryland*)
      1. Is the end within Congress’s listed powers in the Constitution?
      2. Is there some minimal degree of fit between the means and the end? (i.e. are the means “appropriate” to accomplish the end?)
         1. Courts must give Congress discretion with respect to the means by which the powers it confers are to be carried into execution — Congress knows better what is necessary to accomplish the end.
      3. Is there no part of the Constitution that prohibits what Congress is trying to do?
   4. **Substantial Effects Test** (*US v. Darby*)
      1. The use of channels of interstate commerce (roadways, airports, etc.)
      2. The instrumentalities of interstate commerce or persons or things in interstate commerce
      3. Activities that substantially effect interstate commerce \*reaches intrastate activity\*
         1. Rational basis. (*US v. Lopez*) Whether “Congress could rationally have concluded that [the regulated activity] substantially affects interstate commerce.”  
            — often based on proof of legislative findings
         2. Must be regulating an economic activity — “arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially effects interstate commerce.”
   5. **The Aggregation Doctrine** (*Wickard v. Filburn*)
      1. An individuals own contribution to the demand for what may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others situated, is far from trivia
   6. **Constitutionality of Taxing & Spending** (*South Dakota v. Dole*)
      1. Federal spending is constitutional if:
         1. The federal spending is in pursuit of the general welfare.
         2. Conditions are stated unambiguously.
         3. The condition is related to the federal interest in this particular national project or program;
         4. It is “not used to induce States to engage in activities that would themselves be unconstitutional.”
         5. Federal spending may also be unconstitutional if “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”
            1. Test for persuasion v. coercion: “We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.” (*NFIB v. Sebelius*) — no bright-line rule created for this determination
            2. \*\*\*\*analyze all 5 prongs on exam even if obvious\*\*\*\*
   7. **Anti-comandeering Principle** (*Printz v. US*)
      1. “The federal government may not compel the states to enact or administer a federal regulatory program.”
      2. 10th Amendment state sovereignty protection
      3. ex: *Dole* passed this because mere 5% of taxes was not forcing them to comply
   8. **The Dormant Commerce Clause**
      1. Is there a state statute or local ordinance?
         1. The Dormant Commerce Clause imposes limits only on *state* and *local* governments, not the federal government
      2. Market Participation Doctrine Exception — is state acting as regulator or participant?
         1. When the state is acting as a market participant as opposed to a market regulator, they are treated as a private business and there is no limit on who private companies choose to deal with regardless of their intent
      3. Does the state statute discriminate against interstate commerce?
         1. If yes: unconstitutional
            1. Exception to automatic invalidation of the law: Are reasonable, nondiscriminatory, and adequate alternatives available for achieving the same legislative purpose? (*Dean Milk*) If not, then the statute may be upheld.
         2. If no, but incidental effects: Pike Balancing Test
            1. “It will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit.”
            2. Inherently subjective determination
            3. Most statutes typically pass this test easily unless they’re ridiculous
   9. **Taxes Under the Commerce Clause** — *Brady* test (all required, not a balancing test)
      1. Must be applied to an activity with a substantial nexus with the taxing state
      2. Fairly apportioned
      3. Non-discriminatory against interstate commerce
      4. Fairly related to services provided by the state
   10. **Appointments**
       1. Is this person an “officer”?
          1. “Mere employees” do not have to go through appointment process
          2. Officers are persons “exercising significant authority pursuant to the laws of the United States.” *Buckley v. Valeo*
          3. Investigating and issuing reports is not “significant authority,” but the authority to make rules and regulations with the force of law or the authority to prosecute constitute “significant authority.” *Buckley v. Valeo*
       2. If so, is the officer an “inferior” officer or a “principal” officer?
          1. The appointments of principal officers must be made by the President with the advice and consent of the Senate.
          2. Congress can vest the appointments of inferior officers “in the President alone, in the Courts of Law, or in the Heads of Departments.”
   11. **Is a removal restriction in a statute unconstitutional?** (*Morrison v. Olsen*)
       1. Whether the removal restrictions impede the president’s ability to perform his constitutional duty — functions of the officials in question to be viewed in that light
       2. Balancing Test
          1. Functions of the officer?
             1. Purely executive — more likely impedes, less likely okay
             2. Quasi-legislative/judicial — less likely to impede, more likely okay
          2. Principle or Inferior officer?
             1. Restrictions on principle officers more likely to impede
          3. Has Congress attempted to expand its own power?
             1. “for good cause” restrictions (more likely okay) v.
             2. “you need our approval” restrictions (be more skeptical of these)
   12. **Constitutionality of actions taken by legislative branch** (*INS v. Chada*)
       1. “Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect.”
       2. Take bicameralism and presentment into account