**Constitutional Law I Outline**

Fall 2015

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Introduction to the U.S. Constitution

1. ***Introduction***
   1. Constitution – establishes laws that govern a nation or organization, does not have to be codified (i.e. British Constitution is unwritten, various texts)
   2. US Constitution – codified authorizations and prohibitions of gov’t delegated by the people (popular sovereignty – sovereignty rests in the people), features
      1. Separation of powers of executive, legislature, judiciary
      2. System of checks and balances
      3. Federalism
   3. Protection of individual rights via (1) limiting gov’t power (2) expressly guaranteeing individual rights (i.e. 1st amendment)
   4. Amendment Process
      1. Proposal
         1. (1) Congress may propose new amendments to the states by ⅔ vote – how all amendments that have been ratified have been proposed
         2. (2) Legislatures of ⅔ of states may call for a Constitutional convention – zero ratified have been proposed this way
      2. Ratification by ¾ states
      3. Limit: But no state without its consent can be deprived of equal representation in the Senate
   5. Art I: Legislative branch
   6. Art II: Executive branch
   7. Art III: Judicial branch
   8. Art IV: Federalism
   9. Art V: Amendment Process
   10. Art VI: Supremacy Clause
   11. Art VII: Ratification of the original constitution
   12. USSR Constitution – what Madison calls “parchment barriers” – ignored by leaders in order to execute their desires
2. ***Constitutional Interpretation***
   1. Sources of Constitutional Meaning
      1. Text
      2. History
      3. Precedent – vertical (absolutely binding) and horizontal (presumptively binding) *stare decisis*
         1. Purpose: Provides predictable/stable judiciary
         2. Why overrule: (1) Pertinent factual/legal circumstances have since changed, (2) precedent is outdated and no longer prevails to societal norms, (3) prior ruling wrongly decided
      4. Purpose
      5. Consequences
      6. National Ethos – prevailing national beliefs and ideas
   2. Originalism – constitutional interpretation by seeking to uncover its meaning at time of adoption (Thomas, Scalia – faint-hearted originalist because values *stare decisis* over originalism)
      1. Original Intent – what did the framers *intend* when they wrote the Constitution (prominent in 1960s-1980s, rarely used today, Thomas occasionally)
      2. Original Meaning – (originalism 2.0) – what is the objective *meaning* of the text and what would a reasonable observer at the time have assigned to the constitutional provision when enacted
      3. May only change through formal amendment process
      4. Judges usually look to first three sources of Constitutional meaning – i.e. Madison’s journal, Federalist Papers, contemporary dictionaries (many argue that there’s no difference between the two originalism doctrines since using the same sources)
      5. Criticisms – (1) Madison is 1 man, 55 delegates; (2) how to determine a singular opinion from collective group of delegates; (3) how to determine intentions; (4) history is often conflicting/subjective; (5) society has changed drastically since adoption; (6) framers unrepresentative of the public; (7) Federalist Papers were advocacy briefs prepared by just three people, little evidence of usage in ratification; (8) too much faith in the legislative process; (9) laws may not protect minorities as Constitution was intended; (10) framers’ original intent *was* living constitutionalism (Jefferson believed Constitution should be rewritten every 19 years for every generation)
   3. Living Constitutionalism – a constitution that evolves over time to meet the changing norms and needs of a modern society (Breyer and others)
      1. May change through judicial interpretation, formal amendment process not always necessary
      2. Judges more likely to look to all six sources of Constitutional meaning (last three)
      3. Criticism – legislating from the bench, activism can cut both ways (i.e. Equal Protection for fetuses)
   4. *Obergefell v. Hodges* (SCOTUS, 2015) (5-4)

The Judicial Power

1. Overview of the Judiciary
   1. Trial/District Courts – at least one per state and territory
   2. Circuit Courts – 13, appeal mostly geographically oriented (mandatory, appellants v. appellees); OR is in 9th Circuit
   3. SCOTUS – petition for writ (discretionary JD – need four justices votes to be granted (five to win case), petitioners v. respondents)
   4. Mandatory JD – must hear case (i.e. trial and circuit courts)
   5. Discretionary JD – discretion to hear/not hear case (i.e. SCOTUS)
2. Judicial Review
   1. Arguments for judicial review
      1. Nature of written constitution – written constitution binding in that it trumps laws, BUT doesn’t determine *who* best suited for determining constitutionality
      2. Supremacy Clause – Constitution establishes hierarchy with Constitution as supreme BUT again doesn’t determine *who* best suited
      3. Nature of the judicial function – those who apply the law to particular cases must of necessity expound and interpret the law
         1. Judiciary checks on political branches
         2. Judiciary as “least dangerous branch” – unelected, life tenure, less swayed by short-term electoral concerns
         3. Judiciary as “sober second through” – timing long after political battles over, hears only concrete cases so better able to see legislation’s real world effects rather than in the abstract
         4. Numerous checks on the judiciary (i.e. who will guard the guardians) – may override decisions by legislation/Constitutional amendment, appointments - unelected but but appointed by democratically elected president and confirmed by democratically elected Senate, impeachment power (though very rare), legislative & self-imposed/constitutional checks (rest of section)
         5. Arising under jurisdiction – courts need to be able to look to Constitution in engaging in Constitutional problems
         6. Judges oath to protect the Constitution BUT all high-ranking officials take same/similar oath
      4. Constitutional restrictions on Congress’s ability to determine Constitutionality (i.e. Fox and the hen house, who will guard the guardians)
   2. BUT Counter-Majoritarian Difficulty (arguments against) – unelected have power to strike down laws created by democratically elected officials
   3. Facial v. as-applied Constitutional challenges
      1. Facial – law unconstitutional in all applications
      2. As-applied – law unconstitutional as-applied in the facts of the particular case
   4. Original v. appellate JD
      1. Art III, Sec. 2, Cl. 1&2 – limited subset of cases fall within original JD (Cl. 2), interpreted as all else appellate (canon of interpretation)
   5. *Marbury v. Madison* (SCOTUS, 1803)

**H:** Court does not have the jurisdiction to hear case, dismisses

* + 1. Does 𝝅 has a right to the commission he demands? Y – commission final when signed and sealed, to withhold is to violate a vested legal right
    2. If Y and if that right has been violated, do the laws of this country afford 𝝅 a remedy?
       1. Discretionary action – where executive officials act in cases where executive possesses a Constitutional/legal discretion – then N remedy
          1. Origin of legal Q doctrine
       2. v. Nondiscretionary actions – specific duty assigned by law and individual rights depend on performance of that duty – Y remedy – appointments are inarguably discretionary BUT because commission final (signed and sealed), no discretion, must deliver
    3. If Y, is the proper remedy a mandamus from this court?, Two questions
       1. Is the secretary state subject to mandamus? Y, judiciary may review conduct of executive officials and issue a writ of mandamus(a judicial order commanding gov’t official to do something, here for Madison to deliver Marbury’s commission)
       2. Is it in the JD of the court to issue the writ? N, statute, Judiciary Act of 1789, granting original JD in this case in conflict with the Constitution’s Art. III, Sec. 2, Cl. 1&2. Under the Constitution’s Supremacy Clause (Art. VI), the Constitution is supreme therefore the statute is null and the court doesn’t have JD to hear the case → establishes ***judicial review***
  1. *Stuart v. Laird* (SCOTUS, 1803) (unanimous, Marshall took no part in decision)

**H:** Jefferson’s repeal of Adams statute/midnight appointments purging courts all judges appointed by Adams Constitutional → if court had stood up to Jefferson, court likely would have lost its power (a court needs to establish authority before can stand up to establish*ed* authorities; exemplifies court’s awareness of prevailing opinions)

* 1. *Cooper v. Aaron* (SCOTUS, 1958) (unanimous 9-0)

**H:** States are bound by court’s decisions rejecting state's’ belief that they are not bound could interpret on their own → interpretation of becomes same as the text, collapsing distinction between text and precedent

1. Checks on Judicial Power: Is this case properly in federal court?
   1. Legislative Checks
      1. Has Congress removed the Supreme Court’s appellate JD to hear the case?
         1. *Ex parte McCardle* (SCOTUS, 1869) (unanimous 8-0)

**H:** Court lacks power to hear case because Congress removed Court’s appellate JD; Congress may make exceptions to Supreme Court’s appellate JD if granted to the court by Congress i.e. via legislation (v. granted in the Constitution – the Supremacy Clause)

* 1. Constitutional/Self-Imposed Checks
     1. Is the issue in this case requesting an ***advisory opinion***? – prohibited; federal courts may only rule on cases or controversies with actual dispute
        1. i.e. Letter from Secretary of State Jefferson on behalf of President Washington requesting the court’s opinion(s) on neutrality in war between Great Britain and France – court denies
        2. Rationale: (1) President may seek counsel from executive departments, (2) if didn’t follow, could impede on court’s power by implicating that advice from the court need not be followed, (3) avoiding too cozy a relationship with the executive, (4) could burden judiciary
     2. Does the plaintiff have ***standing*** to sue? (A Q of *who*: Is π the proper party to request an adjudication of a particular issue)
        1. Goals of Standing: (1) Adversarial presentation, (2) concreteness of legal issues, (3) judicial restraints/separation of powers
        2. (1) Is the π a quasi-sovereign state (v. private party)?
           1. Idea that states give up certain rights to the US and the US therefore must protect their interests
           2. If Y, π will receive special solicitude from the court in standing analysis
        3. (2) Is there a procedural right to sue (i.e. a citizen suit provision)?
           1. If Y, court will relax the redressability requirement
           2. *Lujan v. Defenders of Wildlife*, Scalia: Provision doesn’t mean that anyone can sue, still need to show particularized and imminent injury otherwise not an Art III case or controversy
        4. (3) Has π suffered a concrete and particularized and actual or imminent injury-in-fact (invasion of a legally protected interest)? Must not be merely conjectural/hypothetical
           1. A 𝝅 raising only a generally available grievance about gov’t – claiming harm to every citizen’s interest in proper application of the Constitution and laws and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Art III case/controversy
           2. Threshold/standard unclear, courts inconsistent: Must argue for one of the following standards

Certainly impending (*Clapper v. Amnesty International USA*)

Substantial risk (*Lujan v. Defenders of Wildlife*)

Reasonable/high likelihood (*Monsanto* – but consider proximity in that case, distinguished from *Lujan*)

* + - 1. (2) Causation and traceability: Is the π’s injury caused by or fairly traceable to the challenged action of the Δ? (i.e. Has the action/inaction challenged caused the injury-in-fact from (1))
      2. (3) Redressability: Will the requested relief redress the injury-in-fact from (1)?
         1. Cannot be merely speculative
      3. (4) Prudential standing – even if court determines case satisfies three Constitutional prongs ^, may decline to hear the case “as a matter of prudence” – used when court wants to stay out of a case/controversy (*United States v. Windsor*)
      4. *Lujan v. Defenders of Wildlife* (SCOTUS, 1992)

**H:** 𝝅 has no standing to challenge Secretary of the Interior’s interpretation of the Endangered Species Act

(3) Special interest in observing endangered species overseas legally recognizable but need concrete/immediate plan (i.e. should have purchased a plane ticket/planned trip)

(3/4) Three nexus theories – ecosystem (any part of contiguous ecosystem adversely affected by funded activity, environmental damage extends to large area), animal (anyone studying harmed), vocational (anyone with professional interest harme) rejected:

1. Ecosystem: Environmental damage must use area affected
2. Animal/Vocational: Would be a basis for harm but inapplicable here

(5) PLURALITY ONLY – agencies funding projects threatening 𝝅’s interests not party to the suit, only DOI, which could not redress injury; US funding only 10%, no real impact because harm likely to still move forward without US funding (Stevens: Disagrees, says could redress and discusses influence of the US)

**Stevens Concurrence:** Grants standing, moves onto second question and determines that ‘86 interpretation the correct one (moves onto the merits, unlike majority)

**Dissent:** (3) Establishes lower threshold, doesn’t matter if trip is now or in 20 years if animals going to be gone

* + - 1. *Massachusetts v. Environmental Protection Agency* (SCOTUS, 2007)

**H:** Standing in 𝝅’s challenge of EPA’s failure to regulate GHG from new motor vehicles

(1/2) Yes

(3) Loss of coastal land (not climate change generally) – MA has already been injured via loss of coastlines

(4) EPA’s failure to regulate contributes to its injury – incremental and every small step helps, US motor vehicle emissions contributes to 6% of CO2 emissions in the world

(5) Injunction requiring EPA to issue emission standards for new motor vehicles – again, every little bit helps, reduction would do something regardless of what happens elsewhere

**Roberts Dissent:** (3) No, global warming affects everyone and may take years to harm coastal land, (4) no, state misleading because complaint of conduct only affects new motor vehicles not all; harm not significant enough to harm coastal land of MA, (5) no, majority redefining the injury to be GHG emissions rather than loss of coastal land/water

* + - 1. *Clapper v. Amnesty International USA* (SCOTUS, 2013)

**H:** No standing to request injunction against Section 1881a surveillance by various gov’t agencies

(3) Communications will be acquired under section at some point in the future (alleging future injury) and 𝝅s have already taken costly measures to protect against risks of surveillance, such as avoiding email, talking in generalities (alleging present injury):

1. Future Injury: speculative, must be *certainly impending* – gov’t would have to target 𝝅s foreign contacts, chose to invoke section 1881a authority, be authorized by FISA court, successfully intercept 𝝅s communications
2. Present Injury: Can’t manufacture standing

**Breyer Dissent:** (3) Only need to assume that gov’t doing its job and that 𝝅’s continuance of electronic communications are likely to be intercepted to assume injury (argues for *Monsanto* injury-in-fact standard of reasonable/high likelihood)

* + - 1. *United States v. Windsor* (SCOTUS, 2013)

**H:** Focus on gov’t’s standing to appeal and prudential standing considerations (Ms. Windsor certainly had right to file – clear redressable injury); standing to appeal because all criteria met and injury unredressed (not moot)

1. Prudential concerns: Should the court insist upon concrete adverseness by the parties (gov’t admits that disagrees with DOMA but refuses to refund, essentially to force the court to strike down DOMA)? – BLAG presenting adversarial opinion; costs of not hearing the case: Extensive litigation, hundreds of thousands affected by decision, separation of powers – not hearing would undermine court’s role in determining constitutionality (further would create precedent that executive could simply maneuver and nullify a law to refuse to defend it in court so that judiciary can’t hear – undermining legislature/judiciary)

**Scalia Dissent:** Gov’t has no standing to appeal – not in the power of judiciary to hear abstract opinions; BLAG also lacks standing due to separation of powers concerns – can’t have legislature suing executive any time there’s a political dispute

**Alito Partial Dissent:** BLAG has standing to sue – in the rare situation that the executive refuses to defend the law, as here, Congress may step in to defend

* + 1. Is the issue in this case a ***political question***, i.e. is the federal judiciary the proper forum to address this case? – prohibited
       1. Political Qs – legal Qs that the judiciary cannot decide because the Constitution has paced the decision in question in an institution other than the judiciary (origins in *Marbury v. Madison*, separation of powers)
       2. *Baker v. Carr* (SCOTUS, 1962)
          1. 6 factors to determine whether political Q

Textual criteria – (1) textually demonstrate constitutional commitment of the issue to a coordinate political department

*Nixon v. US* – limited use of “sole” implies no room for judicial review; “try” implies broader meaning

Functional criteria – court’s institutional capacity (Judges create standards, always a way to find a way to hear a case if they want)

(2) Lack of judicially discoverable and manageable standards for resolving it

(3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion

*Baker v. Carr* – doctrine applies to horizontal separation of powers not vertical federalism

*Nixon v. US* – Impeachment is important institutional check granted by the Constitution, fox and hen house if judiciary weighs in

Prudential criteria – decision’s institutional consequences

(4) Impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government

(5) Unusual need for unquestioning adherence to a political decision already made

(6) Potentiality of embarrassment from multifarious pronouncements by various departments on one question

**H:** No factors apply to challenge of 1901 statute apportioning seats to legislature in TN therefore *not* a political Q, distinguishes political questions from political cases – just because a case is labeled politically controversial doesn’t play into whether or not the case can be heard (i.e. *Baker v. Carr; Bush v. Gore*, *Roe v. Wade*)

* + - 1. *Nixon v. US* (SCOTUS, 1993)

**H:** Question of whether Senate’s creation of subcommittee in violation of Constitution’s impeachment clause is a political question

**J. White Concurrence:** Does not believe case presents a political question (“sole” used to distinguish House and Senate roles, does not mean political branch has entire discretion; textually “try” must have meant legal definition, other definitions like examine/investigate don’t fit), throws out on other merits

**J. Souter Concurrence:** No room for judicial review in cases of impeachment *except* in extreme cases, such as a vote as to whether or not a bad guy

* + 1. ***Mootness*** – a live case/controversy must exist at all stages of federal court proceedings (trial and appellate levels); if not live then advisory and wouldn’t be redressable because no longer an injury to redress
       1. Exception 1: Capable of repetition yet evading review – lifetime of injury shorter than lifetime of review (i.e. *Roe v. Wade*)
       2. Exception 2: Δ voluntarily stops complained of behavior but is free to return to at any time
       3. To avoid, request money damages for injury on top of injunction – injunction claim may become moot but claim for damages cannot
    2. ***Ripeness*** – if injury hasn’t happened yet, then the case is not ripe (closely tied to injury-in-fact requirement)
  1. ***The Eleventh Amendment*** – federal judiciary v. state sovereignty – federal judicial power does not extend to controversies between a citizen and a state
     1. Exception: If Congress relying on the 13th, 14th, or 15th amendments, may abrogate a state’s 11th amendment immunity
     2. *Chisholm v. Georgia* (SCOTUS, 1793) – citizen of South Carolina suing Georgia

**H:** Federal judicial power extends to controversies between a state and citizens of another state via Art. III, Sec. 2

* + - 1. Negative reaction by states (emblematic of federal judiciary v. sovereignty of states) → Eleventh amendment (record timing of amendment enactment in response to court holding)
    1. *Hans v. Louisiana* (SCOTUS, 1890) – Louisiana citizen suing state (distinguished from *Chisholm* because suing own state gov’t)

**H:** 11th amendment doesn’t explicitly prohibit and Congress could easily have barred by including three words BUT state sovereignty should be maintained, court relied on history, consequences, and national ethos (state/legislative reaction to *Chisholm* holding)

The Legislative Power

1. Federal power – limited and enumerated, v. state power – indefinite and numerous
   1. To determine whether federal statute constitutional:
      1. (1) Whether authorized under the Constitution and
      2. (2) Whether prohibited by another provision of the Constitution
2. ***The Necessary and Proper Clause*** – expands the legislative powers to express powers *and* those implied as necessary and proper for effectuating those powers; must be in furtherance of a power expressly listed in the Constitution
   * 1. (1) Is the end within Congress’s Constitutionally enumerated powers?
        1. Building block theory (*United States v. Comstock*), five considerations to determine if goes too far (see application in *US v. Comstock* below):
           1. N&P breadth
           2. History of involvement in policy area
           3. Sound reason for enactment
           4. Accommodation of state interests
           5. Breadth of scope
     2. (2) If Y, is there some minimal degree of fit between the means and the ends, are the means appropriate to the ends?
        1. Courts give Congress discretion regarding means by which the powers it confers are to be carried into execution
     3. (3) If Y, is there no provision of the Constitution which prohibits the Congressional action?
   1. *McCulloch v. Maryland* (SCOTUS, 1819)

**H:** Congress has the power to enact a national bank because federal gov’t is supreme as Constitution emanated from the people not the states and there are implied powers not listed in the Constitution (here end is any provision granting costs/money for which a bank would be useful, i.e. tax and spend, war powers)

* + 1. Textual argument – Articles of Confederation used “expressly” in regards to powers, Constitution does not – written by same people, used for a reason
    2. Could not possibly list all federal powers, meant to be long-enduring document so need to make flexible for the unforeseen
    3. Court defines “necessary” as useful or convenient, rejects MD’s argument that absolutely necessary because “absolute” used elsewhere in the Constitution evidencing that framers would have used “absolutely” if that is what they had intended
    4. MD does not have the ability to tax that bank because the power to tax is the power to destroy
  1. *United States v. Comstock* (SCOTUS, 2010)

**H:** Congress’s use of building block theory (with CC end/enumerated power) enabling civil commitment of prisoners past the date of their sentence constitutional, does not go too far based on five considerations: (1) Breadth of N&P, (2) long history of involvement in this policy area, (3) sound reason for enactment, (4) accommodation of state interests (here 29 states filed amici favoring gov’t), and (5) narrow in scope (affecting only about 100 prisoners of 100,000)

* + 1. Building block theory as tied to CC: CC (power to regulate interstate commerce) → power to punish implied → power to carry out power by creating prisons for punishment (otherwise where would prisoners/criminals go?) → powers to create laws concerning prisons/prisoners
    2. Part Three of test (i.e. Due Process, Equal Protection) not considered in lower court so not considered in SCOTUS, SCOTUS remanded then decision regarding (3) repealed back to SCOTUS

**Dissent:** No enumerated power/end, building block theory goes too far – should be state gov’ts’ responsibility not federal (federalism argument)

1. ***The [Affirmative] Commerce Clause*** – aims: (1) Economic unity and (2) political unity (avoidance of turf wars that may threaten existence of the union), commerce big part of decision to abandon the Articles of Confederation; Congress may regulate
   1. (1) Use of channels of interstate commerce
   2. (2) Instrumentalities of interstate commerce or persons or things in interstate commerce
   3. (3) All activities that substantially affect interstate commerce (applies to *intra*state activity also)
      1. Substantial effects test – the power of Congress to regulate interstate commerce extends to the regulation through legislative activities in intrastate which have a substantial effect on the commerce or exercise of the Congressional power over it, citing the N&P Clause (*United States v. Darby*), no deference to Congress; if N, move on to RBT
         1. Aggregation doctrine – that 𝜋’s 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 own contribution taken together with that of many others situated is far from trivial (*Wickard v. Filburn*)
      2. Rational basis test – whether Congress could rationally have concluded that regulated activity substantially affects interstate commerce (*United States v. Lopez*); another way of phrasing (3), essentially more deference to Congress
         1. Does the statute regulate economic/commercial activity (economic activity refers to production, distribution, and consumption of commodities – *Gonzales v. Raich*)? If N, unconstitutional
            1. *United States v. Lopez* – Regulating possession of guns in Gun-Free School Zones Act not economic
            2. *United States v. Morrison* – Violence Against Women Act not economic
         2. Does the statute include a jurisdictional element (elements that appear on the face of the statute and expressly connect to interstate commerce)? (not requiring, suggesting)
         3. Did the legislature include evidence/findings in its enactment? (not requiring, suggesting) (*United States v.* *Lopez*)
            1. *United States v. Lopez –* Legislature included no findings that guns in school zones affect interstate commerce
   4. *Gibbons v. Ogden* (SCOTUS, 1824)

**H:** Steamboat monopoly granted to Ogden by NY unconstitutional because the power to regulate navigation rests with the federal gov’t (inclusion of navigation in commerce) and when federal law and state law conflict, state law must yield to federal law via the Supremacy Clause

* + 1. Limit: All intrastate commerce excluded (intrastate exclusion overruled/adjusted)
  1. *Champion v. Ames (Lottery Case)* (SCOTUS, 1903)

**H:** Federal statute regulating lottery to prevent “widespread pestilence of lotteries” constitutional because power to regulate includes the power to prohibit and motives for regulating irrelevant (commercial v. moral, as here)

* + 1. Limit: Still on purely intrastate commerce, later adjusted

**Dissent:** Police powers (to regulate public health, safety, morals, welfare, etc.) belong to the state – commercial regulation only proper because cannot impose moral views on the states

* 1. *Hammer v. Dagenhart (Child Labor Case)* (SCOTUS, 1918)

**H:** Federal law prohibiting commerce of goods made via child labor unconstitutional because Congress regulating intrastate manufacturing rather than goods being transported interstate and prior dissent becomes majority holding that moral judgment (i.e. police powers) reserved to the states not the federal gov’t, may only regulate for commercial purposes/motives (overruled in *United States v. Darby*)

**Holmes Dissent:** Congressional power to regulate goods crossing state lines well established in *Champion v. Ames*, once decides to ship out of state, availing to the federal law and Congress may step in

*→* J. Owen Roberts begins upholding FDR’s New Deal Commerce Clause legislation just before vote on President’s extremely unpopular court-packing plan, vindicating Holmes’ dissent

* 1. *United States v. Darby* (SCOTUS, 1941)

**H:** Federal statute prohibiting shipment of lumber manufactured under certain conditions in interstate commerce and prohibiting employment of persons in the production of goods for interstate commerce at other than prescribed wages and hours constitutional because shipment of manufactured goods interstate satisfies interstate requirement for regulation of manufacturing under the CC and motive becomes again irrelevant (consistent with *Champion v. Ames*, overruling *Hammer v. Dagenhart*)

* + 1. Limit: Wholly intrastate activity that has no effect on interstate commerce (court carves in exceptions)
  1. *Wickard v. Filburn* (SCOTUS, 1942)

**H:** Statute intending to prevent wheat surpluses and shortages thereby limiting how much person may grow, even as applied to Filburn who’s growing for his own personal consumption is constitutional

* + 1. Created aggregation doctrine – that Filburn’s own contribution to the demand for wheat may be trivial by itself may be trivial is not enough to remove him from the scope of federal regulation where his contribution taken together with that of many others situated is far from trivial
       1. Rationale – if Congress unable to regulate small amounts, then Congress wouldn’t be able to regulate the aggregation of similar incidences of small activity
    2. Noncommercial (Filburn isn’t going to sell his wheat) – even if assumed never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market; home-grown wheat competes with wheat in commerce citing substantial effects test
  1. *The Civil Rights Cases* – challenged constitutionality of Civil Rights Act of 1964
     1. *Heart of Atlanta Motel* (SCOTUS, 1964)

**H:** Racial discrimination harms interstate commerce by providing disincentives for African Americans to travel; motives, commercial v. moral, irrelevant so long as substantial effect on interstate commerce

* + 1. *Katzenbach v. McClunch* (SCOTUS, 1964)

**H:** Court upholds CRA even absent evidence that any out-of-stater had been harmed because majority of meat comes from out-of-state (applying aggregation doctrine and substantial effects test)

→ At this point Congressional CC power thought to be limitless

* 1. *United States v. Lopez* (SCOTUS, 1995)

**H:** Gun-Free School Zones Act of 1990 declared beyond Congressional CC powers, unconstitutional. Failed to meet RBT for lack of economic/commercial activity, jurisdictional element (to move into/closer to categories 1&2), or legislative findings

**O’Connor Q:** WHere can you not reach interstate commerce power if drawing a line – if drawing a line need to be able to say what’s on the other side; Solicitor General fails to provide answer, so O’C votes with majority (swing vote)

**Dissent:** Don’t need legislative findings, substantial effect is self-evident:

* + 1. Guns in school make people insecure → insecurity interferes with quality of that education → quality of education process will affect economic prospects of local community → local economic effects ripple through state and national economy and may even affect international competitiveness
  1. *United States v. Morrison* (SCOTUS, 2000)

**H:** Violence Against Women Act unconstitutional under CC because even though substantial effects test (legislative findings included because of *United States v. Lopez* but still noneconomic) not economic – reinforces *US v. Lopez*

* 1. *Gonzales v. Raich* (SCOTUS, 2005)

**H:** 𝝅 brings as-applied challenge to Controlled Substancess Act for particular sect of people – purely personal, intrastate consumption of marijuana for medical purposes in state where medical consumption is legal – constitutional, relying on *Wickard v. Filburn* and distinguishing *United States v. Morrison*

* + 1. Analogizing *Wickard v. Filburn* – both growing for personal consumption – with wheat Congress trying to control supply, with marijuana Congress trying to eradicate supply, even if for personal consumption alone, 𝝅 will likely sell for money and will inevitably end up across state lines and inhibit Congressional fight to eradicate supply
    2. Distinguishing *United States v. Morrison* – defines economic ^, activities regulated under CSA quintessentially economic

**Thomas Dissent:** Majority considering marijuana consumption generally, here an as-applied challenge – BUT up to the court to determine level of generality, 𝝅s framed narrowly but court framed generally

* + 1. Level of generality problem – the more generally we define the activity, the more plausible it is that Congress can regulate it (if narrow, narrowing the possibility of substantial effect on interstate commerce)

**O’Connor Dissent:** States as laboratories of experiment argument – if successful, can adopt, if disastrous, can avoid/adjust, those effects limited to states only – courts are extinguishing experiment

**Scalia Concurrence**: To determine whether in category 3 need N&P, here N&P to regulate purely intrastate activities like marijuana due to effect on supply/eradication nationally of marijuana

* 1. *National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services* (SCOTUS, 2012)

**H:** ACA individual mandate requiring individuals to purchase health insurance unconstitutional because compels people to become activity in commerce by purchasing a product (v. regulating existing commerce/activity) – regulate presupposes existence of activity to be regulated

* + 1. Needed because another part of program is community rating and guaranteed issue requirements so that insurance companies cannot deny coverage due to pre-existing conditions and cannot charge higher premiums to sick individuals – without IM, would create perverse incentive for consumers to wait to purchase insurance until sick, could lead to massive increase in premiums and insurance companies going out of business – known via labs of experiment states
    2. Distinguishes *Wickard v. Filburn* and *Gonzales v. Raich* – both actively engaged in growing. an activity (v. inactivity)
    3. To broccoli argument – distinguishes health care consumption from health insurance – get one from a hospital, one from an insurance company, just because active in health care consumption market does not mean active in insurance market, Congress trying to regulate insurance market by saying everyone’s active in healthcare consumption market
    4. To N&P argument – N&P vests Congress authority to enact provisions incidental to enumerated powers and conducive to its exercise BUT no end/enumerated power, Congress creating problem (IM problem) that it’s trying to resolve, can’t do

**Gov’t:** Argues that IM similar to compelling Filburn to purchase wheat in the market (court rejects ^)

**Ginsberg Dissent:** We are all active in healthcare market (broccoli argument: could mandate that we purchase it but could not mandate how we eat/cook it, further political checks to ensure doesn’t happen); also N&P because states’ “lab experiments” showed that required/goal would be undermined without

→ Roberts: Reach limited, unprecedented use of the CC and future cases will show clear connection with enumerated powers

1. ***The Taxing and Spending Clause***
   1. Background – Madison’s v. Hamilton’s view
      1. Madison – Congress can only tax and spend to carry out its other expressly enumerated constitutional powers
      2. Hamilton – Congress’s taxing and spending powers not limited to the enumerated grants of legislative power in the constitution

→ SCOTUS agrees with Hamilton – T&S power nearly limitless (even more so than the CC) because greater political implications – people are more generally opposed to taxes so can (and will) vote elected officials out of office

* 1. Three components:
     1. (1) Congress can tax and spend for the general welfare of the US
     2. (2) Congress can enact a tax on an activity that it otherwise could not authorize, forbid, or control (i.e. tax on cigarettes, ACA individual mandate)
     3. (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 Congress could not directly impose (i.e. *South Dakota v. Dole*, *No Child Left Behind*)
  2. *South Dakota v. Dole* (SCOTUS, 1987) – limitations on use of public funds to expand public policy; Federal spending constitutional if
     1. A particular expenditure must be intended in pursuit of the general welfare
        1. Defer substantially to Congress in these determinations
     2. Conditions on the expenditures must be applied unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation
     3. Conditions must be related the federal interest in the particular project or program
        1. Congress needs to reach this conclusion reasonable
        2. Related to safe interstate travel, a main purpose for which highway funds expended, and various drinking ages an impediment to the federal highway system and Congress is condition receipt of funds to address this particular impediment – condition furthers or is related to the purpose of highway safety
     4. The conditions on federal funds cannot be used to induce the states to engage in activities that would themselves be unconstitutional
        1. No constitutional right to drinking alcohol under age of 21
     5. Federal spending may 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. No bright-line rule on when inducement turns to compulsion – ACA’s medicaid expansion compulsion because states refusal of funds would also lose previously obtained medicaid funds, previously making up over 10% of states’ *total budget* (“this is beyond it”) – *NFIB v. Sebelius*; 5% loss of *highway funding* (about .05 of total budge)from refusal in *South Dakota v. Dole* not considered so compulsive because relatively small percentage affected therefore state has power to refuse without feeling coerced (“this is not beyond it”)
        2. Cannot judge coercion off of success (i.e. every other state’s compliance)
        3. Consider whether new pot of money or old (already receiving) for conditioning state compliance (*NFIB v. Sebelius*)

**H:** Federal gov’t’s conditioning highway funds on states’ raising the drinking age to 21 in pursuance of remedying interstate problem of young people’s desire to drink and their ability to drive deemed constitutional

* + 1. Qs: (3) How closely related do conditions have to be?, (4) After the 21st amendment, can the federal gov’t regulate liquor or reserved entirely to the states?, and (5)?

**O’Connor Dissent:** (3) Relatedness both underinclusive (teenagers same portion of highway drivers) and overinclusive (may insist on safe highways but not condition use of funds to impose/change regulations in other areas of state’s social and economic life – Congress otherwise could effectively regulate almost any area of state’s social, political, or economic life)

* 1. *National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services* (SCOTUS, 2012)

**H:** ACA medicaid expansion to expand scope and category of people medicaid is available to exceeds Congressional power (unconstitutional) because state refusal means losing *all* (not just new) medicaid funding – over 10% of states’ total revenue, realistically states cannot refuse funds because makes up such a significant portion of state funding

**Ginsberg Dissent:** Argues in favor of conditioning new *and old* medicaid funding – (1) when medicaid enacted in 1965, states knew could be changed, (2) Congress not bound by decisions of prior sessions, (3) express statutory language that requirements on program might change, (4) Congress could’ve repealed and created a new program, (5) states don’t have a right of receipt because Congress has right to change its mind

* + 1. Majority’s Rebuttal: No prior expansion/alteration of this kind, politically difficult to repeal and create a new program, states have no right *but* structures have be so created to administer medicaid and states rely on medicaid

1. ***Implementing Treaties*** – Presidential power, ⅔ Senate confirmation vote (procedural limitation); once implemented treaties fall within Supremacy Clause
   1. Treaty power delegated to the federal gov’t so long as (1) valid and (2) constitutional (substantive limitation)
      1. No limitation regarding subject matter
      2. Treaties not self-executing may need statute to put into effect, permitted via N&P (*Missouri v. Holland*)
   2. *Missouri v. Holland* (SCOTUS, 1920)

**H:** Treaty with Canada and UK to protect migratory birds and relevant statute not an interference with Missouri’s reserved state power (via 10th), constitutional via N&P

* 1. *Bond v. United States* (SCOTUS, 2014)

**H:** Constitutional avoidance doctrine – in signing the Chemical Weapons Convention did not intend to reach Bond’s actions in trying to poison her husband’s mistress, if intended to reach minor crimes should make more clear

**Dissent:** Three justices argued for overruling *Missouri v. Holland*

1. ***The Tenth Amendment*** – division of labor between the federal and state gov’ts
   1. 10th amendment provides no legal restrictions on Congressional power so long as constitutionally delegated to act
      1. Exception: Anti-Commandeering Principle – Congress may not compel state legislatures to enact and enforce a federal regulatory program under state law, even if authorized to act, otherwise in violation of 10th Amendment and unconstitutional; federal gov’t may encourage states but not command/compel (*New York v. United States*)
         1. Accountability principle – people need to be able to see clearly which gov’t is imposing on them, applies also to state officers (BUT when federal gov’t encourages, citizens may blame state BUT states have a *choice* and could place a disclaimer on the legislation telling citizens to blame the federal gov’t)
   2. *Garcia v. San Antonio Metropolitan Transit Authority* (SCOTUS, 1985)

**H:** Federal law mandating minimum wages and hours for gov’t employees Constitutional – 10th amendment is a truism providing no legal restrictions once federal legislation pursuant to authorized constitutional power – **R:** Says procedural limitations/safeguards inherent in separation of powers (BUT arguably states aren’t as well represented in political process today as court makes them out to be)

* + 1. Overrules *National League of Cities*’ traditional gov’t functions approach because unworkable (resurrected in *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority* exception (new context))
  1. *New York v. United States* (SCOTUS, 1992)

**H:** 1st/2nd monetary and access incentives constitutional because giving states a choice (not anti-commandeering), not demanding action under CC (distinguishing *NFIB v. Sebelius* CC holding on individual mandate); 3rd incentive of Low-Level Radioactive Waste Policy Amendments Act of 1985 requiring states to take title to all waste generated within its borders unconstitutional via anti-commandeering principle (and accountability principle) – not mere encouragement

→ Federal gov’t could have accomplished same goal(s) via complicated incentive scheme but didn’t because this legislation actually lobbied for by by the states

* + 1. Could New York have waived 10th amendment rights in lobbying for enactment? Problems:
       1. Change in leadership – binds future state gov’t leaders
       2. 10th amendment protects states *and* *citizens* – division between state and federal sovereignty intended to protect individual liberties, New York shouldn’t be able to unilaterally waive the rights of everyone in that state
  1. *Printz v. United States* (SCOTUS, 1997)

**H:** Federal law requiring state officers to perform background checks on prospective handgun purchasers pending development of national instant background check unconstitutional via accountability principle

1. ***The Civil War Amendments*** – confer additional powers to Congress (adding to Congressional toolbox, stronger than other Congressional tools) as each amendment includes a provision permitting Congress to enforce the amendment by “appropriate legislation”
   1. 13th – prohibits “all badges and incidents of slavery,” applies to both public *and private* conduct
      1. Congress has the power to rationally determine, via rational basis test granting Congressional discretion, what are badges/incidents of slavery and the authority to translate that determination into effective legislation
   2. 14th – prohibits the states from denying to any person within their jurisdiction the equal protection of the laws, applies only to state (v. private) conduct – cannot provide a basis for federal laws regulating private discriminatory conduct
      1. State action principle – 14th provides odes of relief against state action/legislation only, does not authorize Congress to create a coe of municipal law for the regulation of private rights (*Civil Rights Cases*, *United States v. Morrison*)
      2. Congress can prevent/remedy an *actual* constitutional violation by a state so long as that legislation is congruent and proportional to the constitutional violation in terms of scope and duration
         1. *City of Boerne v. Flores* – Congressional interpretation not proportionate because court’s interpretation of the Free Exercise Clause is narrow while RFRA’s interpretation is broad – applies to every state regardless of subject, limited evidence of state-level violations of religious freedoms; contrasted with Voting Rights Act – literacy tests narrowly tailored only to state laws requiring literacy tests for voting and clear evidence that literacy tests being used
         2. Congress has the power to enforce the 14th amendment but not to change its meaning as interpreted by SCOTUS (*City of Boerne v. Flores*)
   3. 15th – prohibits a state from denying the right to vote on account of race
   4. Abrogates states’ 11th amendment immunities if suit filed pursuant to one of the Civil War Amendments
   5. *The Civil Rights Cases* (SCOTUS, 1883)

**H:** Five consolidated cases from lower courts with blacks Americans suing theatres, hotels, and transit companies that had refused them admittance or excluded them from “white only” facilities considered constitutional – **R:** 14th – state action principle ^; 13th – applies to private conduct as well, mere discriminations on account of race/color are *not* regarded as badges of slavery

**Harlan Dissent:** Majority interprets 14th too narrowly – Congress shouldn’t have to wait for state misconduct to act, frustrates purpose of 14th enactment; interprets 13th amendment to mean freedom from slavery *and discrimination*

→ Congress eventually able to prohibit discrimination in hotels and restaurants (not covered by 14th due to state action principle) via Commerce Clause power (not argued at time because prior to New Deal Era expansion of CC)

* 1. *Jones v. Alfred H. Mayer Co.* (SCOTUS, 1968)

**H:** The Civil Rights Act of 1866 prohibiting race discrimination in selling and leasing of property Constitutional under the 13th amendment. Congress has the power to rationally determine what are badges/incidents of slavery and the authority to translate that determination into effective legislation **(**impliedly (not explicit) overrules 13th amendment holding in *The* *Civil Rights Cases* – instead follows Harlan’s dissent)

* + 1. Applies rational basis test to Congressional determination of what are badges/incidents of slavery – granting Congress discretion
  1. *U.S. v. Morrison* (SCOTUS, 2000)

**H:** Federal legislation in pursuance of adequate prosecution of cases of gender motivated bias unconstitutional under the 14th amendment (and the CC) because directed at private individuals, the perpetrators of gender-motivated violence, rather than state/state officers as Congress contends (state action principle – cites *The Civil Rights Cases* – OK because only overruled its 13th amendment provision, not 14th)

**→** 13th amendment inapplicable because only interpreted as preventing racial discrimination (14th more general, not interpreted to be limited to race)

**→** AG can’t force better litigation by states via anti-commandeering doctrine

**Breyer Dissent:** Doubts that legislation directed at private individuals v. state misconduct because crimes of gender-motivated violence already prohibited under state law so not targeting perpetrators but state misconduct by providing an alternative avenue in federal court for relief (already believes constitutional under the CC, doesn’t fully address here just notes doubt)

* 1. *Employment Div. v. Smith* (SCOTUS, 1990)

**H:** 𝝅’s claim of exemption from state’s criminalization of peyote use/possession via the 1st amendment’s Free Exercise Clause (14th amendment interpreted to incorporate 1st amendment liberties) rejected, court holds that generally applicable laws can be applied to religious practices under the Free Exercise Clause (if had singled out religion, i.e. by saying “even when used for religious purposes,” potential for exception but here generally applicable law)

→ In response (dislike), Congress immediately passes Religious Freedom and Restoration Act

* 1. *City of Boerne v. Flores* (SCOTUS, 1997)

**H:** Church denied city building permit for expansion, sues under RFRA – RFRA unconstitutional because Congress lacked authority to enact, Congress has the power to enforce the 14th amendment but not to change its meaning as interpreted by SCOTUS

→ Congress enacted RLUIPA in response to holding

Other Federalism Limitations in the Constitution

1. ***The Dormant Commerce Clause*** – some state laws/municipal ordinances unconstitutionally infringe on Congress’s ability to regulation interstate/foreign commerce via the CC, even when no Congressional action
   1. *Gibbons v. Ogden* (SCOTUS, 1824)

**J. Marshall Majority:** Dicta only – Even absent federal law, language of CC suggests that any regulation of interstate commerce by states inconsistent with delegation of power to federal gov’t; distinguishes CC from T&S – commerce, unlike taxing, is not capable of being exercised by two gov’ts (state and federal) at the same time without impeding on each other

**J. Johnson Concurrence:** Wants to adopt bright-line rule that states cannot regulate interstate commerce

→ Origins of the DCC

* 1. (1) Is there a state statute/local ordinance? (if federal law, look to affirmative CC instead)
  2. (2) Is the state/municipal gov’t regulating or participating in the market?
     1. If participating, state statute/local ordinance is constitutional (created in *Reeves, Inc. v. Stake*)
        1. When asking whether participant, really asking whether acting like a private business (*United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, see below – participating in the market but also regulating so moves onto (3))
        2. *Reeves, Inc. v. Stake* (SCOTUS, 1980)

**H:** South Dakota’s decision as owner/operator of cement plant to service in-state consumers before selling leftover cement to out-of-state consumers during shortage – within market participant exception (created in *Hughes v. Alexandria Scrap Corp.*) therefore Constitutional

* + - * 1. Rationale – like private individuals/businesses, gov’t enjoys unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases
        2. Suggests potential limitations (see *South-Central Timber Development, Inc. v.Wunnicke*): (1) Sale of natural resources, (2) restriction of the ability of out-of-state firms to set up plants within its borders, (3) unique access to materials needed to produce [cement] → suggesting that the presence of any of these is more constitutionally suspect
        3. *Hughes v. Alexandria Scrap Corp.* – MD program designed to remove abandoned automobiles from state roadways and junkyards deemed constitutional because not the kind of action CC created to prevent

**Dissent:** States acting as private individuals/businesses may still burden interstate commerce, if goal of CC to prevent burden in favor of national economy, MPD exception should exist

* + - 1. Exception: *South-Central Timber Development, Inc. v. Wunnicke* (SCOTUS, 1984) (PLURALITY ONLY – persuasive but not binding) – State is a market regulator where it imposes conditions on markets in which it is not a participating (i.e. timbers sales v. timber processing)

**H:** Requirement that all timber purchased from AK must be processed in-state – MPD exception doesn’t apply ^; as regulator discriminatory and reasonable, nondiscriminatory alternatives so unconstitutional

* + - * 1. Distinguished from *Reeves, Inc. v. Stake*

Restriction on foreign commerce where DCC scrutiny is more rigorous

Natural resource

Restriction on resale of product to out-of-state producers

**Rehnquist Dissent:** State could have achieved end goal otherwise, listing three alternatives, why make them skirt to be Constitutional (BUT isn’t that what we’re always doing in Con Law?); also faults majority for relying on antitrust law doctrine because inapplicable when acting as a regulator, which court has determined AK is

* 1. (3) If regulating the market, does the state statute/local ordinance discriminate against interstate commerce?
     1. If discriminates against interstate commerce, state statute/local ordinance is unconstitutional
        1. *Philadelphia v. New Jersey* (SCOTUS, 1978)

**H:** NJ law prohibiting importation of solid or liquid waste which originated or was collected outside of its territorial limits discriminates against interstate commerce (protectionist – distinguishes intra and interstate waste) – unconstitutional

* + - * 1. NJ’s purpose in enacting doesn’t matter, purpose of CC was to create common national market and here manifesting concern (protectionism and turf wars threatening existence of the union – other states may retaliate and adopt similar laws) underlying its creation
        2. Court rejects/distinguishes quarantining argument because quarantine applies to all of contagion (i.e. all sick cows), here applies only to waste produce out-of-state

**Rehnquist Dissent:** Purpose (environmental health and safety) not discriminatory

* + - 1. *Dean Milk Co. v. Madison* (SCOTUS, 1951)

**H:** Madison ordinance making it unlawful to sell any milk as pasteurized unless it has been processed and bottled at a pasteurization plant within five-mile radius of Madison central square unconstitutional – erected economic barrier protecting a major local industry against competition, irrelevant that also affects in-state interests

**Dissent:** Disagrees that effect on in-state interests irrelevant, says nondiscriminatory and 𝝅 can have its milk pasteurized in Madison (discrimination not as extreme as *Philadelphia v. New Jersey*)

* + - 1. *C & A Carbone, Inc. v. Clarkstown* (SCOTUS, 1994)

**H:** Flow control ordinance requiring all solid waste be processed at designated transer station before leaving municipality discriminatory because favoring one facility to all others (more so than *Dean Milk Co. v. Madison* where could have processed within five miles) and therefore unconstitutional

* + - * 1. Again, immaterial that affects in-state interests equality
        2. Processing, not waste is the relevant market/commodity (nondiscriminatory in waste collection BUT discriminatory in who processes)
      1. *Hunt v. Washington State Apple Advertising Comm’n* (SCOTUS, 1977)

**H:** NC statute requiring all closed containers (used in shipping only) of apples sold in state to bear either applicable US grade, no state grade use allowed even if higher than US grade – discriminatory (though not on face) and therefore unconstitutional

* + - * 1. Even if nondiscriminatory on face, court may still find unconstitutional in statute’s purpose/effect – here, removes WA’s competitive advantage and raises cost of doing business in NC (advantaging local growers); direct evidence that purpose was to shield the local apply industry (i.e. protectionism)
      1. *West Lynn Creamery, Inc. v. Healy* (SCOTUS, 1994)

**H:** Pricing order imposing assessment on all fluid milk sold by dealers to MA retailers (⅔ sold to retailers produced out-of-state), assessment then distributed as stipend to state dairy farmers – discriminatory (compares to *Bacchus* – Hawaii granted liquor tax exemption to locally produced fruit wine; here instead of exempting, refunding/rebating)

* + - * 1. Can’t look at each state program in isolation, must look at in entirety – OK if different intended purpose of fund, could allocate money to dairy farmers from elsewhere – court punishing MA for being too transparent
      1. Exception 1: Constitutional when no reasonable, nondiscriminatory alternatives available for achieving the same purpose (created in *Dean Milk Co. v. Madison* – there, reasonable, nondiscriminatory alternatives available) (i.e. *Maine v. Taylor* – no other way to avoid the spread of parasites)
         1. Exception to exception 1: Revenue generation is not a sufficient local interest for discrimination because everyone needs to generate money – slippery slope; also alternatives for revenue generation (created in *C & A Carbone, Inc. v. Clarkstown*)
      2. Exception 2: Move onto *Pike* balancing test (4) when discrimination is in favor of a public entity engaged in traditional gov’t functions (*United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority* (SCOTUS, 2007) – i.e. waste transfer station)

→ Court doesn’t address threshold for being engaged in traditional gov’t functions

→ Court resurrects “traditional gov’t function” concept overruled in *Garcia v. San Antonio Metropolitan Transit Authority* but in different context (then 10th amendment)

**H:** Flow control ordinance favoring public transfer station non-discriminatory, creating exception for public entities engaged in traditional gov’t functions, i.e. waste collection/processing, moves on to (4)and passes *Pike* balancing test → constitutional

**Alito Dissent:** Court did not meaningfully distinguish *C & A Carbone, Inc. v. Clarkstown*

* 1. (4) Pike Balancing Test: If non-discriminatory against interstate commerce but only imposes incidental effects on interstate commerce, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits (difficult to establish a burden so clearly excessive, almost always upheld)
     1. Revenue generation acceptable local benefit under *Pike* test (but never a legitimate gov’t purpose under (3)) (*United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*)
     2. *Minnesota v. Clover Leaf Creamery Co.* (SCOTUS, 1981)

**H:** Statute banning retail sale of milk in plastic non-returnable, non-refillable containers but permitting such sale in other non-returnable, non-refillable containers (i.e. paper) – nondiscriminatory because does not affect protectionism but regulates evenhandedly without regard to whether milk, containers, or sellers are from out-of-state

* + - 1. Application of *Pike* balancing test – “burden” (doable, no reason to suspect MN firms benefiting (benefitting out-of-state pulpwood as well) – spread equally equally to in-state and out-of-state firms) not excessive in light of substantial state interest in promotion conservation

1. ***The Privileges and Immunities Clause*** – similar to DCC, prohibits discrimination of out-of-staters by states (think of as another tool in your toolbox); no MPD exception
   1. (1) Does the state restriction apply to individuals? (P&I protects “citizens” only, not corporations and other non-natural persons)
      1. If N, P&I does not protect
   2. (2) If Y, is the activity restricted by the law sufficiently fundamental to the promotion of interstate harmony to be protected by the clause? – Clause doesn’t protect all activities (i.e. recreational elk hunting not protected under clause), determined case-by-case
      1. If N, the statute does not violate P&I
   3. (3) If Y, is there a substantial reason for difference in the treatment of out-of-states?
      1. If N, the statute violates P&I
   4. (4) If Y, does the degree of the discrimination bear a substantial relationship to that reason?
      1. If N, the statute violates P&I

→ Under 3&4, court is *Supreme Court of New Hampshire v. Piper* (SCOTUS, 1985)

**H:** Exclusion of non-state residents to the NH state bar violates P&I parts ¾ and is therefore unconstitutional

1. Parts 3/4 – arguing that each of the state’s four reasons is not substantial and even if they were the state could achieve its end goal through alternative, less restrictive means

Executive v. Legislative Power – The Separation of Powers

1. Background
   1. *United States v. Curtiss-Wright Export Corp.* (SCOTUS, 1936)

**H:** Congressional delegation of authority (Congressional via CC) to prohibit the sale of arms to persons involved in Paraguay-Bolivia conflict to the President constitutional

* + 1. Non-delegation doctrine – the Constitution vests legislative authority in Congress and Congress cannot delegate that authority to the President in a manner that gives him unfettered authority (DEAD LETTER LAW, J. Thomas would reinstate)
       1. Today: So long as there is a discernible standard to govern the President’s actions, the delegation is not excessive (think broad delegation of authority to administrative agencies)
    2. Distinguishes domestic and foreign affairs (suggesting that if confined to internal affairs, would be invalid)
    3. Executive v. Legislative Power: “The President alone has the power to speak or listen as a representative of the nation,” “President has the very delicate, plenary, and exclusive power… as sole organ of the federal gov’t in the field of international relations,” → Congress may delegate president more powers in foreign affairs
       1. Misguided interpretation – Marshall meant that the President is the actor through whom the nation’s foreign affairs are conducted, not that the President is solely responsible in foreign affairs (various Constitutional delegations of war/foreign affairs authority to Congress)
       2. Purpose: Single represent v. all of Congress, connections, stronger to speak with one voice as a country than many, need for dispatch – President can act more quickly than Congress in situations requiring quick action, needs flexibility/discretion in conducting foreign affairs – i.e. negotiating treaties
  1. *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)* (SCOTUS, 1952)

**J. Black’s H:** (formalistic)Seizure of steel mills (and pay at increased wages) due to impending strike for wage/union issues for fear would undermine war effort in Korea unconstitutional

* + 1. President’s reliance on Commander-in-Chief Clause too attenuated – would be dangerous to allow President to expand domestic power when no formal declaration of war; taking possession of private property to prevent labor disputes is a job for the nation’s lawmakers, not its military authorities
    2. Rejects President’s reliance on Take Care Clause (that the laws be faithfully executed) – “executed” furthers that in charge of executing not making the laws, can only recommend and veto laws

**Jackson Concurrence:** (adopted authority; functional): Presidential powers are a function of whether Congress has taken action

→ “Presidential powers are not fixed but fluctuated depending upon their disjunction or conjunction with those of Congress”

* + 1. Category #1 (Presidential Action PLUS Congressional Authorization): Presidential authority is at it’s greatest, includes all that he possesses plus all that Congress can delegate
       1. Most likely constitutional
    2. Category #2 (Presidential Action BUT Congressional Silence): President may only rely on his own independent authority, Congress may have concurrent authority or authority distribution may be uncertain
    3. Category #3 (Presidential Action CONTRARY to Congressional Action): Presidential authority at its lowest, may rely upon own constitutional powers minus constitutional powers of Congress on the matter
       1. Unlikely constitutional but not always (why functional)

**H:** Gov’t in #3 because Congress considered higher wage adoption but didn’t, president also could’ve taken other action but didn’t, acting instead contrary to Congress

* + 1. Rejects gov’t’s emergency powers argument – Gov’t granted only one emergency power by the Constitution, the power to suspend *habeas corpus*; granting emergency powers would significantly expand presidential powers and likely kindle the creation of emergencies to expand authority

→ Rehnquist ( in interview) asserts that had Congress formally declared war against Korea, could’ve been an argument that in Category #1 (but distinguish express approval from implicit – more so for approval UN Charter argument)

→ J. Jackson, who also wrote *Wickard v. Filburn*, admittedly more concerned with executive than legislative abuse of power

**Douglas Concurrence:** Must be ratified by Congress but may be ratified by retroactively (historical argument listing numerous incidences, i.e. Lincoln’s suspension of *habeas corpus*)

**Vinson Dissent:** Jeopardizing soldiers in Korea, had President waited for Congress would’ve been too late – argues in Category #2 (Congress hasn’t said anything)

1. ***Wars and Emergencies*** – delegated war powers
   1. President: Commander-in-Chief of the army, navy, and militia when called into national service
   2. Congress: Power to (1) declare war, (2) grant letters of marque and reprisal and make rules, (3) raise and support armies, (4) provide and maintain a navy, (5) make rules for gov’t 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, (70 provide for organizing, arming, and disciplining the military
   3. Hamilton v. Madison’s views → history followed Hamilton’s view of a strong executive
   4. *The Prize Cases* (SCOTUS, 1862)

**H:** President has no power to initiate or declare a war either against a foreign nation or a domestic state BUT if somebody else initiates a war, then president not only authorized but bound to resist force by force. Bound to accept challenge without waiting waiting for special legislative authority. President’s discretion to determine what constitutes an attack

**Nelson Dissent:** Agrees with majority that Congress consented, but action not constitutional until Congressional action/declaration in July 1864

* 1. *Ex parte Quirin* (SCOTUS, 1942)

**H:** Can try *unlawful enemy combatants* (unlawful because not in uniform)in military commissions (v. civilian courts)

1. Lawful – may detain until military conflict is over, must give POW status and all privileges that come with that status
2. Unlawful – may be detained *and* tried and punished for violating the laws of war
3. Civilian court (v. military commission – can keep sensitive national security info undercover) – higher standard of proof, bill of rights applies only in civilian courts
   1. *Hamdi v. Rumsfeld* (SCOTUS, 2004)

**H (Plurality only):** Gov’t may detain 𝝅 until hostilities in Afghanistan are over (as long as still active in Afghanistan) because in Jackson category #1, Congress authorized via Authorization for Use of Military Force (AUMF) – authorizes president to use all necessary and appropriate force against nations, organizations, or persons associated with 9/11 attacks; As long as *habeas corpus* not suspended, a citizen detainee must be able to allege his side before a neutral tribunal (rejected gov’t argument; later extended to non-citizens)

* + 1. Enemy combatant – part of or supporting forces hostile to the United States or coalition partners [in Afghanistan] and who engaged in an armed conflict against the United States there
    2. “Hostilities” undefined, little guidance from courts
    3. Distinguished from *Quirin* – not being detained pending trial, detained indefinitely
    4. Purpose of detaining – to prevent return to battlefield and taking up arms once again

**Souter Concurrence/Dissent:** “Detention” not use/authorized in statute, distinguishing detention from use of force

* + 1. **O’Connor Plurality**:(Rebuttal) detention is a necessary part of “use of force”

**Scalia Dissent:** Detention of US citizen not authorized, instead gov’t can suspend *habeas corpus* or treat as a traitor and subject to the criminal process before a civilian jury (territorial restriction to his opinion, important that detained in VA)

**Thomas Dissent:** No room for judicial review, judiciary shouldn’t second guess President’s determination, cites *United States v. Curtiss-Wright Export Corp.* (BUT remember often misquoted/misinterpreted)

1. ***The Unitary Executive*** – idea that executive power resides in the President and cannot be divested from him
   1. ***Appointments*** – President appoints executive officers with advice and consent of the Senate (must confirm nominations), Clause allows Congress to create exceptions for “inferior officers”
      1. (1) Is the person an “officer” or mere employee?
         1. Analysis doesn’t apply to mere employees – in this case, no limitations imposed by the Constitution and Congress given more discretion as to appointment
         2. Officers – persons exercising significant authority pursuant to the laws of the US (unclear)
            1. Investigating and issuing reports is not “significant authority” (*Buckley v. Valeo*) (i.e. US Commission on Civil Rights *not* officers)
      2. (2) Is the officer an “inferior” or “principal” officer?
         1. Principal: Appointment must be made by the President with the advice and consent of the Senate; vesting power overwise is unconstitutional
         2. Inferior: Congress may vest power of appointment in the president, the courts of law, or in the heads of departments (interpret as cabinet-level positions for our purposes, SCOTUS hasn’t answered)
            1. Inferior officers – officers whose work is dictated and supervised at some level by principal officers (*Edmond v. United States*)

Independent council inferior officer (as in *Morrison v. Olson*)

* 1. ***Removal*** – Constitution silent on except for impeachment power (only invoked in high crimes and misdemeanors)
     1. *Morrison v. Olson* Balancing Test (overruling *Humphrey’s Executor* test): Whether removal restrictions are of such a nature that they impede on the President’s ability to perform his constitutional duty even when purely executive officer; the functions of the official(s) still relevant but to be analyzed in this light – i.e. if executive officer, court more likely to say restrictions unconstitutional; if judicial/legislative, more likely to uphold restrictions
        1. Applied on a case-by-case basis, subjective
     2. *Myers v. United States* (SCOTUS, 1926)

**H:** President has exclusive power to remove executive officers without Congressional interference – removal of Portland Postmaster General without advice and consent of the Senate constitutional

* + - 1. President needs subordinates to act under his direction for executive branch to function, Otherwise Congress could force unloyal or inefficient executive officers on the President

**McReynolds/Brandeis Dissents** (here looking to inferior officers, don’t need to decide on principal officers)**:** Historical practices – many instances where President has complied with restrictions placed on his authority

* + 1. *Humphrey’s Executor v. United States* (SCOTUS, 1935)

**H:** President’s removal of Federal Trade Commissioner unconstitutional, may remove only for reasons enumerated in Act (“inefficiency, neglect of duty, or malfeasance in office”); President’s exclusive removal confined purely to executive officers, when quasi-legislative or quasi-judicial functions, no exclusive removal power, legislature may limit (Overruled in *Morrison v. Olson* because “unworkable”)

* + - 1. Legislative function – adoption of rules
      2. Judicial function – adjudicates disputes within its scope like a judge/court
      3. Distinguished from *Myers* – Congress did not insert itself into the removal process, less suspect and more likely to be upheld as Constitutional
    1. *Morrison v. Olson* (SCOTUS, 1988)

**H:** Restriction that AG (who may be removed at-will by the President) may remove independent counsel, formed under Ethics in Government Act of 1978, for “good cause” (undefined, includes misconduct) Constitutional even though “purely executive function” → creates modern balancing test (above), overrules executive function test created in *Humphrey’s Executor*

* + - 1. Prosecution always considered a purely executive function
      2. R: (1) Executive through the AG, still has removal power just with “good cause” (Congress again not inserting itself less suspect and more likely to be upheld as Constitutional), (2) limitation necessary for ensuring truly independent (fox and the hen house, pointless if executive could simply remove)

**Scalia Dissent:** Bright-line rule that all executive power belongs to the President, once determined that executive officer/function then President granted exclusive power of removal

1. ***Attempts to Address Structural Issues***
   1. In order to change structure/procedure of Constitution, must amend
      1. Until formal amendment, must comply with all Constitutional requirements; if exercising legislative authority in character and effect (i.e altering rights/status), must meet both Bicameral Clause and Presentment Clause requirements
         1. Bicameral purpose – House and Senate intended to serve different functions with Senate more removed from the people
         2. Presentment purpose – executive check on the legislature (BUT overridden by ⅔ vote), President brings unique perspective as arguably having national constituency
   2. *Immigration and Naturalization Service v. Chadha* (SCOTUS, 1983)

**H:** One-house veto (though efficient – no full-fledged law required) unconstitutional, violates Bicameral Clause and Presentment Clause requirements

1. Framer’s inclusion of just four instances where houses can act independently means intentional and all other instances of independent house action unconstitutional

**J. White Dissent:** Constitution doesn’t expressly prohibit, far-reaching consequences/historically permitted use, functional approach – useful for legislature to delegate to AG but overrule if need be, actually limiting separation of powers by prohibiting

1. Bicameral/Presentment requirements met in enactment of original law, when exercising one-house veto not creating new law therefore not subject to requirements
   1. *Clinton v. New York* (SCOTUS, 1998)

**H:** Line Item Veto Act unconstitutional, must comply Constitutional requirements of bicameral clause and presentment clause requirements

1. Timing difference between veto (before passed into law) and line item veto/cancellation (after passed into law; Congress may pass disapproval bill but President could cancel – ineffective)
2. Grave Implications: Binding future Congresses with no effective check on the executive – could repeal BUT President could veto

**Scalia Dissent:** Effect of provision no different than signing statements or telling Congress where to spend

**Breyer Dissent:** President isn’t repealing/amending but executing the functions delegated to him by Congress; already passed bicameral/presentment requirements in enactment of LIVA

1. ***Executive Privileges and Immunities*** 
   1. Executive Privilege
      1. *United States v. Nixon* (SCOTUS, 1974) – No absolute presidential privilege, balancing test between any presidential privilege in maintaining tapes during investigation and countervailing interests (i.e. importance of evidence in criminal trial – constitutional underpinning)
         1. Court suggests that had there been need to protect military, diplomatic, or sensitive national security secrets, may have balanced more in President’s favor; Nixon simply exerts general privilege, court strikes down notion
   2. Executive Immunity
      1. *Nixon v. Fitzgerald* (SCOTUS, 1982) – Absolute presidential immunity in *civil* lawsuits predicated on acts within the outer perimeter of his official responsibility, no difference if suit during or *after* term
         1. Absolute privilege – no civil lawsuits for actions under official authority
         2. v. qualified privilege – civil lawsuits permitted only where Constitutional officer clearly violated statutory or Constitutional rights
         3. Purpose: Due to special nature of President’s constitutional office and functions, (1) shouldn’t be distracted by private lawsuits (President easily identified for suits) and (2) may be unduly cautious in activity if fear of being subjected to a civil lawsuit before *and* after his term(s)
         4. OK because formal/informal checks on President’s potential misuse of authority
            1. Formal – impeachment proceedings (rare, for high crimes)
            2. Informal – (1) scrutiny by press, (2) Congressional oversight, (3) reelection, (4) President’s traditional concern for historical stature

→ Consistent with *US v. Nixon*? – argued either way

* + - * 1. Y, distinguish criminal (implicating due process) v. civil

→ Applies only in civil suits, court has never ruled on whether President may be subjected to criminal lawsuits

→ Absolute immunity does not apply to subordinates (i.e. Cabinet)

* + 1. *Clinton v. Jones* (SCOTUS, 1997) – immunity (suit should not be dismissed) from civil suits does not apply to *unofficial* conduct that occurred *before* the President took office
       1. Rejects Clinton’s argument that civil suit will distract from his duties as president (court incorrect on this)