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FOCUS ON:

**How will I use a short amount of time and space to get core thoughts across?**

# Chemerinsky Con Law Review

1. Federal Judicial Power - Authority of the Federal Courts under the Constitution
   1. *Marbury v. Madison* (1803) creates the authority for the federal courts to review the constitutionality of federal legislative & executive actions.
      1. The Constitution does not explicitly grant the power of judicial review.
   2. A series of Supreme Court cases created the authority of the Supreme Court to review the constitutionality of state and local actions and the decisions of state courts.
      1. The Constitution is also silent about the power of the supreme court to review.
   3. Requirement for Cases & Controversies
      1. “cases & controversies” interpreted as justicability doctrines (that must be met for any federal court to hear the case):
         1. Standing (most important)
            1. Injury (P must prove that she has been or will imminently be injured)

P must prove personally suffered injuries

P seeking injunctive/declaratory relief must show a likelihood of future harm

* + - * 1. Causation & Redressability (that the D caused the injury & a favorable court decision is likely to remedy the harm- no advisory opinions)
        2. No Third Party Standing Is Allowed (P cannot bring claims of others, of third parties who are not before the court)

In order for there to being third party standing, the P must independently meet all the standing issues

* + - * 1. No Generalized Grievances Allowed (no “generalized grievance” = must not be suing solely as a citizen or as a taxpayer.)

One exception: taxpayers have standing to challenge government expenditure of money pursuant to a federal statute as violating the establishment clause.

* + - 1. Ripeness
         1. “May the Federal Court Grant Pre-Enforcement Review of a Statute or Regulation?”
      2. Mootness
         1. Exceptions:

When the wrong is capable of repetition

When the D voluntarily stops the offending process

* + - 1. Political question
         1. Cases under the republican form of government clause

1. Federal Legislative Power- Authority of Congress under the Constitution
   1. Necessary & proper clause
   2. The taxing, spending, and commerce clause powers
      1. Congress may regulate the **channels of interstate commerce**
         1. The highways, waterways, internet, etc.
      2. Congress may regulate the **instrumentalities of interstate commerce** & persons or things in interstate commerce
         1. Instrumentalities: the things that facilitate commerce (trucks, planes, telephones, the internet).
         2. Persons or things in interstate commerce: *gibbons v. ogden* – anything that goes across state lines
            1. Man act – cannot take a woman across state lines for sexual purposes
      3. Activities which in the **aggregate have a substantial effect** on interstate commerce *Wickard*
         1. *Gonzalez v. Raiche* – pot is a crop that is bought and sold in interstate commerce so across the country the aggregate of home gown creates substantial effect.
         2. Except: In the area of noneconomic activity, substantial effect cannot be based on cumulative impact. *Morrison (violence against women) –* violence against women is a noneconomic activity and so substantial effect cannot be used to aggregate impact.
   3. 10th Amendment “all powers not granted to the united states nor prohibited to the states are reserved to the states & the people”
      1. literally: Congress can act only if it can point to authority in the Constitution. local governments can act unless the Constitution prohibits what they’re doing.
      2. 1992-now:
         1. Congress cannot compel state legislative or regulatory activity:
            1. *NY v. US (radioactive waste disposal)* – act is unconstitutional: violates the 10th amendment because Congress is commandeering the states
            2. *Prince v. US (background checks before issuing handguns)* – act is unconstitutional: violates 10th amendment because Congress is compelling the states to enforce a federal mandate.
         2. Congress can try to induce state/local govts to act by putting conditions on grants, so long as conditions are stated & so long as the conditions relate to the purpose of the program.
            1. *Highway money as condition for age 21 drinking age*- Constitutional
         3. Congress may prohibit harmful commercial activity by state governments
            1. *Reno v. Condon* *(prohibited DMV from releasing person info)*: No 10th Amendment issue, Congress can prohibit such harmful commercial activity.
   4. 14th Amendment, Section 5: authorizes congress to adopt laws to enforce the 14th Amendment
      1. congress cannot create new rights or expand the scope of rights
      2. congress can only act to prevent or remedy a violation of rights already recognized by the courts
         1. such laws must be narrowly tailored: proportionate & congruent to remedy proven constitutional violations.
         2. *City of Boerne v. Flores (religious freedom restoration act declared unconstitutional)*: Congress adopted this law pursuant to 14th Amendment §5, but it created new rights & expanded the scope of rights, which is more than preventing/remedy violation of rights already recognized by the courts-not proportionate and congruent.
2. Federal Executive Power (Authority of the president & the executive branch)
   1. Foreign policy
      1. Treaties
         1. Foreign agreements negotiated by the president, effective when ratified by the senate
         2. State laws that conflict with treaties are invalid
         3. If theres a conflict between treaty & federal statute, whichever is more recent is valid
         4. A treaty is invalid if it conflicts with the Constitution
      2. Executive agreements
         1. An agreement between the united states effective when signed by the president & the head of the foreign nation (no senate approval needed)
         2. May be used for any purpose
            1. Anything that can be done by a treaty can be done by an executive ageement
         3. Executive agreements prevail over conflicting state law but never over federal law or the Constitution
      3. The president has broad powers as commander in chief to use American troops in foreign countries
   2. Domestic affairs
      1. Appointment power
         1. Why may posess the appointment power?
            1. The president appoints ambassadors, federal judges, and US officers.
            2. Senate must confirm the nomination, but appointment power is solely with the president.
         2. Congress may vest the appointment of inferior officers in the president, the heads of departments or the lower federal courts.
            1. Difference: president alone gets to appoint OFFICERS but congress has some discretion as to who gets to appoint INFERIOR OFFICERS
            2. Supreme Court has never defined exactly an inferior officer, but basically its someone who can be fired by another officer.
         3. Congress cannot give itself the appointment power for executive offices.
      2. Removal Power
         1. Unless removal is limited by federal statute the president may fire any executive branch official
            1. *Nixon v. Cox*
         2. Congress may limit removal if:
            1. Must be an office where independence from the president is desirable
            2. Statute must not prohibit removal, only limit to where there is good cause
         3. President has absolute immunity from civil suits for money damages for anything doen while carrying out the presidency
         4. President has no immunity for acts that occurred prior to taking office *Clinton v. Jones)*
         5. Executive privilege protectspresidential papers and conversations but such privlege must yield when there’s an overriding needs for the information
            1. *US v. Nixon -* The need for evidence in a criminal trial outweighs executive privilege
3. Federalism “limits on state & local governmental power because of the existence of a national government & the other states”
   1. Preemption: Supremacy clause in article II- If there a conflict between federal and state law, federal law wins & state/local law is preempted:
      1. Express preemption: if a federal statute specifically says that federal law is exclusive in a certain area, then statre/local laws are preempted
      2. Implied preemption: even if the federal statute is silent can still be preemption]
         1. If federal & state law are mutually exclusive, the state law is deemed preempted
         2. If a state/local law impedes the achievement of a federal objective, then the state/local law is deemed preempted
         3. If congress evidences a clear intent to preempt state and local laws, then state/local laws are deemed preempted (occupy the field) *immegration law*
      3. States may not tax or regulate fedrea government activity
         1. *McCullough v. Maryland: the power to tax is the power to destroy- federal bank*
   2. The Dormant Commerce Clause & Privileges & Immunities Clause of Article 4
      1. Definitions:
         1. DCC means that: state an local laws are unconstitutional if they place an undue burden on interstate commerce
            1. Inferred from the grant of power to congress to reguate commerce among the states
         2. Privileges & Immunities Clause: no state may deprive citizens of other states of the privileges that it accords it own citizens
            1. Anti-discrimination to out of stater people
         3. Privileges or Immunities clause of the 14th Amendment
            1. Is always the wrong answer unless the question involves the right to travel.
      2. Does the state or local law discriminate against out of staters (key question):
         1. *Philadelphia v. NJ (no out of state garbage in landfills): blantantly discriminatory & violates.*
      3. If it does not discriminate, analysisi:
         1. The Privileges & Immuniies clause of article 4 does not apply
         2. If the law puts a burden on interstate commerce, it violates the DCC if the burdens on interstate commerce outweigh the benefits of the law.
            1. Balancing test: burdens on interstate commerce & benefits
            2. *Mudflaps on trucks- unconstitutional because theres no benefit to the law but there is a burden on interstate commerce*
      4. If the state or local law does discriminate, analysis:
         1. If the law puts a burden on interstate commerce, it violates the DDCC unless its necessary to achieve a compelling government interest.
            1. Presumption against these laws & are only upheld if the government can show a compelling need AND the law is necessary (no less discriminatory alternative would suffice).

Exceptions:

Congressional approval (once congress has acted, the commerce clause is no longer dormant!)

Market participant exception (a state or local government may prefer its own citizens when its acting as a market participant) *South Dakota state owned & operated cement company charged less to in state purchased cement.*

* + - * 1. Privileges & immunities clause

Applies only if there’s discrimination against out of staters

The discrimination must be with regard to civil liberties or earning one’s living

Used when the state or local government is discriminating against ability of out of staters to earn a living

*New Hampshire law to practice bar must be a resident, law about fishermen*

Corporations and Aliens cannot use this provision only individuals who are US citizens

The discrimination will be allowed only if its necessary to achieve a compelling government purpose

# Constitutional Interpretation

1. Formalist approach: interested in literal interpretation in Constitutional responsibility (strict adherence to literal, textual roles).
2. Functionalist approach: (represented by Jackson & Frankfurter in *Youngstown*): more pragmatic, broader principles, looking at the purposes of checks and balances, and the prevention of tyranny. Emphasized as a theme to look at and use. Asks – does the action threaten the balance of power? With some deference to accommodation worked out by the political branches.
3. If a court has authority to hold acts of congress unconstitutional, it also can review state courts (on the basis of supremacy clause) and to have some federal review of state court decisions to make uniformity.

## Marbury v. Madison (gave power of Judicial Review)

1. Landmark intersection between politics and Constitutional decision-making.
   1. The basis for Constitutional law: establishes that the court has Constitutional review
   2. The power to interpret may be the most significant power of all.
2. The story: Marbury’s appointment was part of 11th hour efforts of the federalists after they lost the presidential election (Adams defeated by Jefferson) to transform the judiciary system into a federalist stronghold. A lame duck congress decreases size of supreme court & creates new circuit judgeships, new justice of piece position. The senate confirmed new appointees the day before Jefferson took office. President Adams & secretary of state (and chief justice) John Marshall signed but not all commissions were delivered (including Marbury’s commission) .Marbury sues Madison, Secretary of State, because Madison is refusing to deliver the appointment. Marbury wants the court to issue a Writ of Mandamus to order Madison to deliver the commission. He files directly to the Supreme Court (§13 of the judiciary act appears to allow the court to issue writs of mandamus as a matter of original jurisdiction- appears to expand original jurisdiction of Supreme Court).
3. ***Question of Constitutional Interpretation: Does the Constitution confer judicial review?****.*
   1. Implied power: “The judicial power…” if it means anything, it means authority to interpret. Section II “shall extend to all Cases” is straightforward common sense that the power to decide means the power to interpret.
4. *Does the power to interpret include the authority to hold that acts of congress are unconstitutional?* 
   1. Jurisdiction of the Court: Goes to the heart of the court’s power.
      1. If they do not have the power to hear the case, it doesn’t have power to do anything and should just dismiss it.
      2. In Marbury, its decided the SupCt is out of its jurisdiction, but its decided at the end not the beginning. That’s something that got Jefferson mad- how could the case create precedent if the holding is there is no jurisdiction.
5. Is there a right? Yes – the right is attached at signature and seal, delivery not required.
6. *Is there a remedy? (most important, controversial question)*
   1. Is there something about seeking a remedy from a secretary of state that’s different than from a private party or even a local official?
   2. Is the delivery a political act that’s protected?
   3. When can an executive officer be sued?
   4. Two types of acts:
      1. **Discretionary Acts: Political, NOT subject to judicial review, heart of executive power**
      2. **Ministerial Duties/Acts: If individual rights are at issue, subject to judicial review, other things the executive does, things assigned by statute.**
7. *If so, is mandamus the remedy?*
   1. What is the Nature of the Writ?
      1. its not the official that’s the issue, it’s the type of act. Duty v. Discretionary Act.
   2. Can it issue from the Court?
      1. Appears to be a conflict between Article 3 and Section 13.
      2. Section 13 of the Judiciary Act appears to give the court the authority to issue writs as a matter of OG jurisdiction
8. *Judiciary Review*
   1. It is the duty of the court to say what the law is.
      1. You cannot apply the law without interpreting it, and you cant interpret without looking at the Constitution, and so the Judiciary needs to be able to interpret the Constitution because its part of their job.
9. Holding: The court lacks jurisdiction to hear the case. The statute conferring jurisdiction on Marbury is unconstitutional because congress cannot expand beyond those cases enumerated by the court in the Constitution. And the federal court may review legislative action to determine whether they are constitutional, and has the authority to strike down federal law if it conflicts with the C.
10. **Ultimately a separation of powers question**
    1. How far can congress go in limiting jurisdiction of court?
       1. Can congress remove certain issues from the court completely?
       2. “Shall extend to all cases” really implies that the Supreme Court can hear anything.

## DC v. Heller

1. Should the 2nd amendment be understood as protecting rights as relating to military use?
2. Facial challenge: no matter the facts, the law is unconstitutional.
3. How to Interpret the Constitution:
   1. Textual Interpretation
      1. Definitions, Compare to similar or related language in the Constitution, Context, Syntax / Construction of clauses, What’s omitted, Where the text in question is placed in the Constitution (placement within the document overall)
   2. Interpret the Framers’ Intent
      1. The legislative history
      2. The framers tell us what they were thinking, why they did what they did
      3. Hard to say which intent was THE intent, because the framers were a group of people with varying ideas
   3. Historical Context
      1. What were other states doing, How was the language used in legislation, Definitions of words at the time it was written, History in terms of events
   4. Precedent
4. Majority (Justice Scalia)
   1. Originalism! The interpretation should be guided by original meaning.
      1. Only enforce those rights which are explicit in the text or implicit in meaning..
      2. Concerned with limiting the power of the court: most issues should be resolved through the political process, not a Constitutional question.
      3. The opposite is “Living Constitutionalism” (a blueprint, intended to embody principles, not be a specific regulatory code)
5. Debate: Who is going to control here, can government regulate as it sees fit, or will there be little leeway for government to regulate now that this is a Constitutional right.

## Ex Parte MCardle, 1868 (Exceptions Clause- Congress can reduce Supreme Court’s jurisdiction)

1. McCardle was arrested by the Feds for a series of newspaper articles that were highly critical of the Reconstruction and the military rule of the South. McCardle filed a petition for writ of habeas corpus & said that the Military Reconstruction Act was unconstitutional.
   1. Writ of Habeas corpus: Writ ordering a prompt hearing to determine if a prisoner is being held properly.
   2. Reconstruction = sharp political conflict. President Johnson was opposed to Reconstruction Act, & vetoed it before Congress forced it through. At this time Congress was impeaching him for failure to enforce the Reconstruction Act.
   3. Had been repeated efforts by various interests for the Supreme Court to review the constitutionality of the Reconstruction Act. McCartle files under one statute that allows his to seek habeas corpus, and Congress knows what's going on and repeals the Act that allows him to sue. Congress trying to keep the court from assessing the Constitutionality of the Reconstruction Act.
      1. After the Supreme Court had already began oral arguments, Congress adopted a rider to an inconsequential tax bill that would make the Supreme Court not have jurisdiction over the McCardle case.
      2. Congress was afraid the Supreme Court ruling would be obstruction or invalidation of Reconstruction.
2. Congress has the authority to reduce Supreme Court’s jurisdiction, sometimes
   1. Only if the jurisdiction being reduced was one that Congress granted to the Supreme Court in the first place.
   2. Congress cannot reduce Supreme Court’s jurisdiction as outlined in the Constitution.
      1. Just how far can Congress go before it begins to interfere with the Judiciary as stated in Constitution Article III.
   3. Congress does not have the authority to strip the authority to hear certain kinds of cases.
   4. Somewhat unresolved but important political issue and raises questions of separation of powers- tension between congressional authority and power of court.

# Justicability Issues (Is the issue appropriate for judicial determination?)

1. Limitations on Power: devices the court uses to narrow its amount of cases/reduce authority
2. Supreme Court avoids Constitutional issues
3. **Standing: Who Gets to Court** (Requirements)
   1. **Injury in Fact** – Concrete & particular, actual/present or imminent (not speculative)
   2. **Causation** – defendant causes injury *Allan v. Wright*
   3. **Redressability** – the relief sought must eliminate the harm alleged
   4. General prohibitions:
      1. **No 3rd party standing**
      2. **No generalized grievances**: more than just by virtue of being a citizen or taxpayer
   5. Associations can have standing on behalf of its members
4. **Ripeness: When they Get to Court**: must be a genuine, immediate threat of harm
   1. When is it permissible to get pre-enforcement review (requirements)
      1. **Fitness of issues** 
         1. How concrete is the dispute? Are the issues too speculative, contingent on future uncertain events?
      2. **Hardship to the parties** 
         1. If the parties have to wait, what kind of hardship will be incurred?
         2. If the hardship is more speculative, the court may be inclined to wait.
   2. Concerns relate to advisory opinions
      1. If a court decides an issue too soon, there is not a concrete adversarial proceeding and the issues are not developed
      2. Declaratory judgment walks the line between live controversy and advisory opinion (before there is a hardship suffered)
5. **Mootness: relationship between the present case and past events**.
   1. Cases get dismissed all the time for mootness, especially civil cases.
   2. **Exceptions**:
      1. Wrong capable of repetition and of evading review (like pregnancy)
      2. If Defendant voluntarily ceases the behavior but could return to it anytime.
      3. A properly certified class action may continue even if Plaintiff’s claims become moot.
6. **Political Question: On What Subject matter** 
   1. Grounded in separation of powers issue concerns
      1. Court being asked to review political decisions by one of the other branches
      2. Certain things are political and discretionary & upon which the court has no judicial review.
   2. The court refuses to determine:
      1. Foreign Affairs
      2. Guaranty Clause (Republican form of government)
      3. Impeachment
      4. Amendments to the Constitution – process and time (not the substance)

## Allen v. Wright, 1984 (Standing: must allege injury in fact, causation & redressability to have)

1. Parents of black public school children allege the IRS has not sufficiently met its obligation to deny tax-exempt status to racially discriminatory private schools, asserting they are harmed directly because the IRS interfere with the ability of their children to receive an education in desegregated public schools & they want the IRS to revoke tax exempt status to schools that discriminate.
2. No standing to bring this suit:
   1. Court says respondents have not adequately alleged ”injury in fact”
   2. Court says their injury is not fairly traceable to the conduct they claim is unlawful
   3. MUST establish a clear relationship between causation and redressability

## Mass. V. EPA (Standing: relaxed requirements for states)

1. Two lines of deference here articulated in the majority opinion that distinguish from *Allen v Wright:*
   1. Standing is different when a state sues (requirements should be relaxed)
   2. Standing is different when congress authorizes it (a party can sue if they are not happy with an agency action)
      1. Said that since congress had authorized lawsuits under this particular statute the court should apply a different standard.

## Bush v. Gore (standing should have been an issue)

1. Bush sued to stop the recount in FL; equal protection claim; counting mechanism violated voters rights

## Poe v. Ullman (Ripeness- must review fitness of the issues & hardship to parties)

1. Is CT statute prohibiting contraception and contraceptive device constitutional? Holding- Not yet ripe.
2. Fitness of issues – Will this ever be enforced? This is contingent and uncertain.
3. Hardship to the parties – If there is no enforcement, there is no hardship.

## Abbott Laboratories v. Gardner (Ripeness- ripe because the impact is not speculative)

1. Drug manufacturers and association challenge amendment to the Federal Food, Drug, and Cosmetic Act.
2. Fitness- nothing ambiguous, its very clear that if this rule goes into effect this will be the impact.
3. Hardship- the pharmaceutical companies will have to print all new labels and materials.

## Baker v. Carr (Political Question- court does not decide upon the guarantee clause)

1. Challenge here to how voter districts are apportioned, for representation purposes.
2. Somebody said OK forget the guaranty clause, this is a violation of equal protection- the court said OK we do Equal Protection, thanks for bringing it that way, we can decide.
3. Whether or not the text of the Constitution allocates this issue to one of the political branches of government, and is this issue beyond judicial expertise?

## Powell v. McCormack (Not a Political Question but certainly could have been)

1. Congress claims they have grounds to not seat him under the Constitution (Art. 1, §5) – have the authority to decide they don’t have to seat him if they don’t want to, but Powell says no, you can only seat me with those 3 requirements.
2. Issues: (1) Does Congress have the authority to remove him for reasons other than age, citizenship, and residency *NO*. (2) Is this a political question- can the court resolve? *YES.*
3. Why does the court NOT decide this is a political question? Court is obviously concerned what would happen if Congress can just not let people become seated…

## Goldwater v. Carter (No advisory opinions; court will not decide a political question)

## Nixon v. United States (Political Question- generally no review of impeachment)

1. Judge Nixon was sent to jail but was still getting paid there so senate decided to impeach him. Nixon complains because the whole senate did not try and hear his case under Constitutional language.
2. Narrow holding: court will not engage in judicial review of senate use of a committee to take evidence
   1. They do not say there is no role for judicial review ever as it relates to impeachment.

# Federalism: The Allocation of State & Federal Power under the Constitution

1. The federal government can act (only) on the basis of the enumerated powers of the Constitution.
   1. Necessary & Proper Clause expands: congress can use any reasonable means necessary & proper to carry into execution the enumerated powers
2. Federal Commerce Power
   1. Regulates any person or thing that moves within the world
      1. Present status today: Any economic activity, which in the aggregate has a substantial effect on interstate commerce.
3. Pretty much everything else the states are free to act on their own unless prohibited by the Constitution (10th Amendment).

## McCulloch v. Maryland (State bank - Huge States Rights Issue)

1. Issue: Is the tax is valid? Is the bank valid? Does Congress have the power to act?
   1. Is the federal government or the states supreme?
   2. A Constitution is just a blueprint/an outline
   3. Express & Implied Constitutional Powers
   4. Necessary & Proper Clause (shows framers intent that powers be broadly interpreted)
   5. **Power to tax is the power to destroy**
      1. One state cannot impact the national government without consent of all states.
2. **The enumerated powers should be construed broadly to give implied powers.**
3. **The only limit to congressional power is if an act is not Constitutional.**

# The Commerce Clause

1. The basis for just about every federal law out there! A plenary power.
   1. If the fed government does not have a general police power to regulate for general welfare
   2. If its powers are specific and enumerated, then its all going to come from the commerce clause
   3. If the powers are to be interpreted broadly/generously, that includes the commerce clause!
2. **What are the limits of congressional power?** 
   1. Either the states have a lot of freedom or Congress has a lot of power

### THE COMMERCE CLAUSE THROUGH TIME:

* 1824 *Gibbons*: Broad definition of commerce
  + Commerce as intercourse
  + Congress can regulate any activities that affect interstate commerce
  + Interstate commerce doesn’t end at state borders
* 1895-1937: *Pre-New Deal*: Narrow definition of commerce- actually tries to define commerce
  + Formalist
  + Manufacture is not commerce *EC Knight*
  + Stream/Flow of commerce *Sick Chicken*
  + Production of articles is a matter of local regulation *Hamer/Child Labor*
  + Economic Concerns
  + Question of direct v. indirect
  + 10th Amendment: Limits! (Intended to reserve some powers for the state, complements narrow definition of commerce)
  + Enhanced protection to states- an artificial solution, not very workable, line drawing problem.
* 1937-1990s: *Post-New Deal*: stops defining commerce, more about what has a substantial affect on interstate commerce
  + Does the activity affect interstate commerce *Jones & Laughlin Steel, Darby*
  + Congress can regulate local activities when they have a substantial impact on the market in the aggregate *Wickard*
  + **TEST: Does the regulated activity have a substantial effect on interstate commerce?**
  + Rational Basis Test (Civil Rights Cases)
  + 10th Amendment does not draw any lines, only means that what Congress doesn’t regulate is left to the state *Darby*
* 1970s: brief & failed foray into the traditional state function test *National League of Cities (1976)*
  + 10th Amendment prohibits Congress from regulating areas of traditional state function.
  + 1985: *Garcia* overturns *National League* because there is no workable definition of “traditional state function”
* 1990s-current: More limits on Congress’ use of commerce clause, less use of rational basis test, less deference
  + Three categories for commerce clause regulation *Lopez*
  + **3 categories of activities under the Commerce Clause:**
    - **Channels of interstate commerce** (hotels, restaurants, roads);
    - **Instrumentalities, persons & things in interstate commerce** (trucks, railroads);
    - **Local activities with a substantial effect on interstate commerce** (*most confusing area)*
  + No aggregation for non-economic activities *Morrison*
    - TEST: Does the regulated activity have a substantial effect on interstate commerce?
      * Economic activity?
        + If its economic activity, it can be aggregated
        + If its not an economic activity, it cannot be aggregated
      * Nexus: Connection between regulated act & interstate commerce: is there a substantial effect?
      * Jurisdictional element: did congress specifically connect the regulation to commerce
      * Congressional findings: the court will not defer to congress but will review the reports
  + New factor: is the regulated activity part of an overall comprehensive scheme? *Raiche*

### 10th AMEDNEMENT- limitations on federal power spilling over into state power:

If the 10th Amendment DOES anything, it limits the MEANS by which Congress can act regarding states powers.

1. Before 1937:
   1. 10th Amendment is separate provision for limiting federal power
   2. it preserves powers for the states
2. After 1937:
   1. 10th Amendment is but a truism, not a judicially enforceable limit on federal power.
   2. There is no pot of leftover rights for the state, no line you can draw.
3. 1976 - 1985:
   1. 10th Amendment prohibits Congress from regulating traditional state functions. (*National League of Cities*)
4. 1985-current:
   1. 10th Amendment does not impose judicially enforceable limits on the federal government. (*Garcia overrules National League of Cities)*

## Gibbons v. Ogden, 1824 (broad definition: commerce is intercourse)

1. About operating steamboats in New York waters. Can the NY Law regulate the river? Or is a federal law supreme*? NO. Federal law is supreme.*
2. The Constitution should be viewed broadly
3. The Constitution says that congress has the power to regulate commerce (between states, foreign, etc).
4. **Broad Definition of Commerce:** a network of commercial operations; more than just buying and selling & trafficking in goods, it is **intercourse.** 
   1. Congress *can regulate intrastate activities that affect interstate commerce*.
   2. “among the states” includes into the states, does not stop at the boundaries of the state.

## United States v. E.C. Knight Co., 1895 (narrow definition: manufacture is not commerce)

1. About how the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar in the USA & is charged with restraint of trade contrary to Congress’ Act.
2. Issue**:** Can Congress suppress a monopoly in manufacture? *No.*
3. Reasoning:
   1. **Manufacture is not commerce. It is something different that happens before commerce.**
   2. Right now in time:
      1. Industrial revolution
      2. Courts very interested in protecting state’s rights
      3. Major social and economic upheavals in the country
4. Dissent (Holms): Everyone is affected if something unreasonably obstructs buying and selling between states, and so the best entity to regulate is the authority of all- the American government.

## “Sick Chicken Case”, 1935 (narrow definition: Congress can only regulate while goods are in the flow of commerce)

1. About conviction for violations against the Live Poultry Code and conspiracy to commit the violations. Should the Live Poultry Code apply? That is, is ALA operating an interstate business? *NO.*
2. The flow has stopped, there is no stream of commerce anymore
   1. Conditions can only be regulated while the goods are currently in interstate flow/moving in the stream of commerce.
   2. The distinction between direct & indirect transactions must be maintained or else the government’s power will be limitless

ONLY COMMERCE WHILE IN THE STREAM OF COMMERCE. Not before or after.

Chickens Handled

Chickens Raised

## Hammer v. Dagenhart, 1918 (narrow definition: the production of articles is not interstate)

1. About a father who sues on behalf of himself and his 2 sons to enjoin the enforcement of an act of Congress intended to prevent interstate commerce in the products of child labor. Is it within the authority of Congress to regulate commerce among the states to prohibit transportation in interstate commerce of manufactured goods produced by a factory with crap child labor standards? *NO.*
2. The act was intendedto regulate the age at which children may work in certain industries, not transportation between states
3. **Just because the product created by the children in factories might go through interstate commerce doesn’t mean the production is subject to control under the commerce clause**
4. the production of articles, whether for inter- or intra- state use, is a matter of local regulation
   1. the production of goods is reserved to the states.
   2. Though it actually uses the means of interstate commerce it is still reserved to the states.
5. Overruled by *Darby* in 1941

## Champion v. Ames 158 (1903) aka “The Lottery Case”

1. Is Act 1895 valid (prohibiting several activities surrounding lottery tickets)? *YES.*
2. Congress can use the commerce power to regulate any reason congress wants (so long as it is actually targeting commerce). Including morals.
3. Lottery tickets are subjects of traffic and therefore are subjects of commerce.
4. Distinguished from child labor case (Difference in where the problem was the congress was targeting):
   1. lotto: the evil is in the goods and the transportation of them.
   2. Child labor- evil is in the production.

### The Court Packing Plan

1. Court striking down major things on labor and coal production
2. Roosevelt got really frustrated and proposed a plan that would help “alleviate the workload of the Supreme Court justices:” for every justice over 70 years old, a second helper justice would be appointed (up to max of 15 justices).
3. Obviously would allow Roosevelt to change the court, since resistance from the court was public.
   1. Nation and congress perceived this as obvious threat to judicial justice.
   2. A lot of these decisions were 5/4 majority, but Justice Roberts changed
      1. If he had not, Roosevelt might have tried to go forward with the plan

## NLRB v. Jones & Laughlin Steel Corp, 1937 (Does the activity affect interstate commerce?)

1. The National Labor Relations (NLR) Act regulates what is shipped across state lines depending on labor practices (similar to child labor case: target is production, particularly labor practices). Is the 1935 NLR Act valid under the Commerce Clause (labor relations)? *YES*
2. J&L is a multi-state business, which factually distinguishes between the child labor case, but that’s not necessarily what changes the outcome.
3. Here there is some recognition that manufacturing is part of commerce.
4. **They do not define commerce, they talk about purpose of commerce clause.**
5. **Holds that congress can regulate based on whether the activity affects interstate commerce**.

## United States v. Darby, 1941 (Does the regulated activity impact interstate commerce?)

1. Darby doesn’t comply with the Fair Labor Standards Act of 1938. Does Congress have the Constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum? *YES*
2. **Manufacture may not be “commerce,” but the question is whether it impacts interstate commerce, definition doesn’t matter.**
3. *Hammer v. Dagenhart (*child labor case) is *overruled.*
4. When activities intrastate affect interstate commerce, Congress may even regulate intrastate activities.
5. The 10th Amendment doesn’t help draw any lines to what the commerce power is, it only means that what isn’t regulated by Congress is left to the states.

## Wickard v. Fiburn, 1942 (In the aggregate, is there a substantial impact on the market?)

1. About wheat limits imposed by the Agricultural Adjustment Act of 1938.
2. Congress may regulate because the presence of home grown wheat affects the wheat market.
3. **Congress can regulate small local activities when they have a *substantial impact* on the market in the aggregate.**
4. The outer limits of the commerce clause: local activities in the aggregate do have a substantial effect of interstate commerce.

### Civil Rights Cases

1. 14th Amendment guarantee of equal protection only limited *state* power, not private discriminatory acts
2. The only way to create this protection was through the commerce clause & the court knew its decisions were incredibly significant.
3. Does Racial Discrimination in Hotels & Restaurants substantially affect interstate commerce?

## Heart of Atlanta Motel, Inc. v. US, 1964 (Can regulate local activity which places burden on interstate commerce)

1. Motel had a practice of refusing to renting rooms to non white people, and alleged it intends to continue to do so, even after the Civil Rights Act. Suit for declaratory judgment. Does Congress have Constitutional power to regulate the hotel in this situation, under the commerce clause? *YES*
2. **Does business’ racial discrimination substantially affect interstate commerce?** *YES*
   1. Regulated activity = racial discrimination
3. **Discrimination by race places a great burden upon interstate commerce.** 
   1. **Though it’s a local activity, effects are felt interstate** (Impedes Travel, Market is distorted\_
      1. *Congress doesn’t have to meet any kind of standard on these findings.*
4. Regulation for moral purposes is permissible under the commerce clause
   1. No problem if a particular obstruction to interstate commerce is also a moral and social wrong.
5. The power of Congress to promote interstate commerce also includes the power to regulate local incidents, which may have an effect on that commerce.

## Katzenbach v. McClung, 1964 (Rational Basis Test- Deference to Congress’ Assessment)

1. Ollie’s family owned restaurant refuses to serve non whites. Does the Civil Rights Act apply to restaurants which serve food a substantial portion of which has moved in commerce? *YES.* As applied to a restaurant annually receiving about $70k worth of food moved in commerce, is the Act a valid exercise of the power of Congress? *Yes.*
2. Connection between racial discrimination in restaurants and the movement of interstate commerce: If restaurants sell less interstate goods because of the discrimination, interstate travel is obstructed by it, business in general suffered, and new businesses refrain from establishing as a result.
3. Uses *Wickard “*substantial economic effect”
4. Follows *Gibbons v. Ogden:* only commerce which does not affect other states is beyond Congress’ reach.
5. **Rational Basis Test: Deferring to Congress’ assessment of whether this is interstate commerce. Court will not substitute their judgment so long as the court think Congress has acted reasonably.**

### Brief, failed attempt at 10th Amendment limit against regulating areas of “traditional state function”

## National League of Cities v. Usery, 1976 (Traditional State Function Test)

1. Re: Fair Labor Standards Act, 1974 amendments.
2. Holds the 10th Amendment limits Congress’ ability to regulate labor standards for state employees?
3. **10th Amendment prohibits Congress from regulating in these areas of traditional state function.** 
   1. But doesn’t give any definition of “traditional state function”

## Garcia v. San Antonio Metropolitan Transit Authority 178 (SCt 1985)

1. The court deciding what is a traditional state function in fact undermines state’s authority.
2. **Overrules *National League of Cities* because there is no workable way that the Court can properly determine if an area of law ought to be left to the states on the basis of “traditional, integral, or necessary” without totally compromising the principles of federalism in a democratic society.**
3. The framers of the Constitution ensured the role of the states through the structure of the Federal Government itself, much more than by expecting the judiciary to regulate it.

### MODERN TENTH (10) AMENDMENT

## New York v. United States, 1992 (10th Amendment: Fed cannot Commandeer States by compelling them to enact & enforce a particular federal program)

1. Problem of disposal of radioactive waste, Low-Level Radioactive Waste Policy Amendment Act of 1985, “take title” provision.
2. First ask: “Is there doubt about commerce clause authority here?”
   1. If you only have a 10th amendment challenge, you are not saying congress doesn’t have authority, you are saying there’s something about the 10th amendment that prohibits exactly what Congress is doing
3. The 10th Amendment Limits the MEANS by which Congress can act, vis-a-vis the states:
   1. Anti-Commandeering Principle: Fed lacks the authority to commandeer the state legislative process & make the state regulate in a certain way according to Federal policy- Different from when the state is regulated just like everyone else.
      1. Congress should be held accountable for whatever congress wants done, not the states doing Congress’ will.
      2. States are sovereign, not agency of the federal government

## Printz v. United States, 1997 (10th Amendment: Fed cannot Commandeer States Resources for Federal Purposes)

1. Brady Handgun Violence Prevention Act: temporary use of state and local law enforcement officers to run background checks to help enforce the legislation.
2. Is there something the states are being asked to do that violates the 10th amendment?
   1. Cannot force the state to use its own resources to accomplish a Federal mandate

## Reno v. Condon, 2000 (Generally applicable act, regulating the states not requiring the states to regulate)

1. Drivers Privacy Protection act regulated disclosure of personal info in DMV (created after issues with stalkers)
2. Act is generally applicable (didn’t apply solely to the states, rather it also applied to private persons)
3. Act is regulating the states as owners of databases, not requiring the states to regulate their own people. Federal Law does not control the manner in which the state controls its own citizens.
   * 1. Not trying to commandeer the state’s legislative or executive functions.
4. Not requiring states to enforce federal law but asked to comply with federal law: There’s a difference when the fed government prohibits the states from doing something, from when the fed imposes affirmative law making direction on them.

### How can the Federal Government Get the States to Do Something?:

1. It’s a matter of semantics: form prevails over the substance. Federal law must be carefully worded. Congress could have used these methods:
   1. Spending power (conditions to receipt of federal funds)
   2. Commerce power
2. Fed can tell states what to do but not necessarily how to do it.
3. “Cooperative Federalism:” the state is given a choice to either legislate in the way that Congress wants or Congress will come in & run the program under its own authority.
4. Spending Clause: give money with conditions
5. Regulate the activity directly
6. No commandeering: when everyone is regulated & the states are not being separated out, it’s not just about the state, regulation is ok.

### 

### MODERN COMMERCE CLAUSE

## US v. Lopez (Three categories for Commerce Clause Regulation)

1. Repackages the Commerce Clause; Court reworks precedent, and says there are **three categories:** 
   1. **Channels of interstate commerce** (hotels, restaurants, roads);
   2. **Instrumentalities, persons and things in interstate commerce** (trucks, railroads, vehicles);
   3. **Local activities with a substantial effect on interstate commerce** (*most confusing area)*
2. **TEST:**
   1. The nature of regulated activity: Is the regulated activity economic or not?
      1. If the court concludes the regulated activity is not economic, the government has a steep hill to climb. If it’s not an economic activity, there’s no basis for aggregating it.
   2. Connections between the regulated act and interstate commerce: is there a substantial effect?
      1. The arguments become harder to make as connections between the factors and the case at hand get too broad, tenuous, speculative.
   3. “Jurisdictional element:” Does the text of the law draw a line btwn the activity and commerce?
   4. Congressional findings: Congress isn’t required to make findings, but court will examine them.
3. Lopez fails the test:
   1. The nature of regulated activity: Is the regulated activity economic or not?
      1. *Gun possession is noneconomic. Must be a nexus between activity & economics.*
      2. *Court gives no tools on how to decide whether something is economic*
   2. Connections between the regulated act and interstate commerce: is there a substantial effect?
      1. *The link between gun possession at school & interstate commerce was too tenuous to qualify as a substantial affect on commerce*
   3. “Jurisdictional element:” Does the text of the law draw a line btwn the activity and commerce?
      1. No jurisdictional element: Just the possession alone doesn’t have any effect on IC.
   4. Congressional findings: Congress isn’t required to make findings, but court will examine them.
      1. *No express congressional findings about IC*
      2. *Under rational basis test, court would have upheld law.*

## United States v. Morrison (No aggregation for non-economic regulated activities)

1. The statute establishes a civil rights claim for victims of gender-motivated violence.
2. Analysis:
   1. *(What is the nature of the activity?)* 
      1. The regulated activity (gender motivated violence) is non-economic. Since non-economic, no aggregation possible.
   2. (*Is there a direct connection between the regulated activity & interstate commerce?)*
      1. Congress makes the same arguments for connection to commerce that it made in the civil rights cases, but this time the court doesn’t buy it.
   3. *Congressional Findings*
      1. By not deferring to congress, they are substituting their own judgment, and they do that predominantly by looking at economic/non economic distinction

## Gonzales v. Raich (comprehensive regulatory scheme)

1. *Does congress have the power to regulate home grown medical marijuana under the commerce clause?* If they do, you usually would have a preemption situation,
   1. The federal Controlled Substances Act (CSA) federally criminalized marijuana, no exceptions.
   2. California’s 1996 statute created an exemption from criminal prosecution for marijuana.
2. *(What is the nature of the activity?)* 
   1. Home grown medical marijuana.
   2. Parallels w/ Wickard (marijuana is the new wheat).
   3. Marijuana IS economic because its related to interstate commerce by virtue of being a larger market, marijuana is a commodity
3. (*Is there a direct connection between the regulated activity & interstate commerce?)*
   1. Purpose in Lopez – health and safety and education (intended to keep guns away from schools; not an overall broad intention to control the market in guns)
   2. Purpose in Raiche – Controlled Substances Act- intended to regulate or control the market
4. *Congressional Findings*
   1. Stevens bring back “Rational Basis” which had disappeared since *Lopez*.
5. Court emphasizes that the CSA is clearly a comprehensive regulatory scheme (the market of drugs).
   1. Though medical marijuana may be homegrown & local activity, the purpose of the comprehensive regulatory scheme of the overall marijuana market could be undermined
   2. In the face of a comprehensive regulatory scheme this as-applied challenge is unsuccessful.
   3. The local aspect doesn’t matter in the context of the comprehensive regulatory scheme.
   4. Difference between facial challenge and as-applied challenge.
   5. If you pull out a piece of the regulatory scheme, the puling that one piece would undermine the regulatory scheme

### SPENDING CLAUSE – Plenary Power

Requirements:

1. Must be for the general welfare (as defined by Congress) – threshold issue
2. Conditions must not be ambiguous
3. There must be a “reasonable” relation between the conditions and the federal funds (what the funds are going to/policy purpose)
4. Must not be Coercion (possibility for future decision of coercion, but not likely to be found coercive except in extreme example).

## Sabri v. United States (spending clause: the connection between spending & condition can be loose)

1. A guy engages in a bribe.
2. How close does the expenditure of federal funds to the regulated action? Not very, just some.
3. Judicial Deference still exists in spending clause (not anymore in commerce clause)

## South Dakota v. Dole (spending clause: judicial deference still exists)

1. Congress attempts to control drinking age in SD with highway money.
2. Issue: how far can congress go? What are the restrictions on the spending power?

### ELEVENTH (11) AMENDMENT – suing the state as an entity for damages

1. Sovereign Immunity prevents any individual from suing a state for money damages.

Exceptions:

* 1. States may waive sovereign immunity
  2. Congress may authorize suits under §5 power of the 14th Amendment (power to abrogate)
  3. State officers may be sued, unless the state treasury will be the paying damages
  4. Federal Government can sue the state

### FOURTEENTH AMENDMENT, SECTION FIVE (14, §5) “enforcement provision”

1. The principle of state sovereignty is limited by the enforcement provisions of §5 of the 14th Amendment
2. There is a distinction between (a) preventing unconstitutional actions and (b) governing law.
   1. Congress can only enforce the provisions, it cannot determine the provisions.

## Fitzpatrick v. Bitzer, 1976 (Congress can ONLY authorize suits against state government only pursuant to §5 NOT any other congressional power)

1. Congress has the power to authorize Federal courts to award money damages against a state as a means of enforcing the 14th Amendment

## Dept. of Human Resources v. Smith

1. Case about the religious use of peyote.
2. Generally applicable laws that don’t target religion don’t count as discriminatory against religion, even if religion is affected.

## City of Boerne v. Flores, 1997 (Congress can use 14th, §5 to enforce or remedy unconstitutional action)

1. **Enforce: remedy for problems deter future problems**
2. The Religious Freedom Restoration Act (RFRA) is not a valid exercise of Congress’ §5 power?
3. **Test: to have §5 authority, congress can enforce or remedy only proportionate and congruent in relation to the harm:**
   1. **The Constitutional standard itself (little burger, little bun)**
   2. **If extending the Constitutional standard, Congress must justify the extension because of a pattern of discrimination by the states (little burger, why is the bun so big).**
4. Congress can only enforce the provisions of the Constitution, it cannot determine the provisions.
5. Hold: RFRA is too broad to be remedial

## Seminole Tribe of Florida v. Florida, 1996 (Congress lacks the authority to abrogate state sovereign immunity under Article 1)

1. Indian Gaming Regulatory Act: can Congress authorize a tribe to bring suit against a state under the Commerce clause?
2. The test:
   1. *Has Congress unequivocally expressed its intent to abrogate the immunity*? YES.
   2. *Has Congress acted pursuant to a valid exercise of powers*? NO
      1. Only 14th Am, §5 gives Congress the power to abrogate, no power to aggregate under Article 1

## Fitzpatrick v. Bitzer, 1976 (Congress can abrogate state sovereign immunity under the 14th Am)

1. Congress has the power to authorize money damages against a state as a means of enforcing the 14th Amendment (against the shield of the 11th Amendment)? YES

**TEST: Analyzing congressional power to abrogate:**

1. We ask:
   1. Do they have the power to enact this legislation?
   2. Is this a valid exercise of congressional authority under the commerce clause?
   3. Are there any 10th amendment problems? *No, because it applies to everyone, the fed is not commandeering?*
   4. Are there any 11th amendment problems?
      1. Is there clear and explicit Congressional intent to abrogate? (if no, cannot sue the state)
      2. Or is the statute promulgated under the commerce clause (if yes, cannot sue the state)
      3. Does congress have power to remove states’ sovereign immunity?
         1. Is law valid exercise of Congressional power under §5 of the 14th Amendment? Must:
            1. Identify Constitutional standard (right)
            2. A pattern of discrimination by states must exist
            3. Remedy must be proportional and congruent to the harm.

## Board of Trustees, U of Alabama v. Garrett, 2001 (The remedy must be congruent and proportional to the targeted violation)

1. Can Alabama state employees recover money damages for the state’s failure to comply with the ADA? Did Congress act within its Constitutional authority by subjecting states to suits in federal court for money damages under the ADA? *NO. Barred by the 11th amendment.*
2. There is not a sufficient pattern of discrimination for this remedy (must be proportional & congruent)

### Congress’ Greater Authority to Legislate Types of Discrimination - Rights that Receive Heightened Scrutiny (as a way of looking at what is proportional)

## Nevada Department of Human Resources v. Hibbs, 2003 (Under Heightened Scrutiny, its easier to justify a bigger bun)

1. Employees of the State of NV sue to recover money damages because of the state’s failure to comply with the Family and Medical Leave Act of 1993. Did Congress act within its authority when it sought to abrogate the states’ immunity for purposes of the FMLA’s family-leave provision? YES
2. **Test/Process**
   1. Here, Congress’ intent to abrogate is clear.
   2. Is there a pattern of discrimination in the states?
      1. Gender is a quasi-suspect classification- with less leeway for the states to use gender, when congress sees gender being used, they have more leeway to make laws with a bigger bun.

## Tennessee v. Lane, 2004 (Must be an appropriate response to the right)

1. Does Title II of the ADA Act exceed Congress’ power under §5 of the 14th Amendment?
2. Is there is Congress’ clear intent to abrogate? YES- textual
3. Does Congress have power under §5 to abrogate?
   1. What is the Constitutional right that Congress sought to enforce? no disability discrimination
   2. Is Title II an appropriate response to the unequal treatment- a pattern of incidents that show an intent by the state to perpetuate discrimination? different judges have different standards

# Limitations on state/local laws by the Federal Government:

1. Preemption (Federal law preempts state/local laws)
2. The Dormant Commerce Clause (State/local laws are unconstitutional if they place an undue burden on interstate commerce)
3. Privileges and Immunities Clause (citizens of each state are entitled to all privileges and immunities of citizens of any state)

### Preemption- conflict between Fed & State law on the same subject

1. Federal law always trumps state law (supremacy clause- article 6)
2. There is a presumption against finding preemption
3. Types of Preemption (always based upon statutory interpretation):
   1. Express: When Congress says in the text of the law that they intend to preempt any state legislation
   2. Implied: When it’s not clear from the text of the law whether or not Congress intends to preempt.
4. Arises in 3 ways:
   1. Conflict preemption: direct conflict, impossible to comply with both the state & federal laws.
   2. Occupy the field: the federal regulatory scheme is so comprehensive, Congress wanted control & no room for states
   3. Where state law defeats federal purpose/policy: state law is inconsistent w/ federal law.

## Florida Lime & Avocado Growers v. Dept. of Agriculture of California (Conflict Preemption avoided when it is possible to comply with both state & federal law)

1. CA regulates avocados by oil % content, but Fed regulates avocados based on maturity without significance to oil content.
2. Both laws can be met: if you want to sell the avocados in CA, you just need to let the avocados grow a little longer; just hold some of them until they reach the maturity level that meets CA oil % content.

## PG&E v. State Energy Resources Commn. (Preemption Because State Law Impedes the Achievement of a Federal Objective)

1. Congress intends to occupy the field in the matters of construction, and safety.
2. But the state can regulate nuclear power for economic reasons.
3. Notice the presumption against preemption: found an alternative purpose that doesn’t conflict with the federal purpose (court will look hard to uphold the dual regulation wherever possible).

## Hines, Pennsylvania v. Davidowitz (Preemption if Congress intends to Occupy the Field)

1. Differences, but not necessarily a conflict, between a state’s immigration law and the federal immigration law in the context of registration.
2. However, Congress is certainly intending to occupy the field.

### Dormant Commerce Clause- State/local laws are unconstitutional if they place an undue burden on interstate commerce

1. The framers were concerned with state protectionist policies.
2. Even in the absence of fed regulation in a certain area, the states can run afoul of the commerce clause:
   1. **If the state law discriminates against state commerce or**
   2. **If the state law unduly burdens interstate commerce.**
3. Discrimination is only okay if:
   1. there is an important governmental purpose (not protectionism), and
   2. no less discriminatory alternatives exist
4. Discriminatory= Purposefully favoring instate interests at the out of state interests at the detriment of out of state interests.
   1. Facially discriminatory law: When the discrimination is obvious on the face of the law.
      1. Barrier in, Barrier out, Law distinguishes between instate and out of state.
   2. Facially Neutral law but with evidence of discriminatory purpose and/or effect:
      1. Must be an important governmental purpose (not protectionism), and
      2. Must not be any less discriminatory alternative
         1. Only once has a case ever met the standard of no less discriminatory alternatives

**TEST: Discriminatory Laws**

1. **Is the law facially discriminatory?** If yes, go to that test
2. **Is the law facially discriminatory?** If no, go to test for facially neutral law:
3. **Test for Facially Neutral Law:**
   1. **IF there IS evidence of discriminatory effect or purpose** (burdens out of state interests & benefits in state interests?)
      1. Discriminatory laws are presumed unconstitutional, the state must justify that the law:
         1. Is for an important government interest?
         2. Is there a less restrictive alternative?
   2. **If there is NO evidence of discriminatory effect or purpose**
      1. Non-Discriminatory laws are presumed constitutional, so the challenger of the law must show the burdens outweigh the benefits:
         1. Does the law impose an undue burden on interstate commerce?
4. **Test for Facially Discriminatory Law**
   1. Discriminatory laws are presumed unconstitutional, the state must justify that the law:
      1. Is for an important government interest? (Protectionist is never a good reason.)
      2. Is there a less restrictive alternative?

## City of Philadelphia v. New Jersey (“Barrier In” is Facially Discriminatory)

1. NJ has a problem with waste & so to reduce the amount landfills, NJ prohibits imported trash.
2. **This facially discriminates against a commodity traveling across state lines.**
3. There are plenty of less discriminatory alternatives.

## Maine v. Taylor & United States (Only case ever where Facially Discriminatory law upheld because no less discriminatory alternatives exist)

1. Maine statute prohibiting the importation of live baitfish is upheld. Barrier In.
2. Choice of means: can the state convince the court there really is no other way to protect the species other than this barrier.

## Hunt v. Washington State (Facially neutral law with a discriminatory effect- in state interests get benefit while out of state interest gets a burden)

1. Washington has a label standard for their awesome WA apples. But North Carolina passes a law where no labels are allowed except for the federal labels.
2. Facially non discriminatory: on the surface, this law appears to apply to everyone equally.
3. Discriminatory in effect: WA has to change its practices while NC growers do not.
4. Apply the test:
   1. Important governmental purpose: allegedly for consumer protection
   2. Less discriminatory alternative: yes, because the law doesn’t actually protect consumers.

## West Lynn Creamery Inc v Massachusetts Dept. of Food and Agriculture (Facially neutral law with a discriminatory effect- in state interests get benefit while out of state interest gets a burden)

1. MA has a problem about sustaining its failing dairy industry. To do so, the state creates a tax *on dairy dealers* to build a fund to pay MA *dairy farmers*.
2. Appears on the surface to treat in state and out of state interests equally. But, this program subsidizes in state interests primarily by burdening out of state interests.
3. Means matter! Each of these things could have been done separately but not where the out of state interest bear the burden & in state gets the benefit.

## State of Minnesota v. Clover Leaf Creamery Co. (Not discriminatory: in state & out of state interests are equally burdened)

1. The law bans the retail sale of milk in plastic nonreturnable, nonrefillable containers.
2. Go through the test:
   1. Is the law facially discriminatory? No- no distinction between instate and out of state interests
   2. Facially neutral, but is there any evidence of discriminatory purpose or effect? No, no real benefit to instate interests while burdening out of state interests.

## Dean Milk Co. v. City of Madison, Wisconsin (Just because in-state interests are burdened doesn’t mean the law is not discriminatory)

1. Local processing requirement about labeling pasteurized milk within a 5 mile radius of Madison, WI.
2. Just because in-state interests are also compromised, doesn’t mean that the law is not in conflict with interstate commerce, still raises the same kinds of problems.
3. Less restrictive alternatives are available.

## Consolidated Freightways Corp of Delaware v. Raymond Kassel (Facially Non-Discriminatory Laws carry a strong presumption of validity)

1. Iowa prohibits trucks over a certain length, which gets in the way of trucking companies who drive through Iowa on their way across the country. But the burdens on interstate commerce do not outweigh the benefits.
2. If there is an even-handed regulation with a valid purpose that the law actually serves it will be upheld unless the burdens are really excessive compared to the purpose.

## Loren J. Pike v. Bruce Church, Inc. (Facially non-discriminatory law: only violates the DCC if the burden outweighs the benefits)

1. Fruit and Vegetable Act required that all AZ grown cantaloupes must be packed in AZ.
2. The court saw the burden as excessive.

### Market Participation Doctrine

1. Exception to what would otherwise be considered not allowed under the DCC: **if the state is acting a market participant, not a market regulator**
2. “The market” in which the state is said to be a participant is defined very narrowly.
3. The state is free to make whatever terms it wants under the market participant exception.
4. The commerce clause is concerned with the state’s sovereign capacity as a regulator.
5. Premise behind exception is that the commerce clause is not undermined when the state steps out of its regulatory shoes and becomes a participant- only when the state acts as a sovereign.

## South-Central Timber Development, Inc. v. Commissioner, Dept. of Natural Resources of Alaska

1. AK sells timber & restriction what can do with the timber after they buy it (how to process it)
   1. AK is in the market of growing and selling timber but not the market of timber processing.
   2. No market participation doctrine exception for regulator of timber processing.

## Reeves, Inc. v. William Stake

1. State owned cement plant is going to sell to state residents first during a cement shortage.
2. Facially discriminatory, but market participation exception applies because the state is acting as a player in the transaction.
3. Similar example: After a cement shortage, all cement plants must prefer SD residents for concrete sales from its SD facility. Facially discriminatory but only addresses sales from state owned facility, .Regulating how privately owned facilities by telling them that they should give a preference to SD. Facially discriminatory and purely regulatory.

### Privileges & Immunities Clause (Article 4)

1. Bridge between federalism and individual rights: a citizen from a state who ventures temporarily into another state: the temporary visitor should not be subject to discrimination.
2. **TEST to determine whether the law will be upheld under Privileges & Immunities Clause:**
   1. **Only applies to individual citizens (no corporations, no aliens)**
   2. **Only applies to Privileges & Immunities (civil rights & the right to earn a living)**
   3. **Must be a substantial reason for the distinction between in-state and out of state** 
      1. **(looks at the end)**
   4. **Treatment must be narrowly tailored to achieve the important government interest.** 
      1. **(looks at the means)**

## Toomer v. Witsell (Must have a reason to treat out of state fishermen differently)

1. Privileges & Immunities Clause applies to commercial fishing.
2. If the state wants to treat differently needs to show why its important to treat them differently & it shows no reason.

## United Building v. Camden (A local law can trigger the Privileges & Immunities Clause)

1. NJ argues that city ordinance is city-wide & therefore Privileges & Immunities Clause doesn’t apply.
2. Privileges & Immunities Clause is not only triggered by state laws, but by city/county laws (no exceptions just because there is a smaller subdivision within the state).
3. Go through the test:
   1. Does it violate the DCC?
      1. Is it facially discriminatory? Yes- 40% hiring quota for Camden projects
      2. Facially discriminatory = presumed invalid unless it can be shown that the law is for the purpose of a substantial government interest and is this the least restrictive way of meeting the purpose.
         1. Purpose: is to promote the economic well-being for the city of Camden.
         2. Less restrictive means of meeting that purpose? No.
   2. Is there a market participation exception? Yes the city is market participant because they are funding the projects.
   3. Does it violate the Privileges & Immunities Clause?
      1. Is this about someone earning a living? Yes.
      2. Substantial reason for distinction between in & out of state: to improve the Camden economy.
      3. Are the means narrowly tailored? Here the court said we don’t have enough info to decide. (Narrowly tailored isn’t quite an onerous standard as the least restrictive means test for DCC.)

## Supreme Court of New Hampshire v. Kathryn A. Piper

1. Law saying that that out of state residents cannot become a bar lawyer in NH
2. No substantial reason for distinction between instate and out of state AND restriction is not narrowly tailored for those purposes?
   1. Least restrictive means: the court is saying this is the only way you can achieve your objective. Is this the ONLY way?

# Executive Power

### Separation of Powers & Inherent Presidential power

1. Article II confers an awfully short list of powers. Does the President have inherent power?
   1. Are the sum of the powers more than the individual powers themselves?
   2. Is there something about being the president that gives the president authority to handle certain situations?

## Youngstown v. Sawyer (Jackson’s “3 Categories of Presidential Acts”)

1. Major steel strike threatened in the context of the Korean War, so the president issued an executive order directing the Secretary of Commerce to take possession of and operate post of the Nation’s steel mills? Was the president acting within his constitutional power? *NO.*
2. **Black (majority): formalist approach**
   1. **“**Commander in chief” is only for foreign affairs issues.
   2. The president does not have Aggregate (inherent) power.
   3. The Chief Executive must merely execute law, NOT make law.
3. **Frankfurter (concurring)** (pragmatic, functionalist approach)**:**
   1. Historical gloss: when evaluating the grey areas, its worth considering whether branches have behaved a certain way over a period of time.
4. **Jackson (concurring)** (functionalist approach):
   1. **Three categories of how to analyze executive acts:**
      1. **Category 1: Acting pursuant to express or implied authorization of congress**
         1. **The height of presidential power; the only way the action could be unconstitutional is if congress’ act was unconstitutional.**
      2. **Category 2: Acting in absence of a congressional grant or denial of authority**
         1. **Where the president acts in the absence of congressional authorization. May be room for concurrent authority.**
      3. **Category 3: President Acts against the (expressed or implied) will of congress**
         1. **President’s power is at its lowest ebb; president can only prevail if congress lacks authority & the president has authority.**

### The Scope of Inherent Power: The Issue of Executive Privilege

## U.S. v. Nixon (Qualified Privilege based on balancing test)

1. Nixon tried to quash a subpoena directing him to produce Watergate tapes & documents.
2. Does the president have inherent authority? *NO*.
   1. No executive authority as a political question, no executive authority from executive privilege or absolute privilege and court says president’s generalized assertion of absolute privilege looses to a specific need for information in a pending criminal trial.
3. Separation of powers does not preclude judicial review.
4. Executive Privilege: the ability of the president to keep secret conversations with or memoranda to or from advisors. Not in the Constitution, but Presidents have claimed it through history. Another form of evidentiary privilege, like attorney client privilege, etc...
5. absolute privilege: I always win when I invoke the privilege
6. No absolute privilege, it depends on circumstance.
   1. **Qualified privilege based on a balancing test:** 
      1. **balance executive claim versus whatever interest is on the other side** **in that particular context**
      2. (no brightline standards, only that criminal proceedings carry a lot of weight).

### The Authority of Congress to Increase Executive Power: One branch should not encroach on another branch nor aggrandize/expand its own role.

## Clinton v. New York (Line Item Veto is unconstitutional)

1. When 2 branches are in agreement, should the court somehow defer as a political accommodation? If not, how intensely should they review it/how much deference should be given (historical gloss)?
2. Line item veto: After a law has been enacted and signed, the president can discretionarily cancel in certain spending measures (Congress is adding to presidential power and giving up some of its power).
3. This is unconstitutional (formalistic analysis):
   1. Line Item Veto is akin to lawmaking (the executive cannot do legislative acts)
      1. The cancellation prevents the law from having legal force or effect. So the president is amending the law. That's lawmaking.
      2. The framers carefully figured out a specific system for lawmaking in Article 1, §7 so any deviation is unconstitutional.

## INS v. Chadha (Legislative Veto is unconstitutional, all bills must be checked: bicameralism & presentment)

1. Congress reserved a power for itself by holding onto legislative veto.
2. Legislative veto: allowed Congress to look at what the agencies promulgated and cross out certain parts of the rule (means of accountability over executive agencies).
3. Bills must be passed with 2 checks:
   1. Bicameralism - both houses must support the law
   2. Presentment - president must serve as a check
   3. The legislative veto is subject to bill requirements
      1. Because of the purpose and effect of legislative veto
         1. Purpose = alter the rights & obligations of persons
         2. Effect = an act of lawmaking
   4. The real concern: **congress has reserved a role for itself in the execution of the law, which:**
      1. **doesn’t comport with the nature of congressional action AND**
      2. **encroaches on executive branch (the only ones who should execute law)** 
         1. Basically: this is the job of congress, and this is the job of the president, and no mixing! Any mixing is violates the carefully wrought framework.

### Checking Administrative Power *-* The Appointment Power

## Morrison v. Olson (Inferior versus Principal Officers- inferior can be appointed by the president)

1. Appointments Clause of Article II: divides officers into 2 classes:
   * 1. principal (must be appointed by president & senate), and
     2. inferior (can be appointed by president, heads of departments, or by the judiciary).
2. The special prosecutor is **an inferior appointment, because (TEST)**:
   1. **Subject to removal by a higher executive official** (not super persuasive unless they mean a higher official besides the president)
   2. **Limited duties** (is it really that limited? Well, pretty limited. No policy making)
   3. **Limited in jurisdiction** (specific directions, instructions, Can only investigate who she is told to investigate)
   4. **Limited in Tenure** (temporary office)

\*\* Notice these are the factors in this case but there is no real guidance how the factors would play out in (an even slightly) different case.

### Are Foreign Policy & Domestic Affairs Different?

## US v. Curtiss-Wright (Presidential power is Different in Foreign Affairs than Domestic)

1. Curtis Wright challenges constitutionality in president’s executive order prohibiting export to warring nations & says the president is unconstitutionally engaging in lawmaking.
2. **The president has a broad scope of power in foreign affairs, much broader than domestic affairs:**
   1. **Nature of presidential power different in foreign affairs different than domestic (no worries about interfering with sovereign states rights).**
   2. **Sovereign nation (the leader has some inherent authority as representative of sovereign nation: somebody must speak for the country)**
3. Broad view of presidential power in foreign affairs area (on one end of the spectrum). In the rest of the cases, notice the court avoiding any inherent presidential authority and instead using Jackson’s Youngstown approach to show congressionally given power.

## Dames & Moore v. Regan (President can make Executive Agreements, which are like treaties)

1. Carter made an executive agreement to get hostages back from Iran by negotiating that all legal proceedings in the U.S. against Iran will be solved by binding arbitration.
2. A president can make executive agreements:
   1. Prior decisions recognize the president can enter into these executive agreements.
   2. Historical gloss: past practice known to and accepted by promise means the action is taken pursuant to congressional consent.

### Presidential Power & the War on Terrorism

## Hamdi v. Rumsfeld (war is not a blank check when it comes to the rights of the nation’s citizens)

1. Narrow holding: Can an American citizen captured on foreign soil be held as an enemy combatant, and if so under what conditions? Hamdi must be afforded due process including a meaningful factual & hearing.
2. Multiple separation of powers disputes:
3. Question One: Does the executive have the authority to detain citizens who qualify as “enemy combatants?” *Yes, authorized by AUMF as a fundamental incident of war)*
4. Question Two: What process is constitutionally due to a citizen who disputes his enemy-combatant status? *Detainees are entitled to some process. Separation of powers- executive cannot be prosecutor, judge & jury: “war is not a blank check when it comes to the rights of the nation’s citizens.”*

## Ex Parte Quirin (Court again looks toward two branches in agreement)

1. Whether the president has the authority to try through a military tribunal rather than the court of law.
2. Judgment: upholding of military tribunals
3. Who has the authority to create military tribunals?
   1. Congress maybe: quite a bit of specific language in Article II, §8
   2. President maybe: argument that commander in chief needs the authority
   3. *Same pattern of looking for the two branches to be in accord.*

# PRESIDENTIAL IMMUNITY

## Nixon v. Fitzgerald (Official duties: absolute immunity from civil suit for $)

1. Fitzgerald is a whistleblower, and Nixon was vindictive.
2. **President is entitled to absolutely immune from civil lawsuits seeking money damages in regard acts while the president was in office.**
3. Sufficient checks are still available:
   1. Impeachment
   2. Elections
   3. The press
   4. Congressional oversight

## Clinton v. Jones (Non-Official Duties: no immunity from suit, not even temporary immunity)

1. Clinton asks for temporary immunity: a delay on civil litigation until after his term ends.
2. Court says distraction is totally not an issue.
3. Court says the person who sues is entitled to a day in court now, not when the president leaves office.